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Reading Humanitarian Intervention

Human Rights and the Use of Force in International Law

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dangers. As Spivak has argued, it is 'particularly unfortunate [if] the emergent perspective of feminist criticism simply reproduces the axioms of imperialism'.[119] Which of the truths of imperialism risk reproduction in the texts of international legal feminism?

First, just as imperialism was a 'subject-constituting project' which served to consolidate both Europe and Europeans as sovereign subjects by defining Europe's colonies as 'Others', so too was nineteenth-century European feminism.[120] Through her reading of the novel *Jane Eyre*, Spivak shows what this meant for feminism and its colonised others.[121] She focuses on the character of Bertha Mason, the 'madwoman in the attic' who is finally given a history in Jean Rhys' *Wide Sargasso Sea*.[122] Spivak reads the treatment of Bertha Mason in *Jane Eyre*, in particular her setting fire to Thornfield Hall and killing herself 'so that Jane Eyre can become the feminist individualist heroine of British fiction', as 'an allegory of the general epistemic violence of imperialism'.[123] The sacrifice of Bertha Mason was the condition of the freedom and individuation of Jane Eyre. More broadly for nineteenth-century English feminists, the imperial project of soul-making allowed those women of Empire to move out of domestic childrearing so as to take part in the broader mission of civilising the other.

> What is at stake, for feminist individualism in the age of imperialism, is precisely the making of human beings, the constitution and 'interpellation' of the subject not only as individual but also as 'individualist'. This stake is represented on two registers: childrearing and soul-making. The first is domestic-society-through-sexual-reproduction cathected as 'companionate' love; the second is the imperialist project cathected as civil-society-through-social-mission. As the female individualist, not-quite-not-male, articulates herself in shifting relationship to what is at stake, the 'native subaltern female' (*within* discourse, *as* a signifier) is excluded from any share in this emerging norm . . . In a reading such as mine . . . the effort is to wrench oneself away from the mesmerizing focus of the 'subject-constitution' of the female individualist.[124]

This world of subject-constitution through civilising mission, of Europe and its Others, is the world of humanitarian intervention. The constitution of native women in the texts of imperial feminism served to found the individuality of European women, and to make possible their participation in the larger project of soul-making through civilising mission.

[119] Spivak, *A Critique*, p. 114. [120] *Ibid*., pp. 125, 199.
[121] Charlotte Brontë, *Jane Eyre* (New York, 1960).
[122] Jean Rhys, *Wide Sargasso Sea* (London, 1968). [123] Spivak, *A Critique*, p. 127.
[124] *Ibid*., p. 117 (emphasis in original).

In the texts of international law, the feminist individualist is again able to constitute herself in shifting relationship to what is at stake over the bodies of her sisters who function as material evidence. As I argue in Chapter 5, the narratives of humanitarian intervention hail readers as white, powerful, active and masculine, and this has historically been a way of producing white, middle-class, imperial men and women. Audiences in intervening states are asked to identify with the role assigned to the active, muscular, professional agents of democracy or security constituted in these narratives of salvation. Women reading and writing such texts are able to identify with those heroic characters, but only if we are willing to sacrifice others to the feminine role of pitiable victim. In a similar way, nineteenth-century feminists were able to experience increased agency, just as imperial men could. What then are women who are international lawyers required to do to 'other' women and to feminised men in order to participate in 'the spoils of freedom'?[125] How to ensure, as Jean Rhys does in *Wide Sargasso Sea*, that 'the woman from the colonies is not sacrificed as an insane animal for her sister's consolidation'?[126]

In addition, feminist theory threatens merely to facilitate and enable neocolonialism if it stages the key struggle in this globalised world in terms of 'the mesmerizing model' of 'male and female sparring partners of generalizable or universizable sexuality'.[127] Paying attention only to the protagonists in this drama blinds us to the way in which the Third World is staged as a backdrop, with a cast of nameless extras imagined as playing a part they have not written. A feminist analysis of intervention that focuses on gender alone, without analysing the exploitation of women in the economic 'South', would operate to reinforce the depoliticised notion of 'difference' that founds the privileged position of the imperial feminist.[128] Versions of feminism have been able to enter disciplinary debates without destabilising metaphors of race and class that operate within disciplines like science and law to establish knowledge hierarchies.[129] Attempting to broaden the questions asked in her field of sociobiology, Donna Haraway comments:

> I am . . . interested in sociobiology as a postmodern discourse in late capitalism, where versions of feminism readily enter the contest for meanings, at least in retrospect and over the tired bodies of gutsy sociobiological feminists. How

[125] Renata Salecl, *The Spoils of Freedom: Psychoanalysis and Feminism after the Fall of Socialism* (London, 1994).
[126] Spivak, *A Critique*, p. 127. [127] *Ibid*., p. 148. [128] Guest, 'Exploitation'.
[129] Haraway, *Primate Visions*, p. 353.

have sociobiological feminist arguments, like other western feminisms, enabled deconstruction of masculinist systems of representation, while simultaneously both deepening and problematizing unmarked enabling tropes of western ethnocentrism and neo-imperialism?[130]

To some extent, the field of international law differs from the sociobiology that Haraway describes, in that international legal feminists have not been able to ensure that their versions of feminism can enter the contest for meanings in the security and economic areas in which I am interested here. Not even imperial feminisms have been able successfully to contest the meanings of international economic law and collective security. There is clearly a need, then, to continue the attempt to criticise the masculinist foundations of these discourses. Yet the point that feminists are capable of reinscribing race and class difference is an important one in this area. How is it possible to engage with the internationalist discourses that form the object of my study without deepening the 'enabling tropes of western ethnocentrism and neo-imperialism'? In the fields of military intervention and economic development, for example, the bodies of 'womenandchildren' already appear playing the roles of objects: victims of rape, objects of religious control, victims of the sex trade, victims of droughts and famines. Can feminist analyses avoid reproducing these staples of legal texts, avoid dreaming of saving other women in ways that enable us to feel a power that we are unable to feel in our everyday lives?

Errant theory – feminist readings of intervention

A feminist politics of reading international law therefore has to attempt to avoid the deployment of 'the axiomatics of imperialism for crucial textual functions'.[131] In particular, it has to avoid seeing the world in terms of a 'battleground of male and female individualism', in which the goal of feminism would be merely to move women from the female domain of sexual reproduction to the male domain of 'social subject-production' via the sacrifice of the Other Woman. In the texts of humanitarian intervention, for example, the heroic subject is produced according to the logic of a narrative which legalises (or at least legitimises) aerial bombardment or sanctioned starvation. In the texts of international economic law, the belief that globalisation or development will result in liberated subjects ignores the ways in which economic

[130] *Ibid*. [131] Spivak, *A Critique*, p. 133.

reconstruction produces a gendered international division of labour. What might a feminist reading that attempts to avoid reproducing the unarticulated assumptions of imperialism look like? How does this inform the ethics of feminist approaches to international law today?

In the essays collected together in *A Critique of Postcolonial Reason*, Spivak argues that critics (of literature, of law) must try to 'reopen the epistemic fracture of imperialism without succumbing to the nostalgia for lost origins';[132] that is, without trying to discover some kind of originary, exoticised, premodern, and always victimised, Third World Woman. Basing our 'global sisterhood' on the connections we imagine with such a figure supports the current processes of imperialism, militarism, financialisation and development – all can be more palatably conducted in the name of the suffering 'womenandchildren' of the Third World, with First World Feminists helping to constitute those marginalised figures.

A feminist reading practice thus might involve thinking through the conditions of the self-constitution of the international community, and the part that 'sisterhood' is called to play in that self-constitution. Chapter 5 attempts such a reading of the texts of intervention to explore the ways in which they constitute a heroic 'self' for the international community. The appeal of humanitarian intervention is produced through the process of identification with, or as, the heroes of intervention. Intervention narratives are premised on the notion of an international community facing new dangers, acting to save the oppressed and to protect values such as democracy and human rights. The reader of intervention literature is asked to identify with the active hero of the story, be that the international community, the UN or the USA, at the cost of the violence done to the imagined objects who form the matter of the hero's quest. The hero possesses the attributes of that version of aggressive white masculinity produced in late twentieth-century US culture, a white masculinity obsessed with competitive militarism and the protection of universal (read imperial) values.[133]

My reading also attempts to undo the opposition between coloniser and colonised, by seeking to show 'strategic complicities' between the terms in which the 'other' is constructed in intervention texts, and the

[132] *Ibid*., p. 146.

[133] For a discussion of the relationship between colonialism and universality, in which 'European practices are posited as universally applicable norms with which the colonial peoples must conform', see further Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321 at 332–3.

self that is there constructed.[134] I look at the similarities between the production of the heroic, masculine self of the international community, and the constitution of the other against whom force is deployed in the name of the values of that community.[135] Legal texts justify intervention on the basis of the need to reject forms of nationalism that depend upon fundamentalism and religion, and to punish those who seek to found communities on violence, exclusion and the wounding of bodies in the name of the law. Yet the texts of intervention are structured in equivalent ways. Chapter 6 argues that the international community shares something with those fantasised national or 'tribal' communities against which it constitutes itself. It shares a commitment to the wounding and excluding of marked others as its founding act. This fact helps to explain the vehemence with which those who identify with the international community come to disavow the leaders of 'rogue' or 'failed' national or tribal communities as less than human. This disavowal is necessary precisely because these communities in fact share that which the international community rejects as illegitimate: an originary violence deployed against those who are marked out on the grounds of race, ethnicity and gender. That with which we charge the other – that it founds a masculinist, racially exclusionary, violent and nationalist political order on the expulsion and wounding of women and children – is in fact the basis of the international community as constituted through intervention narratives. The attempts to disavow this lead to more violence.

A feminist reading of humanitarian intervention that seeks to avoid enabling exploitation must pay careful attention to the context of increasing economic integration in which such intervention takes place. The ending of the Cold War has enabled the process of economic globalisation to be facilitated by the increasingly effective and rapidly shifting operations of international economic institutions such as the IMF, the World Bank and the World Trade Organization (WTO).[136] The consequences of economic restructuring, and the fact that international

[134] For a reading of the strategic complicities in the treatment of the play of law and history in a text of the coloniser and the colonised, see Spivak, *A Critique*, p. 46.

[135] For a similar reading of the Bosnian conflict as 'an exacerbation rather than an aberration of the logic behind the constitution of political community', see David Campbell, 'Violence, Justice and Identity in the Bosnia Conflict' in Jenny Edkins, Nalim Persram and Véronique Pin-Fat (eds.), *Sovereignty and Subjectivity* (Boulder, 1999), pp. 21–37 at p. 23.

[136] There are many other actors involved in formulating and implementing the process of economic globalisation. The activities of international economic institutions are of particular interest because it is through those institutions that much of the agenda

institutions play such a central role in furthering that project, require international lawyers to begin to rethink what internationalism means in the twenty-first century. Intervention discourse on the whole almost completely ignores the current historical context of rapid and massive global economic change within which security and humanitarian crises emerge and military interventions take place. International law has been criticised more broadly for this curious, ahistorical representation of 'the international'.[137] For example, international lawyers have not taken into account the role played by the activities of international economic institutions in contributing to security crises. While ancient hatreds, ethnic tensions, postmodern tribalism or emerging nationalisms are regularly treated as the causes of humanitarian and security crises, most international legal analyses do not ask whether such crises could better be understood as a consequence of ever more ruthlessly efficient divisions of labour and resources in the post-Soviet era. Nor has the international legal literature on post-conflict reconstruction attended critically to the nature of the economic order that is put in place through that reconstruction process.[138] This book argues that it is necessary to take such activities into account in order to assess the meaning of humanitarian intervention.

Finally, the feminist method I develop assumes that 'international law is not a finished system',[139] that legal texts are never fully enclosed because that which founds the law is itself always both legal and illegal.[140] In her reading of the ethics of international law, Outi Korhonen argues, following Jacques Derrida, that international law, like any other genre, constrains those who seek to communicate in its terms, as it imposes on them the necessity to speak in the language of the law.[141] At the same time, this allows for the openness of the law, precisely because there

of economic restructuring is pursued in the aftermath of the Cold War. Economic and investment liberalisation is largely carried out multilaterally, with unilateral or bilateral initiatives threatened or resorted to in order to strengthen multilateral negotiations and regulations.

[137] David W. Kennedy, 'A New World Order: Yesterday, Today and Tomorrow' (1994) 4 *Transnational Law and Contemporary Problems* 329; Philip Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 *European Journal of International Law* 435.

[138] For an analysis that does pay attention to the economics of reconstruction, from the position of advocating the increased participation of the 'private sector' in 'economic peace building', see Allan Gerson, 'Peace Building: the Private Sector's Role' (2001) 95 *American Journal of International Law* 102.

[139] Outi Korhonen, *International Law Situated: an Analysis of the Lawyer's Stance towards Culture, History and Community* (The Hague, 2000), p. 223.

[140] Derrida, 'Force of Law'.

[141] Korhonen, *International Law*, pp. 207–84.

can never be a purely autonomous legal language. International law is a common enterprise, and thus the meanings that can be made of international law cannot be fully controlled – for any actor to participate in that enterprise is to surrender autonomy. The very fact that there is no controlling agent of the law opens up the possibility of justice. While we are constrained by the protocols of the texts of law, the meanings of those protocols, constraints and texts is something we make in community. Korhonen argues, pace Ronald Dworkin, that 'although the "rules of the game" are often very autonomous and constraining, they cannot be absolutely so, for they never have a singular agent to operate them in a purely idiomatic way. There is no singular Herculean lawyer whose advice could be asked on every issue'.[142] Law is not the autonomous possession of any one agent who can control it and guarantee its purity.[143] In addition, the law can never be a purely self-referential system because 'the legal structure cannot be known or used without its agent (the jurist) who cannot be its agent alone'.[144] International law can only appear closed through the efforts of the international lawyer, who must continually draw the boundary between law and non-law, inside and outside.

> The jurist manages a larger realm than just the circle of law, for that circle is not closed without her constant efforts of providing closure . . . Therefore the jurist stands in a situational bind, for which there is no one-time solution, having to constantly make the difference between law and non-law, legally communicable and non-communicable, inclusion and exclusion – by assertion, detection, and silence.[145]

Here lies the possibility for remaking the law in the image of justice. The law depends upon those who read and write it for the sense of closure upon which its legitimacy depends, and the international community in turn depends upon the law to perform the acts of exclusion and violence which both make possible, and limit, the building of that community. For those of us attempting to avoid 'being made subject-matter of law, subject to these genres, unable to become speaking subjects of law', learning to recognise and engage with the narratives by which the authority of law is produced is an essential skill.[146] When as an Australian feminist I attempt to read and write international law differently, I am also answerable to law's others, those who are rendered

[142] *Ibid*., p. 222. [143] *Ibid*., p. 221. [144] *Ibid*., p. 223. [145] *Ibid*., p. 219.

[146] Nina Puren and Alison Young, 'Signifying Justice: Law, Culture and the Questions of Feminism' (1999) 13 *Australian Feminist Law Journal* 3 at 5.

as outlaws, illegals, material evidence, by the discipline within which I am conditionally authorised to speak. This is not to say that it is possible to avoid these acts of exclusion, or the drawing of boundaries. Rather, the knowledge that 'the commitment to international law implies community-building', and that this process is always incomplete or inconclusive, leads us to understand the ethics of reading and writing law differently. To return to Spivak:

> If we want to start something, we must ignore that our starting point is, *all efforts taken,* shaky. If we want to get something done, we must ignore that, *all provisions made,* the end will be inconclusive. This ignoring is not an active forgetfulness; it is, rather, an active *marginalizing* of the marshiness, the swampiness, the lack of firm grounding in the margins, at beginning and end . . . These necessarily and actively marginalized margins haunt what we start and get done, as curious guardians . . . [We must not] forget the productive unease that what we do with the utmost care is judged in the margins.[147]

Any writer or reader of legal texts, critical or otherwise, is always faced with the challenge posed by these curious guardians at the margins – for me, to remember this is to be reminded of the demands of justice. Reading a legal text as a feminist involves trying to find a way to avoid sacrificing 'other women' while I take part in the constitution of international communities. Yet the authority I have to speak as a lawyer has been produced through a tradition dependent upon the starving, warring, abused, passive, victimised, chaotic, disordered, ungoverned bodies of international legal texts. Thus my reading is itself disciplined by international law. It also attempts to work with and through the limitations of the law, to see whether the protocols of the texts of law make possible 'a moment that can produce something that will generate a new and useful reading . . . a moment of transgression in the text – or a moment of bafflement that discloses not only limits but also possibilities to a new politics of reading'.[148]

The power of international law

It follows from what I have written in this chapter to date that my approach to reading humanitarian intervention departs from that of many international lawyers in its understanding of the basis of the power of international law. The question of the relationship between law and power is one that has been firmly on the theoretical agenda of our discipline

[147] Spivak, *A Critique*, p. 175 (emphasis in original). [148] *Ibid*., p. 98.

since at least the nineteenth century. International lawyers in general are practised in articulating a nuanced account of the power of law. This is in part due to our training in responding to the attacks of domestic positivists such as the nineteenth-century English legal philosopher John Austin, whose well-worn argument is that international society lacks an overarching sovereign, and thus lacks the power to create law.[149] Since the inter-war period, international lawyers have also been concerned to respond to realist international relations scholars, for whom it did not seem at all clear that international law had the capacity to constrain abuses of power by powerful states or to create order out of the anarchic state of international relations.[150] International legal texts thus often open with an account of the nature of international law and a concern with the question: 'how can legal order be created among sovereign states?'[151]

The answer to that question may derive from a positivist focus on the consent of states to the laws governing international society,[152] from a more 'sophisticated attitude about the death of sovereign forms' and the need to work for the renewal of sovereignty at the international level, or from a pragmatic belief that the development of a strengthened international order and flourishing global market cannot ignore how power is actually distributed.[153] Either way, international lawyers do not usually conceive of international law as embodying or enacting sovereign power. Indeed, the question 'is international law really law', a question that haunts international legal theory, is a manifestation of the sense that international law lacks this sovereign force.[154] Yet while international lawyers recognise that international law does not emanate from a single, sovereign authority, the discipline has generally not questioned that such power vests somewhere, usually in those sovereign states that

[149] John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London, 1954), p. 302.

[150] For literature discussing the division, and subsequent post-Cold War rapprochement, between the disciplines of international law and international relations, see David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden Journal of International Law* 9 at 106–9; Gerry Simpson, 'The Situation on the International Legal Theory Front: the Power of Rules and the Rule of Power' (2000) 11 *European Journal of International Law* 439.

[151] As discussed in Anghie, 'Francisco de Vitoria'.

[152] For an elaboration of that position, see Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge, 1999).

[153] Kennedy, 'The International Style', 13.

[154] See, for example, Anthony D'Amato, 'Is International Law Really "Law"?' (1985) 79 *Northwestern University Law Review* 1293.

are the source of international law. The question as to whether international law is really law is never meant as a question about the utility of the sovereign model as a means of understanding the relationship between power and international law, but rather as a question about whether international law conforms to an otherwise self-evidently realistic model of power. As Kennedy has argued, while 'metropolitan' public international law 'remains obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend', its more pragmatic, private international law twin is 'united by its fealty to a rejected sovereignty' and 'haunted by the ghost of a sovereignty it explicitly rejects'.[155]

Traditional international legal scholarship assumes that politics goes on in the public sphere, and that power is a commodity that can be held by particular entities. Those entities may be superpowers exercising power over the new world order, sovereign states exercising power over their peoples and territories, international organisations at times managing to exercise such power over 'failed' or disordered states during successful interventions, or the market disciplining states that have failed to organise their 'economic fundamentals'. International law is primarily understood as either in service to, or as an attempt to constrain, such powerful entities.[156] The principal disciplinary question relating to power is how to orient international law to power, or how best to deal with the realities of the operation of power in the international sphere. As a result, international lawyers focus most of our attention on analysing the ways in which international law can assist in constraining, disabling or negotiating with those who are imagined as holding power.

In this book, I follow in the tradition of an alternative approach to international law, which argues that 'a continuing unsatisfactory juridical image of sovereignty in mainstream internationalist commentary has resulted in an underestimation of law's constitutive role in civil society, of the fluidity of power throughout a culture, and of the potential for politics outside traditional discourses of public authority'.[157] A critical reading of humanitarian intervention needs to depart from a conception

[155] Kennedy, 'The International Style', 11, 13, 14.

[156] The structure of international argument has swung between apologetic or pragmatic approaches to the fact that international lawyers have to be realistic about where power lies and idealistic approaches that make great claims for the possibility that international law can constrain such power: see Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (Helsinki, 1989).

[157] Kennedy, 'The International Style', 10.

of power as a commodity or thing held by particularly powerful entities like states. One way this can be done is by following the methodological shift developed in the work of feminist scholars, postcolonial scholars and queer theorists, who have been arguing for decades that apparently organisational and public issues, such as militarism, imperialism, law and monetarism, are deeply personal, while the personal issues of subjectivity and experience are deeply political.[158] The theorist who has contributed a great deal to the articulation of this shift in understanding of the operation of power is Michel Foucault. In his influential text, *The History of Sexuality: an Introduction,* Foucault argues that power operates in liberal states in ways that differ from what he terms the juridical model of power that is accepted in much political and legal theory.[159] For Foucault, coercive juridical or sovereign power is no longer the dominant form of power operating within liberal states. It has been replaced as the central mode of exercise of power by what he has termed 'disciplinary power', a new mechanism of power that emerged in the seventeenth and eighteenth centuries in Europe.[160] Unlike the model of power that we see at work in positivist legal theory, Foucault suggests that disciplinary power is productive in that it constitutes subjects through 'a multiplicity of organisms, forces, energies, materials, desires, thoughts etc'.[161] Disciplinary power 'is more dependent upon bodies and what they do than upon the Earth and its products'.[162]

This has implications for the way power is studied. One aspect of the methodological shift proposed by Foucault is his suggestion that we move from looking to sovereign entities or beings we imagine as holding power, to thinking about the role of disciplinary power in constituting

[158] For an account of the ways in which a feminist post-structuralist rethinking of the relationship between power and the subject might be used to develop strategies for writing a legal theory for women, see Judith Grbich, 'The Body in Legal Theory' in Martha Fineman and Nancy Thomadsen (eds.), *At the Boundaries of Law: Feminism and Legal Theory* (New York, 1991), pp. 61–76.

[159] Michel Foucault, *The History of Sexuality: An Introduction*, (trans. Robert Hurley, 3 vols., London, 1980), vol. I. For other scholarship that makes use of the work of Foucault in an international legal context, see Simon Chesterman, 'Law, Subject and Subjectivity in International Relations: International Law and the Postcolony' (1996) 20 *Melbourne University Law Review* 979; Dianne Otto, 'Everything is Dangerous: Some Post-Structural Tools for Rethinking the Universal Knowledge Claims of Human Rights Law' (1999) 5 *Australian Journal of Human Rights* 17; Anghie, 'Time Present'.

[160] Michel Foucault, 'Two Lectures' in Colin Gordon (ed.), *Power-Knowledge: Selected Interviews and Other Writings 1972–1977* (trans. Colin Gordon, Leo Marshall, John Mepham and Kate Soper, New York, 1980), pp. 78–108 at p. 105.

[161] *Ibid*., p. 97. [162] *Ibid*., p. 104.

subjects. An analysis of power 'must not assume that the sovereignty of the state, the form of the law, or the overall unity of a domination are given at the outset; rather, these are only the terminal forms power takes'.[163] Power does not operate from the top-down, as something seized by an all powerful sovereign and then used to oppress those with less power. Rather, power is employed and exercised in relations between people, rather than existing as a commodity that can be monopolised by a single entity. Thus, Foucault's methodology involves a shift from studying the sovereign to studying the process of subjectification:

> Let us not, therefore, ask why certain people want to dominate, what they seek, what is their overall strategy. Let us ask, instead, how things work at the level of on-going subjugation, at the level of those continuous and uninterrupted processes which subject our bodies, govern our gestures, dictate our behaviours etc. In other words, rather than ask ourselves how the sovereign appears to us in his lofty isolation, we should try to discover how it is that subjects are gradually, progressively, really and materially constituted . . . We should try to grasp subjection in its material instance as a constitution of subjects.[164]

It is important to stress that this argument does not imply that international lawyers and international relations scholars should forget the state in their theoretical work. Instead, the argument understands the meaning of state power differently. While sovereignty and the state must continue to be a focus of analysis for those who work in these disciplines, 'the power effects of the state must be radically retheorized'.[165] A reconceptualisation of power along the lines proposed by Foucault suggests that while sovereign states, international organisations, superpowers, the global market and at times international law are certainly effects of power, they are not the sources of power. The sense that these entities are omnipotent is itself an effect of power relations.[166] It is not that more coercive top-down models of power are useless in understanding international legal phenomena such as wars, violent military interventions, economic restructuring and the violence imposed in these ways.

[163] Foucault, *The History*, p. 92. [164] Foucault, 'Two Lectures', p. 97.

[165] Nalini Persram, 'Coda: Sovereignty, Subjectivity, Strategy' in Edkins, Persram and Pin-Fat, *Sovereignty*, pp. 163–75 at p. 171.

[166] Eve Sedgwick, *Tendencies* (Durham, 1993), pp. 5–6. Sedgwick describes that sense of power with reference to the 'Christmas effect'. At Christmas time all kinds of institutions and relations (the Church, the state, commerce) line up behind the notion of Christmas. While it seems as if all these institutions speak in the same voice, the effect is not due to the power of some central body, but rather because of the sense of unitary power produced by all these disparate bodies and entities lining up in that way.

On the contrary, classical models of power and coercion are useful in understanding these phenomena. The exclusive adoption of that model of power, however, limits the capacity to explore other effects of the operation of power. For example, Foucault's model of power is useful in attempting to understand the 'private life of war', colonialism or capitalism within industrialised liberal democratic states.[167] By abandoning sovereign power as the central premise of analysis, it becomes possible to analyse the ways in which local effects of power and local tactics combine to make what those who live in democratic industrialised states are used to calling politics possible. In order to analyse the operation of power in such states, we can look to its local effects, rather than looking for, and reproducing in our analyses, some powerful sovereign figure from whom such power is supposedly emanating. The legal system based upon sovereign power is 'superimposed upon the mechanisms of discipline in such a way as to conceal its actual procedures'.[168] The effect of focusing only on the juridical or sovereign form of power is to mask the operation of power in its disciplinary form and, thus, to make that form of power all the more effective. Sovereign power and disciplinary power may coexist in ways that are very productive.

Gayatri Spivak has argued that Foucault's 'monist and unified access' to this new conception of power is itself 'made possible by a certain stage in exploitation'.[169] For Spivak, the new disciplinary mechanism of power in operation in seventeenth and eighteenth-century Europe 'is secured *by means of* territorial imperialism – the Earth and its products – "elsewhere" '.[170] Her argument is important if one is to attempt to use Foucault's reconceptualisation of power to think about international law. The following two examples suggest the relationship between disciplinary power, sovereign power and international law. First, legal texts about actions of the UN Security Council or the North Atlantic Treaty Organisation ('NATO') have an effect as cultural products that both produce subjects and legitimise domination. The new respectability of military intervention, like nineteenth-century imperialism and colonialism, is enabled through faith in the idea that 'certain territories and peoples *require* and beseech domination'.[171] Whether through arguments about

[167] Susan Griffin, *A Chorus of Stones: the Private Life of War* (New York, 1992).
[168] Foucault, 'Two Lectures', p. 105. [169] Spivak, *A Critique*, p. 278.
[170] *Ibid*., p. 279 (emphasis in original).
[171] Said, *Culture*, p. 9 (emphasis in original), commenting on the role of this narrative in nineteenth-century colonialism. On the ways in which these ideas enable military and monetary intervention in the post-Cold War era, see Chapter 3 below.

the need to control state aggression and increasing disorder, or through appeals to the need to protect human rights, democracy and humanitarianism, international lawyers paint a picture of a world in which increased intervention by international organisations is desirable and in the interest of those in the states targeted for intervention. The stories that explain and justify the new interventionism have increasingly become part of everyday language through media reports and political soundbites. As a result, these strategic accounts of a world of sovereign states and of authorised uses of high-tech violence become more and more a part of 'the stories that we are all inside, that we live daily'.[172] Legal texts about intervention create a powerful sense of self for those who identify with the hero of that story.[173] Law's intervention narratives thus operate not only, or even principally, in the field of state systems, rationality and facts, but also in the field of identification, imagination, subjectivity and emotion.

A related example is the way in which international economic texts provide an alibi for the presence of the 'international community' in states that are subject to economic restructuring. These texts make sense of the relations between 'investors' and 'developing states' in terms of a narrative of progress and development, in which a character called Foreign Capital is the agent of wealth and prosperity.[174] This creates the sense that actions undertaken to enable the exploitation and control of people and resources in such states are in fact about charity and benevolence. A belief in prosperity and progress as measures of worth, the justification of desperation and suffering in the name of the gods of efficiency and order, and assumptions about value based on gender, race and class are all necessary to be able to see the world in the terms required to accept economic narratives.

Both sets of texts (military and economic) can be seen as sites of disciplinary power, in that they play a part in the 'constitution of subjects': those who read these texts are invited to become part of the stories they tell. International legal texts operate as a form of representational practice, and such practice is itself an exercise of power. This form of power operates in part through shaping the way in which individuals within states engaging in military and monetary intervention understand

[172] Threadgold, 'Introduction', p. 27. [173] See further Chapter 5 below.

[174] Judith Grbich, 'Taxation Narratives of Economic Gain: Reading Bodies Transgressively' (1997) 5 *Feminist Legal Studies* 131; Arturo Escobar, *Encountering Development: the Making and Unmaking of the Third World* (Princeton, 1995).

themselves and the world, and then regulate their behaviour in conformity with that image. Post-Cold War internationalism requires and is conditioned upon such personal, domestic acts of identification and imagination. This operation of disciplinary power can itself be seen as dependent upon the exploitation of 'the Earth and its products – "elsewhere"'.[175] Access to the bodies, labour and resources of people in states subject to military and monetary intervention is the condition of the prosperous lifestyles of international lawyers and their audiences in industrialised liberal democracies. In turn, the exploitation of the suffering of people in civil wars or famines enriches global media corporations and their shareholders, and produces 'the surplus-value of spectacle, entertainment, and spiritual enrichment for the "First World"'.[176]

The adoption of the sovereign model of power discussed above also limits the capacity of scholars to reflect upon the forms of power exercised by international lawyers. It is necessary to move away from a sovereign model of power in order to begin to think about the ways in which the reading and writing practices of international lawyers are themselves political. The understanding that many international lawyers have of their professional role is shaped by the centrality of the sovereign model of power in international law. International lawyers, like many other professionals in industrialised countries, often see ourselves as essentially performing a neutral, technical function, and have not traditionally conceptualised power as something that we ourselves exercise. At least since the publication of Edward Said's *Orientalism*,[177] such an understanding of the role of knowledge producers in fields that engage with 'other' countries and cultures has been difficult to sustain. Yet international lawyers have continued to reproduce and refine an image of ourselves and our role as apolitical and outside of power relations. International lawyers may write about power, but we less commonly acknowledge that we are implicated in reproducing or making relations of power.

The understanding of knowledge production as a value-free exercise, involving the process of observing and describing a real world that exists externally to the observer, has been subjected to criticism from many quarters. In particular, it has been criticised by those scholars who analyse the ways in which many disciplines perpetuate race, gender and class as organising categories for understanding the world, and mask acts of exploitation and violence with narratives of progress and civilising missions. A different approach to power can enable critical theorists

[175] Spivak, *A Critique*, p. 278. [176] Chow, 'Violence', pp. 81, 84. [177] Said, *Orientalism*.