

New York University School of Law



*The Jean Monnet Center for
International and Regional
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

Jean Monnet Working Paper Series



JMWP 20/13

Rose Sydney Parfitt

**The Unequal Equality of Sovereigns:
A Brief History of “Peripheral Personality”**

Cover: *Upper East Side Family*, Diana Chelaru, USA



THE JEAN MONNET PROGRAM
J.H.H. Weiler, Director

**THE INAUGURAL ANNUAL JUNIOR
FACULTY FORUM FOR INTERNATIONAL LAW**

Jean Monnet Working Paper 20/13

Rose Sydney Parfitt

**The Unequal Equality of Sovereigns:
A Brief History of “Peripheral Personality”**

All rights reserved.
No part of this paper may be reproduced in any form
without permission of the author.

ISSN 2161-0320 (online)
Copy Editor: Danielle Leeds Kim
© Rose Sydney Parfitt 2013
New York University School of Law
New York, NY 10011
USA

Publications in the Series should be cited as:
AUTHOR, TITLE, JEAN MONNET WORKING PAPER NO./YEAR [URL]

**Presentations from the Inaugural Annual Junior
Faculty Forum for International Law—New York City, May 2012**

Dino Kritsiotis, Anne Orford and J.H.H. Weiler

The papers that are presented here for the Jean Monnet Working Paper Series are the result of the inaugural Annual Junior Faculty Forum for International Law held at the New York University School of Law on May 29 and 30, 2012. The Forum is convened by the three of us, and will be held annually in the spring; it will rotate from one year to the next from each of our institutions: from New York, the Forum will head to Nottingham on May 29 and 30, 2013, and, in May 2014, we shall all converge on the University of Melbourne for the third Forum.

We believe that the Forum is an important addition to the international law calendar. It is designed to provide junior faculty from all over the world with a valuable opportunity to receive careful and rigorous feedback on their work in progress from eminent senior scholars in international law and related fields. Each junior faculty member is paired with a senior scholar, who leads a discussion of the work that the junior faculty member presents at the Forum.

The Forum was launched on our website—www.annualjuniorfacultyforumIL.org—attracting a large number of impressive applications from young scholars across five continents. Nine of these applications were selected.

Our meeting in New York—held over two beautiful spring days in Washington Square—was a triumph of intellectual exchange and sustained engagement, and, without exception, the presentations seemed to us to be of such a high standard that they were deserving of a much broader audience. We therefore asked each of those who presented their work in New York—**Christopher Warren** (Carnegie Mellon University), **Michael Fakhri** (University of Oregon), **Sergio Puig** (Stanford University): **Martins Paparinskis** (University of Oxford), **Rose Sydney Parfitt** (American University of Cairo), **Umut Özsu** (University of Manitoba), **René Urueña** (Universidad de Los Andes), **Evan J. Criddle** (Syracuse University; now of William & Mary College of Law), **Alejandro Chehtman** (University Torcuato di Tella)—to consider submitting their presentations to the Jean Monnet Working Paper Series, and it is this impressive collection that you now have before you.

In introducing these presentations for the Jean Monnet Working Paper Series, we would also like to take the opportunity to extend our warmest appreciation to every one of these junior faculty for being part of this experiment—we could have hoped for no finer or more enthusiastic laureates than they to help inaugurate our first Forum. And their work—recorded here—will hopefully inspire other junior faculty to the same cause, and make the Forum a permanent a fixture of the international law calendar.

**THE UNEQUAL EQUALITY OF SOVEREIGNS:
A BRIEF HISTORY OF “PERIPHERAL PERSONALITY”**

By Rose Sydney Parfitt*

Déclaration des droits de l'homme et du citoyen, 26 août 1789.

1. Les hommes naissent et demeurent libres et égaux en droits...

2. Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'Homme. Ces droits sont la liberté, la propriété, la sûreté, et la résistance à l'oppression.

3. Le principe de toute Souveraineté réside essentiellement dans la Nation...

4. La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui: ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la Loi.

Introduction

In the aftermath of NATO's 2011 intervention in Libya, and with the Security Council still at loggerheads over Syria, talk of 'responsibility' and 'protection' is the diplomatic air. But whose responsibility? And protection of what exactly? We are led, for instance by the 'reminder' issued by the Security Council to the Libyan Government in February 2011, to expect an answer to the effect the state should now be understood as having a 'responsibility to protect' the lives of its citizens — the 'bare' lives of their citizens, as Giorgio Agamben might put it.¹ The state, in this rather peculiar logic, is called upon to 'protect' its citizens, not from outside threats, but from *itself* — from its own proclivity for violence. When the Libyan Government paid no heed to the Security Council's warning, however, its overthrow was secured by the 'international community' by means of a Chapter VII-authorized armed intervention, led by France, Britain and the US, to 'protect civilians and civilian populated areas under threat of attack' (rebel forces

* Assistant Professor of International Law, The American University in Cairo

¹ SC Res.1970 (2011), Preamble. On the notion of 'bare life' see G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (1998).

apparently having been included in the Council's definition of 'civilian').² Clearly, then, and as advocates of the idea of 'sovereignty as responsibility' have been arguing since the 1990s,³ the 'international community' is *itself* coming to be understood as bearing default responsibility for the lives of the citizens of 'irresponsible' states.⁴ Given the 'fox guarding the chickens' logic inherent in the very concept of the 'responsibility to protect', it seems unlikely that this newly-tested default option will be allowed to gather dust. The notion of the 'failed'/'quasi'/'juridical' state,⁵ which may thus legitimately be 'saved' is, of course, the flipside of the 'sovereignty as responsibility' narrative, the core assertion of which is that in today's post-Cold War, post-Rwanda, post-9/11 world, the interconnected potential both for risk and reward requires that international law's previously cardinal principal of state sovereignty be squeezed between two morally more important poles: the free-yet-vulnerable individual and the undefined-yet-benign 'international community'. 'Sovereignty', it is argued, must be understood *conditional* (as opposed to absolute) in nature, implying that states which act 'irresponsibly' must be considered to have forfeited some aspects of their sovereignty (the right to non-intervention, for example)⁶ — a controversial proposition, for post-colonial and post-soviet states in particular.

Yet a closer examination of recent international interventions into Libya, Haiti, Iraq, Afghanistan and Kosovo, among others, taking into account not only the use of force, but also the subsequent institutional 'reconstruction' of these territories, points to

² SC Res. 1973 (2011), para. 4.

³ On the 'responsibility to protect' see *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty (2001); *A More Secure World: Our Shared Responsibility*, Report of the High-Level Panel on Threats Challenges and Change, A/59/565 (2004); *In Larger Freedom: towards Development, Security and Human Rights for All*, Report of the Secretary-General, A/59/2005 (2005); *2005 World Summit Outcome*, A/60/L.1 (2005). The 'sovereignty as responsibility' idea is associated in particular with Francis Deng, Special Advisor to the UN Secretary-General for the Prevention of Genocide. See F. M. Deng et al., *Sovereignty as Responsibility: Conflict Management in Africa* (1996). See also Scharf, 'Earned Sovereignty: Juridical Underpinnings,' 31 *Denver Journal of International Law and Policy* (2003), at 373-385.

⁴ *ICISS Report, supra*, at viii.

⁵ Helman & Ratner, 'Saving Failed States,' 89 *Foreign Policy* (1993), at 3-20; R. H. Jackson, *Quasi-states* (1990); Jackson & Rosberg, 'Why Africa's Weak States Persist: The Empirical and the Juridical in Statehood,' 35 *World Politics* (1982), 1-24. Kreijen, 'The Transformation of Sovereignty and African Independence,' in ed. G. Kreijen *et al. State, Sovereignty and International Governance* (2002), at 45-107.

⁶ For an argument against such interventionism see e.g. B. R. Roth, *Sovereign Equality and Moral Disagreement: Premises of a Pluralist International Legal Order* (2011) at 133-168.

a different conclusion. The object of the ‘responsibility to protect’ appears not merely to be the ‘bare life’ (*zoe*) of vulnerable individuals, but, on the contrary, concerns the creation, for such individuals, of a specific form of political and legal subjectivity (*bios*).⁷ Indeed, this is explicit in the ‘responsibility to protect’ literature, which insists that the ‘responsibility to *react* to an actual or apprehended human catastrophe’ is no less important than ‘the responsibility to *prevent* it, and the responsibility to *rebuild* after the event’ – both of which, in the literature, presuppose the creation of a specific kind of polity (the market-democracy) and hence a specific kind of individual (the rationally-maximising voter-consumer).⁸ This object(ive) of ‘responsibility’ is also clear from the particular legal-institutional model considered to be requisite for the ‘prevention’ of humanitarian catastrophes, and on the basis of which ‘rebuilding’ is to take place. In the words of Kofi Annan, UN Secretary-General from 1997 to 2006, ‘responsible’ states possess:

transparent, accountable systems of governance, grounded in the ‘rule of law’, encompassing civil and political as well as economic and social rights, and underpinned by accountable and efficient public administration... [They are committed to] good governance, strong institutions..., rooting out corruption..., and to ‘dynamic, growth-oriented economic policies supporting a healthy private sector...[They are prepared to invest in] human capital and development-oriented infrastructure...[and to guarantee a] favourable legal and regulatory environment, including effective commercial laws that define and protect contracts and property rights, a rational public administration that limits and combats corruption, and expanded access to financial capital.’⁹

‘Sovereignty as responsibility’, then, envisages a specific *kind* of state (possessed of a ‘good’ government, the ‘rule of law’, and an open ‘free’ market economy) which is itself designed to ‘protect’ and reproduce a specific *kind* of individual subjectivity. This is a model in which individuals, and by extension individual states, are understood to be primarily responsible for their own welfare, ‘free’ to define it and ‘equal’ in their opportunities to pursue it, thanks to the ‘level playing field’ provided by the ‘rule of

⁷ I am, of course, borrowing this distinction rather clumsily from Agamben, *supra*.

⁸ ICISS Report, at 17.

⁹ *In Larger Freedom*, at 13. See also High-Level Panel Report, at 26-28.

law'.¹⁰ In order to meet this Hayekian¹¹ ideal, legislation, as in the *Declaration of the Rights of Man*, quoted above, should concern itself solely with clarifying and enforcing the 'rules of the game', for example by means of protections for equality before the law, property rights, and freedom of worship and of contract.¹² Only when the rules are *broken* does collective action — to *discipline* the law-breaker and thereafter to '*rebuild*' the damaged institution — become legitimate.¹³ 'Sovereignty as responsibility', in other words, is as much about the 'protection' of the 'man born free and equal in rights' as it is about the protection of 'bare life' itself.

It is the objective of this paper not so much to criticize the 'responsibility to protect' concept itself¹⁴ as to write it into a history, or genealogy, of international legal personality told from the perspective of the offspring (Haiti, Libya, Rwanda...), as opposed to the patriarchs (France, the UK, the US...) of the 'Family of Nations' or 'international community' as it is now known. I will argue that the experience of these newcomers demonstrates that Annan's prescriptions regarding the legal-institutional structure necessary for international rights and duties to be effective have, in fact, been intrinsic to international legal reproduction and discipline since the concept of 'statehood' first came to be defined in the seventeenth, eighteenth and nineteenth centuries. I will suggest, not that sovereign equality is a myth, but that it functions differently for these two different kinds of state — new states on the one hand, and 'original' states on the other. Sovereign equals are *unequally* equal. I will also argue that it is through this hierarchy implicit, however paradoxically, in the principle of sovereign equality, and through the particular mechanism of international legal reproduction which perpetuates it, that the eye-watering inequalities of power and wealth so obvious

¹⁰ *In Larger Freedom*, at 12.

¹¹ See F. Hayek, *The Road to Serfdom* (1994) and F. Hayek, *The Constitution of Liberty* (1990).

¹² See e.g. Salacuse, 'From Developing Countries to Emerging Markets: A Changing Role for Law in the Third World,' 33 *The International Lawyer* (1999), 875, at 886-890.

¹³ As Margaret Thatcher once put it, 'any set of social and economic arrangements which is not founded on the acceptance of individual responsibility will do nothing but harm. We are all responsible for our own actions. We can't blame society if we disobey the law.' Speech to the General Assembly of the Church of Scotland, 21 May 1988, at <http://www.margaretthatcher.org/document/107246> [accessed 27 Sep. 2012].

¹⁴ This has already been the focus of several important works. See especially A. Orford, *International Authority and the Responsibility to Protect* (2011).

in the 2011 Libyan intervention, and so characteristic of our post-‘Enlightenment’ world generally, are created, sustained and reproduced.

The allegation of sovereign *inequality* has, of course, been made before. Gerry Simpson, for example, has pointed to the historically superior legal position of ‘Great Powers’¹⁵ when compared to lesser sovereigns.¹⁶ However, whereas Simpson explains this hierarchy in terms of ‘legalized hegemony’, institutionalized by materially more powerful states in particular constructions of *lex specialis* (from the Concert of Europe to the UN Security Council), and whereas Simpson excludes ‘unrecognized territories’ from his analysis on the grounds that they ‘exist outside the sovereignty system,’¹⁷ the approach taken here is different. From the perspective of this paper, ‘unrecognized territories’ are, in fact, of *central* importance to the question of sovereign inequality, because it is in the process by which they are granted (or denied) different forms of ‘personality’ that the relationship between ‘Great Powers’ and their subordinates takes shape.¹⁸ Having dealt first with the origin and function of international legal personality, or ‘subjectivity’, the rest of the paper will be devoted to testing a hypothesis. This hypothesis begins with the ‘original’ states of the ‘international community’, such as Britain, France, Spain, the Netherlands and so on. These states are understood in orthodox international legal theory to have been international legal subjects ‘since time immemorial’, to use Thomas Lawrence’s phrase, having been formed (or, more accurately, having *formed themselves*) ‘before the great majority of [international legal] rules came into being’.¹⁹ I will argue that these states should be understood as the ‘standard-setters’ of the international legal system, because it was upon their self-conception of their own shared material characteristics that the criteria for statehood, and the very concept of sovereign equality, came to be based. By contrast, later entrants

¹⁵ According to Gerry Simpson, the first ‘legal expression’ of the idea of ‘Great Powers’ was in the Treaty of Chaumont, 10 March 1814, in which Great Britain, Prussia, Russia and Austria formed a defensive alliance against the Napoleonic Empire, G. Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004), at 96.

¹⁶ *Ibid.*, at 62-88.

¹⁷ *Ibid.*, at 16.

¹⁸ To put it another way, if ‘legalized hegemony’ is simply the formalization of unequal power relations among states, then the explanation for material inequality lies with power and not with law. According to the argument laid out here, however, the relationship between formal equality and material inequality is turned the other way up, with the result that the ‘problem’ lies with law as it does with power.

¹⁹ T. Lawrence, *The Principles of International Law* (1895), at 84.

into the international community — post-colonial states, newly-seceded states and so on — are, I suggest, in the position of ‘standard-takers’. By definition, these ‘peripheral’ states obtained their international legal subjectivity on a *conditional* basis, after ‘re-forming’ themselves, or after making an explicit international legal commitment to reforming themselves in the future, in the image of the ‘original’ states.²⁰ I will argue, on the basis of the survey of practice presented below, that for these later entrants — particularly those which are only able to achieve an approximation of what I will call the ‘standard of statehood’, or which later *renege* on their constitutive commitment to meet this standard — ‘sovereign equality’ functions in a way that is not anticipated in the textbooks. For the ‘standard-takers’, the principle of sovereign equality does not prohibit, but rather *permits*, coercive and other types of disciplinary intervention into their domestic affairs, designed to compel them, as it were, to ‘renew their vows’. I will refer to this kind of hybrid international personality — both ‘full’ and less-than-full at the same time — as ‘peripheral personality’. Only a very few states, such as the US and Japan, which have been both willing and able to internalize the most important of the conditions which make up the ‘standard of statehood’ completely, and proved able to cope with the material after-effects of this internalization, have been able to make the transition from peripheral person to sovereign equal.

Part One. Legal Form and Legal Subjectivity

The principle of sovereign equality is the theoretical starting-point for international legal scholars and practitioners of every political persuasion, whether they celebrate it or not.²¹ The orthodox approach to international subjectivity relies on a distinction

²⁰ This distinction is also made by Lassa Oppenheim: ‘As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not imply membership of the Family of Nations. Those States which are members are *either* original members because the Law of Nations grew up gradually between them through custom and treaties, *or* they are members as having been recognised by the body of members already in existence when they were born.’ L. Oppenheim, *International Law: A Treatise*, Vol. 1 (1905), at 17 (my emphasis).

²¹ In the words of Antonio Cassese, ‘sovereign equality constitutes the linchpin of the whole body of international legal standards, the fundamental premise on which all international relations rest’. A. Cassese, *International Law* (2005), at 48. On the right of the contemporary international legal spectrum, Brad R. Roth has recently made a spirited defence of the existing sovereign-equality-based Charter system, on the grounds that it represents ‘a morally sound response to persistent and profound disagreement within the international community as to the requirements of a legitimate and just internal public order’. B. R. Roth, *op. cit.*, at 17. On the left, China Miéville has attacked ‘the juridical form of

between the ‘factual’ or objective *entity* on the one hand (the state), and its ‘legal’ or subjective *personality* (its rights and duties) on the other. States may be *materially* more or less powerful than one another, but they are assumed in a *formal* sense to be free and equal (‘sovereign’). How, then, can we tell when an entity is a state, and what is the relationship between statehood and international personality? As regards the first question, the classic statement remains that articulated in Article 1 of the Montevideo Convention of 1933:

The state as a person of international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other states[,]²²

with the latter criterion usually taken to stand for juridical ‘independence’.²³ As regards the second question, two rival theories have vied with each other since the nineteenth century, regarded as opposite but for one unifying assumption: that ‘[t]he formation of a new State is ... a matter of fact, and not of law’.²⁴ That is to say, *state*-creation is understood to take place in the objective/material realm of ‘fact’, and is a process of which law ‘takes no notice’.²⁵ The *legal* or normative question is one of whether or not international *personality* follows automatically from the ‘fact’ of statehood (the ‘declaratory’ approach), or whether the principle of sovereign equality demands that new states must be recognized by *existing* international persons *before* they can become subjects of international law (the ‘constitutive’ approach popular, particularly among British international lawyers, before the First World War). The constitutive approach to recognition has been thoroughly discredited over the last eighty or so years, thanks to its

independent sovereignty’ as ‘one which imperialism... tended to universalise’. C. Miéville, *Between Equal Rights* (2005), 260.

²² *Convention on the Rights and Duties of States (inter-American)*, Montevideo, 26 Dec. 1933, Art. 1.

²³ See Separate Opinion of Judge Anzilotti, *Austro-German Customs Union Case*, PCIJ Rep., Series A/B (1931).

²⁴ *Protocol of Conference between Great Britain, France and Russia, relative to the Independence of Greece*, London, 3 Feb. 1830.

²⁴ Oppenheim, *op. cit.*, at 544.

²⁵ *Ibid*, at 110.

association with the so-called ‘standard of civilization’,²⁶ and hence to its imperialistic tendencies and inconsistency. On the one hand, it is argued that this doctrine facilitated colonialism by allowing existing international persons (then almost exclusively European states or neo-European ‘settler states’) to decide which entities to withhold international personality from more or less arbitrarily, on the basis of a notion of ‘civilization’ upon which there was little in the way of consensus.²⁷ On the other hand, the constitutive theory’s implication that ‘international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it’²⁸ is accused of having undermined the universality of international law by allowing some states deemed ‘semi-barbarous’, like China, Siam and the Ottoman Empire, to be considered only ‘partially’ sovereign, and even then only by those states which chose to recognize them. Sometime in the 1930s, therefore, the original ‘declaratory’ approach returned to customary status.²⁹ In eliding statehood with personality,³⁰ both problems associated with constitutive recognition were ostensibly overcome. The result was a forceful statement of sovereign equality,³¹ underpinned by the assumption that the creation of new international persons should be considered a *wholly extra-legal process*. Only with the emergence, in the mid-twentieth century, of the right of peoples to self-determination, did international law again involve itself in the process of creating states in respect of a particular category of non-state entity — namely former colonies and peoples under ‘alien subjugation, domination or exploitation’.³² Such communities obtained the (collective) right ‘to freely determine

²⁶ See Schwarzenberger, ‘The Standard of Civilisation in International Law,’ in G. Keeton & G. Schwarzenberger, eds., 8 *Current Legal Problems* (1955), at 212-235, 1955); G. W. Gong, *The Standard of Civilisation in International Society* (1984); Oppenheim, *op. cit.*, at 19, 31; J. Lorimer, *The Institutes of the Law of Nations: a Treatise on the Jural Relations of Separate Political Communities* (1883-84).

²⁷ A. Cassese, *op. cit.*, at 74. See Antony Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law,’ *Harvard International Law Journal* 40 (1999), 1-80.

²⁸ J. Westlake, *The Collected Papers of John Westlake on International Law*, ed. L. Oppenheim (1914), at 82.

²⁹ Arbitration Commission, EC Conference on Yugoslavia (“Badinter Commission”), *Opinion No. 1*, 29 Nov. 1991, 92 ILR 162, para. 1(a).

³⁰ ‘The state *as a person of international law* should possess the following qualifications ...’ Montevideo Convention, Art. 1 (my emphasis).

³¹ Montevideo Convention, Arts 3-4.

³² *Reference Re. Secession of Quebec*, Supreme Court of Canada Advisory Opinion, 1998, 37 ILM 1340, para. 133.

their political status', choosing in a one-off democratic decision from a list of options including that of independent statehood, and therefore (under declaratory principle) for 'full' international personality.³³

A problem remains, however: is it really plausible to view the criteria for statehood as 'factual', 'objective' and 'declaratory', in contrast to the supposedly 'normative', 'subjective' and 'constitutive' criterion of 'civilization'? After all, as Martti Koskenniemi has pointed out, '[f]acts alone are powerless to create law. For facts to have significance an anterior legal system must be assumed to exist which invests facts with normative sense'.³⁴ This can only mean that '[t]he criteria for statehood...need to be regarded as constitutive of statehood' since '[t]hey form the normative code which regulates the attainment of statehood'.³⁵ If this is the case, then the distinction between 'constitutive' and 'declaratory' recognition has been misrepresented. Under the former approach, existing states 'constitute' the personality of new states on the basis of a 'standard of civilisation'. Under the latter approach, the new state constitutes its *own* personality, on the basis of the criteria for statehood themselves. As we shall see, the shift from the first from the second is less emancipatory than it appears, since the need for external recognition on the basis of an external 'standard of statehood' has, in effect, been obviated by the internalisation of the concept of 'civilisation' within the criteria for statehood themselves, and by the evident willingness of aspiring sovereigns to 'self-recognise' and thereby to 'self-constitute' on the basis of these criteria (the well-known 'declaration of independence'). Evidently, the critique of sovereign equality must then cut deeper than the vague and undefined 'standard of civilization' and call into question of the origin of international legal subjectivity itself.

But what are we actually talking about when speak of '*legal* subjectivity'? What exactly is the difference between 'material' and 'formal' power/identity? As Marxist scholars of international law, such as Evgeny Pashukanis and more recently China Miéville, have long been arguing, these questions are addressed extremely inadequately

³³ GA Res. 1514 (XV), 14 Dec. 1960, para. 2. See also *Western Sahara Advisory Opinion*, ICJ Rep. (1975) 12, para. 59.

³⁴ Martti Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument* (1995), at 272.

³⁵ *Ibid.*

by orthodox international legal theory. The ‘basic materialist strategy’ put forward by Pashukanis was to ‘correlate commodity exchange with the time at which man becomes seen as a legal personality’.³⁶ It was Pashukanis’s argument that ‘[e]very legal relation is a relationship between subjects’.³⁷ Since ‘[c]apitalist society is above all a society of commodity owners,’ this means that ‘in the process of production the social relationships of people assume an objectified form in the products of labour and are related to each other as values.’³⁸ After all, as Marx pointed out, ‘commodities cannot go to market and make exchanges of their own account’; therefore,

[I]n order that...objects may relate to one another as commodities, their guardians must relate to one another, as persons whose will resides in those objects; and must behave in such a way that each does not appropriate the commodity of the other, and part with his own, except by means of an act done by mutual consent. They must, therefore, mutually recognize in each other the rights of private proprietors.³⁹

According to Pashukanis, legal subjectivity is the product of this mutual recognition: ‘simultaneously with the product of labour assuming the quality of a commodity and becoming the bearer of value, man assumes the quality of a legal subject and becomes the bearer of a legal right’.⁴⁰ Legal relations facilitate capitalist exchange in a crucial manner by providing a mechanism for the resolution of the disputes which arise continually over the question of ownership. ‘Free’ and ‘equal’ individual subjectivity in domestic law is, from this perspective, essential to, and inextricable from, capitalist relations of production.

What, then, of *international* law? Miéville takes up Pashukanis’s insistence that ‘[s]overeign states coexist and are counterposed to one another in exactly the same way as are individual property owners with equal rights’,⁴¹ except for the lack of an

³⁶ C. Arthur, quoted in Knox, ‘Marxism, International Law and Political Strategy,’ 22 *Leiden Journal of International Law* (2009), 413, at 416.

³⁷ *Pashukanis: Selected Writings on Marxism and Law*, ed. P. Beirne & R. Sharlet (1980), at 74.

³⁸ *Ibid.*, at 75.

³⁹ K. Marx, *Capital*, Vol.1, Ch. 2, available at <http://www.marxists.org/archive/marx/works/1867-c1/ch02.htm> [accessed 28 Sep. 2012].

⁴⁰ Pashukanis, *op. cit.*, at 76.

⁴¹ *Ibid.*, at 176.

international sovereign, in order to address a very similar issue to the one upon which this paper is focused: that of the relationship between formal equality and material inequality.⁴² Rather than challenging the principle of sovereign equality *itself*, however, the target of Miéville's critique is Koskenniemi's 'indeterminacy thesis',⁴³ which is charged with being incapable of explaining the systematic quality of international material inequality. To provide such an explanation, Miéville focuses on the violence he sees as lying 'at the heart of the commodity form', on the grounds that violence is necessary '[f]or a commodity meaningfully to be 'mine-not-yours', and hence to the concept of private property, as defined by law.⁴⁴ If violence is embedded in the commodity form, and given that in the international arena 'coercion remains embedded in the participants',⁴⁵ it is only natural that the most powerful states will be ones whose 'interpretations' of otherwise indeterminate questions of law 'can be made to stick'.⁴⁶ Yet as Robert Knox has pointed out, there are a number of problems with this attempt to internationalize the commodity-form theory of law. In the first place, 'it is unwarranted to say that the 'something' [necessary] to defend [a commodity's] mine-ness needs to be violent coercion', when economic and ideological explanations of ownership/sovereignty appear to be just as important.⁴⁷ Secondly, Miéville fails to show why states should *necessarily* be the primary subjects of international law. For Knox, this leads him to neglect the possibility that 'progressive actors may be able to constitute themselves as legal subjects'.⁴⁸ Be that as it may, my concern here is less with international legal subjects *other* than states than with the hierarchy which I claim lies *within* the 'full' international personality accorded to states, pointing to a relationship of synchronicity as opposed to equivalence between domestic and international legal subjectivity. In my view, Miéville's willingness to swallow whole the sovereign equality assumption germane to orthodox international legal theory is the result of his inattention to the process of international legal reproduction. In turning to this process, I will first enlist

⁴² Miéville, *op. cit.*, at 260.

⁴³ As laid out in Koskenniemi, *op. cit.*

⁴⁴ Miéville, *op. cit.*, 126.

⁴⁵ *Ibid.*, 136-37.

⁴⁶ Knox, *op. cit.*, at 418-419.

⁴⁷ *Ibid.*, at 425.

⁴⁸ *Ibid.*, at 422.

the help of Bernard Edelman in order to explain how the reproduction of domestic legal subjects takes place,⁴⁹ before applying his approach to *international* legal subjectivity.

Edelman follows Louis Althusser in understanding the term ‘ideology’ to signify ‘the *lived* relation between men [and women] and their world’.⁵⁰ Alongside the economy and politics, ideology is the third ‘instance’ of any society — ‘an organic part of every social totality’.⁵¹ Essentially, the function of ideology is to reproduce society and its means of production by reproducing subjects which identify with that social totality. This takes place, according to Althusser, through a process of ‘interpellation’: ideology ‘hails’ a putative social subject (as a London bobby might shout, ‘Oi!’ to a misbehaving someone), and in responding, that putative subject is transformed into a real subject, having ‘interpellated’ him/herself as belonging to that society and as sharing its ideology.⁵² By what or who, however, are new subjects ‘hailed’? Who interpellates the policeman? The answer Althusser gives is: a ‘Unique, Absolute, Other Subject’ — such as God, for example.⁵³

[The] Absolute Subject occupies the unique place of the Centre, and interpellates around it the infinity of individuals into subjects in a double mirror-connexion such that it *subjects* the subjects to the Subject [...]⁵⁴

But where, then, does the ‘Absolute Subject’ come from? And what is law’s role in the process of interpellation? For Edelman, as for Pashukanis and Miéville, ‘[t]he red thread

⁴⁹ B. Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (1979). Edelman’s theory has the disadvantage of being rather Eurocentric and sexist. However, in my view it is robust enough to be expanded to allow for decolonisation, the collapse of apartheid, the acceptance of gender etc. without requiring any changes other than those suggested below.

⁵⁰ Althusser, ‘Marxism and Humanism’ (1964), available at <http://www.marxists.org/reference/archive/althusser/1964/marxism-humanism.htm> [accessed 28 Jul. 2012]. Emphasis omitted.

⁵¹ *Ibid.*

⁵² ‘[A]ll ideology hails or interpellates concrete individuals as concrete subjects, by the functioning of the category of the subject’. Althusser, ‘Ideology and Ideological State Apparatuses: Notes towards an Investigation’ (1971), available at <http://www.marxists.org/reference/archive/althusser/1970/ideology.htm> [accessed 28 Jul. 2012]. Emphasis omitted.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

running through juridical ideology is freedom and equality'.⁵⁵ Where Edelman goes further, however, is in analysing law as the *primary mechanism* through which individual legal subjects are created. Law exists, in his view, because it generates subjects which identify themselves as 'free and equal' in a manner which helps to perpetuate the circulation of commodities both *directly*, as explained in the 'commodity form theory', and *indirectly*, by ensuring that subjection is experienced as subjectivity.⁵⁶ Like capitalist relations, Edelman demonstrates that the ideology of the 'free and equal' individual did not spring from nowhere, but rather grew out of the ideologies of successive social formations, and does so by tracking the trajectory of the social capacity of individuals to participate in the process of production.⁵⁷ He points out that even Kant's supposedly 'universal' subjectivity excluded the three categories of individual — women, children and servants — which were excluded from capitalist circulation in the 'semi-feudal economy which was [Kant's] natural milieu'.⁵⁸ It was only in the nineteenth century, Edelman argues, with the industrial revolution (and European imperialism, one might) approaching their zenith, that the 'universal subject' became truly universal (in Western Europe and the US at least).⁵⁹ As Hegel describes this subject:

[a] person has as his substantive end the right of putting his will into any and every thing and thereby making it his, because it has no such end in itself and derives its destiny and soul from his will. This is the absolute right of appropriation which man has over all 'things'.⁶⁰

In Hegel's schema, the individual subject is by definition a producer of private property, but his/her subjectivity is also, and simultaneously, produced by it.⁶¹ It is in this sense that legal *subjectivity* is simultaneously legal *objectivity*: the worker is commodified at the instant s/he is interpellated as a legal subject, making individual subjectivity the

⁵⁵ Edelman, 'Transitions in Kant's *The Metaphysical Elements of Justice*,' in Edelman, *op. cit.*, Appendix 2, at 144.

⁵⁶ Edelman, *Ownership of the Image*, at 102 and 107.

⁵⁷ Edelman, 'Transitions in Kant', at 144.

⁵⁸ *Ibid.*, 169.

⁵⁹ For a critique of Hegel's universalism in the context of the Haitian Revolution, see Buck-Morss, 'Hegel and Haiti,' 26 *Critical Enquiry* (2000), at 821-65.

⁶⁰ Quoted in Edelman, 'The Subject in Law in Hegel's *Philosophy of Right*,' Appendix 3 in Edelman, *Ownership of the Image*, at 177.

⁶¹ *Ibid.*, at 178.

ideological aspect of capitalist circulation.⁶² ‘In law,’ Edleman writes, ‘exchange appears not only as the circulation of private property, but also as the circulation of the freedom and equality of every owner’.⁶³ The ‘Absolute Subject’ of capitalist society, he argues, must therefore be capital itself. ‘The son of capital is surplus value contemplating itself in capital. It is the subject redoubling itself in subjects. The individuals, the agents of circulation, are the subjects that assure the functioning of the Subject’.⁶⁴

Reflecting on Edelman’s analysis in 2012, it does appear that the universalization of individual legal subjectivity — effected even further than Edelman allows for by the erasure of the category of ‘colonial subject’ — has succeeded remarkably well in universalizing market relations while simultaneously entrenching inequalities of power and wealth. I suggest, however, that something is missing from Edelman’s account. Most importantly, as I will demonstrate below, the process of creating individual legal subjects is supported in a vital manner by the way in which *international* legal subjectivity is reproduced. At the same time, looking at the two dimensions of legal subjectivity together can help to clarify the somewhat incoherent account of the origin of the ‘Absolute Subject’ presented by Althusser and Edelman. After all, feminist, postcolonial and critical race theorists have been arguing for many years that individual subjectivity is premised on identification with a set of ‘essential’ qualities distilled from a culturally extremely specific ideal: the white, middle-class man.⁶⁵ Here, the ‘Absolute Subject’ is *both* abstract (a synthesis of markers — ‘white’ skin, ‘rational’ thought and so on) *and* ‘real’ in a material sense,⁶⁶ in a way that is perfectly compatible with formally equal individual subjectivity. I therefore make the very straightforward argument, below, that the ‘Absolute Subjects’ of *international* subjectivity are the ‘original’ states of

⁶² Ibid., 169.

⁶³ Edelman, ‘Transitions in Kant,’ 145.

⁶⁴ Edelman, *Ownership of the Image*, at 98.

⁶⁵ As Franz Fanon put it, ‘For the black man there is only one destiny. And it is white.’ F. Fanon, *Black Skin, White Masks* (1986), at 4. See also, among other works, Patricia J. Williams, *The Alchemy of Race and Rights* (1991); K. Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color,’ 43 *Stanford Law Review* (1991), at 1241–1299; Spivak, ‘Can the Subaltern Speak?’, in C. Nelson & L. Grossberg, eds., *Marxism and the Interpretation of Culture* (1988), at 271–316; H. K. Bhabha, *The Location of Culture* (1994).

⁶⁶ A quick review of the world’s 100 richest individuals reveals one black man, four Indian men and ten (white) women. Forbes Billionaire’s List 2011, at <http://www.forbes.com/billionaires/list/> [accessed 6 Sep. 2012].

Western Europe.⁶⁷ Not only have their material characteristics provided the template for the supposedly universal ‘Montevideo’ criteria on the basis of which aspiring sovereigns continually interpellate themselves (i.e. on the basis of which they ‘self-recognize’ in the hope of ‘self-constituting’); at the same time, these same ‘original’ states continue to exert an all-too-real form of material domination, exercised through the global market, over their supposed equals.⁶⁸ Perhaps Edelman’s aim in avoiding this more obvious mode of identification was to avoid its paradoxical implication of a hierarchy *within* formal equality. Yet I suggest that it is precisely this paradox — precisely this hierarchy — which provides the clue we are after.

A second problem with Edelman’s position concerns the absence of coercion in his account. Although interpellation is, as we shall see, central to the process of international legal reproduction, to leave coercion out of the account would be to truncate and trivialize the experience of the vast majority of the ‘non-original’ states in question. What is required is a compromise between Miéville and Edelman: a theory of international legal reproduction with a place both for coercion and for interpellation; for both external ‘constitution’ and for internal ‘self-constitution’.

Part Two. Unequal Equality

A. ‘Absolute Subjects’ of International Law: The Geminal Birth of Sovereign State and Autonomous Individual

It was no accident that the idea of state sovereignty grew out of the administrative chaos of Medieval Europe in the wake of the ‘Peace of Westphalia’ at precisely the same moment the idea of the autonomous individual subject was brought to life in the Enlightenment philosophy of Spinoza, Locke, Voltaire, Kant, Montesquieu, Paine and others.⁶⁹ For the ‘fathers’ of the discipline of international law, such as Grotius,⁷⁰

⁶⁷ For a queer analysis of the forcible “opening up” of China to the West, see Ruskola, “Raping Like a State,” 57 *UCLA Law Review* (2009-10), at 1477-1536

⁶⁸ According to the World Bank, ‘an estimated 1.29 billion people in 2008 lived below \$1.25 a day, equivalent to 22 percent of the population of the developing world’. Yet this is ‘a standard that Western European and the United States attained two hundred years ago’. ‘World Bank Sees Progress Against Extreme Poverty, But Flags Vulnerabilities,’ *World Bank: News and Views*, 29 Feb. 2012 at <http://www.worldbank.org/en/news/2012/02/29/world-bank-sees-progress-against-extreme-poverty-but-flags-vulnerabilities> [accessed 8 Sep. 2012]; World Bank, *World Development Report 1991*, at 1.

⁶⁹ See Strayer, *On the Medieval Origins of the Modern State* (1970), at 10.

Pufendorf,⁷¹ Vitoria⁷² and Vattel,⁷³ the connection between the two dimensions of legal subjectivity was obvious. It is crucial, in other words, though often overlooked, that Vattel's famous definition of sovereign equality, according to which 'a dwarf is as much of a man as a giant' in the same way as 'a small republic is no less a sovereign State than the most powerful kingdom',⁷⁴ refers to 'republics' and not merely to states. What mattered most for these jurists when it came to defining 'sovereign statehood' was the existence of a social contract between ruler and ruled (however much violated in practice) and a body of laws derived freely and without external influence from that contract. Thus for Vitoria, '[a] perfect State or community ... is one which is complete in itself, that is, which is not a part of another community, but has its own laws and its own council and its own magistrates'.⁷⁵ The 'rule of law' was therefore of central importance to the notion of statehood, fulfilling, as Koskenniemi points out, a reconciliatory purpose designed to neutralise the 'liberal paradox' inherent in both legal orders: namely that 'to preserve freedom, order must be created to restrict it'.⁷⁶ The 'rule of law' continues to be regarded as 'legal embodiment of freedom', as Friedrich Hayek, apostle of the free market, described it in the 1940s⁷⁷ -- policing the divide between 'public' and 'private', protecting basic individual freedoms, in particular to liberty and property, as defined in the *Declaration of the Rights of Man*, deciding on a democratic basis when to limit those freedoms in the name of 'order', and thereby interpellating 'free and equal' legal subjects, willing to take up their new roles as 'responsible' owners and legislators.

⁷⁰ Groitius, *De Iure Belli ac Pacis* (1646), Bk. I, Ch. 1, §xiv.

⁷¹ Pufendorf, *De jure naturae et gentium* (1672), Bk. VII, Ch. 2, § xiii (1717 edition, trans. Basil Kennet, at 475).

⁷² Francisco de Vitoria [c. 1532], *De Indis et De Iure Belli: Relectiones*, ed. E. Nys (1917).

⁷³ Vattel, *The Law of Nations, or Principles of the Law of Nature applied to the Conduct and Affairs of Nations and Sovereigns* (1758), Vol. I, Bk. I, §i–iv.

⁷⁴ Quoted in Antonio Cassese, *International Law*, 2nd Ed. (Oxford, 2005), 52.

⁷⁵ Vitoria, *op. cit.*, *Second Relectio*, para. 7. Likewise, Pufendorf insisted that the true state was the 'civil state' in which 'the *People* denotes the whole Body of Men, who in different respects, govern and are govern'd' by means of a 'Covenant' by means of which the *People* are 'subject to a Monarch, or to a Senate' in return for the protection of their liberties. Pufendorf, *op. cit.*, § xiii. Emphasis in the original.

⁷⁶ Koskenniemi, *op. cit.*, at 71.

⁷⁷ According to Hayek, the "rule of law" is what defines a system in which 'government in all its actions is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game, the individual is free to pursue his personal ends, certain that the powers of government will not be used deliberately to frustrate his efforts.' Hayek, *The Road to Serfdom*, *supra*, at 50.

At the same time, the project of overseas imperialism played an important role in consolidating the nascent concept of the state. On the one hand, the ‘savage’ communities ‘discovered’ in the ‘New World’ by Spain, Portugal, Britain, France and the Netherlands to be living ‘without king, without compacts, without magistrates or republic’,⁷⁸ served to reinforce the reciprocal definition of the ‘civil state’ as sovereign *because* possessed of a government ‘responsible’ to the ‘people’ within a certain territory. Moreover, as Ackerman points out, the ‘direct use of maps to further the ends of empire’ appears to be a ‘modern phenomenon, closely tied to ... the emergence of the modern state’.⁷⁹ It was only with the advent of international legal positivism in the nineteenth century that these elements coalesced into the four, supposedly universal criteria for statehood later codified in the Montevideo Convention: as Lassa Oppenheim described them ‘a *people*...who live together as a community’; ‘a *country* in which the people has settled down;’ a ‘*Government*’ consisting of ‘one or more persons who are the representatives of the people and rule according to the law of the land’; and this Government must be ‘*Sovereign*’ and hence possessed of ‘a supreme authority which is independent of any other earthy authority’.⁸⁰

B. ‘Interpellated Subjects’ of International Law: the Production of ‘Peripheral Personality’

The less-than-universal nature of the ‘Montevideo criteria’ is, however, difficult to miss when examined from the perspective of entities which fail in their attempts to self-constitute/interpellate on their basis. Textbook discussions of ‘defined territory’ tend to treat this criterion as unproblematically objective, usually focusing on the issue of micro-states and coming to the rather unexciting conclusion that there is no minimum size for a state.⁸¹ Yet the notion of a fixed territorial border was alien to many social ideologies prior to their contact with the states of Western Europe and the US. Nomadic peoples, for instance, were automatically excluded by this criterion.⁸² Even for powerful

⁷⁸ John Elliot, quoted in J. Sampson, *Race and Empire* (2005), at 14.

⁷⁹ Ackerman, ‘Introduction’, in J. R. Ackerman, ed., *The Imperial Map: Cartography and the Mastery of Empire* (2009), at ix.

⁸⁰ See e.g. Oppenheim, *op. cit.*, at 99-101.

⁸¹ See e.g. Crawford, *The Creation of States in International Law* (2006), at 46-47.

⁸² Lawrence, *op. cit.*, at, 136.

non-European entities with a longstanding claim to statehood like the Ethiopian⁸³ and Chinese empires,⁸⁴ sovereign power was understood to depend on boundaries that were cultural, or even cosmic, as opposed to territorial — expanding in moments of ideological strength, and contracting in moments of weakness. Nor was the benchmark of ‘defined territory’ very strongly enforced,⁸⁵ at least until decolonisation began in earnest. As the colonial right to self-determination took shape, however,⁸⁶ this criterion was strengthened by the adoption by anti-colonial leaders of the principle of *uti possidetis juris*.⁸⁷ Notoriously, this principle ensured that the scope of the territorial ‘self’ in question would be excluded from the range of issues open for popular ‘determination’, and hence that the boundaries of these states would not,⁸⁸ as with ‘original’ states, ‘enshrine the balance of power *a posteriori* but [determine] it *a priori*’.⁸⁹ Apart from entrenching ethnic tensions, the reification of colonial boundaries in turn reified colonial systems of production, distribution and exchange.⁹⁰ The resulting phenomenon of ‘path dependence’ has helped many development economists to explain why the benefits from technological progress trade ‘liberalization’ accrue mostly to former colonial powers — that is, to the ‘original’ states.⁹¹ The requirement that a state should have a ‘permanent’ or ‘settled’ population is also cast as innocuous in the orthodox literature. After all, no conditions are laid down with respect of any

⁸³ See Parfitt, ‘*Empire des Nègres Blancs: the Hybridity of International Personality and the Abyssinia Crisis of 1935-36*,’ 24 *Leiden Journal of International Law* (2011), at 849-872; and R. Parfitt, *Ethiopia and the Incorporation of the Disciplinary ‘Other’: A Bakhtinian Approach to International Personality*, unpublished PhD thesis, University of London, School of Oriental and African Studies (2011).

⁸⁴ See Wang, ‘History, Space, and Ethnicity: The Chinese Worldview,’ 10 *Journal of World History* (1999), 289.

⁸⁵ Crawford, *Creation of States*, *supra* at 48.

⁸⁶ For a radical critique of the principle of *uti possidetis* see Mutua, ‘Why Redraw the Map of Africa? A Moral and Legal Inquiry,’ 16 *Michigan Journal of International Law* (1994-95), at 1113-76.

⁸⁷ *Frontier Dispute Case (Burkina Faso and Mali)*, ICJ Rep. (1986) 554, para 565.

⁸⁸ The continuing relevance of this principle was insisted upon by the Badinter Commission: *Opinion No. 3*, 11 Jan. 1992, 92 ILR 170, para. 2.

⁸⁹ H. L. Wessling, cited in Kreijen, *op cit.*, at 74.

⁹⁰ See e.g. *Towards a New Trade Policy for Development*, Report by the Secretary-General of UNCTAD (1964); Frank, ‘The Development of Underdevelopment,’ in A. G. Franck, *Latin America: Underdevelopment or Revolution: Essays on the Development of Underdevelopment and the Immediate Enemy* (1969), at 3-15.

⁹¹ See Wade, ‘What Strategies Are Viable for Developing Countries Today? The World Trade Organization and the Shrinking of ‘Development Space’,’ 10 *Review of International Political Economy* (2003), at 621-44.

minimum, or even to the nationality of the individuals concerned.⁹² Yet nomadic peoples, again, fall below the radar. Nor does this discussion address the issue of *which* individuals ‘count’ as part of a territory’s population, despite evidence of the ongoing and catastrophic after-effects of the nineteenth-century European obsession with racial classification — in Rwanda for example,⁹³ and of the phenomenon of ‘demographic colonialism’ in Western Sahara, the West Bank and elsewhere.⁹⁴ Equally, the requirement that only ‘independent’ entities can be states is treated as self-evident. Yet by placing the violence involved in wars of national liberation beyond international law’s remit, such violence is — or was until 1960— sanctioned by omission. Meanwhile, developments in the field of international humanitarian law have, for better or worse, conspired to make ‘independence’ an almost insuperable barrier for aspiring sovereigns by limiting the means by which ‘internal’ wars might be fought.⁹⁵ Second, while the right to external self-determination in effect transformed the ‘factual’ criterion of independence into a ‘legal’ right for colonial/occupied peoples,⁹⁶ when it came to peoples that did *not* count as such — peoples who had not been a European ‘salt-water colony’; whose independence would violate *uti possidetis*; or who were unable to produce ‘a free and genuine expression of the will of the peoples concerned’ in favour of

⁹² Crawford, *The Creation of States, supra*, at 52.

⁹³ See Samson, *Race and Empire, supra*; Jefremovas, ‘Contested Identities: Power and the Fictions of Ethnicity, Ethnography and History in Rwanda,’ 39 *Anthropologica* (1997), at 96ff.

⁹⁴ See e.g. Drew, ‘The Meaning of Self-Determination: “The Stealing of the Sahara” Redux?’ in eds. K. Arts & P. Pinto Leite, *International Law and the Question of Western Sahara* (2007), at 87-105.

⁹⁵ *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, Geneva, 12 Aug. 1949, Art. 3; *Protocol II Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977. Wars of self-determination are understood to be regulated by the rules concerning international conflict. See *Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, Art. 1(4).

⁹⁶ In the view of Crawford, this right did not replace the need for an entity to meet the criteria for statehood before it can obtain rights and duties under international law, however, but had an indirect effect on the latter. Where that right is present but being violated it is capable either of compensating where the criteria for statehood are not fully met by the ‘people’ in question (as in Congo and Guinea Bissau), or of undermining an otherwise credible claim to statehood and personality by the oppressor (as with Southern Rhodesia). See Crawford, *Creation of States, supra*, at 129-148; Crawford, ‘The Creation of the State of Palestine: Too Much Too Soon?’ 1 *EJIL* (1990), at 310. Crawford’s argument here is based on assumption that ‘norms that are non-derogable and peremptory [like self-determination] cannot be violated by State-creation any more than they can by treaty-making’. Crawford, *Creation of States, supra*, 107.

independent statehood⁹⁷ — the prohibitive character of the ‘independence’ criterion was simply reinforced. Such peoples, from the Tamils of Sri Lanka to the aboriginal communities of Australia, *are* understood to possess a right to ‘internal’ self-determination, defined as the right to be governed by ‘[a] state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination’.⁹⁸ However, as shall be demonstrated below, this right is, in effect, identical to the limited right of ‘national’ self-determination possessed by national minorities, colonies and mandates/trust territories between 1919 and 1960. Before the significance of this link can become clear, however, an examination of the final criterion of statehood — ‘government’ — is necessary.

Crawford describes ‘government’ as ‘the most important single criterion of statehood, since all the others depend upon it’.⁹⁹ Any government is understood in the orthodox account to be able to meet this criterion, as long as it is ‘effective’ and ‘exclusive’ in the exercise of its ‘governing power’ over the territory under its control.¹⁰⁰ But there is something question-begging about this definition: how do we determine what a ‘government’ is, as opposed to some other kind of entity; or ‘governing power’ as opposed to some other means of control? I would like to suggest that the image of the social contract — manifested in the ‘rule of law’ — remains the key aspect of what ‘government’ means for the purposes of statehood under international law. It is the ‘rule of law’ which attempts to reconcile the central figure of the post-Enlightenment — the ‘free and equal’ individual — with the collective apparatus deemed necessary for his/her ‘protection’. It is also the ‘rule of law’ which gives this apparatus (the state) its claim to ‘sovereignty’ — its *own* claim to be treated as a ‘free and equal’ individual subject by other states. It is the state as defined by the ‘rule of law’ which provides the crucial mechanism through which individual subjectivity is defended and reproduced.

⁹⁷ *Western Sahara Case, Advisory Opinion*, ICJ Rep., 1975, 12, at para. 59. The issue of whether a right to ‘internal’ self-determination is transformed, through its violation, into a right to ‘external’ self-determination remains unresolved. *Reference Re: Secession of Quebec*, 2 SCR (1998), 217, para. 138. See also L. C. Buchheit, *Secession: the Legitimacy of Self-Determination* (New Haven, 1978), and *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ 2010, 22 Jul. 2010, Separate Opinion of Judge Yusuf, 3-4, paras. 11-12.

⁹⁸ *Reference Re: Secession of Quebec*, para. 130.

⁹⁹ Crawford, *Creation of States*, *supra*, 56.

¹⁰⁰ *Ibid.*

The record of practice does appear to accord with this suggestion. As more and more European and neo-European states began to enter into the 'Family of Nations' during the nineteenth century, this benchmark of 'civil' government was applied consistently. Yet it is important for the purposes of 'peripheral personality' to note that the form taken by 'civil' government when applied to new states was *different* from the template found in the 'original' states. The independence of Romania, for example, like that of Bulgaria, Serbia and Montenegro, was recognized in the 1878 Treaty of Berlin, subject to two conditions: protections for religious freedom both for Romanian citizens *and foreigners*, and secondly for the principles of 'national treatment' and 'most favoured nation' (MFN) with respect to trade with the signatory powers, Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey.¹⁰¹ In exchange for its independence from Ottoman rule, and from the latter's far-from 'responsible' form of government, in other words, Romania was required to self-identify – to interpellate itself – as a 'civil state', both in relation to its own population, *and in relation to citizens of the Powers*. As this illustrates, the criterion of 'government' underwent a subtle transformation during its shift from original characteristic to condition of constitution. Whereas for the Enlightenment philosophers of Western and Northern Europe, the primary 'responsibility' of a government was to its *own* 'people', the practice of international reproduction indicates, as we shall see further below, that this 'responsibility' became at once narrower and wider for newly-interpellated subjects of international law. It was narrower in being reduced to a bare minimum of 'negative' liberties – in particular religious freedom, equality before the law and property rights. It was wider, however, both in that this respect was guaranteed by an explicit agreement at the level of international law (in this case, the Treaty of Berlin), and in that these protections were owed not only to citizens but also to the already by-definition-'free and equal' citizens of existing states.

Skipping forward some 230 years, the precise nature of this stripped-down form of 'responsible' government – today being celebrated under the banner of the 'emerging

¹⁰¹ '[S] subjects *and citizens of all the Powers, traders or others*, shall be treated in Romania without distinction of creed, on a footing of perfect equality'. *Treaty Between Great Britain, Austria-Hungary, France, Germany, Italy, Russia and Turkey*, Berlin, 13 July 1878, Art. XLIV. My emphasis.

right to democratic governance'¹⁰² — has been criticized by Susan Marks, among others.¹⁰³ In the context of 'post-authoritarian transition', Marks points out that 'universal suffrage,' for example, 'has not put an end to inequalities in the capacity of citizens to exercise and influence state power' because 'subordinate socioeconomic status tends to reinforce, and be reinforced by, political marginalisation'.¹⁰⁴ However, the promotion outside the West of this kind of this kind of stripped-down, austere, 'low-intensity' form of democracy, contrasted with the institutions of 'actually existing' democracy found in Western states, where 'political and civil rights ... go hand in hand with ... social, economic and cultural rights',¹⁰⁵ is not an accident, in her view. On the contrary, it is linked to two goals. The first is that of 'stabilising existing positions in the global distribution of power and resources' by 'meet[ing] the immediate needs of anti-authoritarian crisis, easing tensions, and restoring order ... in a manner that forestalls far-reaching structural change'.¹⁰⁶ This ensures that 'the concentration in these regions of relatively low wage, low profit, less monopolised economic activities is not endangered'.¹⁰⁷ The second goal associated with the promotion of 'low intensity democracy' is one of 'expanding the reach of global markets and eliminating the remaining barriers to the transnationalization of capital', thereby facilitating 'the penetration and consolidation of capitalist relations of production in peripheral and semi-peripheral regions'.¹⁰⁸ For as she points out, '[p]olicies of economic liberalisation, structural adjustment, exchange deregulation, and so on, have greater legitimacy when pursued by elected governments than when imposed by unelected regimes'.¹⁰⁹ Marks' argument implies that the function of 'democracy-promotion' in the context of the post-Cold War period is to create a type of individual legal subjectivity that is perfectly suited to the demands of economic globalisation. I would like to take this argument a step further by suggesting that very concept of 'government' *itself* associated, and hence the

¹⁰² See in particular Franck, 'The Emerging Right to Democratic Governance,' 86 *AJIL* (1991), at 46-91.

¹⁰³ S. Marks, *The Riddle of All Constitutions* (2000). See also W. I. Robinson, *Promoting Polyarchy: Globalisation, US Intervention and Hegemony* (1996).

¹⁰⁴ Marks, *op. cit.*, at 59.

¹⁰⁵ *Ibid.*, at 50.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

type of statehood and of international personality constituted on the basis of this concept, are closely bound up with this project.

Part Three: The Practice of International Legal Reproduction

A. International Legal Reproduction Before the First World War

The ‘white spaces on a map’ described by Vasuki Nesiah are hard to imagine now.¹¹⁰ The emergence of the ‘standard of statehood’ had allowed most of these spaces — non-state-like and therefore lacking personality — to be colonized by the end of the nineteenth century without violating any rule of international law.¹¹¹ Indeed, as Antony Anghie has argued, it was in and through this very process of colonization that very concept of sovereignty was formed.¹¹² Yet between the ‘white spaces’ and the pink and green shadings of the ‘original states’ and their ‘possessions’ lay a few well-known entities whose characteristics undeniably resembled those of states. On the one hand, there were the ‘eastern empires’, China, Siam, Japan and the Ottoman Empire. On the other, there were the ‘protected states’ which, particularly in the North African, were gradually prised away from Ottoman control. Since the international legal experiences of these entities-of-ambivalent-status share certain important similarities,¹¹³ I will for reasons of space focus on one: the complex and, for that reason, instructive history of China’s international personality.

The process by which the Chinese economy was prised open in the nineteenth century is well known. The ‘unequal treaties’ — concluded over a half a century of coercive interventions, from the Opium Wars of the mid-nineteenth century to the ‘liberation’ of the foreign legations by the Eight-Nation Alliance in 1900 — prevailed upon China to guarantee the rights of foreigner merchants, missionaries and diplomats to travel, trade and invest ‘freely’ in China’s infrastructure; to guarantee these foreigners ‘equality before the law’ by means of provisions for extraterritorial jurisdiction; and

¹¹⁰ See Nesiah, ‘Placing International Law: White Spaces on a Map,’ 16 *Leiden JIL* (2003), at 1-13.

¹¹¹ Anghie has made this argument using the ‘standard of civilisation’, rather than the ‘standard of statehood’ itself. See Anghie, ‘Finding the Peripheries’, *supra*.

¹¹² *Ibid.*

¹¹³ See e.g. Horowitz, ‘International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century,’ 15 *Journal of World History* (2004), at 445-486; Crawford, *Creation of States, supra*, 282-328; on Egypt, McIlwraith, ‘The Declaration of a Protectorate in Egypt and its Legal Effects,’ 17 *Journal of Social and Comparative Legislation* (1917), at 238-59.

ensure that tariffs and internal taxes would remain at rock-bottom levels.¹¹⁴ Typically, MFN clauses were included in the treaties (which by 1901 had been concluded with Britain, the US, France, Sweden and Norway, Russia, Prussia/the German Confederation, Portugal, Japan, Italy, Austria-Hungary, Belgium, Spain and the Netherlands) to ensure that China would extend any concession granted to one ‘treaty power’ to all the others — though this reciprocity did not extend to China itself.¹¹⁵ The practice associated with the ‘unequal treaties’ indicates that treaties constituted for the Chinese Empire a particular form of international personality — simultaneously equal (or else the treaties would have been invalid) and unequal (given the non-reciprocal terms of the treaties and the coercive background to their signature).¹¹⁶ The influx of foreigners and foreign goods into China which the treaties precipitated in the second half of the nineteenth century set in motion a complex chain of events. On the one hand, groups like the ‘Righteous Harmony Divine Boxing Movement’ — whose members, believing themselves to be impervious both to swords and bullets, vowed to ‘[p]rotect our country, drive out foreigners, and kill Christians!’ — demanded the immediate expulsion of the foreign ‘barbarians’ and the abrogation of the treaties.¹¹⁷ On the other hand, however, an equally strong demand was triggered for *further* and *deeper* Westernizing reforms, including military reforms, and ultimately for the replacement of the imperial system with a Western-style Chinese Republic, on the grounds that such reforms would gain, if not force, the respect of the foreigners and hence equal treatment for China. The ‘self-strengthening’ (*tzu-ch’iang*) movement, for example, gained influence in the wake of China’s defeat by Japan (1894-1895), touting the slogan ‘learn the superior technology of the barbarian in order to control him’.¹¹⁸ That is to say, it appears to have been precisely the *gap* between the formal equality, *inter se*, of the

¹¹⁴ See generally D. Wang, *China’s Unequal Treaties: Narrating National History* (2005).

¹¹⁵ Craven, “What Happened to Unequal Treaties? The Continuities of Informal Empire,” 74 *Nordic Journal of International Law* (2005), 335, at 348.

¹¹⁶ *Ibid.*, at 352.

¹¹⁷ See Ch’ên, “The Nature and Characteristics of the Boxer Movement -- A Morphological Study,” 23 *Bulletin of the School of Oriental and African Studies, University of London* (1960), at 287-308.

¹¹⁸ “The Self-Strengthening Movement in China, 1898,” in A. Snyder & S. West, eds., *Readings in Global History*, Vol. II (2nd Ed.) (1997), at 166; Speidel, “The Administrative and Fiscal Reforms of Liu Ming-ch’uan in Taiwan, 1884-1892: the Foundation of Self-Strengthening,” 35 *The Journal of Asian Studies* (1976), at 441-442; H. M. Tanner, *China, a History 2: From the Great Qing Empire through The People’s Republic of China, (1644-2009)* (2010), at 86-97.

'treaty powers', and the formal inequality the unequal treaties constructed between them and the Chinese Empire, that kick-started the process of interpellation *within* China. During the decade which followed the Boxer Uprising and the humiliation of the punitive 'Boxer Protocol' imposed in its wake by the various states of the 'international community',¹¹⁹ China was convulsed with revolts.¹²⁰ These finally coalesced into the Xinhai Revolution of 1911, which forced the abdication of China's last (infant) emperor on 12 February 1912. The provisional constitution of the new Chinese Republic outlined its new representative institutions together with guarantees, *for Chinese citizens*, of equality before the law, religious freedom and 'the right of the security of their property and the freedom to trade'.¹²¹ Yet recognition of the new government was not forthcoming immediately – that is to say its self-interpellation was not, at first, accepted. On the contrary, with the exception of the US, the states of the self-styled 'Financial Consortium' composed of China's major debtors (Britain, France, Japan, Belgium and Russia – as represented by their major banks) agreed to coordinate their recognition policy until evidence of a 'regularly constituted parliamentary regime' was forthcoming; until China had made 'a formal guaranty [*sic.*] of treaty stipulations and rights of foreigners in China';¹²² and most importantly, until the new republic had agreed to the terms of a 'reorganization loan' to cover its astronomical public debt, incurred in the Boxer Protocol and as a result of the other 'unequal treaties'.¹²³ The conditions eventually attached to the £25 million loan agreement, concluded on 26 April 1913 after a painstaking series of negotiations, had two equally important purposes: to 'enable the Chinese Government to reorganise its administration on an effective modern

¹¹⁹ *Agreement between Germany, Austria-Hungary, Belgium, Spain, the United States, France, Great Britain, Italy, Japan, the Netherlands, Russia and China*, Peking, 7 Sep. 1901 [the 'Boxer Protocol'].

¹²⁰ issuing forth from groups including China Revival Society (Huaxinghui), the Restoration Society (Guangfuhui), the Independence Army – some of which came together to form the Revolutionary Alliance, a few years later to become the Nationalist Part (Guomindang). The identification of domestic with international legal subjectivity even in these chaotic years is evident from the fact that by 1911, regions making up more than half the territory of China had declared themselves independent states, including Jiujiang, Anhui, Fujian and Guandong – though their declarations were not recognised. D. C. Wright, *The History of China*, 2nd Ed., (2011), at 123.

¹²¹ *Provisional Constitution of the Republic of China*, 10 March 1912, Arts. 4-6, reprinted in 6 *American Journal of International Law* (1912), Supplement: Official Documents, at 149-154.

¹²² Cited in Cameron, 'American Recognition Policy toward the Republic of China, 1912-1913,' 2 *Pacific Historical Review* (1933), at 220.

¹²³ *Ibid.*, at 214-230.

basis, and pay off its large outstanding debts and build Chinese credit', and to 'protect the interests of American and European investors'.¹²⁴ Recognition duly followed in October 1913.

As China's experience indicates, it would seem arguable that it was the loan agreement, and not the Provision Constitution, that marked the turning-point for China's international personality — for, unlike the Provisional Constitution, the loan agreement amounted to a concrete undertaking *at the international legal level* complete with special protections both for the basic negative rights of Chinese citizens *and* for the property rights of foreigners. In signing it, China interpellated itself as a state possessed, like Romania in 1878, of precisely the 'low-intensity' version of 'responsible government' which, from an international legal perspective, is recognised as constituting a 'government' for the purposes of the 'standard of statehood' when applied to aspiring sovereigns.¹²⁵ The Chinese Republic may have descended into the chaos of the 'Warlord Era' immediately after — and indeed partly because of — the signature of the loan agreement, making a mockery of the practice, if not the principle, of 'responsible government' in China. Yet from this moment onwards, references to China indicate its possession of a more robust form of international personality than before. The most important indication of this can be found in the language of the 'Open Door' — initiated by the US in 1898 and taken up by the other powers after 1918.¹²⁶ The more agreements — like the 'Nine-Power Treaty' of 1922 — dedicated their signatories to 'the principle of equal opportunity for the commerce and industry of all nations throughout the territory of China', the more the 'original states', plus the newer sovereign equals, US and Japan,

¹²⁴ US Department of State Press Release, 19 Mar. 2012, annexed to Straight, 'China's Loan Negotiations,' 3 *Journal of Race Development* (1913), 369, at 411. Reform of China's currency and taxation systems, plus various projects of industrial development characterised the first set of conditions, while the latter was to be achieved by the appointment of foreign agents to 'assist' the work of administration and foreign auditors with executive powers 'to effective expenditure of the loan funds borrowed for the purposes specified'. See Straight, *op. cit.*, at 393-94.

¹²⁵ *Chinese Government per cent Reorganisation Gold Loan Agreement, between France (Banque d'Indo-Chine), Germany (Deutsch-Asiatische Bank), Great Britain (Hongking [sic.] & Shanghai Banking Corporation), Japan (Yokohama Specie Bank), Russia (Russo-Asiatic Bank) and China*, Peking, 16 April 1913 (with appendices), John Van Antwerp MacMurry, *Treaties and Agreements with and concerning China, 1894-1919* (New York etc., Oxford University Press, 1921), at 1007-1038.

¹²⁶ D. Acheson, *US Relations with China: a Century of American Policy* (1949), at 2.

proved willing to guarantee their 'respect [for] the sovereignty, the independence, and the territorial and administrative integrity of China'.¹²⁷

The commitments undertaken by China in the 'unequal treaties' and in the 1913 loan agreement were categorically broken by the Communist government upon its instalment following the Second World War, both in an ideological and in a legal sense. However, since China's international personality had been obtained gradually, on an explicitly conditional basis, it seems that this personality could be 'restored' in the 1970s *after its renewal of these commitments*. This was, after all, precisely the approach taken by the General Assembly in October 1971, when China's permanent seat on the Security Council was finally transferred from the Taiwan-based Republic of China to the Communist People's Republic of China (PRC) which had been in control of the majority of Chinese territory since the 1940s. That this transfer took place four months before the 'Shanghai Declaration' announced the intentions of the US and China to 'normalize' their relations on the basis of 'respect for the sovereignty and territorial integrity of all states' and to 'facilitate the progressive development of trade' between them on the understanding that 'economic relations based on equality and mutual benefit are in the interest of the peoples of the two countries' is, however, significant.¹²⁸ Indeed, the US only recognized the PRC in 1979, following closely in the heels of the initiation of

¹²⁷ *Treaty between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal*, Washington, 6 Feb. 1922, Art. 1. In the practice of the 'open door' the connection is no less clear. Again and again, the response from the treaty powers to any attempt by one state to press China for a permanent economic concession was articulated in identical terms. See, for example, the US response to Russia's attempt to extract concessions from the Chinese government in Manchuria in 1902: 'Any agreement by which China cedes to any corporation or company the exclusive right and privilege of opening mines, establishing railroads, or in any other way industrially developing Manchuria... constitutes a monopoly, which is a distinct breach of the stipulations of treaties concluded between China and foreign powers, and thereby seriously affects the rights of American citizens; it restricts their rightful trade and exposes it to being discriminated against...and strongly tends towards permanently impairing the sovereign rights of China in this part of the empire, and seriously interferes with her ability to meet her international obligations.' US circular to the treaty powers, 1 Feb. 1902, cited in Dean Acheson (ed.), *United States Relations with China with Special Reference to the Period 1944-1949* (Washington: US Department of State, 1949), at 3-4. As an illustration of this direct relationship between individual and international subjectivity, The granting of monopolies to any particular state, common practice in China in the late nineteenth century, was in the language of the Open Door understood to constitute 'a menace to Chinese territorial and administrative integrity'. Acheson, *op. cit.*, at 3.

¹²⁸ *United States-Peoples' Republic of China: Joint Communiqué*, 28 Feb. 1972 [the Shanghai Declaration], 11 I.L.M. (1972), 443.

China's 'Reform and Opening' policy of economic liberalization.¹²⁹ That the General Assembly characterized this transferral as a '*restoration of the lawful rights of the People's Republic of China*'¹³⁰ I suggest reflects the legal 'reality' that, for a period during the 1940s, China *does* seem finally to have attained the status of a 'sovereign equal' to which it was 'restored' in the 1970s. It was recognized as a Great Power in 1949 upon its entry into the Second World War, and was understood, by Quincy Wright, to have attained 'full jural equality' some six years previously, when the US and UK finally abrogated their treaty-based privileges of extraterritorial jurisdiction.¹³¹ We are led, in other words, towards an inescapable conclusion: China's international personality has, since the birth of the discipline of international law, waxed and waned according to its willingness and ability to interpellate itself as a 'civil state', dedicated to protecting, if not *all* the 'rights of man', then certainly those which appear to be most important from the point of view of statehood: namely the property rights of the citizens of *existing* 'civil states'.¹³² To put it another way, that China's economy has 'grown' by such an astonishing degree in the years since it renewed its commitment to such protections with its new foreign property rights¹³³ is not, I suggest, unconnected to the resilience with which its 'sovereignty' is regarded today, recent accusations of 'irresponsible' veto-use notwithstanding.¹³⁴

¹²⁹ See *Joint Communiqué on the Establishment of Diplomatic Relations between the United States of America and the People's Republic of China*, 1 Jan. 1979, 18 I.L.M. (1979), at 274.

¹³⁰ GA Res. 2758 (XXVI), 25 Oct. 1971.

¹³¹ 'Apart from a few remnants,' Wright declared, 'the independent states of the Orient are now legally equal to those of the Occident. Japan, Siam, Iraq, Turkey, Iran, Egypt and China have successively been emancipated from the [extraterritoriality] system', leaving only colonies, protectorates and mandates and 'a number of States in the Orient' still 'in a dependent position'. Wright, 'The End of Extraterritoriality in China,' 37 *American Journal of International Law* (1943), at 288-89.

¹³² The first move of the Chinese Government upon the initiation of the 'Reform and Opening Up' policy after 1978 was to set up 'special economic zones' open to foreign trade and investment in Guandong and Pujian. L. Brandt & T. G. Rawski, *China's Great Economic Transformation* (2008), at 11.

¹³³ China joined the WTO in 2011, and has concluded bilateral investment treaties with 128 countries. See UNCTAD BITs Database, at http://unctad.org/Sections/dite_pcbb/docs/bits_china.pdf [accessed 26 Sep. 2012].

¹³⁴ The refusal of Russia and China to back a similar resolution directed at the Syrian government has similarly been labelled 'irresponsible' – a 'moral stain' on the fabric of the United Nations by the French, and 'a travesty' by the Americans. 'Syria Crisis: Hillary Clinton calls UN Veto a "Travesty",' *BBC News*, 5 Feb. 2012, at <http://www.bbc.co.uk/news/world-middle-east-16896783> [accessed 27 Sep. 2012].

B. International Legal Reproduction in the League of Nations Era

It was one of the characteristics of the practice of international legal reproduction in the inter-war period, dominated as it was by the language of the Versailles Settlement and especially that of President Woodrow Wilson, that ‘responsible government’ was re-branded ‘self-government’, and linked closely with that most Wilsonian of principles: ‘national self-determination’.¹³⁵ Both principles followed from the Allies’ conviction that the First World War had been fought ‘against the Imperialists’¹³⁶ in order to ‘make the world safe for democracy’.¹³⁷ ‘National self-determination’ is often criticized on the grounds of partiality and Eurocentrism.¹³⁸ Yet such an analysis fails to take into account the specific social ideology of the post-1918 period, and its obsession with the perceived dichotomy between absolutism/imperialism (associated by the Allies with the Ottoman, Austro-Hungarian and in particular the German Empire, and hence understood as two sides of the same coin) and ‘self-government’, understood as meaning that ‘governments must be based on ‘the consent of the governed’.¹³⁹ Indeed, so strong was this conviction by those present at Versailles that an unprecedented rule was drafted into the Covenant at Article 1(2): only entities which were or which committed themselves to *become* ‘self-governing’ were permitted to become members of the League.¹⁴⁰ As implementation of the right of ‘national self-determination’, both in Eastern and Central Europe and elsewhere via the Mandate System, indicates, therefore, only *illiberal* imperialism would trigger a right of (national) self-determination. ‘Enlightened’ imperialism of the kind

¹³⁵ For discussions regarding the substance of the term ‘self-governing’ see e.g. Third Meeting of the Commission on the League of Nations, 4 Feb. 1919, in D. H. Miller, *The Drafting of the Covenant* (1928), Vol. I, at 165-66.

¹³⁶ *Address on the Fourteen Points for Peace*, Speech by US President Woodrow Wilson to Congress, 8 Jan. 1918.

¹³⁷ Third Meeting of the Commission on the League of Nations, 4 Feb. 1919, in Miller, *op. cit.*, at 165.

¹³⁸ For this orthodox view, held both in the mainstream and on the radical left, see e.g., respectively, A. Cassese, *Self-determination of Peoples*, *supra*, at 14-36; Bowring, ‘Positivism versus Self-determination: the Contradictions of Soviet International Law,’ in ed. S. Marks, *International Law on the Left: Re-examining Marxist Legacies* (2008), at 143.

¹³⁹ A. Cassese, *Self-determination of Peoples*, *supra*, at 19. My emphasis. See also T. D. Musgrave, *op. cit.*, at 22-23.

¹⁴⁰ *Covenant of the League of Nations*, 28 Jun. 1919, Art. 1(2). For a contemporary argument supporting the constitutive nature of admission into the League on the basis of these criteria, see e.g. Friedlander, ‘The Admission of New States to the League of Nations,’ 9 *British Yearbook of International Law* (1928), at 84-100.

practiced by the by-definition ‘self-governing’ Allies, by contrast, was compatible, if not ideally so, with ‘national self-determination’.

In its strongest form, then, the right of national-self-determination-as-self-government was realised in the form of the new ‘national states’ such as Poland, Czechoslovakia and what would become Yugoslavia, created to fill the post-imperial/post-absolutist European sovereignty-vacuum. The personalities of these states were constituted (and their entry into the League secured) by means of a series of virtually identical peace treaties entered into with the Allies at the end of the War.¹⁴¹ In these treaties — often known simply as the ‘minorities treaties’ though they were in fact much more than this — these aspiring sovereigns expressly self-identified as ‘states’ committed to guaranteeing basic individual rights to equality before the law, religious freedom and private property, in addition to the cultural rights of the ‘national minorities’.¹⁴² As the Permanent Court of International Justice indicated in its Advisory Opinion on the ‘Polish Minorities’, which as Nathaniel Berman points out stressed ‘the significance of the simultaneity of the genesis of Poland [as an international person] and of its obligations under the treaties’,¹⁴³ the form of international personality received by the new ‘national states’ was equal but different from that of the ‘original states’.¹⁴⁴

¹⁴¹ *Treaty of Peace between the United States of America, the British Empire, France, Italy and [sic.] Japan and Poland*, Versailles, 28 Jun. 1919, UKTS 008/1919: Cmd. 223; *Treaty between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State*, Saint Germain-en-Laye, 10 Sep. 1919, Arts. 2, 7, 13; *Treaty between the Principal Allied and Associated Powers and Czechoslovakia*, Saint Germain-en-Laye, 10 Sep. 1919, Arts. 2, 7, 17; *Treaty between the Principal Allied and Associated Powers and Greece*, Sèvres, 10 Aug. 1920, Artss. 2, 7, 17; *Treaty between the Principle Allied and Associated Powers and Roumania [sic.]*, Paris, 9 Dec. 1919, Arts. 2, 8, 13. See also re ‘enemy states’ e.g. *Treaty of Peace between the Principal Allied and Associated Powers and Hungary*, Trianon, 4 Jun. 1920, Arts. 55, 58.

¹⁴² Art. 15. This treaty, the *International Convention for the Abolition of Import and Export Prohibitions and Restrictions*, 8 Nov. 1927, was signed but never entered into force. See M. Fakhri, *The Making Of International Trade Law: Sugar, Development, And International Institutions* (forthcoming, 2014).

¹⁴³ Berman, ‘But the Alternative is Despair’: European Nationalism and the Modernist Renewal of International Law,’ *Harvard Law Review* 106 (1992-93), 1793, at 1838, discussing *Question Concerning the Acquisition of Polish Nationality*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 7 (Sept. 15), at 13-16.

¹⁴⁴ It might be objected that the international personality of Germany, an ‘original state’, was after the War treated as far more flexible than that of any of the new ‘national states’. The terms of the Treaty of Versailles imposed on Germany at the end of the First World War are legendary in their severity. The infamous ‘war guilt clause’ forced Germany to accept full responsibility for starting the war and for making impossible reparations (set in 1921 at 132 billion Reichsmarks or \$32 billion) to the victors. The German Empire was stripped of all of its overseas possessions and a huge amount of its European territory, including Alsace-Lorraine, Northern Schleswig and Posen; union with Austria was forbidden; the Saarland, Germany’s industrial centre, was placed under international control together with

However, where Berman points to the historical specificity of the Court's insistence that Polish sovereignty was subject to a 'new' international law, reinvigorated by means of its juxtaposition against the Modernist 'principle of nationalities', I make the unfortunately less elegant but more general argument that Poland's international legal subjectivity should be understood as an inter-war variant of a persistent international legal phenomenon: that of the kind of international legal reproduction of which unequally equal subjectivity is the product.

Germany's rivers, and Germany's military capacity was severely restricted. Yet it is notable that this downgrading of Germany's rights and upgrading of its duties was understood to be a *temporary* means to an end: namely the extraction of reparations and the restoration of 'self-government'. At the heart of the Allies' case lay Imperial Germany's alleged transgression of *the very principle of sovereign equality itself* – something that only an 'original' sovereign could contemplate. As the 'Coalition of the Willing' would do many years later in relation to Iraq, the Allies insisted that their argument was with the German government and not with the German people, and the German Delegation to Versailles was informed that '[i]t is only justice that restitution should be made and that those wronged peoples should be safeguarded *for a time* from the competition of a nation whose industries are intact'. 'We have no jealousy of German greatness,' Wilson declared. 'We wish her only to accept a place of equality among the peoples of the world – the new world in which we now live – instead of a place of mastery.' Treaty of Versailles, *supra*, Arts. 231, 42-114, 321-364, 159-210; Lamont, 'The Final Reparations Settlement,' 8 *Foreign Affairs* (1930), at 338; *Address on the Fourteen Points*, *supra*. This sentiment was echoed in the Allies' reply to the German Government's protestations regarding the many violations of *German* national self-determination in the peace settlement. See 'Reply of the Allied and Associated Powers to the Observations of the German Delegation on the Conditions of Peace,' 144 *International Conciliation* (1919), at 1341: 'For many years the rulers of Germany...strove for a position of dominance in Europe. They were not satisfied with that growing prosperity and influence to which Germany was entitled, and which all other nations were willing to accord her, in the society of free and equal peoples. They required that they should be able to dictate and tyrannise to a subservient Europe, as they dictated and tyrannised to a subservient Germany.'

⁷ Reply of the Allies, *supra*, at 1344-45. My emphasis. Even after the Second War Germany suffered only a minimal and temporary 'downgrading' of its international personality. Upon their assumption of 'supreme authority with respect to Germany', the four occupying Allied powers (Britain, France, the US and the USSR) were careful to make clear that they were not annexing Germany but rather constituting a new, 'quadripartite' government of Germany. Certainly, Germany was (temporarily) partitioned into two rival 'Germanies' – but, unlike the 'self-governing' Federal Republic of Germany (FRG), the German Democratic Republic (GDR) remained unrecognised until the early 1970s – primarily on the grounds of its lack of 'self-government'. As Britain, the US and France argued, in response to the GDR's application for UN membership in 1966, that the Government of the Federal Republic is the only German Government freely and legitimately constituted and therefore entitled to speak on behalf of the German people in international affairs. It is, furthermore, the only authority in Germany resulting from free elections. The great majority of the world community has refused recognition of the so-called German Democratic Republic... It cannot be eligible for membership in the United Nations, which, according to Article 4 of the Charter, is only open to States.' Quoted in Crawford, *The Creation of States*, *supra*, 456, n. 33. That East Germany was recognised at all, lacking as it was in 'self-government' may be seen as the exception that proves the rule: for arguably only the 'second half' of an 'original' Family of Nations member (and one originally fragmented at that) could have attained international personality without being excluded by a (temporary) failure to meet the 'self-governing' standard. Today, of course, Germany's claim to Great Power status is uncontested, as the people of Greece would be the first to testify.

At the other end of the scale, the ‘right to national self-determination-as-self-government’ could be realised — or, at least, was understood not to have been violated — as long as the community in question *was governed by a ‘self-governing’ state*. Most obviously, this principle was realised in the Mandate System set up by Article of the Covenant.¹⁴⁵ In the ‘Class A’ (Arab ex-Ottoman) mandates, territories which the Covenant considered ‘advanced’ enough that their ‘existence as independent nations’ could be ‘provisionally recognized’,¹⁴⁶ France and Britain set about drafting ‘organic laws’ in which, with the exception of Palestine, parliaments, executives and judiciaries were set up and basic rights to freedom of conscience, contract and trade were codified.¹⁴⁷ But custodians of ‘Class B’ mandates were no less bound to ‘guarantee freedom of conscience and religion’ and to ‘secure equal opportunities for the trade and commerce of other Members of the League’. For ‘C’ mandates, external administration could potentially be extended indefinitely;¹⁴⁸ yet the Mandatory, as a League member, was by definition ‘self-governing’ itself.¹⁴⁹ This highly restricted right of ‘national self-determination’ — barely distinguishable from colonialism itself — should, therefore be understood as identical to the right of ‘internal’ self-determination possessed today — as disaffected minorities from Ireland to Somaliland have long been arguing. It was also perfectly consistent with the right of ‘national self-determination’ being (partially) implemented in Central and Eastern Europe, *and* with the maintenance of the extensive empires of the (axiomatically ‘self-governing’) Allies. The practice of imperialism in the early twentieth century bears this conclusion out. Belgium, for example, was applying a ‘Belgian model of building Congolese government up from a strong local base, reproducing the slow evolution of Walloon and Flemish civil government’ from this moment until the 1950s.¹⁵⁰ Likewise, the first action of the US upon its victory in the ill-

¹⁴⁵ Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations,’ 34 *New York University Journal of International Law and Politics* (2002), 513, at 515.

¹⁴⁶ Covenant, Art. 22.

¹⁴⁷ See discussion of Iraq below.

¹⁴⁸ Covenant, Art. 22.

¹⁴⁹ Covenant, Art. 22.

¹⁵⁰ M. Shipway, *Decolonisation and its Impact: a Comparative Approach to the End of the Colonial Empires* (Maldon 2008).

fated Philippine War of Independence (1899-1902),¹⁵¹ was to read out loud the American Declaration of Independence to an audience in Manila — references to the ‘self-evident truth’ that ‘all men are created equal’ and that ‘Governments derive [their] just power from the consent of the governed’ included.¹⁵² It then proceeded to minimise Philippine tariffs and amend the land laws to allow foreign purchase.¹⁵³ In India, as elsewhere in the British Empire, institutions of partial self-government were a central aspect of the United Kingdom’s preference for ‘informal empire’, formalized between the two World Wars in the ‘Government of India Acts’ of 1919 and 1935.¹⁵⁴ Famously, while they did establish first a ‘diarchy’ and then a federal legislature, these acts contained no bill of rights. They did, however, guarantee ‘national treatment’ for British companies and individuals.¹⁵⁵

This ‘softening’ of colonialism after the First World War is usually understood as a reluctant and half-baked response on the part of the colonial powers to head-off increasingly powerful and widespread demands for independence on the part of the ‘natives’. While this is undoubtedly part of the story, it neglects what I suggest was the crucial function of ‘informal empire’ — that of ensuring that opposition would be channelled towards a certain legal and institutional *form* of ‘independence’ — namely that associated with ‘peripheral personality’. The provision of an institutional apparatus which gave *limited* protection to ‘native’ rights and facilitated *limited* self-government ensured that the most politically effective demands of decolonization would be for *full* individual and international subjectivity — and not for any alternative mode of political, economic, legal or ideological self-organization. That is to say, as in China, deficient subjectivity interpellated itself as full subjectivity. In India, for example, the institutions of partial ‘self-government’ were so entrenched by 1947¹⁵⁶ that alternative modes of

¹⁵¹ The Philippines were ceded to the USA by Spain in return for \$20 million in 1898. *Treaty of Peace between the United States and Spain*, Paris, 10 Dec. 1898, Art. 3.

¹⁵² McHale, ‘American Colonial Policy towards the Philippines,’ 3 *Journal of Southeast Asian History* (1962), at 38.

¹⁵³ Carter, ‘A Plea for the Filipinos,’ *The North American Review* (1907), at 388.

¹⁵⁴ *Government of India Act: An Act to make further provision with respect to the Government of India*, 9 & 10 Geo. 5 c. 101, 23 Dec. 1919, Preamble and *Government of India Act*, 26 Geo. 5 & 1 Edw. 8 c. 2, Aug. 1935, Part V, Ch. 3 (‘Provisions with Respect to Discrimination’).

¹⁵⁵ 1935 Act, Sec. 112.

¹⁵⁶ For example, the Indian Independence Act, which created of the colony of India two new dominions — India and Pakistan — provided that the 1935 Act would stay in place even after the pseudo-

Indian self-organization — notably Ghandi's conception of *swaraj* — were sidelined,¹⁵⁷ and protest channelled into demands which were realisable within the existing legal framework, both domestic and international. And as the image of '*la République une et indivisible*' might lead one to expect, a similar pattern can be seen in the French Empire, in spite of the latter's hostility to the idea of 'self-government' for any of its colonies. Certain of these — most famously a large section of Algeria — were administered as integral parts of the French state, with full citizenship, not to mention independence, denied to the bitter end of one of decolonization's most brutal wars. Yet I suggest that the very fact and implementation of the infamous *Code de l'indigénat* helped to ensure that much of the resistance to French rule would be articulated in terms of closing the gap in legal subjectivity between indigenous individuals and *colons* on the one hand, and between 'France' and 'Algeria' on the other.

C. International Legal Reproduction in the United Nations Era

There is, of course, no explicit requirement in the UN Charter that states should be 'self-governing', even if all state signatories have committed themselves to 'promoting and encouraging respect for human rights and for fundamental freedoms for all'.¹⁵⁸ Yet the language of the Trusteeship System set up to take over from the Mandates System indicates that the type of 'self-government' initially envisaged by the UN for former colonies was continuous with that of its predecessor.

The 'basic objectives' of the Trusteeship System were:

to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government *or* independence as may be appropriate to the particular

independence envisaged by dominion status. *An Act to make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those Dominions, and to provide for other matters consequential on or connected with the setting up of those Dominions*, 10 & 11 Geo 6 c. 30, of 1947, 18 July 1947, Section 8, para. 2.

¹⁵⁷ See M. K. Ghandi, *Hind Swaraj and Other Writings* (1997).

¹⁵⁸ Art. 1(3); 4(1).

circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned.¹⁵⁹

Not only did ‘peoples’ continue to be ranked in terms of their level of ‘political, economic, social, and educational advancement’ (alternatively described as the development of their ‘free political institutions’); ‘self-government’ and ‘independence’ were in the Charter, as in the practice of the League, understood not as consistent with one another, but as *alternatives to* one another — as two options presented to colonized peoples as the entire range of options ‘freely’ available. Given the institutions of ‘partial self-government’ already set up in many of the colonies, the special, stripped-down characteristics of the term ‘self-government’ when applied to aspiring states is clear. On the one hand, Trustees were required to ‘encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world’.¹⁶⁰ On the other hand, however, they pledged ‘to ensure equal treatment in social, economic, and commercial matters for all Members of the United Nations and their nationals, and also equal treatment for the latter in the administration of justice’.¹⁶¹ That is to say, MFN and ‘national treatment’ were written into the putative trusteeship contracts, no less than under the Mandate System, and no less than under the ‘unequal treaties’ (or capitulations in the case of the Ottoman Empire¹⁶²). Events, as we know, overtook the UN’s gradualist approach when the General Assembly launched a full-frontal attack on the concept of ‘progressive development’.¹⁶³ The results of the practice of decolonization through which the right of peoples to self-determination emerged were mixed. In almost every case, decolonization was accompanied by a public rejection of the narrative of ‘tutelage’ and of the superiority of the culture of the metropole.¹⁶⁴ At the *institutional*

¹⁵⁹ UN Charter, Art. 73(b), emphasis added.

¹⁶⁰ *Ibid*, emphasis added.

¹⁶¹ *Ibid*.

¹⁶² See e.g. Ahmad, ‘Ottoman Perceptions of the Capitulations, 1800-1914,’ 11 *Journal of Islamic Studies* (2000), at 1-20.

¹⁶³ GA Res. 1514, *supra*, at para. 3.

¹⁶⁴ In the case of Ghana, for example, ‘Independence Day was viewed by a good many Africans as a redeeming event, bringing with it multiple freedoms. In this sense, it was a celebration not only for Ghana but also of Africa’s traditions and accomplishments. On prominent display were symbols of chieftaincy, royal drums and dance, the drama of various cultures. The occasion also marked the beginning of a

level, however, it is remarkable that such a rejection generally speaking did not take place. On the contrary, the post-colonial states by and large interpellated themselves as 'sovereign states' and opted to complete and invest meaning into the institutions of the 'rule of law' which were, in many cases, already superficially in place. Yet at the height of the Cold War, an alternative ideology *was* on offer, at least in principle, and before long, many of the new states — no less impoverished after 'independence' than they had been as colonies — turned either to Communism or dictatorship or both. In doing so, they reneged on the primary duty associated with peripheral personality: that of reproducing 'free' and 'equal' individual legal subjects, and hence of defending and expanding capitalist relations of production.¹⁶⁵ They had, in effect, violated the commitment they had made as a condition of their recognition and constitution as international ('peripheral') 'people' — leaving the 'international community' of 'sovereign equals' with a right, if not also a 'responsibility', to intervene.

D. International Legal Reproduction in the Post-Cold War Era

The ideal of the 'civil' state, characterized by 'responsible government' and the 'rule of law', received an enormous boost throughout the 1980s and 1990s thanks to the delegitimation of the only powerful ideological alternative to capitalism, itself stemming from the results of oil-shock-induced 'stagflation' and later the collapse of Communism.¹⁶⁶ The social consequences of some of the policies, particularly in the field of economic institutions and property rights, which derived from this legitimacy boost — from 'structural adjustment' throughout Latin American, Sub-Saharan Africa, the West and South Asia to 'shock therapy' in Eastern Europe — have been enormous, however.¹⁶⁷ The announcement of the 'end of history' permitted the IMF and World Bank, too, to

process of restoring a long-observed pantheon of figures, including, among others, Toussaint Louverture, Marcus Garvey, W. E. B. Du Bois, T. Ras Mckonnen [sic.], George Padmore, and others.' Apter, 'Ghana's Independence: Triumph and Paradox,' 98 *Transitions* (2008), 6, at 9.

¹⁶⁵ Indeed, in Ghana, as elsewhere, as David Apter points out, 'one of the reasons that Britain granted self-government was a general fear that delays might promote radicalisation' — in the form of a 'Union of West African Soviet Socialist Republics' for which Nkrumah was aiming. *Ibid.*, at 7.

¹⁶⁶ As Roth puts it, 'liberal democratic values, even if not achieving unquestioned international acceptance, no longer faced a competing set of values pretending to universal applicability.' Roth, *op. cit.*, at 140.

¹⁶⁷ See e.g. P. Gowan, *The Global Gamble* (1999), at 187-247.

'soften' their rhetoric, replacing the language of 'liberalization' with that of 'liberty'.¹⁶⁸ Yet the new 'governance' and 'rule of law' reforms attached to loans associated with the 'Comprehensive Development Programme' appear no less designed to create 'an effective property rights system [to support] economic growth and wealth creation by rewarding effort and good economic judgement by actors in the market' than their predecessors.¹⁶⁹ And as the attacks of 11 September 2001 indicate only too clearly, the legitimacy boost for this 'governance/'rule of law' ideal, if not for that of statehood itself, has hardly been universal. In response, with the launching of the 'War on Terror', alternatives to this ideal — in particular the alternative posed by Sharia, in some of its manifestations — have increasingly become associated in the rhetoric of the 'original states' with irrationality, primitivism and, at the extreme, indiscriminate mass violence.¹⁷⁰

With the game unchanged, but the stakes as high as ever, the interpellative and coercive aspects of international legal reproduction have become impossible to miss, even if the *opinio juris* associated with international legal reproduction continues to insist on the 'objective' character of statehood. In the wake of the collapse of the Soviet Union and Yugoslavia, for example, the states of the European Community (EC) returned to an expressly constitutive model of recognition, affirming 'their readiness to recognise, subject to normal standards of international practice ... those new States' which had 'accepted the appropriate international obligations ... especially with regard to the 'rule of law', democracy and human rights'.¹⁷¹ Antonio Cassese interpreted this as indicating that 'over the years, the *factual* conditions of many States required for

¹⁶⁸ Santos, 'The World Bank's Uses of the "rule of law" Promise in Economic Development,' in D. M. Trubek & A. Santos, eds., *The New Law and Economic Development: a Critical Appraisal* (2006), at 268. See Shihata, 'Preface: Good Governance and the Role of Law in Economic Development,' in A. Seidman et al., *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (1999) and I. Shihata., *The World Bank in a Changing World* (2005).

¹⁶⁹ Salacuse, *op. cit.*, at 887.

¹⁷⁰ See e.g. President George W. Bush, *State of the Union Address*, 23 Jan. 2007, http://www.cbsnews.com/2100-250_162-2391957.html?pageNum=5&tag=contentMain;contentBody [accessed 24 Sep. 2012].

¹⁷¹ *Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union'*, 16 Dec. 1991, *BYBIL* 61 (1991), 559. See also *EC Declaration on Yugoslavia*, 16 Dec. 1991, 62 *BYBIL* (1991) 559.

recognition have changed'.¹⁷² This denial of the normative and constitutive character of the EC's criteria echoed that of the Badinter Arbitration Commission on Yugoslavia, which insisted that recognition remained 'purely declaratory' in its impact.¹⁷³ This gap between practice and *opinio juris* has been borne out by the experience of Bosnia Herzegovina, to take one example of several. Bosnia-Herzegovina was recognized by the EC on 7 April 1992 and entered the UN on 22 May of that year,¹⁷⁴ well before *any* of the four criteria had conceivably been met.¹⁷⁵ Yet if the argument laid out here is accepted, there is little unusual in this. The implementation of the conditions in question was delayed by the continuing civil war, but at its close Bosnia-Herzegovina's commitment to the creation of a 'government' worthy of statehood was secured at the level of international law in the Dayton Peace Accords of 1995. Bosnia-Herzegovina was required to adopt a new constitution in which it self-identified as a state based on respect for 'human dignity, liberty and equality', possessed of 'democratic governmental institutions' and committed to 'promot[ing] the general welfare and economic growth through the protection of private property and the promotion of a market economy'.¹⁷⁶ Bosnia-Herzegovina's international personality was also limited, as in the case of inter-war Poland, at the moment of its constitution by its division into two quasi-independent ethno-territorial units,¹⁷⁷ and by the establishment of an Office of the High Representative (OHR),¹⁷⁸ possessed of powers including that of overturning parliamentary decisions, and tasked with overseeing the practice of government in Bosnia-Herzegovina until it is deemed 'able to take full responsibility for its own affairs'.¹⁷⁹ The OHR's mandate has been extended again and again, to the fury, in

¹⁷² A. Cassese, *International Law*, 2nd Ed. (2005), at 75. My emphasis. See also Warbrick, 'States and Recognition in International Law,' in M. D. Evans, ed., *International Law*, 2nd Ed. (2006), at 265.

¹⁷³ *Opinion No. 1*, Badinter Commission, 29 Nov. 1991, 92 ILR 162, para. 1(a).

¹⁷⁴ See SC Res. 46/237 (1992).

¹⁷⁵ See Rich, 'Recognition of States: the Collapse of Yugoslavia and the Soviet Union,' 4 *EJIL* (1993), 39, at 49-51 and R. Wilde, *International Territorial Administration: How the Civilising Mission Never Went Away* (2008), 138-41 and 226-28.

¹⁷⁶ Preamble, *Constitution of Bosnia and Herzegovina*, 14 Dec. 1995, Annex 4 to *General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14 Dec. 1995, available at http://www.ohr.int/dpa/default.asp?content_id=372 [accessed 24 Sep. 2012].

¹⁷⁷ *Ibid.*, Annex 2.

¹⁷⁸ *General Framework Agreement for Peace in Bosnia and Herzegovina*, Paris, 14 Dec. 1995, available at <http://www.state.gov/www/regions/eur/bosnia/bosagree.html> ['Dayton Accords'].

¹⁷⁹ See 'OHR Introduction,' Available at http://www.ohr.int/ohr-info/gen-info/default.asp?content_id=38519 [accessed 28 Aug. 2010].

particular, of the separatist Republika Srpska region,¹⁸⁰ which has described Bosnia-Herzegovina as ‘a virtual, pointless country, only sustained by the international community’.¹⁸¹

Once again, the form of ‘government’ envisaged for a new international legal subject appears to be a far more limited, more stripped-down affair than that of the ‘Absolute Subjects’ in whose image it has interpellated itself. The ‘low-intensity’ form of ‘responsible government’ and the ‘rule of law’ apparent here, as in Romania, China, Poland, India, Algeria and elsewhere, appears to have been designed to ensure that a particular vision of ‘the good life’ would be internalized — the same vision which, in the American Declaration of Independence, equates the accumulation of private property with ‘the pursuit of happiness’. Indeed, so many new and/or aspiring sovereigns are today being ‘born’ in this manner that this phenomenon has been transformed into a free-standing ‘conflict-resolution approach’ going by the name of ‘earned sovereignty’.¹⁸² In Kosovo, for instance, following ten years of UN and NATO-led ‘statebuilding’, the UN Special Envoy for the Kosovo Status Settlement, Martti Ahtisaari, proposed ‘supervised independence’ for Kosovo: in return for ‘independence’, Kosovo was asked to commit itself to becoming ‘a multi-ethnic society, which shall govern itself democratically and with full respect for the ‘rule of law’’, to creating ‘an open market with free competition’ and to remaining under the “supervision” of the ‘international community’.¹⁸³ The ‘Ahtisaari Plan’ of March 2007 did indeed feature prominently in Kosovo’s declaration of independence the following year,¹⁸⁴ and in the decision of many Western European

¹⁸⁰ Lowen, ‘Bosnia Nears Political Crisis,’ *BBC News*, 23 Feb. 2010, available at <http://news.bbc.co.uk/1/hi/world/europe/8530236.stm> [accessed 29 Aug. 2010].

¹⁸¹ *Ibid.*

¹⁸² ‘Earned sovereignty’ is defined as ‘the conditional and progressive devolution of sovereign powers and authority from a state to a substate entity under international supervision’. Paul R. Williams & Francesca Jannotti Pecci, ‘Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination,’ *DJILP* 40 (2004), 350. For a critical perspective, see Drew, ‘The Meaning of Self-Determination’, *supra*.

¹⁸³ *Comprehensive Proposal for the Kosovo Status Settlement*, Report of the Special Envoy of the Secretary-General on Kosovo’s future Status, annexed to ‘Letter from the Secretary-General addressed to the President of the Security Council,’ 26 Mar. 2007, S/2007/168 [‘Ahtisaari Plan’], Art. 1, ‘General Principles’, paras. 1.1-1.4, 1.11.

¹⁸⁴ *Declaration of Independence of Kosovo*, 17 Feb. 2008, available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm> [last accessed 19 Mar. 2012].

and North American states to recognize Kosovo's independence.¹⁸⁵ Interestingly, the Ahtisaari Plan was torpedoed by three states which have all been on the receiving end of 'peripheral personality': China, Serbia and post-Communist Russia, the latter threatening to veto the necessary Security Council resolution.¹⁸⁶ In Palestine, the ('now wildly off-course'¹⁸⁷) 'Roadmap to Peace' — a peace-plan presented to the leaders of the Occupied Palestine Territories and Israel by the 'Quartet' (the UN, EU, US and Russia) in April 2003 — presented itself explicitly as 'a performance-based and goal-driven' plan aimed at achieving 'progress through reciprocal steps by the two parties in the political, security, economic, humanitarian, and institution-building fields'.¹⁸⁸ With Palestine now controlled by two rival 'governments', one of which is considered a 'terrorist organisation' by the EU, US and Israel, among others,¹⁸⁹ it is perhaps no wonder that the application of the 'State of Palestine' for admission into the UN in September 2011 — an act of interpellation *par excellence* — went unrecognized, and this *in spite of* an unambiguous Palestinian right to 'external' self-determination.¹⁹⁰ Evidently, then, in the post-Cold War period, the 'international community' — *still* represented, as the make-up of the Quartet indicates, primarily by 'original states'¹⁹¹ — continues to constitute, and to

¹⁸⁵ For example, then-US Secretary of State Condoleezza Rice explained the US decision on the grounds that Kosovo had agreed 'to implement the Ahtisaari Plan, to embrace multi-ethnicity as a fundamental principle of good governance, and to welcome a period of international supervision'. 'US Recognises Kosovo as Independent State.' Statement by Secretary of State, Condoleezza Rice, 18 Feb. 2008, Available at <http://www.egovmonitor.com/node/17239/print> [accessed 9 Sep. 2010]. See also 'Political Developments in Kosovo.' Written Ministerial Statement by the Secretary of State for Foreign and Commonwealth Affairs, Mr. David Miliband, 28 Feb. 2008, Available at uknato.fco.gov.uk/resources/en/word/miliband-statement-180208 [accessed 9 Sep. 2010], and Martti Ahtisaari, 'Report of the Special Envoy of the Secretary-General on Kosovo's Future Status', UN Security Council, S/2007/168, 26 Mar. 2007, para. 4.

¹⁸⁶ 'Russia Rejects New Kosovo Draft,' *BBC News*, 1 Jun. 2007, <http://news.bbc.co.uk/2/hi/europe/6710529.stm>; 'China Expresses Concerns over Kosovo,' *China Daily*, 19 Feb. 2008, at http://www.chinadaily.com.cn/china/2008-02/19/content_6464411.htm [accessed 28 Sep. 2012].

¹⁸⁷ Drew, 'The Meaning of Self-Determination,' *supra*, at 97.

¹⁸⁸ *A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict*, April 30, 2003, Preamble.

¹⁸⁹ 'Profile: Hamas Palestinian Movement,' *BBC News*, available at <http://www.bbc.co.uk/news/world-middle-east-13331522> [accessed 26 Sep. 2012].

¹⁹⁰ M. Abbas to Ban Ki-Moon, *Application of the State of Palestine for Membership in the United Nations*, 23 Sep. 2011, available at http://www.scribd.com/fullscreen/66184173?access_key=key-vyucbouczscvin89t8 [accessed 24 Sep. 2012].

¹⁹¹ The Task Force is composed of representatives of the World Bank and the IMF, along with those of the Quartet, Norway and Japan. Statement of the Task Force on Palestinian Reform, 23 Aug. 2002, available at http://www.europa-eu-un.org/articles/en/article_1581_en.htm [accessed 10 Mar. 2012].

require the self-constitution, of new international legal subjects in an explicitly conditional manner, in exchange for ‘reforms’ designed to guarantee the reproduction of individual legal subjectivity, and to deny international legal subjectivity to entities which cannot meet such requirements.

Part Four: Disciplining the Family

The discussion of peripheral personality so far has focused primarily on the way in which ‘sovereign equality’ facilitates the implantation of capitalist relations of production into aspiring sovereigns. However, it is also clear that ‘peripheral’ rights and duties are flexible enough to allow the ‘international community’ to police this implantation. And indeed, virtually *all* non-‘original’ states, from Argentina to Zimbabwe, have been subject to highly invasive, internationally sanctioned disciplinary programmes when found to have strayed from the path of their constitutive commitment. ‘Structural adjustment policies’ (SAPs), today known as ‘Poverty Reduction Strategy Papers’, imposed on ‘developing’ countries which are failing or have failed to maintain an open free market economy are perhaps the most obvious of these.

SAPs are usually treated as an international *economic* law issue, and therefore unrelated to the question of international personality. This appears to be a function of the conceptual separation between the two disciplines, of the supposedly apolitical character of the conditions imposed by institutions like the IMF, World Bank and donor nations (usually ‘original states’, sometimes grouped together, for example in the ‘Paris Club’¹⁹²) and, most importantly, of the sovereign *consent* given in each case.¹⁹³ The consent of Greece, for example — whose post-Ottoman international personality was

¹⁹² The permanent members of the ‘Paris Club’ are Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Ireland, Italy, Japan, the Netherlands, Norway, Russia, Spain Sweden, Switzerland, the UK and the US — all of them ‘original states’ except Japan -- as always, virtually the only ‘peripheral person’ to have made the transition to ‘sovereign equality’. See <http://www.clubdeparis.org/sections/composition/membres-permanents-et/membres-permanents> [accessed 29 Sep. 2012].

¹⁹³ As Judge Anzilotti insisted in his famous dictum, as long as ‘restrictions’ entered into by a state ‘do not place the State under the legal authority of another State, the former remains an independent State however extensive and burdensome those obligations might be’. Separate Opinion of Judge Anzilotti, *supra*.

constituted in two treaties, of 1830 and 1863¹⁹⁴ — was manifestly ‘given’ to the ‘austerity package’ imposed on it 2011 and 2012 by the IMF and a collection of ‘Eurozone’ donors, ongoing mass demonstrations against it notwithstanding.¹⁹⁵ Yet it is only logical that the consent of peripheral persons, as an aspect of their conditionally-obtained rights and duties, should function differently from that of sovereign equals. As with China’s consent to the ‘unequal treaties’, it is hybrid: it embodies at once an equality capable of bestowing validity, and an *inequality* capable of insuring that this validity will remain flexible, based, as it is, on a conditional foundation. It would seem to be the case that the intervention momentarily held in check, rhetorically at least, by the emergence of the right of self-determination has simply returned to its former place, at the forefront of international legal practice, in post-Cold War era. Moreover, it would seem that, far from ‘softening’ the conditionality used to discipline delinquent states, the new interest of the international financial institutions and unilateral donors in ‘good governance’ has in fact had the effect of legitimating one of the major paradoxes of the ‘free’ market: as Ben Fine puts it, the ‘creeping, even galloping, extent of intervention within the economic area to impose *laissez-faire* policies’ — while simultaneously extending the scope ‘for discretionary intervention under the guise of good governance and the imperative to moderate both market and non-market imperfections, and wrap[ping] it up in terms of local ownership’.¹⁹⁶ Yet in the post-2001 era, as we have seen, even the use of force is no longer off limits when it comes to enforcing the ‘responsibilities’ of

¹⁹⁴ *Protocol of Conference between Great Britain, France and Russia, relative to the Independence of Greece*, London, 3 Feb. 1830; *Treaty between Great Britain, France, and Russia, on the one part, and Denmark, on the other Part, Relative to the Accession of Prince William of Denmark to the Throne of Greece*, London, 13 Jul. 1863, Arts. I-III.

¹⁹⁵ For instance, the Greek parliament voted in favour of two bail-out loans in 2010 and 2012. Yet Greece’s government was in both cases composed of a coalition of parties voted in, in 2009, before the austerity packages were negotiated, and headed by an appointed, as opposed to an elected President. The compulsory character of Greece’s ‘consent’ was also underscored by the international outcry which met and immediately killed off the ‘irresponsible’ proposal of a referendum on the bail-out deal by Prime Minister George Papandreou, and by the immediate expulsion of those MPs from the two main parties which failed to vote in favour of the second package. Leaders relieved referendum dropped, awaiting next steps, *Kathimerini*, 5 Nov. 2011, available at http://www.ekathimerini.com/4dcgi/_w_articles_wsitel_1_05/11/2011_413386 [accessed 22 Feb. 2012] Traynor & Smith, ‘Greece approves austerity cuts to secure eurozone bailout and avoid debt default,’ *Guardian*, 13 Feb. 2012.

¹⁹⁶ Fine, ‘Introduction’, in B. Fine et al., *Development Policy in the Twenty-First Century: Beyond the Post-Washington Consensus* (2001), at 14-15. See also Rittich, ‘The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social,’ in D. Trubek & A. Santos, *supra*, 225, at 228 and 251.

peripheral persons. Here again, one case study – that of Iraq – will be used to illustrate the nature of contemporary connection between personality and intervention.

In a manner which would appear deeply paradoxical in the absence of the concept of ‘peripheral personality’, Iraq was first recognized as an international person soon after its categorisation as a ‘Class A’ British mandate under the League of Nations.¹⁹⁷ Article 2 of Iraq’s British-drafted Organic Law of 1924 declared Iraq to be ‘a sovereign State, free and independent’ with its government ‘a hereditary monarchy and its form representative’.¹⁹⁸ The Organic Law had been passed by a ‘Constituent Assembly’ established after the conclusion of a treaty between the British-installed King Faisal, which stipulated that it should ‘contain nothing contrary to its provisions’.¹⁹⁹ These provisions included not only commitments to equality before the law and freedom of conscience,²⁰⁰ but also measures to ‘safeguard the interest of foreigners’ in the wake of the annulment of the Ottoman regime of capitulations,²⁰¹ and non-discrimination between Iraqi citizens and those of all other members of the League ‘in matters concerning taxation, commerce or navigation’²⁰² – in other words ‘national treatment’ and inter-League MFN. The treaty also committed Iraq to British guidance ‘on all important matters affecting ... international and financial and fiscal policy’.²⁰³ The military dominance of Britain in Iraq, giving it the power to protect its by-then extremely substantial oil investments, was secured two years prior to Iraq’s ‘independence’ and entry into the League by a new treaty of 1930.²⁰⁴ It would seem, in other words, that the initially ‘mandatory’ relationship between Britain and Iraq was

¹⁹⁷ No Mandate Agreement was in fact ever concluded with Iraq; yet it was treated as a ‘Class A’ Mandated Territory by the Permanent Mandates Commission. See e.g. Stavros T. Stavridis, ‘Britain, Iraq and the Assyrians: the Nine Demands,’ *Assyrian International News Agency*, n.d. available at <http://www.aina.org/articles/biata.pdf> [accessed 26 Sep. 2012].

¹⁹⁸ *Text of the Organic Law of Iraq*, 10 July 1924, annexed to *Letter from the British Government to the Secretary-General of the League*, 5 Aug. 1924, in *League of Nations Official Journal* (Nov. 1924), 1759.

¹⁹⁹ *Treaty of Alliance between Great Britain and Irak* [sic.], Baghdad, 10 Oct. 1922, Art. III.

²⁰⁰ *Treaty of Alliance*, Art. III.

²⁰¹ *Treaty of Alliance*, Art. IX.

²⁰² *Treaty of Alliance*, Art. XI.

²⁰³ *Treaty of Alliance*, Art. IV.

²⁰⁴ *Treaty of Alliance between His Majesty in respect of the United Kingdom and His Majesty the King of Iraq*, Baghdad, 30 Jun. 1930.

transformed into a 'protective' relationship following the achievement by the latter of an adequate measure of 'self-government'.

From 1969 onwards Iraq's Ba'ath Party set about renegeing on these commitments, leading to the well-known series of military interventions into Iraq which culminated in the invasion of 2003. In the run-up to the invasion, arguments concerning Iraq's weapons capabilities²⁰⁵ went hand-in-hand with arguments which emphasized the many violations the 'rule of law' and in particular of human rights under Saddam Hussein's regime. For example, then-Prime Minister Tony Blair, addressing the British nation on the eve of war, declared that 'brutal states like Iraq ... hate our way of life, our freedom, our democracy'.²⁰⁶ Less prominent was any sense of indignation at the violations of individual *property* rights by the Ba'ath regime — the nationalization of a gigantic British-owned multinational, the Iraq Petroleum Company, in 1972, for instance.²⁰⁷ However, as soon as the invasion itself was over, it became clear that these latter violations were the ones of most concern to the US and UK-run Coalition Provisional Authority (CPA) which undertook to 'reconstruct' Iraq.²⁰⁸ Notwithstanding the unlawfulness of the use of force against Iraq, the UN Security Council in Resolution 1483 and other resolutions²⁰⁹ gave its sanction to this project of 'reconstruction'. With the blessing of the 'international community', then, and Article 43 of the 1907 Hague Convention notwithstanding,²¹⁰ a wave of CPA legislation effectively annulled Iraq's Saddam Hussein-era constitution and much of its Company Law.²¹¹ In place of a constitutionally pan-Arabist, centrally planned dictatorship, explicitly anti-market and

²⁰⁵ SC Res. 687 (1991).

²⁰⁶ Tony Blair, UK Prime Minister, *Address to the Nation* (Mar. 20, 2003), available at http://news.bbc.co.uk/2/hi/uk_news/politics/2870581.stm [accessed 25 Mar. 2012].

²⁰⁷ See e.g. Silverfarb, 'The Revision of Iraq's Oil Concession, 1949-52,' *Middle Eastern Studies* 32 (1996), 69-95.

²⁰⁸ See M. Likosky, *Law, Infrastructure and Human Rights* (2006), at 69-88; Gathii, 'Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law,' 5 *Buffalo Human Rights Law Review* (1999), 107-174.

²⁰⁹ SC Res. 1483 (2003).

²¹⁰ 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.' *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 18 Oct. 1907 ['Hague Regulations'], Art. 43.

²¹¹ See in particular Order 39: Foreign Investment, CPA/ORD/19 September 2003/39; Order 24: Trade Liberalization Policy, CPA/ORD/24 February 2004/54 and Order 40: Bank Law, CPA/ORD/19 September 2003/40.

discriminatory, the ‘Bremner Laws’ built the foundations for a parliamentary democracy underpinned by ‘an almost utopian form of market economy’.²¹² One hundred percent foreign ownership of non-oil Iraqi firms, equal treatment of foreign investors, full profit repatriation and renewable 40-year leases for foreigners on Iraqi property were among the measures given legal protection; all previous trade restrictions were abolished. Secretary-General Annan articulated the objectives of the ‘reconstruction’ — objectives as to which the Iraqi public was not consulted, multi-party elections not having been held until January 2005 — as being the establishment of ‘a market-orientated environment that promotes integration with the global marketplace ... through the establishment of a dynamic private sector’.²¹³ However, if the ‘peripheral personality’ argument is accepted, such a consultation was, strictly speaking, unnecessary. Iraq had *already* been successfully interpellated as a state as long ago as 1924. It had *already* committed itself to precisely this form of domestic order. Its ‘re-construction’ along those lines therefore set no disciplinary alarm bells ringing: as Security Council resolution after Security Council resolution insisted, Iraq’s ‘independence, sovereignty, unity and territorial integrity’ were never in doubt.²¹⁴ And indeed, as sectarian violence continues to escalate in the wake of the departure of the last troops in 2010, it is clear that the only sense in which the ‘rule of law’ can be understood to have been established in Iraq is the ‘Hayekian’ that sense I have stressed: that which guarantees property rights, in particular the rights of foreigners, while giving formal protection only to such basic civil rights, primarily equality before the law and religious freedom (on paper if not in practice) as are required to secure the interpellation of individual subjects as ‘free’, ‘equal’ and therefore invested in the social structure.²¹⁵ Human lives may be at

²¹² Gathii, *op. cit.*, at 526.

²¹³ Kofi Annan, Report of the Secretary-General Pursuant to Paragraph 24 of Security Council Resolution 1483 (2003), S/2003/715, 90 (July 17, 2003).

²¹⁴ See e.g. Preambles to *Security Council Resolutions 1723* (2003); *1546* (2004); *1557* (2004); *1637* (2005) and *1619* (2005).

²¹⁵ According to the US Department of state, in 2010 alone ‘private sources estimate over USD 40 billion in new investments were announced, including private investment in some major infrastructure and housing construction projects’, *2010 Investment Climate Statement: Iraq*, at <http://www.state.gov/e/eb/rls/othr/ics/2011/157295.htm> [accessed 22 Sep. 2012]. Post-invasion Iraq has already signed a Bilateral Investment Treaty with Germany (UNCTAD, Investment Instruments Online, at http://unctad.org/Sections/dite_pcbb/docs/bits_iraq.pdf). For details of the progress of Iraq’s accession to the WTO, see WTO Accessions: Iraq, at http://www.wto.org/english/thewto_e/acc_e/a1_iraq_e.htm) and negotiations are underway for others.

desperate risk, but what has been ‘secured’ by the reconstruction is a constitutional commitment, on the part of the Iraqi state, adopted after a nationwide referendum on 15 October 2005, to ‘guarantee the reform of the Iraqi economy in accordance with modern economic principles to insure the full investment of its resources, diversification of its sources, and the encouragement and development of the private sector’.²¹⁶

Conclusion

This history has necessarily been a partial one. Much has been left out, and much work remains to be done.²¹⁷ Nonetheless, the pattern of international legal reproduction which this paper has begun to uncover is, I hope, clear enough, and its implications significant enough, to bear scrutiny. In ‘foregrounding’ some of the structural issues associated with the practice creating and controlling international ‘people’ by means *both of coercion and* interpellation, which the relentless insistence on the ‘freedom’ and ‘equality’ of twenty-first century states and individuals tends to push into the background, my aim has not been to deny agency to what I have called ‘non-original’ states, or to the communities and individuals within them. On the contrary, it has been to do precisely the opposite – to open up the meaning of ‘subjectivity’ through the creation of what Jacques Rancière calls a ‘dissensus’. ‘Dissensus’, according to Rancière, in his examination of the ‘rights of man’, comes about when one prises open ‘a division put in the “common sense”: a dispute about what is given, about the frame within which we see something as given’.²¹⁸ Political subjectivity, in his view, is equivalent to ‘a capacity for staging such scenes of dissensus,’ by ‘putting two worlds in one and the same world’.²¹⁹ ‘Consensus’, on the other hand,

means the attempt to get rid of politics ousting the surplus subjects [i.e. the agents which do *not* fit into the categories imagined by those who legislate and

²¹⁶ *Iraqi Constitution*, 15 Oct. 2005, Art. 25. My emphasis.

²¹⁷ More work, in particular, needs to be done, for example, on the differences between the pre- or proto-capitalist nature of Spanish and Portuguese colonialism and that of the other Western European powers, and of the impact of these differences on the different forms of international personality in question.

²¹⁸ Jacques Rancière, ‘Who is the Subject of the Rights of Man?’ *South Atlantic Quarterly* 103 (2004), 297, at 304.

²¹⁹ *Ibid.*, at 304.

implement the 'rights of man' in specific contexts] and replacing them with real partners, social groups, identity groups, and so on. Correspondingly, conflicts are turned into problems that have to be sorted out by learned expertise and a negotiated adjustment of interests.'²²⁰

'Consensus', therefore, strips the concept of the 'rights of man' of precisely what is valuable about them, namely 'the back-and-forth movement between the first inscription of the right and the dissensual stage on which it is put to test'.²²¹ If the argument presented above is accepted, Rancière's 'consensus' has been embedded in the concept of statehood for at least the last 150 years. In this celebrated era of universal sovereign equality, it touches everyone, everywhere. Indeed, now that sovereign statehood *has* been universalised, meaning that the 'conquest of new markets' by means of international legal procreation is no longer available as a solution to capitalism's perennial 'crisis of overproduction', only two of Marx and Engels' 'solutions' remain: either the 'enforced destruction of a mass of productive forces' or the 'more thorough exploitation of the old [markets]'.²²² And indeed, as 'austerity' bites in Spain as much as it does in Greece, as 'bio-patenting' bites in Egypt as much as it does in India, and as 'global warming' bites in Iowa as much as it does in Manila, leaving catastrophes of unemployment, environmental degradation and of labour exploitation *simultaneously* in their wake, it would seem that there is nowhere left for subjection – the by-product of subjectivity – to be exported to. By relativising the concept of 'sovereign statehood', by denying its inevitability, and by insisting on the existence of 'two sovereignties within one sovereignty', I have attempted to open up a space of ambiguity and confusion around the concept of (international) legal subjectivity – a political space in which the meaning of words like 'freedom' and 'equality' might be experienced as 'dialogic' rather than 'monologic', as Mikhail Bakhtin might have put it.²²³ I hope, as many have hoped before me, that in this space the notion of subjectivity, and of legal subjectivity in

²²⁰ *Ibid.*, at 306.

²²¹ *Ibid.*, 305.

²²² K. Marx & F. Engels, *The Manifesto of the Communist Party*, at <http://www.marxists.org/archive/marx/works/1848/communist-manifesto/ch01.htm#007> [accessed 28 Sep. 2012].

²²³ See Bakhtin, 'Discourse and the Novel,' in M. M. Bakhtin, *The Dialogic Imagination* (1981), at 259-422.

particular, might be taken apart, kicked about, and perhaps even put back together again. At issue are the strategies for resistance available, in the widest sense, to the human beings (and other organisms?) living in the crudely staked-out patches of earth and ideology we call states, when the very language of emancipation itself is necessarily 'occupied' from the moment of its realisation.

