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Dionysus against the Crucified: Nietzsche, Sovereignty, and the Power of Nihilism

Mr Adam Robert Rowe

Is international law nihilistic? Being produced from nihilism and driven by it? And are even we nihilistic – we Critical scholars who stand beyond the end of history? Not a break from the past *but a continuation?*

That is the gambit of this thesis: to explore the nihilistic inner life of international law, through the root and stem of its creation and development, right up until the contemporary movement towards Critical approaches to the discipline. Through the embracing scope of nihilism, I argue that each of these turns and evolutions can be tracked back to a single logic.

The first Volume of this thesis is dedicated to the theorisation of nihilism and how it could be existentially connected to international law. Using the philosophy of Friedrich Nietzsche, I link nihilism to what I term the ‘civilising psychosis’: a process (or sickness) by which the production of the human and the state is co-constitutive. Through this bond, it becomes possible to argue that the structures of nihilism, and the civilising psychosis, frame and condition the development of legal concepts.

In Volume II, I take the civilising psychosis and apply it to the creation of the European global order of sovereign states. Here I suggest that transformations within sovereignty doctrine have been devices of managing and rearticulating the civilising psychosis. Applying literary techniques, this Volume takes the form of a ‘A play in three acts’. Within it, I follow the civilising psychosis, first, in the domestic generation of sovereignty, through to the use of sovereignty in 19th century imperialism, before bringing the civilising excesses of this latter period into confrontation with Critical scholarship. Through the violence of this encounter, I intend to beget *recognition* and *disorientation*. Rather than marking a departure from the civilising psychosis, such scholarships could be its most visceral manifestation.

*Dionysus against the Crucified: Nietzsche, Sovereignty, and the
Power of Nihilism*

In Two Volumes

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Submitted for the Degree of Doctor of Philosophy

St Mary's College

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I dedicate this thesis to no one in particular – save, perhaps, to the spirit of mischief.

Much Ado About - Nihilism

Might international law – and we international lawyers – be *nihilistic*? Could we be nihilistic to our core: produced by nihilism and driven by nihilism; nihilistic in all of our conceptions, values and creed; nihilistic in how we approach and frame any given issue? What *could* that mean?

As a discipline, we have certainly had our gloomy spells and gloomy writers, and have fretted, and continue to fret, about things that *sound* like nihilism – the loss of epistemic foundations,¹ fragmentation,² and the law’s hypocritical complicity with various forms of intersecting violence.³ Especially with the latter, international law, in some critical circles, is so sullied a tissue, so complicit with *civilisation violence*, as to be not worth keeping alive – if not already a dead letter.⁴

While engaging ‘senses’ or allusions to nihilism, none of these strands get at what nihilism actually means or, more subtly, what it *is*. This, I suggest, is an important, and necessary, omission – an omission that ensures the continual survival of international law and even those very projects calling for the demise of, at least, one type of international law.

To appreciate this, the thesis takes Nietzsche’s understanding of nihilism as its guiding thread. From this approach, nihilism is more than a simple issue of meaning or the lack of meaning. Instead, it is one of *civilising* and the production of the human. This puts me into conversation with recent critical approaches to international law that analyse the discourses of civilisation and the ‘civilising mission’ as methods which have been used to secure and perpetuate Eurocentrism and the supremacy of white, western races.⁵ In drawing attention to the historic (and current) civilisational logic within

¹ Take Scobbie’s review of deconstructionist readings of international law and the alarm bell he sounded. See: Iain Scobbie, ‘Towards the Elimination of International Law: Some radical Scepticism about Sceptical Radicalism’ (1990) 61(1) BYIL 339.

² For an example, see: Martii Koskenniemi, Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15(3) LJIL 553.

³ This subsumes many possible heads of scholarship, such as feminism, TWAIL, and postcolonial methods. See for example: Anne Orford (ed), *International Law and its Others* (CUP, 2006), and Doris Buss, Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2005).

⁴ At the end of his recent book, Simpson argues that his intention is to show that (western) international law is dead. The task now is not to constantly repeat the critique of the law but to *move past it*. See: Gerry Simpson, *The Sentimental Life of International Law* (OUP, 2021) 211.

⁵ This is a broad spectrum of scholarship, encompassing Marxist, TWAIL, and Postcolonial perspectives. For some representative examples, see: Luis Eslava, ‘Istanbul Vignettes: Observing the Everyday Operation of International Law’ (2014) 2 London Review of International Law 3; Rose Parfitt, *The Process of International*

international law, this scholarship understands itself to be at least critiquing the concept, even if they sometimes disagree with the means and methods of departing from that logic themselves. The Nietzschean understanding calls this self-perception into question.

For Nietzsche, the process of civilisation is a *nihilistic psychosis*.⁶ In taming and shaping the human into a domesticated, civilised being,⁷ a fundamental and constitutive split developed within its psyche. This split is between a life denying value called the ascetic ideal, and the lingering bestial, violent nature of a pre-human element.⁸ Crucially, it is only through the exercise of this pre-human violence that the ascetic ideal can be realised. It is fundamentally unstable and hypocritical – and so is the resulting human. While being the most powerful of creatures, it is the most sick; sick with itself and its own nature.⁹ And it is this sickness that leads to nihilism. While its values, the essence of its humanity (the ascetic ideal), is based upon the eradication of violence, each manifestation of it (and the whole ideal itself) can only be achieved through violence.¹⁰ The nihilistic moment comes with the realisation of the ascetic ideal's hypocrisy and its consequent 'devaluation'.¹¹

In this thesis, I argue that this civilising psychosis provides the structural logic, the subterranean value structure, that has guided the development of the various instantiations of international law, and which continues to do so. From TWAIL, Postcolonialism, Marxism, Feminist, to Queer; the critical calling into question of civilisational violence and the need for international law's *redemption*, is nothing more than the latest, most expansive, manifestation of the civilising psychosis. In flushing out and sounding out the hollowness of all bastions of objectivity and neutral value, in exposing the inherent violence of legal relations, the opportunity and exercise of civilising violence is rendered

Legal Reproduction: Inequality, Historiography, Resistance (CUP, 2019); Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP, 2020).

⁶ This is extrapolated from my own reading of Nietzsche, drawing principally upon the second essay of the *Genealogy of Morals*. See: Friedrich Nietzsche, Michael Scarpitti (translator), *On the Genealogy of Morals: A Polemic* (Penguin, 2013) 43-82.

⁷ *ibid* 72.

⁸ *ibid* 78.

⁹ Yet, for all that, Nietzsche maintains that this sickness makes humanity the most *interesting* of animals. *ibid* 21.

¹⁰ *ibid* 83.

¹¹ The idea of devaluation and nihilism was expansively developed in Nietzsche's unpublished journals. See: Friedrich Nietzsche, Michael Scarpitti (translator), *The Will to Power* (Penguin, 2017) 15.

conceptually unlimited. As such, rather than ameliorating the violence within the world, these critical approaches may only escalate it.

To justify this expansive hypothesis, I engage in a Nietzschean critique of international law's history, focusing on the example of sovereignty to anchor my analysis. The purpose of this critique is to read the civilising psychosis into the conceptual roots and development of the discipline through to the present moment. It begins, conventionally enough, with the classical theorists of sovereignty. Here, I argue that, on a domestic level, the internal dynamics of sovereignty theory are organised around and through the structures of the psychosis. Transformations in sovereignty represent (or more accurately, *embody*) articulations of particular moments, particular *tensions*, within the deeper nihilistic psychosis. My account then moves through into the development of the law of nations and international law in the 19th century where civilising narratives are at their most stark. Interpreting this through my Nietzschean lens, I suggest that the (re)production of a global order of sovereign states is a method of stabilising the sickness of European civilisation. On the international level, sovereignty redefines encounters between nations and peoples into the structures of the nihilistic psychosis, enabling the *externalisation and redistribution* of civilisational violence. My account then concludes by forcing a confrontation between critical approaches to sovereignty and those 19th century authors – representatives of the 'uncivilised subconscious' of international law.¹² Rather than seeing a radical antagonism between the two, this confrontation begets *recognition*. This recognition is one Nietzsche characterised as disgust ('*eckel*')¹³ – the realisation of our proximity and culpability to that reviled, pre-human quality.

It is this disgust that is the harbinger of the nihilistic crisis (the ultimate moment of unescapable disgust). In relating this Nietzschean account of international law, my ultimate intention is precisely to exacerbate and trigger that crisis. That is the deeper irony of the work. For if critical accounts represent the fullest extent of the civilising psychosis – all extant legal and political relations reduced

¹² This expression is one of Gerry Simpson's for explaining what reading the work of the jurist James Lorimer can reveal about international law. See: Gerry Simpson, 'James Lorimer and the Character of Sovereigns: The *Institutes* as 21st Century Treatise' (2016) 27(2) EJIL 431.

¹³ The idea of *eckel* is dealt with at length in Tevenar's analysis of *Zarathustra*. See: Gudrun Von Tevenar, 'Zarathustra : that 'malicious Dionysian'' in Ken Gemes, John Richardson (eds), *The Oxford Handbook of Nietzsche* (OUP, 2018) 272, 278.

to violence – and those accounts are revealed as nothing but pre-human violence themselves, then there is nowhere left to go.

Nihilism and international law

The question of nihilism is not one that has been actively pursued within international law.

Mainstream scholarship still conducts its doctrinal inquiries without paying much attention to critical theories that might destabilise their projects.¹⁴ Critical literature, in turn, has expanded into a rich and diverse field. Feminist,¹⁵ Queer,¹⁶ Marxist,¹⁷ TWAIL,¹⁸ and (most recently) posthuman approaches¹⁹ mine the foundations of international law, uncovering the patterns and logics of power and inequality that have constructed, and continue to construct, the law and, in so doing, open up the possibility of emancipatory change. The ‘turn to history’²⁰ has enriched these explorations further, revealing the complicity of the law in perpetuating colonialism and capitalistic exploitation.²¹ The danger of objectivity claims, and the concomitant need to think past foundations, is generally accepted amongst

¹⁴ A quick glance at any major international law journal will show plenty of articles pursuing ‘conventional’ legal analysis. That said, within these same journals critical voices share the space. The third volume of the *European Journal of International Law*’s 2022 edition has both articles on the international law commission and ‘disordering’ international law (Michelle Staggs-Kelsall, ‘Disordering International Law’ (2022) 33(3) *EJIL* 729).

¹⁵ Hilary Charlesworth, Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000); Dianne Otto, ‘Feminist Approaches to International Law’ in Anne Orford, Florian Hoffman, Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 497.

¹⁶ Doris Buss, ‘Queering International Legal Authority’ (2007) 101 *Proceedings of the Annual Meeting (American Society of International Law)* 122; Dianne Otto, ‘“Taking a Break” from “Normal”: Thinking Queer in the Context of International Law’ (2007) 101 *Proceedings of the Annual Meeting (American Society of International Law)* 119; Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2018).

¹⁷ B.S. Chimni, ‘Outline of a Marxist Course on Public International Law’ (2004) 17 *LJIL* 1; China Miéville, *Between equal Rights: A Marxist Theory of International Law* (Brill Leiden, 2005); Robert Knox, ‘Marxist Approaches to International Law’ in Anne Orford, Florian Hoffman, Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 306.

¹⁸ Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers, 1979); Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2005); Parfitt (n 5).

¹⁹ Anna Grear, Emille Boulot, Iván Vargas-Roncancio (eds), *Posthuman Legalities: New Materialism and Law Beyond the Human* (Edward Elgar, 2021).

²⁰ This has rapidly led to methodological confrontations of ‘how to do’ history. For an overview of the different methodologies, see: Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (CUP, 2021).

²¹ This includes now classic treatments, such as Martti Koskenniemi’s *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001) and Antony Anghie’s *Imperialism, Sovereignty, and the Making of International Law* (n 18), and more recent entries, including Tzouvala’s *Capitalism as Civilisation* (n 5) and Lorca’s *Mestizo International Law: A Global Intellectual History 1842-1933* (CUP, 2015).

such scholars without much discomfort. While international law's complicity in imperialism and other axis of oppression has led some to dismiss it as irredeemable,²² for others nihilism could not be more out of mind.²³ The general effort to facilitate a more equitable world order for all groups would appear to offer an abundance of purpose.²⁴

Nevertheless, moments of nihilistic *anxiety* have not been entirely absent. A clear period of nihilistic concern was during the emergence of NAIL scholarship and its attack upon legal foundations and objectivity. To briefly rehearse a familiar event, authors - most famously Koskenniemi in his *From Apology to Utopia*²⁵ - attacked and deconstructed the objectivity of legal argument and discourse. For Koskenniemi, international legal argument was indeterminatively torn between 'apology' and 'utopian' styles of argumentation, producing an oscillation that could only be ended by a political intervention. Law, in other words, collapsed into the political.²⁶

Within the resulting debates between the defensive 'mainstream' and the new NAIL scholars, nihilism was used as a rhetorical form of attack on both sides. For the former, the deconstruction of international law and its subsumption into the political would produce the 'elimination' of international law.²⁷ The very idea of law was taken to demarcate a discursive, regulatory and institutional space in contradistinction to the political. With the dissolution of that demarcation, law was understood to be undone on its own terms. For the new critical theorists, the defence of a formalistic, positivist international law, in light of the critical revelations, was doomed and, consequently, nihilistic. It represented a forlorn desperation to cling to old certainties that had become

²² For a very cynical expression in this vein, see: Miéville, (n 17).

²³ Miéville's position has been critiqued for its bleakness. Even allowing the validity of his remarks, other Marxists suggest that a better future, through the tactical use of international law, is possible. See: Robert Knox, 'Marxism, international law, and political strategy' (2009) 22 LJIL 413, 433.

²⁴ Much critical scholarship is indexed to the need to clear the ground so that new ideas of what law and politics could mean can come to the foreground. The aforementioned volume by Simpson where he offers his 'sentimental' international lawyer as one of these ideas is such an example. See: Simpson (n 4).

²⁵ Martti Koskenniemi, *From Apology to Utopia* (CUP, 2007).

²⁶ For Commentaries on *From Apology to Utopia*, see: Jason Beckett, 'Rebel Without a Cause – Martti Koskenniemi and the Critical Legal Project' (2006) 7(12) German Law Journal 1045; David Kennedy, 'The Last treatise: Project and Person (Reflections on Martti Koskenniemi's from Apology to Utopia)' (2006) 7(12) German Law Journal 982.

²⁷ Scobbie (n 1).

untenable. To escape this nihilism, it was necessary to go beyond established frameworks and thinking.²⁸

Within these discursive encounters, nihilism is not being subject to robust theoretical scrutiny. There is only a surface sense – a sense of the *symptoms* – of nihilism. At the centre is the question of objectivity – of the need for it or the need to get around it. The mainstream attacked the nascent critical project precisely for deflating this objectivity,²⁹ while NAIL suggested that the commitment to objectivity was indefensible and that a new reimagination or revaluation was needed. This tension between a value that is at once said to bestow meaning, and to be at risk of becoming utterly devalued, was crucial yet remained under-explored. What force tied objectivity to meaning? How deep did these forces run? Was this proposed need for revaluation driven by the same affective forces that constituted objectivity as the basis of meaning?

I wish to delve deeper into the question of nihilism. Important theoretical issues have not been addressed which, I argue, are fundamental for understanding the discipline. Nihilism is not a momentary thing which can be sidestepped or complacently ignored. It is a process of (western) civilisation, in which international law is heavily implicated, informing its past, present, and future. To help demonstrate this fact, the thesis makes use of the philosophy of Friedrich Nietzsche.

Nihilism, the will to power and civilisation

In using Nietzsche's philosophy three core concepts need to be understood. These are his understanding of nihilism, what the doctrine of the will to power is, and how both these elements are combined in his account of civilisation. Nothing with Nietzsche is straight-forward and each of these elements will be unpacked at length in the body of the thesis, but, for the purposes of this introduction, I will offer a brief summary.

²⁸ For an example, see: Outi Korhonen, 'New International Law: Silence, Defence or Deliverance' (1996) 7(1) EJIL 1, 14. Interestingly, Korhonen also accused critical scholars of 'silence'. 'The tragedy of the post-modern and anti-foundationalist approaches is that they cling to the critical method as though it was the ultimate universally valid method.' (ibid 17)

²⁹ Scoobie (n 1).

Nihilism and Devaluation

Broadly stated, Nietzsche's understanding of nihilism starts with value and the sustainability of value. Nihilism is, on the surface, a culminating moment in which society's foundational values 'devalue' themselves.³⁰ Following this devaluation, individuals either participate in 'passive nihilism' or 'active nihilism'.³¹ The former is a state of passive despair at the loss of meaning; the latter is characterised by enraged destruction of all those structures based upon the foundational values.³²

Not just any value-system is nihilistic according to Nietzsche. It is highly specific and a product of western civilisation. This value is what Nietzsche describes as the 'ascetic ideal'.³³ The ascetic ideal is the valorisation of unconditioned being: the pure, the perfect, the absolute. It denigrates acts of conditioned being, acts of power and anything bodily, transitory, human, all too human.³⁴ It has its archetypal forms in the Christian God and Plato's forms, but can be found in more subtle guises. Modernism's belief in progress, nationalism and the state, are each a manifestation of the ascetic ideal.³⁵

Crucially for Nietzsche, the commitment to the ascetic ideal is inherently unstable. Each new ascetic 'idol', as he calls them,³⁶ will eventually be interrogated and undermined as reality is gradually reconceived as being constituted by power and relations of power. This new ontological reality is what Nietzsche encapsulated in his idea that all life is 'will to power'.

³⁰ Nietzsche, *Will to Power* (n 11) 15. For an in-depth look at Nietzsche's philosophy of nihilism, see: Bernard Reginster, *The Affirmation of Life: Nietzsche on Overcoming Nihilism* (HUP, 2008), and Kaitlyn Creasy, *The Problem of Affective Nihilism in Nietzsche: Thinking Differently, Feeling Differently* (Palgrave Macmillan, 2020).

³¹ Nietzsche, *Will to Power* (n 11) 15.

³² *ibid.*

³³ The ascetic ideal forms the basis of Nietzsche's third essay in the *Genealogy*. See: Nietzsche, *Genealogy of Morals* (n 6) 83.

³⁴ Friedrich Nietzsche, R.J. Hollingdale, *Twilight of the Idols and The Anti-Christ* (Penguin, 1990) 45-47.

³⁵ In a passage in *Zarathustra*, Nietzsche would denounce the modern state as 'the coldest of all cold monsters'. See: Friedrich Nietzsche, R.J. Hollingdale (translator), *Thus Spoke Zarathustra* (Penguin, 1974) 74. These passages build upon Nietzsche's already prominent critique of the state found in Nietzsche's early to middle period, especially within *Human, All Too Human* (Friedrich Nietzsche, Stephen Lehmann (translator), *Human, All Too Human* (Penguin, 1974) 210.

³⁶ Principally in *Twilight of the Idols* (Nietzsche, *Twilight of the Idols* (n 34)). He threatens to sound out these idols with his tuning fork to see whether they ring hollow.

The Will to Power

The will to power is a crucial ontological, cosmological, and epistemological tool within Nietzsche's corpus. Despite this importance, the meaning of the will to power has been the subject of endless scholarly debate (with at least 11 different schools of interpretation).³⁷ Generally speaking, the will to power is a way of describing the world without recourse to traditional, dualist metaphysical systems, in which a noumenal world stands behind a phenomenal one.³⁸ All life (and on some accounts, all non-biological reality too³⁹) can be described as a force or a power. As power, it seeks its enhancement or (when subdued) its simple preservation. The human being is a construction of the will to power. Its limbs and faculties (from reason, to logic, to language) are all immanent expressions of the will to power, things that help it exert control over the wider world. Reality is compressed, forced, and beaten into accordance with human reason *for power*.⁴⁰ This is not to say that humanity *falsifies* the world, in which there is a 'thing-in-itself' beyond human ken. All reality is will to power and exists on a lateral plane of being. In compressing the world into the contours of the human imaginary, that world is materially (in an ontologically thick sense) altered.⁴¹ And that exterior world, that nexus of will to power beyond the human, exerts *its* power back upon the human in turn. If the balance is against the human, if the conditions are too antithetical to its will to power, it will perish or be forced to change, to evolve. Concepts, doctrines, and ideas are, for Nietzsche, fleshy things.⁴² They *are* the will to power.

Civilising

³⁷ Lawrence Hatab provides a helpful summary of these different schools of thought. See: Lawrence Hatab, 'The Will to Power' in Tom Stern (ed), *The New Cambridge Companion to Nietzsche* (CUP, 2019) 329.

³⁸ Christian Emden, *Nietzsche Naturalism: Philosophy and the Life Sciences in the Nineteenth Century* (CUP, 2014) 21-25; Nietzsche, *Twilight of the Idols* (n 34) 50-51.

³⁹ This is the position that Doyle has recently taken. See: Tsarina Doyle, *Nietzsche's Metaphysics of the Will to Power: The Possibility of Value* (CUP, 2018).

⁴⁰ Nietzsche, *Will to Power* (n 11) 295.

⁴¹ Doyle (n 39) 14.

⁴² This is reflected in Nietzsche's physiological examination of concepts and philosophy. Christian morality, he would argue, was akin to a disease of the eye – it was a sickness. See: Friedrich Nietzsche, Judith Norman (translator), *The Case of Wagner* in Aaron Ridley, Judith Norman (eds), *Nietzsche: The Anti-Christ, Ecce Homo, Twilight of the Idols, And Other Writings* (CUP, 2021) 233, 261.

With the dawning reality of life as will to power, commitment to God, metaphysics, progress, the ‘end of history’, will eventually collapse as belief in the ascetic ideal becomes an impossibility, leaving humanity trapped in a world of power that its highest values have taught it to condemn.⁴³ The prospect of this devaluation and, in effect, damnation is what Nietzsche means in his heralding of the Death of God.⁴⁴ Ultimately, power, and how humanity relates to, and is constituted by, power, rests at the heart of Nietzsche’s theory of nihilism.

But this begs an important question. If the ascetic ideal is nihilistic and, as Nietzsche frequently maintains, antithetical to life (being based upon the suppression of the will to power) then why and how did it catch on and gain such wide acceptance? Nietzsche’s answer to this question is to base the emergence and development of the ascetic ideal *within the will to power* and a civilising process.

Mapped out in his *Genealogy of Morals*,⁴⁵ the progenitor of the ascetic ideal is, for Nietzsche, the ‘ascetic priest’.⁴⁶ An invidious presence, the ascetic priest is motivated by hatred and resentment of the strong. They preach an ethic that denigrates power in order to make the strong guilty for that strength, transforming it into a sign of original and irredeemable sin that allows for their continual moral torture.⁴⁷ To be wasted, ill, and unhealthy is the ideal condition, so preaches the priest. And as the populace forcibly suppresses their ‘will to power’ to become ‘civilised’, that need to exercise power - which for Nietzsche is life itself - *turns inward*.⁴⁸ The victim lashes themselves in acts of ‘bad conscience’ in lieu of an external source of opposition. This creates a horrible twist of irony: in order to deal with their ‘civilising’, the individual attacks themselves, but with every attack of bad conscience the ascetic ideal widens and the will to power becomes ever more suppressed, thus necessitating *further acts of self-mutilation*.⁴⁹ Within this self-perpetuating spiral, the ascetic ideal becomes increasingly illusive and impossible to obtain. Redemption is forever deferred until it is

⁴³ Nietzsche, *Will to Power* (n 11) 16.

⁴⁴ The proclamation of the death of God is found in *The Joyous Science*, section 125. See: Friedrich Nietzsche, Kevin Hill (translator), *The Joyous Science* (Penguin, 2018).

⁴⁵ Nietzsche, *Genealogy of Morals* (n 6).

⁴⁶ Nietzsche’s discussion of the priest and the priestly caste is found within the first essay of the *Genealogy*. See: Nietzsche, *Genealogy of Morals* (n 6) 19-21.

⁴⁷ *ibid* 21-22.

⁴⁸ *ibid* 70-71.

⁴⁹ *ibid*.

denied all together: an exquisite piece of self-torture, wherein forgiveness becomes an impossibility.⁵⁰

And the priest, in forcing this ethic upon the world, turning it into a blasted place of self-torture and sickness, facilitates their own need for *power*, feeding off the violence they create.⁵¹

In making this critique, in demonstrating that the most violent commitment to the ascetic ideal is an equally violent commitment to power, Nietzsche hopes to fatally destabilise asceticism as inescapably hypocritical. If successful, this will trigger the devaluation of the ideal, preparing the ground for his much (self-)vaunted ‘revaluation of all values’⁵² – a reformation-like event that will replace the ascetic ideal with his own ‘Dionysian’ value.⁵³ This is an ideal that, broadly, embraces power and change, and is encapsulated in his theory of the ‘eternal recurrence’.⁵⁴ Ironically then, Nietzsche’s philosophy of nihilism is not to avoid nihilism but to *provoke it* in order to create the circumstances for revolutionary change.

Nihilism and civilisation in international law

Nietzsche enables us to think more widely about nihilism. It engages, to be sure, ideas of objectivity and the loss of conceptual foundations. But this concern with objectivity is connected with a deeper ethic (the ascetic ideal) and ontology (the will to power). In this redescription we can understand nihilism as a deeper psychosis, a particular generative expression of a will to power that attempts to

⁵⁰ *ibid* 74-75.

⁵¹ The ascetic priest’s duplicitous connection to power is unpacked at length in the third essay of the *Genealogy*. See: Nietzsche, *Genealogy of Morals* (n 6) 102-104.

⁵² The need for a revaluation of all values is repeated often in Nietzsche’s mature corpus. See, for example: Nietzsche, *Genealogy of Morals* (n 6) 6-7.

⁵³ The references to Dionysus appear across Nietzsche’s corpus. In the concluding sections of *Beyond Good and Evil*, he announces himself as the last disciple of the god Dionysus. See: Friedrich Nietzsche, Robert Holub (translator), *Beyond Good and Evil: Prelude to a Philosophy of the Future* (OUP, 2008). Before that, the principle of the Dionysian appears in his early work *The Birth of Tragedy*, which explores Grecian tragedy and its applicability to founding a new German culture. See: Friedrich Nietzsche, Shaun Whiteside (translator), *The Birth of Tragedy: Out of the Spirit of Music* (Penguin, 1993).

⁵⁴ The eternal recurrence has proven a vexed element within Nietzsche’s oeuvre. The majority of analytical scholarship dismisses the ideal as a valid cosmological theory, approaching it instead as a kind of thought experiment or moral ideal. For some attempted refutations of the eternal recurrence, see: Ivan Soll, ‘Reflections on Recurrence: A Re-Examination of Nietzsche’s Doctrine’ in Robert Solomon (ed), *Nietzsche: A Collection of Critical Essays* (Anchor Press, 1973); Bernard Magnus, *Nietzsche’s Existential Imperative* (Indiana University Press, 1978); Maudemarie Clark, *Nietzsche on Truth and Philosophy* (CUP, 1990). For a recent and powerful restatement of the centrality of the eternal recurrence, see: Michael Allen Gillespie, *Nietzsche’s Final Teaching* (University of Chicago Press, 2017).

‘undo’ its existence as will to power. The ‘episodes’ of this psychosis are (as will to power) productive of different perspectives, different forms of life – the very constitution of the human and its reality shift as the dynamics of the will to power shift.

This takes us far beyond a mere rhetorical use of nihilism. If civilisation is a synonym for the development of the nihilistic psychosis, then the possibility is opened up that large tracts of international law’s foundations are a product of, or at least intimately connected to, this psychosis. Instead of seeing nihilism as a momentary crisis in the 1990s (that was passed), it may be redescribed as the structural logic (or engine) that has historically driven (and which continues to drive) the discipline. The brief nihilistic moment surrounding NAIL may only have been the brief surfacing to consciousness of that far deeper constitution: a violent moment in which the ascetic and pre-human rearticulated itself.

‘May have been’: I wish to take these conjectures and put them to the test. This thesis will explore the affective power of Nietzsche’s theory of civilisation within the history and theory of international law. It will ask whether historical and contemporary thinking about international law can be perceived through the nihilistic structures of civilisation, whether the development of this thought unfolds in ways Nietzsche would have anticipated, and if contemporary critical scholarship, rather than representing a break with civilisational logic, is its culminative moment.

‘A Night at the Opera’: sovereignty, civilisation, and revaluation⁵⁵

To explore the nihilistic inner life of international law, I anchor my analysis around the study of sovereignty. This selection is not a capricious one. Sovereignty has a historical and continuing centrality within international legal discourse. The prevailing international legal order is one of sovereign states, and it is around and through the analysis of sovereignty that much critical scholarship is done.⁵⁶ Sovereignty, then, provides a crucial entry point into the international legal imaginary – a reoccurring diagnostic touchpoint or thematic thread by which we can gauge the nature

⁵⁵ Queen, *A Night at the Opera* (2015).

⁵⁶ This ranges from the classic volume by Anghie (n 18) to more recent publications, such as that by Parfitt (n 5).

of that imaginary and its development. My purposes, to clarify, are not primarily to make an analytical claim about sovereignty in of itself. Thinking about sovereignty is expressive of deeper structures (structures that I claim are nihilistic) and it is to the exposure of those structures that my chief concerns rests.

In using sovereignty, the task of the thesis will be to explore whether the nihilistic process of civilisation constructs, and is affective through, the various moments, uses, and transformations of sovereignty doctrine. To broadly state the contours of the project, the inquiry begins with the early theorisations of sovereignty in such works as that of Thomas Hobbes⁵⁷ and Thomas Paine;⁵⁸ then it moves to consider the role of sovereignty within the development of a global order of international law in the 19th century, focussing on such authors as James Lorimer⁵⁹ and Johann Bluntschli,⁶⁰ before concluding with contemporary critical commentaries upon sovereignty.

I wish the structure of this work to be familiar and unfamiliar – to at once follow the conventional academic forms and to subvert them: to be a ‘poetical’ approach to scholarship. This partially flows from the Nietzschean foundations of the project. For Nietzsche, the boundaries between art and music, and the objective description of the world and history, were not opaque.⁶¹ Through the cosmologically embracing will to power, the person and world exist in a dynamic relationship – a description of a thing is to exert power upon it. From this premise, Nietzsche could blur literary and musical storytelling with analytical description.⁶² It was at once a method of enhancing the persuasive power of his work to relate it through music and metaphor, and a demonstration of what philosophy could be in the death of God.

The second source of inspiration for my own ‘drama’ of international law, is a tragic-comedic sensibility or sentiment of international legal scholarship; a sensibility of the simultaneous absurdity

⁵⁷ Thomas Hobbes, *Leviathan* (Penguin, 2017).

⁵⁸ Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (OUP, 2008).

⁵⁹ James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Blackwood and Sons, 1883).

⁶⁰ Johann Kaspar Bluntschli, *The Theory of the State* (Batoche Books, 1999).

⁶¹ Emden (n 38) 211.

⁶² Or, at least, the position recognises incoherence as an inevitable consequence of the Death of God that must be come to terms with. *ibid* 212. As Gillespie has effectively argued, many of Nietzsche’s later works follow a deliberately musical structure. See: Gillespie, (n 54) 87-92.

and repulsiveness of our imaginary life. Gerry Simpson's 'sentimental' international lawyer is an important touchpoint here. That lawyer also embraces a poetical approach to law, standing on the creative cusp of laughter and tears – at once laughing at the law's hypocrisies and being moved to tears by the violence they create.⁶³ That is close to my state but not quite. The sentimental layer is at once related to the 'dionysian lawyer' and estranged from them. And in that relation of proximity and estrangement, the tension (if not conflict) between the two could not be higher. I, too, peer past the hypocritical veneer of law, but also the sentimental lawyer's own hypocrisies. That lawyer speaks of liminal spaces and going beyond good and evil, but the note rings false. I am wary of both their laughter and their tears – that is my *presentiment*. The case of the sentimental lawyer (or even the lawyer that would dream up *its type*) is both enthralling and appalling, and it is precisely this attraction and repulsion that I wish to convey.

The basis of any tragedy or comedy is a core dramatic or ironic dynamic. The ascetic ideal is necessarily ironic, and it is around this ironic tension that I spin my work. Each step of the piece is a further step towards the revelation of the ideal's hypocrisy and our continuing complicity with it – steps towards the final, all too anticipated twist, in which our supposed departure from civilisational logic is shown to be a farce. To that end, much of this thesis will follow a standard academic and critical form – exposing the violence and hypocrisy of the 'canons' of international law and its 19th century figures. However, beneath this conventionality there will be a subterranean voice, quietly working against the text, alluding to the deeper irony at play, culminating in a final 'scene', in which the conventional form breaks and the subterranean voice speaks – a voice from beyond the script.

The thesis will be divided into two main Volumes. The first of which, composed of three chapters, is dedicated to gathering the materials necessary for constructing my Nietzschean theory of nihilism and international law, as well as establishing the core motifs that will be carried over into the second Volume. The first chapter is my 'prelude'. In this section, I provide an overview of critical explorations of international law and sovereignty. My goal in doing so is to provide both the context in which I wish to situate my Nietzschean critique and to establish those key motifs of the thesis that I

⁶³ Simpson (n 4).

will carry across the work. These are the themes of imperialism, colonialism, gender – intersecting layers of violence – and the culpability of international law (through sovereignty) in creating and perpetuating them. Uniting and working through all these themes is the idea of *hypocrisy*: the hypocrisy of law in its claims to be objective or to establish justice. It is upon this meta-theme of hypocrisy that I will build my Nietzschean diagnosis of international law’s imaginary and to which I return to in the closing act of this thesis.

Moving away from my prelude, the remaining two chapters of Volume I are dedicated to unpacking and exploring Nietzsche’s philosophy. The first of these chapters is an introduction to who Nietzsche was, his intellectual context, his purposes in philosophising, and the foundational concepts of his philosophy, such as the will to power doctrine and his epistemology. The second chapter then deals with Nietzsche’s specific treatment of civilisation. It inquires, first, into the markers of what Nietzsche termed ‘*décadence*’:⁶⁴ those aspects of society most representative of nihilism. Second, it will uncover Nietzsche’s diagnosis of the deeper nihilistic psychosis underpinning the surface level manifestations of *décadence* and its fundamental connection to the state. This is where I extrapolate a reading of what I term the ‘civilising psychosis’. I argue that this psychosis is fundamentally political, and that through it, the state, the ascetic ideal, and the human being, are each mutually constitutive.

Having established the main elements/motifs of critical scholarship and Nietzsche’s philosophy that the thesis is concerned with, the first Volume concludes. Following this comes a crucial interlude chapter, in which, reflecting back on the civilising psychosis and critical scholarship, and looking forward to the question of nihilism within international law, I construct my Nietzschean theory of the emergence of the European global order to be applied in Volume 2. It is figuratively and structurally at the heart of the thesis.

The chapter will develop a hypothesis of how sovereignty functions within a domestic and international context, and how these two contexts are connected. On a domestic level, sovereignty theories can be deconstructed to demonstrate the affective interplay between asceticism and the pre-

⁶⁴ Nietzsche’s references to *décadence* (always in French) appear across his mature works. In *The case of Wagner*, he takes the titular composer as symptomatic of European *décadence*. In the same text, he even labels *himself* as a *décadent*. See: Nietzsche (n 42) 233.

human that constructs them. The conceptual make-up of sovereignty transitions as this interplay is adjusted and rearticulated. To put it another way, different ‘tensions’ within the civilising process produce different theories of sovereignty. As civilisation increases, the ascetic encompasses more and more of the pre-human until it is entirely subsumed. At this point, sovereignty is at its most unstable, in which the rediscovery of the animal would collapse the entire structure.

International legal sovereignty replicates the nihilistic structure on a global level in order to *redistribute* the internal violence of nihilism. As we saw above, the process of civilising forces the will to power of the pre-human to turn in upon itself through bad consciousness. However, it is possible to reallocate the identification of the pre-human to an externality – be that another person, people or nation. Through doing so, the civilised grouping can redescribe themselves as the ascetic pole and the ‘Other’ as the pre-human, allowing the violence that would normally be visited internally to have an external manifestation. Sovereignty, I argue, is repackaged and utilised as the technology to achieve these redescrptions and reallocations of debt and violence. It allows certain states to stand in for the ascetic and for others to be marked as the pre-human and held responsible. Through it, violence may flow from the civilised to the uncivilised, allowing for the exploitation and abuse of the latter, conditioning it into accordance with the ascetic ideal, but *never allowing total reconciliation*. The pre-human trace cannot be expunged, and the debt never settled - all to allow the continual exercise of the will to power.

Importantly for both the domestic and international, sovereignty, as an expression of the ascetic ideal, is inherently unstable. This is where Nietzsche’s definition of nihilism as ‘devaluation’ comes back into play. As we saw, reality, for Nietzsche, is will to power – the ascetic is an ontological impossibility. In the civilising process itself, the ascetic is merely simulated by the will to power turning inwards. Ironically then, the more ascetic an individual appears the more power they are exercising. As such, any putative sovereign power will eventually collapse under the stresses of its own hypocrisy. It will become ‘devalued’. This is easier to see on the international level. In moving the violence of civilisation to an outward expression, imperialists facilitated the non-ascetic need for external acts of aggression. The technology of sovereignty may present this will to power as ascetic, but that formulation is deeply hypocritical and will be (is currently being) exposed for what it is.

With the theoretical framework established, I can move to put my Nietzschean framework to the test, reading the civilising psychosis into the historical roots of international law, through to contemporary scholarship. This is accomplished in Volume II of the thesis: my tragi-comic drama of sovereignty and the European global order proper. To emphasise these dramatic connections, this second Volume is composed of a play in three acts. Across the three ‘acts’, I examine whether the theoretical writings of sovereignty doctrine correspond to the predictions laid out in the second part. The first of the chapters, Act 1, focuses upon domestic theorisations of sovereignty, moving through the writings of Bodin,⁶⁵ Hobbes,⁶⁶ and Locke,⁶⁷ to the revolutionary accounts of Rousseau⁶⁸ and Paine.⁶⁹ It deconstructs each of these in turn to identify the structures of the nihilistic psychosis. It also asks whether there is evidence of the psychosis deepening as European civilisation becomes increasingly tamed and whether that intensification produces, in turn, increasing calls for revolutionary change. Act 2 then raises the discussion to the international level. It charts the (relative) stabilisation of the western European political space through the reallocation of the pre-human to an extra-European space. Expanding the inquiry into the 19th century, it analyses whether the writings of leading European international jurists, from English, German, and Italian traditions,⁷⁰ reveal the externalised form of the civilising psychosis.

Having excavated the civilisational hypocrisy of the 19th century authors – exposing the ‘uncivilised subconsciousness’ of the discipline – I enter into the culminating Act of the play. Thus far, exploring the violence and prejudice of classical and 19th century sovereignty theorists is something that shares much common ground with contemporary critical commentators. However, having exposed the hypocrisy of our forebears, I force critical commentary into a stark confrontation with it, and out of that confrontation, I reveal the critical complicity with the civilising psychosis. Here is when the

⁶⁵ Jean Bodin, *Six Lives of the Republic*, in Julian Franklin (ed, translator), *On Sovereignty: Four Chapters From the Six Books of The Commonwealth* (CUP, 1992).

⁶⁶ Hobbes (n 57).

⁶⁷ John Locke, *Second Treatise of Government and A Letter Concerning Toleration* (OUP, 2016).

⁶⁸ Jean-Jacques Rousseau, *Of The Social Contract and Other Political Writings* (Penguin, 2012).

⁶⁹ Paine (n 58).

⁷⁰ These theorists will be Henry Wheaton (Henry Wheaton, *Elements of International Law* (Lea and Blanchard, 1836)), James Lorimer (n 59), Johann Bluntschli (n 60), Pasquale Fiore (Pasquale Fiore, *International Law Codified and Its Legal Sanctions; Or, The Legal Organization of the Society of States* (Baker, 1890)), and Lasa Oppenheim (Lasa Oppenheim, *International Law: A Treatise* (Longman, Green & Co, 1905)).

Dionysian voice breaks past the academic form. I want to realise through language, metaphor, and form the disorientation of this critical encounter with its own hypocrisy. I opt for a fragmented delivery of epigrams, aphorisms, and more extended essay-like expositions. This style allows me to get past the rigidity of a traditional essay script with its necessary sequential listing of ideas. Instead, in using this style I can have light feet: moving quickly through a set of positions, jumping from one aspect to another one without a formal link. In and through this flexibility, I can build a web of interconnections previously unavailable. I can allude to similarities and contradictions, gazes and counter-gazes, all the while building a single harmony. I at once intend to mock - to be irreverent and flippant, to laugh and play the jester – and to be deadly serious. Through my laughter I bite.

To give an indication of this final chapter's critical content, I return to the motifs established in the prelude of Volume I – the various themes and ideas propounded within the critical literature. In many respects, the patterns within this scholarship seem propitious from a Nietzschean perspective. In the attack upon international law's objectivity, the hypocrisy of the ascetic ideal has been exposed. The various strands of critical legal thought have unpicked the dynamics of power that have hidden behind, and worked through, the law. The process of civilisation and the role of sovereignty have been particularly fertile grounds of inquiry, revealing the layers of hypocrisy in the practise of imperialistic powers.

All this would seem to fit with Nietzsche's philosophy. In some respects, the attack on objectivity and universal truths makes critical scholars the executors of Nietzsche's revaluation of values. The ascetic ideal appears overturned. This, however, is far from the case. In condemning the process of civilisation for its hypocrisy, critical scholars condemn its violence – the will to power standing behind and working through it. It is a criticism that *comes from the ascetic ideal*. This leads to a hypothesis: far from being a rupture with the civilising process, are critical approaches merely its next incarnation? In exposing a world of power, and the seemingly endless possibility of exercising critical violence against any and all constructions, does critical scholarship exercise a nihilistic will to power?

The anxiety of hypocrisy has not been far away from the critical imagination. The danger of (re)imposing an essentialised voice of the global south or of women (to give but a few examples) is a

theme frequently returned to.⁷¹ To avoid this, scholarship theorises ontologies and political/legal theories that create without being.⁷² Categories can morph into their opposite, be constantly overcome, radically open to their externality. Violence is excreted from reality or only employed to prevent the concentration of power. These are attempts to think of law without foundations, but they only attack foundations *because* they crystallise systems of inequality. They represent the ascetic ideal condemning its own self out of commitment to its ideal – a fantasy in which the violence of the pre-human is finally extinguished, or so minutely and rigorously employed that a simulacrum of the ascetic is created. In this paradox, I suggest that the logic of civilisation is still clear to see.

Method in the madness

Before beginning several methodological points need to be addressed. The first concerns how we are to read Nietzsche's texts. This issue has multiple dimensions to it. For a start, there is the question of the actual literature to be analysed. While publishing many books, Nietzsche left behind substantial unpublished material. Much of this was compiled, following Nietzsche's death, by his sister, Elizabeth Förster-Nietzsche, and friend, Peter Gast, in the volume known as *The Will to Power*.⁷³ Debates have raged since over the status of this text in the Nietzsche corpus and his unpublished material generally.⁷⁴ Heidegger was of the opinion that the unpublished work contained Nietzsche's real philosophy and should be the main object of study.⁷⁵ Others, such as Walter Kaufmann, described this unpublished work as little more than thought experiments; material that Nietzsche had toyed with but had discarded one way or another.⁷⁶ For the purposes of this thesis, the unpublished material will not be rejected out of hand. Following the predominant practice within Nietzschean scholarship, I will

⁷¹ Within TWAIL and postcolonial perspectives, scholarship has devised various frameworks to avoid recreating hegemonic perspectives. For an example, see: Eslava (n 5).

⁷² One example of this is Heathcote's concept of natality. See: Gina Heathcote, *Feminist Discourses on International Law* (OUP, 2019) 112.

⁷³ Nietzsche, *Will to Power* (n 11).

⁷⁴ See: Robert Solomon, 'Introduction: Reading Nietzsche' in Robert Solomon, Kathleen Marie Higgins (eds), *Reading Nietzsche* (OUP, 1988) 3.

⁷⁵ Martin Heidegger, *Nietzsche* (Harper Collins, 1991). For a discussion of the Nietzsche and Heidegger, see: Babette Babich, Alfred denker, Holger Zaborowski (eds), *Heidegger & Nietzsche* (Rodopi, 2012).

⁷⁶ Walter Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist* (Princeton University Press, 1992) 4-6.

use the published material as the main guiding light as to what Nietzsche thought.⁷⁷ *The Will to Power* will be referenced to the extent that it develops a point made within his main corpus. That text does contain some of Nietzsche's more disturbing statements and, to avoid any accusation of presenting a 'palatable' Nietzsche, these extreme elements will still be discussed.

Beyond the published/unpublished dilemma, there is the difficulty of choosing which texts to focus on in Nietzsche's published corpus. Unlike many other philosophers, Nietzsche left no magnum opus containing and summarising the core aspects of his thought.⁷⁸ Usually, his philosophy is divided up between his early phase, middle phase, and mature phase.⁷⁹ In the early phase we find essays like *On Truth and Lies in a Non-Moral Sense*,⁸⁰ *Homer's Contest*⁸¹ and *The Greek State*,⁸² and his first major publications: *The Birth of Tragedy*⁸³ and the *Untimely Meditations*.⁸⁴ From the publication of the last *Untimely (Wagner at Bayreuth)*,⁸⁵ Nietzsche entered into his middle phase: that of the 'Free-Spirit', mocking and teasing the hypocrisies and illusions of western European culture.⁸⁶ The shift begins with *Human, All Too Human*,⁸⁷ continuing into *Daybreak*,⁸⁸ and culminating in *The Joyous Science*.⁸⁹ *Thus Spoke Zarathustra*⁹⁰ stands as the pivot between the middle and late stages of his thought. Composed of four books, *Zarathustra* is stylistically unique (for Nietzsche and, perhaps, western

⁷⁷ Kevin Hill, 'Introduction' in Nietzsche, *Will to Power* (n 11) xv.

⁷⁸ Part of the reasoning for the posthumous creation of *The Will to Power* was precisely to fill this deficit.

⁷⁹ While often forgotten, this division comes from Lou Salomé's book on Nietzsche, originally published in 1894. See: Lou Salomé, Siegfried Mandel (translator), *Nietzsche* (University of Illinois Press, 2001). Though see Jeremy Fortier, *The Challenge of Nietzsche: How to Approach His Thought* (University of Chicago Press, 2020), for a critique of this division.

⁸⁰ Friedrich Nietzsche, 'On Truth and Lies in a Nonmoral Sense' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 114.

⁸¹ Friedrich Nietzsche, 'The Greek State' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 88.

⁸² Friedrich Nietzsche, 'Homer's Contest' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 95.

⁸³ Nietzsche, *Birth of Tragedy* (n 53).

⁸⁴ Friedrich Nietzsche, R.J. Hollingdale (translator), *Untimely Meditations* (CUP, 1997).

⁸⁵ *ibid* 195.

⁸⁶ For an analysis of the period of Nietzsche's thought, see: Paul Franco, *Nietzsche's Enlightenment: The Free-Spirit Trilogy of the Middle Period* (University of Chicago Press, 2020); and Mathew Meyer, *Nietzsche's Free Spirit Works: A Dialectical Reading* (CUP, 2021).

⁸⁷ *Human, All Too Human* is actually in three volumes. The first is the titular *Human, All Too Human*. The second is *Assorted opinions and Maxims*. The third is *The Wanderer and His Shadow*. See: Nietzsche, *Human, All Too Human* (n 35).

⁸⁸ Friedrich Nietzsche, R.J. Hollingdale (translator), *Daybreak: Thoughts on the Prejudices of Morality* (CUP, 1997).

⁸⁹ Nietzsche, *Joyous Science* (n 44).

⁹⁰ Nietzsche, *Zarathustra* (n 38).

philosophy) and in the movement across the books, reveals Nietzsche's own movement into his mature thought. The first book of *Zarathustra* with its declaration of the *Übermensch*⁹¹ echoes many of the themes from *Daybreak* and the *Joyous Science* of the creatively free philosopher. However, by the third book, the focus has shifted to a deeper teaching – the eternal recurrence and the revaluation of values. From *Zarathustra*, Nietzsche enters into his mature phase proper. In this period, he develops the themes of European *décadence*, the will to power, and the ascetic ideal, with publications like *Beyond Good and Evil*,⁹² *The Genealogy of Morals*,⁹³ *Twilight of the Idols*,⁹⁴ *Antichrist*,⁹⁵ *Ecce Homo*,⁹⁶ *The Case of Wagner*⁹⁷ and *Nietzsche Contra Wagner*.⁹⁸

While carrying important distinctions, the divisions between these phases are not radical – a point Nietzsche himself was keen to stress. Each phase throws important light upon the other, and Nietzsche insisted on being read forwards and backwards.⁹⁹ This makes it particularly difficult in deciding which material should be privileged in determining what Nietzsche thought at any stage. For the purposes of this thesis, my attention will rest on Nietzsche's mature phase – the endpoint of his philosophical development. It is in this phase that Nietzsche's philosophical project crystallised around the revaluation of morals and where he performed some of his most important genealogical studies on western civilisation. This means that such works as his *Genealogy of Morals*, *Beyond Good and Evil*, *Twilight of the Idols*, *AntiChrist*, and *Ecce Homo* will compose the bulk of the references. Recourse will still be made to his earlier writings to the extent that they support or nuance an interpretation being made of this later work. Some of the principles of Nietzsche's thought on the sovereign state were sketched in essays he wrote while still a philology professor at Basel, such as *The Greek State* and *Homer's Contest*.

⁹¹ *ibid* 41.

⁹² Nietzsche, *Beyond Good and Evil* (n 53).

⁹³ Nietzsche, *Genealogy* (n 6).

⁹⁴ Nietzsche, *Twilight of the Idols* (n 34).

⁹⁵ *ibid*.

⁹⁶ Friedrich Nietzsche, Duncan Large (translator), *Ecce Homo: How To Become What You Are* (OUP, 2009).

⁹⁷ Nietzsche, Ridley, Norman (n 42).

⁹⁸ *ibid*.

⁹⁹ Nietzsche did this himself by adding new prefaces to his older publications in 1887.

The final methodological point concerning Nietzsche specifically is the potential Eurocentrism of using a thinker like him to make macro-theoretical points about international law. While international legal scholars do not agree on many methodological issues, a common presentiment is that Eurocentrism is a bad thing.¹⁰⁰ While this shared presentiment does not extend to defining precisely what Eurocentrism means¹⁰¹ or how to avoid it,¹⁰² the general outlook is not good for Nietzsche. Even understanding Eurocentrism as a mere question of perspective,¹⁰³ that Nietzsche was white, male, heterosexual, and European is well known. This does cast doubt on his applicability to minority and non-European experiences that are implicated in any inquiry into European imperialism. While I accept the weight of this objection, there are some mitigating factors.

First, I am not using Nietzsche to make a claim concerning the experience of being colonised. The point is to understand why Europeans constructed the global order they did. This is what makes Nietzsche so useful – he offers a close philosophical-psychological excavation of the pathologies haunting the European. It is a philosophy written to Europeans about Europeans. In that sense it is very regional.

Second, the idea of Eurocentrism itself can be called into question by a Nietzschean perspective. Taking the analysis of Tzouvala as a starting point she argues that ‘Eurocentrism’ is an empty signifier: a term in which no hegemonic discourse has emerged to dictate its meaning.¹⁰⁴ In emptying Eurocentrism of objective meaning in this sense, Tzouvala clears the space to advance a radical understanding of the concept.¹⁰⁵ Moving away from Eurocentrism as a matter of perspective,

¹⁰⁰ Ntina Tzouvala, ‘The Specter of Eurocentrism in International Legal History’ 22(3) ANU College of Law Research Paper 413, 414.

¹⁰¹ As Tzouvala suggests, ‘Eurocentrism’ has ‘become the terrain of political confrontation within the discipline. Different historiographical, judicial, and political projects are in competition over authoritatively determining the meaning and consequences of “Eurocentrism”.’ (ibid 416).

¹⁰² Koskenniemi identifies four different methods that have been used to confront Eurocentrism: recounting histories that diversify the origins of international law; critiquing the colonial quality of core doctrines; exploring the dynamic between international law and imperialism; highlighting the Europeaness of the international legal project. See: Martti Koskenniemi, ‘Histories of International Law: Dealing with Eurocentrism’ (2011) 19 *Rechtsgeschichte* 152.

¹⁰³ Tzouvala draws an analytical distinction between seeing Eurocentrism as a matter of perspective and as a matter of theoretical orientation. Tzouvala (n 100) 417. Tzouvala pushes for this latter category, contending that Eurocentrism in international law is a system of capitalism that enhances and entrenches European hegemony. (n 100 432).

¹⁰⁴ Tzouvala (n 100) 415.

¹⁰⁵ Tzouvala makes a particular target of Ian Hunter. For Hunter, critical scholarship enacts its own Eurocentrism by framing the encounters between European, imperial states with First Nation and other peoples,

Tzouvala reinterprets it as a theoretical orientation within the context of global capitalism.

Specifically, Eurocentrism in international law is the structural logics of capitalism that perpetuate and reinforce European hegemony.¹⁰⁶ I propose that something similar can be done *through reading the civilising psychosis into the meaning of Eurocentrism*.

This reading would link Eurocentrism within international law to the ways in which the discipline has grown and spread in accordance with the civilising psychosis. While such a proposition is dependent upon the results of the present thesis (i.e., whether there is actual evidence of the psychosis within international law), an initial sketch can be made. By recognising one another as sovereign – mutual bearers of the ascetic ideal – the violence of the prehuman was displaced beyond Europe. Through the legal technologies of sovereignty and recognition, a select number of western and European states were able to (however uncertainly) stabilise the psychosis through the reallocation of violence abroad. The production and transformations within the structures of the law to (re)stabilise this dynamic is precisely Eurocentrism.

Even the turn towards critiquing Eurocentrism can be interpreted through this reading. The purpose of the exteriorisation of civilisation violence through law is to provisionally realise the ascetic ideal. However, it can only ever be provisional. The ascetic ideal is a simulacrum, and violence can always return. The idol of the universality of western values is precisely that – an idol - and has, consequently, been shattered, revealing them to be parochial expressions of power. Eurocentrism may have been previously interpreted as a matter of perspectivism or orientation, but both fit within this account. As to the first, to insist that ‘European perspectives’ be re-regionalised, held in contempt, not extended beyond a few borders lest epistemological violence be caused - is a reaction being driven by the *same* value structure (the same psychosis) that produced those western ideas in the first instance. The critique of the perspectival position as not being sufficiently radical, such as Tzouvala argues,

within a singular moral framework – a legacy of the *jus gentium*. There is no transcendental position by which to frame and evaluate these encounters. See: Ian Hunter, ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’ in Shaunnagh Dorsett, Ian Hunter (eds), *Law and Politics in British Colonial Thought: Transpositions of Empire* (2010). Tzouvala is critical of this perspective because it deflates the potential of critique. It cannot show us why certain particular, regional perspectives have nevertheless come to dominate over other perspectives. See: Tzouvala (n 100) 430.

¹⁰⁶ This connects back to her work in *Capitalism as Civilisation* (n 5).

may just be the further intensification of the psychosis. The violence must be deeper, more profound. It's not just a question of international law being dominated by Europeans, but that the structural *guts* of the system *necessarily* perpetuate western hegemony. The fault becomes irremediable or in need of revolutionary change. The argument against Eurocentrism, ironically, could just one more way in which the cruelty of the ascetic ideal takes effect – one more way in which the human, all too human quality of the world is drawn attention to in order to give ourselves (Europeans, at any rate) a bad conscience. While the issue of Eurocentrism is not a principal focus of this thesis and would require proper development in its own work following the conclusions of this research, I will return to the possibilities of the continuing nihilistic psychosis within contemporary international legal scholarship in the final chapter.

Beyond Nietzsche specifically, a second methodological concern is how the thesis will approach sovereignty. The study of sovereignty encompasses both a theoretical and an empirical, practical aspect. One can look at what theoreticians have written about sovereignty, and how it has played out in concrete legal scenarios. These two spheres are interlinked, with theory and practical law informing one another. There can also be disruptions between them. Locke's theories on sovereignty, for example, did not really correspond to the febrile politics of late 17th century England.¹⁰⁷ For present purposes, my focus will lean on the theoretical side of the spectrum. Concentrating on those writers who wrote extensively about sovereignty opens a direct window into the European imagination (allowing us to look inside and see the psychosis within) that events and case law could not (or not so immediately). This is not to say that a consideration of practical legal cases and moments will be missing from the work or are in any way less important. By the time the thesis reaches the 19th century textbooks on international law, the positivist method used by some of those authors necessarily brings practical events to the forefront. Be that as it may, an important future avenue of study will be to look more closely into the practical application of the European global order to see in what ways it may differ from a theoretical view. It is entirely possible that the psychosis of

¹⁰⁷ Writing during the Great and Glorious Revolution, a Whig victory over royal power was far from assured.

civilisation was an elite one, and that the individuals on the ground saw the world in very different ways.

In placing the emphasis on the theoretical, the next question is which sovereignty texts to focus on and why. My approach is to pick out authors that were either influential on subsequent thought or are representative (or unrepresentative, as the case may be) of the trends I wish to draw attention to. This will lead me to focus on the ‘canonical’ figures of international legal thought (such as Vitoria,¹⁰⁸ Pufendorf,¹⁰⁹ and Vattel¹¹⁰). While I do not want to replicate this canon to the exclusion of marginalised voices,¹¹¹ it nevertheless provides a valuable gateway into the dominant currents of thought that have shaped mainstream international law – into international law’s own self-historicising and self-mythologising.¹¹² To balance this and to avoid an overly narrow scope I have, where possible, selected authors from diverse geographical locations. In my analysis of 19th century commentators, for example, I draw upon thinkers from the US, Italy, Switzerland, Germany, and England. This is more difficult in the analysis of domestic sovereignty theory and the birth of the state, where I lean heavily on the anglophone scholarship of Hobbes, Locke, and Paine.¹¹³ But even here I widen the scope to consider views from the European continent, such as Grotius, Pufendorf, and Rousseau.

¹⁰⁸ Francesco De Vitoria, *De Indis et De ivre belli, relectiones* (1917, Carnegie, Institution of Washington).

¹⁰⁹ Samuel Pufendorf, *Of The Law of Nature and Nations* (Oxford, Lichfield).

¹¹⁰ Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (CUP, 2011).

¹¹¹ Parfitt has addressed this issue at length. See: Rose Parfitt, ‘The Spectre of Sources’ (2014) 25 *European Journal of International Law* 297, 298-299. See also: Paolo Amorosa, Claire Vergerio, ‘Canon-Making in the History of International Legal and Political Thought’ (2022) 35 *LJIL* 469, 470.

Many scholars now are trying to tell alternative histories of international law that reclaim marginalised voices. See, for example, Eric Leofflad’s excavation of Paulus Vladimiri as an eastern European father of international law: Eric Leofflad, ‘In Search of Paulus Vladimiri: Canon, Reception, and the (In)Conceivability of an Eastern European ‘Founding Father’ of International Law’ (draft on file with the author).

¹¹² A good example of this has been the work uncovering the reclamation of Vitoria and its use in (re)establishing the international legal order. See: Paolo Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law* (OUP, 2019).

¹¹³ This is an issue encountered across studies. See, for example: Charlotte Epstein, *Birth of the State* (OUP, 2020).

As this thesis investigates the historical roots of the civilising psychosis within international law, and doing so through an analysis of historic texts, there is the question of the historical method that I am using.

In international law's 'historical turn' debates over historical method have been increasing.¹¹⁴ Much of this has turned on the insistence, from some quarters, that international lawyers approach the history of their discipline through contextualism: historical events should be painstakingly interpreted in their relevant historical context, avoiding anachronistic meta-narratives or impositions from the past.¹¹⁵ Commitment to this method has tended to produce studies dedicated to smaller and smaller timeframes and a movement away from 'grand narratives'.¹¹⁶ Nevertheless, Anne Orford, in her *International Law and the Politics of History*,¹¹⁷ has contested the hegemony of the contextualist method.¹¹⁸ She warns that contextualist history and the putatively authentic facts it can tell us about law and the past, are being quietly transfigured into a new formalism and foundationalism within the discipline.¹¹⁹ This, she suggests, is a way of alleviating the existential anxiety provoked by international law's loss of foundations.

Accepting such claims allows lawyers to avoid the sceptical conclusions to which the realist critique ultimately leads. Rather than fully accepting uncertainty and our responsibility for the

¹¹⁴ See: Hunter (n 105); Andrew Fitzmaurice, 'Context in the History of International law' (2018) 1 *Journal of the History of International Law* 5; Lauren Benton, 'Beyond Anachronism: Histories of International Law and Global Legal Politics' (2019) 21 *Journal of the History of International Law* 7; Jean D'Aspremont, *The Critical Attitude and the History of International Law* (Brill, 2019); Ignacio de la Rasilla, *International Law and History: Modern Interfaces* (CUP, 2021); Raphael Schäfer; Anne Peters, *Politics and the Histories of International Law: The Quest for Knowledge and Justice* (Brill, 2021).

¹¹⁵ This historical method is largely referred to as the 'Cambridge school', being pioneered by scholars such as Pocock and Quentin Skinner. See: J. Tully (ed), *Meaning and Context: Quentin Skinner and His Critics* (Princeton University Press, 1988). For some examples of studies that undertake this style in international law, see: Pablo Zapatero, 'Legal Imagination in Vitoria: The Power of Ideas' (2009) 11 *Journal of the History of International Law* 221; Samuel Moyn, *The Last Utopia: Human Rights in History* (HUP, 2012); Lauren Benton, Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (HUP, 2016).

¹¹⁶ See the discussion of Simpson on this turn in historiography: James Simpson, *Permanent Revolution: The Reformation and the Illiberal Roots of Liberalism* (HUP, 2019).

¹¹⁷ Anne Orford, *International Law and the Politics of History* (CUP, 2021).

¹¹⁸ She is not alone in this. Other critical scholars have criticised the hegemony of the contextualist method. See: Jo Guldi, David Armitage, *The History Manifesto* (CUP, 2015); Alexander Nagel, Christopher Wood, *Anachronistic Renaissance* (Zone Books, 2012); Dipesh Chakrabarty, *Provincialising Europe: Postcolonial Thought and Historical Difference* (Princeton University Press, 2000).

¹¹⁹ Orford (n 117) 6.

politics of our legal arguments, we can use the work of historians to establish truths about international law.¹²⁰

To combat this, Orford argues that the contextualist method can itself be deconstructed and shown to be the contingent product of particular political circumstances.¹²¹ Against the exclusive use of contextualism, Orford calls for lawyers to embrace the political quality of any history-telling and to engage in historical analyses that are politically ‘useful’. As she states:

[T]he question is not which method is objective, impartial, or correct but which method is useful. Which (partisan and political) vision of the history of international law best helps us to grasp the current moment and why? A particular historical method may be extremely useful in one context but get in the way of a clear analysis or a persuasive legal argument in another.¹²²

In situating my own study in relation to this debate, it is clear that the proposed Nietzschean frame does not sit comfortably with a strict contextualist, history of ideas approach. Hobbes, Locke, and Paine certainly did not expressly think in terms of the civilisational psychosis or were knowingly being hypocritical. Orford’s critique of contextualism, then, is useful for opening up the space for my own analysis.

But beyond just relying upon Orford, Nietzschean philosophy *itself* is critical – or at least wary - of contextualist methods. Nietzsche’s perspectivism and rejection of correspondence theories of truth are well known.¹²³ This rejection, in turn, impacted upon his understanding of history.¹²⁴

¹²⁰ *ibid* 7.

¹²¹ *ibid* 105.

¹²² *ibid* 316.

¹²³ This style of interpretation was very popular at the turn of the millennium. See: David Allison, *The New Nietzsche: Contemporary Styles of Interpretation* (MIT Press, 1985).

¹²⁴ While being overtly concerned about the future, Nietzsche dealt with history at almost every point in his philosophical career. For a comprehensive study of this engagement, see: Anthony Jensen, *Nietzsche’s Philosophy of History* (CUP, 2015).

Writing in the early 1870s, Nietzsche took aim at Leopold von Ranke's popularisation of source-based history.¹²⁵ This took the form, in his second *Untimely* essay, of exploring the value of history for the development of life. To his mind, history was needed 'for the sake of life and action'.¹²⁶ It should be studied only to the extent that it served life, not to the point 'that life becomes stunted and degenerate.'¹²⁷

Nietzsche was very specific about the healthy *types* (or methodologies) of historical study. He defined these as 'monumental', 'antiquarian', and 'critical'.¹²⁸ The former is couched towards a great man understanding of history and the need for motivation. 'History belongs above all to the man of deeds and power, to him who fights a great fight, 'who needs models, teachers, comforters and cannot find them among his contemporaries.'¹²⁹ Monumental history supplies this want, that every significant deed that expands the concept of 'man' should be preserved and used to similarly inspire future souls.¹³⁰ Too much monumental history, however, is harmful. In order to facilitate its inspiring role, monumental history has not much use for absolute veracity. It will have to 'deal in approximations and generalities', compressing differences in order to achieve the necessary effect. History risks becoming 'distorted', close to 'poetic invention'. History itself, in other words, suffers harm.¹³¹

Antiquarian history treats with some of the deficiencies of monumental history. It belongs to that person who preserves and reverts history; 'to him who looks back to whence he has come, to where he came into being, with love and loyalty'.¹³² Through attending to the history of their people, these individuals 'preserve for those who shall come after him the conditions under which he himself came into existence – and thus he serves life.'¹³³ Like with monumental history, the antiquarian approach carries with it dangers. First and foremost is that antiquarian history 'knows only how to *preserve* life,

¹²⁵ For an account of the development of the historical method and the place of Ranke within it, see: Richard Evans, *In Defense of History* (W.W. Norton & Company, 2000) 16-23.

¹²⁶ Friedrich Nietzsche, 'On the Uses and Disadvantages of History for Life' in Friedrich Nietzsche, R.J. Hollingdale (translator), Daniel Breazeale (ed), *Friedrich Nietzsche: Untimely Meditations* (CUP, 1999) 59.

¹²⁷ *ibid* 59.

¹²⁸ *ibid* 67.

¹²⁹ *ibid*.

¹³⁰ *ibid* 68.

¹³¹ *ibid* 70-71.

¹³² *ibid*.

¹³³ *ibid* 73.

not how to engender it'.¹³⁴ Everything old is taken with respect, while that which is new is undervalued and treated with suspicion. It 'mummifies' life, paralysing that individual who desires growth.¹³⁵

This deficiency opens the ground for critical history. In order to live, humanity 'must possess and from time to time employ the strength to break up and dissolve a part of the past'.¹³⁶ This is done through 'bringing [the past] before the tribunal, scrupulously examining it and finally condemning it'.¹³⁷ This destruction is not borne out of justice, but out of a life needing to destroy in order to breathe. This, however, is a dangerous process. 'For since we are the outcome of earlier generations, we are also the outcome of their aberrations, passions and errors, and indeed of their crimes; it is not possible wholly to free oneself from this chain.'¹³⁸

In late 19th Century Germany, Nietzsche thought that the approach to history was becoming unbalanced. But this had nothing to do with one type of his preferred historical methods gaining predominance. It was, rather, the uptake of positivist, contextualist history. This is what he described as 'the demand that history should be a science.'¹³⁹ In insisting that history should be dealt with objectively, that it should be a repository of facts and nothing more, the personality of the age is weakened. In refusing to exercise creative power over the mass assembly of historical practices and beliefs, the individual loses all form. The scholar is 'hollowed out', 'eternally subjectless'.¹⁴⁰ They can produce no effect.

The historical culture of our critics will no longer permit any effect at all in the proper sense, that is an effect on life and action: their blotting paper at once goes down even on the blackest writing, and across the most graceful design they smear their thick brush-strokes which are supposed to be regarded as corrections: and once again that is the end of that.¹⁴¹

¹³⁴ *ibid* 75.

¹³⁵ *ibid*.

¹³⁶ *ibid*.

¹³⁷ *ibid* 76.

¹³⁸ *ibid*.

¹³⁹ *ibid* 77.

¹⁴⁰ *ibid* 87.

¹⁴¹ *ibid*.

Against the objectivity of positivist historians, Nietzsche insists that the perceiver and the perceived cannot be so neatly distinguished. Providing the example of an artist painting a storm, he argues that ‘it is a superstition... that the picture which these things evoke... is a true reproduction of the empirical nature of the things themselves. Or is it supposed that at this moment the things as it were engrave, counterfeit, photograph themselves by their own action on a purely passive medium?’¹⁴² The practice of history is no different, and is a profoundly artistic event. It is the work of a ‘dramatist’, tying together events and moments into an artistic whole. ‘Thus man spins his web over the past and subdues it, thus he gives expression to his artistic drive – but not to his drive towards truth or justice.’¹⁴³ The person best placed to write history is not, therefore, the person to whom ‘the past means nothing at all’: it is the artist. Positivist scholars are ‘handy workmen’ who ‘sift and carry’, but they should not be confused with the master.¹⁴⁴

As life, or will to power (which in a Nietzschean analysis is to say the same thing), the study of history becomes a question of what cultivates or harms that power. The monumental, antiquarian, and critical approaches to history are each, in their own way, conducive to enhancing, or diminishing, the will to power. Neither is more correct or ‘true’ than any of the others. Within each of these approaches, there is nothing that Nietzsche states that would absolutely preclude a contextualist method being used. As we saw above, the monumental approach to history, because of its inaccuracies, causes harm to history itself. The problem lies in the contextualist claim to provide a *definitive* understanding of history to the exclusion of all other consideration. These scholars provide a *tool* for approaching history, but that tool – requiring the effacement of the individual’s will – can prove harmful if it becomes the *raison d’être* of historical inquiry. Rather, this tool, amongst others

¹⁴² *ibid* 91.

¹⁴³ *ibid*.

¹⁴⁴ *ibid* 94.

(such as Nietzsche's genealogical method),¹⁴⁵ should be put to work by more creative historians who are sensitive to the needs of life.¹⁴⁶

Keeping these reflections in consideration, and returning to my own proposed history of sovereignty, this, to use Nietzsche's terms, is a piece of critical history – though, ironically, a critical approach that calls into question the very excesses of that (broad) method within international law. It examines the roots and development of the sovereign state-based European global order so as to flush out the nihilistic psychosis. It sees the past as carrying a fundamental illness that is still bleeding into the present and which needs to be confronted. Within this analysis, the contextualist method will be used but not exclusively so. For example, with respect to Nietzsche himself I examine his published and unpublished works, his social context, his academic context, and his correspondence, in order to build up the most accurate picture I can of both the man and his thought. Where I deviate from the contextualist method is in reading the civilising psychosis into the writings of sovereignty theorists and in the adoption of a dramatic/poetic form to deliver this analysis. From a Nietzschean perspective, these thinkers are embedded within sedimented layers of civilisation and its psychosis of nihilism. This sedimented position, as an expression of the will to power, is determinative of what they can see and how they interpret it. As such, individuals do not experience themselves as writing out of partiality or from anything like a psychosis – it is felt as natural, and they keep their good consciences. To get at the psychosis one must read *past* what commentators say or think they are doing to get at the deeper reality. Words become *symptoms*.

Onwards!

Is international law nihilistic? For much too long this question has been ignored or given cursory attention – thrown about as a rhetorical device. But what if we took it seriously? What if we thought deep down into the complicity of international law with nihilism? What might we find?

¹⁴⁵ For an exploration of this method in Nietzsche's corpus, see: Anthony Jensen, 'Nietzsche and the Truth of History' in Tom Stern (ed), *The New Cambridge Companion to Nietzsche* (CUP, 2019) 249.

¹⁴⁶ These are Nietzsche's 'higher types'. He never sets out this ideal fully or who or what these types are, but the 'type' of Zarathustra is probably a good start. See: Jeremy Fortier, *The Challenge of Nietzsche: How to Approach his Thought* (The University of Chicago Press, 2020) 104.

This thesis takes up that question by using the philosophy of nihilism and civilisation developed by Friedrich Nietzsche. I ask whether the nihilistic psychosis of civilisation provides the generative logic that has shaped - *and still shapes* - the discipline. Is the contemporary turn in critical scholarship, rather than a departure from civilisational logic, merely its latest instantiation? Is the revelation of law's inherent, irremediable, irredeemable violence, the last movement in the nihilistic inner life of international law? Its apogee of disgust?

To answer these questions, I build my own poetical drama of international law's history, recording the infusion of the civilising psychosis within the conceptual roots and growth of the discipline, culminating in the contemporary critical turn. To anchor this analysis, I orchestrate my account around the example of sovereignty – a core diagnostic thread within international law that can guide us through its history. In this Nietzschean history of sovereignty, I explore whether nihilism can be used to explain the (re)production of the European global order of sovereign states. It focusses on both the domestic and international authors, identifying the ways in which both discourses develop and interlink, and how the patterns of the nihilistic psychosis are manifested within these trends. Finally, at the end of the thesis, I turn the civilising psychosis back upon critical scholarship, and ask if contemporary writings on sovereignty have broken with the process of civilisation, or whether they mark a new, more subtle manifestation of the same logic. If the answers to these questions are positive – if international is based on nihilistic roots and critical scholarship is indeed merely a continuation of the same – then we, as a discipline, may need to radically rethink our current trajectory.

The originality of this project is secured in several ways. First, the question of nihilism has thus far not been explored by international legal scholarship. It has been alluded to but never seriously theorised. Second, there is the use of Nietzsche himself. Along with the theme of nihilism, Nietzsche has been, at best, a peripheral figure within international jurisprudence. There has been no previous attempt to apply his philosophy in such a comprehensive way to the structures of international law or to the phenomenon of European imperialism. Nietzsche was one of the keenest critics of western civilisation and modernity and lived contemporaneously with figures like James Lorimer and Lasa Oppenheim (the latter taught at Basel less than 10 years after Nietzsche's departure). That international legal scholarship has brushed over his insights into the pathologies of European

civilisation, and the potential of what they might say about the establishment of European empires, is surprising. Part of this neglect might stem from the fact that Nietzsche has not been seen as a political thinker – sometimes even anti-political.¹⁴⁷ That, at least, is changing within Nietzschean scholarship. Important studies into Nietzsche's treatment of democracy and politics have been published in recent years.¹⁴⁸ Yet there has been no substantive analysis into how his philosophy connects to sovereignty, and how it might be developed to theorise the European global order of sovereign states. Finally, there is the Nietzschean critique of critical law. Many of the reactions to critical scholarship come from outside its methods, trying to re-establish some space for legal positivism or to reclaim international law's good conscience. In contrast, a Nietzschean critique is *internal* to the critical method (sharing many of its methodological commitments) with little interest in maintaining a strict positivism – or assuaging feelings of guilt. It pulls critical approaches apart from the *inside* with their own logic and throws into question all of its moral and political positions. I also consider this Nietzschean intervention to be a timely one. With the mounting importance of critical voices in legal and political discourses, in which law is revaluated into an expression of power, a philosophy of power and the ethical responses to power, becomes all too relevant.

The bow is tensed, and the way is set. Those who wish to take a last gulp of clean air should do so now, for our course is - *downwards*.

¹⁴⁷ Traditionally, Nietzsche has been read as an anti-political thinker. See: Thomas Brobjer, 'Critical Aspects of Nietzsche's Relation to Politics and Democracy' in Herman Siemens, Vasti Roodt (eds), *Nietzsche, Power and Politics* (De Gruyter, 2008) 206-207, and Brian Leiter, *Nietzsche on Morality* (Routledge, 2003) 292. See also the comments made by Paul van Tongeren: Paul van Tongeren, 'Nietzsche as 'Uber-Politischer Denker'' in Herman Siemens, Vasti Roodt (eds), *Nietzsche, Power and Politics: Rethinking Nietzsche's Legacy for Political Thought* (De Gruyter, 2008) 69. There have now been strong pushbacks against this position. See in particular: Hugo Drochon, *Nietzsche's Great Politics* (Princeton University Press, 2016).

¹⁴⁸ There have also been attempts to use Nietzsche for democratic purposes: William Connolly, *Pluralism* (Duke University Press, 2005); Lawrence Hatab, *A Nietzschean Defense of Democracy* (Open Court, Chicago, 1995); David Owen, *Nietzsche, Politics, and Modernity* (Sage, 1995); Mark Warren, *Nietzsche and Political Thought* (MIT Press, 1991); Bonnie Honig, *Political Theory and the Displacement of Politics* (Cornell University Press, 1991).

VOLUME I

As He was Hypocritical, I Slew Him: Prelude to an International Law of Redemption

Janus may have been the original hypocrite, but at least he had the good grace to wear the fact on his sleeve... We moderns do not have the shamelessness of a god – we hide our second face and become *dishonest*.

All seekers of knowledge must have a keen wit, but equally important, though far less glamorous, is their handiness with a *spade*. To get down to any depth one must dig.

This part is very much one of digging. What are we digging for? Knowledge. Knowledge of what? The core themes and motifs found within contemporary critical accounts of international law and its approach to sovereignty. From this, I wish to build a sensibility or atmosphere – a prelude music – of the law that sets the scene of the thesis, and which will be carried throughout the work.

This part is also very much about hypocrisy. It is the theme of hypocrisy that stands as the central note of my prelude: it is the reoccurring point that I intend to trace across and between the different strands of critical scholarship. In each of these strands, no matter how diverse the methodology, there is an unpicking of the law's putative claim to objectivity, justice, and universality. The law's hypocrisy is laid bare, and it is precisely the exposure of this hypocrisy that forms the basis of scholarship's critical bite. Hypocrisy begets disgust; and this disgust begets *devaluation*.

My exploration of critical approaches to international law and sovereignty, and the underlying theme of hypocrisy, begins with the structural/deconstructionist theories of international legal argumentation produced by scholars such as David Kennedy and Martti Koskenniemi. These theories approach international law as a discourse - an argumentative practice. On this account, sovereignty, instead of being a discrete *thing*, likewise becomes a mode of argumentation. And it is the exposure of the essential role of politics within this discourse that reveals the hypocrisy of the legal (self)presentation of objectivity. From this scholarship, the focus will widen to the wider canopy of critical legal theory, beginning with Marxist approaches. This section breaks down recent Marxian

analyses of sovereignty and imperialism, and the causal interconnection between them, as well as ideology critique and the importance of reification. Again, rather than as an objective, peace creating technology, Marxists excavate the artificiality of international law and its inherent entanglement with capitalist, civilisational violence. Moving from this, I then consider TWAIL perspectives. Here, the chapter unpacks the evolving nature of TWAIL critique, transitioning from decolonial movements of the 1950s and 60s, to the work of Antony Anghie, before finally considering the recent studies of Luis Eslava and Rose Parfitt. Sharing links to Marxist methodologies, but not binding themselves to it, TWAIL scholarship maps the (continuing) legacies of colonial and civilisational violence inflicted upon the non-European world through the mechanisms of international law and sovereignty. In the final section, the chapter will analyse feminist, and queer approaches to the state, international law, and civilisation – approaches that pull apart the law’s claim to objectivity and neutrality, dragging to the surface the essential role of gender and sexuality in the construction of sovereignty and the state. Here, the analysis concentrates, first, upon the domestic deconstruction of the nation state by authors such as Carole Pateman and Charlotte Epstein. The discussion then continues towards the international level and the feminist analysis of the role of sovereignty within international law. The section will end with queer scholarship and the work of Dianne Otto.

Discursing about international law: Kennedy, Koskenniemi, and the structures of international legal argument

The American academy has a long history of theorising the relationship between law and politics. The American legal realists from the early 20th Century attest to this. Writing against formalism, aligned scholars contended that political beliefs distorted the application and interpretation of law.¹

¹ Some went so far as to urge for a movement away from the ‘mechanical’ jurisprudence of orthodox law and the acceptance of an understanding of law that envisages it as a method of social control. See: Roscoe Pound, ‘Mechanical Jurisprudence’ (1908) 8 Columbia Law Review 605. While legal realism has long fallen into an abeyance, there has been a recent upsurge of ‘New Legal Realism’. See: Jacob Holterman, Mikael Rask Midsen, ‘European New Legal Realism and International Law: How to Make International Law Intelligible’ (2015) 28 LJIL 211.

Building upon this tradition arose the critical legal studies movement, pioneered by such authors as Roberto Unger² and Duncan Kennedy.³ From this point of view, the application of law was not simply distorted by politics; rather, law itself was inherently political. Writing in Harvard law school and struggling to make a name for himself,⁴ David Kennedy sought to apply the new critical jurisprudence to international law. Amongst his writings,⁵ Kennedy contends that international law is a *discursive practice* – a practice that is inherently political.

His analysis begins with two dilemmas that have dogged the theory and practice of international law. The first of these puzzles concerns the unstructured and indeterminate nature of legal argument. The ‘normative moorings’ of legal discourse are ‘infirm’, he tells us, and all too easily dissolve into ‘thin disguises for assertions of national interest’.⁶ The second dilemma bites when scholarship attempts to resolve the indeterminateness of legal discourse. To do so, Kennedy suggests, entails either abandoning the idea of normative international law or through limiting law’s ambit to a few narrow areas.⁷

Kennedy argues that these dilemmas result from the ontological tension and co-dependence between the individual and the community. This is because ‘[i]ndividual nations find in socialisation both the source of their identity and a threat to their existence’.⁸ A state’s possession of sovereignty, and its associated rights of territorial integrity, depends upon its participation in a community of states that accept the normative claims of that sovereignty. However, being dependent upon such a community necessarily limits the ambit of state sovereignty. It cannot do whatever it likes without risking other states withdrawing their recognition of its sovereignty.⁹

² See: Roberto Unger, *Knowledge and Politics* (New York Press, 1975).

³ See: Duncan Kennedy, *A Critique of Adjudication: fin de siècle* (Harvard University Press, 1998).

⁴ David Kennedy, ‘The Last treatise: Project and Person (Reflections on Martti Koskenniemi’s from Apology to Utopia)’ (2006) 7(12) *German Law Journal* 982.

⁵ Kennedy has written about a diverse range of topics. One of his earlier areas of scholarship was in connection to human rights. Of particular importance was his article ‘Spring Break’ (1985) 63 *Texas Law Review* 1377. Today, his focus is mainly upon questions of global governance.

⁶ David Kennedy, ‘Theses about International Law Discourse’ (1980) 23 *GYIL* 353, 359.

⁷ *ibid.*

⁸ *ibid* 361.

⁹ *ibid.*

The tension between individuality and community is one that Kennedy describes as ‘binary’ and ‘transformational’. ‘Binary’ refers to where the levels of discourse are constructed out of two mutually exclusive poles that, nevertheless, cannot exist without the other.¹⁰ ‘Transformational’ is the incoherency of the binary. Despite the opposition between the two poles of a given discourse, they each maintain the possibility of transforming into the other as an argument moves through the discursive levels.¹¹ To help make sense of this, take the dualities of ‘particularism / community’, and ‘independence / authority’. Each of the two dynamics appears to be the exclusive contradiction of its opposite. However, the establishment of a liberal particularism requires the intervention of authority to prevent trespasses against a person’s freedom, and that, conversely, the idea of community is only coherent when understood as an association of particular individuals.¹² As such, the ostensibly exclusive binaries collapse into indistinction.

In applying the dual ideas of ‘binary’ and ‘transformation’ to the argumentative structure of international law, Kennedy employs the structural linguistics of Saussure.¹³ The objective of structural linguistics was to elaborate how the employment of language could be open-ended, but nevertheless able to produce recognisable and determinate products. To do this, Saussure suggested that the activity of speaking is not a free one, but is, in fact, conditioned by a lingual structure. By this conditioning, the possibilities of phonological and literary constructions are controlled and delimited by a fundamental network of rules. This observation is what underlies Saussure’s distinction between *parole* (the activity of speaking) and the *langue* (the rules that govern speech). Crucially, this *langue* is not constituted by *content*. Rather, it is a system of differentiations, where terms acquire meaning in opposition and combination with others:¹⁴ ‘Language is a system of interdependent terms in which the value of each term results solely from the presence of the others.’¹⁵ From this, several

¹⁰ *ibid* 365

¹¹ *ibid* 365-366

¹² *ibid* 365.

¹³ *ibid* 374-376.

¹⁴ Gary Gutting, *French Philosophy in the Twentieth Century* (CUP, 2001) 215.

For texts dealing directly with Saussure, See: Stephen Anderson, Louis de Saussure (eds), *Rene de Saussure and the Theory of Word Formation* (Language Science Press, 2018); Carol Sanders, *The Cambridge Companion to Saussure* (CUP, 2004).

¹⁵ Kennedy (n 6) quoting Saussure 375.

consequences flow: first, communication is only possible ‘by an *a priori* shared understanding of the structural rules governing their assembly;’¹⁶ and, second, that persuasion being effected by language *in of itself* is impossible: ‘[i]f arguments are meaningful only in opposition, they can never be determinative, for in their triumph, their meaning would be lost.’¹⁷

Applying this to international law, Kennedy contends that meaningful exchange in international law is only achieved by a certain lingual structure; that this structure is composed of the binary opposition between individuality and community; and that since this opposition is transformational argumentative dialogues cannot be determined. Thus:

A statesman speaks. A diplomat hears. The argument is either recognised and accepted or it is not. If so, a response may be given and received. But no one is persuaded. Recognition means simply that the argument formally corresponds with a pre-existing structural set of rules. With an underlying value consensus or pattern of coercion, the conversation may at any point be ended by action. But this action was not compelled by the power of the argument. The action reflects either the underlying value choice, or the pattern of coercion.¹⁸

While Kennedy’s approach to international legal argumentation, was influential, it has been largely eclipsed (as Kennedy himself admits)¹⁹ by the work of Martti Koskenniemi. As any international law student will know, it is difficult to avoid encountering Koskenniemi. He has, over the years, assumed an almost hallowed status. His writings are ‘treated as the gospel’;²⁰ he is the ‘High Priest’²¹ of international law.

¹⁶ *ibid.*

¹⁷ *ibid* 376.

¹⁸ *ibid.*

¹⁹ Kennedy (n 4) 982.

²⁰ Jan Klabbers, ‘Towards a Culture of Formalism; Martti Koskenniemi and the Virtues’ (2013) 27(2) *Temple International Comparative Law Review* 417, 418.

²¹ Anthony Carty, ‘Language Games of International Law: Koskenniemi as the Discipline’s Wittgenstein’ (2012) 13(2) *Melbourne Journal of International Law* 859, 866.

Whatever the merit of these assessments, Koskenniemi's work on international legal argument is largely found within his *From Apology to Utopia* (FATU).²² In FATU, like with Kennedy, Koskenniemi employs the methodology of structural linguistics.²³ As we saw above, under the structural linguistics model, the meaning of expressions are not given by virtue of their content, but through the interplay of binary oppositions.²⁴ In welding the linguistic methodology to international law, Koskenniemi begins by mapping the differentiatonal structures of legal argument. The fundamental binary, he argues, and in contrast to Kennedy's use of the individual/community dichotomy, is composed of two opposing methods for establishing international law's specificity from political or moral dialogues. On the one hand, 'international law is kept distinct from descriptions of the international political order by assuming that it tells people what to do and does not just describe what they have been doing.'²⁵ On the other, the law 'is delimited against principles of international politics by assuming it to be less dependent on subjective beliefs about what the order among States should be like.'²⁶

These two intellectual activities dictate the duality within international law's argumentative authority. For Koskenniemi, they give rise to what he describes as 'normativity' and 'concreteness'.²⁷ Normativity involves 'creating distance between [law] and state behaviour, will and interest';²⁸ concreteness requires 'distancing [law] from a natural morality.'²⁹ Both are required because, firstly, a legal argument that failed to establish sufficient qualitative separation between itself and 'State behaviour, will or interest would amount to a non-normative apology, a mere sociological

²² Martti Koskenniemi, *From Apology to Utopia* (CUP, 2007); see also: Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) EJIL 4.

His other works discussing international law's fragmentation, deformalisation, managerialism, and his culture of formalism, are each deserving of attention, but are beyond our present scope. See: Martti Koskenniemi, 'Constitutionalism as mindset: reflections on Kantian themes about international law and globalisation' (2007) 8 *Theoretical Inquiries in Law* 9, 13; Martti Koskenniemi, 'Fragmentation of international law? Postmodern anxieties' (2002) 15 *LJIL* 553; Martti Koskenniemi, 'The fate of public international law: between technique and politics' (2007) 70(1) *MLR* 1.

²³ Koskenniemi, *From Apology to Utopia* (n 22) 7.

²⁴ *ibid* 8-9.

²⁵ *ibid* 16.

²⁶ *ibid*.

²⁷ *ibid* 17.

²⁸ *ibid* 513.

²⁹ *ibid*.

description’;³⁰ and, secondly, a law that justified its status as such exclusively upon the affirmation of a pre-existing normative code and was, therefore, ‘unrelated to State behaviour, will, or interest’ would inevitably ‘seem utopian, [and] incapable of demonstrating its own content in any reliable way.’³¹

This dual requirement is incoherent. An argument cannot be normative and concrete simultaneously. ‘The two requirements *cancel each other*.’³² The more concrete and based in state practice an argument is, the more political it will seem;³³ but if it based in an appeal to normative codes, it risks appearing utopian and parochial.³⁴ Both positions accuse the other of subjectivity. ‘Natural codes appear a sham to apotheosise one person’s morals; concreteness reduces law to the will of states.’³⁵

While linking this tension to the classic dual purpose of law as being both an activity of legislation and adjudication, a process and a rule,³⁶ Koskenniemi considers that the more profound observation is that the argumentative structure reflects the liberal theory of politics.³⁷ The liberal theory has two core assumptions. First, laws emerge from the consent of the subjects themselves, not from an abstract normative framework. Second, once created legal norms will bind the consenting individuals. They cannot subsequently withdraw their consent and escape the law’s binding force.³⁸ These two assumptions lead to difficulties with the application and enforcement of legal rules. On the one hand, there is the risk that legal institutions will not apply the law in the way conceived by the consenting community, but in line with their own interests. On the other, to avoid the horns of the first problem, legal rules must present themselves as uniform in their application and capable of definitive interpretation. As Koskenniemi phrases the paradox, ‘[c]oncreteness at the level of rule-creation presumes normativity at the level of rule-ascertainment.’³⁹ Meaningful difference cannot be

³⁰ *ibid.*

³¹ *ibid.*

³² Koskenniemi, ‘The Politics of International Law’ (n 22) 8.

³³ *ibid.*

³⁴ *ibid.*

³⁵ Koskenniemi, *From Apology to Utopia* (n 22) 60.

³⁶ *ibid.* 20.

³⁷ *ibid.* 21.

³⁸ *ibid.*

³⁹ *ibid.* 22.

maintained between the two aspects of liberalism, and that a uniquely legal discourse which is separate from politics is not possible.⁴⁰

The argumentative requirements of ‘concreteness’ and ‘normativity’ that dog liberal justification are translated into the sources of authority of international legal argumentation. Koskenniemi characterises them as ‘descending’ and ‘ascending’ styles of justification. Descending arguments invoke ‘a given normative code which precedes the state and effectively dictates how a state is allowed to behave.’⁴¹ In other words, one arrives at a higher normative code, which is then argued *down from* in order to qualitatively categorise state conduct. This mirrors the requirement of normativity. Ascending arguments attempt ‘to construct a normative order on the basis of the ‘factual’ state behaviour, will and interest’.⁴² Here, one argues *up* from factual affairs in order to compose the higher normative code. This follows from the requirement of concreteness. The division is binary and exhaustive.⁴³

As the accusations of mutual subjectivity prevented liberal theory from preferring the argument of concreteness over that of normativity, so too can neither style of legal argumentation be preferred. They accuse one another of subjectivity. From the ascending perspective, the descending model falls into subjectivism as it cannot demonstrate the content of its aprioristic norms in a reliable manner (i.e., it is vulnerable to the objection of utopianism). From the descending perspective, the ascending model seems subjective as it privileges state will or interest over objectively binding norms (i.e., it is vulnerable to the charge of apologism).⁴⁴

As such, ‘*we cannot consistently prefer either set of arguments*’.⁴⁵ Because of this deficiency, legal argument, if it is elude its own incoherencies, is obliged to move ‘*from emphasising concreteness to*

⁴⁰ This treatment of liberalism has been criticized. As Mollers argues: ‘The allegedly contradictory nature of liberalism is neither developed in a theoretical way, nor is it compellingly aligned to public international law.’ See: Christoph Mollers, ‘It’s About Legal Practice, Stupid’ (2006) 7(12) German Law Journal 1011.

However, see Singh’s attempts to link FATU’s theoretical basis to Sartre: Sahib Singh, ‘Koskenniemi’s Images of the International Lawyer’ (2016) 29 LJIL 699.

⁴¹ Koskenniemi, *From Apology to Utopia* (22) 59.

⁴² *ibid.*

⁴³ *ibid* 59.

⁴⁴ *ibid* 60.

⁴⁵ *ibid* 64.

emphasising normativity and vice-versa without being able to establish itself permanently in either position.⁴⁶ The more an argument attempts to escape one pole the more it will sink into the other.⁴⁷

As the structure of differences that compose the *langue* of international law are indeterminate, the specific argumentative movements concerning legal doctrine will contain within them both ascending and descending patterns of justification, and can be presented so as to emphasis either depending upon the opposition. A legal decision is thus an exercise in pragmatism and is ‘dependent upon ultimately arbitrary choice to stop the criticisms at one point instead of another.’⁴⁸ Resolution must be imputed from an externality. As such, each pronouncement upon law is simply an ‘ad hoc’, political decision.⁴⁹ The legal framework, far from being a device that can deliver definitive answers, ‘is singularly useless as a means for justifying or criticising international behaviour.’⁵⁰

To provide one explicative example of these argumentative structures in operation, Koskenniemi invites us to consider the doctrinal opposition between the declaratory and constitutive theories concerning the formation of a sovereign state.⁵¹

On a declaratory account, ‘[a] State’s emergence is a factual event. The legal significance of recognition becomes marginal; its sense is to establish a formal basis for the relations between the

⁴⁶ *ibid* 65.

⁴⁷ *ibid* 65.

⁴⁸ *ibid* 67.

This dependency upon the political that Koskenniemi tracks into international legal argument led early commentators to accuse him of destroying international law. See: Iain Scobbie, ‘Towards the Elimination of International Law: Some radical Scepticism about Sceptical Radicalism’ (1990) 61(1) *BYIL* 339.

Unsurprisingly this censor has been resisted. See: Jason Beckett, ‘Rebel Without a Cause – Martti Koskenniemi and the Critical Legal Project’ (2006) 7(12) *German Law Journal* 1045, 1059.

Finally, Koskenniemi himself has been quick to argue that the political decision is not a random process. It is instead dictated by a given institution’s ‘structural biases’. See: Martti Koskenniemi, ‘The Politics of International Law – 20 Years Later’ (2009) 20(1) *EJIL* 7.

Also worthy of attention are the attempts by Neo-Positivist to overcome the lack of foundation within international law by Koskenniemi’s thesis. See variously: Jean d’Aspremont, *International law as a Belief System* (CUP, 2018); Jean d’Aspremont, Jorg Kammerhofer (eds), *International Legal Positivism in a Post-Modern World* (CUP, 2014); Jean d’Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP, 2011).

⁴⁹ Koskenniemi, *From Apology to Utopia* (n 22) 60.

⁵⁰ *ibid* 67.

⁵¹ *ibid* 272.

The theories of recognition have received significant attention in the literature. See variously: Ian Brownlie, ‘Recognition in Theory and Practice’ (1982) 53 *British Yearbook of International Law* 197; Colin Warbrick, ‘Recognition of States’ (1992) 41 *International and Comparative Law Quarterly* 473.

recognised and the recognising States.’⁵² The crucial element here is, then, ‘the entity’s own subjective power and will to exist as a State’.⁵³ However, such a position seems overly apologist: ‘Surely, even if the process which leads to the establishment of the State may be a sociological one, it cannot be wholly dependent on what the emergent entity does and how it itself views what it is doing.’⁵⁴ Opposing states are unlikely to meekly accept the subjective assertions of one another.

Therefore, the declaratory account is obliged to make use of external determinative factors in order to make the factual markers of the state’s birth explicable.⁵⁵ This fusion of declaratory and constitutive approaches, however, carries with it the dilemma concerning the status of those criterion by which certain factual phenomenon are to be taken as significant of statehood. Indeed, ‘[i]f this rule precedes any individual State then it looks like a rule of natural law.’⁵⁶

As opposed to the declaratory account, the constitutive theory places the establishment of states under the control of the legal order.⁵⁷ While avoiding the apologist implications of the declaratory account, the constitutive approach risks appearing too arbitrary. It glosses over rights of self-determination of a new entity, imposing upon it the political paradigms and norms of already existing states.⁵⁸ This cynicism is produced by the fact that the ostensibly objective rules cannot establish their own objective facticity.⁵⁹

Therefore, neither position can be preferred:

From one perspective, such practice seems to support declarativism, from another, constitutivism. Statehood seems dependent on both facts and an external cognition of facts. But neither alternative seems fully acceptable. To lay stress on “pure facts” seems necessary so as to overrule the subjectivism in external cognition. To emphasise the importance of external cognition seems necessary to avoid relying on a naturalistic view about the “self-

⁵² Koskenniemi, *From Apology to Utopia* (n 22) 273.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid* 274. (The Montevideo Convention (1933) criteria provide such a list).

⁵⁶ *ibid.*

⁵⁷ *ibid* 275.

⁵⁸ *ibid* 278.

⁵⁹ *ibid* 279.

evidence” of facts or on the new entity’s self-definition. Yet no third alternative seems available.⁶⁰

Because of this, an argument concerning the achievement of statehood will inevitably employ and move between ascending and descending styles of argument. One state can draw attention to the factual effectiveness of an entity to justify recognition; an opposing state can counter by inquiring as to what foundation renders the relied upon facts dispositive of statehood; to which the first state will have to again slide into an argument that demonstrates the norm’s factual reality. Therefore, ‘[t]he pure and the legal approach to sovereignty seem indefensible because both dissolve into politics. The former fails to draw a line between force and law. The latter will legitimise the imperialism of existing States.’⁶¹

‘There are correct legal answers to legal questions. Law is something distinct from politics and is determined by its rules’. While that may seem intuitively correct to a new undergraduate, the work of Kennedy and Koskenniemi throw it into doubt. Law is not a ‘thing’ that may be found, and which provides answers to our legal questions. Instead, law is as an argumentative structure, and this structure is *indeterminate*. Each aspect of international law is constituted by this structure, being organised around hard/soft arguments or ascending/descending arguments. Any legal argument must oscillate between these two branches – only being determined by a political intervention. The law’s claim to objectivity collapses: it is hypocritical. Politics invades the legal space, devaluing it in its own terms. Was not the very purpose of law *not* to be arbitrary and political?

Of course, some questions still remain. First, international legal argument may be indeterminate and dependent upon politics, but why is it that international law has routinely supported the imperialistic ambitions of western powers? Law’s claim to objectivity may be hypocritical, but is its claim to being just and fair also chimerical? What is the nature and consequence of international law’s politics?

Second, there still remains the question as to why various dynamics of authority continue to manifest

⁶⁰ *ibid* 280.

⁶¹ *ibid* 282.

themselves. Even assuming that ascending and descending arguments provide an exhaustive account of what is occurring within international legal argument, we must still ask why the behaviour of individuals or moral norms are generative of authority. Koskenniemi connects his binary with the liberal theory of politics, but that is still question begging. Political systems and theories, after all, are designed to satisfy certain motivations and desires.

Another point that should be remembered is that Koskenniemi and Kennedy were not the first to call into question the putative objectivity and neutrality of the law. Feminist and Marxist critiques have been punctuating the masculine and capitalist quality of legal structure for over a century. The significance of the NAIL movement is the *way* in which it challenged the objectivity of the law – the method by which it exposed the law’s hypocrisy. Analysing international law as an indeterminate discourse opened a window that had previously been closed. Instead of looking at the discipline as a discrete thing to be analytically probed, one could examine concepts (such as sovereignty and civilisation) as argumentative discourses - discourses couched towards realising and legitimating specific actions in the world. While FATU does not extend the critical reach of its method beyond description and blaming liberalism, the path was opened for others to consider why this discursive pattern manifested, why it routinely benefited certain parties more than others, and how it might be altered. Not all critical scholars have followed its method (as we will see), but the discourse theory of Koskenniemi and Kennedy has proved influential in Marxist and TWAIL accounts of international law.

Critical approaches

Some critical approaches are very old. Marxist and feminist analyses stretch back centuries - and have the accompanying literature to show it. Other approaches are quite young. Queer perspectives on international law have only emerged in recent decades. Each method has a distinct frame of analysis and set of objectives, but alliances are common. Marxist, TWAIL, and feminist analyses can be combined in a single line of inquiry. Equally common are antagonisms – both within and across methods. A feminist approach might take issue with a Marxist analysis that construes gender relations

as simply capitalistic, thus glossing over society's construction of male and female roles. In such a blizzard of diversity it can be difficult to make broad brushed descriptions. However, like with the discourse theories of Koskenniemi and Kennedy, critical theories (in their various ways) demonstrate the hypocrisy of the law. They subvert its claims to objectivity and justice, revealing the partial power structures and objectives that operate beneath and through international law. They undermine these sedimented layers of power, denaturalising them, allowing oppressed voices, classes, races, genders, and sexualities, to be heard.

Marxism

In international legal scholarship, Marxist and then soviet analyses have not been lacking. Falling into an abeyance from the collapse of the USSR,⁶² there has been an upsurge of Marxist analysis of international law from the early 2000s.⁶³ In this section, we will break down this recent scholarship, focusing in on the discrete themes of sovereignty, imperialism, and reification.

Sovereignty, imperialism, and capitalism

International law's claim to propagate peace and justice is, for Marxist scholars, little more than a hypocritical sham. Instead, violence is *inherent* to the law. The recent literature has drawn direct links between international law, the concept of sovereignty, and the imperialistic violence of capitalism. An influential example of this can be found in China Miéville's *Between Equal Rights: A Marxist Theory of International Law*.⁶⁴ The first aspect of the book's theoretical foundation is Koskenniemi's

⁶² There were a number of Soviet commentators on international law. Perhaps the most famous of these was Tunkin. See: Grigory Tunkin, *Theory of International Law* (Harvard University Press, 1974). Unsurprisingly, most of this literature was neglected by Western commentators. However, there has been a recent upsurge of publications throwing light on this area. See: Bill Bowering, 'Positivism Versus Self-Determination: The Contradictions of Soviet International Law' in Susan Marks (ed), *International Law on the Left* (CUP, 2008) 133; Lauri Malksoo, *Russian Approaches to International Law* (OUP, 2015).

⁶³ This is not to say, of course, that important Marxist analysis was not being done before this date. Chimni's highly influential *International Law and World Order: A Critique of Contemporary Approaches* (Sage, 1993) was released almost a decade before. See: B.S. Chimni, 'Outline of a Marxist Course on Public International Law' (2004) 17 LJIL 1; B.S. Chimni, 'Prolegomena to a Class Approach to International Law' (2010) 21(1) EJIL 57.

⁶⁴ China Miéville, *Between equal Rights: A Marxist Theory of International Law* (Brill Leiden, 2005).

indeterminacy thesis explored above. Miéville is supportive of the conclusions reached by Koskenniemi but criticises his account for being overly ideal and unable to account for how legal disputes are resolved.⁶⁵ This leads to Miéville's second foundation, the commodity-form theory of Pashukanis.⁶⁶

For Pashukanis, the legal form arises from the exchange of commodities. For commodities to be exchanged, the respective parties must recognise each other as owners of private property. This gives rise to the formal, abstract legal subject and laws.⁶⁷ Applying this to international law, Pashukanis argued that as the legal form places both participants into the position of private owners of property, it transforms societies into territory owning sovereign states.⁶⁸ As owners of private property, these states acquired classes. Following Lenin⁶⁹ and Bukharin's⁷⁰ understanding of imperialism, in which the imperial act is one that mirrors that domination and exploitation of the working class by the capitalist class, Pashukanis argued that international law is 'the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world.'⁷¹

Miéville's contribution to Pashukanis' thought concerns the issue of coercion in the commodity-form exchange and how it connects with politics. As he argues, without enforcement, the separation of commodities into spheres of private ownership would be unstable.⁷² This need for enforcement, accordingly, makes coercion inherent to the legal form. Bringing these threads together, Miéville makes a number of conclusions. First, in response to the indeterminacy thesis, he observes that since there is no overreaching arbiter, the violence within the legal form 'remains in the hands of the very

⁶⁵ *ibid* 48-60.

Since the publication of *From Apology to Utopia*, Koskenniemi has shed light on how decisions are reached. See: Koskenniemi, 'The Politics of International Law – 20 Years Later' (n 48). Far from arguing that decisions are arbitrary, he links them to an institution's 'structural bias'.

⁶⁶ For summaries of Pashukanis' thought see: China Miéville, 'The Commodity-Form Theory of International Law: An Introduction' (2004) 17 *LJIL* 271; Michael Head, *Evgeny Pashukanis: A Critical Reappraisal* (Routledge, 2008).

⁶⁷ Robert Knox, 'Marxist Approaches to International Law' in Anne Orford, Florian Hoffman, Martin Clark, *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 306.

⁶⁸ Miéville tracks this development across the 18th Century.

⁶⁹ Vladimir Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular Outline* (Foreign Languages Press, 1970).

⁷⁰ Nikolai Bukharin, *Imperialism and World Economy* (Merlin Press, 1972).

⁷¹ Evgeny Pashukanis, *Law and Marxism: A General Theory* (Pluto Press, 1987).

⁷² Miéville (n 64) 126.

parties disagreeing over the interpretation of law.⁷³ Some states, however, have a far greater capacity for violence than others. Therefore, in the moment of legal argument, between equal rights, the stronger state will prevail. Second, he concludes that ‘*international law assumes imperialism*’.⁷⁴ Since the legal form necessarily places participants into the position of private property owners, transforming all nations into sovereign states with corresponding classes, and if imperialism is the domination and exploitation of one class by another, then it follows that international law will inevitably recreate imperialistic relations. The self-determination of previous colonial powers is not, then, a rolling back of imperialism but its next, more evolved stage.⁷⁵

Miéville’s analysis is an important addition to the literature of sovereignty and civilisation. It deepens our understanding of the affective forces standing behind international law’s argumentative structure. While Koskenniemi argued that the determination of the law’s indeterminate structure was a political intervention, Miéville provides texture as to what that intervention is. It is the imperialistic violence of the capitalist class. Another way that Miéville goes further than Koskenniemi is in his theorisations of what precisely international law is intended to facilitate. Koskenniemi connected this structure to liberalism. Miéville pushes this by suggesting that international law, through doctrines like sovereignty, transfigures the world into the binaries of capitalistic structures of exchange. In and through the imposition of international law and sovereignty, states become capitalistic or proletariat, exploiter or exploited. With Koskenniemi, the law’s claim to objectivity is found to be hypocritical; in

⁷³ *ibid* 292.

⁷⁴ *ibid* 293.

While agreeing with the connection between international law and imperialism, Neocleous criticises such accounts for passing over Marx’s idea of ‘primitive accumulation’. This refers to the process of rendering the working-class dependent upon wages for subsistence. As Neocleous argues, colonial exploitation was fundamental for the success of this. See: Mark Neocleous, ‘Accumulation; Or, the Secret of Systematic Colonization’ (2012) 23(4) EJIL 941.

Alternatively, this argument conflicts with Carty’s earlier treatment of international law and Marxism. Writing about the allied invasion of Iraq, Carty employs a Marxist framework to explain the US’s actions. However, the imperialistic violence is described as breaking international law. Far from being inherently implicit in imperialism, international law offers an important tool of resistance. See: ‘Anthony Carty, ‘Marxism and International Law: Perspectives for the American (Twenty-First) Century’ (2004) 17 LJIL 247.

⁷⁵ This has been heavily criticised by Bill Bowering. See: Bill Bowering, *The Degradation of the International Legal Order? The Rehabilitation of Law and the Possibility of Politics* (2008).

That said, the concern that international lawyers may perpetuate a state-based exploitative international law has been explored by Susan Marks. As she argues, lawyers faced with the imperialistic world may either feel anxiety over their lack of influence, or, more darkly, anxiety over the scale of their influence in producing this world. See: Susan Marks, ‘State-Centrism, International Law, and the Anxieties of Influence’ (2006) 19(2) LJIL 339.

Miéville, it is its claim to promote peace. Because of this conclusion, Miéville is deeply pessimistic concerning redemptive projects. To his mind, '[t]he chaotic and bloody world around us *is the rule of law*.'⁷⁶ International law is a bloody and soiled cloth that necessarily promotes violence and exploitation. It is utterly devalued and beyond redemption.⁷⁷

Miéville is not the only Marxist scholar to connect Koskenniemi and capitalism to the study of international law, sovereignty, and civilisation. Moving away from Pashukanis' theory of law, Ntina Tzouvala explores the standard of civilisation in international law as a method of legal argumentation. This mode of argumentation establishes a link 'between the degree of international legal personality that political communities are recognised as having and their internal governance structure, or, to be more precise, their conformity with the basic tents of capitalist modernity'.⁷⁸ In establishing this link, the argumentative structure moves between two poles. The first is what Tzouvala refers to as the 'logic of biology'. This refers to a scepticism of the 'possibility of equal inclusion for non-western, predominantly non-white political communities in the realm of international law'.⁷⁹ This attitude is dependent upon deep-rooted ideas of the cultural and racial inferiority of the non-white, non-western world. Its effect is to create 'unsurpassable barriers against non-western communities acquiring equal rights and obligations under international law'.⁸⁰ The second pole is the 'logic of improvement'. This argumentative method allows for the possibility and desirability of the non-western world entering the western legal and cultural space, on the condition of the 'adoption of particular reforms by such communities that would ensure their conformity with the necessities of capitalist modernity'.⁸¹

Crucially, this method of argumentation that is expressed in and through international law 'only becomes possible, plausible and even necessary in the context of imperialism as a specifically capitalist phenomenon'.⁸² Capitalism, Tzouvala argues, establishes spaces of political and economic

⁷⁶ *ibid* 319.

⁷⁷ Some scholars, however, have disagreed with this depressing account. See: Robert Knox, 'Marxism, international law, and political strategy' (2009) 22 LJIL 413, 433; Akbar Rasulov, 'A Marxism for International Law: A New Agenda' (2018) 29(2) EJIL 631, 639.

⁷⁸ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP, 2020) 2.

⁷⁹ *ibid*.

⁸⁰ *ibid*.

⁸¹ *ibid*.

⁸² *ibid*.

domination, and, most recently, ‘structures ‘global value chains’ in order to transfer value from the periphery to the imperial centre.’⁸³ Coupled with this logic of exploitation is one of expansion. The capitalist mode of production contains an ‘inherent tendency’ for expansion, contributing ‘to the spread of the institutions, legalities and techniques necessary for the establishment and reproduction of the capitalist mode of production.’⁸⁴ The ‘under-development’ of certain areas of the globe is not the result of insufficient contact with capitalism, but rather ‘of the specific, uneven way different regions of the world became incorporated into global capitalism.’⁸⁵ The standard of civilisation is ‘a historically contingent response to the need to make sense of and regulate a world shaped and reshaped by these dynamics of unequal, yet global, capitalist development.’⁸⁶ The structure of the argumentative method may remain stable, but its terms can change:

The structure of the standard might remain constant, but what precisely constitutes ‘civilisation’ relies on a wide range of evolving intellectual tools to construct and maintain its credibility; for example, the relative decline of explicitly (biological) racist justification of inequalities of wealth and power influenced the specific ways the ‘standard of civilisation’ was articulated in international law. ‘Cultural difference’ started doing the argumentative heavy lifting, and ‘objective’ ways of differentiating amongst states based on their ranking in different indexes, their credit-worthiness, or their purported (un)willingness to deal with terrorism stood in for the explicit racialisation of whole populations and political communities.⁸⁷

In providing this analysis of civilisation, Tzouvala argues that her position moves beyond that of Miéville’s. The latter provides a strong explanation of how civilisation was employed to justify inequality in legal relationships between western and non-western powers. The problem, however, is

⁸³ *ibid.*

⁸⁴ *ibid* 3.

⁸⁵ *ibid* 4.

⁸⁶ *ibid.*

⁸⁷ *ibid* 5.

that Miéville then re-mystifies concepts like sovereignty.⁸⁸ He assumes ‘that ‘sovereignty’ or even the ‘state’ has a clear, unitary meaning in the context of international law, which is metonymically captured by ‘civilisation’.⁸⁹ Miéville himself is falling prey to false idols of objectivity. In contrast to this, Tzouvala argues that when lawyers define particular terms, ‘they invariably do so with the purpose of attaching specific legal outcomes to them, or in other words, lawyers are generally in the business of crafting terms to fit legal arguments.’⁹⁰ As such, she demonstrates the oscillating, contingent, and structural nature of sovereignty, with this evolving quality being an expression of capitalist relations. Nevertheless, while pushing further than Miéville in her analysis of the state, the international law of Tzouvala’s work is still one of a hypocritical entity that spreads nothing but violence with its rule of law. The argumentative structures of civilisation, all the worse for putting on the neutral language of ‘development’, ensures the continuing domination of a few powerful states.

Ideology and Reification

In the last section, we saw the argument that international law and sovereignty, rather than promoting peace, are hypocritical instruments that ensure the spread and maintenance of capitalistic relations. Supplementing these Marxist analyses are ideology critiques. Exemplifying this method is Susan Marks’ *The Riddle of All Constitutions*.⁹¹ Mark’s theory of ideology is taken from the writings of John Thompson. For Thompson, ideology refers ‘to the ways in which meaning serves to establish and sustain relations of domination.’⁹² To break this down, ‘meaning’ is the significance established

⁸⁸ *ibid* 15.

⁸⁹ *ibid*.

⁹⁰ *ibid* 15.

⁹¹ Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of ideology* (OUP, 2003).

Marks work is not limited to ideology critique. She has explored alternative histories of human rights in *The False Tree of Liberty* (OUP, 2020), and the concept of ‘superfluity’ within international law. This refers to the creation of superfluous people in capitalist systems. See: Susan Marks, ‘Law and the Production of Superfluity’ (2011) 2(1) *Transnational Legal Theory* 1.

For other examples of ideology critique and law, see: Shirely Scott, ‘International Law as Ideology: Theorising the Relationship between International Law and International Politics’ (1994) 5 *EJIL* 313; Alan Norrie, *Law, Ideology and Punishment: Retrieval and Critique of the Liberal Idea of Criminal Justice* (Kluwer, 1991); David Sugarman, *Legality, Ideology, and the State* (Academic Press Inc, 1983).

⁹² Marks (n 91) 10.

through texts, actions, images, and utterances.⁹³ Through the control of these utterances – over the monopoly of public meaning – relations of domination (such varying levels of access to resources and other inequalities) can be established and maintained.⁹⁴

The type of ideology that Marks is interested in is that of ‘low-intensity democracy’.⁹⁵ A hypocritical device, being produced from unequal levels of capitalist development, low-intensity democracy ‘meets the immediate needs of anti-authoritarian crisis, easing tensions and restoring order’ while leaving existing capitalist structures unreformed. It is, essentially, a tool for assuaging the loss of control and exploitation achieved by global capital, handing the exploited masses some limited voting rights that are exercised infrequently so that they feel in control, all the while substantive socio-economic change is bracketed off.⁹⁶ Marks’ argument is that international law is culpable in the perpetuation of this ideology through legitimisation,⁹⁷ dissimulation,⁹⁸ displacement,⁹⁹ naturalisation,¹⁰⁰ unification¹⁰¹ and reification.¹⁰² For the sake of space, let us focus particularly on the latter of these, reification.¹⁰³

To speak generally, reification owes its origins to Marx’s idea of ‘commodity fetishism’.¹⁰⁴ A classic piece of hypocrisy, this concept refers to the phenomenon whereby the value of a commodity is assumed to be somehow natural or inherent when none of the value in question can be anticipated in the physical properties of the commodity. A common Marxist example would be paper money; for

⁹³ *ibid* 11.

⁹⁴ *ibid*.

⁹⁵ *ibid*.

⁹⁶ *ibid* 61.

⁹⁷ ‘[T]he process by which authority comes to seem valid and appropriate’ (*ibid* 19).

⁹⁸ This is where ‘relations of domination are obscured, masked or denied’. (*ibid* 20).

⁹⁹ Marks describes this as ‘the transfer of attributes belonging to one person or object to another.’ (*ibid* 20).

¹⁰⁰ Where ‘social arrangements come to seem obvious and self-evident, as if they were natural phenomena belonging to a world ‘out there’’ (*ibid* 22).

¹⁰¹ This refers to where ‘social relations come to appear coherent and harmonious, and cleavages are made to seem non-existent, or, at any rate, irrelevant.’ (*ibid* 20).

¹⁰² Marks defines this as ‘a process by which human products come to appear as if they were material things.’ (*ibid* 21).

¹⁰³ Reification has suffered a great deal of uncertainty as to its meaning. Pitkin claims to have identified twenty different understandings of ‘reification’: see: Hanna Pitkin, ‘Rethinking Reification’ (1987) 16 *Theory & Society* 263, 293.

Discussions of reification can be found in the writings of Adorno and Horkheimer, where reification is deemed to be a form of forgetting. See: Alastair Morgan, ‘The ‘living entity’: Reification and Forgetting’ (2014) 14(4) *European Journal of Social Theory* 377.

¹⁰⁴ Douglas Litowitz, ‘Reification in Law and Legal Theory’ (2000) 9(2) *Southern California Interdisciplinary Law Journal*, 401, 406.

there is nothing inherent in a piece of paper that could afford it the significance society does.¹⁰⁵

Marx's objective was to reveal these products for the hypocritical tools they were, and, in so doing, to redirect social activity towards the realisation of rational ends – better education, food production etc.¹⁰⁶

Taking Marx's idea of a conflation between nature and artifice and expanding upon it, Lukacs developed his theory of reification.¹⁰⁷ The central idea was presented in the following terms:

Its [reification] basis is that a relation between people takes on the character of a thing and thus acquires a 'phantom objectivity', an autonomy that seems so strictly rational and all-embracing as to conceal every trace of its fundamental nature: the relation between people.¹⁰⁸

In other words, the society in which we live, with its various networks of relations between individuals, is treated as something natural or necessary – in the way that the relations of gravity or conduction are. The members of society simply forget the contingent nature of this constructed social arrangement and the fact that it could be organised differently. This sense of absolute necessity, whereby an individual might struggle to conceive of the world outside of the extant social arrangement, is what distinguishes the products of reification from the laws of some ideology; for the possibility of a social space built upon contrary ideological principles is usually recognised even by the most stringent ideologue.

While Lukacs indexes both the causation and products of reification to capitalist constructions (banks, companies etc.) and economic forces, it has a clear applicability to the concept of law. The influence of reification can occur internally within law – that is to say, the law concretises reified

¹⁰⁵ *ibid.*

¹⁰⁶ *ibid* 408.

¹⁰⁷ Georg Lukacs, *Reification and the Consciousness of the Proletariat* (Routledge, 2012).

¹⁰⁸ *ibid.*

For an alternative definition:

'Reification is the apprehension of human phenomena as if they were things, that is, in non-human or possibly suprahuman terms. Another way of saying this is that reification is the apprehension of the products of human activity as if they were something else than human products – such as facts of nature, results of cosmic laws.' (Thomas Berger, Peter Luckman, *The Social Construction of Reality* (Penguin, 1991)).

assumptions into its normative code.¹⁰⁹ This is the use that Marks makes of reification in her discussion of low-intensity democracy. In exploring the discourses of democracy within international law, she observes the tendency of viewing democracy as ‘a destination, rather than a journey; a state of being, rather than a project; a point of space, rather than a process over time.’¹¹⁰ In this way, democracy’s socially constructed nature is lost.¹¹¹ The problem with internal analyses of reification is that it leaves the sovereign state system of international law neutral. It can be used for good or ill. We have already seen how the structural critiques of Miéville and Tzouvala pushed past this, demonstrating how international law is inherently tied to capitalism. However, reification can be developed further to argue that it may occur in the construction of the legal form itself.

Within critical international legal scholarship, references to reification and the centrality of contingent choice in the constitution of law are not difficult to find. Take the work of James Boyle and his strident opposition to essentialism within international legal scholarship.¹¹² For Boyle reification constitutes ‘an attempt to deny both “contingency” and choice by incorporating some political decision about a subject into the description of that subject.’¹¹³ He employs the example of a sexist or racist comment to illustrate this point: to utter something derogatory about a certain woman or group of women and then exclaim “That’s women for you!”¹¹⁴ is to commit an act of reification; for in making such a statement, we have arrived at a political decision concerning the essence of ‘woman’ and inserted it into the definition so that it becomes natural.¹¹⁵

This reifying quality of an appeal to essences translates directly into the instance of international law. As Boyle argues, upon engaging in doctrinal analysis, scholars may ‘think that they are merely

¹⁰⁹ Litowitz (n 104) 417.

¹¹⁰ Marks (n 91) 66.

¹¹¹ Marks has since returned to her analysis of the emerging right to democratic governance within international law. She is still insistent that low-intensity forms of democracy should not be abused in order to perpetuate inequality but expresses some optimism that democracy can be useful in liberatory politics. See: Susan Marks, ‘What has Become of the Emerging Right to Democratic Governance?’ (2011) 22(2) EJIL 507.

¹¹² James Boyle, ‘Ideals and Things: International Legal Scholarship and The Prison-House of Language’ (1985) 26(2) Harvard International Law Journal 327, 328. The issue of essentialism has also been tackled in Jason Beckett, ‘Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL’ (2005) 16(2) EJIL 213, and Anne Orford, ‘The Destiny of International Law’ (2004) 17(3) LJIL 441. See also: Outi Korhonen, ‘New International Law: Silence, Defence or Deliverance’ (1996) 7(1) EJIL 1, 5.

¹¹³ Boyle (n 112) 328.

¹¹⁴ *ibid.*

¹¹⁵ *ibid.*

describing something – whether that “something” is a rule, or an obligation, or the source of law – when in fact they are putting forward a profoundly political set of arguments.’¹¹⁶ There is, in other words, no objective law that can be scientifically examined – the act of description constitutes the entity being described, and an appeal to a ‘legal essence’ simply disguises the political purposes that inform this activity. To demonstrate the fallaciousness of an essentialist dialogue and the decisive agency of purpose, Boyle invites us to consider the poles of legal positivism and natural law.

Turning first to positivism, Boyle describes how authors aligned with the school gave themselves an essential definition of law: ‘the essence of law was that it was a command backed by a threat, or a norm stipulating a sanction.’¹¹⁷ With this definition in hand, positivists could engage in the task of differentiating political and moral social phenomenon from the specifically legal. However, in order for such essentialist definitions to be convincing they had to appeal to some purpose held by society; for in of itself, the positivists claim ‘to universality cannot be taken seriously... [It is] just another way to slice up the world.’¹¹⁸

The purposes and sources of legitimacy that legal positivism appealed to were multifaceted. On the one hand, positivism supplied the need for functioning conceptual tools. Positivist methods could predict with a fair amount of accuracy things such as what would draw formal responses from government.¹¹⁹ But what was of even more importance was that positivism sought to give a universal description of what law fundamentally is.¹²⁰ The very claim to scientific universality supplied a want in a society that had moved away from a theologically inspired natural law yet still required some system to supply normative organisation to social relations.

From the perspective of natural lawyers, the positivist claims of universality and legal essence were not persuasive. Rounding upon the positivist claim that consent provides the law’s normative force, the natural lawyer inquired as to what imbued consent with this legitimating power. ‘The natural

¹¹⁶ *ibid.*

¹¹⁷ *ibid* 333.

¹¹⁸ *ibid* 335.

In an interesting piece, Boyle applies the issues of essentialism and positivism to the work of Thomas Hobbes. See: James Boyle, ‘Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism’ (1987) 135(2) *University of Pennsylvania Law Review* 383.

¹¹⁹ Boyle (n 112) 335.

¹²⁰ *ibid* 334-335.

lawyers argued that this circularity involved the positivists in an endless set of boot-strapping exercises in which they sought some higher source which could, in turn, imbue the sovereign's consent with the kind of normative force they wanted.¹²¹ Therefore, one had, ultimately, to rely upon some moral imperative. However, the appeal to moral norms does not stop the logical regress. Upon selecting a given moral code as the organising principle of law, one must ask what invests this morality with normative force. Whatever higher source of authority the natural lawyer might appeal to '[t]his higher source must still rely on a still higher source and so on until one reaches something that can be called the "grundnorm", the "rule of recognition"... but which sounds like a definitional stop by any other name.'¹²² To avoid this dilemma, the natural lawyer must appeal to 'a discoverable teleology immanent in the natural state of affairs.'¹²³ That is to say, the theory must appeal to the facts and purposes manifest within the international community.¹²⁴

It is here that we can perceive a striking resemblance to the internal analysis undertaken by Kennedy and Koskenniemi. To those authors, the necessity of a mutual appeal to fact and normative values was a consequence of the liberal theory of politics. In contrast, Boyle connects the phenomena back to the lack of essentiality in our concepts and the attempts to overcome that lack:

If you found a discipline on a question like "What is Law?" your arguments are bound to be circular. They will be circular because you will have to alternate between giving precedence to your theory and giving precedence to "the facts", and you will be unable to make it seem as though your choices in this regard are necessary unless you appear to be describing something fairly close to an essence.¹²⁵

Therefore, like with Kennedy and Koskenniemi, Boyle argues that law cannot be approached as an objective entity capable of detached analysis. Any attempt to deny the indeterminacy and contingency

¹²¹ *ibid* 337.

¹²² *ibid*.

¹²³ *ibid*.

¹²⁴ *ibid*.

¹²⁵ *ibid* 338.

of our legal concepts, such as sovereignty, through the utilisation of an essentialist ontology is to fall victim to reification and to forget the choice that is available to each individual. This forgetting on the part of international legal scholarship, is, for Boyle, unjustifiable. There is ‘something demeaning, something evil,’ in following the dictates of social structures, whatever they may concern.¹²⁶

To remedy this ‘evil’, to be redeemed from it, the process and consequences of reification must be attacked. Scholarship should, according to Boyle, devise methods ‘of getting ourselves away from the objectified fantasy world of state sovereignty, and towards the actual human beings whose lives our abstractions effect.’¹²⁷ This entails that we keep in mind our fundamental ability to choose.¹²⁸

Employing the examples of Marx and God, Boyle describes how ‘both of them seemed to get fairly angry when people not only gave up their ability to choose, but gave it up to the very objects – be they industrial goods or the golden calf – that they had just created.’¹²⁹

Reification and ideology critique provide an alternative means of approaching the hypocritical life of international law and sovereignty. On this analysis, the pursuit of ‘essences’ is impossible. To pose something like an essence when discussing law (or anything else for that matter) is to transform the political description of it into the thing itself. The pursuit of objectivity produces the indeterminate value structure seen in the works of Kennedy and Koskenniemi. No single source of authority, by itself, can ground an essentialising description, and so one must move between them in a circular fashion. Ascending arguments eventually have to rely upon descending arguments and vice versa. In sum, legal and political ideas serve human ends and cannot be separated from those ends without introducing artifice.

While Boyle does not explicitly discuss sovereignty and civilisation, the applicability is clear. Descriptions of sovereignty, just like the positivist and natural law traditions, are political in nature,

¹²⁶ *ibid.*

¹²⁷ *ibid.*

¹²⁸ While agreeing with the argument that the socially constructed quality of international law should be drawn attention to, Marks stresses that we must be careful to avoid falling into a ‘false contingency’ mind-set. The material conditions that produced those constructions and continue to condition them must be the subject of study. See: Susan Marks, ‘False Contingency’ (2009) 62(1) *Current Legal Problems* 1.

¹²⁹ Boyle (n 112) 359.

and any attempt to naturalise a given description is to reify it – to create a piece of hypocrisy. The standard of civilisation could also be seen in this light – that is, as something capable of reification – but it might also be approached as the process underlying the *production* of the reified concepts of sovereignty. Boyle does not consider *how* and *why* a thing might come to be reified, leaving an important explanatory gap within his account – a gap that Tzouvala and Miéville can be seen to fill.

Further, the call to resist reification presents us with questions. If we accept that sovereignty is directed towards the creation of a reified product, why does it necessarily follow that members of society should resist the imposition? To frame the question in a slightly different way, why is it morally incumbent for each individual to cherish their own judgement and authority? Why should we be so angered by the law's hypocrisy? Why should we be disgusted by it? The demonstration that the law is reified does not carry with it the necessary logical result that Boyle believes it does, and a reference to the irritation of the divine is hardly a satisfactory theoretical authority.

Summary

Recent Marxist scholarship demonstrates the potential of reading international law as a discursive system. In both Miéville and Tzouvala, sovereignty and civilisation are redescribed as core tools in facilitating and justifying Western imperialistic/capitalistic violence. Especially in the case of Tzouvala, the structure of international law is transformational, developing its twin logics of biology and improvement to continually renew and perpetuate the grounds of imperialism. The law's recourse to objectivity and liberal principles is hypocritical and merely obscures what are, in fact, very political moves. In effect, international law becomes a discursive system for realising exploitation.

These structural accounts dovetail with older analyses of ideology critique and, specifically, reification. Again, the goal here is to destabilise the hypocrisy of the law. Reification is the naturalisation of a political description, a phenomenon that occurs at all levels of society but also within law. The liberal system of law that Miéville and Tzouvala demonstrate to be so exploitative, is a partial creation of a certain tradition of thought that has become naturalised. Reification analysis seeks to disturb this, reopening the question of the law's political nature and the possibility of change.

TWAIL

Third World and Approaches to International Law (TWAIL) share much common ground with Marxist analysis. The latter has proven a useful tool in revealing how capitalism and economic structures have supported the oppression and exploitation of former colonial nations. This connection can be seen from TWAIL's inception. The arrival of the 'Third World' in international law discourse is usually linked to the Bandung Conference in 1955.¹³⁰ Here 29 countries (mostly former colonies) gathered to discuss their shared experiences and to map out an alternative vision of the global space. In the resulting dialogues, a key point of importance was self-determination and the securing of sovereignty over their borders and economic resources, as well as the need to reorder global economic relations.¹³¹ Both of these concerns were later given concrete expression by Bedjaoui and his call for a new international economic order to replace global capitalism.¹³² Today, these concerns have gained greater urgency with the intensification of globalisation.¹³³ The inequality between the Global North and South is becoming ever more entrenched with the exploitative practices of transnational corporations and finance institutions,¹³⁴ the dominance of 'economic development' as a standard of

¹³⁰ 'Third World Approaches to International Law', however, emerged out of Harvard in the 1990's. See: James Gathii, 'TWAIL: A Brief History of its Origins, its Decentralised Network, and a Tentative Bibliography' (2011) 3(1) Trade Law and development 26.

¹³¹ For a selection of essays exploring the history and implications of Bandung, see: Luis Eslava, Michael Fakhri, Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (CUP, 2017).

¹³² Mohammed Bedjaoui, *Towards a New International Economic Order* (Holmes & Meier Publishers, 1979). For other early TWAIL scholarship, see: R P Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' (1966) 15 ICLQ 55; George Abi-Saab, 'The Newly Independent States and the Scope of Domestic Jurisdiction' (1960) 54 ASIL Proceedings 84.

¹³³ Hardt and Negri have argued that it is now anachronistic to speak of imperialism. Global society has formed itself into an Empire, banishing the ideas of the Global North and South (See: Michael Hardt, Antonio Negri, *Empire* (Harvard University Press, 2000)). Such an argument, however, has been heavily criticised. See: Anthony Carty, 'Marxism and International Law: Perspectives for the American (Twenty-First) Century 17(2) LJIL 247.

¹³⁴ Dan Danielsen, 'Corporate Power and Global Order' in Anne Orford (ed), *International Law and its Others* (CUP, 2006).

global governance that re-articulates the standard of civilisation,¹³⁵ the phenomenon of ‘land-grabbing’,¹³⁶ and the activities of international institutions.¹³⁷

TWAIL analysis, however, goes beyond questions of self-determination and the pursuit of sovereignty. Faced with continual marginalisation and inequality following formal integration into the sovereign state system, new critical theories questioned whether the sovereign system *itself* produced the inequalities former colonial territories were facing.¹³⁸ Might international law’s promise of justice be hypocritical? Similar to the structural Marxist critiques of Miéville and Tzouvala discussed above, TWAIL scholars questioned the role of sovereignty in perpetuating European colonialism and ensuring the South’s continuing subordination to the Global North. A prominent early example of this scholarship can be found in the work of Antony Anghie.

TWAIL II

Anghie’s book, *Imperialism, Sovereignty, and the Making of International Law*,¹³⁹ explores the constitutive relationship between imperialistic and colonial practices and the generation of international law. On the one hand, Anghie’s thesis revises the traditional history of international law

¹³⁵ See: Sahib Singh, ‘The Fundamental Rights of States in Neoliberal Times’ (2016) 4(3) Cambridge Journal of International and Comparative Law 461; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP, 2011); Jean Cohen, ‘Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalisation’ (2010) 38 Political Theory 578; Balakrishnan Rajagopal, *International Law From Below: Development, Social Movements and Third World Resistance* (CUP, 2009); William Davey, John Jackson (eds), *The Future of International Economic Law* (OUP, 2008).

¹³⁶ Rodolfo Lopes, ‘Between the Shield and the Sword: Characterising Land Grabbing as a Crime Against Humanity’ (2019) 16(1) Brazilian Journal of International Law 224; Ntina Tzouvala, ‘Food for the Global Market: The Neoliberal Reconstruction of Agriculture in Occupied Iraq (2003-2004) and the Role of International Law’ (2017) Global Jurist 1; Jessica Embree, ‘Criminalizing Land-Grabbing: Arguing for ICC Involvement in the Cambodian Land Concession Crisis’ (2015) 27(3) Florida Journal of International Law 399.

¹³⁷ Dan Sarooshi, *International Organizations and Their Exercise of Sovereign Powers* (OUP, 2010); B.S. Chimni, ‘Capitalism, Imperialism and International Law in the Twenty First Century’ (2012) 14 Oregon Review of International Law 17; Robert Knox, P Kotiaho, ‘Beyond Competing Liberalisms: The WTO as Class Project’ (2014) Social and Legal Studies 23.

¹³⁸ Because of the diversity of TWAIL projects, Gathii has stressed the polycentric quality of the field. See: Gathii (n 130).

¹³⁹ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2005).

For other analyses that follow the TWAIL II mould, see: Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009); Partha Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (Princeton University Press, 2009).

as being hermetically developed in Europe and then transported abroad fully formed.¹⁴⁰ On the other, Anghie distinguished himself from scholarship that had sought to demonstrate how the various doctrines of international law had existed for centuries outside of Europe.¹⁴¹ Staking out a position between these two poles, Anghie argues that colonialism was a crucial factor in the formation of international law, and that its core doctrines, such as sovereignty, were forged in the attempt to create a legal system to frame and facilitate the interaction between European and extra-European nations in the colonial encounter.¹⁴²

To justify this thesis, Anghie begins by suggesting that the activity of imperialism was based on a characterisation of non-Europeans as primitive.¹⁴³ But this then raises the question as to how European law and norms could be generalised as universal and then applied to the uncivilised other.¹⁴⁴ Anghie describes the solution as the ‘dynamic of difference’.¹⁴⁵ The dynamic of differences refers to ‘the endless process of creating a gap between two cultures, demarcating one as ‘universal’ and civilised and the other as ‘particular’ and uncivilised, and seeking to bridge the gap by developing techniques to normalise the aberrant society.’¹⁴⁶ In other words, colonial cultural norms are taken as universal; a universality that both constructs the Other into an ‘uncivilised’ nation and, as such, brings it within the normative ambit of the colonial order. The nation, now figured as uncivilised, becomes *culpable* for its failure to assimilate to the universal standard. Through this culpability, violence for civilising the uncivilised – to bring them into line with the universal colonial cultural norms – becomes vindicated. While this may suggest, at first glance, that there would be an eventual end to the

¹⁴⁰ For an exploration of Eurocentrism within international legal history, see: Arnulf Becker Lorca, ‘Eurocentrism in the History of International Law’ in Bardo Fassbender, Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012) 1034, 1042.

¹⁴¹ For an example of this mode of scholarship, see: Alexander Orakhelashvili, ‘The Idea of European International Law’ (2006) 17 EJIL 315.

¹⁴² Anghie (n 139) 2-4.

This argument is forcefully echoed by a number of scholars. See: Makau Mutua, ‘What is TWAIL?’ (2000) *American Society of International Law* 31-39. He argues that ‘the construction and universalization of international law [was] essential to... imperial expansion’ (31); See also: James Gathii, ‘Imperialism, Colonialism, and International Law’ (2007) 54 BuFF. L. RN. 1013; James Gathii, ‘How American Support for Freedom of Commerce Legitimised King Leopold’s Territorial Ambitions in the Congo’, in Padideh Alai, Tomer Broude, Cohn Picker (eds), *Trade As The Guarantor Of Peace, Liberty and Security? Critical, Historical and Empirical Perspectives* (Australian Studies of Transnational Legal Policy, 2006) 97.

¹⁴³ Anghie (n 139) 2-4.

¹⁴⁴ *ibid.*

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

violence (once the entity in question has been civilised, further violence should be illegitimate) this is not the case. The civilising process is endless. New differences and aberrations are always to be found, further horizons for international law to overcome – a constant moving of the goalposts.¹⁴⁷

Within international law, Anghie argues that the dynamic of difference is constructed around sovereignty.¹⁴⁸ It is sovereignty that discriminates between members of the ‘family of nations’ and those without. Those states that are sovereign have rights of independence, non-interference, and equality. Those that are not sovereign do not. Through manipulating the requirements of sovereignty by linking it to evolving standards of European civilisation, colonial states could continually (re)justify their colonial subjugation of the non-European world.¹⁴⁹

Anghie traces the dynamic of difference throughout the life of international law.¹⁵⁰ One example Anghie uses, going back to the conceptual roots of international law, are the writings of Vitoria and that scholar’s efforts to conceptualise the legal framework in which the Spanish – First Nation encounter was taking place.¹⁵¹ What Anghie identifies as being crucial in Vitoria is the manner in which Vitoria argues that the Spaniards and the First Nations peoples belonged to a *jus gentium* – a common system of law. However, this *jus gentium* had as its standard Spanish and Christian norms of civilisation.¹⁵² Being none of these things, First Nations couldn’t help but be in contravention, and as deviants, their criminal practices had ‘to be remedied by the imposition of sanctions [that would] effect the necessary transformation.’¹⁵³ Indigenous resistance to conversion becomes a reason for war.¹⁵⁴

While Vitoria does not explicitly analyse the position of First Nations peoples in terms of sovereignty, it is not absent from his thought. For Vitoria, sovereignty is a relationship between the

¹⁴⁷ *ibid.*

¹⁴⁸ *ibid.* 5.

¹⁴⁹ Beyond exploring the connection between sovereignty and personality, Nuzzo has examined the spatial significance of sovereignty in constructing the non-western world. See: Luigi Nuzzo, ‘Territory, Sovereignty, and the Construction of the Colonial Space’ in Martti Koskenniemi, Walter Rech, Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (OUP, 2017) 263.

¹⁵⁰ Of these examples, Elberling is critical of the fact that Anghie limits his focus to First and Third World encounters. In doing so, important insights may have been lost. See: Bjorn Elberling, ‘Imperialism, Sovereignty and the Making of International Law’ (2006) 49 *German Yearbook of International Law* 696.

¹⁵¹ Anghie (n 139) 13.

¹⁵² *ibid.* 22.

¹⁵³ *ibid.*

¹⁵⁴ *ibid.* 23.

prince and the people. The prince stands as an instrument of the state, the metaphysical embodiment of the people,¹⁵⁵ tasked within expanding the state and bringing those without into its confines.¹⁵⁶ In terms of identifying *who* or *what* was sovereign within Europe, Vitoria struggled (in light of the confusing overlaps of jurisdiction and subordination) to coherently name any one individual or polity, save perhaps the Castilian and Aragon monarchies.¹⁵⁷ However, his discussion of sovereignty becomes considerably clearer in his explication of the ‘just war’ doctrine. For Vitoria, the parameters of a just war are not determined subjectively. Only a sovereign can wage a just war¹⁵⁸ and only those conflicts entered into by sovereigns on behalf of Christianity were capable of being just.¹⁵⁹ This is where Anghie forges the link between nascent sovereignty and the colonisation of the First Nations. Being non-Christian, First Nation peoples could never wage a just war and, consequently, could never enjoy the powers and protection of sovereignty.¹⁶⁰ The First Nations, then, become the objects of the purest expression of sovereign power: ‘The most characteristic powers of the sovereign, the powers to wage war and acquire title over territory and over alien peoples are defined in their fullest form by their application to the non-sovereign Indian.’¹⁶¹

Anghie provides helpful guidance in understanding the interface between civilisation, international law and sovereignty. Like with the previous accounts we have examined, Anghie rejects the hypocritical objectivity of doctrines such as sovereignty. On his analysis, sovereignty is a process and a device through which to affect the civilising process and to realise colonial exploitation. Sovereignty becomes the vital bridging concept that unites the ‘universal’ and ‘uncivilised’ culture into a singular civilisational metric, and, through the discursive interplay between these two, justifies the expansion of one against the other. In this economy of power, what is of particular interest is that the contours of ‘civilisation’ are not settled. Civilisation can be continually developed in order to legitimise the

¹⁵⁵ *ibid* 24.

¹⁵⁶ *ibid* 25.

¹⁵⁷ *ibid*.

¹⁵⁸ *ibid* 25.

¹⁵⁹ *ibid* 26.

¹⁶⁰ *ibid*.

¹⁶¹ *ibid* 28.

continued relocation of the uncivilised and the subsequent exercise of violence against it. The delivery of civilising power through the engine of sovereignty becomes self-perpetuating.

Anghie's theory bears several similarities with that of Miéville and Tzouvala. Each of them approaches sovereignty in an instrumental fashion, seeing it as a tool intended to affect relations of domination. Out of the two though, Tzouvala comes closer to Anghie. Like with Tzouvala, Anghie does not reify what constitutes civilisation and sovereignty. The categories of 'civilised' and 'uncivilised' are constructed through sovereignty, and constantly evolve and expand to (re)enable new forms of exploitation. Anghie, however, does not connect the structures of sovereignty necessarily to capitalism or liberalism, keeping the dynamic of difference causally open-ended.¹⁶²

TWAIL III

The third wave of TWAIL scholarship takes the insights of thinkers like Anghie and develops them further. One recurring trend here concerns how to move *past* the hypocritical form of international law and to redeem it. Rather than merely tinkering with a framework that is inherently tied up with civilising violence, these accounts argue that there needs to be a redistribution of power, allowing other voices of what the law is or can be to come to the foreground. As one scholar puts it, we must 'rethink how one might engage strategically with international law and institutions in the interests of those differentially subjected to the transformative violence currently administered through its institutions.'¹⁶³ The only way that international law can move past its hypocrisy is to open itself up and recognise the reality of the laws and perspectives of other peoples.

A good example of this can be found in the work of Luis Eslava. For Eslava, the operation of international law can be likened to the operation of photography. Utilising the term 'enframing' he argues that 'both international law and photography have a tendency to draw our gaze to exceptional events and sites, often leaving aside what they may consider ordinary and everyday.'¹⁶⁴ Just how the

¹⁶² There is also the critique by Atwood, who cautions against large macro-causal accounts. See: Bain Atwood, *Empire and the Making of Title: Sovereignty, Property and Indigenous People* (CUP, 2020) 6.

¹⁶³ Pahuja (n 135) 8.

¹⁶⁴ Luis Eslava, 'Istanbul Vignettes: Observing the Everyday Operation of International Law' (2014) 2 *London Review of International Law* 3.

point from which a photograph is taken determines the organisation of the world depicted, international law is a mechanism ‘through which the world is viewed, apprehended and constructed according to parameters that are superimposed upon our surrounding realities. In doing so, they organise the world and our political responses to it.’¹⁶⁵ Law and sovereignty is no different. Through the doctrines and concepts of international law, certain perspectives are imposed upon the world. The task is to disrupt the universalised, civilising process affected through things like sovereignty, and in doing so allow other voices to enter and transform ideas of law. Importantly, this is also about ensuring that critical scholarship *itself* does not fall into the same trap of imposing essentialised voices of what marginalised groups think or should do. That would be to replicate the processes of civilisation that they intend to subvert. For Eslava these ideas of frame and scale require us to reflect ‘on the question of how others understand our object of study, how we understand it, and what kind of (re)description of our object we are then committed to as a result.’¹⁶⁶

Alongside this redemptive re-imagining of international law, TWAIL scholars continue to deconstruct sovereignty’s hypocritical complicity with international imperialism. A recent example of this is Rose Parfitt’s discussion of conditional sovereignty. While the supposition that sovereign rights are conditional upon a state behaving in accordance within certain normative standards may appear novel,¹⁶⁷ it is Parfitt’s contention that ‘sovereignty has always been conditional in precisely this way – since the dawn of the very ideas of the state and of international law.’¹⁶⁸ Indeed, ‘[o]nly those entities deemed to be in possession of a particular set of legal and institutional arrangements – arrangements dedicated to offering the individuals within that jurisdiction a very specific and very narrow set of rights and duties – have, under international law, been able to pass as states.’¹⁶⁹

¹⁶⁵ *ibid* 3-4.

¹⁶⁶ *ibid* 46.

¹⁶⁷ The objective of rendering sovereignty conditional has been a major inspiration for many international lawyers. See: Kofi Annan, ‘Peacekeeping, Military Intervention, and National Sovereignty in Internal Armed Conflict’ in Jonathan Moore (ed), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Rowman & Littlefield) 57. Also note the literature on the putative ‘Responsibility to Protect’ Doctrine’: David Rodin, ‘Rethinking Responsibility to Protect: The Case for Human Sovereignty’ in Don E Scheid (ed), *The Ethics of Armed Humanitarian Intervention* (CUP, 2014) 248; Anne Orford, *International Authority and the Responsibility to Protect* (CUP, 2011).

¹⁶⁸ Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP, 2019) 6.

¹⁶⁹ *ibid*.

The process that affects the creation of conditionality is one that she terms ‘international legal reproduction.’¹⁷⁰ This is where new subjects of international law are brought into being and disciplined by the existing, ‘successful’, members of the international community.¹⁷¹ Because of this, sovereignty is always conditional and never final. The talk of inalienable rights flowing from sovereignty is merely a hypocritical charade. Regardless of new states being violently disciplined into the sovereign state model, existing states remain vulnerable to the discipline of their ‘peers’ if they should renege on the constitutive parameters of their sovereignty.¹⁷² States are, therefore, ‘both sovereign *and* less-than-sovereign simultaneously, with a set of rights and duties which wax and wane depending on their ‘success’ in meeting these conditions.’¹⁷³

While including several examples, Parfitt’s major case study is the Italian conquest of Ethiopia in 1935. Both Ethiopia and Italy were sovereign states and members of the League of Nations. However, the brutal Italian attack and subsequent conquest was scarcely condemned. Minor sanctions were introduced by the League but were dropped within a year.¹⁷⁴ While subsequent theorists considered the League’s failure a result of international law’s lack of development or codification, Parfitt takes this to be a paradigmatic example of the process of legal reproduction.

As she demonstrates, Ethiopia laboured under a hybrid personality that was both sovereign and less-than-sovereign.¹⁷⁵ The League standards of statehood included the classic requirements of territory and population, but also a sufficient level of civilisation. While this was previously indexed to confessional allegiance, it had become increasingly couched towards race. Ethiopia, containing both Christians and Muslims, as well as white and black populations, contravened both old and new standards.¹⁷⁶

¹⁷⁰ *ibid* 12.

¹⁷¹ *ibid*.

That dominant actors discipline global society into conformity with its norms through law and a civilised/uncivilised distinction has been well documented. See: Niall Ferguson, *Empire: How Britain Made the Modern World* (Penguin, 2018); Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (CUP, 2009); Mark Salter, *Barbarians & Civilisations in International Relations* (Pluto Press, 2002).

¹⁷² Parfitt (n 168) 12.

¹⁷³ *ibid*.

¹⁷⁴ *ibid* 1-3.

¹⁷⁵ Rose Parfitt, ‘Empire Des Negres Blancs: The Hybridity of International Personality and the Abyssinian Crisis of 1935-36’ (2011) 24(4) LJIL 849, 859.

¹⁷⁶ *ibid* 858.

Ethiopia did pass the formal requirements for statehood, but concerns regarding its degree of civilisation prompted the insertion of two special requirements: the abolition of slavery¹⁷⁷ and that it relinquish its right to import arms.¹⁷⁸ To Parfitt, the first of these additional requirements was designed ‘to drag Ethiopia ‘up’ the evolutionary scale by casting the ‘Abyssinian Empire’ as a colonial power, duty-bound to ‘civilise’ its own feckless, slave-raiding ‘natives’.’¹⁷⁹ Conversely, in denying Ethiopia the right to import arms, Europeans cast it as ‘the ‘uncivilised’ native *object* of a European colonial treaty designed to prevent weapons from falling into the hands of untrustworthy ‘barbarians’’.¹⁸⁰ This duality in Ethiopia’s sovereignty was then exploited by the Italians to legitimise their conquest. Insisting upon Ethiopia’s continual practice of slavery and its barbaric culture, Italy argued that Ethiopia no longer possessed the qualities necessary to retain its sovereignty.¹⁸¹

The third wave of TWAIL authors continues the trends identified within TWAIL II. Like with Anghie, Parfitt sees sovereignty as a hypocritical part of the imperialistic system. While sovereign states are putatively equal in the international legal order, the unconditionality of this sovereignty is distributed unevenly. The protection sovereignty affords is conditional upon the standards of civilisation being met. It operates as the crucial delimiting factor that distinguishes which nations are vulnerable to imperialistic violence and those that are not. In and through sovereignty discourse then, the economies of inter-state domination and exploitation is mediated. A new dimension of TWAIL III, however, is the effort to avoid imposing their own hegemonic paradigms – to move past hypocritical violence, and, through that, to redeem international law. Speaking of large collective categories, such as the ‘Global South’ and the ‘colonised’ for instance, risks putting forward a false

That Ethiopia’s sovereignty was rendered conditional upon the satisfaction of a European standard of civilisation has been the subject of previous study. See: Jean Kallin, ‘Slavery and the League of Nations: Ethiopia as a Civilised Nation’ (2006) 8 *Journal of the History of International Law* 213.

¹⁷⁷ For a study on Ethiopia’s engagement with the slave trade, see: Alice Moore-Harell, ‘Economic and Political Aspects of the Slave Trade in Ethiopia and Sudan in the Second Half of the Nineteenth Century’ (1999) 32 *The International Journal of African Historical Studies* 416.

¹⁷⁸ Parfitt (n 168) 859.

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid* 860.

universal. If the violence of the sovereign order is to be resisted, then a new way of speaking about law that does not repeat the exact same violence is needed.

Summary

TWAIL scholarship shares many of the trends found within Marxist theory. Like with the Marxist perspectives of Miéville and Tzouvala, TWAIL scholars within the second and third waves have analysed international law structurally, uncovering the crucial role of sovereignty in facilitating, and hypocritically justifying, violence and exploitation. Calling into question the pursuit of sovereign statehood as a way of obtaining equality with western states, this scholarship understands that same sovereign state system as *responsible* for reproducing subordination. It is what the system is designed to do. In a similar way to Tzouvala's logics of biology and improvement, TWAIL accounts stress the importance of civilisation in the discrimination of sovereign and non-sovereign entities. In both the dynamic of difference and the process of legal reproduction, to be a fully sovereign state requires accepting the culture and norms of the imperialistic states. To keep non-Western, non-liberal regimes and epistemology in place is to be denied the rights of non-interference that attach to sovereign states. Civilisational requirements are not, however, set in stone. Things change from period to period, allowing the continual renegotiation and exclusion of certain nations. The focus may be on neo-liberal markets for a certain time, but this could evolve to encompass anti-terrorist laws. The game is rigged and cannot be won. Unlike with Marxist analyses, TWAIL scholarship does not necessarily rely upon capitalism as the *exclusive* causal force driving international law. The dimensions of race and culture mean that the class divisions of bourgeoisie and proletariat state do not simplistically fit.

Feminist and Queer Approaches to International Law

Feminist engagement with international law has a long history. One can look at the activities of interwar feminist NGOs and their efforts to achieve both women's representation in international

organisations and to place women's issues on their agendas to appreciate this.¹⁸² While ranging across a diverse range of topics, sovereignty and civilisation have been a particular point of critical interest for feminist analysis, both at a domestic and international level. Before moving on to consider feminist critiques of international legal sovereignty, it is worth taking time to reflect on those accounts couched at the domestic level.

Feminist approaches to law and the state

Feminists have examined the discourses surrounding the constitution of the liberal state and the idea of the social contract.¹⁸³ Peering past the formal equality of contemporary citizens, Carole Pateman excavated the 'sexual contract' to explain the genesis of civil society and the private sphere, and the continuing, naturalised subordination of women within both.¹⁸⁴ The classical social contract theories, Pateman argues, only tell half the story. In the works of Hobbes, Locke, and Rousseau, the focus is upon the neutral figure of the 'individual' who contracts with their fellows to establish civil society. This contractarian approach and the front-centring of individuals was claimed to mark a rejection of the patriarchal control of fathers and Kings.¹⁸⁵ However, behind the gender-neutral language, it is clear the contracting individuals are men. Calling into question the gender of the participants casts a new light upon the meaning of the rejection of traditional patriarchal authority. For Pateman, the political right of the patriarch over his sons is preceded by another right – the conjugal right to a women's body.¹⁸⁶ The father can only have children through intercourse with the mother. The movement towards civil society can be interpreted as a fraternity of the sons against the political right

¹⁸² Carol Miller, "'Geneva – the Key to Equality': Interwar Feminists and the League of Nations' (2006) 3(2) *Women's History Review* 219.

¹⁸³ See also the important work by MacKinnon: Catherine MacKinnon, 'Feminism, Marxism, Method, and the State: Towards a Feminist Jurisprudence' (1983) 8(4) *Signs* 635; Catherin MacKinnon, *Women's Lives; Men's Laws* (HUP, 2007).

¹⁸⁴ Carole Pateman, *The Sexual Contract* (Polity Press, 1997) 11.

¹⁸⁵ The patriarchal control by kings had been explicitly contended for in the 17th century by such figures as Sir Robert Filmer. See: Sir Robert Filmer, J.P. Sommerville (ed), *Filmer: 'Patriarcha' and Other Writings* (CUP, 2014). Locke's *First Treatise on Government* was, in part, dedicated to critiquing Filmer's argument that the king's right came from the patriarchal inheritance of Adam.

¹⁸⁶ Pateman (n 184) 110.

of the father, but not the sex right.¹⁸⁷ They kill the father, sharing his political power, but keep in place the original sexual contract. Women remain subordinated, and, through the institution of marriage, can be shared out amongst the men, avoiding the patriarch's exclusive possession. As men, they can emerge as bounded, sovereign individuals, supported as they are, materially and psychologically, through the subjugation of women. While women do enter civil society with men so as not to reveal the hypocrisy of the ideal of universal freedom, this freedom is tinged with the sexual contract. Supposed inadequacies of women in comparison to men are naturalised, ensuring continued subordination in the civil and private sphere. The original sexual contract is 'continuously renewed and reaffirmed through contracts in everyday life.'¹⁸⁸ Through marriage especially, a man 'receives a major part of his patriarchal inheritance',¹⁸⁹ obtaining conjugal rights to the women's body and her domestic service as a housewife.¹⁹⁰

More recently, the feminist deconstruction of the modern liberal subject and its relation to the state has been developed by Charlotte Epstein. Focusing in on the concept of the human body, Epstein demonstrates how it has been a crucial theoretical device in the construction of the state and the liberal subject endowed with rights. Through the use of the body, the state and the citizen *co-constitute one another*.¹⁹¹ Epstein's critique encompasses how political commentators, such as Hobbes and Locke, and the rise of empirical sciences comingled to affect this constitution. Discourses of human nature provided the means to renaturalise a series of fundamental exclusions that allowed modern values of liberty and personhood to come into being. Locke, as Epstein argues, built human subjectivity upon the grounds of rationality¹⁹² and, as the operationalisation of this rationality, property ownership. Those groups of peoples that could not (or did not) hold property – such as the poor, women, and foreigners – were, therefore, excluded from the boundaries of rationality and, as a consequence, those of full humanity as well.¹⁹³

¹⁸⁷ *ibid* 113.

¹⁸⁸ *ibid* 114.

¹⁸⁹ *ibid* 115.

¹⁹⁰ *ibid*.

¹⁹¹ Charlotte Epstein, *Birth of the State: The Place of the Body in the Crafting of Modern Politics* (CUP, 2020) 2.

¹⁹² *ibid* 155.

¹⁹³ *ibid* 157.

Epstein finds the paradigm of this constitution of the body and the state in the public anatomy lesson of the 17th century. In the public dissection, knowledge of a universal human was abstracted from particular bodies – the bodies under dissection. These dissected bodies were typically of executed criminals or of the poor, and whatever crimes the person had committed would be announced to the spectating public. This performed a number of functions. It solidified the rupture between the universal subject of knowledge, represented both through the abstract learning produced and through the viewing crowd, and the criminal body that could be cut up. As Epstein describes it, the anatomy class reproduced the choreography by which ‘the space of criminality and poverty was established without’ civilisation, ‘while within was constituted as the site of the construction of a natural human universal.’¹⁹⁴ Further, this forged a bond with the emerging state. The state allowed the provision of bodies to the anatomy class as a continued manifestation of corporeal punishment. In so doing, ‘the ritualised and public deployment of the power to punish upon the body helped perform into being the institution whose power it expressed.’¹⁹⁵ But it also allowed for an association between the universal body of knowledge and the state.¹⁹⁶ The spectacle of the dissection rid modern learners of their superstitions, teaching them to think and see scientifically. It gave the state its ‘docile scientific-cum-political subjects.’¹⁹⁷

This domestic feminist literature opens a critical window onto the mythologies that have been spun around the establishment of the state and its sovereignty. Instead of something universal or neutral, sovereignty is deeply gendered and affects the hypocritical exclusion and subjection of women and other suppressed groups. If, as these commentators show, the sovereign state is based upon a series of hypocrisies, then one would expect that the international legal system of sovereign states would also be. And that is exactly what feminist international lawyers have demonstrated, destabilising the ostensible neutrality of leading paradigms within international law to reveal their gendered dimensions.

¹⁹⁴ *ibid* 271.

¹⁹⁵ *ibid* 253.

¹⁹⁶ *ibid* 254

¹⁹⁷ *ibid*.

Feminist approaches to International Law

As Charlesworth and Chinkin have argued, ‘the absence of women in the development of international law has produced a narrow and inadequate jurisprudence that has... legitimated the unequal positions of women around the world’.¹⁹⁸ The task of feminist inquiry in exposing the hypocritical, gendered quality of international law is a multi-layered one.¹⁹⁹ This ranges from exploring the lack of women in international legal institutions,²⁰⁰ to the lingering masculine normativity in legal instruments – such as the continuing use of masculine pronouns when referring to people generally.²⁰¹ Delving deeper, feminist analysis uncovers the gendered quality of the basic concepts of international law, such as ‘states, ‘order’ and ‘conflict’.²⁰² Throughout all levels of possible inquiry, the key element for feminists remains the ‘silence and exclusion of women’.²⁰³ This silence is inherent in the constitution of international law and is just as important as codified lists of positive rules.²⁰⁴ For feminist analysis, this silence must be challenged on every level using a variety of methodological tools. These can include locating a public/private divide,²⁰⁵ uncovering gendered coding in legal discourse,²⁰⁶ and identifying uses of gender essentialism that affect the subordination of women.

Charlesworth and Chinkin provide a comprehensive analysis of the international legal canopy, but the most useful example for our purposes is their discussion of the sovereign state.²⁰⁷ They argue that

¹⁹⁸ Hilary Charlesworth, Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 1.

In making this argument, feminist scholars have met with dismissal from mainstream, male writers. See: Hilary Charlesworth, ‘Cries and Whispers: Responses to Feminist Scholarship in International Law’ (1996) 65 *Nordic Journal of International Law* 557.

¹⁹⁹ Charlesworth, Chinkin (n 198) 49.

²⁰⁰ See: Hilary Charlesworth, ‘The Gender of International Institutions’ (1995) 89 *American Society of International Law Proceedings* 79; Hilary Charlesworth, ‘Transforming the United Men’s Club: Feminist Futures for the United Nations’ (1994) 4(2) *Transnational Law & Contemporary Problems* 421.

²⁰¹ Charlesworth, Chinkin (n 198) 49.

²⁰² *ibid.*

²⁰³ *ibid.*

²⁰⁴ *ibid.*

²⁰⁵ The public/private distinction has been a classic tool in feminist analysis. See: Carole Pateman, ‘Feminist Critiques of the Public/Private Dichotomy’ in S.I. Benn, G.F. Gaus (eds), *Public and Private in Social Life* (St. Martin’s Press, 1983) 281. For an overview of feminism’s relation with the critique, see: Ruth Gavison, ‘Feminism and the Public/Private Distinction’ (1992-1993) 45 *Stanford Law Review* 1.

²⁰⁶ Charlesworth and Chinkin have explored a number of examples of this. See: Hilary Charlesworth, Christine Chinkin, ‘The Gender of Jus Cogens’ (1993) 15(1) *Human Rights Quarterly* 63.

²⁰⁷ Charlesworth, Chinkin (n 198) 124.

each of the elements within international law's definition of a state establishes a masculine subject. Under the Montevideo Convention a state requires four elements: a permanent population, a defined territory, government, and the capacity to enter into relations with other states.²⁰⁸ Looking at the first of these, permanent population, Charlesworth and Chinkin connect the requirement to the concept of citizenship. A state's population (or at least the majority of it) are citizens – members of the sovereignty. Citizenship, however, has a very gendered history, stretching as far back as the Greek *polis*. Echoing the analysis of Pateman, in the Polis the citizenship of a few privileged men was supported and made possible by the subordination of women to the private sphere and the burdens of 'production and reproduction'.²⁰⁹ To keep the masculine ideal of citizenship alive, the sexuality and domestication of women had to be tightly controlled so that it remained in the service of the male citizenry.²¹⁰ The masculine imaginary of the state continues with the second requirement, a defined territory, which reproduces ideas of the male body.²¹¹ That male body is a bounded self, independent, and protected from governmental (and anybody else's) interference. Likewise, the sovereign state of international law has rights of independence and non-interference, and the ability to use force when threatened by foreign aggression.²¹² Nations that cannot effectively control their territory are not sovereign. This understanding of the state as a male body bleeds into the legitimising practices of colonial conquest, where colonialism was presented erotically. Male states would locate and penetrate 'virgin territory', conceptualising its inhabitants as 'unbounded, uncontrolled female people',

Other feminist scholars have brought the methodology to bear on a wealth of examples. See: Doris Buss, 'Performing Legal Order: Some Feminist Thoughts on International Criminal Law' (2011) 11 *International Criminal Law Review* 409; Fionnuala Ni Aolain, Dina Haynes, Naoimi Cahn, *On the Frontlines: Gender, War and the Post Conflict Process* (OUP, 2011); MacKay Krook, *Gender, Politics and Institutions: Towards a Feminist Institutionalism* (Palgrave, 2011); Marsha Henry, 'Peaceexploitation? Interrogating Labor Hierarchies and Global Sisterhood Among Indian and Uruguayan Female Peacekeepers (2012) 9(1) *Globalisations* 15.

²⁰⁸ The classic account of the formation of states is given by Crawford. See: James Crawford, *The Creation of States in International Law* (OUP, 2006).

²⁰⁹ Chinkin, Charlesworth (n 198) 127.

²¹⁰ *ibid* 128.

The exclusion of women from suffrage in Athens is well noted. This treatment, however, was not necessarily the norm across the Hellenic world. Sparta, in fact, was unusual for allowing women to inherit and own property independently. See: Paul Anthony Rahe, *The Grand Strategy of Classical Sparta: The Persian Challenge* (Yale Library of Military History, 2016).

²¹¹ This is taken from Naffine's analysis of the legal subject in criminal law. She describes it as the 'body bag'. See: Ngaire Naffine, 'The Body Bag' in Ngaire Naffine, Rosemary Owens (eds), *Sexing the Subject of Law* (Law Book Co. Ltd., 1997) 76.

²¹² Chinkin, Charlesworth (n 198) 129.

justifying its predations and the need to tame them.²¹³ The requirement of stable government compounds this masculine imaginary. The male subject is a rationale one, and nothing better expresses this than government. Government ‘enables the state to be seen as a complete, coherent, bounded entity that speaks with one voice, obliterating the diversity of voices within the state.’²¹⁴ The government is the head that controls the body established by the requirement of a defined territory. The capacity to enter into relations with other states completes the androgenous quality of statehood. It assumes the completely self-sufficient quality of a state and that it can only be made subject to legal requirements of its own volition.²¹⁵

How sovereignty might be reconstructed and redeemed in a feminist analysis has posed a challenge.²¹⁶ While supporting Charlesworth and Chinkin’s analysis, Knop is apathetic regarding the production of a feminist replacement. Much of this trouble stems from the sheer diversity of women’s experiences, making it difficult and undesirable to generalise what a feminist sovereignty would look like.²¹⁷ As ‘women’s identities are multifaceted... they may choose to participate in international law in ways that reflect their identity as part of an ethnic, linguistic, or religious group, rather than the united front of gender.’²¹⁸ This concern to avoid reinforcing gender essentialism²¹⁹ is prominent across contemporary feminist discourse. Recently, Otto has written about the ‘gender paradox’. The paradox is that while striving to eliminate sexual difference as the tool of women’s exclusion and subordination, feminism nevertheless takes up the perspective and makes claims on behalf of

²¹³ *ibid* 130.

²¹⁴ *ibid* 133.

²¹⁵ *ibid* 134.

See also: Charlesworth’s reflection on the Responsibility to Protect Doctrine: Hilary Charlesworth, ‘Feminist Reflections on the Responsibility to Protect’ (2010) 2(3) *Global Responsibility to Protect* 232.

²¹⁶ The majority of feminist scholarship has avoided engagement with foundational concepts. As Heathcote warns, this may allow for the reification of them. See: Gina Heathcote, *Feminist Dialogues on International Law* (OUP, 2019).

²¹⁷ Karen Knop, ‘Re/Statements: Feminism and State Sovereignty in International Law’ (1993) 3(2) *Transnational Law & Contemporary Problems* 293, 297.

²¹⁸ *ibid* 298.

²¹⁹ The dilemma of essentialism is a problem for feminist analysis. See variously: Rachael Faithful, ‘Breaking Gender: In Search of Transformative Gender Law’ (2010) 18(3) *American University Journal of Gender, Social Policy & Law* 455; Megan O’Dowd, ‘Secular Gender Essentialism: A Modern Feminist Dilemma’ (2010) 3(2) *The Crit: A Critical Studies Journal* 104; Jane Wong, ‘The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond’ (1999) 5(2) *William & Mary Journal of Women and the Law* 273; Angela Harris, ‘Race and Essentialism in Feminist Legal Theory’ (1990) 42(3) *Stanford Law Review* 581.

‘women’ – the category produced by that discourse of sexual difference.²²⁰ In other words, ‘feminism ends up reproducing the sexual difference that it sets out to eliminate.’²²¹

Heathcote, however, expresses more optimism, developing a gender-neutral understanding of sovereignty. This is done through the use of the ‘split subject’.²²² The split subject approach to sovereignty continues to make use of an anthropomorphic understanding of the concept, but does not substitute a feminine model for a masculine one. The point is to ‘see the diversity of bodies and personhood derived from the recognition of plural subjectivities.’²²³ This derives from the idea of the pregnant body, ‘understood as difference, as potentiality’.²²⁴ We are all of us born and have thus undergone a split with another being. The natal moment unites all people in their capacity for differentiation, for further relationships and splits. Subjectivity is, on this account, fluid and porous and the antithesis of the masculine body presented under traditional accounts of state sovereignty. ‘State sovereignty... is reconceived as created via a splitting, for the need for relationships and connections and the focus is on the potential for further splitting, for the need for relationships and connections, as well as development of autonomy and a sense of self/identity.’²²⁵ The legal subject is ‘never whole, closed, or unified; instead they are diverse, fractured, connected, singular, and fluid all at once.’²²⁶

Queer theory

Queer theorists carve out for themselves a unique place within critical scholarship.²²⁷ In outlining what queer theory means in the context of international law, Dianne Otto separates herself from

²²⁰ Dianne Otto, ‘Feminist Approaches to International Law’ in Anne Orford, Florian Hoffman, Martin Clark (eds), *The Oxford Handbook of the Theory of International Law* (OUP, 2016) 497-498.

²²¹ *ibid.* See the work of Kapur for an example of this critique: Ratna Kapur, ‘Gender, Sovereignty and the Rise of Sexual Security Regime in International Law and Postcolonial India’ (2013) 14(2) *Melbourne Journal of International Law* 317. See also: Aparna Polavarapu, ‘Global Carceral Feminism and Domestic Violence: What the West can Learn from Reconciliation in Uganda’ (2019) 42(1) *Harvard Journal of Law and Gender* 123.

²²² Gina Heathcote, *Feminist Discourses on International Law* (OUP, 2019) 112.

²²³ *ibid* 110

²²⁴ *ibid.*

²²⁵ *ibid* 128.

²²⁶ *ibid.*

²²⁷ There is also some degree of tension here. As Otto explains, there has been a reluctance amongst feminists to explore all the implications that the queer project has for gender. ‘Many feminists worry that the coherence of the category ‘women’ as an organising focus will be threatened if gender is understood as mobile and plural, and

approaches that would simply expand the existing legal framework to accommodate non-heterosexual voices and experiences,²²⁸ such as broadening human rights to include homophobic discrimination.²²⁹ Otto believes that queer theory can realise a more radical and far-reaching critique. For her, queer analysis involves taking a break ‘from “seeing normally” by engaging sexuality as a primary category of analysis’.²³⁰ This entails removing oneself from the heterosexual imaginary.²³¹ In doing so, queer theory expands upon the sex/gender distinction to ‘denaturalise’ sex.²³² From this perspective, sex and gender are the products of regulatory discourses – reiterative performances and norms that naturalise and discipline bodies into sexed bodies.²³³ These discourses make certain genders and sexualities intelligible (‘normal’), thus constructing anything outside of that paradigm as an aberration.²³⁴ A queer critique seeks to make visible the levers of power that construct the heterosexual normality. In the context of international law, this critique would expose the heterosexual ordering that underpins the systems and doctrines of the law,²³⁵ and how it serves as an instrument in the ‘micromanagement and “disciplining” of everyday lives’.²³⁶

Sovereignty has not been overlooked in queer analyses.²³⁷ As feminist approaches saw gendered assumptions in the Montevideo criteria, Otto argues they are also deeply heteronormative. The requirement of a permanent population, to take one of the criteria, is implicated in the creation of a reproductive community.²³⁸ To sustain the civil space of citizens, bodies need to be disciplined into

especially if its biological anchor is questioned.’ (Dianne Otto, ‘Queering Gender [Identity] in International Law’ (2015) 33(4) *Nordic Journal of Human Rights* 299, 306.).

²²⁸ Dianne Otto, ‘“Taking a Break” from “Normal”’: Thinking Queer in the Context of International Law’ (2007) 101 *Proceedings of the Annual Meeting (American Society of International Law)* 119.

²²⁹ *ibid* 120.

²³⁰ *ibid*.

Otto has written of the heteronormative nature of the state elsewhere. See: Dianne Otto, ‘Resisting the Heteronormative Imaginary of the Nation-State’ in Dianne Otto (ed), *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2018) 236.

²³¹ Otto (228) 120.

²³² See: Judith Butler, *Undoing Gender* (Routledge, 2004).

²³³ Otto (n 230) 301

²³⁴ *ibid* 300.

²³⁵ Otto (n 228) 120.

²³⁶ *ibid*.

²³⁷ Other subjects of queer analysis has been the activities of CEDAW. See: Surya Monro, ‘Transgender: Destabilising Feminisms?’ in Vanessa Munro and Carl F Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish, 2007) 125; Darren Rosenblum, ‘Unsex CEDAW, or What’s Wrong with Women’s Rights’ (2011) 20(2) *Columbia Journal of Gender and Law* 98.

²³⁸ Otto (n 228) 120.

the gendered roles of man and women, and the latter subjugated to the former to provide the necessary children to maintain the class of citizens. The traces of the disciplining can be found in the administrative bureaucracy surrounding the person and family. The state requires '[c]ensus forms, surnames, birth registration, tax arrangement [and] inheritance'.²³⁹ Even in the more progressive developments within international law, Otto still finds the presence of heterosexual disciplining. Take the Yogyakarta Principles.²⁴⁰ These were intended to shed some light on the extent of state obligation under international human rights law to issues such as sexual orientation and gender identity.²⁴¹ The Principles even go so far as decoupling gender identity from its reliance upon biology.²⁴² However, the Principles still characterise gender as male and female and as being a 'deeply felt internal...experience'.²⁴³ In indexing gender to the poles of man and women, and asserting that a specific gender identity is 'deeply felt', those who experience gender as shifting or lying somewhere between male and female are excluded.²⁴⁴ Even the rhetoric of 'deeply felt experience' reinforces '(bio)logic' through glossing over and failing 'to acknowledge the influence of social context on the way that gender is understood and expressed'.²⁴⁵

Summary

Feminist and queer analyses continue the deconstruction of international law's various hypocrisies and hidden inequalities. Like with other critical methods, they attack the law's objectivity. From Pateman to Otto, the supposed neutrality of the law acts as a screen to naturalise gender imbalances in power and to perpetuate the regulatory regimes of sexuality. Further, the supposed universality of sovereignty is deconstructed as a specifically masculine and heterosexual construct. Epstein demonstrated the fundamental role of Lockian rationality and the scientific revolution in the

²³⁹ *ibid.*

²⁴⁰ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity' (International Commission of Jurists, 2007).

²⁴¹ Otto (n 230) 312.

²⁴² *ibid.*

²⁴³ *ibid.*

²⁴⁴ *ibid* 313

²⁴⁵ *ibid.*

construction of the civil subject and the state. Charlesworth and Chinkin excavate the gendered quality of the requirements of statehood and how it correlates to masculine ideas of the body. The masculine figure of the state leads into ideas of colonialism, with non-sovereign entities being figured as female spaces that could be penetrated and exploited by masculine-coded sovereign states. And finally, in queer theory, those same requirements of statehood reinforce heterosexuality.

These trends echo what we have previously seen in TWAIL and Marxist scholarship. In both those methodologies, scholarship peers behind the objectivity of the law, identifying sovereignty as a key differentiating technology, determining which nations are protected from interference and which can be subjected to imperialism. Marxist accounts point to the causal role of capitalism in this structure; TWAIL to the function of civilisation and culture in legitimating the discriminations; feminist and queer analyses add an important layer to this image. Bringing to light the regimes of masculinity and heterosexuality helps us to understand how we ended up with the idea of sovereignty. Marxist and TWAIL analyses reveal the *functions* of sovereignty, but this does not get at the roots of the idea. Surely many concepts in addition to sovereignty could have performed the necessary work. Feminist and queer approaches give us a grasp on the identity of sovereignty, its masculine and heterosexual point of view, that that the other methods do not.

Finally, feminist and queer approaches continue the trend seen in TWAIL III of avoiding the reintroduction of new, hypocritical, hegemonic paradigms. Feminist scholars have, as we saw, recognised this and been careful to avoid the replication of essentialism and imperialism in their efforts to re-imagine and redeem international law.²⁴⁶ Heathcote's 'natality' principle is one way of addressing this. In queer theory, the very idea of queering leans into the continuous destabilisation of boundaries, opening up a new idea of the body that is radically open to plurality and difference and which could inform a new sense of statehood and sovereignty.

Conclusion

²⁴⁶ Orford, for one, has warned white, Western feminists that writing to 'save the third world' has imperialistic consequences. See: Anne Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71(2) *Nordic Journal of International Law* 275.

Supposing international law to be hypocritical - what then? First, it must be *critiqued*. In doing so, the hypocrisy of the law is exposed; its pretensions of objectivity and justness reduced to little more than a fraudulent veil that obscures a deeper reality of parochial violence. Regardless of the methodology employed, the essence of critical approaches remains precisely this: pulling the mask away from the law and revealing its true nature. Kennedy and Koskenniemi employed discourse theory to collapse the law's claim to be objective and free from politics. Rather than apolitical, the whole legal argumentative structure was determined precisely by politics. TWAIL scholarship focused on how the pursuit of equality and freedom through sovereignty was, in fact, a farce. International law, and its doctrine of sovereignty, had developed precisely to continually legitimate colonial practices. Marxist writers further pull apart international law's promise of peace and prosperity. For Miéville and Tzouvala, international law is inherently tied to the expansion and exploitation of the capitalist mode of production. The rule of international law necessarily begets war and imperialism. Feminist commentators, in turn, attack the supposed universality of concepts such as the state and sovereignty, excavating the fundamental masculine imaginary of these structures. In each of these threads, the very ironic contradiction between the law's putative values and that revealed nature provides the bite of critical scholarship – hypocrisy begets disgust.

What comes after the exposure of international law's hypocrisy is a difficult question, for it is the question of *redemption*. Can such a sullied tissue be salvaged? As we saw, for those like Miéville, the answer is an emphatic no. The rule of law is necessary the rule of violence – of 'the anarchy'.²⁴⁷ Others suggest the need for a cognitive revolution so that the constant (re)creation of potentially hegemonic structures is avoided: a conception of law beyond the stultifying and hypocritical boundaries of frameworks and paradigms; a law that would finally fulfil its promise.

Hypocrisy and the need for redemption: these are the two themes running through critical approaches to international law and sovereignty. That, at first glance, may seem uncontroversial. No one likes a hypocrite, after all. But perhaps we can stop and ask: why the determined pursuit of hypocrisy? why our disgust? why the need for redemption? Miéville's condemnation of the law as

²⁴⁷ 'The Anarchy' is a poem written by Percy Shelley upon learning of the 'Peterloo' massacres in England.

inescapably violent almost sounds *nihilistic* for all its anger: painting an image of international law in which none of our cherished values of peace and justice can be realised. It reads as a sentence of *condemnation*.

Perhaps, then, we international lawyers ought to know more about nihilism – both in terms of how our doctrines might be nihilistic and we ourselves too. I intend to supply this want. International law is hypocritical and in need of redemption: I suggest that this is because it is based on nihilistic roots. Redemption only becomes a question *because of nihilism*. To help us to understand the connections between nihilism and international law, I turn to the philosophy of Friedrich Nietzsche in the next two chapters.

Dionysus Explains the World: Nietzsche, Nihilism, and the Will to Power

‘Gott ist tot!’ – don’t look so sad about it though. He was a hypocrite.

The world as will to power and nothing besides... Is this not our problem? – or the problem that is coming for us?...

In this thesis, my goal is to explore whether the constitution and development of international law is nihilistic. To meet this goal, we first need to have an understanding of what nihilism actually is. In achieving this understanding, the philosophy of Friedrich Nietzsche will serve as our foundation. This foundation stone, however, is a challenging one.

At the end of his philosophical career, Nietzsche repeatedly asked whether he had been understood. The herald of the ‘revaluation of all values’ and self-styled ‘antichrist’, Nietzsche did not want to be conflated with Wagnerians, Romanticism, or empty relativism. He was the new Socratic gadfly on the back of society - the harbinger of the ‘great noontide’ that would announce the end of Europe as it was known. Nietzsche, rightly or wrongly, viewed his position (and himself) as unique and wanted people to know it.

To introduce ourselves to this mercurial figure, a good place to start is by asking what Nietzsche thought was so special about he was doing and how he was doing it. What exactly was it Nietzsche wanted his readers to understand? What exactly set him apart from his contemporaries? In approaching this, I will tackle three foundational questions: 1) who was Nietzsche and what was his context?; 2) what was Nietzsche’s objective in producing his philosophy?; and 3) what are the basic ontological and epistemological grounds of his thought? With these questions answered, we can begin to consider how his philosophy helps to advance an understanding of international law as nihilistic.

The case of Nietzsche

Historical and intellectual context

Nietzsche's life unfolded in a period of flux. Old social hierarchies were challenged, and new patterns of social power emerged. This is most obvious in the case of Germany itself. Under the Holy Roman Empire, Germany has been composed of hundreds of principalities.¹ Following the wars of succession over the course of 18th century,² the Holy Roman Empire went into decline, but its termination was violently accelerated by Napoleon and the French invasions from 1805 onwards. Napoleon dissolved the Empire in 1806 and greatly simplified the administration of Germany, incorporating many of the smaller principalities into larger entities, like Bavaria, and creating a condensed 'Confederation of the Rhine'.³ After the defeat of Napoleon, many of his imperial reforms were undone, but the French occupations had triggered the outbreak of German nationalism.⁴ From 1815 onwards, there was increasing debate around the 'German question' and the possibility of unification. This unification was achieved by Prussia under the chancellorship of Otto von Bismarck through a series of brutal wars against Denmark, Austria and finally France (a war Nietzsche himself would serve in), at the end of which the Second German Empire was declared.⁵

Alongside the growing power of the German state was the explosion of German industry and urbanisation. From 1870 to 1890. Germany's production of coal and steel increased tenfold;⁶ industrial production increased by 40%; the population sprang from 41 million to 67 million;⁷ the working class increased seventeenfold; and Berlin doubled in size.⁸ The changing nature of Germany's economic landscape had several implications. The first was a pronounced rejection, in some quarters of modernity and a concern that authentic German culture was sliding into decadence. The composer Richard Wagner was one such individual, who believed that capitalists and the

¹ For an expansive history of this entity, see: Peter Wilson, *The Holy Roman Empire: A Thousand Years of European History* (Penguin, 2017).

² Principally the Austrian War of Succession that led to the rise of Prussia as a Great Power. See: Hamish Scott, *The Birth of a Great Power System, 1740-1815* (Routledge, 2013).

³ For a volume of essays exploring these events, see: Alan Forrest, Peter Wilson (eds), *The Bee and the Eagle: Napoleonic France and the End of the Holy Roman Empire* (Palgrave Macmillan, 2008).

⁴ This sentiment is powerfully seen in Fichte's *Address to the German Nation*. See: Gregory Moore (ed), *Fichte: Address to the German Nation* (CUP, 2009).

⁵ For overviews of these events, see: Christopher Clark, *Iron Kingdom: The Rise and Downfall of Prussia, 1600-1947* (Penguin, 2007) 556; Katja Hoyer, *Blood and Iron: The Rise and Fall of the German Empire 1871-1918* (The History Press, 2022).

⁶ Robert Holub, *Nietzsche in the Nineteenth Century* (University of Pennsylvania Press, 2018) 125.

⁷ *ibid* 126.

⁸ *ibid*.

bourgeois were ruining the spiritual heart of Germany.⁹ But in addition to the concern of cultural elites was the rise of the ‘social question’. Rapid industrialisation transformed the proletariat into a significant economic and political power.¹⁰ By 1890, the Social Democrat party received over 1.4 million votes, making it a major power in the German Parliament.¹¹

Politically and intellectually, older ideas of the absolute sovereignty of monarchs were giving way to what Nietzsche would contemptuously describe as modern ideas: liberalism, democracy, utilitarianism, and capitalism. Alongside the emergence of a mainstream liberalism, Nietzsche was also a contemporary to the arrival of the various streams of socialism, feminism, anarchism,¹² Marxism,¹³ and nihilism.¹⁴ An important unifying factor of these currents was the transition to a material explanation of the world instead of an idealist one.¹⁵ Supporting this development was the rise of positivist science.

Rejecting the reliance on metaphysics, science sought, through the privileging of the observing eye and empiricism, to offer a true account of reality through revealing materialistic processes. The scope of science became extremely wide, ranging from chemistry, to physics, to astronomy, but perhaps the most (socially) destabilising scientific trend were the Darwinian¹⁶ and natural scientists.¹⁷ Upturning

⁹ Bryan Magee, *Wagner and Philosophy* (Penguin, 2001).

¹⁰ Holub (n 6) 127.

¹¹ *ibid* 128.

¹² This included such figures as Emma Goldman (Emma Goldman, ‘Anarchism: What it Really Stands For’ in Robert Hoffman (ed), *Anarchism as Political Philosophy* (Routledge, 2017) 34, 40.); Pierre-Joseph Proudhon (Pierre-Joseph Proudhon, *What is Property?* (Critical Editions, 2022)), and Mikhail Bakunin (Mikhail Bakunin, *Statism and Anarchy* (CUP, Revised edn, 2014)).

¹³ Surprisingly, Nietzsche never made explicit mention of Marx or his ideas in his published or unpublished works.

¹⁴ Nietzsche was not the first to think of or engage with nihilism. Russian nihilism, being explored and critiqued by Dostoevsky, was an important source of inspiration for Nietzsche, especially the former’s *House of the Dead* and *The Idiot*. For a discussion of the relationship between the two famous authors, see: Jeff Love, Jeffrey Metzger (eds), *Nietzsche and Dostoevsky: Philosophy, Morality, Tragedy* (Northwestern University Press, 2017). For a wider discussion of nihilistic thought before Nietzsche, see: Michael Allen Gillespie, *Nihilism before Nietzsche* (University of Chicago Press, 1996).

¹⁵ An important progenitor of this transition (and influence upon Wagner) was Feuerbach and his *The Essence of Christianity* (Dover Philosophical Classics, 2008) and *Principles of the Philosophy of the Future* (Hackett Classics, 1986). An early influence upon Nietzsche in this respect (and providing a robust criticism of Schopenhauer) was Lange’s *History of Materialism* (Friedrich Albert Lange, *History of Materialism and Criticism of its Present Importance* (Legare Street Press, 2022)) – a text that took up a Neo-Kantian position, restressing the epistemological limits of human faculties and the dangers of overstepping them. For a commentary on Nietzsche’s early engagement with Lange, see: Daniel Blue, *The Making of Friedrich Nietzsche: The Quest for Identity, 1844-1869* (CUP, 2018) 241-243.

¹⁶ Charles Darwin, *On the Origin of Species* (Capstone, 2019).

¹⁷ Holub (n 6) 313-359.

established creation myths, humanity's separation from the animal world, and political progress narratives, evolutionary accounts of life were an intellectual earthquake. Instead of metaphysics and rationalism, core issues that had vexed philosophers for millennia (such as morality) might be explainable through evolutionary accounts.¹⁸ These developments were rapidly politicised. Social Darwinism, such as that developed by Herbert Spencer,¹⁹ would use evolutionary theory to justify the hegemony of the emerging white bourgeois class from which he belonged, as well as the misery of those who were on the sharp end of the new capitalistic system.

While each of these developments marked Nietzsche, none of them were so important as the dual influencers of Wagner and Schopenhauer. Wagner, by the time Nietzsche encountered him in 1868, was an international celebrity and one of the leading composers of his day.²⁰ As a young man, Wagner had been heavily influenced by Feuerbach and anarchist thought, despising the economic and political corruption he saw around him.²¹ By his mature period, he had shifted his philosophical allegiance to Schopenhauer. Disillusioned with the possibility of political change and seized by a growing sensibility that the violence he saw in the world was perennial, Schopenhauer offered him a philosophical expression of his deepest instincts.²² Operas such as *Tristen und Isolde* and *Parsifal* are heavily marked by this encounter with Schopenhauer.²³ Even *The Ring*, while initially written under the aegis of his Feuerbachian principles, was later transformed by Wagner to reflect the futility of progressivism and the need to deny the will to live.²⁴ Believing that German culture had become

¹⁸ An example of this was the work of Nietzsche's own friend, Paul Rée in his *Origins of Moral Sensations*.

¹⁹ See: Jeffrey O'Connell, Michael Ruse, *Social Darwinism* (CUP, 2021) Chapter 4.

²⁰ For a recent discussion of the relationship between Nietzsche and Wagner, see: Ryan Harvey, Aaron Ridley, *Nietzsche's The Case of Wagner and Nietzsche Contra Wagner: A Critical Introduction and Guide* (Edinburgh University Press, 2022). See also the discussion of how Wagner and Nietzsche's conceptions of love diverged, in Jeremy Fortier, *The Challenge of Nietzsche: How to Approach His Thought* (University of Chicago Press, 2020) Chapter 1.

²¹ Magee (n 9) 421.

²² *ibid* 128. See also: Kevin Karnes, Andrew Mitchell, 'Schopenhauer's Influence on Wagner' in Robert Wicks (ed), *Oxford Handbook of Schopenhauer* (OUP, 2020) 517.

²³ See in particular Scruton's discussion of *Parsifal*: Roger Scruton, *Wagner's Parsifal: The Music of Redemption* (Penguin, 2021).

²⁴ Magee (n 9) 186.

This thesis is also powerfully set out by Nietzsche himself in *The Case of Wagner* in division 4. For commentaries on Wagner's *The Ring*, see: Nicholas Vazsonyi, Mark Berry (eds), *The Cambridge Companion to Wagner's Der Ring des Nibelungen* (CUP, 2020).

degraded and was in jeopardy from alien elements, Wagner envisaged his new tragic opera reenergising and bringing forth the German soul.²⁵

Arthur Schopenhauer was a merchant's son who turned away from a mercantile career to study philosophy. He taught briefly at Heidelberg but, from deliberately holding his classes at the same time as Hegel, attracted few students and was soon dismissed. Holding a bitter grudge against Hegel (in particular) and academic institutions (in general), Schopenhauer spent the rest of his life as a private intellectual, supported by the fortune left to him by his father.²⁶ His philosophical system was set out in his early text *The World as Will and Representation*.²⁷ Much of Nietzsche's engagement with ethics, epistemology, and ontology can be read as an engagement with this philosophical system,²⁸ making it important to explain it in some detail.

The World as Will and Representation is composed of a nexus between Kantian philosophy, Platonism, Christianity, and Hinduism.²⁹ Following Kant, Schopenhauer argued that the human mind had a particular structure and did not perceive the 'thing-in-itself'. Unlike Kant, however, Schopenhauer believed that we could deduct the core attributes of the 'noumenon'. This was to be done by abstracting every attribute of human phenomenal experience from reality.³⁰ All that is left, he argued, was a force called 'will'.

As Schopenhauer described it, 'Will is the innermost essence, the kernel, of every particular thing and also of the whole.'³¹ The Will is in everything, and the only distinction between a human and a rock is the degree to which the Will is manifested. This is not to say that a human contains *more* Will

²⁵ Magge (n 9) 422.

²⁶ For an overview of Schopenhauer's life, see: Bertrand Russel, *History of Western Philosophy* (Routledge, 1996) 681.

²⁷ Arthur Schopenhauer, *The World as Will and Representation, Vol 1* (Dover Publications, 2000).

²⁸ For examples of this argument, see: Robert Wicks, 'Schopenhauer: Nietzsche's Antithesis and Source of Inspiration' in Tom Stern, *The New Cambridge Companion to Nietzsche* (CUP, 2019) 72.

²⁹ For general introductions to Schopenhauer's philosophy, see: Christopher Janaway, *Schopenhauer* (OUP, 1994); Julian Young, *Schopenhauer* (Routledge, 2005); Robert Wicks, *Schopenhauer* (Blackwell Publishing, 2008).

For a discussion of this latter element, see: R. Raj Singh, 'Schopenhauer and Hindu Thought' in Robert Wicks (ed), *The Oxford Handbook of Schopenhauer* (OUP, 2020) 380.

³⁰ Arthur Schopenhauer, R.J Hollingdale (translator), *Essays and Aphorism* (Penguin, 1976) 106. Wicks (n 28) 41.

For a discussion of Schopenhauer's continuing Kantian imagination, see: Sandra Shapshay, 'The Enduring Kantian Presence in Schopenhauer's Philosophy' in Robert Wicks (ed), *The Oxford Handbook of Schopenhauer* (OUP, 2020) 111.

³¹ Schopenhauer (n 27) 110. Wicks (n 28) 53.

than the rock. In each ‘phenomena’ the entire Will is present. Rather, it is a question of what Schopenhauer terms the Will’s ‘objectification’.³² Objectification is Schopenhauer’s rendition of Plato’s forms.³³ Like Plato’s forms, the Will has a series of increasingly complex ‘ideas’ which are objectified in reality.³⁴ The lowest objectification of the Will are the foundational physical forces, like gravity and mass.³⁵ The highest objectification is the human being and personality.³⁶ While *individual* people can come and pass away, the *idea* of the human, as the highest degree of objectification, remains unaltered.

The relationships between the objectifications of the Will are not necessarily peaceful. Each manifestation of the Will strives for its fullest objectification. On the organic level, this will produce conflict as each objectification seeks possession of existing matter to enable its full realisation - think of trees competing for light and nutrients from the soil.³⁷ Generally speaking, the higher Idea will subdue inferior Ideas, bending and subduing them to its Will. This does not mean the *destruction* of lower ideas. They will continue to manifest their nature but subordinated to the higher tyranny of the reigning Idea.³⁸ It is not, therefore, the case that the Idea of humanity exists independently from the rest of reality. Rather, all the Ideas of matter, right down to the inorganic forces of physics, are manifested within it.³⁹ It is a culmination. Through the organisation and layering of its Ideas, the *power* of the Will is increased.⁴⁰ However, even though lower Ideas are subdued in the generation of the higher objectifications, this enslavement is always precarious. The drive to realise their objectification to its fullest extent – not to be subdued to any extent – continues to push against the Will of the higher organisation.⁴¹ Eventually, from the constant pressure of maintaining its hegemony, the body perishes. The ‘subdued forces of nature win back from the organism, wearied even by

³² Schopenhauer (n 27) 128.

³³ *ibid* 129.

³⁴ *ibid* 130.

³⁵ *ibid*.

³⁶ *ibid* 131.

³⁷ *ibid* 148.

³⁸ *ibid* 144.

³⁹ *ibid* 153.

⁴⁰ *ibid* 146.

⁴¹ *ibid*.

constant victory, the matter snatched from them, and attain to the unimpeded expression of their being.⁴²

In this struggle between objectifications, there is no end point or logical goal. The violence will continue perpetually.

[N]owhere is there a goal, nowhere a final satisfaction, nowhere a point of rest... everywhere the many different forces of nature and organic forms contest with one another for the matter in which they desire to appear, since each possesses only what it has wrested from another. Thus a constant struggle is carried on between life and death, the main result whereof is the resistance by which that striving which constitutes the innermost nature of everything is impeded. It presses and urges in vain; yet by reason of its inner nature, it cannot cease; it toils on laboriously until this phenomenon perishes...⁴³

This constant violence – the repetitive and endless formation and breaking apart of objectifications – led Schopenhauer to believe that all life was, effectively, pointless.⁴⁴ That the human being, the most complex of all the Will's objectifications, must eventually crumble to dust and be annihilated, 'is nature's unambiguous declaration that all the striving of this will is essentially vain.'⁴⁵ It also meant that '*all life is suffering*'.⁴⁶ By 'suffering' Schopenhauer had a very particular definition in mind. Suffering arises through an obstacle being placed before our obtainment of some desired goal. The realisation of the goal is happiness.⁴⁷ Because the Will is a constantly driving force without end, it necessarily follows that no goal – no stasis – is possible. Each obtained goal will immediately be smothered by a new sense of suffering.⁴⁸

⁴² *ibid.*

⁴³ *ibid* 309.

⁴⁴ Wicks (n 28) 83.

⁴⁵ Schopenhauer (n 30) 54.

⁴⁶ Schopenhauer (n 27) 310.

⁴⁷ *ibid* 309.

⁴⁸ *ibid.*

For a discussion of Schopenhauer's description of boredom, see: Joshua Isaac Fox, 'Schopenhauer on Boredom' (2022) 30(30) *British Journal for the History of Philosophy* 477.

To complete his gloomy picture of life, Schopenhauer believed that egoism was an unavoidable quality of being. As composed of Will, each objectification necessarily strives for the fullest realisation of its *own* being and to play the master. It wants to subdue, control, and dominate. An objectification only experiences the world in terms of what is useful and harmful to it – and what it can possess. The degree to which this egoism expresses itself depends upon the height of the Idea. At its lowest levels, such as that of vegetative life, it is quite limited. A tree only wants and needs so much to live. But with the human being – the highest of all Ideas – the extent of the appropriative impulse is possibly unlimited. ‘[E]veryone wants everything for himself, wants to possess, or at least control, everything, and would like to destroy whatever opposes him.’⁴⁹ This inherent egoism renders the human as something reprehensible. They are the apogee of the Will, in which the infliction and experience of suffering is at its height. The human is the *guiltiest* of creatures, and this guilt – the guilt of the whole impulse to life - is confirmed in death.

[T]hey [humanity] must be originally and in their essence sinful and reprehensible, and the entire will to live itself reprehensible. All the cruelty and torment of which the world is full is in fact merely the necessary result of the totality of the forms under which the will to live is objectified, and thus merely a commentary on the affirmation of the will to live. That our existence itself implies guilt is proved by the fact of death.⁵⁰

The sinful nature of the human and of life itself led Schopenhauer to his life-denying ethics. If the Will is reprehensible, causing nothing but suffering, then it is a *mistake*. The Will must be *denied*. The denial of the Will comes, first, through an act of perception. This perception is that all life is essentially one. While we may represent distinct Ideas of the Will, all life is, nevertheless, part of that Will. Only human reason is capable of this: it is the Will itself becoming *self-aware*, realising what it is. The perpetual war of the Will’s objectifications, the mutual infliction of suffering, is a great act of

⁴⁹ Schopenhauer (n 27) 332.

⁵⁰ Schopenhauer (n 30) 63.

self-harm. It is the Will sinking its teeth into its own flesh. ‘Tormentor and tormented are one.’⁵¹ This realisation may lead to philanthropic and socialistic acts, attempts to curb the masochistic violence of the Will. But this can never be enough. Being *alive* is still to will. No matter how much we combat the violence of life, no matter how virtuous we are, it will never be enough, *because life itself is the problem*. The only permanent solution is the practice of *ascetic* values, to completely deny the will.⁵²

The use of ‘asceticism’ to describe these values was not an idle one. Schopenhauer finds much to praise in the ascetic lifestyle. In the denying the Will, the ascetic mortifies the objectification of their body. It is starved and weakened, lest it grow too strong and be excited by the passions of a healthy body. The ascetic ‘resorts to fasting, and even to self-castigation and self-torture, in order that, by constant privation and suffering, he may more and more break down and kill the will that recognises and abhors as the source of his own suffering existence and the world’s.’⁵³ But this does not mean that the individual should kill themselves – that would be an act of violence, of Will. The true ascetic principle is that of the Buddhist *Nirvana*,⁵⁴ to deny the Will, to transition to a state of nothingness.⁵⁵

As we will see, Nietzsche took Schopenhauer’s deification of nothingness and his ascetic values as representative of the malaise corrupting. Dionysus against the Crucified can, with some license, be rewritten as Nietzsche against Schopenhauer.

Biography

The future ‘antichrist’ had an unlikely origin.⁵⁶ As one commentator noted, he ‘could hardly have been born more comfortably embedded in the church and state’.⁵⁷ Friedrich Wilhelm Nietzsche

⁵¹ Schopenhauer (n 27) 354.

⁵² *ibid* 380.

For a discussion of the praxis of denying the will, see: Livia Ribeiro, ‘The Ways of Denial of the Will in Schopenhauer’ (2016) 7(2) *Voluntas* 64.

⁵³ Schopenhauer (n 27) 382.

⁵⁴ For the influence of Eastern thought on Schopenhauer, see: Arati Barua, Michael Gerhard, Matthias Kossler (eds), *Understanding Schopenhauer Through the Prism of Indian Culture, Philosophy, Religion, and Sanskrit Literature* (De Gruyter, 2013).

⁵⁵ Schopenhauer (n 30) 61.

⁵⁶ For a detailed examination of Nietzsche’s family life, see: Graham Parkes, ‘Nietzsche and the Family’ in Ken Gemes, John Richardson (eds), *The Oxford Handbook of Nietzsche* (OUP, 2016) 19.

⁵⁷ R.J. Hollingdale, *Nietzsche: The Man and His Philosophy: revised edition* (CUP, 2014) 82.

(named after the Prussian king) was born on the 15th of October 1844 at Rocken, a parish near Leipzig.⁵⁸ The family home was a particularly religious one. His father, Karl Ludwig, was the pastor of Rocken, and his mother Franziska Oehler, was the daughter of a priest.⁵⁹ Nietzsche's sister, Therese Elisabeth Alexandra (Elisabeth), was born in 1846.

Following the death of Karl Ludwig 1849, the family moved to the city of Naumberg where Nietzsche began to attend school.⁶⁰ He was first sent to the Municipal School in Naumberg, before moving to the *Dom Gymnasium*, a cathedral school. Notwithstanding the poor quality of these institutions and his family's limited social connections,⁶¹ Nietzsche was successful at securing a scholarship at Schulpforta, the leading classical school in the German bund.⁶² At Schulpforta, Nietzsche discovered a particular talent for classical philology - the beginning of his long obsession with ancient Greece and the classical world.⁶³

After briefly attending Bonn as a theology student, Nietzsche transferred to Leipzig to study philology. The decision was (initially) a beneficial one. He was enthusiastic about the work, his teachers were impressed within him, and he helped establish a philology society. In doing so, Nietzsche discovered a gift for pedagogy (his joy, if not need, for students and disciples would prove disastrous in his future relationships). It was also at Leipzig that two crucial influences entered Nietzsche's life. The first was the philosophy of Arthur Schopenhauer. His student letters of this period are dominated by references to the philosopher. Even the event of a close friend suffering a bereavement is an opportunity to discuss the 'negation of the will'⁶⁴. The second influence, that fundamentally altered his life's trajectory, was that of Wagner.⁶⁵ Wagner was a passionate proponent of Schopenhauer and planned to use that philosophy in a crusade to (in his mind) revitalise German

⁵⁸ Blue (n 15) 27; Sue Prideaux, *I am Dynamite! A Life of Friedrich Nietzsche* (Faber, 2018) 10. For other biographical treatises on Nietzsche, see: Julian Young, *Friedrich Nietzsche: A Philosophical Biography* (CUP, 2010); Ronald Hayman, *Nietzsche: A Critical Life* (Phoenix Giants, 1995).

⁵⁹ Hollingdale (n 57) 9.

⁶⁰ Prideaux (n 58) 13.

⁶¹ Blue (n 15) 37, 58-59.

⁶² Much of this is owing to Franziska's efforts and the fact that Schulpforta had a number of scholarships available for the sons of deceased ministers. *ibid* 78.

⁶³ Probably the most detailed account of Nietzsche's years at Schulpforta that we have is that of Blue. See: *ibid* 93-177.

⁶⁴ 'Letter to Carl von Gersdorff January 16th, 1867' in Friedrich Nietzsche, Christopher Middleton (ed), *Selected Letters of Friedrich Nietzsche* (Hackett Classics, 1997) 19.

⁶⁵ Nietzsche narrated his first meeting with Wagner in a letter to Erwin Rohde. *ibid* 'November 9th, 1868' 35.

culture. Nietzsche was enthralled by the sense of higher purpose embodied by Wagner and rapidly became disillusioned with philology. He complained in his letters of the ‘seething brood of the philologists’ of his time who ‘every day having to observe all their moleish pullulating, the baggy cheeks and blind eyes’ failed to consider ‘the urgent problems of life’.⁶⁶ There was also a frustration at the limitations of scholarly research and the desire to leave a mark on the pages of history. As he wrote later: ‘I also realize what Schopenhauer’s doctrine of university wisdom is all about. A completely radical doctrine for *truth* is not *possible* here. Above all, from here nothing really revolutionary can come.’⁶⁷

These frustrations found an outlet following Nietzsche appointment as Professor of Classical Philology at Basel university (at the age of just 25).⁶⁸ Wagner was then living close by and invited Nietzsche to frequently visit him (at his house called Tribschen). Nietzsche was fawning in his adulation: ‘How long have I intended to express unreservedly the degree to which I feel grateful to you; because indeed the best and loftiest moments of my life are associated with your name...’⁶⁹ But more importantly, Nietzsche quickly adjusted his academic projects to fit the aim Wagner laid out for him at Tribschen – to become a ‘Walking Hope’.⁷⁰ The result was *The Birth of Tragedy*,⁷¹ a book that applied Wagnerite thinking to the problems of classical drama. In a triumphant letter to Wagner, Nietzsche predicted the entire upending of philology.⁷² The result was not as he had hoped: complete silence from the philological community and then censure.⁷³

This disappointment was followed by a rapid disintegration in Nietzsche’s health during the fallout of his involvement in Prussia’s military conflicts. Nietzsche, as a student, had enthusiastically

⁶⁶ *ibid* ‘Letter to Erwin Rohde, November 20th 1869’ 41. He also suggested in some unsent fragments that his movement into philology (with its objectivity) was merely a temporary need to control his rapidly changing interests and temperament. *ibid* 47.

⁶⁷ *ibid* ‘Letter to Erwin Rohde, December 15th, 1870’ 73. For Nietzsche’s growing apathy towards philology, see: Blue (n 15) 293-313.

⁶⁸ For a series of essays exploring the importance of Nietzsche’s exposure to the classics and his time as a philologist, see: Paul Bishop, *Nietzsche and Antiquity: His Reaction and Response to the Classical Tradition* (Boydell & Brewer, 2004).

⁶⁹ Nietzsche, Middleton (n 64) ‘Letter to Richard Wagner, May 22nd, 1869’ 53.

⁷⁰ *ibid* ‘Letter to Erwin Rohde, February 15th, 1870’ 62.

⁷¹ Friedrich Nietzsche, Shaun Whiteside (translator), *The Birth of Tragedy: Out of the Spirit of Music* (Penguin, 1993).

⁷² Nietzsche, Middleton (n 64) ‘Letter to Richard Wagner, January 2nd, 1872’ 91.

⁷³ *ibid* ‘Letter to Erwin Rohde, October 25th, 1872’ 103.

followed the Austrian-Prussian conflict and had complained of the dishonour of sitting by ‘while the fatherland is beginning a life-and-death struggle’.⁷⁴ He joined (boastfully)⁷⁵ a mounted artillery regiment, but was rapidly injured in a training exercise. Later, in the 1870s, he participated in the Franco-Prussian war as a stretcher-bearer. The experience would prove traumatic. His letters recount ‘terribly devastated’ battlefields, ‘scattered all over with countless mournful remains and reeking with corpses’,⁷⁶ and attending men with ‘shattered bones’ and gangrene.⁷⁷ The experience proved a grim encounter with the realities of German nationalism. Nietzsche himself eventually fell victim to dysentery and diphtheria. The doctors’ administrations of silver nitrate left Nietzsche’s digestive system permanently damaged.

The collapse in his health and the failure of his writings provoked Nietzsche into retiring from his Professorship and to break with Wagner.⁷⁸ In later life he was at pains to describe the crisis of this event. ‘The decision that was taking shape in me at that time was not just a break with Wagner – I was registering a general aberration of my instinct, and individual mistakes, whether Wagner or my professorship in Basle, were only a sign.’⁷⁹ His previous practice of philology and speculative metaphysics were leading him away from what he considered his true nature: ‘[c]rawling through ancient metricians with meticulous precision and bad eyes – things had got that bad with me! With a look of pity I saw how utterly emaciated I was, how I had wasted away’.⁸⁰ ‘Any kind of life’ would, he maintained, be ‘preferable to that unworthy selflessness’ which he had fallen into.⁸¹ The break from philology, he thought, gave him the space to realise his own thought.

⁷⁴ *ibid* ‘Letter to Franziska and Elisabeth Nietzsche, end of June, 1866’ 13.

⁷⁵ *ibid* ‘Letter to Carl von Gersdorff, December 1st, 1867’ 29.

⁷⁶ *ibid* ‘Letter to Franziska Nietzsche, August 29th, 1870’ 67.

⁷⁷ *ibid* ‘Letter to Richard Wagner, September 11th, 1870’ 68.

⁷⁸ Nietzsche always retained a fascination for Wagner. ‘Now that I am speaking of the relaxations in my life, I need to say a word to express my gratitude for what has been by far my most profound and cordial relaxation. Without a shadow of a doubt this was my intimate association with Richard Wagner. It would cost me little to forsake the rest of my human relationships, but not at any price would I part with the Tribschen [Wagner’s house near Basel] days from my life.’ Friedrich Nietzsche, Duncan Large (translator), *Ecce Homo: How To Become What You Are* (OUP, 2009) 27.

⁷⁹ *ibid* 57.

⁸⁰ *ibid*.

⁸¹ *ibid* 58.

All by themselves my eyes put an end to all bookwormery, otherwise known as philology: I was released from the 'book', and read nothing more for years – the *greatest* favour I have ever done myself! – That nethermost self, as if buried alive, as if made mute beneath the constant *need* to pay heed to other selves... awoke slowly, shyly, hesitantly – but finally it *spoke again*.⁸²

This urge to realise his own thought led Nietzsche to live what can only be describe as a miserable life. Between the migraines and nausea that frequently incapacitated him, lack of any success with his publications, and his deepening isolation, Nietzsche was often suicidal. He described himself (to one of his few remaining friends) as lacking all interests, depressed with 'a motionless black melancholy';⁸³ 'the barrel of a revolver is for me now a source of relatively pleasant thoughts... My whole life has crumbled under my gaze'.⁸⁴

What kept Nietzsche going was a sense of purpose carried over from his fascination from Wagner. He described this in fatalistic terms:

I am hard at work too; and the outlines of an unquestionably immense task before me are emerging more and more clearly from the mists. There were dark moments meanwhile, whole days and nights when I did not know how to go on living... Nevertheless, I know that I cannot escape by going backward or to the right or to the left; I have no *choice*.⁸⁵

To complete this mission was mandated by his body itself – its dominating passion, the '*task* of which one is the involuntary missionary.'⁸⁶ In order to realise the results of what this passion willed, to remove conflicting 'foreign' instincts, he felt compelled to ever deeper solitude, to a 'still more

⁸² *ibid*.

Nietzsche's obsession with self-realisation can be tracked right through to his youth and to several essays he wrote at Schulpforte ('Fate and History' and 'Freedom of Will and Fate'. See: Blue (n 15) 132-137.

⁸³ Nietzsche, Middleton (n 64) 'Letter to Franz Overbeck, March 24th, 1883' 210.

⁸⁴ *ibid* 'Letter to Franz Overbeck, February 11th, 1883' 206.

⁸⁵ *ibid* 'Letter to Franz Overbeck, February 3rd, 1888' 282.

⁸⁶ *ibid* 'Letter to Carl Fuchs, December 14th, 1887' 280.

intense *depersonalisation*.⁸⁷ This task, as Nietzsche came to describe it, was the ‘*revaluation of all values*’.⁸⁸ By the end of his sane life, the importance of this revaluation had been transfigured into an acute moment of destiny for the entire human race. He was ‘dynamite’, in whose wake humanity would be split in two – the most ‘radical revolution that mankind has known’.⁸⁹

Perhaps unsurprisingly, the end of Nietzsche’s life was not a happy one. After a decade from leaving Basel, Nietzsche settled in Turin (the aristocratic architecture appealed to him).⁹⁰ Towards the end of 1888, his mental health became erratic, and he collapsed in the streets. From 1893, Nietzsche was largely cared for by Elizabeth. She quickly set about establishing what became known as the Nietzsche Archive that would secure her brother’s legacy (and promote her own nationalistic, anti-Semitic politics).⁹¹ Nietzsche would eventually suffer a number of strokes, passing away on the 25th of August, 1900.⁹²

Nietzsche’s stigmata and method

Now that we know who Nietzsche was and the world in which he lived and thought, we can turn to what his objectives were in philosophising. This question has not always been in the forefront of the analytical Nietzschean scholar’s attention. Too often they jump straight to identifying a core doctrine and then organise the rest of his philosophy around it.⁹³ While this does capture some core aspects of Nietzsche’s thought, it fails to explain why such themes and doctrines had relevancy for Nietzsche.⁹⁴ The *purposes* of a Nietzschean analysis remain ambiguous. This deficiency is explained by Reginster. For him, ‘[t]he systematicity of [Nietzsche’s] philosophy... is determined not by a central philosophical doctrine, but by the requirements of his response to a particular crisis in late modern

⁸⁷ *ibid.*

⁸⁸ *ibid.* ‘Letter to Paul Deussen, September 14th, 1888’ 310.

⁸⁹ *ibid.*

⁹⁰ *ibid.* ‘Letter to Peter Gast, April 7th, 1888’ 290.

⁹¹ *ibid.*

⁹² *ibid.* 364.

⁹³ See, for example: Richard Schacht, *Nietzsche* (Routledge, 1983).

⁹⁴ Bernard Reginster, *The Affirmation of Life: Nietzsche on the Overcoming of Nihilism* (HUP, 2006) 3.

European culture.⁹⁵ This crisis, for Reginster, is that of nihilism.⁹⁶ The following sections will explain the contours of what Nietzsche understood by nihilism and what he considered the task of his (eventual) philosophy to be.

The ascetic ideal and its many guises

Nietzsche's engagement with nihilism begins with the 'ascetic ideal'.⁹⁷ Probably inspired by Schopenhauer's own use of asceticism, the ascetic ideal is what he took to be at the heart of the European illness. The ideal has an outer and an inner logic. Externally, it is the need for truth, an unconditional, absolute meaning of life.⁹⁸ Anything in flux, anything that grows and decays and perishes, is reviled. The ideal is also hegemonic and tyrannical – *its* truth must be a truth for all. It unquestioningly believes in its superiority over all other values and that for anything to have worth, it must be for its benefit, its purpose.⁹⁹ But peering past the surface of the ascetic ideal and into its hidden depths, one can see that its inner logic is the *need for meaning*.

The ascetic ideal simply means that *something was lacking*, that Man was surrounded by a tremendous *void* – he did not know how to justify himself, to explain himself, to affirm himself; he *suffered* from the problem of his own meaning.¹⁰⁰

It is not suffering itself that has plagued humanity but '*suffering absent meaning* – and the ascetic ideal supplied that want. It closed the door on suicide, saving the will to life.¹⁰¹ While the ascetic

⁹⁵ *ibid* 4.

⁹⁶ *ibid*.

⁹⁷ Friedrich Nietzsche, Michael Scarpitti (translator), *On The Genealogy of Morals: A Polemic* (Penguin, 2013) 83.

⁹⁸ *ibid* 142.

⁹⁹ *ibid* 131.

¹⁰⁰ *ibid* 144.

¹⁰¹ *ibid* 144-145.

values are indeed hostile to life, as we will see, they did preserve a life at the depths of its illness.¹⁰²

Humanity, Nietzsche tells us, ‘will desire *oblivion* rather than not desire *at all*.’¹⁰³

Over the course of Europe’s history, the ascetic ideal has taken on many guises and seeped into almost every corner of the western mind. Take the philosophical tradition. From Plato to Schopenhauer, Nietzsche identified a continuing obsession and valorisation of the unconditioned. For philosophers, ‘[d]eath, change, age, as well as procreation and growth, are for them objections – refutations even. What is, does not *become*; what becomes, *is not*.’¹⁰⁴ Everything of any value must be *causa sui*; to originate out from something is to throw it into question.¹⁰⁵

Science, too, which considers itself as undermining both religion and metaphysics is, likewise, not opposed to the ascetic ideal, but ‘its most intellectualised offspring, its most front-line troops and scouts, its most insidious, delicate and elusive form of seduction’.¹⁰⁶ Science still believes in *truth*; that truth is ‘divine’ and that if the individual sufficiently effaces themselves, becomes an objectively seeing eye (and nothing besides) then truth can be obtained.¹⁰⁷ In becoming more subtle, in casting off the claims to an alternate, higher reality in both Christianity and metaphysics, science has only strengthened the ascetic ideal. The cloak of realism has enabled it to become ‘more elusive, more abstract, more insidious’.¹⁰⁸ Science may have broken down the outer-fortifications and battlements of the ascetic ideal, but these walls were mere distortions and the destruction no real threat. The wielder of the hammer *is* the ascetic ideal, and in delivering the blows it conceals itself again.¹⁰⁹

Nihilism

¹⁰² While the ideal is not *life affirming*, it nevertheless *preserves* life – however ill. See: Lawrence Hatab, ‘How Does the Ascetic Ideal Function in Nietzsche’s Genealogy?’ (2008) 35 *Journal of Nietzsche Studies* 106, 109.

¹⁰³ Nietzsche, *Genealogy* (n 97) 145.

That is meaning and not suffering that is central to Nietzsche’s thought is supported by Gemes and Sykes. See: Ken Gemes, Chris Sykes, ‘The Culture of Myth and the Myth of Culture’ in Julian Young (ed), *Individual and Community in Nietzsche’s Philosophy* (CUP, 2014) 51.

¹⁰⁴ Friedrich Nietzsche, R.J. Hollingdale (translator), *Twilight of the Idols* and *The Anti-Christ* (Penguin, 1990) 45.

¹⁰⁵ *ibid* 47.

¹⁰⁶ Nietzsche, *Genealogy* (n 97) 134. See also: Christopher Janaway, *Beyond Selflessness: Reading Nietzsche’s Genealogy* (OUP, 2007) 230.

¹⁰⁷ Nietzsche, *Genealogy* (n 97) 135.

¹⁰⁸ *ibid* 138

¹⁰⁹ *ibid*.

For Nietzsche, the ascetic ideal is based on a hatred of life and nihilism. As he states in no uncertain terms.

We can no longer conceal from ourselves precisely *what* this will, under the direction of the ascetic ideal, expresses, which is a hatred of anything human, animal or material; abhorrence of the senses, of reason itself; fear of happiness and beauty; the desire to escape from all illusion, change, growth, death, wishing, even from desiring itself – all this means – let us have the courage to confront it – *a wish for oblivion*, an aversion to life, a repudiation of everything vital to existence.¹¹⁰

The ascetic ideal is heading for disaster. This disaster will arrive when the ascetic ideal undermines itself. That same love of truth informing the ideal will subject truth itself to examination.¹¹¹ This will be the conclusion of the ‘great hundred-act play’¹¹² in which the ascetic ideal, the belief in truth and God, is destroyed. This moment of self-realisation will be the harbinger of what he styled ‘nihilism’.¹¹³ Humanity will find itself stranded in a world of power and becoming which, as paradigmatically expressed in Schopenhauer’s philosophy, it has learnt to despise as evil.¹¹⁴ Once again, humanity will lack a meaning.

Nietzsche was not the first to announce the death of God. The German Romantics, including Hölderlin, Novalis, and Schlegel, had reflected upon the loss of Christian faith and the need to establish a new mythology to bind the *volk* together;¹¹⁵ Feuerbach’s landmark *Essence of*

¹¹⁰ *ibid* 145. See also: Friedrich Nietzsche, R.J. Hollingdale (translator), *Thus Spoke Zarathustra* (Penguin, 1974) 59.

¹¹¹ Nietzsche, *Genealogy* (n 97) 136.

¹¹² *ibid*.

¹¹³ Hollingdale echoes this position. Hollingdale (n 57) 2-3.

¹¹⁴ Take the comments in Reginster: ‘Nihilism – the claim that life is meaningless – is thus the conclusion of an implicit reasoning that comprises two premises: the death of God, or the conviction that the highest values cannot be realised, and the negation of life, which is the stance motivated by the endorsement of life-negating values.’ Reginster (n 94) 49.

See also: Robin Small, ‘Being, Becoming, and Time in Nietzsche’ in Ken Gemes, John Richardson (eds), *The Oxford Handbook on Nietzsche* (OUP, 2016) 629.

¹¹⁵ See: Ethel Matala de Mazza, ‘Romantic politics and society’ in Nicholas Saul (ed), *The Cambridge Companion to German Romanticism* (CUP, 2009) 191.

*Christianity*¹¹⁶ had argued that religion was a projection of human nature; and the rise of the life-sciences and Darwinian evolution had undermined the Christian founding story of Eden. Finally, and importantly for Nietzsche, both Schopenhauer and Wagner had argued that life was solely suffering and without redemption. Efforts by the early neo-Kantians attempted to reconcile Kantian epistemology with the new scientific breakthroughs,¹¹⁷ while political thinkers, such as Herbert Spencer, strove to justify extant (white, morally Christian) society as mandated by evolution.¹¹⁸

Such efforts, for Nietzsche, failed to properly weigh the full significance of the death of God. Paradigmatic of Nietzsche's position is an early essay in which he attacks David Strauss. Strauss had professed to no longer being a Christian, yet nevertheless propounded a secular Christian ethics based upon vague scientific laws.¹¹⁹ For Nietzsche, this position is untenable and doomed to founder. The death of God is a moment of crisis, of disorientation, of anguish.

What did we do when we unchained this earth from its sun? Where is it heading? Where are we heading? Away from all suns? Are we not constantly falling? Backwards, sideways, forwards, in all directions? Is there still an above and below? Are we not straying as through an infinite nothingness? Do we not feel the breath of empty space?... God is dead! God remains dead!¹²⁰

In the Death of God and the moment of nihilism, humanity loses its meaning. It is where 'there is no goal, no answer to the question: why?';¹²¹ when '*the highest values devalue themselves*.'¹²² Humanity

¹¹⁶ Feuerbach, *The Essence of Christianity* (n 15).

¹¹⁷ See in particular the influential Lange (n 15).

¹¹⁸ Herbert Spencer, *Social Statistics* (Wentworth Press, 2019).

¹¹⁹ Friedrich Nietzsche, 'David Strauss, the Confessor and Writer' in Friedrich Nietzsche, Daniel Breazeale (ed), R.J. Hollingdale (translator), *Friedrich Nietzsche: Untimely Meditations* (CUP, 1999) 31.

¹²⁰ Friedrich Nietzsche, R. Kevin Hill (translator), *The Joyous Science* (Penguin, 2018) 133-134.

Nietzsche's concern with nihilism following the death of God, and the attempt to overcome that nihilism, is frequently taken as fundamental to his work. See: Nandita Biswas Mellamphy, *The Three Stigmata of Friedrich Nietzsche: Political Physiology in the Age of Nihilism* (Palgrave MacMillan, 2011).

¹²¹ Friedrich Nietzsche, Michael Scarpitti (translator), *The Will to Power* (Penguin, 2017) 15.

¹²² *ibid* 15.

has been dependent upon ascetic values for so long, that in the moment where the base origins are revealed, the world will lose its value and become meaningless.¹²³

This meaningless is divided by Nietzsche into ‘purpose’, ‘unity’ and ‘being’.¹²⁴ By purpose, Nietzsche refers to the various dialectics (both ideal and material) that posited a definite end point of development. The ‘world process’ is meant to achieve something and humanity is supposed to be a labourer in that process – perhaps even its culmination. But, in the nihilistic moment, we come to understand that the ‘process’ ‘achieves *nothing*, accomplishes *nothing*.’¹²⁵ Humanity is no fateful labourer, nor defining moment.¹²⁶ ‘Unity’ alludes to a feeling that reality is guided by some type of organisation. Humanity ‘imagines that there is a *wholeness*, a *system*, even an *organisation* to all that occurs, so that the mind, longing for something to admire and worship, revels in the general idea of a supreme form of governance and administration.’¹²⁷ Being part of such a perceived unity brings a sense of comfort, a ‘profound sense of relation to and dependence upon a whole that is infinitely superior to him, and feels himself to be a mode of the divine.’¹²⁸ But this unity was merely illusory, there to shore up humanity’s sense of value.¹²⁹ Without the notion of being enfolded within some organised infinity, a connected instrument guided by a higher divine, humanity’s values become deflated.¹³⁰ The final aspect, being, concerns the positing of a metaphysical ‘world of truth’ to be contrasted with the changeable world of ‘illusion’.¹³¹ The loss of this belief is the purest form of nihilism:

As soon as man finds out that this world [that of metaphysical truth] was merely pieced together to meet his psychological needs, and that he has absolutely no right to it, the final form of nihilism emerges: the nihilism which involves disbelief in *a metaphysical world*, and

¹²³ *ibid* 16.

¹²⁴ *ibid* 19.

¹²⁵ *ibid* 18.

¹²⁶ *ibid*.

¹²⁷ *ibid*.

¹²⁸ *ibid*.

¹²⁹ *ibid* 19.

¹³⁰ *ibid* 18.

¹³¹ *ibid*

which forbids itself any belief in a world of truth. From this standpoint, he must admit that process and change are the *only* reality, and must deny himself any shortcuts to other worlds or false gods.¹³²

In essence: ‘all the values which have previously rendered the world worthy of our esteem ultimately render it worthless when they prove to be inapplicable.’¹³³ Schopenhauer’s call for the abnegation of the will and death will be the only viable future.

Disgust and Revaluation

Nietzsche does not seek to challenge the unrealisability of the ascetic ideal. Instead, as Reginster argues, Nietzsche’s strategy is to call the nihilist’s life-denying values into question.¹³⁴ *The world is only condemned if the life-denying values are maintained.* Nietzsche’s task, as he came to define it, was to affect the ‘revaluation of values’ – to make values ‘life-affirming’. The importance and fatefulness of this task would grow to Armageddon-sized proportions in his later life. It was ‘the question of millennia’,¹³⁵ in which he would hurl ‘thunders and lightnings at everything Christian or infected by Christianity’.¹³⁶

Hyperbole aside, one of the devices that Nietzsche frequently employs to realise his revaluation is the theme of disgust. Disgust (‘Ekel’ in German) is a moment of rejection. It occurs when we perceive the world, through our value-structure, as *unliveable*: a moment in which our whole will to life reels from a stimulus that depresses it. In his exploration of this issue, Tevenar traces the presence of Ekel throughout *Zarathustra*.¹³⁷ Beginning with no disgust as he descends from his cave, Zarathustra quickly becomes sickened by the smallness and resentment of humanity; so much so that the great

¹³² *ibid* 19.

¹³³ *ibid* 20.

¹³⁴ Reginster (n 94) 49.

¹³⁵ Nietzsche, Middleton (n 64) ‘Draft Letter to Elisabeth Nietzsche, 1888’ 339.

¹³⁶ *ibid* ‘Letter to Georg Brandes, November 20th, 1888’ 326.

¹³⁷ Gudrun Von Tevenar, ‘Zarathustra : that ‘malicious Dionysian’’ in Ken Gemes, John Richardson (eds), *The Oxford Handbook of Nietzsche* (OUP, 2018) 272, 278.

challenge facing him eventually becomes overcoming his own disgust at life.¹³⁸ The only way to do this is to *lean in to* the feeling of disgust, to trigger a crisis in the value structure. In a culminating scene, Zarathustra has a vision of a shepherd lying stricken, a snake writhing in his gullet.

I saw a young shepherd writhing, choking, convulsed, his faith distorted; and a heavy, black snake was hanging out of his mouth.

Had I ever seen so much disgust and pallid horror on a face?¹³⁹

Zarathustra tries to pull the snake out but to no avail. Instinctively, a voice, a voice that encapsulates all his horror, hate, disgust and pity, cries out from him: 'Its head off! Bite!'¹⁴⁰ This is the apogee of disgust – where it reaches such a point of intensity that it must be overcome or become fatal. The shepherd follows Zarathustra's imperative, bites and spits away the snake's head, and rises '[n]o longer a shepherd, no longer a man – a transformed being, surrounded with light, *laughing*.'¹⁴¹ In the depths of disgust, reevaluation has occurred. Former disgust and despair cede to laughter.

For Nietzsche, then, 'it is by the application of *Ekel* that *Ekel* is overcome.'¹⁴² To achieve his reevaluation, Nietzsche deliberately encourages nihilism and disgust. His analysis identifies the ascetic ideal within a target and then radically subverts it through the revealing of power. But the achievement of nihilism is merely the moment of crisis, the culmination of disgust – the moment in which we must bite off the snake's head or perish. With nowhere else to go, the space is opened up (or forced open) to reevaluate the meaning of nihilism itself. Instead of denigrating a world of becoming and power, like Schopenhauer, it becomes the central unit of value.

Life according to Nietzsche: will to power, the human being, and truth

¹³⁸ *ibid* 279.

¹³⁹ Nietzsche, *Zarathustra* (n 110) 180.

¹⁴⁰ *ibid* 180.

¹⁴¹ *ibid*.

¹⁴² Tevenar (n 137) 279.

The core ontological and epistemic elements of Nietzsche's corpus are inherently tied to the crisis of the ascetic ideal and nihilism. His understanding of the world is one of power and power alone – it is unescapable. In this way, Nietzsche does not distance himself too much from Schopenhauer's bleak description of reality. To confirm that gloomy assessment, and to provoke a revaluation of values, is the point.

The will to power

Nietzsche's characterisation of life is an ugly one:

[L]ife itself *in its essence* means appropriating, injuring, overpowering those who are foreign and weaker; oppression, harshness, forcing one's own forms on others, incorporation, and at the very least, at the very mildest, exploitation... 'Exploitation' is not part of a decadent or imperfect, primitive society: it is part of the *fundamental nature* of living things, as its fundamental organic function; it is a consequence of the true will to power, which is simply will to life.¹⁴³

This 'essence' is what he would refer to as 'the will to power'.¹⁴⁴ In his final publications, the hypothesis of the will to power is asserted unequivocally. In *Anti-Christ*, we read: 'What is good? – All that heightens the feeling of power, the will to power, power itself in man.'¹⁴⁵ And also: 'I consider life itself instinct for growth, for continuance, for accumulation of forces, for power'.¹⁴⁶ In his unpublished notebooks, Nietzsche declares '[t]his world is the will to power – and nothing besides! And even you yourselves are this will to power – and nothing besides!'¹⁴⁷

¹⁴³ Friedrich Nietzsche, Marion Faber (translator), *Beyond Good and Evil: Prelude to a Philosophy of the Future* (OUP, 2008) 152-153.

¹⁴⁴ *ibid* 36.

¹⁴⁵ Nietzsche, *Antichrist* (n 104) 127.

¹⁴⁶ *ibid* 129.

¹⁴⁷ Nietzsche, *Will to Power* (n 121) 586.

One way to interpret the will to power is to link it back to Schopenhauer's Will. The latter's description of the Will as a blindly striving, violent force, that constituted the essence of all living things, poses no small similarity to Nietzsche's description of the will to power. But given the hostility Nietzsche acquired for his philosophical mentor, it is unlikely that the two 'wills' are exactly equivalent.

To help gain some traction on the will to power, it is useful to consider further its context. Recent scholarship has uncovered the connections between Nietzsche's thought and his engagement with the life sciences and neo-Kantism.¹⁴⁸ The neo-Kantians Nietzsche read were those of the 1840s-70s, scholars like Albert Lange, Afrikan Spir and Otto Liebmann.¹⁴⁹ As they were writing, idealistic philosophy was giving way to materialistic and scientific accounts of the universe. The knowledge available to the human mind was the result of physiological and cognitive processes. But this leads to a paradox: 'If the perceived structure of reality was itself a product of the body, the observer and knowing self were always already part of this world, lacking any privileged point of view grounded in the autonomy of reason.'¹⁵⁰ In the absence of a transcendental viewpoint, it becomes impossible to distinguish between the products of human intellect and nature. In such a situation, the 'reality' available to us, Lange argued, is merely the product of the interacting, dynamic forces of our bodies and the rest of the world.¹⁵¹ To allow any stable understanding of human development, these 'forces' required theorising; but any theorisation could be critiqued as a manifestation of the forces they sought to describe.

Nietzsche's will to power grabs this paradox by the horns. It is an attempt to provide a foundational *description* (he never tries to *explain* them) of these forces, of life, without lapsing into the traditional metaphysical habit of doubling reality (phenomena/noumena).¹⁵² As Emden puts it, 'Nietzsche views

¹⁴⁸ This has taken several forms. Richardson, for one, has described the will to power as an evolutionary trait that has been favoured by processes of natural selection. See: John Richardson, *Nietzsche's New Darwinism* (OUP, 2004) 52.

¹⁴⁹ Christian Emden, *Nietzsche's Naturalism: Philosophy and the Life Sciences in the nineteenth Century* (CUP, 2014) 21.

¹⁵⁰ *ibid* 23.

¹⁵¹ Lange (n 15) 493.

While still a student Nietzsche discussed Lange enthusiastically. See: Nietzsche, Middleton (n 64) 'Letter to Carl von Gersdorff, August 1866,' 18.

¹⁵² Stern describes this as the 'Life Force Theory'. See: Tom Stern, *Nietzsche's Ethics* (CUP, 2020) 7-10. Taking a less ontologically 'thick' approach to the will to power – interpreting it as performing a 'nominal function' - is

the will to power as describing the formal conditions constitutive of living things, such as overcoming resistance, development, and growth.’¹⁵³

Whether Nietzsche entirely escapes the need to use metaphysical explanations is contentious. On the one hand, Emden suggests that Nietzsche intended the will to power to be understood as a ‘necessary reification’, an experimental ‘concept of the will [which] allows us to conceive of something in an efficient way that, otherwise, we could not express at all.’¹⁵⁴ This is supported by Nietzsche’s description of how a philosophical theory should be evaluated:

The question is rather to what extent the judgement furthers life, preserves life, preserves the species, perhaps even cultivates the species; and we are in principle inclined to claim that judgements that are the most false... are the most indispensable to us, that man could not live without accepting logical fictions, without measuring reality by the purely invented world of the unconditional, self-referential, without a complete falsification of the world by means of the number – that to give up false judgements would be to give up life, to deny life.¹⁵⁵

The will to power could be one of these regulative fictions without which humanity could not survive. And it is certainly true that Nietzsche felt that his will to power was supported by the leading contemporary science of the 19th century. Emden has provided important evidence in this regard by charting Nietzsche’s scientific reading. To provide a few illustrative examples, he carefully read Ruggiero Boscovich, who argued against materialist atoms – reality was entirely composed of competing forces.¹⁵⁶ Another striking example is that of Jean-Marie Guyau’s *A Sketch of Morality Independent of Obligation or Sanction*.¹⁵⁷ For Guyau, human agency was structured around the

the work by Lawrence Hatab. See: Lawrence J. Hatab, ‘The Will to Power’ in Tom Stern (ed), *The New Cambridge Companion to Nietzsche* (2019) 329, 334-337.

¹⁵³ Emden (n 149) 146.

Emden provides a convincing survey of the scientists Nietzsche read and how these ideas informed his own. One example is Jean-Marie Guyau’s *A Sketch of Morality Independent of Obligation or Sanction* (Forgotten Books, 2012).

¹⁵⁴ *ibid* 168.

¹⁵⁵ Nietzsche, *Beyond Good and Evil* (n 163) 7.

¹⁵⁶ For an analysis of Nietzsche’s use of Boscovich, see: Matthew Tones, John Mandalios, ‘Nietzsche’s Actuality: Boscovich and the Extremities of Becoming’ (2015) 46(3) *Journal of Nietzsche Studies* 308.

¹⁵⁷ Jean-Marie Guyau, *A Sketch of Morality Independent of Obligation or Sanction* (Legare Street Press, 2022).

intensification of living. Life, quite simply, was ‘a productive force that acquired its environment and continually expanded.’¹⁵⁸ Finally, there is Maximilian Drossbach’s theorisations on power and force.¹⁵⁹ For him, ‘[w]e only have a proper understanding of force if we recognise it as the striving for expansion.’¹⁶⁰ Nietzsche underlined this and wrote: ‘will to power, is what *I* say’.¹⁶¹

On the other hand, while suggesting that reifications and fictions have been lurking behind philosophy, Nietzsche’s doctrine itself is not so obviously caveated. In her recent discussion of the will to power, Doyle makes similar claims to Emden but maintains that the will to power is indeed metaphysical. Like with Emden, Doyle argues that Nietzsche is heavily informed by the life sciences and seeks to naturalise Kant’s philosophy, placing mind and nature on the same plane.¹⁶² However, she disagrees that Nietzsche thought empirical sciences could ‘stand on their own two feet. Rather, the empirical sciences require a metaphysical explanation’.¹⁶³ The will to power is a direct causal, essentialist thesis, ‘which operates at the level of human, non-human, organic and inorganic nature.’¹⁶⁴

Nietzsche, to be sure, disavowed any connection to metaphysics, but the metaphysics he alluded to were the dualistic systems of the idealists. That his monistic theory, in order to avoid being cannibalised through incoherency, had to itself be metaphysical (or speculative) either did not occur to him (improbable since he was aware of the incoherencies identified by the neo-Kantians) or did not concern him.¹⁶⁵ Nietzsche may have thought that living with incoherence is simply part and parcel of moving past the ascetic ideal. As Emden suggests, ‘[Nietzsche’s] theory of the will to power might be the one and only interpretation of human behaviour of which we are capable when we consider the evidence and think about it as clearly as we can.’¹⁶⁶

Whether entirely escaping metaphysics or no, the material point for us is that the will to power is the central ontological building block of Nietzsche’s philosophy. Echoing the violent traits of

¹⁵⁸ Emden (n 149) 171.

¹⁵⁹ Maximilian Drossbach, *Die Genesis des Bewusstseins nach Atomistischen Principien* (Forgotten Books, 2019).

¹⁶⁰ Emden (n 149) 171.

¹⁶¹ *ibid.*

¹⁶² Tsarina Doyle, *Nietzsche’s Metaphysics of the Will to Power: The Possibility of Value* (CUP, 2018) 6.

¹⁶³ *ibid.* 120.

¹⁶⁴ *ibid.* 144.

¹⁶⁵ The contradiction issue is discussed by Kaufmann. See: Walter Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist* (Princeton University Press, 1992) 204-207.

¹⁶⁶ *ibid.* 206.

Schopenhauer's Will, it united the poles of phenomenal and noumenal worlds together, providing a foundational explanatory principle for reality.

Being human

Having made the will to power his central ontological principle, Nietzsche extended it to the living organism. Several influences stand out here. The first is Schopenhauer again, who understood the human body to be an Idea of the Will, composed of dominated inferior Wills. The second is that of the neo-Kantians and the attempt to naturalise the epistemological structures Kant gave to the human body and mind.¹⁶⁷ Nietzsche's reading of the life sciences is also an important thread. Wilhelm Roux argued that the evolutionary struggle for survival not only took place between individuals but *within* those individuals themselves – between their organs and cells.¹⁶⁸ This proposition was also shared by a scientist called Henry Rolph.¹⁶⁹ To him, life was marked by a permanent instability: even at the cellular level there was waged an unending struggle in which each element strove for as much power and resources as possible.

Each of these ideas bleeds into Nietzsche's own thought. For Nietzsche, a subject is a concentration of competing forces that have been subdued and forced into an organised unity by a dominant will to power.¹⁷⁰ A species develops when this concentration of power becomes predictable and stabilised.¹⁷¹ In the evolution of the species, there is no fixed purpose guiding the development. Each phase of biological growth is determined by the unique pressures of the will to power at that moment.¹⁷² All 'ends and utilities' are merely 'signs' that one power has overcome an inferior force, impressing upon it its own desires and needs.¹⁷³ The process of evolution is certainly not direct or efficient. It is a series

¹⁶⁷ For an exploration of the connections between Kant and Nietzsche's thought, see: Kevin Hill, *Nietzsche's Critiques: The Kantian Foundations of His Thought* (OUP, 2005).

¹⁶⁸ Wilhelm Roux, *La lutte des parties dans l'organisme* (Materioloquies, 2012).

¹⁶⁹ Henry Rolph, *Biologische Probleme zugleich als Versuch zur Entwicklung einer rationalen Ethik* (MV Natural Science, 2021).

¹⁷⁰ Nietzsche, *Will to Power* (n 121) 290.

¹⁷¹ *ibid* 287.

¹⁷² Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality* (CUP, 1997) 46.

¹⁷³ Nietzsche, *Genealogy* (n 97) 63.

of ‘subjugations’, the overcoming of resistance, and ‘the attempted adaptations and alterations of form for the purpose of defence and reaction, and, further, the results of counter-measures.’¹⁷⁴

The human being is no different. The constitutive elements of the human mind and sensory organs are an expression of a will to power that seeks to preserve itself and to master its surroundings. The perceptions of which we are conscious are merely those that have been found necessary and desirable both by us and the organic process that proceeded us.¹⁷⁵ As such, human perception does not encompass the totality of possible perceptions. ‘*Consciousness extends only so far as it is useful.*’¹⁷⁶ That the human mind utilises reason and logic is also an expression of will to power. Reason transforms a chaotic reality into something orderly that enables the human subject to understand and navigate it. In the application of reason, ‘[t]he object is not ‘to know’, but to schematize, to impose as much regularity and form upon chaos as our practical needs require.’¹⁷⁷ In its development, a world of will to power and relative energy has been incomprehensible to the human. Reason and logic force other forces to fit into its conceptual scheme of ‘being’ and fixed identities. Thus, logic ‘only pertains to *fictitious beings which we have created*. Logic is the attempt to *comprehend the real world according to an ontological scheme we have postulated, or, to put it more accurately, to render the world expressible, calculable.*’¹⁷⁸

How to think like an immoralist

This description of the human being paves the way for Nietzsche to redescribe epistemology through the will to power. Truth, and the need for truth, were manifestations of the will to power that enabled a certain organism to live, to gain in strength. The argument is made plain in his unpublished notes.

¹⁷⁴ *ibid.*

¹⁷⁵ Nietzsche, *Will to Power* (121) 295.

¹⁷⁶ *ibid.* Note that in the *Joyous Science*, Nietzsche suggests that it was the need for *communication* that produced consciousness: ‘*consciousness has developed only under the pressure of the need for communication – that from the very beginning it has been necessary and useful only between man and man (especially between those commanding and those obeying) and has only develop in proportion to its utility. Consciousness is actually nothing but a network of connections between man and man – only as such did it have to develop: a reclusive or predatory man would have had no need of it.*’ Nietzsche, *Joyous Science* (n 120). This account hints at the genealogy of western civilisation that we will explore more in the next chapter.

¹⁷⁷ Nietzsche, *Will to Power* (n 121) 299.

¹⁷⁸ *ibid* 301.

‘The will to truth is a matter of *making* things determinate, of *making* things true and lasting, a total elimination of that *false* character, a reinterpretation of it into *being*.’¹⁷⁹ Because of this,

‘truth’ is not something which exists and which has to be found and discovered – it is something which *has to be created* and which gives its name to a *process* or, better still, to the will to subdue, which in itself has no purpose; to introduce truth is a *processus in infinitum*, an *active determining*, not a process of becoming conscious of something [that] would be ‘in itself’ fixed and determinate. It is merely a word for the ‘will to power’.¹⁸⁰

There is no unconditioned ‘truth’ that stands outside of life. What humanity considers to be truth (and the need for truth at all) is, inescapably, within life and serves the purposes of a certain form of life.¹⁸¹

Nietzsche’s perspectivism poses some challenges: if his task (as he often claimed) is to reevaluate values – to expose ascetic values as ‘life-denying’ – then he must allow for some privileged epistemic position by which to judge value. But if everything is perspectival, such an avenue appears closed to Nietzsche.¹⁸² The solution to this paradox rests, again, in the will to power.

The will to power is the inherent force that constitutes bodies and values. *Different bodies produce different values*. As Nietzsche asserts, the ‘condemnation of life by the living is... no more than the symptom of a certain kind of life’.¹⁸³ Nietzsche makes no bones about the absence of a transcendental position – he stresses it: ‘[o]ne would have to be situated *outside* life... to be permitted to touch upon the *value* of life: life itself evaluates through us *when* we establish values...’¹⁸⁴ But the nature of life, for Nietzsche is (whether formally or metaphysically) *fixed*. Life is a force that strives to overcome, to grow, to impose its will on dynamics of competing force. Therefore, if a register of values actively strives for a cessation of the will - to negate the will to power - it is possible to assert that life is

¹⁷⁹ *ibid* 320.

¹⁸⁰ *ibid*.

¹⁸¹ This is also echoed in *Daybreak*: Nietzsche, *Daybreak* (n 172) 118-120. See also: Nietzsche, *Zarathustra* (n 110) 85; Nietzsche, *Beyond Good and Evil* (n 145) 7; Nietzsche, *Genealogy* (97) 107.

¹⁸² Kaufmann (n 165) 203.

¹⁸³ Nietzsche, *Twilight of the Idols* (n 104) 55.

¹⁸⁴ *ibid*.

declining.¹⁸⁵ But beyond this general comment, Nietzsche cannot (from the will to power alone) promulgate substantive norms. As Emden argues, ‘[i]t would be a grave mistake to argue that... the will to power entails any concrete substantive commitments of an epistemic or moral kind; in as much as it is constitutive of life it lacks any content and merely allows for the possibility that our drives and practices can be realised.’¹⁸⁶ To do otherwise, he suggests would be to commit the metaphysical mistake of social Darwinists, such as Herbert Spencer, in which certain values are projected teleologically and causally onto nature that had themselves emerged from nature (a theoretical move Nietzsche frequently denigrated).¹⁸⁷ To put the point another way, from the will to power alone one cannot say that humanity should develop a wing or a third lung.

How then, can Nietzsche move from a critique of certain value registers as life-denying, to a positive assertion of ethical and political structures, without projecting a certain ideal society as the teleological goal of the will to power? This is no idle question; as we shall see, Nietzsche can be highly prescriptive as to what he thinks society should look like. In responding to this, it is necessary to return to Nietzsche’s cosmology and his specific understanding of objectivity.

Reality, for Nietzsche, is a dynamic environment of will to power. Each cite of power attempts to normatively transfigure and subordinate the others to realise itself. A value is merely, ‘objective’, Doyle explains, if one has the capacity ‘to manifest its nature in cooperation with the dispositional character of reality.’¹⁸⁸ That is to say, the will to power of the value agrees with forces around it. Objectivity, then, is not a fixed thing but susceptible to development. This may be difficult to achieve if that ‘dispositional’ dynamic of forces is particularly strong or heavily sedimented, but it is possible. For example, that humans are unlikely to develop the capacity to grow wings, due to the accumulated layers of millennia of evolution, is true enough – but *only* unlikely. The same holds with values:

¹⁸⁵ Emden (n 149) 182.

This need for overcoming does create a paradox in the will to power. It allows for no permanent satisfaction. See: Reginster (n 94) 138.

¹⁸⁶ Emden (n 149) 205. Reginster takes a similar approach, albeit from more of a psychological perspective. For him, the will to power is the essential human motivation. It is a ‘second order’ desire for the overcoming of resistance. Importantly, the will to power, for Reginster, has no determinate content. That content is given by the first-order desire. See: Reginster (n 94) 132.

¹⁸⁷ Emden (n 149) 154.

¹⁸⁸ Doyle (n 182)14.

western European has developed (for Nietzsche, at any rate) Christian values that are deeply entrenched, but revaluation is not radically foreclosed. Nietzsche's critique of values and his positing of alternative values can be understood as such an attempt to destabilise and recalibrate the previous 'objectivity'. It does not claim the special status of Spencer's position – it is an intervention that claims its status as 'life-affirming' by leaning into the contingent, conditioned, temporal quality of the will to power and is self-aware of its own limitations.¹⁸⁹ But the recognition of this limitation *as a limitation* is in itself challenged by Nietzsche's critique – through genealogy and positing of the will to power, the evaluation of epistemic claims is turned on its head.

That this is paradoxical and (probably) confusing is inevitable – the logical parameters that we employ to examine issues are being fundamentally subverted. But confusion and disorientation are things Nietzsche thinks are what western humanity needs to come to terms with in the death of God. As the madman in the marketplace cried:

'What did we do when we unchained this earth from its sun? Where is it heading? Where are we heading? Away from all suns? Are we not constantly falling? Backwards, sideways, forwards, in all directions? Is there still an above and below? Are we not straying as through an infinite nothingness? Do we not feel the breath of empty space?...'¹⁹⁰

Slouching towards Bethlehem

Nietzsche ended his philosophical career with the words 'Have I been understood? – *Dionysus against the crucified one...*'¹⁹¹ In answer, I have understood Nietzsche's project to be one engaged with nihilism and the attempt to overcome it. He reveals the defining principle of western civilisation – the ascetic ideal – and its corrosive, nihilistic effects. Against it, he raises his god, Dionysus: the avatar of the 'revaluation of all morals'. In this stand, Dionysus against the crucified, Nietzsche wages his spiritual warfare for the soul of humanity.

¹⁸⁹ See also: Emden (n 149) 211.

¹⁹⁰ Nietzsche, *Joyous Science* (n 120) 133-134.

¹⁹¹ Nietzsche, *Ecce Homo* (n 78) 95.

In realising this philosophical mission, Nietzsche grounded his thought in foundations that leaned into the pessimism of Schopenhauer. Using the physics and biology of his time, Nietzsche crafted a naturalised form of Schopenhauer's Will that he termed 'the will to power'. The will to power provided the core principle out of which Nietzsche formulated his understanding of the body and epistemology. As will to power, bodies are a nexus of power, held together by a dominant force, that strives to subdue and extend its power over the world. Knowledge is no exception. The human mind, that thinks in terms of time, space, causation, forces reality into a framework through which it can understand and master it. Between the force of the will to power that attempts to subdue *us*, and that of our faculties, the object is constituted – a constitution, however, that is unstable and never final.

Applying these core aspects of Nietzsche's philosophy to the question of international law's nihilism already takes us far. As we saw in the prelude, critical approaches have uncovered the law's fundamental hypocrisy: rather than being objective and neutral, international law is political and partial. In this process, the commitment to objectivity by the law can easily be read as a commitment to the ascetic ideal, and the aftermath of critique as one of devaluation. The very claims that marked international law out as distinct from politics and arbitrary violence are precisely that which necessarily condemn it. The turning away of Miéville from international law¹⁹² in disgust would appear to fit within Nietzsche's passive nihilism in the wake of devaluation.

While indicative, these connections between Nietzsche, nihilism, and international law are, at the moment, quite shallow. All we can say is that Nietzsche's concepts of the 'ascetic ideal' and 'devaluation' line up with some of the phenomenon we saw in the prelude concerning international law, but there is no immediate or necessary link. We cannot say that the state, sovereignty, and international law are concepts and practices fuelled and shaped by nihilism in anything but a superficial sense. Part of this flows from the fact that, up until this point, all we have is Nietzsche's mere description of the features of the ascetic ideal without explaining how it came about or how it fully operates. We know that certain bodies, through the will to power produce particular philosophies

¹⁹² See: 'Prelude' 14-15.

and perspectives of the world. But this lacks a firm connection to law and sovereignty. What sort of bodies and life would see reality through the prism of such concepts? Is the ascetic ideal implicated in the creation of the body that thinks in terms of sovereignty? How could the intersections between the body, the will to power, and the ascetic ideal combine to establish a European global order of sovereign states? Without a deeper account that establishes clearer links across the ascetic ideal, law, and the body, we cannot constitutively read the ascetic ideal and nihilism into international law.

Happily for us, Nietzsche does supply a more substantive theory of the ascetic ideal that can be used to build the conceptual bridges we need. In the next chapter, I will analyse Nietzsche's theory of civilisation and the creation of the human subject. Extrapolating from this account what I term the 'civilising psychosis', I argue that Nietzsche casts the ascetic ideal in a fundamental and generative connection with the state and the human being. Through the mechanism of this psychosis, it becomes possible to figure the ascetic ideal and nihilism as inherent to international law and sovereignty.

Human, All Too Human: Diagnosing Nihilism with Doktor Nietzsche

‘The slave became an ascetic priest; the priest became a metaphysician; the metaphysician became a positivist.’ Just so, and the positivist became?...

The Cross? Hypocritical. The State? Hypocritical. The ascetic ideal? Hypocritical... A question: if we want to be ‘authentic’, must we also be blonde beasts again? Or do we simply misunderstand these beasts because we look at them through our crooked gazes?

Nietzsche has already taken us far in assessing whether or not international law is nihilistic. We know that nihilism is a product of the ascetic ideal and devaluation. We also know that, in subverting the ascetic ideal, Nietzsche theorised the world in terms of the ‘will to power’. What we do not know is how the ascetic ideal originates, how it connects to the will to power and Nietzsche’s ontology / epistemology, and if it can be inherently tied to the emergence of the sovereign state. The goal of this chapter is extrapolate a reading of Nietzsche that can begin addressing these gaps.

The first step in crafting this interpretation is to focus more attentively on exactly what Nietzsche took to be symptomatic of the ascetic ideal - of *décadence*, as he put it. In the previous chapter, we briefly saw how Nietzsche associated the ideal with Christianity, metaphysics, and science.¹ Here, I intend to expand the scope, considering further categories of ‘idols’ that Nietzsche connected to the ascetic ideal (such as liberalism, socialism, and feminism) and investigating precisely why he did so. This will help, first, to finetune our own diagnoses of the nihilistic features of international legal thought, but also to provide a route down into the foundation of the ascetic ideal.

However, the collation of nihilistic symptoms can only take us so far in understanding the nature of asceticism and its possible connection to sovereignty and international law. We need to get under the skin of the ideal. To achieve this, I piece together what I have termed the ‘civilising psychosis’ from Nietzsche’s *Genealogy of Morals*.² Emphasising the *political* origin of this psychosis, I chart its generative role in the creation of human subjectivity. Here, I make the argument that in Nietzsche’s

¹ ‘Dionysus Explains the World’ 63-64.

² Friedrich Nietzsche, Amichael Scarpitti (translator), *On the Genealogy of Morals: A Polemic* (Penguin, 2013).

thought, the state, the ascetic ideal, and the human subject, are each mutually constitutive and one another's grounds of possibility. Through the civilising psychosis, I can begin to argue that the development and creation of the state and sovereignty is fundamentally a generative expression of the ascetic ideal and nihilism. This will provide the foundation by which to move past the limits of Nietzsche and theorise the emergence of the European global order.

The symptoms of sickness

Overturing the life-denying ethics of the ascetic ideal is Nietzsche's goal. In doing so, he picks apart western civilisation to find those practices and values that he took to be representative of the ascetic malaise. To provoke the rejection of these idols – to provoke disgust of them – Nietzsche sounds them out with his tuning-fork. He taps them to see whether there is the dull thud of ascetic solidity, or a telling hollow ring, betraying the idol's origins in the will to power. This is his ironic twist of knife: to demonstrate that such values are complicit in that which they must condemn as evil and impure.

Christianity

I call Christianity the *one* great curse, the *one* great intrinsic depravity, the *one* great instinct for revenge for which no expedient is sufficiently poisonous, secret, subterranean, *petty* – I call it the *one* immortal blemish of mankind...³

Nietzsche did not care for Christianity. It is the root of European *décadence*, out of which all the other symptoms grow. To combat Christianity – to take up the role of *Antichrist* – is to attack the soul (to use an ascetic word for an ascetic thing) of European civilisation.

³ Friedrich Nietzsche, R.J. Hollingdale (translator), *Twilight of the Idols and The Anti-Christ* (Penguin, 1990) 198.

For an overview of Nietzsche's critique of Christianity, see: Stephen Williams, *The Shadow of the Antichrist: Nietzsche's Critique of Christianity* (Baker Publishing Group, 2006), and Bernard Reginster, 'The Psychology of Christian Morality: Will to Power as Will to Nothingness' in Ken Gemes, John Richardson (eds), *The Oxford Handbook of Nietzsche* (OUP, 2016).

The illness lurking within Christianity is all too plain when it is compared with the religions which it replaced. The pagan gods of the Romans and Greeks were warlike and aggressive, joyful, proud, sexual beings, and very much *alive*.⁴ To die in such mythologies was a terrible event, becoming a washed-out shade of the living being you once were.⁵ The Christian God eliminates all of this. All ‘the prerequisites of *ascending* life’, ‘everything strong, brave, masterful, proud is eliminated from the concept of God’. He becomes ‘the symbol of a staff for the weary’, ‘the God of the sick’ – ‘*of what* does such a transformation speak?’⁶ With unrestrained invective, Nietzsche condemns Christianity, in which ‘nothingness [is] deified, the will to nothingness sanctified!’,⁷ and which has ‘taken the side of everything weak, base, ill-constituted’, making ‘an ideal out of *opposition* to the preservative instincts of strong life’.⁸

Perhaps the worst thing about Christianity, its most subterranean and vengeful quality, is its *hypocrisy*. Like with anything else, the Christian faith, for Nietzsche, is a product of the will to power. But what sets apart Christianity is that it is the will to power of the *sickest* bodily instincts trying to survive, grow, and above all, *play the master*. It is value-structure of the weak trying to subdue and dominate. To hammer home his point, Nietzsche links Christianity to a form of grand politics, in which the weak attempt to seize mastery over the strong.⁹ This politics is what he famously describes as the ‘slave revolt in morals’.

The slave revolt begins with resentment: a state characterised by intense anger at one’s own weakness and an inveterate hatred of those who are strong.¹⁰ The resentful want to be masters and to revenge themselves on the previously powerful. To accomplish this, they hit upon a simple tactic:

⁴ A brief look at any book on Greek mythology will reveal the various love interests between Aphrodite and Mars, Zeus’ extra-marital affairs with mortals, and the violent overthrow of the Titans. See: Robert Graves, *The Greek Myths: The Complete and Definitive Edition* (Penguin, 2017).

⁵ In the *Odyssey*, the shades that Odysseus encounters lament being dead. Achilles himself expresses a wish that being alive in the humblest body was preferable to death. Homer, Peter Jones (translator), *The Odyssey* (Penguin, 2009) 140.

⁶ Nietzsche, *Antichrist* (n 3) 139.

⁷ *ibid* 140.

⁸ *ibid* 129.

⁹ In the *Genealogy*, this resentful class are the Jews. See: Nietzsche, *Genealogy* (n 2) 22. The problem of anti-Semitism in Nietzsche’s thought is discussed at length in: Robert Holub, *Nietzsche’s Jewish Problem: Between Anti-Semitism and Anti-Judaism* (Princeton University Press, 2015).

¹⁰ Nietzsche, *Genealogy* (n 2) 25.

‘Turn all evaluations *upside down*’.¹¹ Everything that was previously held to be important, everything ‘autocratic, masculine, triumphant, tyrannical’, had to be twisted to produce ‘doubt, pangs of conscience, self-destruction.’¹² All that previously constituted strength and health would be redescribed as evil. A vital tool in justifying this inversion of morality was the invention of an afterlife. ‘To be able to reject all that represents the *ascending* movement of life, well-constitutedness, power, beauty, self-affirmation on earth, the instinct of *ressentiment* here become genius had to invent *another* world from which that *life-affirmation* would appear evil, reprehensible as such.’¹³ The afterlife is a device for transferring the value of existence *away from life and in opposition to life*. Only those acts that mortified the body in order to realise a purer connection to that realm of spirituality (asceticism) had value. In this way, bodily weakness became something to be praised, while bodily strength and health became a sin.¹⁴

Metaphysics

Nietzsche viewed the western tradition of metaphysical philosophy as being a product of the ascetic ideal. The idealist systems of Kant and Hegel, the establishment of a noumenon, the ‘thing-in-itself’, the Ideal, a higher reality to be privileged over the fake, decaying world given to us by our sense – all gleamed through the divine instrument of *reason* - were little more than the products of sick natures. Much of this sickness is *Christian* sickness. For Nietzsche, modern European philosophers are little more than secularised Christians, promulgating ethical and cosmological systems that reproduce the same Christian world view.¹⁵ Schopenhauer was even boastful of this pedigree, describing his

¹¹ Friedrich Nietzsche, Marion Faber (translator), *Beyond Good and Evil: Prelude to a Philosophy of the Future* (OUP, 2008) 56-57.

¹² *ibid* 56-57.

¹³ Nietzsche, *Antichrist* (n 3) 147.

¹⁴ For all of Nietzsche’s vitriol, scholars have continued to excavate his lurking Christian imaginary. See: Daniel Came, ‘Nietzsche as a Christian Thinker’ in Daniel Came (ed), *Nietzsche on Morality and the Affirmation of Life* (OUP, 2022) 38.

¹⁵ This will lead to his vitriolic condemnations of Christianity seen in the *Antichrist*. See: Nietzsche, *Antichrist* (n 3) 198.

philosophy as being in the spirit of the New Testament.¹⁶ But there is another origin of metaphysics that is older than Christianity: Plato and Socrates.

For Nietzsche, the fetishizing of reason above the body and instinct begins with the Athenian gadfly; but Socrates himself only emerged as a symptom of a wider context of decline.¹⁷ A healthy society could not have produced a Socrates: only one in which the body was already sick (sick from the body itself) does a Socrates make sense.¹⁸ And this is how Nietzsche characterises Athens in the age of Socrates. Humanity's animal instincts were out of control – the urge to be monstrous and to revel in cruelty were boiling in every citizen: 'everywhere people were but five steps from excess: the *monstrum in animo* was the universal danger.'¹⁹ To counter this threat that augured the collapse of society any expedient seemed justifiable; and this is what Socrates provided through the glorification of reason. 'Rationality was at that time divined as a *saviour*; neither Socrates nor his 'invalids' were free to be rational or not... it was *de rigueur*, it was their *last* expedient.'²⁰ But of course, this desperate need to reject the body and flee into reason was just another form of sickness. 'The harshest daylight, rationality at any cost, life bright, cold, circumspect, conscious, without instinct, in opposition to the instincts, has itself been no more than a form of sickness, another form of sickness...'²¹ In this way, the philosophy that threw contempt on the body was merely a device of that same body to perpetuate itself: of the will to power.

The herd animal

¹⁶ Arthur Schopenhauer, R.J Hollingdale (translator), *Essays and Aphorism* (Penguin, 1976) 64.

¹⁷ Nietzsche's engagement with Socrates has a long history, beginning with *The Birth of Tragedy*, in which he blamed Socrates for the advent of the 'Alexandrian' spirit that brought an end to tragedy. For an in-depth examination of Nietzsche's continuing pre-occupation with Socrates, see: Werner Dannhauser, *Nietzsche's View of Socrates* (Cornell University Press, 1974).

¹⁸ This is reflected in Nietzsche's insistence of Socrates' ugliness: his visage reflected his base nature. For discussions on this point, see: Alexander Nehamas, 'Le visage de Socrate a ses raisons... Nietzsche sur le problème de Socrate' (1999) 11 *Revue germanique internationale* 27 ; Yannick Souladie, 'La Laideur de Socrate' (2006) 35 *Nietzsche-Studien* 29.

¹⁹ Nietzsche, *Twilight of the Idols* (n 3) 43.

²⁰ *ibid* 43.

²¹ *ibid* 44.

‘*Morality in Europe today is herd animal morality*’.²² This is Nietzsche’s mocking assessment of the 19th century European. Flowing out of the old, subterranean Christian instinct, herd morality seeks to make everything and everyone equal, all docile members of the same herd, free from predators and rulers.²³

Encapsulated in ‘modern ideals’ – such as socialism, equalitarianism, utilitarianism, democracy, and anything else intended to advance equality - Nietzsche sees in these notions nothing but resentment. ‘Revenge sits within your soul: a black scab grows wherever you bite... Thus do I speak to you in parables, you who make the soul giddy, you preachers of *equality*! You are tarantulas and dealers in hidden revengefulness!’²⁴ This is the same unconquerable hatred of the Christian, launched against anything privileged or noble or healthy.²⁵ The goal is to create the environment in which the herd animal can live comfortable, ‘a common green pasture of happiness for the herd, with safety, security, comfort, ease of life for everyone’.²⁶ And the only way this flatland can be created is to reduce society to ‘a diminished, almost ludicrous species’, something ‘sickly, and mediocre’.²⁷ Weakness and atrophy are what must be valorised if this ‘sickly’ creature is to survive – the energetic and aggressive person is dangerous and in need of ‘taming’.

This point is well captured in one of Zarathustra’s withering dialogues. ‘I go among this people and keep my eyes open: they have become *smaller* and are becoming ever smaller: *and their doctrine of happiness and virtue is the cause*.’²⁸ This ideal of happiness is to be comfortable²⁹ and tamed. ‘To them, virtue is what makes modest and tame: with it they make the wolf into a dog and man into man’s best domestic animal.’³⁰ No one in this world is capable of being an independent agent. ‘Some of them *will*, but most of them are only *willed*. Some of them are genuine, but most of them are bad

²² Nietzsche, *Beyond Good and Evil* (n 11) 89.

²³ Nietzsche indicates that the ‘herd’ is almost as old as humanity itself and has become part and parcel of the human psyche. See: *ibid*.

²⁴ Friedrich Nietzsche, R.J. Hollingdale (translator), *Thus Spoke Zarathustra* (Penguin, 1974) 123.

²⁵ *ibid* 123.

²⁶ Nietzsche, *Beyond Good and Evil* (n 11) 41.

²⁷ *ibid* 57.

²⁸ Nietzsche, *Zarathustra* (n 24) 189.

²⁹ As Zarathustra describes the herd animal: ‘Fundamentally they want one thing most of all: that nobody shall do them harm.’ *ibid* 190.

³⁰ *ibid*. See also the earlier comments in Daybreak: Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality* (CUP, 1997) 174.

actors.’³¹ This extends even to society’s leaders who affect only to obey. No one can be seen to be wielding power as a master, so they preach the doctrine ‘I serve, you serve, we serve’.³² ‘The first ruler is *only* the first servant.’³³

As with the rest of the ascetic ideal, the herd animal universalises its values, so ‘that the ‘tame man’ has learned to consider themselves as an end and as supreme, as the culmination of history, a ‘higher man’ ...’³⁴ This ‘culmination of history’ would be the creation of what Nietzsche describes as the ‘Ultimate Man’. The Ultimate Man is humanity when its will to power has reached its lowest ebb, when the bow of its desire has even ‘forgotten how to twang!’³⁵ With no will to power, such a human will know nothing of love, creation, hope and aspiration. They are great flatland of being,³⁶ where to be equivalent to your neighbour is the only goal to speak of. There should be one herd, free from the need of any shepherd. In the perfect herd, ‘[e]veryone wants the same thing, everyone is the same: whoever thinks otherwise goes voluntarily into the madhouse.’³⁷

The state

Nationalism and state-worship, Nietzsche sneers, are ‘a scabies of the heart and poisoning of the blood’.³⁸ They are a cultural cancer, and a particularly *German* illness. As he ironically puts it, ‘*Deutschland, Deutschland uber alles* was, I fear, the end of German philosophy...’³⁹

As this suggests, Nietzsche considered the state as another ascetic idol. While the role of the state would develop in his later thought (as we’ll discuss in connection to the civilising psychosis), Nietzsche, from his earlier periods, was very alive to the meaning (and danger) of the modern,

³¹ Nietzsche, *Zarathustra* (n 24) 189.

³² *ibid.*

³³ *ibid.*

³⁴ Nietzsche, *Genealogy* (n 2) 31.

³⁵ Nietzsche, *Zarathustra* (n 24) 46

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Friedrich Nietzsche, Kevin Hill (translator), *The Joyous Science* (Penguin, 2018) 275.

³⁹ Nietzsche, *Twilight of the Idols* (n 3) 71.

For all his criticism of German nationalism, Nietzsche has been endlessly linked to fascistic thought. For an overview of Nietzsche’s appropriation by far-right political thought, see: Jacob Golomb, Robert Wistrich (eds), *Nietzsche, Godfather of Fascism? On the Uses and Abuses of a Philosophy* (Princeton University Press, 2002).

nationalistic states growing up around him. With the secularisation of Europe, the state fills the vacuum of meaning left in the wake of the Death of God. In the state, Nietzsche identified the meanings of purpose and, especially, *unity* that we discussed in his treatment of nihilism.⁴⁰

In a perceptive passage in *Zarathustra*, Nietzsche dissects the ontological fusion of the state and its subjects, labelling the state – the Leviathan – as the ‘coldest of all monsters’.⁴¹ Some context is useful here. For theorists of the sovereign state, ranging from Hobbes,⁴² to Locke,⁴³ and to Pufendorf,⁴⁴ the state, created through a social contract, represented the coagulation of the sovereign power and its subjects.⁴⁵ The word of the sovereign was legitimate precisely because the people had voluntarily surrendered a portion of their private will to it. It *was* them in a certain sense – a point visually demonstrated in the famous cover image from Hobbes’ *Leviathan*.⁴⁶ Nietzsche’s critique directly attacks this crucial conceptual strut of sovereignty, casting it as nothing but an ascetic lie and a piece of nihilism.⁴⁷ As Zarathustra thunders to his followers, everything about the state and its link to the people is false; ‘it bites with stolen teeth. Even its belly is false.’⁴⁸ Through its desire to claim and represent the will of all members of society, the state is a will to death.⁴⁹ Formerly within peoples and nations, individuals created standards of good and evil and law. Now, in the absolute homogenisation inherent in the form of the state – this monstrous artifice that claims to be the ‘regulating finger of God’ – everyone must sink to their knees before *its* valuation.⁵⁰ Through filling the void left by God, the state is able to trick and lure the sickest elements of society to its banner – there to be devoured,

⁴⁰ See: ‘Dionysus Explains the World’, page 77. This was especially so in his earlier work. See: Friedrich Nietzsche, *Human, All Too Human* (Wordsworth Classics, 2015) 216-217. This has not stopped authors from using Nietzsche to justify a liberal democratic state. See: Lawrence Hatab, *A Nietzschean Defense of Democracy* (Open Court, Chicago, 1995); William Connolly, *Pluralism* (Duke University Press, 2005). See: Hugo Drochon, *Nietzsche’s Great Politics* (Princeton University Press, 2016), and Frederick Appel, *Nietzsche contra Democracy* (Cornell University Press, 2019) for a critique of this use.

⁴¹ Nietzsche, *Zarathustra* (n 24) 76.

⁴² Thomas Hobbes, *Leviathan* (Penguin, 2017).

⁴³ John Locke, *Second Treatise of Government and A Letter Concerning Toleration* (OUP, 2016).

⁴⁴ Samuel Pufendorf, *On the Duty of Man and Citizen According to Natural Law* (CUP, 1991).

⁴⁵ There are, of course, important differences across these authors as to the nature of sovereign power. In Volume II, Act 1, we will see how Nietzsche’s thought can be used to interpret the work of these various theorists.

⁴⁶ Hobbes (n 42).

⁴⁷ Nietzsche, *Zarathustra* (n 24) 76.

⁴⁸ *ibid.*

⁴⁹ *ibid.*

⁵⁰ *ibid.*

chewed and re-chewed.⁵¹ Even the ‘great souls’ are deceived into expending themselves for the state. This is a particular lament for Nietzsche in his earlier works. Too many of society’s most able are swayed by the pursuit of political laurels into expending all their ‘emotional and intellectual capital’ for the state.⁵² ‘Does it then *pay*’ Nietzsche asks, ‘all this bloom and magnificence of the total... when the nobler, finer, and more intellectual plants and products... must be sacrificed to this coarse and opalescent flower of the nation?’⁵³ In sum, ‘a death for many has here been devised that glorifies itself as life’.⁵⁴ The state is ‘where everyone, good and bad, is a poison-drinker: the state where everyone, good and bad, loses himself: the state where universal slow suicide is called – life.’⁵⁵

Feminism

In tune with his condemnation of ‘modern ideas, Nietzsche became virulently hostile to feminism.’⁵⁶ The context for Nietzsche’s thought is an interesting one. He lived in a time when the ‘women’s question’ was beginning to spread through Germany. Leipzig University held the first General German Women’s Association conference in 1865 (the year of Nietzsche’s own entry into Leipzig University) and various higher education institutions across Europe started allowing women to matriculate over the course of the late 19th century and early 20th. Nietzsche himself, during his tenure at Basel, was required to vote on whether to allow a woman to pursue her studies there (he voted in favour but the majority were opposed).⁵⁷ Nietzsche also had several personal friendships with (middle-class) feminist thinkers, including Malwida von Meysenburg,⁵⁸ Meta von Salis and Helen

⁵¹ *ibid.*

⁵² Nietzsche, *Human, All Too Human* (n 40) 225.

⁵³ *ibid.*

⁵⁴ Nietzsche, *Zarathustra* (n 24) 76.

⁵⁵ *ibid.* 77.

Nietzsche is even more opposed to the socialist state. See: Nietzsche, *Human, All Too Human* (n 40) 217- 218. Be that as it may, some scholars have advocated for a socialistic understanding of Nietzsche’s political thought. See: Julian Young, *Nietzsche’s Philosophy of Religion* (CUP, 2006).

⁵⁶ The importance of Nietzsche’s commentary on women has been played down by scholars seeking to rehabilitate his reputation. Kaufmann, for example, wrote: ‘Nietzsche’s writings contain many all-too-human judgments - especially about women – but these are philosophically irrelevant; and *ad hominem* arguments against any philosopher on the basis of such statements seem trivial and hardly pertinent.’ Walter Kaufmann, *Nietzsche: Philosopher, Psychologist, Antichrist* (Princeton University Press, 1975).

⁵⁷ Robert Holub, *Nietzsche in the Nineteenth Century* (University of Pennsylvania Press, 2018) 188.

⁵⁸ Whose *Memoirs of an Idealist* Nietzsche read in the 1870s and expressed approval of.

Druskowitz,⁵⁹ and was familiar with male publications that advocated feminism – in particular Mills’ *The Subjection of Women*.⁶⁰

In his personal interactions with women, Nietzsche is recounted as being courteous, never entering into arguments over women’s social and political status and displaying a genuine interest in their intellectual pursuits in his correspondence with them.⁶¹ And yet, within his mature philosophical writings Nietzsche displays a vicious and crude misogyny.

For example, in *Ecce Homo*,⁶² Nietzsche lambasts the equal rights movement, equating it with a form of *resentement*: ‘‘Emancipation of woman’ – this is the instinctual hatred of the *botched*, i.e. infertile women against the woman who turned out well... By raising *themselves* up – they want to bring *down* the general level of woman’s standing.’⁶³ These concerns over the ‘degeneration of women’⁶⁴ are repeated in *Beyond Good and Evil* (with the dubious caveat that the comments ‘are simply – *my truths*’).⁶⁵ First, Nietzsche tells us, that the campaign for equal rights and autonomy is a sign of ‘Europe’s overall *uglification*’⁶⁶ and that ‘*women are regressing*.’⁶⁷ ‘Ever since the French Revolution, women’s influence in Europe has *decreased* to the same extent that their rights and ambitions have increased’.⁶⁸ Nietzsche is critical of all those who support women ‘to imitate all the stupidities that are infecting ‘men’ in Europe, European ‘masculinity’.’⁶⁹

An ‘authentic’ feminine nature, is characterised, by Nietzsche, as ‘predator-like’ with ‘cunning suppleness’, ‘their tiger’s claws beneath the glove, their naive egoism, their ineducability and inner wildness, the mystery, breadth, and range of their desires and virtues ...’⁷⁰ ‘[T]heir great art is the lie, their highest concern appearance and beauty.’⁷¹ And it is this nature that attracts men to women: ‘Let

⁵⁹ Though this friendship ended on acrimonious terms. Druskowitz rapidly grew disgusted by Nietzsche’s misogynistic comments. See: Holub (n 57) 198-200.

⁶⁰ John Stuart Mill, *On Liberty and The Subjection of Women* (Penguin, 2006). See: Holub (n 57) 202.

⁶¹ *ibid* 201.

⁶² Friedrich Nietzsche, Duncan Large (translator), *Ecce Homo: How to Become What You Are* (OUP, 2009).

⁶³ *ibid* 42-43.

⁶⁴ Nietzsche, *Beyond Good and Evil* (n 11) 128.

⁶⁵ *ibid* 124.

⁶⁶ *ibid*.

⁶⁷ *ibid* 128.

⁶⁸ *ibid*.

⁶⁹ *ibid* 129.

⁷⁰ *ibid*.

⁷¹ *ibid* 125.

us admit it, we men: it is precisely *this* art and *this* instinct that we honour and love about women: we who have it difficult in life and are glad to relax in the company of creatures with hands, glances, and tender follies to make our seriousness, our difficulty and depth seem almost like folly.⁷² In ‘ruining’ this nature, Nietzsche fears that women are becoming ‘less competent for their first and last profession, the bearing of healthy children.’⁷³

Perhaps one of the most infamous sections in *Zarathustra* is the dialogue ‘*Of Old and Young Women*’.⁷⁴ Here, Zarathustra talks with an elderly lady regarding women. The general bent of Zarathustra’s comments are that women are mercurial and untrustworthy, and that their sole purpose is bearing children. ‘Everything about woman is a riddle, and everything about women has one solution: it is called pregnancy.’⁷⁵ A woman’s only happiness is to obey a man: ‘Behold, now the world has become perfect!’ – thus thinks every woman when she obeys with all her love. And woman has to obey and find a depth for her surface. Woman’s nature is surface, a changeable, stormy film upon shallow waters.⁷⁶ In thanks for this ‘wisdom’, the old woman tells to Zarathustra a piece of wisdom of her own. ‘Are you visiting women? Do not forget your whip!’⁷⁷

Colonialism

Along with his condemnation of feminism, did Nietzsche extend his hostility to questions of decolonisation and the abolition of slavery? On the whole, colonialism has been an overlooked aspect of Nietzsche’s work. This is in spite of the fact that Nietzsche himself had significant encounters with colonialism through his sister’s marriage to Bernhard Förster. Förster’s specific brand of colonialism

⁷² *ibid.*

⁷³ *ibid* 129.

⁷⁴ Nietzsche, *Zarathustra* (n 24) 91.

⁷⁵ *ibid.*

⁷⁶ *ibid* 92.

⁷⁷ *ibid* 93. Many theories have been put forward to explain away Nietzsche’s misogyny. See: Holub (n 57) 182. There have also been sustained attempts by feminist thinkers to use Nietzsche. See: Hedwig Dohm, *Die wissenschaftliche Emanipation der Frau* (CreateSpace, 2014); Helene Stöcker, *Liebe: Roman* (Telegramme Verlag, 2021); Luce Irigaray, *Marine Lover of Friedrich Nietzsche* Columbia University Press, 1993). Derrida suggested that Nietzsche tries to push past gender entirely: Jacques Derrida, *Spurs: Nietzsche’s Styles* (University of Chicago Press, 1979).

appeared in the 1880s within the wider context of Germany's own colonial predations. In this decade, Germany acquired Togoland, Cameroon, South West Africa, German East Africa and New Guinea.⁷⁸ For Förster, however, the important thing wasn't whether Berlin owned the colony, but whether the colony was authentically German.⁷⁹ Drawing directly on some of Wagner's own writings, German culture, Förster argued, had been fatally compromised by the decadent influences of modernism, capitalism and Judaism. The authentic German *volk* of hardworking (white and Protestant) farmers was perishing. The only expedient left was to 'abandon the degenerate and forsaken fatherland in order to take up on another part of the planet's surface under more favourable climatic conditions with fresh resolve [for] the undaunted journey to the ideals of the Aryan race.'⁸⁰ And this is what he duly did, purchasing a tract of land in a significantly weakened Paraguay following the War of the Triple Alliance in 1870. *Neuva Germania*, as it was named, proved a financial disaster, leading Förster to take his own life.⁸¹

Nietzsche's reaction to his sister's colonial venture was mixed. His hostility to nationalism and anti-Semitism certainly posed an insuperable ideological opposition to Förster.⁸² But having said that, Nietzsche would have had sympathy with the latter's critique of Europe's decadence, and he did follow the fate of New Germany carefully, variously out of concern for his sister, as an economic investment, and sometimes with the idea of emigrating himself.⁸³

Colonial ideas also appear within Nietzsche's philosophy. An early indication of this comes in *Daybreak*⁸⁴ regarding the plight of the worker. Expressing his disdain of capitalism and its effects upon culture, Nietzsche advocates a colonial solution.

Everyone ought to say to himself: 'better to go abroad, to seek to become *master* in new and savage regions of the world and above all master over myself; to keep moving from place to

⁷⁸ *ibid* 219.

⁷⁹ *ibid* 221.

⁸⁰ *ibid* 228.

⁸¹ Sue Prideux, *I am Dynamite: A Life of Friedrich Nietzsche* (Faber & Faber, 2018) 278-288.

⁸² Holub (n 56) 223.

⁸³ *ibid* 236 – 237.

⁸⁴ Nietzsche, *Daybreak* (n 28).

place for just as long as any sign of slavery seems to threaten me; to shun neither adventure nor war and, if the worst should come to the worst, to be prepared for death... the workers of Europe ought henceforth to declare themselves *as a class* a human impossibility and not, as usually happens, only a somewhat harsh and inappropriate social arrangement; they ought to inaugurate within the European beehive an age of great swarming-out such as has never been seen before, and through this act of free emigration in the grand manner to protest against the machine, against capital, and against the choice now threatening them of being *compelled* to become either the slave of the state or the slave of a party of disruption.’⁸⁵

In his later notes, Nietzsche’s comments on colonialism become connected to the will to power. Over the course of the 1880s, Nietzsche describes how a being must strive for power and ‘over-abundance’ so as to reproduce itself.⁸⁶ This extends to nations, so that a people that does not seek to reproduce themselves through colonies is ‘unnatural’.⁸⁷ Elsewhere, he argues that European colonialism, however veneered by a hypocritical civilising mission, betrays a will to power and extra-Christian instincts.⁸⁸ While these comments are not further developed, we cannot, as Holub suggests, rule out a possible (or eventual) colonial role for Nietzsche. Statism and nationalism may be rejected by Nietzsche, ‘it is difficult to locate features of Nietzsche’s “untimely” colonial imagination that would have mitigated the oppression and inequities still rampant in our own postcolonial reality.’⁸⁹

Beyond *décadence*

⁸⁵ *ibid* 206-206.

Rebecca Bamford has resisted this reading. She reads this aphorism as an exercise of therapy, and that it need not entail colonialism *tout court*. See: Rebecca Bamford, ‘The Liberatory Limits of Nietzsche’s Colonial Imagination in *Dawn 206*’ in Manuel Knoll, Barry Stocker (eds), *Nietzsche as Political Philosopher* (De Gruyter, 2014) 59.

⁸⁶ Quoted in Holub (n 57) 225.

⁸⁷ *ibid*.

⁸⁸ *ibid* 249.

⁸⁹ *ibid* 259.

This has not stopped postcolonial thinkers from making use of Nietzsche: Ofelia Shutte, ‘Response to Alcoff, Ferguson, and Bergoffen’ (2004) 19(3) *Hypatia* 182, 183. Though see Linda Martin Alcoff, ‘Schutte’s Nietzschean Postcolonial Politics’ (2004) 19(3) *Hypatia* 144 for a critique.

There aren't many aspects of western European society that Nietzsche does not take as symptomatic of illness and decline. But perhaps his two biggest (and connected) targets are metaphysical philosophy and Christianity. In Nietzsche's mind, both are based upon a hatred of life, valorising everything that is fixed, stable, and eternal – that is, everything which is ascetic and *dead*. The changing and violent reality of the body and its sensibility is denigrated as fake and, in the Christian case, reviled as unclean. The body must be weakened - made sick. Strength and vitality are suspect: the emaciated body becomes *moral*. Flowing out of the Christian instinct are what Nietzsche terms 'modern ideas': these include democracy, utilitarianism, socialism, feminism. These are similarly attacked for their life-denying quality. In seeking to end suffering and make everyone equal, modern ideas attack the very nature of life – of the will to power. They, like Christianity, are born out of resentment, and merely serve to bring down anything higher and more noble. This leads Nietzsche to be harshly critical of feminist movements. In seeking to make women equal with the bourgeoisie male, feminism is ruining the nature of women, reducing them to the same ludicrous state condition of men. Women, for Nietzsche, have one task, which is to play the coquette and have children. Finally, Nietzsche's attitudes on colonialism remain ambiguous. While being contemptuous of the European civilisation doing the colonising, his own philosophy of power does not rule out a 're-evaluated' form of colonialism.

Nietzsche's engagement with European civilisation, however, does not stop here. For him, the issues of metaphysics and modern ideas were *foreground* matters. While providing more 'data' on the ascetic ideal, they still do not get at the ideal itself. What is the nature of the sickness that produces the human being who thinks in terms of Christianity and metaphysics? Why did the slaves of the 'slave revolt' produce the value system of asceticism? For a deeper understanding of the sickness afflicting Europeans, the genealogy of the ascetic ideal must be understood.⁹⁰

⁹⁰ This is why, as Bernard Reginster has argued, Nietzsche's genealogical inquiry is not so much about contesting the epistemic validity of values, but the *functions* of those values and the needs they serve. See: Bernard Reginster, *The Will to Nothingness: An Essay on Nietzsche's On the Genealogy of Morality* (OUP, 2021) 11.

The psychosis of civilisation and the rise of the sovereign state

One might think that it is Christianity that is the root of Europe's ascetic ideal. After all, Nietzsche usually lays the blame for all symptoms of *décadence* at the door of the church. But Christianity is merely the most visceral manifestation of a deeper sickness that is *constitutive* of the human being. That sickness, in noun and verb, is civilisation. It is through being civilised that humans first became ill, developing reason and a subjectivity, turning upon all of its instincts, preparing the soil for colonisation by values symptomatic of a blasted vitality. Civilisation is not a static condition, but a *psychosis*. It is on-going, generative and transformative, taking place in and upon bodies. The product of the psychosis is the creation of a certain kind of being – the *human*, set in contradistinction to the unclean, the animal and the criminal. This is the inner logic of asceticism: the counterposing of the perfected and the pure, against a debased and *culpable* form of life that, because of its *guilt*, must be ground down.

The remainder of this chapter will be dedicated to mapping out the nature and origins of the civilising psychosis. It begins with the state. For Nietzsche, civilisation, the ascetic ideal, and the sovereign state are fundamentally connected to each other, providing mutual grounds of possibility. The civilised human subject and the state are co-constitutive and inherently intermingled.⁹¹

Birth of the state through the spirit of - violence

Unsurprisingly, Nietzsche did not think that the state had peaceful or divine origins – let alone being produced from a contract. Nietzsche is unequivocal in his insistence that the birth of society was one violence and slavery. In one of his earliest writings, *The Greek State*,⁹² we read that the taming of a

⁹¹ The biopolitical complicity and mutual constitution between humanity, sovereignty, and law has been powerfully explored by Peter Sedgwick. Summarising the consequences of the Second Essay, he writes: 'A victim, it follows, never approaches sovereignty by stepping out of a Lockean-style "state of nature" as a fully formed "individual"... The image of the individuated political subject, as Nietzsche presents it, is of a being standing before overwhelming domination, bloodied, battered, replete with self-loathing...' See: Peter R. Sedgwick, 'Hyperbolic Naturalism: Nietzsche, Ethics, and Sovereign Power' (2016) 47(1) *Journal of Nietzsche Studies* 141, 160.

⁹² Friedrich Nietzsche, 'The Greek State' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 88.

‘wild’ population could only be achieved through repeated acts violence.⁹³ The oldest state was ‘a dreadful tyranny, a repressive, ruthless piece of machinery, which went on working until this raw material of a savage populace was not only thoroughly manipulated and compliant, but also *shaped*.’⁹⁴ Much later (and more famously), in the *Genealogy*, similar ideas are expressed.

I used the word ‘state’; my meaning is self-evident, namely, a herd of blond beasts of prey, a master race, a race of conquerors which, aggressive, powerful and organised, pounces with its most horrid claws on an unsuspecting population, one which in numbers may be tremendously superior, but still undisciplined and nomadic. Such is the origin of the ‘state’ (I think we have disposed of that notion, one held enthusiastically by many, according to which the ‘state’ originates with a sort of contract).⁹⁵

The state and civilisation begin with terrible acts of violence aimed at domesticating and *moulding* untamed human beings into useful tools.⁹⁶ Rather than simply devouring the conquered prey, the blonde beasts *enslave* them. In this enslavement, in the brutalities that were necessary to achieve it, the instinctual life of the slaves, as we will see in the next section, was turned on its head. Humanity became *sick*. The state we see today, and the human bodies that inhabit it, are the products of this violent enslavement. The democratic, socialistic state, and all the moral-political ideals of the herd animal, *are the products of the slave*. It is the slave instinct that abolished the whip wielding master and who wished for an end of suffering.⁹⁷ It is the enslaved human that needs the ascetic ideal to provide its torment with meaning.

⁹³ *ibid.*

⁹⁴ Nietzsche, *Genealogy* (n 2) 72.

⁹⁵ *ibid* 72.

⁹⁶ Nietzsche’s treatment of the masters and slaves sets him in direct contradiction to someone like Hegel. Rather than a question of recognition, the blonde beasts are driven by *instincts*. They do not think of themselves as individuals. The idea of individuality and recognition only comes *after* the process of civilising. See: Michael Allen Gillespie, Keegan F. Callanan, ‘*On the Genealogy of Morals*’ in Paul Bishop (ed), *A Companion to Friedrich Nietzsche: His Life and Works* (Boydell & Brewer, 2013) 255, 259-260.

⁹⁷ As Janaway has argued, Nietzsche was eager to rebut the positions of Schopenhauer and Paul Rée, both of whom, in very different ways, connect morality to selfless instincts and unegotistic motives. As the above indicates, moral sentiments, for Nietzsche, come from a very partial place. See: Christopher Janaway, *Beyond Selflessness: Reading Nietzsche’s Genealogy* (OUP, 2007), Chapters 4 and 5.

Ecce homo! Civilising, enslavement, and the emergence of the human

Civilisation begins with an act of violent enslavement – and this enslavement was *fateful*. All of humanity's instincts - its predatory, violent nature – became useless (even harmful) in the moment of enslavement. It all had to be beaten out of the prehistoric human, driven *inward*. Civilisation has no use for predators. It wants 'to produce a tame and civilised animal, a *domesticated animal*'.⁹⁸ That is the 'very *essence of all civilisation*'.⁹⁹

The pressure and trauma of civilisation fundamentally *wounds* the psychic life of the human. It becomes sick. A psychosis develops – but a psychosis that allows the human to *survive* in its new, miserable aspect. The psychosis operates around a *split* in the human mind; a split between a civilised, disempowered, subjectivity and a bestial, aggressive, unliveable nature. This split, however, is prevented from ever becoming a radical one so that *the civilised subject can be perpetually held accountable for that prior nature*. And in the act of accountability, the enslaved human can perpetuate violence against *themselves* in what Nietzsche called 'bad consciousness'.¹⁰⁰ The disempowerment of the slave requires that power to be turned inwards – to eat itself. This taming and *humanising* can continue almost indefinitely, because, as Nietzsche shows, this process is also an expression of the will to power: and the will to power *must* will something, even sickness. The more civilised a being becomes, the more disempowered it is, and the *more* it must seek out new sources of bad consciousness. The irony then, is that the civilising process aims to suppress the will to power, yet is a terrible manifestation of it.

Picking up the account in the *Genealogy*, following the seizure of a population by 'the beasts of prey' and the establishment of the slave state, the process of civilisation begins – the goal being to create a docile herd, a tool to be exploited. Herein emerges humanity's subjectivity. The first step was

⁹⁸ Nietzsche, *Genealogy* (n 2) 72.

⁹⁹ *ibid* 72.

¹⁰⁰ Against the belief that cruelty and violence, and compassion and pity, are opposites, Nietzsche, here, collapses them into one another. The unegotistic morals of the 'good' are just as based in cruelty and violence. See: Christopher Janaway, 'Guilt, Bad Conscience, and Self-Punishment in Nietzsche's *Genealogy*' in Brian Leiter, Neil Sinhababu (eds), *Nietzsche and Morality* (OUP, 2007) 139, 140.

breeding a creature with memory.¹⁰¹ For this to be achieved, humanity had to become predictable, and in order for everyone to be predictable, there was a need for a certain uniformity: '[H]ow thoroughly must man have first become *reliable, disciplined, predictable*, even for himself and his own conception of himself, so that like a man making a promise, he could warrant himself *for the future!*'¹⁰² This can be achieved through custom and moral norms,¹⁰³ but by far the most expedient method was *punishment*.¹⁰⁴

Blood, torment and sacrifice were necessary for man to create memory in himself; the most dreadful sacrifices and forfeitures (among them the sacrifice of the firstborn), the most loathsome mutilation (for instance, castration), the cruellest rituals of all the religious cults (for all religions are in essence nothing but systematic cruelty) – all these things originate from that instinct which found its most potent mnemonic to be the infliction of pain.¹⁰⁵

Following the creation of memory, the rationality of the herd animal emerged through the structured opposition between creditor/debtor. This structure stems from the very activity of dealing out violence and punishment. To begin with, punishment was not linked to any idea of *moral* responsibility.¹⁰⁶ Instead, it arose as an innocent expression of the will to power – a rage at having suffered injury and the desire to mete out violence back against the perpetrator.¹⁰⁷ Eventually, this anger, and the exchange of violence, transforms thinking 'through the idea that every injury has some sort of *equivalent* price, which can be paid as a form of compensation, even if it be nothing but inflicting

¹⁰¹ See: Christa Davis Acampora, 'Nietzsche's *On the Genealogy of Morality*: Moral Injury and Transformation' in Tom Stern (ed), *The New Cambridge Companion to Nietzsche* (CUP, 2019) 222, 233. As Deleuze clarifies, the crucial thing about this memory is not recalling things from the past, but that one must hold to something in the future. See: Gilles Deleuze, Hugh Tomlinson (translator), *Nietzsche and Philosophy* (Athlone Press, 1983).

¹⁰² *ibid.* See: Daniel Conway, *Nietzsche's 'On the Genealogy of Morals': A Reader's Guide* (Bloomsbury, 2008) 55.

¹⁰³ Nietzsche, *Genealogy* (n 2) 45.

¹⁰⁴ Acampora (n 101) 233.

¹⁰⁵ Nietzsche, *Genealogy* (n 2) 47.

For an exploration of this process, see: Mathew Rukgaber, 'The "Sovereign Individual" and the "Ascetic Ideal": On a Perennial Misreading of the Second Essay of Nietzsche's *On the Genealogy of Morality*' (2012) 43(2) *The Journal of Nietzsche Studies* 213, 218.

¹⁰⁶ Nietzsche, *Genealogy* (n 2) 49.

¹⁰⁷ *ibid.*

pain upon the one who has caused the injury.’¹⁰⁸ The ideas of ‘*creditor* and *debtor*’ are, therefore, the bedrock of punishment.¹⁰⁹ Through the frequency of violence and punishment, the creditor/debtor relationship infused thinking itself – is where, even, *thinking began*. For Nietzsche, the relationship ‘between buyer and seller; between creditor and debtor’ is how ‘individuals first met one another and *measured themselves* against one another.’¹¹⁰ ‘Establishing prices, assessing values, determining equivalents, trading’ occupied ‘the primal thoughts of man to such an extent that in a certain sense it *constituted* thinking itself.’¹¹¹

In this constitutive role within human subjectivity, the creditor/debtor relationship begins to structure political relationships. ‘[T]he community stands to its members in that important relationship of creditor to debtor.’¹¹² Individuals can live protected within the community, sheltering its members from the violent elements contained without, but for this protection, they stand in debt to the community.¹¹³ To break this ‘contract’, either through not remunerating the benefactor for its services or through attacking it, is to become a *criminal*.¹¹⁴ In response to the criminal, the community will exact payment through the infliction of violence. The debtor is cast out into ‘the wild and brutish conditions from which he was previously isolated’; he is given the ‘customary treatment of an enemy, one who is despised, disarmed and conquered, and who is not only deprived of any rights and protection, but is not even granted mercy.’¹¹⁵

As the taming of the population continues, punishment becomes less and less severe, but this leads, crucially, to the sickness of ‘bad consciousness’. In suppressing the will to power of civilised humanity, in the war ‘against the old instincts of freedom’,¹¹⁶ that will turns *inwards*. For want of an external enemy to exercise power upon, the individual attacks themselves.

¹⁰⁸ *ibid.*

¹⁰⁹ See: David Owen, *Nietzsche’s Genealogy of Morality* (Routledge, 2014) 95-96; Daniel Conway, *Nietzsche’s ‘On the Genealogy of Morals’: A Reader’s Guide* (Bloomsbury, 2008) 62.

¹¹⁰ Nietzsche, *Genealogy* (n 2) 56.

¹¹¹ *ibid.*

¹¹² *ibid* 57; Gillespie, Callanan (n 96) 263.

¹¹³ *ibid.* Owen (n 109) 96; Conway (n 109) 64.

¹¹⁴ Nietzsche, *Genealogy* (n 2) 56.

¹¹⁵ *ibid.*

¹¹⁶ *ibid* 70.

It was man who, lacking external enemies and opposition, and imprisoned as he was in the oppressive confines and monotony of custom, in his own impatience, frustration and rage, lacerated, persecuted, gnawed, frightened and abused himself; it was this animal, which is supposed to be ‘tamed’, which beat itself against the bars of its cage; it was this being who, homesick for that wilderness of which it had been deprived, was compelled to create, out of its own self, an adventure, a torture-chamber, an unknown and perilous wasteland...¹¹⁷

A *split* develops between the civilised subjectivity that is disempowered, and the animal nature that is powerful. These two natures, nevertheless, remain fundamentally connected, and their interplay results in sickness – in the *need* for sickness. In the state, opportunities for self-flagellation become necessary for this sick animal to survive, to understand its suffering: ‘[i]t was that desire for self-torture in the savage who suppresses his cruelty because he was forced to contain himself (incarcerated as he was in ‘the state’, as part of his taming process), who invented bad conscience so as to hurt himself, after the more *natural* outlet for this desire to hurt had been blocked’.¹¹⁸ This self-torture is structured around the split: the individual holds themselves to be in debt for their civilised personality and *responsible* for their lingering animality.¹¹⁹ The deeper the process of civilisation, and the more ‘humanised’ the subject, the wider the split becomes, and the *more intense the torture needed*.¹²⁰

At the earliest stages of the illness, Nietzsche connects it to ideas of the ancestors and gods: that is, the success of the clan or state is owed to the constitution laid out by the ancestors or the favour of

¹¹⁷ *ibid* 71.

In this point, we can see that pleasure and pain are not the main motivators in Nietzsche’s philosophy. The crucial thing is the will to power. Bad conscience is not pleasurable, but it *allows the act of power*. See: Janaway (n 100) 141.

¹¹⁸ *ibid* 78. The idea of guilt before the ascetic ideal, and how it serves a life-supporting avenue for the delivery of power, is explored by Reginster. See: Reginster (n 90) 121.

¹¹⁹ The sense of responsibility is crucial in order that the self-inflicting of harm is legitimated. See: Janaway (n 100) 124.

¹²⁰ See Keith Ansell-Pearson’s useful introduction to this section of the *Genealogy*: Keith Ansell-Pearson, ‘Introduction’ in Friedrich Nietzsche, Carol Diethe (translator), *Nietzsche: On the Genealogy of Morality* (CUP, 3rd edn, 2017) xviii.

some god,¹²¹ and this debt must be repaid through worship and sacrifice. These gods, however, still embody ideas of *good health* – of striving in the world, conquering neighbours, growing, exerting power. The Greeks and Romans that Nietzsche so admired were indeed sick with civilisation, but that civilisational sickness was yet to take on the visceral aspect of the ascetic ideal.¹²² Bad conscience was *held at bay*.¹²³ In his early essay *Homer's Contest*, Nietzsche explored how the Greek polis, through agonal competition, were able to sublimate their violent tendencies and allow their culture to flourish.¹²⁴ But eventually the 'slave revolt' in morals comes. This is when the sickest, most oppressed of the enslaved population begin to *moralise* – to seek to become the tyrant. It is the 'ascetic priests' who weaponise bad consciousness against the 'masters' and produce the ascetic ideal.¹²⁵ Everything healthy and active had to be made sick, to despair of its gods and its thankfulness. Here, the Christian faith and its ascetic ideal proved to be a terrible stroke of genius. As 'bad conscience... establishes itself, eats extends and grows like a polyp'¹²⁶, 'there is conceived the notion that debt cannot be repaid, the sin is unforgiveable'.¹²⁷ Humanity becomes guilty of an original fall (Adam and Eve) and produced from impure origins. We are considered to be trapped in a realm that is '*inherently worthless*'.¹²⁸ Then, in what Nietzsche calls Christianity's stroke of genius, God sacrifices himself for the debt of mankind, 'God as the one being who can deliver Man from what Man had become unable to deliver himself'.¹²⁹ Through these ideas, the one with a bad conscience can 'carry his martyrdom to its ghastly extreme.'¹³⁰ 'He takes 'God' as the most extreme antithesis that he can find to his own characteristic and indomitable animal instincts; he himself gives a new interpretation to these animal

¹²¹ Nietzsche, *Genealogy* (n 2) 74.

¹²² Brian Leiter, *Nietzsche on Morality* (Routledge, 2003) 285. Zamosc suggests that, for Nietzsche, bad consciousness could have developed into something positive, but that the moralising of the psychosis through the ascetic ideal wrecked that potential. See: Gabriel Zamosc, 'The Relation between Sovereignty and Guilt in Nietzsche's *Genealogy*' (2011) 20(1) *European Journal of Philosophy* 107.

¹²³ Leiter (n 122) 244.

¹²⁴ Friedrich Nietzsche, 'The Greek State' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 88.

¹²⁵ Nietzsche, *Genealogy* (n 2) 19-21.

¹²⁶ *ibid* 77.

¹²⁷ *ibid*.

¹²⁸ *ibid* 78.

¹²⁹ *ibid*; Acampora (n 101) 234.

¹³⁰ Nietzsche, *Genealogy* (n 2) 78.

instincts as being ‘sins’ before God’.¹³¹ God becomes the ‘hangman’, a sign of ‘unending torment, as hell, as unimaginably vast punishment and guilt’.¹³²

There is, however, a lurking difficulty in this account. The ascetic priests and the slave revolt in morals may have produced the ascetic ideal, but why should the masters have been won over by it? Why should they have abandoned their old gods to take up life-denying values? While Nietzsche is never explicit on this point, there is a possible answer in his very description of the ascetic ideal that was discussed in the previous chapter.

The ascetic ideal simply means that *something was lacking*, that Man was surrounded by a tremendous *void* – he did not know how to justify himself, to explain himself, to affirm himself; he *suffered* from the problem of his own meaning.¹³³

The ascetic ideal provided humanity with a meaning for the suffering of enslavement and civilisation. As Leiter argues, Nietzsche does not temporally caveat this statement. It encompasses the Ancient Greeks and Romans who, while keeping bad conscience at bay, still suffered from a lack of meaning. The ascetic ideal originated with the slaves and sickest elements of society, but it nevertheless provided a balm – the only balm of its type to have appeared - for the deep, nagging illness of humanity’s civilised condition.¹³⁴ Why should a meaning for suffering, however, be so necessary? The notion of a settled, definitive purpose to an activity already smacks of the ascetic ideal, so how does it *pre-exist* the ideal? A possible answer to this lies in the fact that the animal craving meaning is *the slave*. Their brutal transformation into slaves was precisely to realise some purpose of the masters – they were crafted to be tools. And as a tool, the need for a goal or function is fundamental. That is why the civilised human craves meaning - that is what makes a background presence of asceticism

¹³¹ *ibid.*

¹³² *ibid* 79.

¹³³ *ibid* 144.

¹³⁴ Leiter (n 122) 286. This is also echoed by Acampora (n 101) 240. However, Clark has recently argued that Nietzsche’s concern with the ascetic ideal in the Third Essay of the *Genealogy* is not so much why the ascetic is needed, but the value it has for discrete categories of human being (priests, philosophers, scholars, women). See: Maudemarie Clark, ‘On the ‘meaning’ of the Ascetic Ideal: A Normative Interpretation of *GM III*’ in Daniel Came (ed), *Nietzsche on Morality and the Affirmation of Life* (OUP, 2022) 91.

feel inevitable. The original blonde beasts, however violent, innocently enacted their own nature and would have no sense or horror of a meaningless world.

No other ideal has so far appeared that might contest asceticism – to provide humanity a new meaning for the suffering of civilisation. That is why Nietzsche came to view his revaluation of all values in such awesome terms. It is the moment in which humanity gains its new ideal and leaves the sick house of the ascetic ideal.¹³⁵ The entire fulcrum and fate of humanity will shift.

The hermit digs further?...

Nietzsche likened his ideal philosopher to a hermit – delving into gloomy caves (and the gloomier the better) in search of knowledge. While the hermit may rest, on occasion, from their labours (and from themselves), their task is never over. A philosopher who sets down their spade and lamp is something suspicious. Why did they stop here? Why could they not have gone further?¹³⁶ Beyond every cave must lie a deeper cave - ‘a wider, stranger, richer world over every surface, any abyss behind his every ground, beneath his every ‘grounding’.¹³⁷

Already, Nietzsche has given us much (some better some worse). Investigating what he took to be the sickness of European civilisation, he dissected a number of telling symptoms. These included Christianity, metaphysical philosophy, the sovereign state, democracy, utilitarianism, socialism, and feminism. Anything that posited a higher reality, or valorised pity and weakness, or promoted equality was the product of resentful slave natures. His attack on feminism and women is misogynistic and some of the worst (and least original) aspects of his philosophy. Colonialism was never a major theme of Nietzsche’s thought, but it is unlikely that he would have rejected it as a practice.

¹³⁵ This is not to say that Nietzsche aspires for a *return* to the state of the Masters. As Hatab as argued, the very internalisation of power and the development of the faculties has achieved many of the finer achievements of the arts that Nietzsche so valued. The point is to move past masters and slaves and to provide the civilising psychosis with a new, healthier ideal. See: Lawrence Hatab, ‘Why would master morality surrender its power?’ in Simon May (ed), *Nietzsche’s On the Genealogy of Morality: A Critical Guide* (CUP, 2011) 193, 207-210. For a similar position, see: Gillespie, Callanan (n 96) 263.

¹³⁶ Nietzsche, *Beyond Good and Evil* (n 11) 173.

¹³⁷ *ibid.*

Beyond symptoms, Nietzsche understood the real sickness of the ascetic ideal as a psychosis. Through the pressure of enslaving and taming a once wild human, the psyche of humanity became split – split between the civilised subjectivity and a lingering bestial element. That split, however, is never a radical one: the emerging human subjectivity, with its reason and self-awareness, is *responsible* for its animal self. This responsibility procures bad consciousness, in which the human animal, its external manifestations of power denied, bites into its own flesh. While all civilised peoples have suffered from the bad conscience of civilisation, the slave revolt in morals produces the ascetic ideal. The ideal is a life-denying, suicidal manifestation of the civilising psychosis. While the ascetic ideal is based upon a condemnation and suppression of the will to power, it can only realise itself *through power*. Hence, the more civilised humanity becomes, the more terrible its acts of self-flagellation must become. In this taming and the production of the rational human being, the state is inherently bound up. It is in the establishment of the state that the taming begins. It is the state's demand for slaves and its monopoly of force that foments the breeding of domesticated animals. The state and its subjects – civiliser and civilised – are co-constitutive and mutual grounds of possibility.

Nietzsche did not return to the interconnections between the state and the civilised human subject. But can we not dig a little bit further here? Delving into the literature of sovereignty, could we not see whether Nietzsche's psychosis of civilisation is present? Whether the major theoretical works founding the state are shot through with the moralising structures of civilisation – of ascetic ideals and completed humanity, pre-human animality, and, above all, *guilt and responsibility*? Finally, could we not go on into caverns that Nietzsche himself did not consider? The European global order of sovereign states: how does the civilising psychosis explain this? Might Nietzsche have overlooked one of the most ludicrous and fascinating depths of the European's psychology?

At the beginning of this thesis, I asked whether international law was nihilistic: whether nihilism lay at the heart of the inner life of the discipline and drove its development. In the last chapter, I introduced Nietzsche's concept of the ascetic ideal, how it was nihilistic, and his ontological and epistemological principal of the will to power. While allowing us to see elements of international law and scholarship as displaying *features* of the ascetic ideal and devaluation, this fell far short of establishing an essential connection between international law and nihilism. To achieve this extra

step, we needed to show how the ascetic ideal was realised through the will to power, and whether this generation was implicated in the sovereign state. This deeper theorisation is achieved through my extrapolation of the civilising psychosis from Nietzsche's *Genealogy*. Taking the nihilistic psychosis of civilisation, I propose that we can push past the limits of Nietzsche's political thought and read it into the creation of international law and the global order of sovereign states. In so doing, I will suggest that it is precisely the psychosis that (still) structures international legal thinking and which provokes the hunt and outrage at hypocrisy seen in the prelude. International law as hypocritical *because of* the nihilistic psychosis.

This marks the end of Volume I of the thesis. In what follows - the chapter that stands outside, between, and across Volumes I and II - I take the civilising psychosis and use it as a tool to create a nihilistic theory of sovereignty, international law, and the generation of the global order. If this is theoretically a possibility, we will be in a position to answer the question of whether international law is nihilistic

END OF VOLUME I

In the Depths

Down, down, in the depths, lantern held aloft. Picking, scratching, squinting along. ‘Keep your face covered! The air is foul.’

Whispers, whispers, in the dark, echo from below. Hissing, spitting, sneering soft. ‘Hold to your courage! Our way is long.’

Down, down, in the depths...

Is international law nihilistic? Quite possibly.

Critical international legal scholars, as we saw in the prelude,¹ are keenly aware of the law’s hypocrisy. The exposure of this hypocrisy and the reflexive reaction of disgust occasioned by it, is not a small part of the rationale and bite of such scholarship.² This concern with hypocrisy and disgust bears a close resemblance to nihilism. Painting an image of international lawyers as trapped in a legal framework that is inherently antithetical to their values of peace and justice does raise the question – ‘what is the point? Can anything be done?’ Miéville’s turning away from international law³ is all too representative of Nietzsche’s nihilism.⁴ Only the faint hope of revolutionary emancipation – the idea that if a *sufficient amount* of disgust is generated then we all might collectively break free from our tethers – allows such a theory to escape a complete devaluation. And we can still ask what that ‘emancipation’ *means*.

If the question of international law’s nihilism is being raised (as I am raising it), then it is sensible to consult someone who knows a thing or two about nihilism. These themes of hypocrisy, disgust, and devaluation that I mentioned above are all found in Friedrich Nietzsche’s philosophy of nihilism and civilisation. For Nietzsche, nihilism flows from the value structure that has thus far sustained and crafted the western European mind: that of the ascetic ideal.⁵ Breaking down the operation of this

¹ Pages 2-55.

² *ibid* 54.

³ *ibid* 16-19.

⁴ See: ‘Dionysus Explains the World’ 74-78.

⁵ *ibid* 73-74.

ideal, I extrapolated from Nietzsche what I term the ‘civilising psychosis’.⁶ This psychosis is a development of humanity’s primordial civilising and transformation into a political/economic agent of the state. So fundamental is the connection that the genealogy of the emergence of a civilised human subject is at once the story of the emergence of the state.

To establish my argument that international law is nihilistic, I propose to read this psychosis into the foundational structures of international law – principally, into sovereignty. Nietzsche has already taken us far in providing a theoretical lens for approaching this proposition. On my reading of Nietzsche, the psychosis is already fundamentally political. However, crucial gaps remain. For a start, Nietzsche never isolated sovereignty itself as a discrete subject of inquiry. He is acutely aware of the *effects* of the sovereign state and its claim to absolute power, but the specific idea of sovereignty is left untheorised. Nietzsche’s account of the state is also too indirect. He does not apply his dynamic of civilisation to the historic theories and commentaries of the state, such as that found in Hobbes and Locke. But perhaps most importantly, it is not obvious how Nietzsche’s account of civilisation can be used to understand the global order of sovereign states. His attention remains almost entirely on the domestic sphere.

If this deficiency is to be overcome, several things can be proposed. First, we must understand what distinguishes a specifically *sovereign* political order on a Nietzschean analysis from other structures. That will allow us to isolate the specific concept of sovereignty and its significance within Nietzsche’s philosophical framework. Second, Nietzsche’s diagnosis of nihilistic civilisation could be repurposed as a critical tool for deconstructing sovereignty theory. *The violent dynamic between the ascetic and the pre-human can be read into sovereignty theory.* The generative quality of this dynamic – the constant expansion of the ascetic through the ironic collapsing of idols and the expansion of the pre-human – can be seen in and between sovereignty theories, explaining the lateral movement from one manifestation of sovereignty to another. And finally, the violence and tensions within civilisation and sovereignty should explain the need to reproduce sovereignty on a global scale through imperialistic practices. In other words, the Nietzschean reading of sovereignty must be able to place the

⁶ ‘Human, All Too Human’ 111-119.

development and evolution of both its domestic and international manifestations into a single, monistic process or economy of civilisation.

Civilisation and domestic sovereignty

Since Nietzsche wrote more about the domestic state (or at least the German state) than the international, it provides the most straightforward route for applying his philosophy of civilisation to sovereignty.

As we saw, Nietzsche conceived of the modern state as a symptom of the ascetic ideal.⁷ His censure of this ‘cold monster’ that aped the regulating hand of God was unequivocal. The state and its preachers represented a will to death, ushering in a universal slow suicide that masqueraded as life. While this skirts around the specific idea of sovereignty, running his comments through his descriptions of the human body helps fill in the gaps. According to Nietzsche, the world is will to power, and nothing besides.⁸ The human body is no exception: it is a contingent and temporary coalescence of will to power under the hegemony of a dominant will.⁹ Western philosophers and theologians have confused the nature of the body by implanting within it a *soul*. The body itself is a thing of growth and decay and violence, but the soul is eternal. It is a shard of the ascetic within the mire of the human, all too human; it commands the flesh absolutely and survives the eventual dissolution of that same flesh. The concept of sovereignty can be conceived in similar terms. Instead of perceiving society as a contingent structure of will to power, sovereignty mystifies it. The dominant power within society is transformed into the ascetic – a figure of the divine. It commands and must be obeyed absolutely by virtue of its metaphysical, ascetic, significance. As opposed to a pre-modern politics, in which competing interests, groups, and legal/political structures could coexist in the same society, the asceticism of sovereignty demands a single, ultimate site of authority and power.

⁷ ‘Human, All Too Human’ 101-103.

⁸ ‘Dionysus Explains the World’ 81.

⁹ *ibid* 86-88.

For Nietzsche, the sovereignty of the state is a chimerical creation. As he made clear as far back as the *Greek State*,¹⁰ society is originally founded in violence and slavery.¹¹ In many respects his analysis on this point chimes with that of Pateman¹² and Epstein¹³ that we discussed in the first chapter.¹⁴ For the former, the fraternity of civil society is founded on both the murder of the patriarch and the original enslavement of women in the social contract.¹⁵ While the gender identity of Nietzsche's 'blonde beasts of prey' or their victims is not made clear, it is not too much of a stretch to imagine (especially in the violent world Nietzsche is depicting) that the beasts of prey are predominantly men and their targets women. For Epstein, the liberal state and its (male) subject have been constructed through a series of violent exclusions.¹⁶ With Epstein especially, who also points to the mutual constitution of the human subject and the state, there is much common ground with Nietzsche. His account is, admittedly, more ontologically thick, in as much as he focuses on the *actual crafting* of the body rather than upon discourses *about* the body. This distinction carries with it a potential answer to a difficult question. We may agree with Epstein concerning the construction of the state and subject through discourse, but *why should that discourse take the shape it does?* Why frame power in terms of sovereignty and obscure its violent foundations? Through stepping *outside* discourse and returning to the body as will to power, Nietzsche's account of civilisation and the psychosis can provide some answers to this.

We know that Nietzsche understood the state as having its origins in violence and slavery, that civilised, *sick*, bodies are produced within it, and that the structures of the state developed in tandem with the need to increase and perpetuate the civilising of humanity. If civilisation, the ascetic ideal, and the state walk hand-in-hand, unified in the civilised body, then a hypothesis might be offered. If the psychosis of civilisation takes on the highly specific form that Nietzsche describes, and if the state

¹⁰ Friedrich Nietzsche, 'Homer's Contest' in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 95.

¹¹ 'Human, All Too Human' 112.

¹² Carole Pateman, *The Sexual Contract* (Polity Press, 1997).

¹³ Charlotte Epstein, *Birth of the State: The Place of the Body in the Crafting of Modern Politics* (CUP, 2020).

¹⁴ 'Prelude' 42-45.

¹⁵ *ibid.*

¹⁶ *ibid.*

has been one of the causes and products of this civilising, *then might the theoretical structures of sovereignty mirror that of civilisation?*

When Nietzsche writes about the state in the *Genealogy*¹⁷ and elsewhere, it tends to be in a very material and consequential sense: specific methods of punishment or laws being devised to limit or channel acts of aggression, and the consequences for humanity growing up (or withering away) under such conditions. But this leaves open the question of how the state has been justified, rationalised, or otherwise theorised about; and the only people who have undertaken such work are those who have been the products of a sovereign order – those who have been civilised. Recalling Nietzsche's epistemology that held knowledge to be an extension of the knower's will to power,¹⁸ it is not much of a stretch to suggest that the nihilistic psychosis of the civilised person would be manifested in how they constructed and perceived the world. This is exactly Nietzsche's point when he condemns the metaphysics and Christian ethics that have been formed out of the ascetic ideal: the sick created values that corresponded to, and supported, their own natures. There is no reason, then, that sovereignty would be in any way exempt. If anything, since the sovereign state has been one of the principal agents of the European's civilising, we should be more expectant of seeing the dynamics of civilisation within it.

This does face the difficulty that while civilisation, for Nietzsche, is the consequence and production of a violent dynamic of the will to power, sovereignty is usually conceived in static terms, or as a descriptive marker: a person, an institution, or a people, might be sovereign. But as critical scholarship has demonstrated at length, the material attribution of sovereignty is merely the tip of the proverbial iceberg. It does not address the deeper theory and rationalisations of *why* and *how* that particular person, body, or thing is sovereign; and it is precisely within that theory that Nietzsche's psychosis of civilisation exercises its influence.

A Nietzschean deconstruction of sovereignty theory entails, I suggest, locating within it the ascetic, the pre-human, and the violent dynamic between them. The ascetic stands for the ideal condition: the space without destruction, change, or danger. Within sovereignty, it represents that element which is

¹⁷ Friedrich Nietzsche (trans Michael Scarpitti), *On the Genealogy of Morals: A Polemic* (Penguin, 2013).

¹⁸ 'Dionysus Explains the World' 77-78.

sacred, that promises safety, or commands obedience – that idol to which humanity is subjected to. The pre-human is the lingering element which illudes the ascetic order, or the primordial, chaotic pool from which the ascetic emerges. These two fields must, crucially, be connected, so that the pre-human is responsible for its condition as pre-human to the word of the ascetic idol. Within this duty of responsibility, the effects of bad consciousness must be replicated. The translation of this violence into sovereignty theory is the exercise of coercive force by the servants of the sovereign power. To break the order imposed by the sovereign, or to refuse to leave a condition that becomes excepted from that order, is to become the legitimate target of violence. As this suggests, the being of whom the violence of bad consciousness is targeted, who is marked by the duty of responsibility, is the human subject of sovereignty themselves. *The sovereign order is the very transposition of their struggle (their obligation) to become human.* Importantly, however, the sovereign order must be an evolving one. The quality and logics of sovereignty have changed over time, and this change should be explained through the generative processes of civilisation. As Nietzsche argues that the scope of the ascetic increases as the need for the self-inflicted torture of bad consciousness likewise increases, so the same should happen with sovereignty. The ascetic element within sovereignty theory should become wider, more pervasive, more nuanced as the civilising of the subject of sovereignty increases. Different moments or tensions within the dynamic of civilisation, consequently, should produce different understandings of sovereignty.

While this might account for the changing nature of domestic sovereignty, it doesn't throw much light on the sovereign global order. How do we jump from the domestic processes of sovereignty to those of the international? To answer this question, it is useful to return to the those critical approaches to sovereignty discussed in the first chapter.

The structures of the sovereign world order

A crucial aspect of critical approaches to civilisation and sovereignty was to reimagine those concepts as structural devices or methods of argument that were then tracked through modern international

legal history. One basis of this position can be found in the structural work of Koskenniemi.¹⁹ On his analysis, international law is an argumentative system, organised around the interplay between ascending and descending arguments, in which an exterior political decision provided the necessary determination.²⁰ Koskenniemi himself linked this theory to liberalism, but a robust consideration of ‘civilisation’ as a discrete phenomenon was absent from his work. Subsequent scholars have filled this deficit. Commentators like Anghie,²¹ Miéville,²² Parffit²³ and Tzouvala²⁴ describe civilisation and civilising as a process, an argumentative method, and an economy of violence, operationalised through the core doctrine of sovereignty. Anghie posits his ‘dynamic of difference’;²⁵ Parffit the ‘process of legal reproduction’;²⁶ and Tzouvala the logics of ‘improvement’ and ‘biology’.²⁷ I propose that a similar structural history can be performed with Nietzsche’s account of civilisation and international law. It too is structural in nature and, perhaps surprisingly, closely corresponds to current critical paradigms.

To recap, Nietzsche’s nihilistic psychosis is structured between the ascetic element and a lingering bestial element. The gap between these two is never a radical one, with the individual being held responsible for that bestial remnant. As civilisation progresses, the ascetic part of the individual grows, increasing the debt and the need for self-torture. The more the animal is suppressed, the more it must turn inwards in acts of bad conscience.²⁸ Taking Anghie’s work as a representative example, we see a very similar model. In the dynamic of difference, there is the ascetic, universal culture and the bestial, uncivilised remnant. It is in and through sovereignty that this division is constructed and, crucially, that they are connected. Sovereignty renders the uncivilised peoples or nation deviant and in need of punishment and reconditioning. The violence of bad consciousness occasioned through the growth of the ascetic ideal is reconfigured as imperialistic violence, being realised and channelled

¹⁹ Martti Koskenniemi, *From Apology to Utopia* (CUP, 2007).

²⁰ ‘Prelude’ 8-14.

²¹ Antony Anghie, *Imperialism, Sovereignty, and the Making of International Law* (CUP, 2005).

²² China Miéville, *Between equal Rights: A Marxist Theory of International Law* (Brill Leiden, 2005).

²³ Rose Parffit, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance* (CUP, 2019).

²⁴ Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (CUP, 2020).

²⁵ ‘Prelude’ 33.

²⁶ *ibid* 38.

²⁷ *ibid* 19-20.

²⁸ ‘Human, All Too Human’ 113-119.

through sovereignty. That Anghie argues the civilising process of sovereignty is never complete is also an important point of coincidence. Each extension of the civilising, ascetic ideal renders more and more the uncivilised remnant suspect and accountable. And this evolution of the ascetic is represented through a transformation in the meaning and content of sovereignty. Through these transformations, the almost unlimited infliction of bad consciousness obtains its mirror in the almost unlimited infliction of imperialistic violence.

These latter points chime with the critique Tzouvala made of Miéville, in which she criticised the latter for essentialising sovereignty and the state. To her mind, these concepts are fluid and change as the need to justify capitalistic exploitation change.²⁹ Considering Tzouvala's account of civilisation more generally, further comparisons can be made. The logics of biology and improvement bear no small resemblance to the ascetic and the pre-human. Most clearly, the logic of biology accords with the pre-human: it is that pre-civilisation remnant that renders the individual less than human. The logic of improvement, in turn, provides the ascetic extension of responsibility. The breach between the ascetic and pre-human is not a radical one. In being capable of reaching the ascetic, of improving, the pre-human is brought within its normative field, and thus becomes accountable for its lingering pre-human quality.

Nevertheless, there is an important distinction between Nietzsche's account of civilisation and the theories put forward here. For Nietzsche, violence is not projected from the ascetic. It is the violence of the uncivilised being that is turned against itself. However, on Anghie, Parfitt, and Tzouvala's account, the economy of violence moves from the 'civilised' states against the 'uncivilised' – from the ascetic to the pre-human. This begs the question of whether Nietzsche's theories can offer a cogent account of sovereignty, imperialism, and civilisation. In moving to address this, it is important to remember that, for Nietzsche, the putatively ascetic states are themselves the *original products of the civilising process*. The violent dynamics and bad conscience of the civilising psychosis already structure their thinking. What Nietzsche helps us to see is that the global civilising mission is the violence of the internal civilising process *externalised*. Instead of seeking the remnant of the pre-

²⁹ 'Prelude' 20.

human within themselves, this identification can be shifted upon some Other. *They* become burdened with civilisation's debt. That violence which the civilised would ordinarily have to visit upon themselves can now be redirected against the Other. In this reallocation of violence, the civilised become (at least temporarily) complete and may stand with a good conscience.

This may seem counter intuitive. Nietzsche's entire point concerning the civilising process was that it *internalises* violence. The blonde beasts of prey featured in the *Genealogy* are committed to wanton and random acts of aggression, not the subsequent civilised animal. Be that as it may, there is an important distinction between the external violence of the beasts of prey and the sort of externalised form of violence that I am proposing here. The beast of prey is innocent: it manifests its power and violence without thought. It is its nature and enacts it. The civilised creature is profoundly hypocritical. Its violence *must* be couched in hypocritical terms – to be a *non-violence*. Its violence must be redefined in ascetic terms: realising the advance of the faith, raising the 'savage' to a standard of civilisation, the white man's burden, the end of history. Consider the slave revolt in morals – possibly the most significant externalisation of the civilising psychosis. The slaves, the most oppressed elements of society, sought to exercise power externally and dominate over others through offloading the burden of bad consciousness. They refigured morality so that being sick and weak was a badge of virtue, and that seeking worldly power, knowledge, and physical health was a sin.³⁰ In so doing, they prepared the ground for their own priest caste to rule. *The slaves' pursuit of power is always based on the lie.*

Sovereignty, then, in the international space can be interpreted as a marker for re-burdening and reallocating the debt and violence of bad consciousness. This returns us to the question of how theories of sovereignty have been generated domestically. Since the international use of sovereignty is about redirecting the violence of bad consciousness produced domestically, it unites the domestic and the international into a single violent economy. This externalisation of violence is premised upon its creation within the domestic sphere. As was suggested above, sovereignty theory, as developed domestically, should contain within itself the structural interplay of the ascetic and the pre-human:

³⁰ 'Human, All Too Human' 96-98.

identifying the ascetic authority and rendering a pre-human element accountable towards it. Moreover, the identification and scope of these two elements should develop as the process of civilisation intensifies. The scope of the ascetic should grow until encompassing almost the entirety of the pre-human; and this growth, in turn, should trigger greater and greater violence. The height of asceticism should be counter-posed with an image of an unforgiveable, bestial human remnant that must be clawed away from the emerging self.³¹

The emergence of the European global order

In developing this Nietzschean theory of sovereignty, it is possible to make some conjectures on the conditions of possibility (and the continuing conditions of possibility) of the European global order. The state, as we saw, enacts the violence of bad consciousness over and within its subjects. This violence, however, can always be outsourced: those without the sovereign order are, *prima facie*, representative of pre-human, uncivilised violence. This outsourcing of violence can be very important in preserving the health of the state's subjects. The civilised animal, it should be remembered, is a sick one. The occasional opportunity to exercise its violence freely, externally, wildly, is a palliative – but a palliative that still hides a poison. The external show of violence is still ultimately to soften the continued civilising at home. Even civilisation's medicines are hypocritical.

Civilisation is older than sovereignty. Pre-modern political orders had their constant external wars and raids against neighbours. The question is what changes with the introduction of a sovereign political-legal order? The pre-sovereign order allows for more violence to occur *within* the given society's borders. I mean 'violence' here in its widest, Dionysian sense. It is rupture and disharmony. In the pre-modern state, competing legal and political regimes might exist, the subjects are less

³¹ This bears some similarity to a Derridean position on law; a position that also sees within law and sovereignty a continual act of founding violence. See: Jacques Derrida, 'Force De Loi: Le Fondement Mystique De L'Autorite' (1990) 11(5-6) *Cardozo Law Review* 920-1046. However, where Nietzsche can take us beyond Derrida is through directing the civilising psychosis back upon the latter. The juxtaposition (yet intimate connection) established between the violent and deconstructible law, and his almost messianic, un-deconstructible justice, recreates the relationship between the ascetic ideal and the pre-human: Law, no matter how ostensible liberal or just or non-violent, will always necessarily depart from justice – a justice that is only ever 'perhaps'. The world cannot and will not measure up to our hallowed ideal. We are continually stretching out our hands and panting after God.

policed, alternative dispute resolution mechanisms beyond the state can exist. There is, as such, *less need* for violence to be generated externally. With the emergence of sovereignty and the apparatus of the modern state, that sickness of civilisation intensifies. Conflicting orders are quashed, the subject is more tightly disciplined, and the potential violence of the subject is surrendered into the hands of the sovereign. The sovereign space becomes symbolic of the ascetic, with the pre-human forced out and eliminated. Of course, this is hypocritical. The ascetic is only a simulacrum of its ideal, sustained through continued acts of violence. To save itself from its internal hypocrisies and the exposure of its own hollowness, the ascetic sovereign will need to increasingly externalise the pre-human.

At first glance, this wouldn't seem conducive to the emergence of any global order, save a monocentric imperialistic one – a global sovereign, if you will. There is no obvious reason why European states wouldn't attack one another increasingly in more systematic ways as they became domestically more civilised. What would need to change? On some level, the process of civilisation would have to be extended to inter-state relationships: the potential violence of those relationships would have to lose its good consciousness, becoming subject to the ascetic ideal and domesticated. The sovereign states would have to *recognise* one another *as bearers of the ascetic, as mutual bearers of sovereignty*. Of course, lacking an overarching ascetic power, this process might only be partial and still fraught with violence. While conflict may not be entirely eliminated, it must at least be dampened; such as controlling the *way* violence is exercised, the *conditions* in which it is exercised, and the *mechanisms* through which it is channelled. But if violence between European states becomes increasingly civilised, this starts amplifying the incoherencies within civilisation itself. The pre-human must be displaced somewhere to prevent its destabilising return. This is where European imperialism receives its rationale. The ascetic peace between European states (however partial) becomes predicated upon the transposition of violence to the non-European world. Through the extension of sovereignty to these places, the exercise of European violence becomes justified and receives its good consciousness.

This order, as I said, is far from stable. For a start, not every European state is an equal participant in extra-European violence. Lacking this external outlet of civilisation's pressures, they represent a lurking threat to the European order by reintroducing violence between sovereign states. Second,

civilisation, by its nature, is hypocritical and must necessarily manifest violence as it claims to civilise. Eventually, all the territory on the earth (technology and military superiority allowing) will be brought within the sovereign economy and civilised. For the order not to fall apart when this terminus is reached, *the conditions of sovereignty must evolve*. New areas of the pre-human must be discovered; new horizons for violence to be applied to. Perhaps most seriously, the hypocrisies of civilisation themselves are at risk of being exposed – when civilisation looks at its own works in dismay *and devaluates itself*. The vacuity of the ascetic promises made in the effort to legitimatise violence are revealed to be human, all too human. The entire edifice is shaken when it is revealed that to escape the pre-human, the civilised European has constructed an awful economy of violence on a global scale. The politics of the European global order is hinged upon staving off each of these three threats, ensuring the tragicomic performance continues.³²

Signs of Civilisation

Interpreting Nietzsche's work through critical scholarship carries us a significant way to developing a working theory of sovereignty and civilisation. One important factor, however, remains unaddressed. If the dynamics of sovereignty develop in accordance with the dynamics of civilisation, and if it is going to be the task of the thesis to track this evolution, then we need a grasp of the significations of increased civilisation. In other words, what does civilisation mean for Nietzsche?

Fortunately, Nietzsche was very forthcoming about what he did not care for in European society. As we saw in the previous chapter, Nietzsche condemns Christianity, metaphysics, democracy, liberalism, capitalism, socialism, nationalism, anti-Semitism, atheism, and feminism. He admired strong, aristocratic societies, but was disgusted by the putative weakness of the German upper classes. Uniting all of these trends, in Nietzsche's eyes was resentment, slave morality, and encapsulating

³² This argument bears some similarity with the recent study by Kojo Koram, who suggests that the technologies of imperialism (such as the company) are 'boomeranging' back against the original imperial states (Kojo Koram, *Uncommon Wealth: Britain and the Aftermath of Empire* (John Murray, 2023)). However, Koram's piece is not concerned with the philosophical underpinnings of sovereignty and the European global order per se, and nor does it excavate anything like a civilising psychosis to explain the development of western political/legal ideas.

them all, the ascetic ideal. Applying this to sovereignty gives us several diagnostic factors to look out for.

First, a clear indication of the civilising process would be the presence of Christianity, theology and metaphysics. Any transcendental dressing of power is a smoking gun for Nietzsche. Importantly, this transcendental power should be radically opposed to the mundane, human world. The profane cannot touch the sacred. Second, a Nietzschean position would anticipate the gradual encroachment of humanitarian interests: issues of freedom and equality, the purpose of power being for the benefit of the people etc. This should chime with a mounting atheism. The gap between the human and the sacred should narrow as the civilised human emerges. Eventually, the human should emerge as what is sacred – an end of history. Secularism, modernism, and nationalism, all represent, for Nietzsche, the final stages of nihilism. Third is the presence of a racial dynamic. While Nietzsche's own thoughts of race are far from innocent, he did perceive anti-Semitism as a manifestation of the ascetic ideal. The marking of a race as the pre-human, as the target of resentment, disgusted him. Finally, we should expect a mounting stress on the civilised human's subjectivity. As the division between the ascetic and the pre-human diminishes, the threat of that pre-human increases. The risk of breaking the debt to the ascetic mounts, prompting greater and greater self-inquisition over one's very humanity.

All aboard!

Is international law nihilistic? Can the civilising psychosis be read into the very 'geist' of the discipline, into sovereignty and the development of the global order of sovereign states?

While Nietzsche himself did not address sovereignty explicitly, I have tried to fill that deficit by reading Nietzsche's account of civilisation *through* sovereignty. This allowed us to see the discourse and theorisations of sovereignty as a (perhaps *the*) crucial site in the struggle and violence of becoming human. Sovereignty theory, I suggest, is organised around the antagonistic, though connected, poles of the ascetic and the pre-human. The developing tension between these poles – the degree of the human's emergence – produces different kinds of sovereignty. In this theory, the domestic and the international are linked within a single economy of violence. As the pressure of

domestic civilisation increases to the point of collapse, it becomes possible to externalise that pressure. A different culture or nation can be marked as the pre-human, made responsible to the ascetic through the technology of sovereignty, and legitimately subjected to violence. The state, therefore, spares itself from the incoherencies of civilisation through a process of externalisation. This creates the grounds of possibility for the European global order, in which a small collection of states recognise one another as mutual bearers of the ascetic, redirecting their violence towards the non-sovereign world.

Taking this Nietzschean understanding of sovereignty we can now put it to the test. In Volume II, I will present my drama of international law and the establishment of the global order of sovereign states. In it, I examine both domestic and international writings about sovereignty and see whether they can be broken down in the ways my Nietzschean theory of sovereignty predicts. This will involve considering the sovereignty writings themselves but also the development *between* theories and whether the transformations within sovereignty correlate with the nihilistic process of civilisation. Finally, the connections between how theorists frame the national and the international, and whether the conditions of the political emergence of a European global order chime with my theory, will be considered. Having accomplished this – having read the nihilistic psychosis into the root and stem of international law – we will be able to determine whether the discipline is indeed nihilistic.

VOLUME II

‘The Rise and Fall of a Global Order’: a Play in Three Acts

Incipient Tragedia! Or perhaps incipient comoedia? Or perhaps both? Recognising the comedic in the tragic can be an important restorative from an excess of seriousness – and there is much here that I would consider serious.

What is the object of all this seriousness? At the beginning of this thesis, I posed the question of whether international law was – and is – nihilistic: whether nihilism has driven the development of the discipline and if it continues to do so. Are we critical scholars, so adverse to the law’s *hypocrisy*, still in the clutches of that civilising, nihilistic psychosis? To answer these questions and, more particularly, to demonstrate the continuing complicity of contemporary critical scholarship with nihilistic/civilising patterns, I suggested that we trace the presence of nihilism through international law’s roots, bark, and foliage. My purpose in relating this account was precisely to exacerbate nihilism and to demonstrate the unsustainability of current paradigms. That is the seriousness that I speak of.

Over the previous Volume, we have been collecting our tools and instruments by which to relate this history of international law. I excavated Nietzsche’s theory of nihilism and civilisation; I stressed the political dimension of how these two elements combine in the civilising psychosis; and, in the thesis’ bridging and central chapter, I demonstrated how this psychosis could be linked to a generative theory of sovereignty and the European global order. Now this theory can be put to the test.

I, accordingly, present my philosophical history of the European global order – a play in three Acts. Within it, I follow the development of the civilising psychosis *through* sovereignty, charting its development and transformation into the foundation of a global order, right up until the contemporary denouement of international law. In the first Act, we begin with the deep roots of international order. Here, the focus rests upon the origins of the state: it concentrates on paradigmatic authors in the conceptual construction of the western sovereign state, including Bodin, Hobbes, Lock, Paine, and Rousseau. Within, across, and between the writings of these authors, I tease out the dynamism of the

civilising psychosis. In Act 2, I lift the discussion up to the international. Extending the analysis into the 19th century, it will examine how the psychosis of civilisation was stabilised and redirected outside of western Europe through the construction of non-sovereign entities. Again, the attention of the chapter rests upon several paradigmatic authors that show, in their distinct ways, the externalisation of the civilising psychosis as the basis for the global order. Finally, in Act 3 the narrative moves to contemporary critical scholarship. While passing over much of the 20th century, I wish to force this critical scholarship into a direct confrontation with the overtly civilising logic of their 19th century forebears and, through this encounter, to begat *recognition*. This is the culminative nihilistic moment of the drama: a disorientating moment in which the pre-human is again found within ourselves, even as we most virulently reject it. I give this disorientation literary expression through the rupturing of the academic script and style. Here, the subterranean, Dionysian voice speaks – a mocking, Godless voice, that calls attention to *our* hypocrisies. The thesis comes full circle back to that prelude exploration of critical scholarship; except this time the theme of hypocrisy falls upon their heads.

Now, enough talking! The stage is set, and the orchestra primed: the bow rests upon the strings. Take your seats. The play is starting.

Act 1: A Glance at the State

‘Perhaps we have gotten things the wrong way round... Perhaps it was the Devil who created the Earth and that the invention of ‘God’ was merely a subsequent piece of spite.’ (Scrawled in the corner of an undergraduate’s notebook).

Arbitrariness! Is this not the shadow and the delight of the civilised mind?...

My account of the development of the European global order begins with the emergence of the sovereign state. The task, in this first Act, is easy enough to express: to identify the fundamental role of the civilising psychosis in domestic theorisations of sovereignty. If this inquiry proves to be successful, and that sovereignty theories can be deconstructed along the lines of the psychosis, then I can move to consider in the next Act whether my previous hypothesis of the externalisation of pre-human violence also holds true.

Before beginning, it should be observed that civilisation is not just limited to the *sovereign state*.¹ Most types of society (if not all) require some domesticating of the pre-human animal if they are to exist. As we saw previously, Nietzsche himself explored how the ancient Greeks dealt with the pressures of civilisation through the agon in *Homer’s Contest*.² To limit our attention to the sovereign state raises the question of what distinguishes it from other forms of political order, and how this distinction can be explained through my theoretical framework. That is the first issue which will be tackled in this chapter. In answering it, I suggest that the emergence of sovereignty and the sovereign state represents a transformative moment in the nihilistic process of civilisation. It is the arrival of a truly *ascetic politics*; whereby the purpose and meaning of political relations becomes structured

¹ Within Europe itself, there have been diverse models of organising the body politic. The Polish-Lithuanian commonwealth, for example, operated on the basis of an elected king. For histories of the Polish-Lithuanian Commonwealth, see: Daniel Stone, *The Polish-Lithuanian State: 1386-1795* (University of Washington Press, 2001); Robert Frost, *The Oxford History of Poland-Lithuania, Volume 1: The Making of the Polish-Lithuanian Union* (OUP, 2015); Adam Zamoyski, *Poland: A History* (William Collins, 2015).

² Friedrich Nietzsche, ‘The Greek State’ in Keith Ansell Pearson, Duncan Large (eds), *The Nietzsche Reader* (Blackwell Publishing, 2006) 88.

around and through the ascetic ideal. In making this argument, the chapter will focus upon the writings of Bodin and, in particular, Hobbes' *Leviathan*.³

The psychosis of civilisation is not a stationary one. From its inception in the 16th and 17th centuries, sovereignty moved from absolutist understandings to liberal and revolutionary interpretations by the end of the 18th century. Accounting for these developments is the next issue the chapter will cover. As I will argue, the more civilised society becomes, the more sovereignty becomes burdened with the need to civilise *itself*. The violence of sovereignty that was necessary for civilising the social space is called into question. The idol becomes destabilised through the increasing exposure of the pre-human, culminating in a crisis point in which the whole sovereign apparatus risks devaluation. Discussing this will take us from Hobbes, through to Locke, and then to the revolutionary thinkers of Paine and Rousseau.

Scene 1: Raising Leviathan: Jean Bodin and Thomas Hobbes

The origin of sovereignty is disputed. As far back as Aristotle's *Politics*⁴ we can see the discussion of authority and power within social bodies.⁵ While not invoking the term 'sovereignty' directly, scholars have observed the elements of the doctrine in the works of Marsilius of Padua, Bartolus of Saxoferrato,⁶ and Machiavelli.⁷ Without getting waylaid by genealogical debates, what we can say is that the jurist and philosopher Jean Bodin⁸ marked both a culmination and turning point in pre-modern political thought. He concentrated the elements within public law discourse into a complete

³ Thomas Hobbes, *Leviathan* (Clarendon Press, 1929).

⁴ Aristotle, Ernest Barker (translator), *The Politics* (OUP, 2009).

⁵ For an in-depth discussion of both Aristotle's work and how Bodin developed it, see: Howell Lloyd, 'Sovereignty: Bodin, Hobbes, Rousseau' (1991) 45(179) *Revue Internationale de Philosophie* 353, 354.

⁶ Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Eubron, 2007).

⁷ Quentin Skinner, *Foundations of Modern Political Thought* (CUP, 1978).

⁸ For an overview of Bodin and the consequences of his works, see generally: Jacob Peter Mayer (ed), *Fundamental Studies on Jean Bodin*, (New York: Arno Press, 1979). For accounts of Bodin's personal life, see: Stéphane Beaulac, 'The Social Power of Bodin's 'Sovereignty' and International Law, (2003) 4 *Melbourne Journal of International Law* 28; Stéphane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and The Myth of Westphalia* (Martinus Nijhoff, 2004) 121; Howell Lloyd, *Jean Bodin. 'This Pre-eminent Man of France': An Intellectual Biography* (OUP, 2017).

package on which he bestowed the name 'sovereignty'⁹ in his masterpiece, *Six Lives of The Republic*.¹⁰

If Nietzsche admired the 16th century for its violence and lack of civilisation, Bodin thought the exact opposite. The France in which he lived and wrote was beleaguered both by a weak and faltering royal line and religious wars sparked by the Reformation.¹¹ France needed to pull itself back together, and to help with that (and no doubt to ingratiate himself with royal authority) Bodin offered his new philosophy of the state, complete with its reflections on sovereignty. From its inception, then, sovereignty was a device intended to domesticate.

In his description of sovereignty, Bodin establishes a very ascetic form of authority. One sign of this is the distinctly Christian imagination in which it is produced. Sovereignty is dispensed by God to the Prince for 'commanding other men'.¹² Through this divine connection, political power takes on an extra-human, otherworldly quality – the Prince becomes an idol. Bodin takes the uncivilised tools of power and clothes them in the cloak of sovereignty, divinely woven and gifted. Another sign is the absolutist terms in which sovereignty is granted. As we saw, the ascetic ideal is Truth itself: from Plato's forms to the Christian God.¹³ It is unchanging and perfect. Such is the same for Bodin's sovereignty. The power of the sovereign is 'absolute and perpetual' and only seconded to God Himself.¹⁴ The sovereign cannot be subjected to the command of any other being; for to say otherwise would invert the relationship between a master and a servant.¹⁵ The word of the sovereign is

⁹ Lewis has argued that despite all the elements of sovereignty being within intellectual circulation, it was Bodin who concentrated them into the singular theory of sovereignty. See: J. Lewis, 'Jean Bodin's 'Logic of Sovereignty'' (2006) 16 *Political Studies* 206–222. For additional accounts of how Bodin advanced sovereignty discourse from the medieval period, see: Dieter Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept* (Columbia University Press, 2015); Ralph Giesey, 'Medieval Jurisprudence in Bodin's Concept of Sovereignty', in Horst Denzer (ed), *Jean Bodin: Proceedings of the International Conference on Bodin in Munich* (Munich, 1973) 167-86.

¹⁰ Jean Bodin, *Six Lives of the Republic*, in Julian Franklin (ed, translator), *On Sovereignty: Four Chapters From the Six Books of The Commonwealth* (CUP, 1992).

¹¹ For an overview of these events, see: Mark Greengrass, *Christendom Destroyed: Europe 1517-1648* (Penguin, 2015).

¹² Bodin (n 10) 46.

¹³ 'Dionysus Explains the World' 73-74.

¹⁴ Bodin (n 10) 46.

¹⁵ *ibid* 49.

This absolutist understanding of sovereignty is the traditional reading of Bodin. See: D. Engster, 'Jean Bodin, Scepticism and Absolute Sovereignty' (1996) 17(4) *History of Political Thought* 469; Julian Franklin, *Jean Bodin and the Rise of Absolutist Theory* (CUP, 1973). See also: John Wilson, 'Royal Monarchy: 'Absolute'

law in its fullest sense: what the sovereign commands should become a natural reality for his subjects. Because of the sovereign's absoluteness, there cannot be two. The justification for this is drawn from the nature of God: 'Just as God, the great sovereign, cannot make a God equal to Himself because He is infinite and by logical necessity... two infinities cannot exist, so we can say that the prince, whom we have taken as the image of God, cannot make a subject equal to himself without annihilation of his power.'¹⁶

Life for the subject of this image of God would appear less than idyllic. As the authority of the sovereign takes on the quality of the Christian God, those under his sceptre owe obedience. Their individual will to power is utterly overawed and made abject to the command of the sovereign. While the Prince is accountable to God and expected to take care of his flock and exercise restraint¹⁷ (an idol cannot be too violent lest its ascetic quality be called into question), the subject has no right to resist an abusive sovereign. They do lose their positive duty to *obey* the sovereign. One cannot follow a sovereign that breaches God's natural and divine law for (as the higher incarnation of the ascetic ideal) it is to Him that the ultimate duty of obedience is owed.¹⁸ However, this does not extend to a right to *resist*. Much in the same way a son cannot lay hands upon a sinful and criminal father,¹⁹ it is better 'to suffer death rather than make any attempt on [the prince's] life or honour',²⁰ 'even if he has committed all the misdeeds, impieties, and cruelties that one could mention.'²¹ It is not for base human clay to punish that which is touched by the ascetic.

At first glance, all this seems to suggest that the civilising psychosis is quite developed in Bodin's sovereignty. It is an ascetic form of power – absolute for its subjects with divine trappings – that restricts the expression of the subjects' will to power wherever and whenever the sovereign speaks the

Sovereignty in Jean Bodin's *Six Books of the Republic*' (2008) 35 *Interpretation: a Journal of Political Philosophy* 241.

¹⁶ Bodin (n 10) 50.

This argument by Bodin of the indivisibility of sovereignty did receive considerable criticism. See: Julian Franklin, 'Sovereignty and the Mixed Constitution: Bodin and his Critics' in J. Burns (ed), *The Cambridge History of Political Thought* (CUP, 1991) 298.

¹⁷ *ibid* 195. For proponents of this reading of Bodin, see: Max Shepard, 'Sovereignty at the Crossroads: A Study of Jean Bodin' (1930) 45(4) *Political Science Quarterly* 580; Lewis (n 6) 206–222.

¹⁸ Bodin (n 10) 34.

¹⁹ *ibid* 119–120.

²⁰ *ibid* 120.

²¹ *ibid* 115.

law. The human animal is civilised by the command of the sovereign. This may be true, but the dynamic here is, in fact, crude. While the sovereign's subject is connected to it by the mutual tie of Christianity, that bond is an indirect one. The duty of the subject is to obey the ascetic sovereign *but not to assume that asceticism themselves*. This is rendered definitionally impossible, for there is an essential separation between the subject and sovereign. The subject is *not* divinely appointed, but the sovereign *is*; and it is upon this radical gulf that the authority of the sovereign depends. Beyond a religious duty to obey, it cannot be said that Bodin's sovereignty touches the interiority of the subject: how can one be tortured with bad conscience over a failure to represent an image of majesty that they definitionally cannot assume? It is in this sense that I described the nihilistic psychosis here as crude. The sovereign is reminiscent of a divine force that materialises on earth before overawing and subjugating us lesser beings. It is one individual claiming, in of themselves, to be symbolic of the Truth. There is little subtlety here: it is an external, awesome force, that both dazzles and overwhelms. Short of a common Christian faith, there is little reason for a person to obey the sovereign save the expectation of force. Robbed of divine spectacle, the sovereign is merely human, all too human: a fleshy being, much like anyone else.

In terms of the nihilistic process of civilisation, then, Bodin is a start, rather than a paradigm. If anything, he might better be described as a prologue. This is for one important reason: the absence of the state. Bodin discusses the republic – the 'public thing' – and the nature and responsibilities of princely power. But it is all very personal and patriarchal. The sovereignty Bodin is interested in is the sovereignty of the ruler, not the entity that is France. It operates within a feudal political imagination, marking it as distinctly pre-modern. Nevertheless, the seed of ascetic politics created by Bodin would prepare the groundwork – the civilised human subject – necessary for the deepening of the nihilistic psychosis and its reflection and production in the sovereign state. To make this argument, I now turn to one of the foundational theorists of the early-modern state, Thomas Hobbes.

Thomas Hobbes certainly wasn't the only scholar thinking about the state, politics, and law, at the beginning of the 17th century. By the 1640s Europe had been tearing itself to bits for 20 years in what would become known as the Thirty Years War, and the English monarchy, mired in civil war, was all

set to collapse and be led to the scaffold. How, and in what form, the European world should be put back together was a political question of very high stakes.

Hobbes himself was living in exile in France²² when he wrote his famous *Leviathan*.²³ While he was a proponent of monarchy by inclination, *Leviathan* is far more than a defence of the personal sovereignty of the monarch like we saw with Bodin.²⁴ By the time of its composition, the Parliamentarians were in firm control of England, leaving a royal restoration of the monarchy a remote possibility. That reality had to be reckoned with. Yet politics was far from settled. With the removal of the King a power vacuum was opened, and there was every chance the violence would continue. Hobbes wanted to shut down this possibility and achieve order.²⁵ His solution would move political theory into the early-modern period, away from the feudal imagination of Bodin, and provide the conceptual blueprint of the sovereign state.

Instead of the largely personal and feudal dynamics seen in the work of Bodin, Hobbes placed the emphasis on the community as a being in of itself. The ‘great LEVIATHAN called a COMMON-WEALTH’ is ‘but an Artificial Man’.²⁶ In reimagining the community as an artificial human body, the understanding of sovereignty was necessarily transformed. Within *Leviathan*, ‘the *Sovereignty* is an *Artificial Soul*’.²⁷ Sovereignty still assumes many of the traits that Bodin ascribed to it (mirroring the absolute power of God) but now becomes inherently tied to the human being. The individuals comprising a commonwealth become constitutive elements within the material fabric of the state, given animation by the voice of the sovereign.

This continues the ascetic imagination of political power by Bodin, but it still lacks that essential connection between the sovereign power and the individual. What is preventing Hobbes’ *Leviathan*

²² For a detailed summary of Hobbes’ life, see: A.P. Martinich, *Hobbes: A Biography* (CUP, 1999).

²³ Hobbes (n 3).

²⁴ Notwithstanding Hobbes’ intentions, his work met with immediate resistance – even from other royalists. See: Samuel Mintz, *The Hunting of Leviathan* (CUP, 1962).

²⁵ David Runciman, *Confronting Leviathan* (Profile Books, 2021) 7.

²⁶ *ibid* 8. Hobbes was writing from the commencement of the scientific revolution, a period marked by its commitment to mechanicalism. From this perspective, the whole of reality, including the human being, could be explained through the physical motion of atoms. The soul ‘is entirely reducible to and accountable by our material circumstances and our biological wirings.’ (Charlotte Epstein, *Birth of the State* (OUP, 2020) 59). The idea, then, that the sovereign power could be described as a *soul* makes perfect sense from this epistemological perspective.

²⁷ Hobbes (n 3) 8.

from being another external projection of authority that merely beats and overawes the subjects into subjugation? Hobbes' answer is to existentially link the emergence of civilised subject to the emergence of the state, rendering them mutually dependent. The rationale and challenge of the state becomes synonymous with the rationale and challenge of becoming fully human. In doing so, the state and individual become configured within a unified dynamic of bad consciousness and nihilistic psychosis.

Before addressing sovereign power directly, Hobbes' first conceptual move is to paint an image of the pre-human, *rendering it an irradicable burden that each and everyone of us carries*. This pre-human is pre-civilised humanity in the 'state of nature'.²⁸ It is a distinctly Dionysian creature, acting on impulse, driven by 'a perpetuall and restlesse desire of Power after Power, that ceaseth onely in Death.'²⁹ There is no claim of natural sociability that Hobbes' contemporary, Grotius, suggested.³⁰ In the state of nature, absent any mediating government, the mutual pursuit of power necessarily leads humanity into conflict with one another. Everyone is broadly equal and has an even enough chance of taking resources from any other person.³¹ To be secure in one's possession necessitates an aggressive stance to the world at large. Why wait to be attacked when you have the opportunity to land the first blow? The result is a continual condition of war, in which life is 'solitary, poore, nasty, brutish, and short.'³²

²⁸ This is very much the classic understanding of Hobbes' treatise presented by Leo Strauss in *The Political Philosophy of Hobbes* (University of Chicago Press, 1952). But see Kody Cooper, 'Reason and Desire After the Fall of Man: A Rereading of Hobbes' Two Postulates of Human Nature' (2013) 26(2) *Hobbes Studies* 107 for a recent critique.

²⁹ Hobbes (n 3) 75.

³⁰ See: Hans Blom, 'Sociability and Hugo Grotius' (2015) 41(5) *History of European Ideas* 589.

³¹ Gender equality in Hobbes' work has been the subject of study. On the one hand, Preston argues that Hobbes' theory is gender neutral: the goal is the establishment of unified authority. Gender is merely incidental (Preston King, *The Ideology of Order* (Allen and Unwin, 1974)). This is challenged by Carole Pateman who draws attention to the use of conjugal power in Hobbes work and the importance Hobbes' attaches to paternal power (Carole Pateman, 'God hath ordained to man a helper: Hobbes, patriarchy and conjugal right', in Mary Lyndon Shanley and Carole Pateman (eds), *Feminist Interpretations und Political Theory* (London, Polity, 1991) 53-73, 54.) Finally, according to the research of Gabriella Slomp, Hobbes' understanding of equality only attaches to the state of nature. It is possible following the social contract for inequality to exist, but she argues that Hobbes' philosophy contains important details as to why this shouldn't be the case (Gabriella Slomp, 'Hobbes and the Equality of Women' (1994) 42(3) *Political Studies* 441).

³² Hobbes (n 3) 97.

Though from Epstein's perspective, it is not the case that humanity desires conflict with one another. The problem comes from *the desire of peace*. Each person wishes to cooperate with one's fellows for mutual advantage. But differing opinions and voices as to how this should be managed is what leads to conflict. Absent government, the very desire for peace generates conflict. (Epstein (n 26) 77).

It is to escape this world of violence and chaos that Hobbes introduces his sovereign, civilised order – a place of relative safety and ease. But for this contrast to have emotive effect presupposes that we would find a world of peace desirable; but why should we? If human nature is one of violence, then a peaceful space should prove an anathema to us. To resolve this, Hobbes inserts the civilisational split within the human being. Through the use of reason, individuals should glimpse that the internecine conflict is counterproductive. Far better would be a reality in which humans could coexist peacefully and be secure in their life and property. Such is Hobbes' conviction in the fundamental quality of this principle that he makes it the basis of natural law: nature, as God has crafted it, compels the human subject 'to seek Peace, and follow it.'³³ The very structures of God's reality require a transition out of the pre-human state of nature and into the ascetic condition of civilisation.'³⁴ The individual becomes accountable for their lingering bestial nature.

To fulfil the natural law, the individual will to power of society's members must be alienated and surrendered to a common power. Absent this alienation, the uncivilised will to power of those members might resurface and cause violence. As Hobbes puts it, 'before the names of Just and Unjust can have place, there must be some coercive Power, to compel men equally to the performance of their Covenants, by the terrour of some punishment, greater than the benefit they expect by breach of their Covenant'.³⁵ While the natural law might render the uncivilised animal accountable to the ascetic ideal, the bestial nature can't be trusted on its own to do the right thing. In effecting this alienation to

It has been argued that Hobbes' state of nature was inspired by the First Nations (and that, as a consequence, he implicitly denies them the status of being a sovereign state). See: Pat Moloney, 'Hobbes, Savagery, and International Anarchy' (2011) 105(1) *American Political Science* 189.

³³ Hobbes (n 3) 100.

³⁴ *ibid.*

These laws of nature contain the following: (i) *That every man strive to accommodate himselfe to the rest* (page 116); (ii) *That upon caution of the Future time, a man ought to pardon the offences past of them that repenting, desire it* (page 117); (iii) *in Revenges..., Men look not at the greatnesse of the evill past, but the greatnesse of the good to follow*; (iv) *no man by deed, word, countenance, or gesture, declare Hatred, or Contempt of another* (*ibid.*); (v) *every man acknowledge other for his Equall by Nature* (page 118); (vi) *at the entrance into conditions of Peace, no man require to reserve to himselfe any Right, which he is not content should be reserved to every one of the rest* (*ibid.*); (vii) *if a man be trusted to judge between man and man... he [should] deale Equally between them* (page 119); (viii) *such things as cannot be divided, be enjoyed in Common* (*ibid.*); (ix) those things that cannot be divided or enjoyed in common should have their possession determined by lot (*ibid.*); (x) No man is his own judge (page 120).

³⁵ *ibid.*

The voluntarist tones in this passage earned Hobbes a wealth of detractors – one of the foremost amongst them being Leibniz. See: Mark Goldie, 'The Reception of Hobbes', in J.H. Burns, Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (CUP, 1994) 589.

the common power, the subject surrenders their will and judgment to that of the commanding power. It represents their person and voice, and whatever it commands must be treated as if authored by those subjected to it.³⁶ From the establishment of this unity in one individual, the Leviathan is established – ‘that *Mortall God*, to which wee owe under the *Immortall God*, our peace and deference.’³⁷ He who carries the person of the Leviathan unity ‘is called SOVERAIGNE, and [is] said to have *Sovereigne Power*.’³⁸

It is these elements of Hobbes’ work that make it so important. The problem of the power and violence of individuals (actual and potential), and how to deal with it, is at the forefront of Hobbes’ thought. Everything else is conditional upon that dilemma; and in recalling and confronting the pre-human, Hobbes interprets the task of civilising as a political one. Why he is so radical is that the state and the civilised person become one another’s ground of possibility. A civilised person can only emerge through the creation of the sovereign state and vice versa. The civilised subject is part of the artificial body of the Leviathan and that Leviathan is nothing more than the sum of the people who compose it: they become, in a sense, one and the same. The discordant will to power of individuals are diffused and channelled into the animation of a wider organism that nevertheless represents them each individually. Through this paradox, the incoherency of civilisation and the tension between the will to power and the ascetic ideal is seemingly resolved. The ascetic and the pre-human become one and the same.

³⁶ Hobbes (n 3) 131.

³⁷ *ibid* 132.

³⁸ *ibid*.

The ability to create in contradistinction to the material causality in which Hobbes’ thought was situated, places humanity in a unique position. See: Epstein (n 26) 85.

Whether sovereignty is invested in the individuals, or the office is open to debate. The standard view is that Hobbes’ ideas of representation mean that sovereignty can only be held by a natural person (see: Quentin Skinner, ‘Hobbes and the Purely Artificial Person of the State’ in *Visions of Politics Volume II: Hobbes and Civil Science* (CUP, 2012)). But see counter-narratives where the office is deemed to be what is possessed of sovereignty: Christine Chwaszcza, ‘The Seat of Sovereignty: Hobbes on the Artificial Person of the Commonwealth’ (2012) 25(2) *Hobbes Studies* 123.

The degree to which individuality is abandoned to the sovereign is debatable. See: Sheldon Wolin, ‘Hobbes and the Culture of Despotism’ in Sheldon Wolin (ed), *Fugitive Democracy, and Other Essays* (Princeton University Press, 2018) 149; Hannah Arendt, *The Rise of Totalitarianism* (Penguin, 2017); Bryan Garsten. ‘From Popular Sovereignty to Civil Society in Post-Revolutionary France’ in Richard Bourke, Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (CUP, 2016) 236; Jean Hampton, *Hobbes and the Social Contract Tradition* (CUP, 1987).

But this is not a final solution due to the very nature of the ascetic ideal. That ideal can only be realised through a simulacrum – through the internalisation of the will to power. The subject of civilisation suppresses and eats away at themselves *as an act of power*. Hobbes' sovereignty is no different. It presents itself as sovereign and is interpolated as such by the social contract, but its ascetic quality is hypocritical. As Nietzsche himself argued, the social contract is a fabrication. It conceals, and through concealment justifies, repeated acts of conditioning violence by the sovereign power to maintain and construct its order. While the potential violence of the subjects is diminished, the sovereign power becomes, ironically, the apogee of a violent, pre-human force. And that perhaps is the great flaw in Hobbes's conceptual edifice: to eliminate the violence of individuals he merely combined them into a collective individual organism. The resulting creation is no less violent than any of its members. It continues to exist in the state of nature, exercising its will, compelling its constitutive organs and cells into obedience and calling that peace. While this may indeed civilise the human being, the excessive burden of sovereign force risks exposing the sovereign *itself* as the dangerous, pre-human element.

Scene 2: Thinking liberally: the philosophy of John Locke

Two interrelated things mark the subsequent transformation of sovereignty doctrine. The first is the civilising of the sovereign power itself. Instead of a sovereign that may act as it pleases, its power becomes predicated on the good of the people and constitutional limits. The second is the colonisation of pre-history by the avatar of the civilised subject. In affecting this colonisation, in making the pre-civilisation human - the being in the state of nature - *ascetic*, the sovereign power and order becomes symptomatic of corruption and artificiality. *The space of civilisation becomes that of the pre-human.*

To some degree, both these elements can be seen in the writing of John Locke. Locke shared much of Hobbes' experiences of 17th England. Born in the 1630s, he lived through two civil wars and enjoyed his own spell of exile in the late 1680s.³⁹ Unlike the royalist Hobbes, however, Locke

³⁹ For biographies of John Locke, see: Maurice Cranston, *John Locke: A Biography* (OUP, 1985); Roger Woolhouse, *Locke: A Biography* (CUP, 2007); Samuel Rickless, *Locke* (Blackwell, 2014) 1-12.

gravitated to the nascent Whig opposition to royal absolutism: his political writings, emphasising the importance of liberty and the accountability of government, would stand as a philosophical canon within the Whig tradition that shaped the country politically and culturally in the coming century. Perhaps the most influential of these political writings is Locke's *Second Treatise of Government*,⁴⁰ published in 1689.⁴¹

Sovereignty as theorised by Locke bares several similarities with Hobbes. Like with his predecessor, Locke constructs a dualism between the state of civilisation and the state of nature. However, the 'civility' of Locke's state of nature is striking. This state of nature is far from nasty or brutish: each individual is free and equal,⁴² none being naturally the subject of any other.⁴³ The state of nature has its natural law, obtained through reason, 'that being all *equal and independent*, no one ought to harm another in his Life, Health, Liberty, or Possessions.'⁴⁴ Individuals are not equal in the state of nature in the Hobbesian sense, that everyone has some gift or skill that can be exploited to the harm of another - you may be stronger than me but I am wiler. For Locke, the essential equality of humanity stems from a shared nature and being the common subjects of God.

For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker: All the Servants of one Sovereign Master, sent into the World by this Order, and about his Business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure: And being furnished with like faculties, sharing all in one community of Nature, there cannot be supposed any such *Subordination* among us, that may authorize us to destroy one another, as if we were made for one another's Uses, as the inferior creatures are made for ours.⁴⁵

⁴⁰ John Locke, *Second Treatise of Government and A Letter Concerning Toleration* (OUP, 2016).

⁴¹ For a detailed review of Locke's social and intellectual context, see: Eric Mark, *John Locke* (Bloomsbury, 2013) 1-20.

⁴² Locke (n 40) 4.

⁴³ *ibid* 4.

⁴⁴ *ibid* 5. For a discussion of Locke's theory of rights, see: John Simmons, *The Lockean Theory of Rights* (Princeton University press, 1994).

⁴⁵ *ibid* 5.

John Locke's theory of personhood and the human mind is set out more fully in his *Essay Concerning Human Understanding* (John Locke, *An Essay Concerning Human Understanding* (Penguin, 1997)). For a discussion of how this text intersects with Locke's political thought, see: Epstein (n 26) 155; Rickless (n 39) 152-168.

As Epstein has demonstrated, however, the equality that Locke invests humanity is carefully curtailed. Only those persons in possession of *reason* have a claim to equality. Those who violate property rights act from a lack of reason, and so are less than fully human. Those who perform such violations enter into a state of war with those who they attack, thus legitimating all acts of violence and enslavement against them.⁴⁶ The pre-human is not all encompassing in the state of nature but limited to a discrete class of people. Still, with that lurking presence the lives of pre-civilisational, rational, humanity may be put at risk. As such, ‘The great and *chief End* therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the Preservation of their Property.*’⁴⁷

The creation of the state of civilisation, for Locke, is still conditional on a social contract establishing a sovereign power.⁴⁸ This follows the contours set by *Leviathan*. At the establishment of the social contract, each member of society alienates and surrenders to the wider community a certain amount of their ‘natural power’.⁴⁹ The individual gives up their ‘private judgement’ as to what would serve their interest best to the legislative power of the community, and to the repairing of wrongs and the execution of laws to the ‘umpire’ of the community.⁵⁰ Sovereignty is drawn in particularly ascetic terms. It is the ‘supream power’, ‘sacred and unalterable’ – the legislative power.⁵¹ Society cannot be governed or subjected by any law that has not been sanctioned by the legislator.⁵² Should the legislative power be destroyed, the civilisation itself dissipates; for it is ‘in their *Legislative*, that the

⁴⁶ Epstein (n 26) 164. Locke’s apathy to the propertyless is well known. For a discussion of his *Essay on the Poor Law*, see: Epstein (n 26)169.

⁴⁷ Locke (n 40) 63, 124.

Locke’s justification of private property is not our main focus, but, of course, is a topic that has accumulated an enormous literature. For some general introductions, see: C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press, 1962); J. Tully, *A Discourse on Property: John Locke and his Adversaries* (CUP, 1980); Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988); Mathew Kramer, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (CUP, 2009).

For Epstein, Locke’s justification of property rights is fundamentally linked to his construction of personhood, and thus embodies a variety of constitutive exclusions, ensuring the continuing white/male quality of capitalism. See: Epstein (n 26) 177.

⁴⁸ Locke (n 40) 49. See: Eric Mack, *John Locke* (Bloomsbury, 2013) 75.

⁴⁹ Locke (n 40) 43.

⁵⁰ *ibid.*

⁵¹ *ibid* 67.

⁵² *ibid.*

Members of a Commonwealth are united, and combined together into one coherent living Body.’⁵³

The legislator is ‘*the Soul that gives Form, Life, and Unity* to the Commonwealth... And therefore when the *Legislative* is broken, or *dissolved*, Dissolution and Death follows.’⁵⁴

While Hobbes had the sovereign stand as the representative for all, to be the sole person within the state of nature who may employ violence and the will to power, Locke proposes an alternative vision. With respect to an absolute monarch, Locke argues that they settle everything in accordance with their private judgement, without supervisory oversight of an appellate body. This renders them a contradiction to the rationale of civil society. The whole point of civil society is that disputes are not handled by the individual’s ‘private judgement’.⁵⁵ An absolute monarch, however, having recourse to both legislative and executive power, is both law-maker and the executioner of those laws. ‘[S]uch a Man, however intitled, *Czar*, or *Grand Signoir*... is as much *in the state of Nature*, with all those under his Dominion, as he is with the rest of Mankind.’⁵⁶ To exit the state of nature it is not sufficient to surrender up one’s will to power to a representative, sovereign subject: that subject *must also have exited the state of nature and be civilised*.⁵⁷

This creates something of a paradoxical position, pithily captured in Nietzsche’s satirical description of liberal leaders: ‘you serve; I serve; we all serve’.⁵⁸ Previously, as Hobbes would have it, the tension between the ascetic and the pre-human is resolved through their co-mingling in the person of the sovereign. In the combining and representing the choice of every individual in that of a single member, the will of the sovereign becomes the realisation of the ascetic. Locke changes this. That representative ‘soul’ must equally have recourse to a common source of appeal, which, in effect, creates a ‘civilisational loop’. Members of society become civilised through their submitting to a common source of authority, but that common source of authority must also submit to something. Power cannot be arbitrary; ‘arbitrary’ here meaning being the product of the pre-human and

⁵³ *ibid* 105.

⁵⁴ *ibid*. Rickless (n 39) 195-214.

⁵⁵ The idea of ‘private judgement’ would become the crucial element within the anarchist thought of William Godwin (William Godwin, *An Enquiry Concerning Political Justice* (OUP, 2013)). See: John Clark, *The Philosophical Anarchism of William Godwin* (Princeton University Press, 1977).

⁵⁶ Lock (n 40) 46.

⁵⁷ *ibid* 45.

⁵⁸ Friedrich Nietzsche, R.J. Hollingdale (translator), *Thus Spoke Zarathustra* (Penguin, 1974) 189.

uncivilised. From this we can perhaps see the genesis of other liberal ideas, such as the separation of powers. In order to prevent a single being or institution bearing all the faculties of pre-civilisational humanity, they should be divided up and set against one another. It is Dionysus dismembered.⁵⁹

While this isn't the place for a lengthy discussion of liberal constitutional theory, what Locke is insistent upon is that political power was to be used for the benefit of the members of society. This marks another departure from Hobbes. For the latter, whether the sovereign behaved well or ill wasn't really the point. The point was that *they acted*, and in acting ended the state of nature. According to Locke, however, the sovereign power is merely a fiduciary power and is limited to the public good. 'It is a Power, that hath no other end but Preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects.'⁶⁰ When a ruler begins to legislate or govern beyond the dictates of established law or for their own interest, tyranny arises.⁶¹ Having lapsed into tyranny, that person or body which has exceeded their powers, 'ceases in that to be a Magistrate, and acting without Authority, may be opposed, as any other Man, who by force invades the Right of another.'⁶²

While taming some of the harsher aspects of the Hobbesian sovereign, these transformations in the understanding of sovereignty theory represent something of the civilisational Pandora's Box. In effect, they begin to reverse the dynamic between the ascetic and the pre-human. For Hobbes, the state of nature is representative of the pre-human, to be contrasted with the ascetic promise of the state of civilisation. From Locke, the being in the state of nature becomes that of the ascetic – a reasoning being bestowed with natural law rights. This, in turn, begins to recast the sovereign order as a potential cite of pre-human violence. While Locke only takes this so far, it opens up the possibility of pushing the transition further. If the pre-civilisational space is absolutely reconfigured as that which

⁵⁹ For a discussion of the separation of powers in Locke's thought, see: Suri Ratnapala, 'John Locke's Doctrine of the Separation of Powers: A Re-Evaluation' (1993) 38 *American Journal of Jurisprudence* 189.

⁶⁰ Locke (n 40) 68.

⁶¹ *ibid* 99.

For a recent discussion of tyranny and the foundations of the western legal order, see: Aoife O'Donoghue, *On Tyranny and the Global Legal Order* (CUP, 2021).

⁶² Locke (n 40) 100. Locke is, however, quick to affirm some protections to the sovereign and that rebellion against rightful power is condemnable in the eyes of 'God and man'. See: Lock (n 40) 101. Locke also suggests that the people retain the right to change the legislative power. See: Locke (n 40) 75.

contained the ascetic ideal of the individual human subject with rights, then the extant world of sovereign orders can be, in turn, absolutely cast as the corrupting space of the pre-human – or worse, as a post-human place that has occasioned the *degradation* of the human individual. Through this reimagination, the pitch of civilisational violence can be amplified to new heights. No longer is the pre-human a moral burden that humanity, in order to be realised, must escape from. Instead, the source of danger is the hypocritical sovereign order – that false idol – which presented and justified itself on the grounds of being such an escape. Its hypocrisy is *criminal*; and as criminal it may be (must be) destroyed so that a true ascetic order – the true human being - may be reclaimed. The road is open for the entirety of the extant world to be offered as a holocaust for the ascetic ideal.

Scene 3: Toppling idols: Jean-Jacque Rousseau and Thomas Paine

Two thinkers are emblematic of the revolutionary turn in sovereignty discourse: Thomas Paine and Jean-Jacque-Rousseau.⁶³ Both, in their distinct ways, offer a radical critique of the sovereign-based orders in which they lived, demanding a total reconstitution of law and politics to accommodate and (in their eyes) *reclaim* a lost humanity.

Remaining within the anglophone world, we will start with Paine. Born in 1737, the start of Paine's life was not a prosperous one. He drifted between employments, being variously apprenticed as a staymaker, a teacher, a tobacconist, and an exciseman.⁶⁴ With each of these routes turning to grief, Paine left England, emigrating to the Thirteen Colonies in 1774, just as tensions between the colonists and Great Britain were beginning to boil over. Siding with the colonists, Paine composed some of the most influential pamphlets of the Revolutionary movement, including *Common Sense*,⁶⁵ declaiming

⁶³ There were, of course, amongst others. The writings of Voltaire, Diderot, Brissot, Thomas Jefferson, and John Wilkes were all influential upon the late 18th century.

⁶⁴ For accounts of Thomas Paine's life, see: Alfred Aldridge, *Man of Reason: The Life of Thomas Paine* (Cresset Press, 1960); Audrey Williamson, *Thomas Paine: His Life, Work and Times* (Allen & Unwin, 1973); Harvey Kaye, *Thomas Paine: Firebrand of the Revolution* (OUP, 2000); J. Keane, *Tom Paine: A Political Life* (Bloomsbury, 1995).

Interestingly, the importance of Paine is usually taken to be his influence as a polemical writer, not as a political thinker in his own right. See: Robert Lamb, *Thomas Paine and the Idea of Human Rights* (CUP, 2015) 1; Benard Vincent, 'Storming the "Bastille of Words": Tom Paine's Revolution in Writing' in Bernard Vincent (ed), *The Transatlantic Republican: Thomas Paine and the Age of Revolutions* (Brill, 2005).

⁶⁵ Thomas Paine, *Rights of Man, Common Sense, and Other Political Writings* (OUP, 2008).

the tyranny of the British crown and the justness of the colonists' struggle. Following the conclusion of the American War of Independence, and the eruption of the French Revolution, Paine would leave for France, becoming a member of the National Assembly.⁶⁶ His *Rights of Man*⁶⁷ would launch a powerful defence of the principals of the French Revolution and challenge the conservative politics of his native England, taking on the famous Whig politician Edmund Burke.⁶⁸

The fulcrum of Paine's political thought hinges upon the reversing of the ascetic and the pre-human. Pre-civilisational space, for Paine, is really nothing of the sort. There is little hint here of violence or an aggressive humanity in need of domestication. The beginning of government and society is more of a practical concern: nature has made the wants of humanity greater than what could be achieved by the skills of any lone individual, necessitating that they work together.⁶⁹ Added on top of this is a predisposition towards sociability. Without the company of its fellow humans, the individual would be quite miserable.⁷⁰ For Paine, natural sociability can achieve much, making government only necessary in so far as sociability and civilisation cannot achieve the end.⁷¹ He goes as far as to suggest that a perfect civilisation would be able to govern its own affairs without the need of an executive power.⁷²

Crucially, the individual in the state of nature is a being with rights.⁷³ Jumping upon the conservative use of precedent and history to justify an extant constitution,⁷⁴ Paine argues that such use of precedent must lead back to the 'divine origin of the rights of man at the creation'.⁷⁵ That previous scholars have been reluctant to follow this line of inquiry is because of 'upstart governments' obstructing reason, 'presumptuously working to *unmake man*.'⁷⁶ While avoiding becoming embroiled

⁶⁶ In which capacity he would vote for the death of Louis XVI.

⁶⁷ Paine (n 65).

⁶⁸ Edmund Burke, *Reflections on the Revolution in France* (Penguin, 1982).

For overviews of Paine's thought, see: G. Claeys, *Thomas Paine: Social and Political Thought* (Unwin & Hyman, 1989); Jack Fruchtman, *The Political Philosophy of Thomas Paine* (John Hopkins University Press, 2011).

⁶⁹ Paine (n 65) 'Rights of Man Part 2', 214.

⁷⁰ *ibid* 'Rights of Man Part 2', 214.

⁷¹ *ibid* 'Rights of Man Part 2', 215.

⁷² *ibid* 'Rights of Man Part 2', 216.

⁷³ For a critical discussion of Paine's natural rights, see: Lamb (n 64) 25-73.

⁷⁴ This was particularly a rejoinder to Burke, who insisted that the British constitution was something passed on through tradition across the generations. See: Burke (n 68).

⁷⁵ Paine (n 65) 'Rights of Man, Part 1', 117.

⁷⁶ *ibid*.

in theological disputes about the divine origins of humanity, Paine contends that all accounts of the creation agree upon the essential principal of the ‘*unity of man*’.⁷⁷ By this, Paine means to say ‘that men are born equal, and with equal natural right, in the same manner as if posterity had been continued by *creation* instead of *generation*’.⁷⁸

Having developed his idea of natural rights contained within the state of nature, Paine reimagines the putative civilised space as a *corruption* of humanity, an *unmaking*. In the putative civilisation ushered in through the sovereign state, humanity has, in fact, become ‘artificial’ and separated from ‘his Maker’.⁷⁹ Natural humanity is the true symbolic of the ascetic, not the hypocritical false idol of the sovereign monarch. As such, all governments that had thereto existed could not have commenced other than through ‘a total violation of every principle sacred and moral’.⁸⁰ Indeed, they are a criminal imposition; doubly criminal for their hypocrisy and for their destruction of the real state of asceticism. The palaces of Kings, for Paine, were, ‘built upon the ruins of the bowers of paradise.’⁸¹

Across Paine’s writings, the idea of the sovereign monarch as a false idol takes on a literal sense. The idea of a human, all too human, monarch assuming the accoutrements of divinity, of asceticism, is too much to bear. It is a form of ‘popery’;⁸² ‘the most prosperous invention the Devil ever set on foot for the promotion of idolatry.’⁸³ It is impious that ‘the title of *sacred majesty*’ should be applied ‘to a worm, who in the midst of his splendour is crumbling to dust.’⁸⁴ But perhaps even worse than impiety is the hypocrisy of the sovereign monarch. In a move that mirrors Nietzsche’s description of the beasts of prey and the violent origins of the sovereign state,⁸⁵ Paine uncovers the muck which the

⁷⁷ *ibid.*

⁷⁸ *ibid.*

⁷⁹ *ibid* ‘Rights of Man Part 1’, 118.

⁸⁰ *ibid* ‘Rights of Man Part 2’, 220.

⁸¹ *ibid* ‘Common Sense’, 5. Paine even argues that the violence of the French Revolution was the fault of centuries of saturation in corrupt and unnatural government. ‘These outrages were not the effect of the principles of the Revolution, but of the degraded mind that existed before the Revolution...’ See: ‘Rights of Man Part 1’, 110.

⁸² *ibid* ‘Common Sense’, 15.

⁸³ *ibid* ‘Common Sense’, 11.

⁸⁴ *ibid.* Paine goes so far as to link traditional ideas of sovereignty to original sin. ‘For as in Adam all sinned, and as in the first electors all men obeyed; as in the one all mankind were subjected to Satan, and in the other to Sovereignty; as our innocence was lost in the first, and our authority in the last; and as both disable us from re-assuming some former state and privilege, it unanswerably follows that original sin and hereditary succession are parallels.’ See: ‘Common Sense’, 17.

⁸⁵ ‘Human, All Too Human’ 112.

gold leaf of monarchy attempts to conceal. If royal genealogists attended to the origins of their master's lines, they would find nothing but 'the principal ruffian of some restless gang' who 'over-awed the quiet and defenceless to purchase their safety by frequent contributions.'⁸⁶ The members of royalty become refigured as delinquents and criminals, responsible for the enslavement and decay of humanity. As time has progressed and the history of their origins obscured, royal authority has deigned to *civilise itself*. It 'assumed new appearances'; '[w]hat at first was plunder, assumed the softer name of revenue; and the power originally usurped, they affected to inherit.'⁸⁷

The situation between existing states is one of which Paine describes as a state of nature. This is not because there is an absence of transnational social contract, but because the very states that claim to be civilised are, in fact, trapped within a dehumanising rule of uncivilised governments. In other words, the usurpation of kings creates an international system of warfare. The old governments are 'beyond the law as well of GOD as man', and are, as such, 'like so many individuals in a state of nature.'⁸⁸ Being thus uncivilised, 'they pervert the abundance which civilised life produces to carry on the uncivilised to a greater extent.'⁸⁹ Wars create the need for taxation, and in this Paine identifies the key reason for monarchs engaging in hostilities.⁹⁰ For Paine, if the old governments were swept away and civilisation truly set up in Europe, international commerce would develop, leading to the enrichment of all.⁹¹

But what would be a true condition of civilisation for Paine? That entails reconnecting political order with the natural rights of man. Humanity is bestowed with equal dignity, meaning no power can be raised above and in contradistinction to them. Paine is insistent that political power should be republican in nature and that sovereignty lies not with a lone individual, but with the people at large. While they form a body, this body is not that represented by the human body. It 'is like a body contained within a circle, having a common centre, in which every radius meets; and that centre is

⁸⁶ *ibid* 'Common Sense' 15. This is repeated in 'Rights of Man Part 1' at 121, and in Part 2 at 220.

⁸⁷ *ibid* 'Rights of Man Part 2', 221.

⁸⁸ *ibid* 'Rights of Man Part 2', 264.

⁸⁹ *ibid*.

⁹⁰ *ibid* 'Rights of Man Part 1', 195.

⁹¹ *ibid* 'Rights of Man Part 2', 266.

formed by representation.’⁹² Consequently, ‘[e]very citizen is a member of the Sovereignty, and, as such, can acknowledge no personal subjection; and his obedience can only be to the laws.’⁹³

This can be seen as an attempt to ‘perfect’ the sovereignty of Hobbes. For the author of *Leviathan*, the problem of the pre-human was resolved through the alienation and transference of the will to power to one representative figure who embodied that violence for all. In Paine’s mind, this sovereign is imperfect. Not only are the historical figures that have claimed sovereignty been little better than frauds, the transference of sovereignty to one person creates a breach between the government and the members of the community, creating the possibility (if not reality) of violence and subordination between them. To prevent this, the sovereign power and the community must be one and the same. The ‘citizen’, in contradistinction to the ‘subject’, comes forth as the bearer of a shard of the ascetic sovereignty, marking them as truly human. A new understanding of humanity and a new understanding of sovereignty emerge hand in hand.

Paine’s citizen endowed with natural rights would prove a potent instrument in Europe’s path of civilization. His pamphleteering and essay writing was an important source of propaganda for both the American and French revolutionaries. There can be no compromise with the old order; anything short of revolution merely perpetuates the state of uncivilisation. While he does not actively promote civilisational violence between states, it’s not difficult to see how his work could be employed for that purpose. In effect, France (or whatever republican entity it might be), once it has finished cleansing itself (or more appositely, to distract itself from the possibility of its own continuing pre-human state) reimagines itself as the only bastion of humanity in a sea of pre-human filth. The extension of violence from the former to the latter would be merely clearing away artificiality. If that entails

⁹² *ibid* ‘Rights of Man, part 2’, 233. The idea of representative democracy had been pioneered in the creation of the Constitution of the United States and, theoretically, in the *Federalist Papers*. See: James Madison, Alexander Hamilton, John Jay, *The Federalist Papers* (Penguin, 1987) 247.

⁹³ *ibid* ‘Rights of Man, Part 1’, 193.

Due to Paine’s resistance to the calcifying effects of tradition, Feit has suggested that Paine’s ideal society be understood as a ‘generational democracy’, in which the creative rights of the living are affirmed. See: Feit Mario, ‘For the Living: Thomas Paine’s Generational Democracy’ *Polity* 48(1) 55. For a general account of Paine’s importance to the representative political tradition, see: Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago press, 2006).

violence, well: that violence is a necessary product of the pre-human violence perpetuated by old governments that must be employed in order to be erased.

Perhaps what defines Paine's political thought is disgust⁹⁴ – a disgust not that far removed from nihilism. The failure of the idol of monarchy to live up to its ascetic pretensions is what triggers this disgust. But it does not tip Paine over the edge into fully fledged nihilism because of the preservation of the civilised subject in the state of nature: while corrupted by royal pretenders, it is still a salvageable ideal. This, however, introduces a destabilising hypocrisy into the work of Paine. What he does not (cannot) see is that the ascetic ideal of the citizen, *figured as both the historical antecedent and future redemption* of the sovereign order, is the product of that same order. It is civilisation turning with disgust upon its own instruments, redefining them as corruptions of its image. The idea of the citizen must be detached from its human, all too human, origins and showered with purifying scent. Sadly, all idols will eventually ring hollow.

'Man was born free, and everywhere he is in chains.'⁹⁵ The inversion of the sphere of pre-human nature and ascetic civilisation could not be better encapsulated than in this statement by Rousseau. Rather than emerging from the pre-human state of nature into the ascetic promise of civilisation, a once ascetic humanity has been enslaved and corrupted by the false idol of the sovereign.

Born a Genevan citizen, Rousseau emigrated and eventually took up residence in France where he began his philosophical output. Following in the wake of the exigencies of the 16th and early 17th Centuries, France developed one of the strongest systems of absolute monarchy in Europe (with the work of Bodin providing important jurisprudential support).⁹⁶ Such was their power that Louis XIV, in a very idolatrous move, intitled himself the 'Sun King'.⁹⁷ Financial and social inequalities in France grew sharper as power was concentrated into royal and noble hands. The situation deteriorated further

⁹⁴ Feit has described it as contempt. In contradistinction to the classical tradition in philosophy, Paine, Feit argues, adopts a *democratic contempt* at anything non-democratic. See: Mario Feit, 'Thomas Paine and Democratic Contempt' in Xavier Márquez (ed), *Democratic Moments* (Bloomsbury, 2017) 81.

⁹⁵ Jean-Jacques Rousseau, *Of The Social Contract and Other Political Writings* (Penguin, 2012) 10.

⁹⁶ For an assessment of the legacy of Bodin, see: J.H. Salmon, 'The Legacy of Jean Bodin: Absolutism, Populism or Constitutionalism?' (1996) 17(4) *History of Political Thought* 500.

⁹⁷ See: Philip Mansel, *King of the World: The Life of Louis XIV* (Penguin, 2022).

in consequence of the disastrous conflicts waged by the Bourbons across the 18th century.⁹⁸ Disgusted by these inequalities and the ineffectual nobility that surrounded him, Rousseau launched scathing attacks in his *Discourse on Inequality*⁹⁹ and *Emilie*.¹⁰⁰ Following the publication of the, *The Social Contract*,¹⁰¹ where he fiercely argues for the sovereignty of the people, he was forced into exile.

Predictably, Rousseau begins his *Social Contract* with the idea of the state of nature.¹⁰² Again, this is not Hobbes' state of nature, but a place of reason. In this state, humanity has natural liberty and is independent from all others unless they volunteer for some association. This, for Rousseau, springs from humanity's nature, 'whose first law being that of self-preservation, our principle concerns are those which relate to ourselves: no sooner, therefore, doth man arrive at years of discretion, than he becomes the only proper judge of the means of that preservation, and of course his own master.'¹⁰³ In his earlier work, *A Discourse on Inequality*, the state of nature is described in even more rhapsodic terms, appearing as a sort of golden age, from which mankind has degenerated into a condition of unnatural inequality and unhappiness.¹⁰⁴

The exiting of this state of nature is only justified on the grounds of necessity – a moment of exigency, 'when the obstacles to their preservation, in a state of nature, prevail over the endeavours of individuals to maintain themselves in such a state.'¹⁰⁵ At this point, people must coalesce to form 'an accumulation of forces sufficient to oppose the obstacles'.¹⁰⁶ In a similar vein to Paine, Rousseau is opposed to any concentration of the sovereign power within a lone individual. To do so would be to divide 'the human species into herds of cattle', making each a property of its shepherd.¹⁰⁷ Such

⁹⁸ The two conflicts that stand out in this respect are the Spanish War of Succession (James Falkner, *The War of the Spanish Succession, 1701-1714* (Pen & Sword Military, 2015)) and the Seven Years War (Franz Szab, *The Seven Years War in Europe: 1756-1763* (Routledge, 2007); Daniel Baugh *The Global Seven Years War 1754-1763: Britain and France in a Great Power Contest* (Routledge, 2011)).

⁹⁹ Jean-Jacque Rousseau, *Discourse on Inequality* (Penguin, 1984).

¹⁰⁰ Jean-Jacque Rousseau, *Emile* (Penguin, 1991).

¹⁰¹ Jean-Jacque Rousseau, *The Social Contract: Or, Principles of Political Law* (Peter Eckler, 1893). For an in detailed commentary on Rousseau's famous text, see: David Lay Williams, *Rousseau's Social Contract* (CUP, 2014).

¹⁰² *ibid* 10.

¹⁰³ *ibid*.

¹⁰⁴ Christopher Bertram, *Rousseau and The Social Contract* (Routledge 1994) 49. For an analysis of the *Discourse on Inequality*, see: Marc Plattner, *Rousseau's State of Nature: An Interpretation of the Discourse on Inequality* (North Illinois University Press, 1979).

¹⁰⁵ *ibid* 23.

¹⁰⁶ *ibid*.

¹⁰⁷ Rousseau (n 101) 11.

reasoning is the logic of Caligula.¹⁰⁸ The pre-human violence of the sovereign is here brought to the fore, and the Hobbesian solution to ascetic politics turned on its head. But how does Rousseau intend to set up a true sovereign idol that will not ring hollow? His terms of success would appear paradoxical: to find that form of association which shall protect and defend, with the whole force of the community, the person and property of each individual; and in which each person, by uniting himself to the rest, shall nevertheless be obedient only to himself, and remain as fully at liberty as before.¹⁰⁹

The answer to the paradox is in its dissolution. The social contract, in predictably ascetic terms, demands the absolute alienation of every individual to the community,¹¹⁰ thus preventing any one person acting on their independent judgement.¹¹¹ To allow the continuation of private judgement would be to perpetuate the state of nature.¹¹² While this may just sound like Locke, what is crucial about Rousseau is that the sovereign power stays with the contracting community and its members as a collective whole. The representative methods proposed by Paine are not good enough. The individual is collapsed into the community and vice versa. Leviathan truly *is* the commonwealth: it is Hobbes' sovereign ascetically perfected. Therefore 'the individual, by giving himself up to all, gives himself to none.'¹¹³ They submit to the 'general will of all', and the collective body receives 'each member into that body as an indivisible part of the whole.'¹¹⁴

The idea of the general will is crucial for Rousseau's understanding of sovereignty. It is the expression of that force which perfects the unity between individuals and the community. In contradistinction to the ideas of free-thinking individuality, Rousseau likens the general will to the mechanics of the human body: 'As nature hath given every man an absolute power over his limbs... so the *Social Contract* gives to the body-politic an absolute power which, directed by the general will, bears the name... of the sovereignty.'¹¹⁵ These 'sovereign acts' constitute 'convention[s] between

¹⁰⁸ *ibid.*

¹⁰⁹ *ibid* 24.

¹¹⁰ *ibid.*

¹¹¹ *ibid.*

¹¹² *ibid.*

¹¹³ *ibid* 25.

¹¹⁴ *ibid.*

¹¹⁵ *ibid* 46.

[the] whole body and each of its members'. They are Laws.¹¹⁶ Importantly, laws can only deal with general things. To concentrate on some specific and particular object will give rise to the particular concerns of individuals and thus fracture the sovereign body.¹¹⁷ This leads to two central qualities in Rousseau's understanding of sovereignty. First, it is unalienable. Whenever the particular concerns of individuals qua individuals come to predominate, the moral collective of the sovereign collapses: distinct will to powers come to the fore.¹¹⁸ Second, it is indivisible. The fully human being does not willingly suffer its foot or hand to act of its own volition. Therefore, the sovereign body cannot suffer one part of it to act of its own will and interest.¹¹⁹ And to ensure this conformity to the general will, the state is permitted to employ coercive force.¹²⁰

In transposing sovereignty into the body of the community itself, Rousseau ramps up the tension of civilisation. Previously, the ascetic command of the sovereign was something of an external thing. While morally connected to the ascetic sovereign through the social contract and natural law duties, you did not carry the burden of sovereignty yourself. If anything, the transference of your will to power to the ascetic sovereign was intended to *relieve* the anxiety and danger posed by the pre-human. With Rousseau, all this changes. In making each person a member of the sovereignty, bound to act upon the general will, the *civilisational anxiety* remains alive, generating a subjectivity of paranoia and self-inquisition. Each political action (if not thought) must be carefully interrogated to see if it manifests a separate inclination from the ascetic, general will – and each act and thought of your neighbour too. But what makes this even more challenging is identifying precisely when an act is that of the general will and not of a pre-human, individual will. The only way to escape anxiety is to engage in acts of self-mortification – to do that which is so contrary to your individual inclination and comfort. In short, to act, literally, *ascetically*. Rousseau is quite explicit about the benefits of austerity;

¹¹⁶ *ibid* 55.

¹¹⁷ *ibid* 56.

¹¹⁸ *ibid* 39.

¹¹⁹ *ibid* 41.

The absolute conception of sovereignty presented here does not chime easily with Rousseau's belief in natural law (For an analysis of Rousseau's approach to natural law that sees it as part of the constructivist tradition, see: Kenneth Westphal, 'Natural Law, Social Contract and Moral Objectivity: Rousseau's Natural Law Constructivism' (2013) 4(1) *Jurisprudence* 48). However, scholars have argued that natural law, for Rousseau, is an enabling factor of sovereign power. See: Melissa Schwartzenburg, 'Rousseau on Fundamental Law' (2003) 51(2) *Political Studies* 387.

¹²⁰ *ibid* 29.

for to his mind, the pursuit of wealth and status is what exacerbates the usurpation of the general interest in favour of particular interest of individuals.¹²¹ In line with these ideals, his advice to the contemporary Corsican independence movement¹²² was to avoid any commercial, wealth producing activities in favour of agriculture and other honest forms of labour.¹²³

Notwithstanding such unappealing economic suggestions, Rousseau was not optimistic regarding the long-term viability of a true ascetic sovereignty. It is here that the first overt notes of nihilism start creeping in. The first problem is how the general will is supposed to be ascertained, especially if representative politics is ruled out. Rousseau insists on the centrality of regular general assemblies, composed of the members of the sovereignty.¹²⁴ This, of course, presents the problem of any state of significant size. In such a circumstance, how is direct democratic participation supposed to be realised? The only solution Rousseau can perceive is moving the general assembly from town to town.¹²⁵

Rousseau's difficulties of preventing the inclusion of individual interests within the legislature carry over into his conception of the relationship between the sovereign power and government. For Rousseau, in order to put the general will into operation (to give the will bodily expression) and to deal with particular concerns, government is established.¹²⁶ It serves 'as a communication between the state and the sovereign, and effecting the same purpose in the body-politic, as the union of the soul and body in man.'¹²⁷ Importantly, the government does not partake of the body politic's sovereignty. The power it exercises is a commission, in which it 'act[s] as [a] mere officer of the sovereign'.¹²⁸ The

¹²¹ *ibid.*

¹²² Led by Pasqual Paoli in the 1760s. It was quashed at the battle of Ponte Novu by the French in 1769.

¹²³ Rousseau (n 101) 29.

¹²⁴ *ibid* 127-129.

¹²⁵ *ibid* 130-131.

¹²⁶ *ibid* 81.

¹²⁷ *ibid* 82.

¹²⁸ *ibid.*

The distinction between sovereign power and government significantly detaches Rousseau from early theorists. For a discussion of how the distinction emerged from the writings of Bodin through to Rousseau, see: Richard Tuck, 'Democratic Sovereignty and Democratic Government' in Richard Bourke, Quentin Skinner (eds), *Popular Sovereignty in Historical Perspective* (CUP, 2016) 115. However, it should be noted that the fundamental division by Rousseau of the sovereign legislature and the government has been argued to be incoherent. See: Mathew Simpson, 'A Paradox of Sovereignty in Rousseau's Social Contract' (2006) 3(1) *Journal of Moral Philosophy* 45.

need for government tends towards the destruction of the sovereign power.¹²⁹ As the prince has a will of his own, ‘the government necessarily makes a continual effort against the sovereignty.’¹³⁰

Therefore, ‘it must sooner or later infallibly happen, that the prince will oppress the sovereign, and break the social contract.’¹³¹ To Rousseau, ‘[t]his is an inherent and unavoidable defect, which, from the very birth of the political body, incessantly tends its dissolution’.¹³²

A permanent escape from the pre-human, for Rousseau, becomes an impossibility. It can be illuded for a short duration and an ascetic state of civilisation established, but this is only temporary. The shadow of the pre-human will eventually catch up to the ascetic and lead to its ruin. This falls short of denying the reality of the ascetic ideal entirely – a theoretical move that would likely usher in devaluation. But in making the state of civilisation contingent and in jeopardy, the civilisational anxiety can be maximised. There are high stakes now, meaning the inquisition can never be casual in its vigil.¹³³ A lapse opens the window to the threat of pre-human violence.

Scene 4: Towards the global order

As the first Act in my analysis of the European global order, my goal in this chapter was to investigate whether domestic theorisations of the sovereign state could be broken down along lines indicated by the civilising psychosis. Through examining the writings of Hobbes, Locke, Paine, and Rousseau, the question can be answered in the affirmative.

The sovereign state, the human subject, and the civilising psychosis are fundamentally linked. Indeed, it is through the nihilistic psychosis that sovereignty and the individual are mutually constituted. The civilising dynamic within the individual is, properly understood, a *political one*. It is only through the establishment of community and sovereignty that the violence of the pre-human is

¹²⁹ Rousseau (n 101) 121.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ The French Revolutionary journalist Jean-Paul Marat, in his *L’Ami du peuple*, was very much inspired by Rousseau, believing that the political establishment always tended towards corruption. For that reason, his pamphlets are (in)famous for their calls for vigilance and the denunciation of possible traitors. See: Serge Bianchi, *Marat: “L’Ami du peuple”* (Belin, 2017).

resolved (or at least tackled): sovereignty and humanity walk hand-in-hand – expressions of the same thing or impulse. This essential connection between a certain type of humanity and a political order – their mutual fusion in the nihilistic process of civilisation - defines the sovereign state.

Bodin established many of the classical qualities of sovereignty – its absoluteness, indivisibility, and its sacredness. In doing so, he opened the door for the ascetic description of political power. However, it is in the writings of Hobbes that we first see the sovereign state come to the fore. Instead of feudal connections, Hobbes binds the subject and the sovereign together in the great Leviathan. A state of nature haunts the human being: a violent place, a war against all. The only way of escaping this pre-human violence is to establish the sovereign power. The sovereign power combines and represents the will to power of each member of the community. The civilisational pressure of suppressing the will to power is dissolved through the identification of each person with the sovereign power – that being who remains in the state of nature and exercises violence.

As civilisation increases, important transformations begin to occur in the quality of sovereign power. Most notable is a ‘flip’ between the poles of the state of nature and the state of civilisation. While under Hobbes the former represents the space that must be escaped from, that characterisation begins to shift. In suppressing and civilising the will to power of the sovereign’s subjects, but allowing the sovereign itself to stand in the state of nature, the path was opened to begin recognising the *sovereign itself* as representing the pre-human threat. One of the progenitors of this transition is Locke, who paints a far more benign image of the state of nature and, importantly, insists on the need for sovereign power to be civilised. This entails the imposition of fiduciary duties towards the subjects, but also the subjection of the sovereign power to a source of appeal. For if civilising means the alienation of your private judgement, of your will to power, then a civilised sovereign must do the same. While writers like Locke allow some place for a sovereign prince to continue existing, others, such as Paine, take this further. Under him, the reversal of the state of nature and civilisation is total. The state of nature is a place of bliss from which humanity has fallen, been un-made, by the false state of civilisation under monarchs. In enslaving humanity to their will, they have degraded the rights of man, producing nothing but a subject. Rather than being in any way ascetic, kings are merely the

ancestors of violent robbers, criminals in the state of nature. Only a revolution can revise this situation; only a revolution can realise the rights of man and true humanity.

As this progression suggests, the nihilistic process of civilisation is inherently paradoxical and unstable. Since it is ultimately an expression of the will to power, it must grow and overcome. This raises the question of how an order could settle for any length of time. This, I suggest, is where the international dimension comes into play. Through displacing the pre-human and the activity of the will to power to an externality, it avoids that same will to power destabilising the established order within the state. In the next chapter, we will explore this dynamic playing out, and how from it Europeans were able to construct a global order.

Act 2: Gently Civilising: Nihilism's Great Politics and the Building the European Global Order

ROBESPIERRE: 'Personne n'aime les missionnaires armés.'

A PATRIOT: 'Keep down! We don't want to lose our good conscience.'

A European with a gun is a misfortune. A European with a lawbook is a danger. A European with both is a coloniser.

The nihilistic psychosis of civilisation is paradoxical and unstable. The psychosis' ideal – the state of asceticism – can only be achieved through a simulacrum. Life is will to power; and it is only as will to power that the ascetic ideal can be expressed. But this is inherently contradictory (or ironic): the ascetic ideal is precisely an aversion to the will to power, yet it is nevertheless an expression of will to power. This leads to some interesting results. Each idol that is set up to civilise humanity, as a manifestation of the ideal's realisation and possibility, must be continually 'devalued' – exposed as nothing but a product of human, all too human violence. Each time the state of asceticism is believed to have been reached, it must be overcome, and new areas of pre-human violence exposed and legitimated as targets of civilising violence. The human being's emergence is predicated upon this self-laceration – this self-devouring.

In the last chapter, I suggested that the psychosis of civilisation produces the sovereign state. It is only in conjunction with the sovereign state (as a citizen of the state's sovereignty) that the fully human being emerges. United through the civilising process, they co-constitute one another. However, by the very logic of the civilising process, the human being can never be completed. The sickness and the self-cannibalisation upon which the human is founded, cannot end. To be alive, the human must exercise will to power, and the unique expression of the will to power that defines them is that gnawing away of the self. This psychosis, I suggested, manifested in the last chapter through continual transformations in sovereignty theory and civil paroxysms. How, then, could a stable understanding of humanity and civilisation emerge without immediately being cannibalised? This is a question of whether the paradoxical features of civilisation can be (at least temporarily) reconciled.

The solution to this rests within the international sphere. If the space of the sovereign state is that of the ascetic, it is possible to transfer the pre-human beyond that space and into an externality. The state's external enemies can be marked with the pre-human, rendered unliveable, savage bodies, and, consequently, legitimately targeted with violence. The violence of both the sovereign and subject/citizen is, therefore, turned away from itself and given external expression. It allows a break in the sickness of civilisation – albeit one that is nevertheless cast in and through the terms of that same sickness. Instead of an honesty in these acts of violence about what they are, the civilised state must present them in the logic of the ascetic. It becomes a question of realising the ascetic ideal, suppressing the pre-human and lifting civilised beings out of its mire. Naturally, since this is a product of the will to power, the externalisation of the pre-human cannot logically end. New territories must be found; new aspects of the pre-human discovered in those subjected to domination.

This externalisation of the pre-human is an advanced expression of the psychosis of civilisation and can only exist when the sovereign state has reached a certain level of maturity (i.e. have advanced towards the more Lockian and Painean understandings of sovereignty).¹ Additionally, for a distinctly *European* global order to be produced, it requires a degree of stabilisation and mutual ascetic recognition between European states - they cannot identify each other as the pre-human. One way this could happen is through the creation of an overarching, singular European state that collectively externalised the mark of the pre-human. Some authors thought along these lines, such as Christian Wolff,² and a few ambitious rulers attempted to achieve it (Napoleon, perhaps, coming the closest).³ What took its place instead was the emblem of sovereignty itself. As sovereignty represented the realisation of completed humanity, states could recognise one another's sovereignty and humanity. While this has never perfectly eliminated violence from amongst those states that are mutually

¹ See: 'A Glance at the State' 157-167.

² This is Wolff's idea of a universal state: a moral and legal collectivity that European nations were each part of. See: Christian Wolff, *Jus Gentium Methodo Scientifica Pertractum* (Carnegie, 1934) 489. For discussions of Wolff, see: Thomas Kleinlein, 'Christian Wolff' in Stefan Kadelbach, Thomas Kleinlein, David Roth-Isigkeit, *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (OUP, 2017) 216; Stephen Neff, *Justice Among Nations: A History of International Law* (HUP, 2014) 184; Knud Haakonssen, 'Christian Wolff' in Bardo Fassbender, Anne Peters, (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012) 1106.

³ At its height, Napoleon's empire stretched from Spain to Poland. See: Thierry Lentz, *Le Premier Empire: 1804-1815* (Pluriel, 2018).

sovereign, it facilitated the humanisation of warfare (at least between *sovereign* states), and the redirection of violence towards an externality. The generation and maintenance of the European global order that developed out of this economy of violence is what I term ‘Nihilism’s Great Politics’.

Before examining this Great Politics in detail, several caveats must be made. While the efforts to civilise relations between sovereign states themselves is a crucial aspect of this story, it is beyond the scope of this thesis to examine them in close detail. I will draw attention to some important moments in the redirection of civilisational violence, but a discussion of the laws of war, humanitarian law, and the emergence of international human rights is an analysis that will be left for another time. Second, this will entail some overlap with the previous chapter as we reflect upon how earlier sovereignty theorists conceived of the European political space and the ways in which they tried to impose order upon it. However, our attention will mainly rest upon authors of the 19th century – commentators who are paradigmatic of the eventual Nihilistic Great Politics. These authors are taken across the European geopolitical perspective and do offer up contrasting theories of how international law should function. Nevertheless, each one of them follows the rhythms of the civilising dynamic. Third and finally, this is not an account of the transformation in international law’s *method* – such as the general move away from natural law theories to positivistic ones. While these transformations are implicated in the analysis, it will not be my explicit focus.

Scene 1: The Cross comes to America: civilisation and the pre-modern European

Western Christendom had been interacting with the wider world long before the arrival of the sovereign state. This was sometimes violent and sometimes not. In the 11th and 12th centuries (and beyond) Italian merchants had been happy to trade with the Abbassid and Fatamid Caliphates,⁴ alongside Crusader attempts to violently seize territory (and even here warfare, diplomacy, and trade were deeply interwoven).⁵ As maritime technology developed, these zones of contact widened,

⁴ For a description of these interactions throughout the Crusades, see: Jonathan Phillips, *The Life and Legend of the Sultan Saladin* (Bodley Head, 2019).

⁵ See also: Jonathan Riley-Smith, *The Oxford History of the Crusades* (OUP, 1999).

bringing western Christians into direct contact with powers such as Mughal India and Shogunate Japan.⁶ While, for the most part, the pre-modern Christian kingdoms and principalities were more concerned with one another, the treatment of conquered non-Christian lands and their populations became increasingly important as Spain and Portugal began annexing vast swathes of land in what is now South American and Mexico.⁷

Right from its inception, the Spanish occupation of the American continent was marked by brutality. Such was the rapacity of Columbus that he was recalled by the Spanish monarchy and narrowly avoided trial.⁸ In response, Columbus argued that his predations against the First Nations peoples violated no law as the territory was simply uncivilised and beyond the reach of law. In response to such claims, Charles V, King of Spain and Holy Roman Emperor, consulted the famed jurist Francesco de Vitoria of the University of Salamanca as to the legal status of the First Nations and the Spanish control over their territory. In a series of lectures, Vitoria gave his response in an attempt to curtail the harshness of Spanish colonial practice.⁹ Vitoria's treatise addresses, first, the question as to whether the First Nation peoples¹⁰ had, originally, lawful ownership over their territory, and whether the Spanish had (or could) acquire that title and displace the First Nation political leaders. The second aspect addresses the parameters of the 'just war' doctrine.

Connections between Vitoria and civilisation have been previously explored by scholarship. As we saw in the prelude of Volume I, Vitoria is the first historical commentator that Anghie addresses,

⁶ The expansion of European empires and its connections to law and geography is explored by Lauren Benton. See: Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (CUP, 2010).

⁷ While much of the focus of international legal scholarship has been on Europe's encounter with the Americas, Far-East, and Africa, the interactions between western Europe and eastern Europe and the expansion of Christianity should not be overlooked. The question of whether Christian polities could ally with heretical ones in the Northern Crusades was of significant jurisprudential import. See: Wladyslaw Czapliński, 'Pawel Wlodkowic (Paulus Wladimiri) and the Polish International Legal Doctrine of the 15th Century' (2007) 7(1) *Baltic Yearbook of International Law* 65.

⁸ For a contemporary account (and indictment) of the Spanish atrocities, see: Bartolome Las Casas, *A Short Account of the Destruction of the Indies* (Penguin, 1992).

⁹ These lectures are recognised by some as constituting the birth of international law: James Scott, *The Spanish Origin of International Law* (Clarendon Press, 1934) 127; James Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law' (1972) 28 *Traditio* 483-97; Joseph De Torro, 'The Roots of International Law and the Teachings of San Francisco de Vitoria As A Foundation For Transcendent Human Rights and Global Peace' (2004) 2(1) *Ave Maria Law Review* 123.

¹⁰ The selection of 'First Nation' is deliberately chosen over the more dated term, 'Native American'. For a discussion of this issue, see: Michael Yellow Bird, 'What We Want To Be Called: Indigenous Peoples' Perspective on Racial and Ethnic Identity Labels' (1999) 23(2) *American Indian Quarterly* 1.

using him to demonstrate the deep roots of his ‘dynamic of difference in action’ within international law.¹¹ For Anghie, the First Nation peoples were brought within the western normative imagination through divine and natural law. This inclusion, at the same time, constructs the ‘otherness’ of the First Nations, justifying the use of imperialistic violence against them. Only in accepting the Christian faith and culture can a First Nation be considered sovereign; but, as Anghie shows, the parameters of sovereignty generated by the civilising mission are endlessly transformable.

Within the nihilistic understanding of civilisation and international law, there are some clear connections. Perhaps first and foremost is the presence of Christianity in Vitoria’s scholasticism.¹² In of itself, the Christian God is one of the purest expressions of the ascetic ideal: the doctrine and commands stemming from Him are absolute and beyond the mundane sphere. To employ Christianity in constructing the international space is already to breath ascetic values into it. Beyond the mere inclusion of Christianity as a normative doctrine, Vitoria makes no bones concerning whether adherence to the Christian faith can (potentially) disrupt the First Nations’ title to their land. The First Nations are rational and human¹³ and can thus engage with the Christian faith. The arguments of living in sin¹⁴ and unbelief¹⁵ are raised as possible grounds for loss of title.¹⁶ To deliberately obstruct the propagation of Christianity would legitimate the use of force against the First Nations,¹⁷ but, as it happens, the poor behaviour of the Spanish and their failure to properly teach the Christian faith vitiate against their claim to the lands in question. As Vitoria puts it,

¹¹ ‘Prelude’ 33-35.

¹² David Kennedy, ‘Primitive Legal Scholarship’ (1986) 27(1) *Harvard Journal of International Law* 1; Martti Koskenniemi, *From Apology to Utopia: The Structures of International Legal Argument* (CUP, 2007).

¹³ Francesco De Vitoria, *De Indis et De ivre belli, relectiones* (1917, Carnegie, Institution of Washington) 127. That said, Vitoria does introduce the idea (without accepting or denying it) that the Spanish might administer the First Nations territory in order to enhance their civilisation (page 161).

In this vein, Vitoria has been of interest for those exploring the legality of humanitarian intervention. See: Terry Nardin, ‘The Moral Basis of Humanitarian Intervention’ (2002) 16(1) *Ethics and International Affairs* 57–70; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge University Press, 2003); William Bain, ‘Vitoria: The Law of War, Saving the Innocent, and the Image of God’ in Stefano Recchia (ed), *Just and Unjust Military Intervention: European Thinkers From Vitoria to Mill* (CUP, 2013).

¹⁴ Vitoria (n 13) 122.

¹⁵ *ibid* 123.

¹⁶ *ibid* 123-124. To lose title in this way, for Vitoria, would require a trial.

¹⁷ *ibid* 156.

I hear of no miracles or signs or religious patterns of life; nay, on the other hand, I hear of many scandals and cruel crimes and acts of impiety. Hence it does not appear that the Christian religion has been preached to them [the First Nations] with sufficient propriety and piety that they are bound to acquiesce in it...¹⁸

The hypotheticals by which Vitoria suggests that the First Nations could have fallen under Spanish dominion largely follow the patterns of just war.¹⁹ Again, this reasoning is founded upon a delicate blend of divine and natural law. Vitoria's first point to note is that '[t]he Spaniards have a right to travel into the lands in question [that of the First Nations] and to sojourn there, provided they do no harm to the natives'.²⁰ Engaging in trade is lawful, 'importing thither wares which the natives lack and by exporting thence either gold or silver or other wares which the natives have in abundance'.²¹ If the First Nations wish to obstruct this trade, 'the Spaniards ought in the first place to use reason and persuasion'²² in order to defuse any potential violence. However, if 'the barbarians decline to agree and propose to use force, the Spanish can defend themselves and do all that consists with their own safety, it being lawful to repel force by force.'²³ If the situation so requires it, the Spanish may make war upon the First Nations 'as against sworn enemies... despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones'.²⁴ To compound this statement, Vitoria is quite clear that the justness of a conflict is not based upon situational perspective.²⁵ If this was the case 'even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service.'²⁶ The significantly limits the scope in which non-Christian peoples can engage in a just war to stop the Spanish trade and inquisitorial interventions.

¹⁸ *ibid.*

¹⁹ *ibid.* 150.

²⁰ *ibid.* 151.

For further discussion on this point, see: Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice Since Vitoria* (Ashgate, 2002).

²¹ Vitoria (n 13) 152.

²² *ibid.* 154.

²³ *ibid.*

²⁴ *ibid.*

²⁵ *ibid.* 173.

²⁶ *ibid.*

Taking these comments, it is possible to work them through the dynamics of civilisation. The realm of Christianity and natural law stands as that of the ascetic; the pre-human is externalised to the non-Christian world. As rationale beings, the First Nations are accountable, to some degree, for not following the teachings of Christianity. Once properly taught the correct faith, there is little ground to refuse conversion. As such, the space is opened for Christians, hiding behind the asceticism of their faith, to exercise violence with a clean conscience beyond the confines of Latin Christendom. Their wars to spread their faith will always be just; while those who stand against the advance of the Cross are figured as heretical and criminal.

But such conclusions are overhasty. The civilising element of Christianity (in of itself) and that of the nihilistic economy of sovereign states, are distinct, if connected, things. That Christianity is a hypocritical tool for exercising violence is a basic element within Nietzschean philosophy and hardly a surprise. Indeed, it is Christianity's *whole rationale*.²⁷ Taken by itself, however, Christianity is an immature version of the civilising psychosis. The political element, in which the fully human only emerges through being a subject and citizen of a sovereign power, is absent. To be sure, Vitoria does acknowledge something approaching the state – the 'perfect community'.²⁸ This perfect community is one 'which is not part of another community, but has its own laws and its own council and its own magistrates, such as is the Kingdom of Castile and Aragon...'²⁹ While this does anticipate elements of Bodin's sovereignty, it falls short of the existential weaving together of the human subject and state by Hobbes that would go on to define political thought. And nor do the implications of this form of politics play a significant role in how Vitoria constructs the normative relations between the Spanish and First Nations – despite one being a 'perfect community'. His law of nations is too feudalistic and arbitrary. The law of God commands a certain form of behaviour by virtue of nothing more than His divinity. While those who don't follow His law may be deemed 'heretics' (unclean, sinful) and treated as such, this lacks the immanence, the interiorisation, of the civilising psychosis. It is not about realising a true humanity, but whether the dictates of God are being properly satisfied. While an

²⁷ See: 'Human, All Too Human' 82.

²⁸ *ibid.*

²⁹ *ibid.*

important antecedent for what followed, it is only with the emergence of the political structures of sovereignty that the constitutive elements of the nihilistic global order were realised.

Scene 2: Something monstrous this way comes: meeting the Leviathans

With Hobbes and his *Leviathan*,³⁰ the civilising dynamic takes on its modern aspect: the realisation of the ascetic is reformulated into a political question, in which the production of certain type of human being is made co-dependent upon a simultaneous production of a certain legal-political order. The pre-human haunts this coupling, both historically (as the condition they emerge out of) and contemporaneously (as that state which continually threatens to re-consume the state of order). Once established, the psychosis of civilisation continues to burn away. The sovereign itself must become civilised, either through the dismemberment of that sovereign power or its assimilation into the body of the people themselves. Subjects transform into citizens; the sovereign becomes first master, then servant, and then *both*.³¹

But what about the international in all of this? As we saw in Vitoria's scholasticism, Christianity provided a transnational framework (to use an anachronistic term) for understanding and resolving disputes. Hobbes' *Leviathan* poses a challenge to this. The sovereign state forged by Hobbes, and the type of human being forged within it, stands upon an emphatic rejection: a rejection of the space *before* and *beyond* the sovereign state. Aside from a faint natural law there are no norms to speak of in the state of nature. Even the sovereign itself is merely a person in the state of nature to whom the subjects alienate and surrender their specific will to power in order to escape (through submission) the danger of the pre-human.³² The international space, as constructed by Hobbes, is necessarily that of a state of nature. Even if there stands in this normative wilderness another society, the two societies still relate to one another as two people in the state of nature.

This has some important implications. If to realise the ascetic unity of the Leviathan the will to power of members of society is alienated to a sovereign, and that sovereign (whether a lone person or

³⁰ Thomas Hobbes, *Leviathan* (Penguin, 2017).

³¹ See: Act 1 'A Glance at the State'.

³² *ibid* 145-151.

no) is representatively the *body* of the nation existing in a state of nature, it will inevitably behave *like a body* in that state of nature through the exercise of power. This power will not be directed inwards, for that is the space of the ascetic. Instead, it manifests *outwardly*, against those beings still in the state of nature. Ironically then, far from softening the violence of the state of nature, the creation of Leviathans have the potential to (from an international perspective) enhance that violence to unprecedented heights. The degree to which this violence is externally manifested will be conditional upon the degree of internal civilisation. The subjects of a Hobbesian sovereign (and that sovereign itself) are far less ‘sick’ than their later contemporaries: as such, much of the violence of the society is directed towards ensuring the domesticity of its members – ensuring their taming. While the external world is indeed representative of the pre-human, it is more something that must be *kept at bay* than *openly attacked*. The state of nature is not *criminalised* under Hobbes. It is merely that dank fog from which the state of safety (civilisation) emerged, and which continually threatens to return should the sovereign state fail.

Of course, reality was far more complex than the world presented in Hobbes’s text, both materially, politically, and theoretically. Violent conflicts had broken out within and between nations on confessional grounds over the course of the 15th and 16th centuries that threw into doubt the viability of a law of nations based on Christian faith.³³ While Hobbes’ work was, in part, a response to this crisis and a way of thinking about law and politics beyond religious paradigms, different European nations theorised the international space in very different ways – a diversity itself that illustrates a lack of overarching order. To grossly summarise a dizzyingly complex jurisprudential mosaic, French commentators and politicians, from Bodin to Cardinal Richelieu, would produce an approach to foreign affairs based on a strict *raison d’etat*, justifying the continental expansion of Louis XIV³⁴ (though French commentators also aspired to create international systems for achieving peace – the *Projet* of l’abbe de Saint-Pierre in 1713 is a good example).³⁵ Hugo Grotius would develop a layered

³³ See: Charlotte Epstein, *Birth of the State: The Place of the Body in the Crafting of Modern Politics* (CUP, 2020); David Runciman, *Confronting Leviathan: A History of Ideas* (Profile Books, 2022) 1-5.

³⁴ For an overview of international legal thinking at this time in France, see: Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300-1870* (CUP, 2021) 357.

³⁵ Saint-Pierre, ‘*Projet pour rendre la paix perpétuelle entre les Souverains Chrétiens*’ (Hachette Livre, 2013).

normative system, encompassing some positivist law, natural law, and a hybrid of the two called ‘voluntary law’.³⁶ Normative rules amongst states were possible without the need for God. The arrival of the Grotian system in the confines of the Holy Roman Empire produced both empirical-utilitarian systems, such as that of Samuel Pufendorf,³⁷ and rationalist methods, exemplified in the treatise of Christian Wolff.³⁸ For the former, the principles of the good and human flourishing could be deduced and extrapolated from human nature and applied to inter-state relations.³⁹ The latter, through the agency of reason alone, could expound upon the principles of human society, the formation of states, and the normative reality they inhabited. Wolff, in particular, would develop his idea of the ‘Universal State’, a metaphysical ideal that encompassed all states and which bound them within various norms of civilisation.⁴⁰ Moving outside the natural law tradition completely, Dutch and English writers had started to approach international relations in more positivistic terms, collating large volumes of extant treaty law.⁴¹

The persuasiveness of these various jurisprudential systems in achieving European peace would come under pressure over the course of the 18th century. In less than 50 years the continent was rocked by the Great Northern War,⁴² the War of Austrian Succession,⁴³ and the Seven Years War.⁴⁴

³⁶ See: Janne Nijman, Randall Lesaffer (eds), *Cambridge Companion to Hugo Grotius* (CUP, 2021); Martha Nussbaum, ‘Grotius: A Society of States and Individuals Under Moral Law’ in Martha Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (HUP, 2019) 97; Stephen Neff, *Hugo Grotius on the Law of War and Peace* (CUP, 2012). For a recent discussion of Grotius’s theory of the state, see: Nehal Bhuta, ‘The State Theory of Grotius’ (2021) 73(1) *Current Legal Problems* 127.

³⁷ Wolff (n 2).

³⁸ Samuel Pufendorf, *Of The Law of Nature and Nations* (Oxford, Lichfield).

³⁹ See: Knud Haakonsen, ‘Samuel Pufendorf (1632-1694)’ in Bardo Fassbender, Anne Peters, *The Oxford Handbook of the History of International Law* (OUP, 2012) 1102; Ben Holland, ‘Pufendorf’s Theory of Facultative Sovereignty: On the Configuration of the Soul of the State’ (2012) 33(3) *History of Political Thought* 427; Martti Koskenniemi, ‘Miserable Comforters: International Relations as New Natural Law,’ (2009) 15(3) *European Journal of International Relations* 395; Thomas Beheme, ‘Pufendorf’s Doctrine of Sovereignty and its Natural Law Foundations,’ in Hunter, Saunders (eds), *Natural Law and Civil Sovereignty* (Palgrave, 2002) 43. See also: Craig Carr, Michael Seidler, ‘Pufendorf, Sociality, and the Modern State’ (1999) 17(3) *History of Political Thought* 354. For a consideration of the legalities of Napoleon’s exiling, see: Adam Rowe, ‘Prometheus Caged: The Exiling of Napoleon and the Law of Nations, 1814-1821’ (2023) *LJIL* 1.

⁴⁰ Wolff (n 2).

⁴¹ Leibniz was an important figure in this movement. The *Codes Iuris Gentium Diplomatici* was one of the earliest treaty compilations. In England during the beginning of the 18th century, a large collection of treaty documents known as ‘Rymer’s *Foedera*’ began to appear. See: Neff (n 2) 190.

⁴² Robert Frost, *The Northern wars: War, State and Society in Northeastern Europe 1558-1721* (Routledge, 2000).

⁴³ M.S. Anderson, *The War of Austrian Succession 1740-1748* (Longman, 1995).

⁴⁴ Franz Szabo, *The Seven Years War in Europe: 1756-1763* (Routledge, 2007).

Act II: Gently Civilising

The endemic violence led Kant to label scholars such as Hobbes, Pufendorf, and Wolff as ‘miserable comforters’.⁴⁵ Others, like Rousseau and Paine, were even more hostile.

For both these thinkers, the so-called state of civilisation is a false idol: hypocritical, duplicitous, and criminal.⁴⁶ It stands upon the bones of a corrupted humanity while proclaiming itself the guardian of that same humanity. No matter what attempts are made to dress existing sovereigns up in the colour of civilisation, they have corrupted a true ascetic human nature. We have all been *unmade* as human. This is a far more aggressive form of the civilising psychosis. The very air of the sovereign state becomes criminal and must be cleansed through revolution. Only a new form of politics and a new form of state can revive fallen humanity.

To make a holocaust of a nation’s entire history and identity is, suffice it say, a potentially intolerable burden of self-mutilation; and, of course, runs the risk of the revolution’s children devouring themselves. If the artifice and corruption of the pre-existing sovereign state must be cleared away, it is difficult to identify when one space ends and the other begins; and as the revolution eats away at itself it might come to realise this fact itself, bringing the entire psychosis to a moment of debilitating self-realisation. It is little surprise, then, that both Rousseau and Paine contain an external dimension to their thought that follows a very similar line. The state of nature in which Hobbes’ placed the relations between sovereigns, and the violence of that state, can be laid at the door of the corrupting influence of the sovereigns themselves. If the sovereign state is responsible for corrupting humanity under its sceptre, then it is not much of a leap to blame the endemic violence between states on that same sceptre. If the criminality of the sovereign monarchs were removed and humanity reconstituted, then wouldn’t the natural peacefulness and sociability of humanity remerge too?⁴⁷

⁴⁵ Immanuel Kant, *Perpetual Peace* (CreateSpace, 2016). See also: Neff (n 2) 188; Koskenniemi (n 34) 872.

⁴⁶ See: ‘Act I: A Glance at the State’ 157-167.

⁴⁷ Rousseau’s writings on international law are contained into two essays: *Extract of the Plan for Perpetual Peace* and *Judgement on Perpetual Peace*. See: Koskenniemi (n 34), 431, and Georg Cavallar ‘Jean-Jacques Rousseau’ in Bardo Fassbender, Anee Peters, (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012) 1114, for commentary.

The ensuing violence of the French Revolutionary wars (in which Rousseau and Paine provided important ideological support) is a good illustration of this dynamic in operation.⁴⁸ The eruption of the conflict, launched by the party of the *Girondins*, was both an effort to stabilise the Revolution within France and halt the advance of the more radical Jacobins, and was justified through the language of bringing liberty to a corrupted Europe.⁴⁹ When the French armies started losing, the solution of many Revolutionaries was that the social fabric of France was still being polluted by counter-revolutionaries. More purity was needed. The spontaneous violence of the September Massacres⁵⁰ and Barère's call to make 'terror the order of the day' can be traced to this logic.

This all presents us with an important dilemma. If the pitch of civilisation within a sovereign state increases the potential for violence to be exercised upon surrounding powers, then how did a specifically European global order emerge? The answer, I suggest, can be found in Emer de Vattel.⁵¹

Heavily involved in European political life, Vattel would serve as a legal advisor for the Saxon court during the Seven Years War, in which that country found itself occupied by the Forces of King Frederick II of Prussia.⁵² In the course of the conflict, he would develop a deep dislike of the Prussian King, going so far as to suggest that he was a criminal under the Law of Nations.⁵³ As this suggests, Vattel was also a philosopher and legal scholar. Heavily influenced by Leibniz and Wolff, Vattel produced his *Law of Nations*⁵⁴ – one of the first treatments of the subject that was published in French

⁴⁸ For some recent histories of the period, see: Jeremy Popkin, *A New World Begins: The History of the French Revolution* (Basic Books, 2019); Peter McPhee, *Liberty or Death: The French Revolution* (Yale University Press, 2017); Simon Schama, *Citizens: A Chronicle of the French Revolution* (Penguin, 2004).

⁴⁹ Early in the Revolution, wars of conquest had been forbidden. When Girondist party launched its war in 1792, it stressed that its war was not for conquest, but to liberate enslaved peoples (See: Koskenniemi (n 34) 465-466).

⁵⁰ Taking place in 1792. Facing defeat on the battlefield and wary of the number of political prisoners contained in the capital, crowds seized control of the city's major prisons and established ad hoc tribunals, putting to death anyone they considered a danger. The victims numbered in the thousands.

⁵¹ For some general discussions of Vattel's work, see: Paul Schröder (ed), *Concepts and Contexts of Vattel's Political and Legal Thought* (CUP, 2021); Emmanuelle Jouannet, 'Emer De Vattel (1714-1767)' in Bardo Fassbender, Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP, 2012) 1118; Vincent Chetail, Peter Haggemacher (eds), *Vattel's International Law in a 21st Century Perspective* (Martinus Nijhoff, 2011); Stephane Beaulac, *The Power of Language in the Making of International Law: The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Martinus Nijhoff, 2004).

⁵² Jouannet (n 51) 1118.

⁵³ Walter Rech, *Enemies of mankind: Vattel's Theory of Collective Security* (Martinus Nijhoff, 2013) 151.

⁵⁴ Emer de Vattel, *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* (CUP, 2011).

rather than the traditional Latin. This is no small measure aided his subsequent popularity and fame.⁵⁵ Vattel was by no means the only person writing about the Law of Nations at this time and was part of a much wider dialogue. As we saw, the critiques of Kant, Rousseau and Paine, came after his death, and in many ways the jurisprudence of Vattel was just the sort of miserable comfort that was being condemned. Nevertheless, Vattel is representative of an important shift within the construction of the European global order, in which the violence between states begins to be redirected towards a periphery.

While Vattel imagines states as being in the state of nature, this a highly civilised manifestation of that concept, in which all sovereign entities are equal⁵⁶ and owe substantive duties to one another.⁵⁷ As Vattel explains, '[n]ations as obliged by nature reciprocally to cultivate human society are bound to observe towards each other all the duties which the safety and advantage of that society require.'⁵⁸ These duties generally consist in doing as much as possible for the welfare of others without compromising the duties towards oneself.⁵⁹ Translated into inter-state relationships, '[o]ne state owes to another state whatever it owes to itself, as far as this other stands in real need of its assistance, and the latter can grant it without neglecting the duties it owes to itself.'⁶⁰ And this doesn't just apply to desisting from exercising violence upon another state. Quite the contrary. A state should provide the resources, if it has an abundance, to allow another state to realise its own perfection. In a pointed example, Vattel suggests that a 'learned nation, if applied to for masters and teachers in the sciences, by another desirous of shaking off its native barbarism, it is not to refuse such a request.'⁶¹ The pre-human must be combatted.

Of course, there are limitations to this. The ascetic community of states is not perfect. A state, in helping others, shouldn't provide assistance that it cannot afford⁶² or that would place its security in

⁵⁵ For commentaries on the influence of Vattel, see: Paul Guggenheim, *Emer de Vattel et l'étude des relations internationales en Suisse* (Librairie de l'Université, 1956) 23; Emmanuelle Jouannet, *Emer de Vattel et L'émergence Doctrinale du Droit International Classique* (Pedone, 1998) 421.

⁵⁶ Vattel (n 54) 209.

⁵⁷ *ibid.*

⁵⁸ *ibid* 193.

⁵⁹ *ibid* 194.

⁶⁰ *ibid.*

⁶¹ *ibid* 196.

⁶² *ibid* 197.

jeopardy.⁶³ Where nations are suspected of violent designs, they may be treated as an enemy.⁶⁴ ‘Thus when the Turks... were in their ascendant, in the flame of their conquests, it behoved all Christian nations, exclusively of any bigotry, to look on them as their enemies.’⁶⁵

These latter comments indicate the growing shift represented by Vattel’s work. Warfare amongst European states is regrettable, but there are rules to civilise it. This is quite clear with the example of the warmongering sovereign. Such a ruler threatens the community of states at large, legitimising the establishment of a general alliance in order to resist. This resistance, however, does not stretch to the removal of the sovereign itself. That would be a violation of the sovereignty of that nation. The removal of the leader can only be lawfully affected by the nation itself.⁶⁶ This does not apply to non-European nations.⁶⁷ Peoples like the Tartars that engage in highly aggressive warfare should, Vattel tells us, be exterminated.⁶⁸ They are criminal and pre-human, justifying any level of violence against them. Outside of direct extermination, Vattel is also willing to condone colonialism along civilisational lines. Adopting a labour approach to property reminiscent of Locke, Vattel argues that entitlement to land is based upon the productive use of that land. A hunter gatherer society that claims larges tracts of land, therefore, usurps the right of more industrious nations to develop the land in question.⁶⁹ Vattel does distinguish Arab nations from the First Nations, allowing the former a higher degree of civilisation and entitlement to their land.⁷⁰ Nevertheless, he still caveats it by asserting that

⁶³ *ibid* 200.

⁶⁴ For a discussion of Vattel’s approach to intra-European politics, see: Gustavo Gozzi, *Rights and Civilizations: A History and Philosophy of International Law* (CUP, 2019) 66.

⁶⁵ Vattel (n 54). Vattel does work in the idea of a balance of power into his natural law. He argues that ‘[i]t is in the interest of princes to stop the progress of an ambitious power, which aims at a farther aggrandisement by subduing it neighbours.’ (195).

⁶⁶ Rech (n 53) 151.

⁶⁷ It is important to note that Paine did not share this aspect of Vattel’s thought. For Paine’s the British actions within its Empire are something to be lamented. This still, however, fits firmly into the civilising parameters of Paine’s thought and does not necessarily exclude empire. Rather than demonstrating a Christian example to ‘Indians’, the ‘little paltry dignity of earthly kings has been set up in preference’. From this, Britain has made the Indians tools of ‘treachery and murder’, sacrificing ‘every manly principle of honour and honesty... to luxury and pride’. Britain has even engaged in the slave trade, ravaging coastlines in cold blood. Only with the advent of the Republic will all these horrors dissipate. Again, the pre-human violence and criminality in the world is attributable to the false idols of monarchs. They have distorted the spread of Christian principles. With the toppling of this idol – and the reclamation of humanity – can these harms be addressed. See: Thomas Paine, *A Serious Thought* (A Serious Thought. XIV Thomas Paine. 1906. The Writings of Thomas Paine (bartleby.com) Accessed on 18/01/2023).

⁶⁸ Vattel (n 54) 214-215.

⁶⁹ *ibid* 216.

⁷⁰ *ibid* 310.

in the necessity of future commercial expansion, Europeans could settle in the Arab world, teaching the natives how to be more productive.⁷¹ From these comments, Gozzi argues that Vattel anticipates the key tropes that would come to define European imperialism:

the Western civilization's superiority over the native "savages", the advanced state of Western technology in comparison with the backward ways of the Arab world, and the Western states' "pressing necessity" to expand, to clear the way for their commercial interests, and hence to establish new markets, to this end feeling justified in bending other peoples into submission on no other ground than that the ways of life in these foreign lands are different from those that prevail in the West.⁷²

While Vattel is indicative of things to come, the European global order of civilisational violence is not entirely established. The focus remains largely centred on the European continent, with colonial and extra-European elements playing a background function. Vattel's world was also quickly overtaken by events. The upheaval of the American and French Revolutions would profoundly alter the ideational and material landscape of Europe, redefining the limits of political possibilities.⁷³ The careful balance of power maintained between states was then smashed to pieces by the Napoleonic Empire, dissolving in the process the 1000-year-old Holy Roman Empire,⁷⁴ reducing the Kingdoms of Prussia and Austria to an enfeebled condition, and conquering Spain and Italy completely.⁷⁵ The fall

⁷¹ Vattel (n 54) 169. Accordingly, Vattel finds much to praise in the Protestant colonisation of North America. See: Vattel (n 54) 164.

⁷² Gozzi (n 64) 71.

⁷³ For a recent discussion of the consequences of the French Revolution for international law, see: Edward James Kolla, *Sovereignty, International Law and the French Revolution* (CUP, 2017).

⁷⁴ For a history of the Holy Roman Empire, see: Peter Wilson, *The Holy Roman Empire: A Thousand Years of Europe's History* (Penguin, 2017). For an account of Napoleonic destruction of the Empire, see: Alan Forest, Peter Wilson (eds), *The Bee and the Eagle: Napoleonic France and the End of the Holy Roman Empire, 1806* (Palgrave Macmillan, 2007).

⁷⁵ The History of the Napoleonic Empire has been recounted in several places. See: Thierry Lentz, *Le Premier Empire: 1804-1815* (Pluriel, 2018); Michael Broers, *Europe Under Napoleon* (Bloomsbury, 2021). Napoleon's relationship to the Law of Nations is complex and under-theorised. For Cassese, it was little more than a legal hiatus (Antonio Cassese, *The Human Dimension of International Law: Selected Papers* (OUP, 2008) 90). Thierry Lentz, however, has offered some recent commentary on how Napoleon perceived the Law of Nations. See: Thierry Lentz, *Napoléon Dictionnaire Historique* (Perrin, 2020) 326. See also: Thierry Lentz, 'Napoléon et le droit des gens' in Yves Bruley, Thierry Lentz (eds), *Diplomaties au temps de Napoléon* (CNRS Éditions, 2014).

of Napoleon was followed by the Concert of Europe,⁷⁶ and a form of Great Power geo-political control unimaginable from Vattel's position. However, as Europe moved deeper into the 19th century and the Concert was broken up, colonialism began to accelerate, bringing the civilisational element to the forefront.

Scene 3: International law and the Last Men: civilising in the 19th century

As international law moved into the 19th century, the nihilistic sovereign global order began to take shape. This depended upon two things: the recognition of fellow European states as equal members of an ascetic ideal, the limitation of war between those states, and the displacement of the pre-human (and the violence that goes with it) to a non-European space. Of course, this order was never perfect, in as much as European states continued to threaten and make war upon one another. But warfare between civilised states, however neutralised of civilisational weight through its legalisation, crucially, did not carry with it a *good conscience*. Only violence exercised against the uncivilised externality was *moral*.

In the following section, we will examine a number of international legal jurists, exploring how their writings on the intersections between civilisation and sovereignty manifest the externalised expression of the nihilistic psychosis. In doing so, we will gain an understanding of the uniquely hypocritical imperial politics of international law.

Henry Wheaton

Born in 1785 on Rhode Island, Henry Wheaton was the first North American scholar to dedicate his attention to the study of international law.⁷⁷ Serving in various legal positions in the United States,

⁷⁶ For analyses of the Congress of Vienna and the political system constructed there, see: H.M. Scott, *The Birth of a Great Power System, 1740-1815* (Routledge, 2013); Mark Jarrett, *The Congress of Vienna and its Legacy: War and Great Power Diplomacy after Napoleon* (Tauris, 2013); Brian Vick, *The Congress of Vienna: Power and Politics after Napoleon* (HUP, 2014); Beatrice Graaf (ed), *Securing Europe after Napoleon: 1815 and the New European Security Culture* (CUP, 2019).

⁷⁷ Lydia H. Liu, 'Henry Wheaton' 1132. See also: Elizabeth Feaster Baker, *Henry Wheaton, 1785-1848* (University of Pennsylvania Press, 2016).

Wheaton eventually gained important diplomatic experience in Denmark and then in Prussia.⁷⁸ His treatise of international law published in 1836, *Elements of International Law*,⁷⁹ was the first English-language international law textbook to be published. Its influence upon the 19th century has been compared with that of Vattel over the 18th.⁸⁰

In the *Elements*, Wheaton establishes the ascetic homogeneity of western civilisation. This is the law of ‘civilised, Christian nations of Europe and America’,⁸¹ forged through the comingling of ‘religion, chivalry, the feudal system, and commercial and literary intercourse’,⁸² and which has ‘blended together the nations of Europe into one great family’.⁸³ States no longer figure one another as representative of the pre-human. Fights and squabbles can still happen amongst family members, Wheaton admits. A perfected global order would require that civilised states form an overarching sovereign state of their own.⁸⁴ As it is, the ascetic unity of civilisation is only imperfect and independent states, having the freedom of their own will to power, could fracture the familial bliss of Europe.

Nevertheless, through ‘the progress of civilisation, founded on Christianity’,⁸⁵ European states have been able to conceive a law that is the next best thing, which they apply to ‘all nations of the globe’ and ‘without reciprocity on their part.’⁸⁶ This is a revealing phrase. The violence amongst civilised European states is diffused through a law that is then projected towards an externality. And as Wheaton explains, this expansion of the boundaries of civilisation requires considerable exertion on the part of sovereign states. With regards to the Chinese, to take one example, the European and American states compelled that country to abandon its uncivilised ‘anti-commercial and anti-social

⁷⁸ *ibid* 1133.

⁷⁹ Henry Wheaton, *Elements of International Law* (Lea and Blanchard, 1836).

⁸⁰ Liu (n 77) 1132.

For Onuf, it was Wheaton who provided a coherent (if incomplete) exposition of liberal internationalism through his genealogy of legal doctrine. Rather than an aberration, the emerging liberal world could be seen as a natural progression from what came before. See: Nicholas Onuf, ‘Henry Wheaton and “The Golden Age of International Law”’ (2000) 6 *International Legal Theory* 2-9. For Stephen Neff, Wheaton stands as an important figure in the movement away from Vattel and towards positivism. See: Neff (n 2) 228.

⁸¹ Wheaton (n 79) 40.

⁸² *ibid*.

⁸³ *ibid*.

⁸⁴ *ibid* 45.

⁸⁵ *ibid*.

⁸⁶ *ibid*.

principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.’⁸⁷ ‘Compelled’: acting through the ascetic ideal, the barer of the pre-human is relocated to the extra-European world, allowing the delivery of civilising violence and coercion with a good conscience.

In Wheaton’s system of civilisation, sovereignty acts as the key discriminatory device of who is the ascetic and who is the pre-human. To be sovereign, Wheaton informs us, is to be entitled to certain rights because the state is ‘an independent moral being’.⁸⁸ Echoing the fusion of the political and the human encapsulated within civilisation, a properly sovereign state has the dignity of an ascetic human being. As representative of the human, sovereign states enjoy the aforementioned rights, such as self-preservation and the pursuit of power – the latter right being only limited by the coequal rights of other states.⁸⁹ While conflict and violence may erupt between these ‘moral beings’ when rights are transgressed, their violence is limited by the mutual recognition of humanity.

Unfortunately for the rest of the world, not everyone can be recognised as an equal sharer of the ascetic. The tamed humanity of civilisation can only exist within a state, so it is only states that may be perceived as sovereign. As Wheaton tells us, the ‘legal idea of a State’ requires a fixed abode, a definite territory, and a ‘habitual obedience’ to those in whom ‘superiority is vested’ – or simply government.⁹⁰ Nomadic peoples – those ‘unsettled horde[s] of wandering savages’ – can never be recognised.⁹¹

The requirement of recognition is important within Wheaton’s civilisational scheme. Through the ascetic’s recognition, that which was mired in a state of uncivilisation can be cleansed of its bestiality and made *human*. While Wheaton does admit that ‘internal sovereignty’ is a matter for a nation itself (its sense of itself *as a state*), this does not apply to entry within the family of nations.⁹² To be a state is both to have rights and the duty to execute obligations to other states, and only a competent moral

⁸⁷ *ibid* 46. For a commentary of sovereignty in China, see: Maria Carrai, *Sovereignty in China: A Genealogy of a Concept Since 1840* (CUP, 2019).

⁸⁸ Wheaton (n 79) 101.

⁸⁹ *ibid* 102.

⁹⁰ *ibid* 54.

⁹¹ *ibid*.

⁹² *ibid*.

being can do that. To be recognised as such a being, existing sovereign states can demand whatever requirements they think fit, ranging from the nation's 'internal constitution or form of government, or the choice it may make of its rulers.'⁹³ In effect, western states can encumber pre-human states with whatever ascetic weights of responsibility they like.

Between sovereign and non-sovereign nations, Wheaton allows for the ambiguous category of 'semi-sovereign' states.⁹⁴ These are nations which, while not entirely barbarous, are in some way dependent upon others for the exercise of certain rights necessary for 'perfect external sovereignty.'⁹⁵ They are only partially human – minors and those lacking capacity – that need the guiding hands of the ascetic states. Within Europe, Wheaton gives the example of the Ionian Islands and elements of Poland, and in the US, he cites the First Nation tribes. Glossing over the military conquest, Wheaton informs us that the position of many tribes is that of a protectorate, acknowledging that they hold their remaining land by the will of a given state.⁹⁶

The violence that can be committed against non and semi-sovereign states is very much open ended. We have already seen the more subtle types that can be afflicted through the requirements of recognition (demands of government change etc), but violence can sometimes be far more apparent. While the conflict between sovereign states is managed through positive laws and is always just on either side,⁹⁷ this is not so with non-sovereign states. Wheaton gives us the example of the liberation of the Greeks from Ottoman rule.

Still more justifiable was the interference of the Christian Powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land into Egyptian bondage, or exterminated by their merciless oppressors. The rights of human nature wantonly outraged by the cruel warfare, prosecuted for six years against a civilized and Christian people, to whose ancestors mankind are so

⁹³ *ibid* 55.

⁹⁴ *ibid* 65.

⁹⁵ *ibid* 67.

⁹⁶ *ibid* 73.

⁹⁷ *ibid* 342-343.

largely indebted for the blessings of arts and letters, were but tardily and imperfectly vindicated by this measure; but its principle was fully vindicated by the great paramount law of self-preservation.⁹⁸

Several elements of this passage stand out. The first is the emphasis upon the pre-human quality of the Ottoman: they are ‘merciless’ and ‘oppressors’, either enslaving the Greeks or exterminating them. But where Wheaton lays on thick the rhetorical gloss is through the *inversion* of the civilisational dynamic. The Greeks are taken as symbolic of the ascetic. They are a ‘civilized and Christian people’ to whom, moreover, the very birth of ascetic civilisation is ascribed to. They represent a certain *sacredness*, and the inheritors of this sacredness are indebted to it. It is, then, all the more abhorrent to see such a people and place subjected and made abject by those who are figured as pre-human. The pre-human attacks and sullies the ascetic – and that, as we have seen, is *criminal*. The effort of the Ottoman to hold its imperial possessions together can never be just; while all efforts to undo them are permitted.

Within Wheaton’s text, the hypocritical structures of international law and the civilising psychosis are clear to see. First, the civilisational violence between a few European states is suppressed through the device of *recognition*. Instead of coagulating the nations of Europe within a singular sovereign entity, recognition allows these select nations to identify themselves as equal members of the ascetic – as sovereign states. And as sovereign, violence between these entities is to be avoided and regretted. But in the suppression of the civilisational tension between European states, the violence must be directed somewhere. To satisfy this, the stabilisation of the European order is predicated upon the reallocation of the pre-human to an extra-European space. Again, recognition and the marker of sovereignty combine to serve as the crucial mechanism of discrimination. Those nations and peoples that do not fit

⁹⁸ *ibid* 114.

For studies on European intervention in the Ottoman Empire, see the work by Rodogno: Davide Rodogno, *Against Massacre: Humanitarian Interventions in the Ottoman Empire, 1815-1914* (Princeton University Press, 2011); Davide Rodogno, ‘European Legal Doctrines on Intervention and the Status of the Ottoman Empire within the Family of Nations’ throughout the Nineteenth Century’ (2016) 18(1) *Journal of the History of International Law* 5.

neatly within the parameters set by European civilisational standards are excluded from the protections afforded by ascetic sovereignty. They are saddled with the civilisational duty to *become human*; all the while being excluded from that standard in order to permit the continual delivery of violence by Europeans. Amongst the uncivilised and pre-human nations, the antithesis to the ascetic sovereign states are the *criminals*. These are the nations that desecrate ascetic idols, belittle the state of humanity, and so are open to acts of unmitigated retaliatory violence. The hypocritical veneer of concealing violence behind benevolence is dropped. This is the violence of the outraged and it has a very good conscience about it.

Within Wheaton's book, race is heavily implicated. Only the European, white nations appear as fully sovereign, with the rest of humanity falling into the category of pre-human, or worse - criminal. These inferences, however, are by implication. Wheaton does not make race a direct marker of the civilised and uncivilised. This usage of race would be different in the work of our next scholar, James Lorimer.

James Lorimer

James Lorimer was one of the founding members of the *Institut de Droit Internationale*. Born in 1818, he studied at Edinburgh University,⁹⁹ before pursuing postgraduate study at various European institutions, including Berlin and Geneva. He became Regius Professor of Public law at his Alma Mater in 1862 – a position he held until his death in 1890. His treatise on international law, *The Institutes of the Law of Nation*,¹⁰⁰ was published in 1884.

Like with Wheaton, Lorimer's jurisprudence replicates the generative structure of the ascetic and the pre-human, and the bond of responsibility between them. His primary tool for separating and allocating is through ethnology.¹⁰¹ Through the manipulation of scientific inquiry, Lorimer brings all states within the umbrella of a common, ascetic humanity, but then reintroduces insuperable divisions

⁹⁹ For context on the social and intellectual environment Lorimer grew up in, see: Gerry Simpson, 'James Lorimer and the Character of Sovereigns: The *Institutes* as 21st Century Treatise' (2016) 27(2) EJIL 431, 434.

¹⁰⁰ James Lorimer, *Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Blackwood and Sons, 1883).

¹⁰¹ *ibid* 93.

between certain races, thus allowing for the legitimation and continuation of European domination of an extra-European, extra-white space.¹⁰²

Using ethnology, Lorimer suggests that ethnic differences may lead to differences in political ordering, and that in the face of these inevitable and reoccurring difference, international law must accommodate itself.¹⁰³ But what exactly does Lorimer mean by this accommodation? At first, he seems to invite a type of relativity. As he states, '[o]ught we not to distinguish between differences of kind and differences of degree and, *within the lines of natural law*, to measure nations rather by the approach which they make to their own ideal than to ours?'¹⁰⁴ Excluding the ethnological determinism, that may sound somewhat encouraging. He even states that these different forms of ordering should be given equal moral weight.¹⁰⁵ This, however, is quickly contradicted. First, he stresses that it is recognition within *western international law* that he is concerned with.¹⁰⁶ The mere collation of data concerning ethnical differences means nothing in the determination of this analysis if it is not connected with some 'absolute standard by which to measure the ethical results of its political activity'.¹⁰⁷ And to ascertain what this 'absolute standard' is, scientists must go back to those laws of our common nature which govern all races and nations alike.'¹⁰⁸

Falling back on a universal standard allows Lorimer to do several things. First, it means that he can distinguish between a properly ascetic humanity endowed with rights, and all that which falls beneath it. As Lorimer informs us, there are (as a 'political phenomenon'),¹⁰⁹ three divisions within humanity: 'that of civilised humanity, that of barbarous humanity, and that of savage humanity'.¹¹⁰ Second,

¹⁰² See: Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (CUP, 2016) 96.

Unlike many of colleges at the *Institut*, Lorimer was not liberal – he was elitist and deeply racist. While his philosophy was not original, it gave expression to sentiments widely shared in Europe at that time. See: Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27(2) EJIL 415, 416. While Lorimer might be dismissed as having any relevancy to our own time, Simpson expresses some uncertainty on this point. Much of Lorimer mirrors the exclusionary categories that would come to be used into the 20th and 21st centuries, albeit in a much more obvious and vulgar tone. See: Simpson (n 99) 434.

¹⁰³ Lorimer (n 100) 97.

¹⁰⁴ *ibid* 94.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid* 98.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid*.

¹⁰⁹ *ibid* 101.

¹¹⁰ *ibid*.

having made these classifications, Lorimer can utilise them to ‘scientifically’ ground a gradation of international legal rights. The device through which ethnological categories bleed into the legal is *recognition*. Recognition is the test of whether an entity fits the bill of being fully human – whether it can transcend mere biological existence to become fully ascetic.¹¹¹ In Lorimer’s words, recognition

may be defined as a formal declaration of the result of an inductive process, by which one separate entity has satisfied itself that another entity, phenomenally presented to it, possesses a separate political existence; or, in other words, is capable of performing the duties, and, consequently, is entitled to the rights which centre in international existence.¹¹²

Recognition, predictably, can only be wielded by the already civilised states – it belongs to them as of right.¹¹³ It is not, however, a rigid binary. Lorimer allows for three forms of recognition corresponding to his categories of humanity.¹¹⁴ These are ‘plenary recognition’ (including the European states and their colonies, as well as the United States of America),¹¹⁵ ‘partial recognition’ (including nations such as Turkey, China, and Japan),¹¹⁶ and, finally, ‘natural or mere human recognition’.¹¹⁷ This extends to the ‘residue of mankind’,¹¹⁸ a biological trace of humanity lacking all the endowments of the ascetic ideal.

To ascend from the Homosapien swamp and reach plenary recognition, a nation must obtain those qualities that European civilisation rendered as markers of the ascetic. These, at the time, were liberal values. Lorimer condenses these down into two requirements: the will to perform reciprocal duties and the capacity to do so.¹¹⁹ Of the two, the presence of ‘reciprocating will’ is the more theoretically

¹¹¹ For an exploration of Lorimer’s theory of recognition, see: Koskenniemi (n 102) 420.

¹¹² Lorimer (n 100) 104.

¹¹³ *ibid* 101.

¹¹⁴ Koskenniemi (n 102) 421; Ntina Tzouvala, *Capitalism as Civilisation : A History of International Law* (CUP, 2020) 51.

¹¹⁵ Lorimer (n 100) 101.

It is important to bear in mind that even those civilized states, there was not, for Lorimer, a strict equality. The power of a nation – its degree of reality – effected its rank. See: Koskenniemi (n 102) 422-423.

¹¹⁶ Lorimer (n 100) 102.

¹¹⁷ *ibid*.

¹¹⁸ *ibid* 102. Simpson (n 99) 438.

¹¹⁹ Lorimer (n 100) 109.

nuanced and affects the most pronounced exclusions, encompassing both faith and political structures. Reciprocating will is, in effect, the willingness to practice liberal-Christian principles. A state may contain non-reciprocating ‘elements’ (such as Jews, Muslims and communists)¹²⁰ without entirely compromising its claim to recognition; but should the state itself politically endorse such a creed, it will suffer that forfeiture.¹²¹

The political creeds that Lorimer places under his ban are relatively straightforward: any political programme or foreign policy that is non-liberal or anti-liberal is denied reciprocating will. This includes empires, such as that of Napoleon, that aim to conquer all surrounding states (though this only seems to apply to states seeking conquest within Europe);¹²² intolerant republics that wish to affect universal revolutions (Revolutionary France being Lorimer’s example here);¹²³ and, finally, creeds such as communism – and nihilism.¹²⁴

Beyond political creeds, Lorimer’s discussion of the centrality of Christianity to reciprocating will is revealing. To justify the privileging of Christianity, Lorimer makes use of Lockian rationality. In contradistinction to faiths that solely rest upon ‘divine revelation’ and the words of prophets,¹²⁵ Christianity is confirmed in and through the practice of reason in the contemplation of the human body. In Lorimer’s circular prose, ‘Its divinity is guaranteed to our nature by the divinity which addresses us through our nature’.¹²⁶ While this may appear counter-intuitive at first, Lorimer reassures us that it was, after all, as a ‘Son of man’ that God initially spoke to humanity.¹²⁷ Christianity, in effect, is naturalised. It remains privileged precisely because it is expressive of the ascetic quality of human nature, its reason. Those faiths that demand a *suspension* of reason are dismissed precisely because they reject this ascetic faculty – that part of the person which is most human.

Supporting this foundation in reason is the content of Christianity. Only those religions who ‘preach the doctrine of “live and let live”’ – the mantra of the tamed European animal - will be afforded

¹²⁰ *ibid* 112.

¹²¹ *ibid* 113.

¹²² *ibid* 128.

¹²³ *ibid* 131-132

¹²⁴ *ibid* 133.

¹²⁵ *ibid* 117-118.

¹²⁶ *ibid* 114.

¹²⁷ *ibid*.

recognition.¹²⁸ In Lorimer's analysis, almost every faith that is not Christianity fails at this. The Jews do not extend their sympathy beyond their nationality, and even that allegiance is subordinated to race.¹²⁹ Muslims are considered too absolutist in the superiority of their specific faith and the need for the rest of the world to adopt it. This, Lorimer tells us, requires assuming towards it the same attitude that it presents to the west. 'So long as Islam endures, the reconciliation of its adherents, even with Jews and Christians, and still more with the rest of mankind, must continue to be an insoluble problem'.¹³⁰

Finally, there are a number of supplementary elements that Lorimer wields to catch any nation that does not fall into the banned political and religious categories. These hinge upon capacity – whether the nation in question has the full use of ascetic reason. For example, he suggests that those communities that suffer from 'political nonage' cannot even be considered for recognition.¹³¹ While the nations themselves can be old, they can be 'old children', and while this childishness lasts the people are cut off from international rights, much in the same way 'the childishness of a promising child cuts it off from municipal or political rights.'¹³² Rather than recognition as fully fledged human beings, the 'right of undeveloped races' is merely to guardianship – to that guidance that will allow them to mature.¹³³ The civilised European races obtain the right to exercise violence to tame these entities. While this may suggest that there is potential for the effected nations to obtain equality with Europeans, Lorimer is quick to shut down the possibility. Some races, he tells us, suffer from imbecility. When found, imbecility stands as a 'permanent bar' against recognition, confining the nation in question to 'perpetual pupillarity and guardianship' by the superior race.¹³⁴ Finally, criminality (though not the criminality of European states) acts as a permanent exclusionary factor. The Barbary States, infamous for its piratical activities and enslavement of Europeans, was incapable of recognition by Europeans.¹³⁵ To commit a trespass against the bearers of the ascetic ideal is a sin

¹²⁸ *ibid.*

¹²⁹ *ibid* 121.

¹³⁰ *ibid* 124.

¹³¹ *ibid* 157.

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ *ibid* 158.

¹³⁵ *ibid* 161.

and justifies all manner of punishment to beat the pre-human back into submission. As Lorimer argues, the invasion and conquest of Algeria by France was not an illegal act. Instead, it was ‘an act of discipline’ that any (civilised) state can make in the absence of a police force.¹³⁶

As this suggests, Lorimer imagines very different rules applying between civilised and uncivilised states. Those states within the ‘pale of civilisation’ have duties of mutual non-interference and toleration.¹³⁷ While this falls short of active assistance and unification, it ensures an ascetic space of civilisation in which pre-human violence is contained. That violence, instead, is channelled to the uncivilised space. It is not the case, however, that anything goes. The violence must be couched in terms of realising the ascetic humanity and taming the pre-human if it is to have a good conscience. There must be both a will to civilise and the capacity to do so.¹³⁸ For example, if the uncivilised state is on the far side of the globe and the European state in question is not a naval power, then no right or duty to interfere will arise. However, the moment that a civilised state does possess the power to ‘help a retrograde race towards the goal of human life’, then that nation becomes duty bound to exercise that power.¹³⁹ It may assume the position of guardianship, ‘and to put wholly aside the proximate will of the retrograde race.’¹⁴⁰ The only break on the interference is if the effort of ‘guiding’ the uncivilised state would extract such a cost as to retard the development of the civilised state itself.¹⁴¹ Selflessness has its limits.

Distinct from the relations between civilised states, and those between the civilised and the uncivilised, is a murky layer of those states that are partially recognised.¹⁴² Broadly speaking, partial recognition is afforded to those who, possessing a degree of power, have made some steps towards the realisation of the ascetic ideal.¹⁴³ To some extent, Lorimer admits, all recognition is to some degree partial – no civilised state surrenders its own conscience and judgement to that of another state.¹⁴⁴

¹³⁶ *ibid.*

¹³⁷ *ibid* 230-232.

¹³⁸ *ibid* 227.

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid* 228.

¹⁴² *ibid* 216.

¹⁴³ *ibid.*

¹⁴⁴ *ibid.*

Nevertheless, civilised states have reached such a stage of agreement that each ‘intrusts its citizens to the other’ and accepts the law and legal decisions of that state.¹⁴⁵ This is not the case with those states who only obtain partial recognition. Pointing to examples such as Japan, while recognising the steps that state had made towards the establishment of the rule of law, fully civilised states do not entrust their citizens to its courts. They instead, under the principle of extra-territoriality, maintain their own separate courts for their citizens.¹⁴⁶ While not entirely bestial, these nations still carry too much of the lingering traces of their uncivilised condition to be fully accepted into the ascetic community.

Combining ethnology and a theory of recognition, Lorimer is able to transform the extra-European world into a space for civilising and the exercise of European power. Through the assertion of a common standard of humanity based in reason, Lorimer categorises humanity into a gradation of legal right. Through legal recognition, only those entities that meet the standard of the liberal, European male are able to be classed as ascetic persons. Non-sovereign states are susceptible to the exercise of civilisation violence. Through ideas of ‘nonage’ and ‘imbecility’, it is possible to extend this taming perpetually. Criminal nations, those that trespass against ascetic idols, obtain no recognition and can be disciplined as needs must. Between the civilised and the uncivilised fall a number of states that possess partial recognition. These have too many features of the ascetic ideal to be dismissed as savage, but too much of the lingering trace of non-Europeanness and animality to become equal members of the ascetic community.

Johann Kaspar Bluntschli

Bluntschli was a Swiss legal scholar and politician. Born in 1808, he studied at the universities of Zurich, Berlin and Bonn. While taking up teaching positions at the University of Zurich from 1829, Bluntschli’s liberal political activities in Switzerland eventually obliged him to leave the country. He

¹⁴⁵ *ibid* 217.

¹⁴⁶ For an analysis of Japan and international law in the long 19th century see: Susumu Yamauchi, ‘Civilisation and International Law in Japan during the Meiji Era (1862-1912)’ (1996) 24 *Hitotsubashi* 1; and P.R. Anand, ‘Family of “Civilized” States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation’ (2003) 5 *Journal of the History of International Law* 13.

would, however, land on his feet, obtaining professorships in constitutional law at the Universities of Munich and Heidelberg.¹⁴⁷ Like with Lorimer, he was a founding member of the *Institute de Droit de Internationale* and would act as the representative of the German Emperor at the conference on the international laws of war at Brussels.¹⁴⁸

While publishing important texts on the law of war,¹⁴⁹ our focus will be on his *The Theory of the State*,¹⁵⁰ published in 1875. Within this text, Bluntschli would develop an understanding of the sovereign state system fundamentally connected to an overarching civilising agenda. Through linking the state to an ascetic ideal of order, he would secure to a select few European states guardianship over the world and the legitimacy of exercising violence against subordinated non-white, feminine, and non-ascetic races.

For Bluntschli, one can distinguish between the conception and idea of the state.¹⁵¹ The former refers to the quality and characteristics of actual states. The latter is the perfected, ideal of the state that, while never yet existing, is striven for.¹⁵² The quality of existing states depends upon how closely they approach the ideal. To Bluntschli, the ideal of the state corresponds to liberal state structures, ensuring the primacy of western Europeans. First, a state requires a certain level of population – a tribe cannot be a state.¹⁵³ There must also be some permanent relation to soil. A nomadic people, no matter how great in number, cannot aspire to the condition of statehood until settling.¹⁵⁴ Finally, the nation must have a government and a means of distinguishing between the governed and the governors.¹⁵⁵

Like with Lorimer, Bluntschli is careful to naturalise this liberal state through situating it in human nature. While admitting the state is not a natural organism (being dependent upon the craft of

¹⁴⁷ See: [Johann Kaspar Bluntschli | Swiss scholar | Britannica](#) (accessed 15th May, 2022).

¹⁴⁸ The connection to the Kaiser is an important one. As Koskenniemi has argued, German legal commentators, after Bismarck's change of attitude with respect to colonialism in 1884, viewed colonialism as a logical element in Germany's development into a great power. Scholars, such as Karl Heimberger and Paul Heilborn, would defend Germany's position as a later-comer to the colonial phenomenon. See: Martti Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (CUP, 2001) 95.

¹⁴⁹ Of particular importance were his codifications of international law. See: Neff (n 2) 322.

¹⁵⁰ Johann Kaspar Bluntschli, *The Theory of the State* (Batoche Books, 1999).

¹⁵¹ *ibid* 22.

¹⁵² *ibid*.

¹⁵³ *ibid* 22-23.

¹⁵⁴ *ibid* 23.

¹⁵⁵ *ibid*.

humanity to fashion it), the ‘tendency to political life is to be found in human nature’.¹⁵⁶ It, in essence, reflects and is an expression of the humanity that constructs it. It is spirit and body, manifesting the ‘thoughts and feelings’ of a nation, realising them in law and act.¹⁵⁷ While linking the state to a putatively universal humanity, Bluntschli couches it in the structures of the civilising psychosis: only a certain aspect of humanity can represent its ascetic perfection. This asceticism is the bounded, sovereign, masculine subjectivity of liberal modernity.¹⁵⁸ This is explained through a comparison with a feminine coded Church. The Church may have all the qualities of a political community that could confer statehood, yet is nevertheless not a state, ‘just because she does not consciously rule herself like a man, and act freely in her external life, but wishes only to serve God and perform her religious duties.’¹⁵⁹ Only the masculine is fully representative of the ascetic ideal; the feminine is less than human – pre-human.¹⁶⁰

In approaching the ideal of the state, Bluntschli again relies upon an ascetic and universal human nature. The ideal of the state is not called up by a ‘rational peculiarity’, but by ‘the common nature of mankind.’¹⁶¹ While there may be variations in the human, these still point to an overarching, ascetic unity. Likewise, nation states, born out of that same human nature, ‘points with inner necessity to the higher unity of mankind of which the nations are only members.’¹⁶² This ‘higher unity’ is the ‘universal State or universal Empire’, the political culmination of progress and ‘the visible body of Humanity’ – the ascetic ideal realised.¹⁶³

Up until the late 19th century, the ‘common consciousness of mankind’ has been ‘confusedly dreaming’, disturbed and thrown off course by the pre-human.¹⁶⁴ It has never ‘yet been able to evolve its organic existence’, reaching that level of perfected, ascetic humanity.¹⁶⁵ In this civilisational

¹⁵⁶ *ibid* 25.

¹⁵⁷ *ibid* 27.

¹⁵⁸ *ibid* 28.

¹⁵⁹ *ibid*.

¹⁶⁰ For a discussion of the gendered dimension to Bluntschli’s thought, and of the 19th century perception of the state in general, see: Aoife O’Donoghue, ‘The Admixture of Feminine Weakness and Susceptibility: Gendered Personifications of the State in International Law’ (2018) 19 *Melbourne Journal of International Law* 227, 237.

¹⁶¹ Bluntschli (n 150) 30.

¹⁶² *ibid*.

¹⁶³ *ibid* 31.

¹⁶⁴ *ibid*.

¹⁶⁵ *ibid*.

slumber, the ideal of the unity of mankind has arisen from time to time, however vaguely in focus and imperfectly realised. The attempts at universal empires, such as that of Alexander and Napoleon, are, for Bluntschli, examples of failed attempts.¹⁶⁶ However, with the emergence of ‘civilised Europe’ the goal has never been more firmly in mind.¹⁶⁷ The pre-human violence of western Europe has been stabilised, and now those civilised nations within Europe experience any disturbance in any other state, even at its most extreme boundaries, as an evil – an upsurge of the pre-human that demands to be civilised. Such is the need to realise the ascetic ideal that the ‘spirit of Europe already turns its regards to the circuit of the globe, and the Aryan race feels itself called to manage the world.’¹⁶⁸ In the Universal Empire, states will not be conquered or assimilated. This empire will be a liberal one of sovereign, ascetic beings, realised through the leadership of western nations.

To buttress the western-centric logic of Bluntschli’s common, ascetic humanity, he is quick to also insert racial exclusions.¹⁶⁹ To those who argue for the ‘theoretical’ equality of races, there is ‘scarcely one’, Bluntschli argues, who recognises it in practice.¹⁷⁰ ‘The whole history of the world bears witness to the different endowment of races, and even to the unequal capacities of the nations which have grown out of them.’¹⁷¹ Of the ‘nations of night’, Bluntschli insists that they have never ‘attained a moderate degree of legal and political development.’¹⁷² They have no real history, a predisposition towards ‘luxuriant fancy’ and ‘excitable passions, a ‘poor understanding and a weak will’, ‘childish by nature’, they are meant to be governed by superior, more masculine races.¹⁷³ Even in history, he goes on, the black races of India and Egypt were ruled by white races.¹⁷⁴ The African kingdoms still extant in the late 19th century are not really states, but ‘arbitrary and capricious despotisms.’¹⁷⁵ Even the attempts by black nations to establish liberal constitutional principles in Haiti and Liberia are

¹⁶⁶ *ibid* 31-34.

¹⁶⁷ *ibid* 31.

¹⁶⁸ *ibid* 35.

¹⁶⁹ See: Mohammad Shahabuddin, *Ethnicity and International Law: Histories, Politics and Practices* (CUP, 2016) 69-70 for commentary on this aspect of Bluntschli.

¹⁷⁰ Bluntschli (n 150) 75.

¹⁷¹ *ibid*.

¹⁷² *ibid*.

¹⁷³ *ibid*.

¹⁷⁴ *ibid*.

¹⁷⁵ *ibid*.

dismissed by Bluntschli as being ‘burlesques of the life of political nations.’¹⁷⁶ Other races are treated with little additional kindness. The ‘red races’ of the First Nations are considered ‘less childish’, but still suffer from a lack of capacity for political activity.¹⁷⁷ Their tribal structures rest on ‘no firm foundation of law and institutions’.¹⁷⁸ They are not states, and so can ‘offer no opposition to the advance of the white civilization’.¹⁷⁹ They must, invariably, be ‘crushed out and destroyed by it.’¹⁸⁰ Even the large civilisations that had existed in South America are argued to have been founded by ‘Ayran settlement from Asia.’¹⁸¹ The Asian states of China and Japan are treated with more courtesy than the rest, but their government is written off as a despotism. ‘They have little sense of honour, and no idea of national freedom.’¹⁸²

Standing above all other races is ‘the white race of Caucasian or Iranian nations’ – the ‘nations of the daylight’.¹⁸³

They are pre-eminently the nations which determine the history of the world. All the higher religions which unite man with God were first revealed among them; almost all philosophy has issued from the works of their mind. In contact with other races they have always ended by conquering them and making them their subjects. They give the impulse to all higher political development. To their intellect and to the energy of their will, we owe, under God, all the highest achievements of the human spirit.’

Being the avatars of the ascetic ideal, Bluntschli argues that the white nations of Europe have the task of becoming the political leaders of the world and of all other races. As the common standard of humanity encompasses them, non-white, non-European races are imagined as accountable to that standard. And being the closest approximation of the ideal, the European, white races have the

¹⁷⁶ *ibid.*

¹⁷⁷ *ibid.*

¹⁷⁸ *ibid.*

¹⁷⁹ *ibid.*

¹⁸⁰ *ibid.*

¹⁸¹ *ibid.*

¹⁸² *ibid* 76.

¹⁸³ *ibid.*

responsibility of extracting the price of that debt. They are obliged to exercise violence to realise the universality of their ideal, of perfecting the organisation of humanity, of achieving the world State.¹⁸⁴ Given the racial (and thus natural) inferiority of the non-white races, the exercise of civilisational violence by the Europeans and their continued superiority can be justified perpetually.

Pasquale Fiore

Pasquale Fiore was a leading Italian Jurist of his day.¹⁸⁵ Born in 1827 in the Kingdom of Naples,¹⁸⁶ he studied across the peninsula, becoming professor of constitutional and international law at Urbino in 1863. He held similar positions in Pisa and Turin, before returning to take up a final seat in his native city of Naples.¹⁸⁷ His jurisprudence has been recognised as one of the defining examples of the Italian neostatutist school, exercising significant influence over future Italian generations of legal scholars and within Latin-America.¹⁸⁸ His *International Law Codified and Its Legal Sanctions*,¹⁸⁹ published in 1890, was an attempt to give a more precise account of the positive international law extant at the end of the century.¹⁹⁰ While milder than most of his contemporaries, Fiore's thought still reproduces the structures of the civilising psychosis.

Like with Bluntschli, Fiore is concerned with the construction of a rational organisation of international society.¹⁹¹ Again, the ascetic contours of the ideal society taken on a liberal

¹⁸⁴ *ibid* 77.

¹⁸⁵ For a commentary on Italian usage from the 1600s to the decades immediately prior to Fiore, see: Walter Rech, 'International Law as a Political Language, 1600-1859' in Giulio Bartolini (ed), *A History of International Law in Italy* (OUP, 2020) 48.

¹⁸⁶ The Kingdom of Naples has a long international legal shadow. Occupied by the Bourbons, the Kingdom fell to Napoleonic conquest. Passed to Joseph (Napoleon's elder brother) and then to Murat (Napoleon's brother-in-law), the latter would attack the Austrians during the 100 Days in a bid to unify the peninsula. Murat would ultimately be defeated and shot by the allied powers, and the Kingdom returned to the Bourbons. For a history of these events, see: Thierry Lentz, *Nouvelle histoire du premier empire IV. Les cent jours 1815* (Fayard, 2010) 513.

¹⁸⁷ The professionalism of international law in Italy was a slow and drawn out process. See: Eloisa Mura, 'The Construction of the International Law Discipline in Italy: Between the Mancinian and Positive Schools' in Giulio Bartolini (ed), *A History of International Law in Italy* (OUP, 2020) 109.

¹⁸⁸ See: [Pasquale Fiore | Italian jurist | Britannica](#) (accessed 17th May, 2022).

¹⁸⁹ Pasquale Fiore, *International Law Codified and Its Legal Sanctions; Or, The Legal Organization of the Society of States* (Baker, 1890).

¹⁹⁰ See: Neff (n 2) 322.

¹⁹¹ Fiore (n 189) 1.

dimension.¹⁹² Against theocratic states that placed beyond the pale all those who didn't share their faith, Fiore sees the pursuit of civilisation as being guided by the Christian message of mutual love and inclusion.¹⁹³ Christ, through his proclamation of the unity of mankind, 'gave the true conception of humanity.'¹⁹⁴ Despite the Christian message being available for all who would listen, Fiore believes that it has been poorly attended to and perverted across history. These perversions are representative of those pre-human elements that Fiore excludes from the ideal: the Papacy's seizure of absolute truth, the attempted establishment of universal empires, the effort by Metternich and the concert of Europe to maintain sovereigns on their thrones, protectionist economic policies, such as Colbertism – all distortions.¹⁹⁵ Two revolutions in the 19th century helped, according to Fiore, to affect a reversal. The first was the general establishment of open trade and capitalistic relations; the second was scientific, which overthrew previous superstitions and allowed reconstruction on its ruins.¹⁹⁶ With these two transformations (transformations within the ascetic ideal), civilised Europe could glean the true concept of humanity: that 'the solidarity of interest of all civilised countries should come before the egotistical interests of their own country.'¹⁹⁷

While civilised humanity may have had before it the 'true' conception of humanity Fiore recognises that it would take some time to realise.¹⁹⁸ Too much potential of pre-human violence remained within Europe. A particular issue Fiore saw was the prevailing state of 'armed peace'.¹⁹⁹ Lacking a global sovereign, states had to look to their own arms to assert their rights, leading to a spiralling arms development and accumulation.²⁰⁰ To end this condition is, in Fiore's opinion, one of the biggest tasks

¹⁹² The liberalism of Fiore contrasts somewhat with the Italian tradition established by Pasquale Mancini. Heavily steeped in the unification of Italy, Mancini argued that 'the principle of nationality' was the basis for legitimacy and subjectivity on the international stage. Fiore, while being sympathetic to nationalism, nevertheless suggested that states were the main subjects under international law – not nations. For a commentary on Fiore and his distinctions from Mancini, see: Edoardo Greppi, 'The *Risorgimento* and the "Birth" of International Law in Italy' in in Giulio Bartolini (ed), *A History of International Law in Italy* (OUP, 2020) 79, 99-101.

¹⁹³ Fiore (n 189) 3.

¹⁹⁴ *ibid.*

¹⁹⁵ *ibid* 3-9.

¹⁹⁶ *ibid* 9.

¹⁹⁷ *ibid* 13.

¹⁹⁸ *ibid* 14.

¹⁹⁹ *ibid* 15.

²⁰⁰ *ibid.*

in achieving the rational organisation of humanity,²⁰¹ and while it was far from settled in the 19th century, he looked on with approval at the number of treaties aimed at outlawing certain kinds of weapons.²⁰²

Beyond the law existing between states, Fiore considered it necessary to extend some form of rights to non-state parties. The omnipotence of the state had to be balanced against the international rights of all those who constitute international society.²⁰³ This encompasses investing individuals with rights, peoples and nations, churches and other forms of social organisation, and even uncivilised nations.²⁰⁴ Unlike Lorimer, Fiore contends that neither race nor political organisation can ever affect a loss of those 'rights which, always and everywhere, must pertain to the human personality.'²⁰⁵ These rights are reflective of the ascetic aspect of the human being and, perhaps unsurprisingly, are presented by Fiore as being very much liberal in nature:

He enjoys, besides, the right to personal inviolability and liberty; he has the right to acquire property anywhere and to require the respect thereof; he is entitled to freedom of conscience, to the free exercise of his activities, to the free exercise of international trade. Are those rights in any respect rights belonging to man as the citizen of a particular state, or are they international rights appertaining to man as such? In our opinion they unquestionably belong to the human personality, independently of the bond uniting every one, as a citizen, to some given country.²⁰⁶

Every human, even those outside of Europe's legal/political space, is thus transformed as bearing within themselves a liberal capitalist waiting to be brought forth. It also carries with it the implication that uncivilised states that attempt to enforce an alternative normative regime to the European one will be committing a crime against ascetic rights.

²⁰¹ *ibid* 16.

²⁰² *ibid* 22.

²⁰³ *ibid* 31.

²⁰⁴ *ibid.* Koskenniemi (n 148) 128.

²⁰⁵ Fiore (n 189) 41.

²⁰⁶ *ibid* 32.

Whilst extending the European ascetic order to the uncivilised, Fiore is quick to add that non-state entities do not enjoy legal equality with the European states. This is because they lack fundamentals of law that are necessary for the legal community.²⁰⁷ Echoing Lorimer, Fiore argues that these fundamentals hinge upon whether a putative state can fulfil its liberal duties towards other states.²⁰⁸ Absent these civilisational fundamentals, the Europeans become entitled to civilise, manage, and exploit the extra-European space. On the one hand, Fiore insists that uncivilised peoples enjoy the rights of humanity and are entitled to the enjoyment of the land that ‘they actually occupy’ and ‘the right not to be deprived of it by violence without their consent’.²⁰⁹ The expression ‘actually occupy’, however, proves very much to be a limiting one. Land which is of ‘no use to the savages’ (‘use’ being defined through a European prism) ‘cannot be denied to civilised states’.²¹⁰ Indeed, colonialism ‘cannot be questioned’ – it is, in fact, necessary for the good health of European states. ‘New outlets and ‘new possessions’ are required ‘for their increasing activity’.²¹¹ Europeans need an outlet for their will to power and will to civilise. The only stop on this is that the international rights of the uncivilised must be respected, and that the appropriation of land is exercised in the means ‘least injurious to the savages from whom the useless land is taken.’²¹² Violence must not spill beyond the accepted limits of the ascetic ideal, lest the very ascetic quality of the civilised be called into question.

Lasa Oppenheim

Lasa Oppenheim’s textbook, *International Law: A Treatise*,²¹³ is one that every student of international law will eventually encounter. Despite his repute within the field, Oppenheim did not start out in international law. Across the 1880s Oppenheim taught criminal law at the Universities of Freiburg and Basel (the same University that Nietzsche held the professorship in philology from

²⁰⁷ *ibid* 34.

²⁰⁸ *ibid* 233.

²⁰⁹ *ibid* 120.

²¹⁰ *ibid*.

²¹¹ *ibid* 46.

²¹² *ibid* 120.

²¹³ Lasa Oppenheim, *International Law: A Treatise* (Longman, Green & Co, 1905).

1869-1879).²¹⁴ Oppenheim made the transition to international law upon emigrating to the United Kingdom in 1895. He taught at the London School of Economics (where he wrote the first edition of his famous textbook), before becoming the Whewell Professor of International Law at the University of Cambridge in 1908.

For Oppenheim, international law encompasses those rules which ‘are considered legally binding by civilised States in their intercourse with each other.’²¹⁵ There is an ascetic community of states, each one of whom is sovereign and equal, independent and free from external interference, and which can only be bound by their consent.²¹⁶ Violence may happen, but it takes places within legally bounded limits.²¹⁷

As to the scope of the ascetic community, Oppenheim admits that it was originally the product of ‘Christian civilisation’, only extending to the Christian states that practiced it.²¹⁸ Between Christian and Muslim nations there was nothing but enmity, and no relations with the ‘Buddhistic States’.²¹⁹ By the 19th century, Oppenheim thinks that this image has changed. While gulfs in culture may still exist, that mutual ‘intercourse’ of trade and communication as brought Christian and non-Christian states together.²²⁰ The ambit of the ‘family of nations’ has expanded.²²¹

According to Oppenheim, there have been three requirements behind this expansion.²²² At its foundation, the state must be ‘a civilised State’ in ‘constant intercourse’ with the ‘members of the

²¹⁴ It has been extensively argued that Oppenheim’s methodology was informed by his German education. For an extensive analysis of Oppenheim’s method, see: Mathias Schmoeckel, ‘The Internationalist as a Scientist and Herald: Lassa Oppenheim’ (2000) 11(3) EJIL 699.

²¹⁵ Oppenheim (n 213) 3.

²¹⁶ *ibid* 16.

²¹⁷ *ibid*.

²¹⁸ *ibid* 30.

²¹⁹ *ibid*.

²²⁰ *ibid* 31.

²²¹ It should also be noted that Oppenheim rigorously rejected any idea of natural law; see: Lassa Oppenheim, ‘The Science of International Law: Its Task and Method’ (1908) 2(2) AJIL 313. This rejection of natural law and morality has caused Oppenheim to be subjected to criticism. For a particularly stinging example, see: Antony Carty, *The Decay of International Law* (Manchester University Press, 2019). That said, Oppenheim’s rejection of natural law was simply following on from the Enlightenment scepticism that a truly objective natural law could be realised (see: Harold Scheu, ‘On the Science of International Law: Oppenheim Revisited’ (2001) 2 *Common Law Review* 30, 31). Additionally, it has been argued that Oppenheim’s positivism was crafted in order to better realise his moral and ethical commitments (See: Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ (2002) 13(2) EJIL 401.

²²² Oppenheim (n 213) 31.

Family of Nations'.²²³ By 'civilised', Oppenheim stresses that he does not necessarily mean Christian civilisation, 'but civilisation of such kind only is conditioned as to enable the respective State and its subjects to understand to act in conformity with the principles of the Law of Nations.'²²⁴ While seemingly inclusive, this smuggles in the civilisational requirements of the liberal, western world view. It, in effect echoes Lorimer's reciprocating will. The principles of international law are liberal, and a state that cannot reciprocate them to others cannot benefit from their protection (we'll see below how Oppenheim theorises the position of states outside international law).²²⁵ The other two requirements are that the new state, tacitly or otherwise, accept the prevailing rules of international law (this naturally flows from the first requirement) and receive the recognition of the existing members of the community.²²⁶ Only the sight of the ascetic community can make human.

Oppenheim points us towards the many successful entities that have entered into the community of states. An important one is, again, Japan, who, 'through marvellous efforts', has become both a modern state and an influential power.²²⁷ Some others, however, fall into a bracket of 'semi-sovereign'. These include the countries of Persia, Siam, and China.²²⁸ While admiring their progress in achieving civilisation, they have not quite reached the point of being able to understand and carry out in every respect the rules of international law.²²⁹ While they can be participants to treaties, they are not fully guaranteed the rights of non-intervention, jurisdictional autonomy, and equality.

However, there still exist those nations that are entirely outside the law of nations – those of the pre-human. To these states, international law 'does not contain any rules concerning the intercourse with and treatment of such States'.²³⁰ Behaviour towards these entities should be governed by the 'principles of Christian morality',²³¹ but Oppenheim admits that this is not always the case. In practice, the behaviour meted out 'is not only contrary to Christian morality, but arbitrary and

²²³ *ibid* 31.

²²⁴ *ibid*.

²²⁵ *ibid*.

²²⁶ *ibid*.

²²⁷ *ibid* 33.

²²⁸ *ibid*.

²²⁹ *ibid*.

²³⁰ *ibid* 34.

²³¹ *ibid*.

barbarous.²³² Here, perhaps, one can see the economy of civilisational violence coming under pressure. Under previous accounts, the violence exercised against uncivilised states had to be in line with ascetic principles in order to perpetuate a good conscience. There is none of that here. The pre-human is outside the law and Oppenheim admits that the behaviour of the civilised in this space is that of the prehuman: it is animalistic and barbaric. The *hypocrisy* of the ascetic community begins to break through.

The hypocrisies of empire

From Wheaton to Oppenheim, European imperialism is marked by its hypocrisies. The exercise of power in an extra-European space had to have a *good conscience*. It couldn't be presented as mere acquisitive aggression. Instead, it was linked to ideas of civilisation. This phenomenon, I suggest, follows the pattern of the externalised civilising psychosis. The geopolitical space of western states is figured as the ascetic. Each of the authors that we examined was concerned to limit the violence in this space – to erase the possibility of the pre-human. While some were more sanguine than others, the mutual growth of liberal principles, duties of non-interference, and the laws of war were seen as key markers of success. But perhaps more importantly, none of these western states viewed one another as *uncivilised*: they were each sovereign, imbued with ascetic personhood. The pre-human element of civilisation was secreted to the non-European world. Using universal standards of humanity, combined with various discriminatory categorisations, mostly racial and gender based, these non-European spaces were brought within the normative reach of civilisation, rendered *responsible* to the ascetic ideal, and then *culpable* because of their perceived failure to live up to it. That culpability, made most acute in the case of the *criminal* nation, legitimised the use of civilising power by the western, ascetic states. Instead of digging further into their own flesh, Europeans were able to fashion a moral system that enabled them to continue the practice of external violence.

By the time of Oppenheim, this civilisational economy is starting to come under pressure: the pre-human violence lurking behind the ascetic presentation is breaking through. In the ensuing 20th

²³² *ibid.*

century, western Europe would see the very real return of pre-human violence to Europe and the fracturing of its ascetic unity. The *criminalising* of European states in both World Wars and the phenomenon of ‘total war’ are but some artefacts of this crisis in paradigms. Nevertheless, the dynamics of the ascetic and pre-human would survive to be rearticulated in order to perpetuate the civilising psychosis. New ways of identifying the pre-human and the fraternity of civilised states were found, repackaged through the ostensibly neutral and technological language of development, government, and law. The overt language of civilised and uncivilised has been (largely) dropped from legal parlance. Yet, as we have seen, critical scholarship continues to pry apart the misleadingly dry assemblages of international legal regulation to find the veiled reality of civilisational violence – all the worse for its hypocritical rejection of ‘civilisation’ as a signifier.²³³ This then leads to an important question: does this critical scholarship mark the final denouement of the civilising psychosis? Or something entirely? Why is it so concerned with hypocrisy?...

Scene 4: In search of fresh meat

The will to power is always in need of new grist for its mill. The same holds for the healthy and the sick. The sick, however, must contort this exercise of power through the hypocrisies of the civilising psychosis. Power can be exerted but only *against* power. There must be a pretence of realising a state of asceticism: a place in which violence will no longer happen – an end of history. Sadly, each pulse of energy to realise that ascetic state merely deepens the psychosis. The ascetic ideal becomes wider, more allusive, requiring escalating levels of violence.

The civilising psychosis is very much a political one. The sovereign state and the civilised subject are mutually constitutive: the civilised body is only produced in the state, and it is those same civilised bodies that require and demand the state. As we saw in the last chapter, the sovereign state is founded on the dual poles of the ascetic ideal and the pre-human, and the bond of responsibility between them. However, the civilising psychosis at the heart of the state is inherently unstable. As will to power, more aspects of the pre-human must be opened up and sought out. This generative

²³³ See: ‘Prelude’ 15-55.

quality of the psychosis is responsible, I suggested, for the transformable nature of sovereignty doctrine.

To stabilise this psychosis and prevent the state collapsing in on itself from the weight of its own hypocrisies, the international provides an invaluable resource. Through externalising the civilising psychosis, in making a foreign entity the bearer of the pre-human, it becomes possible to redirect civilisational violence from its interiority. The moment a distinctly *European* global order emerged, I argued, was when a few western European states were able to *recognise* one another as members of an ascetic unity. While the possibility (and actuality) of violence between these states remained, it was not tinged with the moral baggage of civilisation. This warfare was something to be deplored – it gave everyone a *bad consciousness*. Having recognised one another as civilised, the pre-human could be leveraged against the rest of the world, channelling and legitimising European violence.

The externalisation of the pre-human, however, is not a permanent solution to the civilising psychosis. The will to power cannot rest. New spaces and new dimensions of the pre-human must be sought out. While the global order started with a commitment to liberal values, there is no reason why the contours of the ascetic ideal wouldn't transform to allow a renewed serge of civilising. Then there is the constant threat that the pre-human might return to the ascetic geo-political space: the recognition of mutual sovereignty amongst western nations might falter, unleashing civilisational violence amongst Europeans once again. The targets of civilisation themselves might even react, either growing in strength so as to be able to challenge the west's use of violence, or in revealing to the west the hypocrisies of its civilising mission, forcing it to see the disjuncture between its actions and the ascetic ideal.

Perhaps more interestingly, elements *within* the civilised – those who are maybe more sensitive, devout, and hungrier for new vistas of violence - might even draw attention to the hypocrisies of their fellows. These voices reopen the wounds of the psychosis within the civilised community, forcing a confrontation with the society's own animality and criminality. While extirpating the language of civilisation, condemning the hubris of ages gone in their commitment to false idols, the almost irremediable criminality of the putatively civilised, these voices still wear the vestments of the ascetic priest – that genius of *hypocrisy*...

Act 3: Ça Ira

1. A questionable question

It was at the beginning of the civilising psychosis, Nietzsche tells us, that humanity became interesting to the gods.¹ Nothing was of greater fascination than an animal turning upon all of its most natural instincts *in pursuit of power*. Sovereignty and the global order that grew out of it, present the spectator with a singular example of this psychosis and its effects: from the generation of sovereignty theory in Bodin and Hobbes, through to the international legal commentators of the 19th century, the civilising dynamic has produced and reproduced a structure through which violence was managed and directed.

Today, the European global order of the 19th century has undergone some radical transformations. Gone are the colonial empires; in are the neo-liberal empires. International legal scholarship, too, has experienced its own share of changes. The discipline is undergoing a deep look *inward* and *backwards*. Through the critical theories that were discussed in the prelude, the practice and history of international law has been pulled apart to reveal its complicity in establishing and perpetuating certain patterns of power and privilege.

The discussion of those insights and tensions raised by this critical scholarship was necessary to establish the space for my Nietzschean critique. Now, to conclude the thesis, that Nietzschean critique can be brought back into conversation with those perspectives. In this dialogue we can probe the points of coincidence and tension; the places where Nietzsche can develop our knowledge of sovereignty and imperialism and where he cannot. However, a crucial aspect of this debate is the critical light the Nietzschean approach throws upon the contemporary theories *themselves*. The goal of this thesis was to study the nihilism of international law – a nihilism that, I suggested, overtly surfaced at certain points, such as the NAIL turn in scholarship.² That study led to the investigation of

¹ Friedrich Nietzsche, Michael Scarpitti (translator), *On the Genealogy of Morals: A Polemic* (Penguin, 2013) 21.

² 'Introduction' iv-vi

sovereignty and the roots of the global legal order so as to demonstrate the deep implication the discipline has with nihilism. That nihilistic structure has not gone away. In returning from the historical inquiry to the present, the *question* of critical scholarship emerges. What does that look inward and backward *mean*?

2. Not so serious

‘What’s this? Critical scholarship is, perhaps, *nihilistic*? Surely not. Have you not spent all this time telling us that Nietzsche’s target was the ascetic ideal – an ideal he closely associated with the belief in absolute Truth – and that all those old philosophers and scholars that disguised their partiality and will to power behind the drapes of the ascetic ideal were deeply hypocritical in his eyes? As far as I can tell, one of the key moves behind his own account of civilisation was to demonstrate just how deep that hypocrisy ran. And it seems all too apparent that critical scholarship shares this rejection of absolute truth and objectivity. While the exact methods are not identical, the degree of shared territory cannot be denied. Koskenniemi and Kennedy, through their structuralist/deconstructuralist framework, attacked the possibility of objectivity within international legal argument. The conclusions of legal debate were held to be dependent upon a political intervention. Feminist scholars have deconstructed the state as a masculine construct – a bounded, self-sufficient self – to be set against feminine spaces in which the masculine states can legitimately intervene. Epstein, as I remember, explored the constitutive connections between the body and the establishment of the state, demonstrating that the creation of the latter was coterminous with that of the rational male subject. Queer scholarship, led by figures such as Otto, has supplemented this by pointing to the heterosexual element which complement the male body of the state. Marxist and TWAIL perspectives, for their part, have uncovered the complicity of sovereignty in perpetuating global imperialism. And why! These latter approaches, including writers such as Tzouvala, Anghie, and Parfitt, were fundamental in operationalising *your* Nietzschean framework for application at the international level!’

‘I readily admit all that.’

‘Then let me tell you, uniting this critical scholarship is a desire to destabilise the hegemonic structures of western civilisation, to empower suppressed voices and, in so doing, to break the freezing effects of a putatively objective and natural order. By every account, this seems to promise the destruction of the ascetic process of civilisation and the triumphant reintroduction of the Dionysian into political life.’

‘Perhaps; but I entreat you to think more - comically.’

3. Criticising

Is not all critical inquiry merely an effort at *devaluation*? To make lawyers see that all the pretension of objectivity and neutrality and justice is a bare faced lie; to peel back the civilised veneer and expose the whole sorry history of violence, oppression, and enslavement – what is this but a sounding out of idols? a threat of devaluation? If so, an important question arises. To what end? What does our redemption mean?

Forays and Skirmishes

4. Making my Apologies to Utopia

From apology to utopia – *ad infinitum*. There might be something of the psychotic in that. But why these two poles – ‘apology’ and ‘utopia’? Koskenniemi tells us that they are part of a liberal discourse for realising (simulating) objectivity.³ But why the need to insist on objectivity in the first place? And why the need to achieve it through the use of utopian and apologetic arguments?

³ ‘Prelude’ 8-15.

Truth is an ascetic impulse, but it must be handled carefully. Too close an association with the human, all too human and it will crack. Bodin's sovereign, armed with God's authority, could be speak the law and stand as truth without recourse to argumentation (perhaps Bodin's treatise was seen as an indelicacy precisely for *stooping* to argumentation). We are much too civilised for that now; much too perceptive at seeing uncleanness. Modernity's legal subject has a phobia of power: the truth must always be *found* but never *invented*. Apology and utopian arguments represent further intensifications of civilisation: truth as gleamed through reason or truth as empirically observed in the world. Neither, of course, can stand long as the ascetic ideal itself with a clean conscience. One may be a piece of hypocritical partiality; the other, a tool merely to entrench extant power structures. What is the seesaw between these poles but a nervous handwringing of the civilised mind? To enact the law is certainly a powerful act, but one stripped of its putative human element through its objectivity. How nerve-racking, then, to have this comfort removed, along with one's good conscience, and to be exposed to the ascetic ideal's condemnation?

5. Who's Afraid of Pashukanis?

Between Miéville's position and my own there seems to be little in the way of methodological common ground. A theory that focuses upon the application of commodity form to states seems to have little to say to an account of structural nihilism and vice versa.

Or perhaps they do. Nietzsche's dynamic of civilisation and the production of the human hinges upon the idea of debt. The *thinking* human subject only emerges, for Nietzsche, with the structures of 'debtor and creditor'.⁴ It was through that dualism that human beings first became cognisant of one another – measuring up, comparing, and contrasting. In constituting the thinking subject, the debtor-creditor relationship developed into a political form, structuring punishment and the ways in which subjects related to the communities they were members of.⁵ The very relation between the ascetic

⁴ 'Human, All Too Human' 115.

⁵ *ibid.*

ideal and the pre-human is one of the debt. It is in the idea of debt that the crucial linking bond of *responsibility* is allowed to perform its normative work.

Focussing upon the creditor/debtor aspect of Nietzschean thought narrows the distance with Miéville. The Nietzschean paradigm casts states into the roles of ascetic creditor and the uncivilised as debtor states; much in the same way Miéville casts them into the class roles of capitalist and proletariat. That international law is also necessarily violent and assumes imperialism is also shared by the two positions. Since the structures of international law, according to Miéville, place political entities into the guise of property-owning states, and since imperialism is defined as the exploitation of proletariat states by the capitalistic ones, the system necessarily (re)produces imperialism.⁶ Likewise, on my Nietzschean account, political entities are recast as ascetic and pre-human. The very purpose of the globalisation of the civilising dynamic is to resituate that pre-human element and enable the external exercise of violence. As such, the system of sovereign states necessarily (re)produces continual acts of violence.

Beyond these similarities, the Nietzschean perspective can develop that of Miéville's in interesting ways. For one, it can complement it through tying the commodity form to the emergence of the civilised human subject. Here, the establishment of capitalistic relationships becomes mutually constitutive with that human subjectivity. Alongside the political structures that grew in tandem with the deepening psychosis of this subject, so to could economic structures have done so. But perhaps a more important criticism my perspective can have upon Miéville is with respect to nihilism itself. Out of all the commentators covered Miéville is the only one who is avowedly nihilistic with respect to international law – a feature of his position that has led to no small measure of criticism from other scholars.⁷ Since international law is constitutively tied to the imperial relations of capitalism, it cannot help but foment violence in the world. It is irredeemable. Having made this bleak assessment, Miéville has had little scholarly output – possibly because his position leaves him with nowhere to go. In this nihilistic turn, Miéville falls squarely into Nietzsche's devaluation. International law, that

⁶ 'Prelude' 16-19.

⁷ *ibid* 19.

‘gentle civiliser’, is found to be utterly hypocritical and a fomenter of pre-human violence. The ascetic ideal *devalues it*.

This devaluation, however, need not lead to a more general and comprehensive devaluation. Other Marxist scholars, such as Robert Knox, stress that international law, while the unclean imperial tool of global capitalism, can be strategically used to uproot and transform that global order – and finally itself.⁸ Seen from this perspective, the devaluation of international law becomes a necessary, if painful, *overcoming*: the brushing away of a misleading veil that facilitates a true realisation of the ascetic promise. And in this we can see that the devaluation and the overcoming of international law still comes from the ascetic ideal. It is rage on *behalf of the ideal* that leads to the disgust with international law, to the exercise of *power* in its overcoming. Nothing in this suggests that the ideal *itself* was being called into question.

6. Reification

‘We are all dupes! We have been studying and practicing international law as if it were real; but it is merely a political description masquerading as something natural. And we all know that false idols should not be worshipped. We can (and should) change it: speak new forms of international law into being.’

Nothing is worse for the civilised subject than to be in the snares of a false ascetic idol – or perhaps nothing so good? To dismiss an entire discipline, with all its accumulated history, literature, and practitioners, as a grand piece of charlatanism – *that* is an overcoming. And to keep ensuring that no one vision of the law will become so venerable as to be taken as *true* – that will transform every scholar into an executioner with a twitchy hand.

Perhaps it is worth exercising a little caution and ask whether some of the false idols may be very necessary for our good health as international lawyers. Oh? Bad health is the goal?...

⁸ *ibid.*

7. Dynamics of Difference and other Thoughts

As I said, Anghie's analysis is very important for the operationalisation of my own. To that end I am well disposed towards him. But an important question can be asked. 'The dynamic of difference':⁹ why would anyone *need* to justify themselves in so convoluted and foolish a way? Why did Europeans feel *obliged* to dress up their petty acts of violence as if they were nothing of the sort? To put it even more bluntly: what need of reason? Surely a devil wouldn't stop to give reasons.

8. The Logics of Capitalism

Tzouvala's account is an advance on Anghie's, if I may say so. The hypocritical structures of imperialism are repeated here (the logics of 'improvement' and 'biology') but there is a reason given for this absurdity: it is capitalism.¹⁰ Capitalism has a will to power of its own, so to speak, and always needs to expand. The two logics give the violence necessary to achieve this a *good conscience*. Target nations (markets) are brought within the capitalistic social order through the possibility of their realising liberal legal structures, but their continuing subordination is ensured through the logic of biology. All is natural and as it should be.

But is this just not kicking the proverbial bucket up the road? If we accept the causal role of capitalism in producing these structures, then the question is simply reframed as capitalism's pathologies. Why would a civilisation need to contort itself through such philosophising, just to move property from one part of the globe to another? Why the need for dishonesty? And another question: who precisely was this dishonesty *meant for*? Were the 'wretched of the earth' reading the European textbooks of Lorimer, Fiore and Bluntschli? One suspects not.

9. Nietzsche and the Feminine

⁹ *ibid* 33.

¹⁰ *ibid* 19-21.

By the end of his life (at the very least) Nietzsche was a misogynist. The feminist movements of the late 19th century are dismissed by him as ruining women.¹¹ While his frustration at women turning into the bourgeois men he so despised might attract some sympathy, he was not interested in letting women define themselves. Nietzsche had very specific ideas of what a woman was and should be – and none of them (even in his own time) were particularly palatable. Beyond his specific statements on gender, it is easy to read the will to power as a masculine ideal (the diminishment of the will to power in Europe is decried by him as making men ‘womanly’),¹² and the material of life that the (male) artist-tyrant shapes as being the feminine – life and truth, he tells us, are women.¹³

This raises an important question mark: does employing a Nietzschean framework as I do perpetuate misogyny? Quite possibly. Can that framework still offer anything useful to feminist voices? Perhaps.

On an initial level, the idea that conceptions of masculinity have been foundational in constructing the pillars of law and the state chimes with Nietzsche’s epistemology. For him, all knowledge and politics stem from deep instincts that exercise will to power, forcing the world into its paradigms. Much of Nietzsche’s critique is that the mediocre, bourgeoisie European man has done precisely this, building a world in which he was comfortable and then declaring it an end of history.

Second, the Nietzschean dynamic of civilisation is identifiable in feminist discourses:

1. Only men can be rational and fully human. Women? At best, poor copies.
2. Arbitrariness. Women are just as rational as men and deserve an equal place in the world.
3. Wait! That world as a *masculine* world? Not *the* world? And we as women are – *their* ideal?
4. Revaluation. Women must free themselves from men and speak *for themselves*.
5. A troubling question: what is a women’s voice? Might *we* be committing violence against other women? Are we merely setting up a *new ideal*?
6. A ‘universal’ woman’s voice declared an impossibility. The oppression and domination *of women by women* must be sought out. The privileged women hang their heads with shame.

¹¹ See: ‘Human, All Too Human’ 103-107.

¹² *ibid.*

¹³ For example, see Nietzsche’s famous opening line of *Beyond Good and Evil*: Friedrich Nietzsche, Robert Holub (translator), *Beyond Good and Evil: Prelude to a Philosophy of the Future* (OUP, 2008) 1.

Third, Nietzsche could be used to re-evaluate some of feminism's own dogmatisms. Several writers set feminism as the caring substitute for the rigidity and power-seeking of the masculine part. It is more *civilised* than masculinity – but might this characterisation be a problem? Femininity, once figured as the pre-human to the ascetic man, is now asceticised in turn, offering an escape from the hypocritical violence of men. Notwithstanding this assessment of men, who said femininity wasn't violent? Who said women were caring? And most to the point: *why should we want to think that?*

10. Natality and other Tales

The pain inflicted by civilisation can be terrible – especially as the knots of the ascetic ideal grow tighter and everything that previously preserved our health is called into question. Take structures. To categorise, differentiate, sort, to create: violences, yes, but very useful ones that allowed creatures such as ourselves to live. The ascetic ideal gave this violence a good conscience (even mandated it), but what to do when the falsity of structures has been revealed? One possibility is that the life of the human subject will become intolerable. Another, however, promises absolution: what if it were possible to *think past structures*? No more I and you, us and them. Several critical scholars have dabbled with this: Louis Eslava's 'enframing'¹⁴ and the theory of 'natality' but forward by Gina Heathcote.¹⁵ International law, on this latter account, will remain radically open to its exteriority, its 'other'. It will not enforce shapes or patterns or structures upon the world, continually one thing and its opposite. The violence of civilisation structures, the wounds inflicted by law, will be abolished.

As a preliminary observation, is there not something of the atavism about this? A certain smell of incense? The return of that most powerful of Christian urges: to escape the mundane reality of sin and violence through a transcendence? Or perhaps it is something unprecedented – the attempt by the civilisational dynamic *to resolve itself*.

¹⁴ See: 'Prelude' 37.

¹⁵ *ibid* 49-50.

For Nietzsche, civilisation rests upon a contradiction. It is motivated by the ascetic ideal but can only be realised through the will to power. The greater the commitment to the ascetic ideal the greater must be the acts of violence to realise it. The critical movement follows that logic. To readdress layers of historical power that have constituted the present will require previously unimaginable levels of violence. However, the poststructural ontology is something more than that. The previous simulants of the ascetic ideal – laws and structure – are condemned for their violence. The escape from this violence is held to be *in the Dionysian*: in those liminal spaces of indistinction and radical openness. This may appear to be an impossible piece of irony. The violent indistinction of the Dionysian is precisely what the ascetic ideal is counterposed to. That, however, is exactly the point. The ascetic ideal is opposed to the violence of life, forced to use hypocritical tools of that same violence to realise itself, but what if it could transcend this limitation? The Dionysian violence of life could become *asceticised*. The Dionysian, then, becomes a space free from violence, in which structures never form, animated by love and compassion. The civilisational dynamic is thus dissipated: the ascetic ideal, through the enchainment of Dionysus, has *become life*.

11. The body and the state

Between Epstein and my myself, there is much common ground.¹⁶ The body, the state, and civilisation are fundamentally connected for both of us. While Epstein did not extend her analysis so far, the use of the body in international law texts is clear to see. For writers like Lorimer and Bluntschli, the gendered and raced body is a crucial site for constructing inclusions and exclusions.¹⁷

However, the body is only incidental in Epstein's work: it is a central part of a *discourse* that co-constituted the state. It is what commentators have said about the body and its relation to the state that is important – the 'real' body that stands behind discourse cannot be grasped. For Nietzsche, however, the body is the fundamental point of reference. As will to power, it is the body *itself* that forces the world into cognisable frameworks, creates values and political structures in which it can thrive. When

¹⁶ *ibid* 43-44.

¹⁷ Act II: 'Gently Civilising' 166.

Nietzsche says the emergence of the human, the state, and civilisation are ‘co-constitutive’, that is meant in a very literal sense. Epstein would probably respond that Nietzsche’s position is just another discourse that links the state and a certain conception of the human body together that requires its own set of constitutive exclusions – though Nietzsche is (un)usually more forthcoming with those exclusions than the writers Epstein looks at. By way of rejoinder, it might be pointed out that Epstein’s thesis merely begs the question: the question of *why* any and all of this ‘construction’ takes place in the first place. In the development of scientific epistemology (or – an ‘optic regime’) and the idea of the human, what is driving those thinkers of the 17th century? Why make all those constructions and exclusions? For power? But why would discourse be motivated by power? What precisely *is* discourse at this point anyway?

12. English tastes

Epstein is likely correct to trace the emergence of the empirical epistemological revolution and the birth of liberal ideas to England. Nietzsche, looking at the same authors, reached a similar conclusion 150 years ago – but with half so many words.

‘They are not a philosophical race, these Englishmen’ Nietzsche tells us, ‘Bacon represents an *attack* on the philosophical spirit in general; Hobbes, Hume, and Lock a century-long degradation and devaluation of the concept ‘philosopher’.¹⁸ Under the influence of this ‘profoundly average people’, this most pious and Christian people with its ‘modern ideas’ of happiness for the greatest number, Europe sank into a depression.¹⁹

How much, then, of critical scholarship is simply a war against the English palate?

13. Queer eyes

¹⁸ Nietzsche, *Beyond Good and Evil* (n 13) 143.

¹⁹ *ibid* 145.

While we do not say it, we critical scholars still love our absolutes – and know how to tyrannise with them. Take Otto: all biological notions of gender are a chimera: regulatory fictions that beat, bully, and shape us into certain forms.²⁰ There can be no accommodation with these regimes, let me tell you! Truces, perhaps, but that is all. While liberalism may tolerate *us*, we do not tolerate *them*. Humanity must be reconstituted – liberated – through the queer gaze... While the imposition of these new eyes might be a painful surgery for most (and we can doubt the skill of the aspiring surgeons), it is worth asking why this new ideology of absolutes has such a good conscience with itself, and whether, in what circumstances, straightness could be permitted.

Interlude

14. Respect for your elders

Or a lack of respect. That is a typical fate for a venerable scholar who, in their time, had no small measure of *evil* in them when dismantling the established truths of the field. To suffer the bad manners of the youth! One hopes they take solace in this spite as a form of respect.

What? Koskenniemi *and* Kennedy?...

15. Law affronted

‘Do I hear rightly! *I*, who took on the burden of shaping you, creating a world so safe and civilised so that you might prosper, am now considered *uncivilised*? Because I had the barbarity to wield the chisel? For shame! For shame! You should know of all people how much tyranny is needed for peace.’

²⁰ See: ‘Prelude’ 50-52.

16. Engaging with the enemy

It was very right that the academy, at first, studiously *ignored* critical approaches to the law. ‘I read them without interest’: a potentially lethal remark.²¹ But not to last... Perhaps being more sensitive than the rest or having finer nerves, Scoobie sounded the alarm – the elimination of international law! At that the game was up.

17. Discoursing

Academics, by their nature, are too bookish. It is only from an excess of reading that the world could degenerate into a *text*. To those who live outside libraries, who feel the sun and wind on their face, life might be more – alive. But who am I to say? I’m writing this from inside a library.

18. Reading Lists

Books are expressive of *particular* health(s). Because of that, one should be just as circumspect with what you read as what you eat. The postmodern’s fare is lethal to most. The post-human’s does not bare mentioning.

19. A matter of taste

It is ridiculous (or perhaps curious) that, by way of synonym, we dignify ‘scholarship’ as ‘literature’. That is what I call uncivilised...

20. Indigestion

²¹ The remark is by Louis Henkin on being asked what he thought of the new linguistic, deconstructionist works appearing (such as FATU). See: Jean d’Aspremont, ‘Marti Koskenniemi, the Mainstream, and Self-Reflectivity’ (2016) 29 LJIL 625, 633.

In matters of nutrition, both ‘yes’ and ‘no’ can be taken to the extremes of tyranny. To be so particular that everything new and foreign is an anathema to the taste and must be rejected – what is this but a piece of resentful tyranny over the body? A will to starvation? The opposite extreme, to say yes to everything with a reckless abandon, to encompass everything within one’s own stomach, regardless of its potential toxicity: that is a deeper, more subtle, type of spite.

21. A question of scale

Scale comes in several forms. Geographic scale; population scale; chronological scale etc. (and, of course, these scales intersect). In framing questions of violence and oppression, these scales can be very important. Taking an altercation between two individuals happening in the present, one may be significantly larger in build, be surrounded by their friends, and in their local area. However, altering the scale somewhat, we may find that local area is a minority population in a minor city with a recent history of oppression by the class of the other party. The dynamic shifts – and will shift again if you pull any one lever of scale. And there is the more subtle point that both parties to the altercation may *think* in different scales, perceiving and suffering harm accordingly. The *politics* of scale, then, is something that requires attention.

22. Puppet strings

The West does love its freedom – or perhaps more accurately, *losing* it. We are always looking and watching, furtively checking our pocket to see if our precious freedom is still there, delighting in any puppet-master who claims to have stolen it. But this game should not be taken too far. Even the sweetest things become nauseating in excess.

23. Crucifying

Everything on the cross is divine. Thus our morals have it. So we have become adept at *nailing* our chosen subjects onto them. But what's that? Crucifixion is morally wrong? We are doing a violence! Please, please! Take the hammer. I must go up onto the cross!

24. The tyranny of the bank

While it is common to hear critical scholars decry capitalism, one should be slow to believe it. They have, so I hear, their own bank and ledger of accumulated *debt*, kept with a tyrannical precision and memory. When this horde is finally cashed in the books will be balanced, come what may, and while not wanting to frighten you, my friends, I doubt they'll be accepting money as payment!

25. Decolonisation

Even while negating itself, Europe, nevertheless, *affirms* itself. The quest for purity, to shake off the corrupting, all too human, cobwebs of Europe, to provincialise and *humble* Europe, the mutual *love* of the oppressed...

26. Pacifism

While once something that elevated, pacifism now could become immoral and shameful: a *mask* that allows the status quo to endure.

The Case of Critical Scholarship

27. Devils

Assuming that I am speaking in confidence, have we critical scholars considered our own need and love of violence? Do not all our hairs stand on end in *anticipation* of some great release of energy in which our previously imagined acts of revenge that have roused and needled us might be realised in fact? The promise of an unparalleled *fete* in which the tyrant will be led to the scaffold, and all his structures pulled down. But I am being too coarse: we mustn't lose our good conscience.

28. An indelicacy

'I must be frank! Rather than a radical break with the past, such critical approaches may be a logical, all too logical development of the nihilistic inheritance that they have received: a final, exquisite farce for the gods, in which European civilisation eats itself. In exposing international law and sovereignty's complicity with power, exposing its hypocrisies, critical scholarship enacts a final tightening of the civilisational knot – a moment in which the pre-human returns to the very heart of the ascetic, irremediably condemning it as false. And in this condemnation, the ascetic ideal reaches its widest proportions, swallowing and colonising the Dionysian itself.'

'Stop shouting! We're in civilised company.'

29. Our freedom

What is the freedom that we postmoderns are interested in? Is it that freedom which promises an escape from all violence; all suffering; all oppression? Perhaps. That is what we *say*, at any rate. But there is another type of freedom that we are deeply interested in – a type of freedom that gives the first its *zest*. This is the warrior's freedom: to overcome resistance; to conquer and make a *fete* in victory. Is there not something of the warrior's delight as we take the sword to the hypocrisies of the law? The feeling of facing great odds – and winning? The taste of blood?... In any case, this is reason enough to be civil to our opponents, to actively *want* strong opposition. Otherwise we may be faced with the catastrophe of realising that first freedom. No warrior enjoys peace.

30. Critical History

Far from being *less* violent, the violence of today may simply be more *refined*. Take critical history. To place the patient on the surgical slab; to lay bare the history of that patient and the violence of every knot that brought it into being (those ‘constitutive exclusions’); and then to take the dissecting knife to those knots – to make the patient scream not just in the present, but across every age of its being. Surely only a devil would do that? Yes, but only if *someone else* is wielding the knife. Put the knife in the hand of the patient and we suddenly have a saint.

31. The case of Fanon

‘They are the hypocrites and liars! *They* the human and *we* the animal? They are the *criminals* who unmade us as man – yes, I say unmade! – and have exploited us for profit. And as criminals they must *pay*, oh yes. Humanity must be *reintroduced* across the globe. But we can only realise ourselves with violence. It’s been so long since I could be violent – always turning my aggression inward. No more! I will be human when I can attack the criminal – to cut their throat and bury them. And don’t say that I am just like them. Our violence is of brothers and sisters, truly united by *love* – *Love!* - set against the false *idols* of individualism and capitalism!’

At that the doctor took off his glasses and said quietly, ‘yes, you have been sick for a long time.’

32. Truth...?

The greatness of a person may also be glimpsed from the scale of their errors. In leaving Russia, Napoleon likely declared to himself: ‘that is worthy of *me*’. Likewise, the great re-evaluator of all morals, made a blunder of his own. Nietzsche was aware that the ascetic ideal had taken on many guises, but he maintained that its ultimate expression was Truth. In calling Truth into question, he thought he would shake the ascetic ideal to its core, preparing the ground for his own counter ideal in

the Eternal Recurrence. *That* was a piece of German *niaserie*. Truth has been called into question, and yet the ascetic ideal is alive and well. This is because it was the ascetic ideal *itself* that called Truth into question. That did court the devaluation of the ideal, certainly. In revealing that law lacked any objectivity, that it was a mere partial mechanism of power for realising the desires of a select group – in reducing law to power – the ascetic ideal seemed an impossibility. But this was a mere raising of the stakes. The law, and reality, was reduced to power, but the ascetic ideal was *retained*.

33. An old resentment

While indeed one of its own, the ascetic ideal has always been wary of science and positivism, seeing within it (rightly or wrongly) a potential danger. Nietzsche, *autrefois*, once praised the metaphysics of Schopenhauer and Kant precisely for putting this arrogant method back in its place... Science did, for a time, win out over the old philosophy, but now we have discovered discourse. Is this not our finest instrument of revenge and domination? The world as discourse, and nothing besides! The body as discourse, and nothing besides! Science as discourse, and nothing besides – and a particularly *immoral* discourse at that!

34. Grave robbing

Many people, whether English or no but who wear English heads, are confused by the critical turn. ‘This is nonsense! Brainwashing!’ Well they might think that, for there is something in critical scholarship that does not sit well with that English mind. It is the return of *European ideas*. Tired of their neighbour’s dullness (and perhaps pre-eminence?) did not the French sniff out the graveyards of Europe’s thinkers, dig up the bodies, and then set them against the English? Is this not Europe’s *revenge* against the English?

Look! I even spy Nietzsche’s mummy preaching the doctrines of perspectivism and genealogy. But what? *Preaching*? That sounds out of character. Moving closer I remark, ‘You look well after all this

time! Your gestapo coat seems to have fallen away. But is not the cut of this new jacket you wear English? And – good God! – is that a *bible* I see in your pocket?’

35. Creativity

We critical scholars are too *civilised* to create. And that is quite right. There is so much *tyranny* in creation: so many potentialities cut off, so many elements forced into an arbitrary style. While we can tear down a false idol (to *uncreate*) quite cheerfully, we become embarrassed, unconfident, and demur when asked to put something up in its place. Our palates are too refined for *that* violence.

36. Our philosopher’s stone

But what if we could create *without* violence! Creation *moralised*! Could we?... Could we?...

37. Beyond Good and Evil?

‘Dionysus! We were wrong about you. We were all duped by Apollo and his freezing, violent gaze. In your justness, we will all know no harm, no oppression! We wish to be beyond good and evil now.’

At that the old god laughed: ‘Well! Never have mortals dared to speak of me in such poor terms. One ill turn deserves another. Perhaps I will take you beyond good and evil and show you *my* justice.’

Redemption From Redeemers?

38. Amongst moderns

‘Critical scholarship – this wokeism – is a cancer. We must shake our children by the shoulders, get them out from under the influence of university professors, and *back to reality*.’

There is something comical in this insistence of seeing the critical turn as an *aberration* from ‘good sense’ – and to *blame* it on university professors, no less. On the contrary! Critical scholars have your eyes and mouth – the family resemblance is clear to see. So, if you wish to fight these new thinkers – well, let me just say that it will not entail a return to *your* reality!

39. Privilege

In this newly transformed economy of bad consciousness we find ourselves in, *privilege* becomes the new marker of responsibility or culpability. To be privileged is to have *benefited* from the previous (and continuing) distributions of *power*. That power is still pre-human – a stain that cannot be eliminated, for the complicity with power is constitutive of the *entire being* of the civilised subject. Against these new avatars of the pre-human, power may be exercised to ‘deconstruct’ them, pulling them apart and deflating any hegemonic position they might have. Considering the *arbitrariness* of the course of history thus far, this application of power is possibly limitless.

40. Markers of the human

Sovereignty once marked the boundaries of the human and not human. To be sovereign and human was to be rationale and shielded from external intervention. This was based on a set of constitutive exclusions – women and foreigners, amongst others, could not be fully human. Part of the modern impulse to equality has been to chip away at these exclusions. Why can’t women and those beyond the borders of a few European states be rationale and have their liberty and autonomy protected through law? To give modernity its due, it made some admirable progress in this. However, we have now reached that moment of history where the idea of the modern, liberal human is called into question. Why should that be our standard of what is human? Why should the dead hand of Lockean

rationality control us? We should, as a culture, be open to notions of personhood and being from perspectives that are not white, male, and European.

Passing over the trite observation that this, in order to be consistent, will need to be open to those perspectives that would happily *deny* most people any rights as human, one can question the extent to which that old modern understanding has been jettisoned. The dominant positions (of the aforesaid white men) are arbitrary creations and tyrannical, and must, therefore be deconstructed at all costs; the positions of minorities, however, must be protected and encouraged at all costs. Perhaps, then, instead of *rejecting* modernity we have simply *reversed* it, and made the protection of personal sovereignty contingent on *power* – or, rather, the *lack of it*. That is very Christian of us.

41. Une question des langues

Language has been a vital part of civilising (and creating) humanity. To overcome difference, to make predictable and uniform, to allow the members of the herd to communicate – all facilitated through language. It is little surprise, then, that the modern state took great pains to systematise and impose language: the dictionary and grammar book are not innocent instruments. But as this systematising and shaping is, necessarily, *violent*, language is beginning to irritate and inflame our painfully sensitive nerves. Our eyes are open and wary of this thing called language. To force the world and peoples into the confines of fixed and frozen words (words that, moreover, have been *arbitrarily* created) is *immoral*. If we can, we shall have done with it. Away with those cruel nouns! They are the shackles of the past and a shadow of its barbarity... Like with so many of the fruits of civilisation, language eventually turns against itself – its task, perhaps, accomplished.

42. The return of the ‘I’

Are we, unwittingly, preparing the ground for tyrants and narcissists? It is not one of our smaller ironies that, in expelling the presumptive and arrogant ‘I’, we have succeeded in reinforcing it. ‘We are the products of systems and discourses... The liberal ideology of a sovereign, consenting subject

is an oppressive and hegemonic lie'. Very good, but if we are all necessarily enthralled by discourse, what other grounds of emancipation are there than individuals speaking out and excepting themselves from it? And if the world is indeed a text, what possible limits can we place upon the news words and worlds they might speak?

43. A hidden tyranny

'Society is composed of constructed systems of power that project and privilege a singular entity: the white, straight male.'

'Go on.'

'Those structures unfairly suppress counter voices and world views. Black and feminine and queer ideas of personhood and politics, for example, are marginalised.'

'Go on.'

'Therefore, we must deconstruct those tyrannical systems of power, allowing choice and desire the freedom to express themselves.'

'But my friend! How will you determine when your choice is free or just?'

'By doing that which disgusts me.'

44. The ascetic ideal today

Beyond truth, eh? What, then, is the ascetic ideal concerned with today? Not wanting to be a dogmatist, I would say that the ideal is concerned with *tyranny*. It was against Caesar, after all, that Christianity first flourished... Nowadays, even Truth itself and our previously vaunted 'objectivity' are too tyrannical to be borne. Of course, as something produced in opposition to tyranny, the ascetic ideal is well versed in tyranny, only knowing how to act tyrannically. What? Could the ascetic ideal *be immoral...?*

45. Good consciousness

In the current climate, how might an international lawyer (or any lawyer for that matter) have a good consciousness? There are, unfortunately (depending on your point of view), only two avenues available. The first is what Nietzsche referred to as active nihilism. This entails participating in deconstruction (or just ‘destruction’ if we’re speaking frankly) of the law. The second is more profound and, perhaps, a necessary follow-up. This is the path Schopenhauer indicated: to deny the will. If even the very glance of the privileged is a violence, and if that violence is to be ended, the only *final* solution appears to be to *not* act, to *not* will.

46. Glad tidings?

Is international law in need of a redeemer? The accumulated debt of all that inequality, blood and violence – how is it to be paid? Our eyes are rolling in their sockets looking for some redeemer that will pay. Alas, I fear this time that there is no god in a giving vein, and that we’ll have to carry the debt ourselves.

47. Acts of revenge

A revaluation of all values, you say? Have *you* not had *enough* of revaluations? To be transformed from the height of civilisation into its meanest, most hypocritical and base element. You suffered your own revolt in morals and now want your good conscience back – to play the tyrant once more. No, no! Speak no more of revaluations. Return to your spiderwebs and fantasies of revenge.

48. Timely meditations

Thinking is only as healthy as the epoch in which it is done: ill thoughts for ill times. This should be borne in mind, as even our efforts to think past our sickness is a product of that same disease. What society at peace with itself could understand ‘revaluation of all values’?

49. Saying 'no' with grace

In a period of exaggerated 'yes' saying, we may need to relearn the delicate art of saying 'no' with grace. This involves an appreciation of a boundary and those circumstances in which something *need not* be and *should not* be for everyone else – to say no not out of resentment, but from a sense (and, again, appreciation) of style. Perhaps, then, we need to give some space for the aristocrat in us (not just the democrat) to speak.

50. What is to be done?

Being honest, surely the answer to this question hinges upon what we want? Nevertheless, if we were serious about escaping (or to put it better, overcoming) the civilising psychosis, we would need to posit a counter-ideal against the hither-to *tyranny* of the ascetic ideal which has dictated values and politics for centuries in the west. The ascetic ideal, make no mistake, has been crucial for the flourishing of life and has provided us with enviable gifts. Life may be violence but, on occasion, that violence wounds itself. A degree of civilising, the moulding and shaping into a *durable* form, is indispensable. Alas, however, asceticism is running on too quickly and at least needs to be put in conversation with something that would pull it up short - some of the times, at any rate. And no – this counter-ideal must not simply be the ascetic ideal wearing a mask: violence allowed but only when it leaves us with a clean conscience. Let us, then, be saints 6 days of the weeks but as God rests on the 7th, let us *truly* be devilish.

But we should take caution. Beings as civilised as ourselves, when we try to act beyond the sedimented layers of moral history that compose us, are liable to do something deeply foolish and damaging when we play at being evil. We are at risk of *over-acting* our part. Our instincts will be against us, reducing our previously sure-footedness to the fumbling step of the toddler. It will be very uncomfortable and embarrassing all round, taking time and many failures to retrieve our naturalness,

Act III: Ça Ira

our suppleness, our good grace. As I said, however: this is all a question of what we want – and *who* would want *this*?

END OF VOLUME II

Curtain Call

A question of tact

Once, at the end of the play, the writer and actors would entreat the audience to look well upon their work. That is tactful. Any writer wants their audience to return for their next work, and so you must stay on their good side. Even when you wish to criticise them, you must nevertheless affirm that you're really on *their* side. Again, one must be tactful.

Or must one? The weight of writing behind a mask is a wearisome one – and any writer who aspires to have light feet deplores all unnecessary weight. And this requirement of not giving offense (or only offense to the *right* parties) - is that not a weight? Why critique from a place of decorum? To be civilised?

In this thesis – my own drama of international law's nihilistic inner life – I have presented much that might (I hope) displease. I have tried to create a critical work of international law that took critical scholarship *as a problem*. And not just a problem in as much as we 'crits' are not going far enough or not being sufficiently *just*; that new fields and depths of critique can and should be found. To argue that is more of an endorsement than a problematisation. No, I have wanted to call into question the whole psychology and purpose of critique. I wanted to expose its need for 'sacrificial', 'purifying' violence – to expose its continuing complicity with civilisational logic – to expose its own hypocrisies. In a word, I wanted to share my *disgust*.

Where have I been?

The inner life of international law and lawyers is nihilistic. We are driven by nihilism and informed by nihilism. This nihilism can be traced from the law's inception right through to current critical paradigms. That is the deep irony and critical bite of the work: rather than a departure from the past,

critical scholarship is just as – if not more – complicit in civilisational logic as their forebears that they so critique.

To make this argument, I turned to the philosophy of Friedrich Nietzsche and his theory of nihilism/civilisation. For him, nihilism is a state of *devaluation*. It is a moment in which humanity realises its highest values are impossibilities. The value that Nietzsche believed was producing European nihilism was the ascetic ideal. The ascetic ideal valorises states of perfect being: unchanging, never becoming, eternal, beyond decay and death. This ideal is hostile to life itself. Described through his will to power doctrine, life is a constant overcoming, change, birth, and destruction. Because of this fundamental opposition, Nietzsche argued that the ascetic ideal could not be realised, and that the west's commitment to it was leading it towards nihilism. To underscore his argument, Nietzsche tracked the ascetic ideal down into a fundamental psychosis that was constitutive of western civilisation.

This psychosis is composed of a split within the human psyche: between the ascetic, human subjectivity, and a lingering bestial animal. The split, however, is not a radical one. The emerging human subject is responsible for its remaining animality. This bond of responsibility produces bad consciousness, in which the tamed animal within humanity, its external expressions of power circumscribed, eats into its own flesh. Life is will to power, and so even the civilised being *needs* to exercise power in some way. This is Nietzsche's great insight: that the ascetic ideal is a simulacrum – it too is merely another expression of the will to power. As the human subject becomes more and more tame, and the pre-human element more enchained, the pangs of bad consciousness become even worse. New sites of animality must be sought out; new frontiers for the animal to lacerate itself. Old repositories of the ascetic ideal must be smashed and revealed as fraudulent, so that the civilisational violence might continue.

Taking Nietzsche's diagnosis of western civilisation as nihilistic, I speculated whether this psychosis was present within international law; whether the psychosis provided the subterranean bedrock that structured and powered the inner life of the discipline; and whether the latest critical turn in scholarship is merely a further upsurge of the psychosis.

From this hypothesis, I determined to make a drama of international law: a poetical approach to scholarship that would trace the psychosis through the roots of the discipline, to the civilisational excesses of the 19th century and the construction of the European global order, before finally bringing this into a direct and sudden confrontation (my ironic, twist of the knife) with critical approaches – approaches that so condemned their predecessors – in order to begat *recognition*.

Sovereignty served as my diagnostic touch point in relating this narrative of international law – the thread around which I would spin my tale. Sovereignty is one of the foundational doctrines of international law: it is sovereign states who are the primary subjects of international law, and upon whom the legal apparatus is predicated. It is also around and through the study of sovereignty that much critical scholarship is conducted. Sovereignty, therefore, could provide the constant marker or theme that I would follow across history, charting its changing shape and what was said of it, reading these passing shadows as expressions of the civilising psychosis.

The inquiry was divided into two principal volumes. Volume I, composed of three chapters, was dedicated to establishing the themes of the thesis and gathering the materials by which to construct my Nietzschean theory of the European global order. The first of these three chapters was my prelude. In this chapter, I established the key motifs within critical scholarship that would both introduce the tone of thesis and be carried across the work. The particular motif that I concentrated upon was that of hypocrisy. Across critical scholarship, notwithstanding the different methodologies employed, the reoccurring theme was the hypocrisy of international law: that the law's putative claim of objectivity and justice concealed fundamental complicities with violence and imperialism. The *disgust* provoked by this 'devaluing' literature was seen to provide the very bite and rationale of critical approaches. From this, I posited some questions that established the path towards my Nietzschean analysis: what is the nature of this hypocrisy? Why draw attention to it? Why the disgust?

From these preludial notes and questions, I moved to begin building my Nietzschean theory of sovereignty and international law. This was accomplished in two chapters. The first of these focused on introducing Nietzsche. It asked the core questions of who Nietzsche was, what his social and academic context was, what were his objectives in philosophising, and, finally, what were the foundational elements of his thought. In answering these questions, I interpreted Nietzsche's work as

being principally a reaction against the pessimistic thought of Schopenhauer and Wagner. Instead of trying to present a softer image of reality, Nietzsche leant into the bleak assessment of Schopenhauer, arguing that life was indeed violence and suffering, but that it was only due to a certain value structure – the ascetic ideal – that made this fact a reprehensible thing. To affect a revaluation of values, to overturn the ascetic ideal, became Nietzsche's philosophical task. He would do this through triggering disgust in the ascetic ideal, demonstrating its impossibility – literally *fomenting* nihilism in order to trigger a crisis that could serve as the window of opportunity for his revaluation. The core elements of Nietzsche's thought correspond to this task. The central ontological principle is the will to power. The will to power is life itself: it is a violent force – creating and destroying in equal measure. The will to power is Nietzsche's premise in construing human ontology and epistemology. All knowing, for Nietzsche, comes from the will to power. We perceive through organs and structures that make reality liveable for us, that allow us to exert power and grow.

Digging deeper into the ascetic ideal, the second of the Nietzsche chapters focused on his diagnosis of civilisation. The first part of this chapter considered the symptoms of *décadence*: those elements of European society that Nietzsche considered symptomatic of a degenerative will to power. Moving beyond symptoms to the root of the sickness itself, the chapter mapped out Nietzsche's theory of the state, the civilising psychosis, and the genesis of the ascetic ideal. In this section, I suggested that the psychosis of civilisation is fundamentally a political one. The state and the civilised human subject are mutually constitutive. Interpreting the civilising psychosis in this way, the ground was opened to push Nietzsche's philosophy into a comprehensive theory of sovereignty and the global order.

This was accomplished at the heart of the thesis: the chapter that stood between and across Volumes I and II. Here, I suggested that sovereignty doctrine is constituted through the civilising psychosis, that it could be deconstructed to reveal a structure corresponding to the ascetic ideal and pre-human, and that at the centre of it stood the production of 'tamed' human beings. The transformations within sovereignty doctrine, as it moved from absolute theories to more popular models, represented *tensions* within the tightening knot of civilisation. To stabilise the psychosis, allowing a sovereign order to settle, I argued that the international plane was crucial. Instead of locating the pre-human inside the state, with all the civilisational pressure that would entail, it could be *externalised*. A foreign entity

could stand as the pre-human, enabling the state to manifest its will to power externally once more. A specifically *European* global order emerged when a select number of western states could recognise one another as equal members of an ascetic community – as *sovereign*. The device of sovereignty could then be used to affect the externalisation of violence to the non-European world. Through the lack of sovereignty, the other – a different people, nation, or race – becomes the symbol of the pre-human remnant, accountable for their failure to live up to a true standard of humanity. The exercise of violence to civilise these aberrations within the human become justified. Violence can be displaced from the imperialistic centre to its peripheries.

With my Nietzschean theory in hand, I finally moved, in Volume II, to present my philosophical history of sovereignty and the global order: a play in three Acts. Each Act was intended to build the picture of sovereignty and international law's complicity with the nihilistic psychosis, before bringing this image into confrontation with contemporary scholarship in order to beget *recognition* – a culminative moment of devaluation.

The first Act focused upon the development of domestic sovereignty theory in the classical period. Through an examination of Bodin and Hobbes, I argued that the emergence of the sovereign state was informed by the civilising psychosis. Hobbes tied the justification of the state to the realisation of a true humanity. An uncivilised state of nature was set against the ascetic state of civilisation. The human being, stretched across this divide, was rendered responsible for the transition through natural law. While Hobbes attempted to dissolve the civilising dynamic through collapsing the sovereign and the subject into one another, subsequent scholars cleaved the two apart once more. Moving from Hobbes to Locke, the poles of the civilising psychosis begin to transform. The state of nature, once that of the pre-human, becomes *ascetic*. The human in the state of nature, rationale and self-reliant, becomes an echo of that in the state of civilisation. The creation of the sovereign state is designed merely to tame and punish a discrete number of uncivilised elements - the irrational and the criminal. The sovereign power itself is also tamed. Gone is Hobbes' solution of leaving the sovereign as the only being in the state of nature. The sovereign must also have exited the state of nature and become civilised. Advancing forward to Thomas Paine and Jean-Jacques Rousseau, the reversal of the ascetic and the pre-human is completed. The state of nature becomes the place of the ascetic ideal, in which

humanity existed in all its perfection. Modern society, the state of civilisation, represents a *corruption* of the human. The perpetrators of this deed, the usurpers of humanity - the sovereigns - become *criminal*. This, I argued, reflected civilisation turning back on itself and *condemning*. It is civilisation trying to civilise itself.

In the second Act, I lifted the discussion up to the international level. The ever-increasing knots of civilisation, culminating in the attack upon the very conditions that produced that civilisation, constitute an almost intolerable burden of self-mutilation. The displacement of civilisational violence to an externality becomes a necessity. In the authors examined in the previous chapter, the international takes on increasing significance. For Hobbes, states stand to one another as people in the state of nature. There is no law to speak of, save that vague dictate of natural law. By the time of Paine and Rousseau, this has taken on an all-new dimension. The endemic violence between states becomes representative of the corruption of humanity affected by sovereigns. To reclaim an ascetic humanity and to set relations between peoples back on their proper bases, that order of sovereigns needed to be torn down. While not directly calling for international conflict, Paine and Rousseau prepared the intellectual groundwork to justify the excesses of the French Republic at the end of the 18th century. For a properly European global order to emerge, this violence between European states had to be tackled – they needed to cease perceiving one another as representative of the pre-human. This, I argued, was achieved in the 19th century. Examining the jurisprudence of scholars from across the western world, the externalised structures of the civilising psychosis were clear to see.

Recognition formed a vital element: the geopolitical space of western European states was stabilised through the recognition of one another as mutual members of the ascetic ideal – as *sovereign*. This carried with it duties of non-interference and mutual respect. While not eliminating conflict between these states entirely, it made it, at the very least, a neutral, bureaucratic event. This was in contradistinction to the rest of the globe that were denied recognition as sovereign, opening nations to the civilising violence of Europeans.

In the concluding and final Act, bringing the blatantness of the 19th century civilisational imaginary into a sudden confrontation with contemporary critical scholarship, I wished through the very height of the contradiction to *break it down*. Here, the Dionysian under-voice of the work breaks through to

the surface. All the themes of hypocrisy and violence that have sounded from the prelude come to bear on this point and reach their fulfilment. Breaking the academic form as a literary expression of the disorientation of this event, I argue that critical scholarship, rather than a break from the civilisational violence that I unpack in the first and second Act, is merely a tortured continuation of the same sickness. It does mark the twilight of the global order as the violence is revisited back upon the civilised, but it in no way marks an end of the psychosis for all that. It is a violent feeding frenzy, in which there are no conceptual limitations to the violence that might be inflicted. Behind all of this, all this rhapsody of violence against the hypocrisy of previous ages – a hypocrisy that is chocking, all embracing, inescapable – stands the ascetic ideal, as ever.

Mots d'adieu d'un fou

Look! International law is hypocritical. It presents itself as objective – ascetic – when in fact it is nothing of the sort. Look! Each theoretical movement in its history is nothing but a bad turn: a turn that either creates violence or, even better, dissimulates it. International law is a bad actor and speaks with a false mouth. Look! How ugly it seems, this false idol when divested of its sacramental cloth. How disgusting.

Is this not the sentiment expressed at the end of every critical text? Do we ever sound a different note or play a different tune? Or is our novelty merely the unearthing of a new pit that may be mined for further evidence of hypocrisy? We are great miners, we critical scholars, and are never happier than when in murky depths, bringing back to the surface the fruits of our labours. But what are these fruits? And what value do they have?

A problem with mines is that they get exhausted. Unless one is inventive or is willing to take greater and greater risks, the seams will run dry. The hungrier one is, the faster one takes, and the faster one takes, the faster things become exhausted. We critical scholars have been a very hungry group. We talk a lot about sustainability, but I fear we do not practice what we preach. International law has provided a veritable Babylonian feast: enough flesh for all! Eating away at this miserable bauble has certainly allowed us to grow, but we are getting down to the marrow now.

Again, that niggling question: why are mining? why are we consuming? Come now! The answer does not lie in cracking open another rib (and don't be so greedy, I might add). Simple answer: to make the world a little better. Our forebears were hypocrites. We are not hypocrites. We expose hypocrites and, in so doing, clear the world for reconstruction. That is heavy work – breaking all these idols. It is violence, but the violence of the good: divine violence. Our conscience is very clean. We only break the uncivi- ...what's that? Choked on your rib?...

Beyond?

Is international law nihilistic? I have argued that it is. Digging into the roots of sovereignty, I have demonstrated that the emergence of the doctrine was the result of the injection of the ascetic ideal and civilising psychosis into politics. Relations of guilt, accountability, and completed humanity bled into the conceptual foundations of the state. From Hobbes to Paine, the question of politics and the fate of the state is how to rescue humanity from pre-human violence and corruption. The development of sovereignty across these authors is nothing but the escalation of the psychosis. At each moment when it appears that the psychosis is over, the mask is pulled away to reveal deeper pools of hypocrisy. From the faint natural law push of Hobbes, the whole of human history becomes *criminalised* by Paine. It is not a case of *making* humanity but *remaking* it from its criminal dissolution. The entry of sovereignty as the conceptual foundation of the European global order is nothing but the inflammation of the psychosis and a series of attempts to stabilise it. To prevent the spilling out of violence between them – in order that their mutual conflicts did not become civilisational and *ascetic* conflicts – each state recognised the other as a mutual bearer of the ascetic ideal: *sovereign*. The criminal violence could then be (largely) displaced to a murky pre-human periphery. That periphery could become the criminal or the pre-human: the sovereign could send their soldiers there to murder with a clean conscience.

Is our thinking today still controlled by the civilising psychosis? While speaking a great deal of emancipation and redemption, have we really marked a departure from the standard of civilisation? I have argued no. Critical scholarship can be read as a further intensification of the civilising psychosis:

the return of pre-human violence to the fold of the civilised. The structures and history of international law are torn apart precisely because they are hypocritical – because of the ascetic ideal. Shorn of our good conscience on the global stage, the externalisation of the civilising psychosis is not possible. It must now turn inwards again. Critical approaches certainly allow us to *live* by offering new fields and opportunities of violence - of will to power. But this is a feast of Eysichthon, in which we nourish ourselves by eating away at our own flesh. The reality and history of international law have become our Nietzschean torture chamber, in which we may flay ourselves with bad conscience until there is no skin left on the bone, dreaming up fantasies of redemption that serve as nothing more but a further instrument in our own mortification. Such is the fare that keeps us going; such is the life that we lead; such is the hope that we represent.¹

Perhaps, then, we are reaching a point where a question mark must be raised over the direction, motives, and viability of contemporary critical scholarship. Instead of challenging and healing the pathologies of western civilisation, we may be aggravating them to a dangerous fever. In many respects, the confrontation between Nietzsche and critical scholarship is an atavism of that between Schopenhauer and Nietzsche. Schopenhauer collapsed the world into the violence of the World Will, making life irremediably immoral. Have we not done the same? In reducing all social relations to questions of power, in *appropriating* the Dionysian to maximise civilisational guilt, critical scholarship makes a return to Nietzsche almost an inevitability. In tying the knot of civilisation *too tightly*, in producing *too much disgust*, someone was bound to ask questionable questions, to go looking for *an escape*. An escape to what? to where? Certainly not an escape *backwards* into comfort where they formerly played the master. One cannot go backwards, only forwards – only *beyond*. But beyond what? Dionysus against the Crucified one?...

¹ Perhaps ours is the cruellest of cruel optimisms. See: Lauren Berlant, *Cruel Optimism* (Duke University Press, 2011).

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