Cyborgs, Gods and Post-Capitalist Futures: Moving Beyond Resistance and Compliance through a Feminist-Posthuman Analysis of the Structure of International Law and its Subjects

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Thesis submitted for the degree of PhD

2018

Centre for Gender Studies

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Declaration for SOAS PhD thesis

I have read and understood Regulation 21 of the General and Admissions Regulations for students of the SOAS, University of London concerning plagiarism. I undertake that all the material presented for examination is my own work and has not been written for me, in whole or in part, by any other person. I also undertake that any quotation or paraphrase from the published or unpublished work of another person has been duly acknowledged in the work which I present for examination.

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Abstract

This thesis seeks to reinvigorate the knowledge project at the basis of feminist approaches to international law. To imagine a way out of the conundrum of resistance and compliance which feminist international lawyers have found themselves caught between in recent years, I propose an approach which analyses structural issues and structural bias in international law; such as the construction of international legal personality and the role of capitalism, that draws on contemporary feminist gender theories from outside of law. I use feminist posthuman theories including the work of Haraway, Braidotti, feminist new materialism and xenofeminism as well as French postructuralist theories, including French feminisms. The thesis makes a unique contribution to knowledge through the application of, until now not yet applied or little applied theories and methodologies, to international law.

The thesis analyses the function of capitalism in international law and its role in tethering feminist and queer projects for transformation to watered down neo/liberal accounts of themselves. This is exemplified through measurement cultures in the global order and the ways in which gender and LGBT freedom and equality is measured as well as through the role and status of the global corporation in international law. The ways in which the corporation uses legal personality to claim its rights while avoiding responsibility for human rights breaches is demonstrated drawing on case law. This phenomenon is understood through the application of Deleuze and Guattari's notion of schizophrenic capitalism and Grear's work on corporate personality. The thesis then considers emerging calls for the environment to have legal personality, drawing on various projects and cases and using feminist new materialism to analyse such claims and to explore alternative approaches to legal subjectivity. Bringing together the focus on the role of capitalism in the global order and the need to explore alternative approaches to legal subjectivity, the thesis outlines emerging theories which straddle both, particularly xenofeminism and accelerationism, which pose technology as a means through which to challenge subjectivity and potentially create a post-capitalist order. I argue for the need for feminist international lawyers to consider posthuman and xenofeminist theory. The thesis concludes by reflecting upon the limits of feminist posthumanism and xenofeminism via an analysis of the discourse on autonomous weapons systems and the role of the necropolitical in the global order. I therefore modify and apply these theories, concluding by highlighting the fact that a feminist-posthuman/xenofeminist approach is necessary when it

comes to the legal and ethical regulation of military technologies, with such an approach also providing a means to transform legal subjectivity and the structure of international law.

This thesis exemplifies the importance and usefulness of feminist posthuman theories for feminists working in international law. Through the contextual examples used, the thesis poses a way in which resistance and compliance can be balanced in a resistive way, without collapsing into compliance, using the system to challenge the system. It considers possible practical and theoretical ways in which feminists in international law may push towards structural change in international law, with key proposals around environmental personalities and the regulation of military technologies.

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Acknowledgements

I am honoured to be able to say that many people have helped to support me and this research over the past four years. I would like to begin by thanking my first supervisor, Gina Heathcote, for her guidance, support, critical eye and belief in me and my work. I don't think anyone has even believed in my work as much as she has since the very first day I met her. Gina has given me a confidence and a belief in myself that I will hold, now, with pride, forever. Thank you.

I would like to thank Yoriko Otomo, my second supervisor, for her support and guidance, her attention to detail and for sharing her keen knowledge of critical theory with me, always having another concept for me to add and think about with joy. Yoriko is one of those rare people who are both able to theorise at a phenomenal level while remaining attentive to the realities of life, something which I have greatly appreciated the past four years.

I would like to thank Vanja Hamzić, my third supervisor who joined my team only for the last few months of this research; for stepping in at such a crucial moment, for taking an interest in my work and for his thoughtful and inspiring feedback.

Unfortunately, I lost Sarah Keenan as a supervisor in my first year. I would like to thank Sarah, however, for that first year and for allowing me to audit her Feminist Legal Theory class. That class was one of the best classes I have ever taken and I would also like to thank all my fellow students in that group for the wonderfully fruitful discussions we had every week.

I would like to thank the Centre for Gender Studies at SOAS and all my fellow colleagues and PhD students at the Centre. I have learnt so much about so many things I knew nothing about before through being at the Centre. I would like to thank, in particular; Akanksha Mehta, Sabiha Allouche, Haje Keli, Jana Cattien and Jacquelyn Strey for their help, support, and friendship. Thank you to Nadje Al-Ali for my research training in my first year and to Alyosxa Tudor for their wonderful Gender Theory lectures in 2016/17.

I would also like to thank my colleagues and fellow PhD students from the School of Law at SOAS. Thank you to Sheri Labenski, my colleague, fellow student and friend. We weathered through all the ups and downs together, making the downs always more manageable. Thanks to Brenna Bhandar for the wonderful Law Reading Group she ran in my first year and thank you to Siavash Eshghi and Hanns Kendal, for making that group and those discussions so fascinating and rewarding. Thank you to Lutz Oette, whom I had the pleasure of working with

and who helped me with invaluable advice in relation to Chapter Three of this thesis. Thank you to my teaching colleagues, without whom my SOAS experience would never have been the same. In particular, thank you to Mayur Suresh, Anne Street and Gail Price.

Thank you to all my students at SOAS and the University of Essex, from 2014 until the present. I feel I learnt far more from you than you did from me and many of you have done so many amazing things already. It has been an honour to be able to work with you all.

Further, I would like to thank the staff and participants at the two summer schools I attended at the University of Utrecht: 'Critical Theory Beyond Negativity: the Ethics, Politics and Aesthetics of Affirmation' in 2014 and 'The Posthuman Glossary' in 2016. Not only did I learn so much during the two summers I spent in Utrecht but I also met so many amazing and inspiring people. Thank you.

I would also like to thank my various other colleagues, many of whom I am lucky enough to now be able to call friends or mentors. In particular, I would like to thank; Dianne Otto, Christine Chinkin, Louise Arimatsu, Agnus Lockyer, Loveday Hodson, Troy Lavers, Bérénice K. Schramm and Ratna Kapur for their support, mentoring, friendship and critical engagement with my work.

Thank you to the School of Law at the University of Essex and my colleagues there, for being so welcoming, friendly and supportive and for seeing my potential before I had even finished my PhD. Thank you to my friends and colleagues at Essex, in particular; Patricia Palacios Zuloaga, Constantin Mehmel, Meagan Wong and Tara Van Ho.

Thank you to the School of Law at Sciences Po in Paris, for hosting me as a Visiting Researcher in my second year. Thank you in particular to Nofar Sheffi and Mikhaïl Xifaras.

Thank you, to Emmanuelle Tourme-Jouannet, for her guidance while I was at Sciences Po and for being so warm, caring, welcoming and generous and for making me smile so deeply every time she popped into the office to see me.

I would also like to thank everyone at Equality Now, for their support of and belief in me, especially Jacqui Hunt.

I have had the pleasure of meeting many wonderful and interesting people across the many events and workshops I have been to across the past four years. The names and places are too

many to list but thank you to you all, for your inspiration, interesting conversations, vitality, passion and generosity.

Thank you to Luce Irigaray for her inspiring work and for introducing me to people who have since changed my life. Thank you for teaching me lessons I never expected to learn in the one week we spent together.

Thank you to all the wonderful scholars whose work before me has inspired this thesis.

I would also like to thank my A level teachers who pushed me to believe in myself. Special thanks to Dave Brock, my first law teacher.

Last but certainly not least, I would like to thank my friends and family. There are too many people to possibly thank in this section so thank you to you all.

Thank you to my parents, for always believing in me and supporting me. Thank you to my sister, Rachel, for being the best sister and for reading over parts of this thesis for me at the end when I needed help most. Thank you to my Grandparents, for passing on their socialist sentiments and for instilling the need to discuss politics and change the world from a very early age.

Thank you to Hamida, Steph, Miranda, Lucy, Charlotte, Fran, Fede, Marina, Masha, Rhea and Emily.

Thank you to Ursula, for always being there to listen to me make sense of my work, for reading through sections of this thesis at the end when I most needed help and for her love and strength.

Thank you to Jasper, for accepting me and for being himself.

Chapter 1

Introduction: Feminist Approaches to International Law, Resistance and Compliance and Structural Bias Feminism

1. Feminist Approaches to International Law

In this thesis I argue that there is a need to return to analysing the structure of international law. While feminist work has, over the past few decades, become recognised in the global order, feminist voices are given attention and heard, for the most part, only within the realms of equality and sexual violence.[1] Feminist perspectives which consider issues outside of this however, including structural issues, such as the concept of the state or international legal personality, remain on the periphery. Feminist approaches to international law, however, have always cut across many layers, as Charlesworth and Chinkin show in their metaphorical excavational dig:

> One obvious sign of power differentials between women and men is the absence of women in international legal institutions. Beneath this is the vocabulary of international law… Digging further down, many apparently 'neutral' principles and rules of international law can be seen to operate differently with respect to women and men. Another, deeper, layer of the excavation reveals the gendered and sexed nature of the basic concepts of international law… Permeating all stages of the dig is a silence from and exclusion of women…. [this is] an integral part of the structure of the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures.[2]

[1] The 'global order' is a specific term which comes from a particular set of literature. Coming from international legal scholarship, the term encompasses international law but aims to also consider the other elements which impact on global rule and the application of international law such as, for example, the role experts play. See, for example; David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance,' *Sydney Journal of International Law*, (2005), 27, p. 5-28.
[2] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*, (Manchester University Press, 2000), p. 49.

Since Charlesworth and Chinkin's book,[3] a multitude of approaches to international law have been developed by different feminists. Throughout the 1990's and 2000's, much work has also been done to bring women into the international legal system.[4] However, while in many respects international law has adopted the message of feminism, the vocabulary of gender; it has yet to adopt the method(s), including the method of reconsidering structural issues.[5] Many positive changes have occurred within international law due to the partial acceptance of the relevance of gender issues within global governance, yet there are clear problems with this framework.

The tension between method and message can be seen through the example of gender mainstreaming. Gender mainstreaming, the idea that gender should be woven throughout the international system, is one of the most widely known and used approaches to including women in the international legal system. Charlesworth shows how the tension between method and message plays out in gender mainstreaming programmes in a number of contexts. For example, Charlesworth shows how gender mainstreaming has been linked to a right to equality which has then 'essentially remained tethered to a limited, procedural, account of non-discrimination which has had minimal effect on improving women's lives.'[6] Gender mainstreaming often ends up being about numbers; how many women are included. While numbers can be important, they do not, alone, change the substantive and, as will be discussed in Chapter Three, they often tell a limited account of what is really going on.[7] Thus, while the first layer of Charlesworth and Chinkin's excavational dig; the inclusion of (more) women in international institutions, has, to some extent,[8] been acted on through gender mainstreaming programmes, this has been done without consideration of or reference to the inter-linking further layers of analysis and change; the deeper layers of the feminist excavational project and the methods that they bring and require.

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[3] Ibid.
[4] See, for a short list of some of the key ways women have been brought into international law since 1991 'from the vantage point of 2004'; Doris Buss and Ambreena Manj, 'Introduction' in Doris Buss and Ambreena Manj (eds.), *International Law: Modern Feminist Approaches*, (Hart, 2014), p. 3-4.
[5] See; Hilary Charlesworth, 'Talking to ourselves? Feminist scholarship in international law' in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law*: *Between Resistance and Compliance?* (Hart, 2014), p. 32.
[6] Ibid. p. 27-8.
[7] Ibid. p. 30; Doris Buss, 'Measurement Imperatives and Gender Politics: An Introduction,' *Social Politics*, (2015), 22(3), p. 381-9.
[8] However, this inclusion remains far from universal, for example, the WTO has never taken on the language of gender. See; Charlesworth, above note 5, p. 23.

Another key issue that has garnered a lot of attention from feminists working in international law is the issue of sexual violence. Women face sexual violence and the threat of sexual violence globally. Thanks to feminists working in international law, rape has now been accepted as a crime against humanity.[9] Rape has also been deemed enough to constitute genocide, if conducted in the aim of ethnic cleansing.[10] Sexual violence and gender based violence have also gained greater recognition in international human rights law, through the work of the Committee of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), for example.[11] These are but a few examples of the many successes feminists have had in international law. There is, however, still a long way to go to fully address gender-based violence.

While the attention now given to sexual violence in the global order is a great success story for feminists, the focus on this issue has worked to side-line other feminist concerns and projects. Feminist approaches to international law, however, must work to pay attention to the silences.[12] This, as Otto notes, must include a questioning of the silences created by feminist work in the global order.[13] For example, sexual violence has particularly garnered attention in relation to conflict, as exemplified by the vast global focus on sexual violence in the Democratic Republic of Congo (DRC) which has been dubbed the "rape capital of the world."[14] Yet sexual violence is not only a problem in conflict zones but is an issue globally, including the Global North, with nearly one in five of all women in England and Wales reporting that they have been the victim of sexual offence since the age of 16.[15] The vast focus on sexual violence in conflict

[9] This was first legally recognised (and found) in the case of *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)*, IT-95-23-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 2001.
[10] *Prosecutor v. Jean-Paul Akayesu (Trial Judgement)*, ICTRY-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 1998.
[11] On gender based violence, see in particular; UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 12 and 19: Violence against women, 1989.
[12] Charlesworth and Chinkin, above note 2, p. 49.
[13] Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism,' in Margaret Davis and Vanessa E. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory*, (Routledge, 2013), p. 197-216.
[14] See, for example; Guardian Africa Network, Guardian 2013, 'Congo: We did whatever we wanted, says soldier who raped 53 women,' https://www.theguardian.com/world/2013/apr/11/congo-rapes-g8-soldier (accessed 21/10/2017); Alex Crawford, 'Harrowing Stories from Rape Capital of World,' Sky New 2015, http://news.sky.com/story/harrowing-stories-from-rape-capital-of-world-10373956 (accessed 21/10/2017). In contrast, see; Justine Masika Bihamba, 'The 'rape capital of the world'? We women in Congo don't see it that way,' Guardian 2017, https://www.theguardian.com/global-development/2017/oct/09/the-rape-capital-of-the-world-we-women-in-democratic-republic-congo-dont-see-it-that-way (accessed 21/10/2017); Tanya Turkovich, 'As DR Congo Crisis Persists, UN classifies rape as weapon of war,' UNICEF, https://www.unicef.org/infobycountry/drcongo_44598.html (accessed 21/10/2017).
[15] UK Home Office and Ministry of Justice, 'An Overview of Sexual Offending in England and Wales,' https://www.gov.uk/government/statistics/an-overview-of-sexual-offending-in-england-and-wales (accessed

zones, however, works to shift from view the sexual violence in other places, promoting a colonial narrative of the victims of sexual violence as being located in the Global South, subject to the criminal violence of male subjects of the Global South.[16] The Global North subsequently uses this focus on sexual violence in conflict situations to promote itself as the ideal, progressive, civilised space, the standard of civilisation which the Global South needs help to attain. The hyper-visibility of sexual violence in the Global South helps promote a colonial narrative of the utopic Global North which, as highlighted by the high figures on sexual violence in the UK, is socially damaging.

In addition, as Heathcote notes, the vast focus on sexual violence in conflict situations has worked to promote certain stereotypes about women in these conflict zones, where the '*the* gendered experience of war' is 'either the constricted role of a combatant or a civilian and the gendered meaning applied to each as a consequence.'[17] Focusing on sexual violence so heavily in conflict situations works to promote the association that women living in conflict situations are either victims of sexual violence or are combatants.[18] Women who fit neither of these

05/03/2015). It must also be noted that this is only the reported figure, with the majority of cases going unreported. This statistic is likely very conservative.

[16] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in Cary Nelson and Lawrence Grossberg (eds.), *Marxism and the Interpretation of Culture*, (University of Illinois Press, 1988), p. 271-316.

[17] Gina Heathcote, 'Laws, UFOs and UAVs: Feminist Encounters with the Law of Armed Conflict,' in Dale Stephens and Paul Babie (eds.), *Imagining Law: Essays in Conversation with Judith Gardam*, (University of Adelaide Press, 2016), p. 158.

[18] The focus on sexual violence, too, can be seen in the UN Women Peace and Security framework. See, for example; UN Security Council, Security Council resolution 1820 (2008) (on acts of sexual violence against civilians in armed conflicts), 19 June 2008, S/RES/1820; UN Security Council, Security Council resolution 1888 (2009) (on acts of sexual violence against civilians in armed conflicts), 30 September 2009, S/RES/1888; UN Security Council, Security Council resolution 1960 (2010) (on women peace and security), 16 December 2010, S/RES/1960.

The focus on combatants is especially apparent in relation to the recent focus on Kurdish female combatants who have recently been exceptionalised by the Western media despite the fact that Kurdish women have been fighting in combatant roles for decades. See, for example; Lizzie Dearden, ''Isis are afraid of girls': Kurdish female fighters believe they have an unexpected advantage fighting in Syria,' Independent 2015, http://www.independent.co.uk/news/world/middle-east/isis-are-afraid-of-girls-kurdish-female-fighters-believe-they-have-an-unexpected-advantage-fighting-a6766776.html, (accessed 21/10/2017); Kate West, 'The female guerrilla fighters of the PKK,' Middle East Eye 2015, http://www.middleeasteye.net/in-depth/features/female-guerrilla-fighters-pkk-2044198184, (accessed 21/10/2017); Mark Townsend, ''Hundreds of us will die in Raqqa': the women fighting ISIS,' The Observer 2017, https://www.theguardian.com/world/2017/apr/30/hundreds-of-us-will-die-in-raqqa-the-women-fighting-isis, (accessed 21/10/2017).

It is also worth noting the fact that many of these women have been deemed "terrorists" by the Global North. For example, the Kurdish Worker's Party (PKK) is deemed to be a 'Foreign Terrorist Organization' by the US and the European Union. See; U.S. Department of State, 'Foreign Terrorist Organizations,' https://www.state.gov/j/ct/rls/other/des/123085.htm, (accessed 21/10/2017); EU Council Decision (CFSP) 2017/1426 of 4 August 2017 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2017/154, http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:32017D1426&from=EN, (accessed 21/10/2017).

descriptions, who are surviving conflict on an everyday basis with all the various gendered experiences that such a situation entails, or women who may be political actors, peace negotiators, perpetrators of international crimes, protestors, faith leaders, or working to re-build communities, for example, are silenced, their experiences and their gendered experiences ignored.

Further, the focus on sexual violence, particularly on sexual violence in conflict and post-conflict spaces, has worked to side-line other issues which require a feminist perspective, including, for example, militarism and capitalism or, recalling Charlesworth and Chinkin, the deeper structural issues.[19] As per Charlesworth and Chinkin above,[20] feminist approaches initially began through a consideration of the need to analyse the structure of international law from a feminist perspective and highlight this structure's bias, as exemplified by the work of feminist international lawyers on the gendered nature of the sovereign state.[21] Such work was inspired by much of the feminist and gender work ongoing in other disciplines, as shown by Knop's and Gardam's use of Irigaray[22] or Charlesworth and Chinkin's use of transnational feminist scholars such a Mohanty.[23] While feminist and gender theory has long worked to challenge issues such as capitalism[24]and environmental justice,[25] feminist and gender theory

[19] A similar phenomenon has been noted by Marks in her analysis of international law. Marks has highlighted the ways in which human rights law and the focus by many international lawyers on human rights has worked to push aside and thereby silence other issues, many of these issues being structural. Thus, while human rights may focus on some of the problems which 'engender and sustain' the global order, little attention is given to 'the larger framework within which those conditions are systematically reproduced.' This works, as Knox notes, to ensure that 'the 'practical' focus on human rights is profoundly *depoliticizing'* working to silence broader, structural critique of the law (including the critique of the problems with the capitalist system itself) by containing such critique within a fundamentally liberal discourse. This is something which I will examine in Chapter Two specifically in relation to global capital as an important space for feminist analyses. See; Susan Marks, 'Human Rights and Root Causes,' *Modern Law Review*, (2011), 74, p. 71; Robert Knox, 'Marxist Approaches to International Law,' in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 321. Author's own emphasis. See also; Susan Marks, 'False Contingency,' *Current Legal Problems*, (2009), 62, p. 1-21.

[20] Charlesworth and Chinkin, above note 2, p. 49.

[21] See, for example; Karen Knop, 'Why Rethinking the Sovereign State is important for Women's International Human Rights Law,' in Rebecca J. Cook (ed.), *Human Rights of Women*, (Pennsylvania UP, 1994), p. 153-64; Yoriko Otomo, 'Endgame: feminist lawyers and the revolutionary body,' *Australian Feminist Law Journal*, (2009), 31, p. 153-64; Hilary Charlesworth, 'The Sex of the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 251-68.

[22] Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law,' *Transnational Law and Contemporary* Problems, (1993), 3, p. 328; Judith Gardam, 'An Alien's Encounter with the Law of Armed Conflict,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 234.

[23] Charlesworth and Chinkin, above note 2, p. 52; Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' *Feminist Review*, (1988), 30(1), p. 61-88.

[24] See, for example; Angela Davis, *Women, Race and Class*, (Ballantine Books, 2011); Shahrzad Mojab (ed.), *Marxism and Feminism*, (Zed Books, 2015); Laboria Cuboniks, 'Xenofeminism: A Politics for Alienation,' http://www.laboriacuboniks.net/, (accessed 21/09/2017).

[25] See, for example; Maria Mies and Vandana Shiva, *Ecofeminism*, (Zed Books, 2014); Richard Grusin (ed.), *Anthropocene Feminism*, (University of Minnesota Press, 2017).

in international law has largely moved away from considering these issues, such topics tending to be tackled by international lawyers not coming from a feminist perspective. Feminist approaches to international law, therefore, have come to focus, in the past two decades, on the first few layers of Charlesworth and Chinkin's excavation: representation, language and the need to include women in the system. Further to this, much feminist work on international law has moved away from considering gender theory from outside the law. Work which moves beyond this, analysing the structure itself, or work which does draw on feminist and gender theories from outside the law, is ongoing, but is few and far between and remains on the periphery.[26]

I define structural bias feminism as a feminist approach which aims to challenge the structure of international law, thus moving beyond questions of formal equality at law, looking towards questions concerning how key concepts in international law are gendered. This is not to say that the formal equality layer is not a structural bias issue on some level as there are obvious structural reasons for the inequality in representation, but it is to say that that alone is not enough. Even if women do achieve equal representation in international institutions it does not automatically follow that the law will change to account for inequality as those representatives may not have the power to make these changes or may not want to. Thus, I am defining structural bias as looking at the structures and laws themselves; what applies and what ideas such structures promote. Charlesworth and Chinkin's metaphorical excavation, at the shallowest level, includes the consideration of the bias of supposedly 'neutral' principles, moving on to consider the sex and gender of international law throughout its application and, at the deepest level as embedded in international law's foundational structures. It is this deepest, structural level, as affected and created in excavating the layers before it, that I am focusing on both due its importance and due to the lack of attention such perspectives have received in recent years.

Kotiswaran has critiqued the 'structural bias thesis' of feminist approaches to law for failing to see the impact of other factors outside the strict structure of law such as: the way the law is enforced and how the law is negotiated by and between subjects and enforcers, including

[26] Of course, the more contemporary works which do exist which do consider these structural issues more have greatly inspired this thesis. These works include (but are by no means limited to); Ratna Kapur, *Erotic Justice: Law and the New Politics of Postcolonialism*, (Taylor & Francis, 2005); Gina Heathcote, *The Law on The Use of Force: A Feminist Analysis*, (Routledge, 2012); Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement*, (Oxford University Press, 2016); Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, (Routledge, 2017).

informal rules.[27] Kotiswaran, who focuses on sex work in India, is, however, critiquing a particular strand of materialist/radical feminism which broadly sees the world as structured around patriarchal dominance, thus problematically questioning the possibility of women's agency within this structure and thus promoting an abolitionist stance on sex work.[28] This thesis, while recognising the importance of materialist/radical feminism and whilst noting the fact that many of the critiques of legal structures come from these feminist thinkers, as will be exemplified below through an analysis of the work of MacKinnon, is not a materialist/radical feminist piece. As Charlesworth and Chinkin indicate above via the excavation dig of feminist approaches, structural bias approaches can be multiple; multiple approaches analysing multiple problems. As such, Charlesworth and Chinkin by no means tether such a notion to a materialist or radical feminist approach.

In this thesis I work to re-engage structural bias feminisms, drawing them in dialogue with postructuralist and posthuman feminisms, including the emerging theory of xenofeminism. Under such an approach, the thesis proposes a view of the structure of international law which is not universal (as international law likes to portray itself) but is, rather, multiplicitous and changing or, in the words of some of the key theorists this thesis will draw on, fluid,[29] nomadic,[30] or in flow.[31] Structural bias is thus used as a method of understanding, looking towards the key ideas which create the multiply assembled structure of international law which is made up of multiple connecting systems and formations which are ever changing, working together in assemblage to territorialise and deterritorialise through multiple connections including the law, politics, militarism, capitalism, activism, 'the behaviour patterns of an individual, the organisation of institutions'[32] and beyond, all forming together to make an ever changing international law.[33] In particular, I examine the theoretical bias legal subjectivity embeds in international law.

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[27] Prabha Kotiswaran, *Dangerous Sex, Invisible Labour: Sex Work and the Law in India*, (Princeton University Press, 2011), p. 177.
[28] See, for example, Catharine A. MacKinnon, *Women's Lives, Men's Laws*, (Harvard University Press, New edn., 2007).
[29] Luce Irigaray, 'Volume Without Contours,' trans. David Macey in Margaret Whitford (ed.), *The Irigaray Reader* (Blackwell, 2000), p.53-68.
[30] Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory*, (Columbia University Press, 2011).
[31] See, for example; Donna Haraway, *When Species Meet*, (University of Minnesota Press, 2008), p. 26, 32.
[32] Adrian Parr, *The Deleuze Dictionary*, (Edinburgh University Press, Revised Edn., 2010), p 18.
[33] See; Adrian Parr, *The Deleuze Dictionary*, (Edinburgh University Press, Revised Edn., 2010), p. 18-19, 232-235; Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, trans. Brian Massumi, (University of Minnesota Press, 1987), p. 88, 315-27.

Charlesworth and Chinkin state that 'feminist interventions in international law have to be conducted on a number of levels, inside the discipline, strengthening it to respond to the oppression of women, and outside looking in, drawing attention to the structural faults in the system.'[34] In recent years, however, feminists working within international law have been caught between resistance and compliance; using international law as a tool to change women's immediate circumstances whilst wishing to challenge the structures of international law itself.[35] For the most part, feminist approaches, as noted above, have turned towards what can be deemed more of a compliance mode. While, indeed, all feminist interventions in the global order are in some way resisting, there is a need to push further at the boundaries of what that resistance is and can be. What I am therefore deeming to be "compliance methods" (while remembering that resistance and compliance are not binary oppositions), are those methods which remain hopeful of 'international law's potential for women,'[36] using the law and its concepts to pursue their aims.[37] While this stance has proven useful in many instances, as shown above by the recognition by the global order of the need to tackle conflict-related sexual violence, such a project also does not go far enough; how can these sexed and gendered structures and discourses also *be* the sites of transformation?[38] There will always be 'problems for women in assuming state involvement is always beneficial'[39] and working too much inside the structure of international law works to reinforce the structure itself and its inadequacies. Further, working within the structure alone limits the space in which feminist activists can work. While international structures can be used for change, these structures are also at the core of the problem itself. Thus, working within such systems inherently limits the possibilities for feminist transformation.

[34] Charlesworth and Chinkin, above note 2, p. 60

[35] I have taken the terminology 'resistance and compliance' from a key text within feminist approaches to international law which discusses the tension between these two modes. See; Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2014).

[36] Sari Kouvo and Zoe Pearson, 'Introduction,' in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2014), p. 5.

[37] Gina Heathcote has also highlighted the turn to compliance in feminist approaches to international law, noting that structural bias has been neglected in favour of perusing goals within specific areas of international law, 'notably international criminal law and collective security.' See; Gina Heathcote, 'Splitting the Subject: Feminist Thinking on Sovereignty,' *Unpublished manuscript on file with author*, (2013).

[38] See Yoriko Otomo who asks: 'The writings of feminist legal theorists are torn between the impulse to resist and the drive to comply with the law. To withhold or fill up. Are these really our two poles of inhabitation?' Otomo, above note 26, p. 154.

[39] Charlesworth and Chinkin, above note 2, p. 165.

While there is a clear need to re-consider structural bias and resistance methods in feminist approaches to international law further, there are problems and tensions in such a project. These issues have been discussed by critical international lawyers. For example, Orford has shown how the structure itself, in many ways, protects against further exploitation of the system by the powerful. This can be exemplified in the principle of state consent, which is often a barrier to change in international law; yet state consent can also be seen as a counter-hegemonic tool, with many formerly colonised states now naming sovereignty as their key tool against imperialism.[40] Thus, as Orford notes, while formalism's aims and the aims of the UN Charter are, in many ways, problematic, these tools are still the best international lawyers have in protecting against imperialism.[41] Thus, for Orford, international lawyers are doomed to always return to formalism i.e. the formal rules and structure of international law.

At the same time, the danger of resistance as always reimagining on the peripheries does not mean that work which aims to analyse and challenge the structure of international law should not be done. As Knop notes, 'if the international system is "nothing other than a structure of ideas"… then it is at this level that the system must be challenged – but with the abstract anchored in the concrete, the real transformed by the imagination.'[42] There is a need to not only go back to considering projects that work outside, looking in, as well as those that consider the inside of the discipline, but, following on from feminist theory more broadly, there is a need to recognise that inside/outside is a gendered dichotomy in itself, and one that feminist international lawyers have assimilated and left largely unquestioned as a gendered underlying assumption of feminist international legal scholarship. Inside/outside might be seen in a more fluid way; one is not necessarily mutually exclusive of the other and supposed contradictions between an inside and an outside approach are, in and of themselves, constructs. While it is important to always be aware of the real impact of theory on lived experience, this does not mean that we should not go "outside" too and push at the boundaries of international law, thus pushing at the boundaries of scholarship on feminist approaches to international law. Feminist approaches to international law are only doomed to always return to formalism if they accept this as their only possibility. This thesis, therefore, will seek to show other possibilities. At

[40] For example, see; Nicaragua, Statement at the July 2009 UN General Assembly Informal Debate on the Responsibility to Protect. Document accessed via: http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2493-general-assembly-debate-on-the-responsibility-to-protect-and-informal-interactive-dialogue-#debate, (accessed 22/10/2017).
[41] Anne Orford, 'The Gift of Formalism,' *European Journal of International Law*, (2004), 15(1), p. 179-95.
[42] Knop, above note 22, p. 343.

times this will be done via remaining within the law. However, the thesis also offers an array of non-legal suggestions, drawing on gender theories from outside the law to note alternative ways in which the structural bias of global order can be challenged and changed in the hope of transformation.

2. Thesis Aims and Chapter Outlines

In this thesis I seek to reconsider and reimagine the resistance versus compliance conundrum in which feminist international lawyers have long been caught between.[43] Methods which use the structure of international law to accommodate feminist needs have, indeed, had a very strong impact. However, such methods also limit the transformative potential of feminist work in international law. Resistance projects which work towards deeper structural transformation, however, risk being either ignored or obtaining something even more damaging than before. Feminist approaches to international law began by trying to bridge these two projects, aiming to consider both equality issues, such as women's human rights, as well as deeper, structural issues.[44] However, over the past decade, feminist approaches to international law have slowly leaned more towards bringing feminist goals to the mainstream of international law. This has reduced feminist work to a mostly liberal paradigm. This approach has been successful and achieved many important goals. However, liberal discourses around, for example, representation, have also been easily co-opted by those with more right-wing agendas, as can be exemplified by numerous right leaning female figures claiming their feminist credentials while, in the case of British Prime Minister Theresa May, for example, implementing large-scale cut-back and austerity plans which often effect women more drastically than they do men.[45]

In this thesis I consider how feminist international lawyers may continue to resist and challenge international law's foundations and structural bias without falling into the trap of 'speaking to ourselves'[46] by remaining on the periphery and thus being ignored. As a starting point I take Irigaray's work on searching for the other, the other values to those which Western society

[43] Kouvo and Pearson, above note 35.
[44] See; Charlesworth and Chinkin, above note 2; Charlesworth, above note 21.
[45] See; Fawcett Society Flikr account, Photo of Theresa May in a 'This is what a feminist looks like' t shirt, https://www.flickr.com/photos/fawcettsociety/3115868250/, (accessed 28/10/2017). See also, generally; Avtar Brah, Ioana Szeman and Irene Gedalof (eds.), Feminist Review Special Issue on 'The Politics of Austerity,' (2015), 109(1).
[46] Charlesworth, above note 5.

(and international law) has chosen not to take up.[47] I draw on psychoanalysis, posthuman theory, feminist legal theory, feminist work on international law, critical international legal studies, philosophy and critical theory more broadly alongside science and technology studies, xenofeminism, international relations theory and others, to consider both what the structure of international law is and how it can be re-thought.[48]

The thesis begins with a Freudian/Lacanian psychoanalytic analysis of the structure of international law, drawing on this analysis to consider the way in which international law works and is constituted. The psychoanalytic model is chosen due to the fact that several important engagements with international legal structures have drawn on psychoanalytic models, using these models to analysis the metaphysics of the structure of international law itself.[49] While the thesis begins with a psychoanalytic model, however, it does not try to resolve the issues highlighted by a psychoanalytic approach through psychoanalysis itself. Rather, in noting the flaws in, particularly Lacanian psychoanalytic thinking, and the way in which the work of psychoanalytic thinkers such as Irigaray and Guattari rejected many of the formal ideas of Freudian/Lacanian thought,[50] this thesis, in Chapter Four, seeks to move beyond the model of law and lack which is inherent in such thinking, tracing, instead, an alternative, non-binary mode of thought. This is not to reject psychoanalysis altogether, however. Such thinking provides a very adequate account of the way the world works. However, this thesis seeks to

[47] For example; Margaret Whitford, 'Luce Irigaray and the Female Imaginary,' *Radical Philosophy*, (1986), 43, p. 8.

[48] Examples of key pieces I draw on include (in order of the disciplines outlined above); Psychoanalysis: Maria Aristodemou, *Law, Psychoanalysis and Society*, (Routledge, 2014); Yoriko Otomo, 'Of Mimicry and Madness: Speculations on the State,' *Australian Feminist Law Journal*, (2008), 28, p. 53-76; Luce Irigaray, *Speculum of the Other Woman*, trans. Gillian C. Gill, (Cornell University Press, 1985); Posthuman Theory: Donna Haraway, 'A Cyborg Manifesto,' in David Bell and Barbara M. Kennedy (eds), *The Cybercultures Reader*, (Routledge, 2001), p. 291-324; Donna Haraway, *The Haraway Reader*, (Routledge, 2004); Rosi Braidotti, *The Posthuman*, (Polity Press, 2013); Feminist Legal Theory: Ngaire Naffine, 'Women and the Cast of Legal Persons,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 15-25; Anna Grear, ''Sexing the Matrix': embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 39-52; Feminist Approaches to International Law: Charlesworth and Chinkin, above note 2; Knop, above notes 21 and 22; Otto, above note 13 and 26, Heathcote, above notes 17 and 26; Critical Legal Studies in International Law: Marks, above note 19; Knox, above note 19; Kennedy, above note 1; Philosophy and Critical Theory: Deleuze and Guattari, above note 33; Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983); Science and Technology Studies: Gordon E. Moore, 'Cramming More Components onto Integrated Circuits,' *Electronics* (1965), p. 114–117; James H. Fetzer, *Artificial Intelligence: Its Scope and Limits*, (Springer, 1990); Xenofeminism: Laboria Cuboniks, above note 24; International Relations: Lauren Wilcox, 'Embodying Algorithmic War: Gender, Race and the Posthuman in Warfare,' *Security Dialogue* (2016), p. 1-18; Rahul Rao, 'Global Homocapitalism,' *Radical Philosophy*, (2015), 194, p. 38-49.

[49] See, for example; Maria Aristodemou, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours,' *European Journal of International Law* (2014), 25(1), p. 35-58; Otomo, above note 48.

[50] Irigaray, above note 48; Deleuze and Guattari, above note 48.

imagine new possibilities beyond the current structure. This, I pose, is something which posthuman theory allows for in a way in which much psychoanalysis does not.[51]

In addition to this, while I will begin with Irigaray's work, Irigaray is used more as a springboard for thinking through issues of resistance and compliance and challenges to structural bias. The thesis does return to her in certain moments throughout but, largely, each chapter thereafter refers to a different theory which tackles these same issues with Chapter Two focusing on Deleuze and Guattari's schizophrenic capitalism,[52] Chapter Four focusing on feminist new materialism[53] and Chapters Five and Six focusing on feminist posthumanism and xenofeminism.[54] Each of these chapters, however, build upon one another, drawing on the knowledge learnt from the previous chapters, integrating it with various different theories which manage the balance between resistance and compliance in different ways, applying them to different contexts.

Another key, interlinking aim of this thesis is to speak to feminist approaches to international law, calling for both a more rigorous consideration of feminist and gender theories from outside feminist legal theory and their application to international law, as well as aiming to bring feminism to areas of international law which feminist approaches are no longer associated with. My argument is that many of the issues of being caught between resistance and compliance have already been well thought through by theories outside of legal scholarship, including in several emerging and more recent feminist theories such as in critical posthumanism and xenofeminism. Drawing on these theories, the thesis thus remains loyal to resistance while noting that resistance and compliance, like inside and outside, are not distinct categories. Broadly, these theories note the fact that resistance-compliance is, also, a false binary. Whilst 'utopias cannot be reached,'[55] states Lacey, in that they cannot just be imagined and implemented out of nothing as any structural frame of imagination is already limited by what is known, utopias, Lacey continues, 'provide horizons towards which we attempt to move.'[56] Resistance does not come about by situating oneself against but, rather, as I will propose, resistance can be effective when manipulating the system for structurally transformative aims.

[51] This is also not to say that psychoanalysis cannot move beyond the limits of law and lack. Rather to note that these limits have already been transgressed in posthuman theory.
[52] Deleuze and Guattari, above note 48.
[53] See, for example; in Stacy Alaimo and Susan Hekman (eds), *Material Feminisms,* (Indiana University Press, 2008).
[54] Laboria Cuboniks, above note 24.
[55] Nicola Lacey, *Unspeakable Subjects: Feminist essays in legal and social theory*, (Hart, 1998), p. 236.
[56] Ibid.

The very success of feminists working in international law up until now has been through using the system. There is a need to take this approach, which has proven so successful, and use it to push further to challenge the biases inherent in the system itself. This may include using legal solutions, as has been done in the past, albeit in more creative ways; for example, as exemplified in Chapter Four, by using the concept of legal personality to challenge the dominant model of subjectivity which international law is structured around. In addition, this may also be done as via using non-legal solutions which can work beyond the limits of the biased structure of international law, as this thesis proposes specifically in relation to military technologies in the final chapter. Situating oneself against something else can be useful in certain moments but there is a need, too, to use what exists and appropriate it. Resistance, in these modes, understands the importance of using structures and manipulates these structures according to its own aims.

In considering gender theories from outside legal scholarship, feminists working in international law can move beyond thinking of feminist scholarship in international law as applying to "women's issues" only, returning to the core of feminist thinking which aims to challenge, not only what impacts on lived experiences but structural bias too.[57] Accordingly, this thesis considers topics that are no longer or have never been associated with feminist approaches to international law,[58] including technology and capitalism. While there has been some feminist engagement with these issues, such perspectives have also tended to focus on women's lives.[59] In this thesis, I seek to consider such topics from a structural bias perspective. This is done via my key case studies on the role and place of the global corporation in international law and the future regulation of military technologies.

I noted above that feminists working in international law need to reconsider the subject of their work. By this I mean not only the topics which feminists cover but also in a more literal sense: the subjectivity of international law's subjects. This thesis is structured around reconsidering international law's models of subjectivity in the aim of working towards re-thinking them and thus pushing at the limits of the structure of international law. Subjectivity, it is posed, is part of what makes up international law's (biased) conceptual structure, as applied through

[57]Charlesworth and Chinkin, above note 2.
[58] Though this lack of association is not to say that there is no work at all on these different areas of law. However, such work remains marginal. See, for example; Heathcote, above note 26; Otomo, above note 26 and 48.
[59] See, for example; Shelley Wright, 'Women and the Global Economic Order: A Feminist Perspective,' *American University International Law Review*, (1995), 10(2), p. 861-87; Nicola Henry and Anastacia Powell, *Sexual Violence in a Digital Age*, (Palgrave Macmillan, 2017).

international legal personality. The thesis thus manages key topics and themes as well as the desire to challenge international law's multiply assembled structure by focusing on subjectivity and international legal personality for two main reasons. First, it is noted how international law is made and structured by multiple actors. These actors make international law through their acts and omissions and thus play a key role in creating international legal structure. As the conceptual description of international law's actors, giving them rights and duties under international law,[60] international legal personality describes these actor's roles and the ways in which they are theorised and given a place in international law, therefore defining their subjectivity. I will show this model of subjectivity to be biased in that it is both gendered and raced.[61]

Second, I have chosen to focus on subjectivities in international law because this links well with my conceptual framework. Subjectivity and the need to challenge hegemonic accounts of subjectivity is key theme in the work of Irigaray, feminist posthumanists such as Haraway and Braidotti and in feminist new materialist and xenofeminist work.[62] Thus, as Braidotti notes;

> A focus on subjectivity is necessary because this notion enables us to string together issues that are currently scattered across a number of domains. For instance, issues such as norms and values, forms of community bonding and social belonging, as well as questions of political governance both assume and require a notion of the subject.[63]

A focus on subjectivity allows this thesis to work transdiciplinarily, noting the links between discourses, disciplines and interlinking structures, allowing a questioning of the bias behind such structures.[64] In identifying one of the elements which works to make up part of international law's structure - subjectivity - and noting the way it links to other key forces, such as capitalism and militarism, this thesis will re-think international law through a transformative lens by challenging international law's biased accounts of subjectivity. I will thus, in this thesis, analyse some of the various different subjectivities present in international law, from international legal personalities such as the global corporation, to emerging personalities, such

[60] James Crawford, *The Creation of States in International Law* (Oxford University Press, 2006), p 32.
[61] For a more detailed definition of international legal personality, see appendix.
[62] Alaimo and Hekman, above note 53; Rosi Braidotti, 'The Posthuman in Feminist Theory,' in Lisa Disch and Mary Hawkesworth (eds.), *The Oxford Handbook of Feminist Theory*, (Oxford University Press, 2016), p. 673-9; Haraway, above note 48; Irigaray, see above note 48; Laboria Cuboniks, above note 24.
[63] Braidotti, above note 48, p. 42.
[64] For more on the need for transdiciplinarity in the current times, see; Braidotti and Hlavajova, 'Introduction,' in Braidotti and Hlavajova (eds.), *The Posthuman Glossary*, (Bloomsbury, 2018), p. 1-14.

as the environment, to entities which may challenge subjectivity, but which do not yet exist as legal personalities yet, such as artificially intelligent machines.

The underlying theoretical basis of the thesis comes from a psychoanalytic account of international legal structure. I propose that, following international law's struggle for secularisation, international law having originally been a Christian based system, international lawyers, in trying to separate international law from God, merely replaced God with an idealised image of himself, the human figure, as God: the bounded, rational, male, individual, heterosexual idealised subject (i.e. the humanist subject of enlightenment thought).[65] Applied to international law, it is clear the ideal subjectivity/personality of/in international law *is* this impossible subject: bounded, individual and autonomous.[66] This can be exemplified in the theory of the sovereign state. The sovereign state is conceptualised as all these things; as being an individual, all-powerful sovereign with complete control over its own territory and as having clear and definite boundaries,[67] the sovereign state thus being conceptualised as the white, individual, bounded, autonomous, idealised-male figure.[68] The sovereign state, as, technically, international law's only *full* legal subject, thereby provides the blueprint for full international legal personality in international law and thus the blueprint required in order to gain the fullest array of powers under international law.[69] The subject of the sovereign state thus provides the model of the standard of subjectivity through which other entities must mould themselves to in order to gain greater power in international law,[70] as will be exemplified particularly in Chapter

[65] Ngaire Naffine, 'The Body Bag,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 79-96; Braidotti, above note 48, p. 13-16.
[66] Naffine ibid; Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene 'Humanity',' *Law and* Critique 2015, 26(3), p. 231.
[67] See, for example, the legal definition of the state under the Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097.
[68] This conceptualisation of the sovereign and the ways in which the sovereign state is therefore gendered in its very construction has been noted my multiple authors. For a literature review of this area, see appendix. Key works which have highlighted this point include; Knop, above notes 21 and 22; Karen Knop, 'Statehood: territory, people, government' in *The Cambridge Companion to International Law*, James Crawford and Martti Koskenniemi (eds.), (Cambridge University Press, 2012), p. 95-116; Charlesworth, above note 21; Otomo, above note 48; Charlesworth and Chinkin, above note 2.
Much of this work, was, of course, inspired by domestic feminist legal critiques of the domestic legal person. See, for example; Naffine, above note 65.
The racialisation of the subject of the sovereign state has also been well noted. Broadly, these authors note the ways in which sovereignty has been used to justify rule the rule by some and the exclusion of others. See appendix for further discussion. Key works which have highlighted this include, for example; Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in
Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583-99; Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal*, (1999), 40, p. 1-71.
[69] See appendix on defining international legal personality.
[70] Parfitt, about note 68; see my definition of international legal personality in appendix.

Three through the example of the role and status of the global corporation.[71] The sovereign state and therefore international legal personality is based on a limited, hierarchical, liberal-humanist account of the subject, an account which is gendered, racialised and works to hierarchise the human over also the nonhuman animal and matter.[72]

In this thesis I will, however, highlight the fact that this humanist, gendered and racialised blueprint of subjectivity upon which international law is based is false. Man made God and then killed him (in international law), replacing him with man in God's image. No human, however, can ever fully live up to this idealised expectation of subjectivity. For example, no person is ever merely an individual; we all live in connection with one another (and the same can be said of sovereign states).[73] Any account of subjectivity which promotes an individual, bounded and containable account of the subject, therefore, is inherently false. In fact, as will be shown in Chapter Three, creating such an unrealistic blueprint of subjectivity/personality in international law has worked to allow the global corporation to gain great power, for it can indeed *be,* in many ways, this idealised subject precisely because it is *not* embodied. This has led Grear to state that the ultimate disembodied subject of law could never be a human at all.[74]

In this thesis, feminist posthumanism is posed as an alternative way of understanding subjectivity. I have chosen to focus on posthumanism and some of its feminist strands including feminist new materialisms and xenofeminism, since these theories explicitly work to challenge and de-centre the problematic humanist subject described above. Broadly, feminist posthumanism, as being post-humanism and therefore aiming to both rupture and act in continuation with humanism, does this through considering the challenge posed to humanism by both technology[75] and nature-matter (environment).[76] An example of this can be seen in the ways in which technology itself and our uses of it are already changing our subjectivities in that humans are, already, more interconnected and are all, in some ways, cyborgs in that humans often use machines as extensions or as parts of themselves.[77] Feminist new materialism, on the other hand, focuses more specifically on nature-matter, i.e. how we are all

[71] Grear, above note 66.
[72] Ibid.; Braidotti, above note 48, p. 13-16.
[73] Christine Chinkin, Gina Heathcote, Emily Jones and Henry Jones, 'The Bozkurt Judgement: A Feminist Judgment of the Lotus Case' in Loveday Hodson and Troy Lavers (eds.), *Feminist Judgments*, (Hart Publishing, Forthcoming 2018).
[74] Grear, above note 66, p. 240.
[75] Laboria Cuboniks, above note 24.
[76] Alaimo and Hekman, above note 53.
[77] Haraway, above note 48.

already embedded in nature-matter and are nature-matter (as we are all embodied).[78] These theories will be used to both analyse and propose ways in which environmental and technological subjectivities can expand and challenge the bias present within the concept of international legal personality without collapsing into the liberal roots of the concept itself.

Another key theme throughout the thesis is capitalism. Chapter Three outlines the ways in which international law is structured around capitalism, which, drawing on Deleuze and Guattari, is defined as schizophrenic [sic].[79] It is noted that capitalism is a biased structural force which prioritises certain aims of others. Chapter Three gives two key examples of this. First, the Chapter draws on examples from measurement cultures within human rights and development discourses and the limited narrative often told by gender measurements in particular (usually reducing core concepts such as freedom and equality to neo/liberal accounts of these terms alone).[80] Second, the chapter considers the role and status of the global corporation in the global order, noting another example of schizophrenic capitalism at play in the ways in which the corporation has been able to exploit concepts such as legal personality and rights. Capitalism is thus defined as another key, structural element in the contemporary global order. It is noted how schizophrenic capitalism has been so successful precisely because it situates itself between resistance and compliance, bringing all, including resistance, to capitalism itself.[81]

Chapter Four draws on feminist new materialist accounts of subjectivity as a means through which to challenge the structurally biased liberal, humanist blueprint upon which legal subjectivity lies.[82] Noting contemporary claims for the environment to have legal personality,[83] the chapter highlights the need for the law to not only open up the category of legal personhood to more and different subjects, but to fundamentally change the model of subjectivity which legal personhood is based on.

[78] Alaimo and Hekman, above note 53; Karen Barad, 'Posthumanist Performativity: Towards and Understanding of how Matter comes to Matter,' in Stacy Alaimo and Susan Hekman (eds), *Material Feminisms*, (Indiana University Press, 2008), p. 120-56.
[79] Deleuze and Guattari, above note 48.
[80] Buss, above note 7; Rao, above note 48.
[81] Deleuze and Guattari, above note 48, p. 245.
[82] Alaimo and Hekman, above note 53.
[83] See, for example; Tutohu Whakatupua, Agreement between Whanganui Iwi and the Crown, 30 August 2012, http://www.harmonywithnatureun.org/content/documents/193Wanganui%20River-Agreement--.pdf, (accessed 12 March 2017).

Chapter Five turns to theories from outside the law which aim to challenge the structurally biased force of capitalism and create a post-capitalist world, including accelerationism[84] and xenofeminism.[85] Xenofeminist theory both aims to create a post-capitalist world while also promoting feminist posthuman subjectivities. Xenofeminism is explicitly situated between resistance and compliance working, however, not within the structure but seeking to challenge and change structures by shaping them. This can be seen in xenofeminism's call to use and appropriate technology for its own, critical feminist and post-capitalist aims, for example, by accelerating the use and development of technology to create a jobless, post-capitalist world where the machines do all the work.[86] Xenofeminism and xenofeminist method, therefore, are proposed as a means through which feminists may be able to resist and challenge the structure of international law.

Returning to international law and its basis as a system which was set up to manage relations, conflicts and disputes between states, xenofeminist theory is questioned and challenged by putting it into conversation with international law. This is done through focusing on the specific legal problem of autonomous weapons systems, working to bring xenofeminism's stance on technology to the realm of international law and working to consider the usefulness of this theory for feminist international lawyers. Artificial intelligence (AI), may indeed both challenge hegemonic models of subjectivity in conceptions of legal personality in that it will *be* a new subject, both in actuality and, most likely in the not so far future, legally.[87] Further, AI, along with robots, may work to create a job-free society, allowing for the creation of a post-capitalist world. However, one of the key areas in which AI is being rapidly developed is in the realm of weapons technology. Autonomous weapons, weapons which can select and aim at targets and make decisions whether to shoot or not, at their most advanced, may have AI. However, autonomous weapons are a long way off the paradigms of xenofeminist positivity suggested above which work to challenge subjectivity and capitalism. Autonomous weapons are deeply embedded within capitalism, militarism and the necropolitical order. Xenofeminist and posthuman positivity around technology seems considerably less positive considering these systems.

[84] Alex Williams and Nick Srnicek, '#ACCELERATE MANIFESTO for an Accelerationist Politics,' Critical Legal Thinking, 2013, http://criticallegalthinking.com/2013/05/14/accelerate-manifesto-for-an-accelerationist-politics/, (accessed 05/04/17).
[85] Laboria Cuboniks, above note 24.
[86] Williams and Srnicek, above note 84.
[87] See; European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, (2015/2103(INL)).

I thus conclude Chapter Six by returning to resistance and compliance and the possibility of analysing and challenging the bias structure of international law and the global order for feminist international lawyers. Drawing on Haraway's work on anti-militarism[88] as well as feminist international legal scholarship which situates feminist approaches to international law as within anti-militarism,[89] Chapter Six defines anti-militarism as part of an international feminist ethics. Incorporating this ethics into posthuman-xenofeminist theory, while trying to both promote possible post-capitalist futures while also aiming to challenge conceptions of international legal personality using feminist posthuman accounts of subjectivity, the chapter concludes with two key proposals. First, it is noted how the law will soon be forced to accept 'electronic persons' as legal subjects.[90] Noting the need to see the human-machine as interconnected as opposed to distinct in order to ensure that technologies can be properly understood and regulated; the importance of a feminist posthuman stance on subjectivity is therefore justified as crucial in any project which aims to change, extend or challenge legal personality. International legal personality, itself, must be used, challenged and changed in order to encompass new modes of subjectivity.

Second, drawing on Braidotti's affirmative approach to the posthuman condition[91] and xenofeminist method (which I define as a blueprint for an affirmative politics); the aim of appropriating technology for feminist aims, resisting via using what exists, it is proposed that feminists also need to be appropriating, debating and writing the legal-ethical frameworks for the regulation of technology as well as seeking to shape these technologies at the development stage. The current times represent a key moment for social and legal change. The law will soon be forced to change to be able to moderate the negative forces of technological change, as can be seen in the debate around autonomous weapons. Further legal change is 'urgently' required, notes the European Parliament, given the vast issues around accountability and liability technological subjects may soon present.[92] This is a moment which feminists must grasp to shape. A xenofeminist approach is thus needed; not only to ensure that a feminist posthuman account can be applied to technological legal personalities, thus potentially expanding humanist and liberal accounts of legal personality more broadly, but also to ensure that

[88] Haraway, above note 48.
[89] Dianne Otto, 'A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325,' *Michigan Journal of Gender and Law,* (2006) 13(1), p. 113-75; Heathcote, above note 29.
[90] See; European Parliament, above note 87.
[91] Braidotti, above note 48.
[92] See; European Parliament, above note 87.

technology may be shaped, developed and regulated in line with the aims of anti-militarism while also ensuring that technological potentials and the possibility that technology may, indeed, help to create a post-capitalist world, are neither erased nor limited. This moment thus represents a way in which to use the legal system to promote resistive transformation.

3. Resisting Fragmentation

In this thesis I cover multiple different subjects and topics in international law, including questions posed by military technologies, considerations of the role and status of the global corporation in international law and international and environmental legal personalities. I have chosen to focus on multiple areas of international law as part of my methodology in the aim of resisting the contemporary tendency within international law and international legal scholarship towards fragmentation.

Fragmentation describes the ways in which, in recent years, different areas of international law have become more and more specialised.[93] International lawyers, now, tend to specialise in one particular area of international law, such as human rights law, environmental law or the law of the sea. While fragmentation allows for more detailed regimes and work, as Orford notes, fragmentation and increasing specialisation is, in fact 'a barrier rather than an aid to comprehension.'[94] There is a need, therefore, notes Orford, to consider the links between the various different areas of international law in order to understand better both the history of international law as well as the way things work now.[95]

It is in this vein that I have written this thesis. Fragmentation, indeed, provides a barrier to comprehension working to silence the overall political structure of international law itself as well as allowing certain regimes to get caught up in their own discourse without account for what is going on elsewhere. This can be seen within the area of feminist approaches to international law itself, in that, in focusing mostly on human rights and equality issues, gender has become a specialisation in the era of fragmentation. The rendering of gender as a specialisation in international law has worked to also bound the area, thus silencing feminists who wish to speak on issues beyond those which are deemed to be "women's issues." In

[93] Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law, Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi, A/CN4/L.682 (13 April 2006).
[94] Anne Orford, 'Theorising Free Trade,' in Orford and Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 706.
[95] Ibid.

explicitly trying to move away from the current boundaries of gender has been designated as an area in international law, while aiming to search for overarching and interlinking structural themes within international law, I discuss multiple topics in this thesis. The thesis is thus structured, not around specialisation, but around key themes including resistance and compliance, structural bias and international legal personality/the subjectivities of international law. Resistance to fragmentation should therefore not be seen as another exemplification of international legal anxiety around a lack of wholeness. Rather, this thesis begins, as exemplified in the next chapter, with the premise that this wholeness is and was always a myth but that links between different areas of international law need to be drawn in order to fully dispel that myth.

Chapter 2

The Masculinist Humanism of International Legal Structure and Feminist-Gender Theory's Resistance

1. Introduction

In this thesis I seek to challenge the structural bias of international law via using feminist gender theory. In analysing the structure of international law, however, there is a need to understand what the structure of international law is. While I have already noted that international legal structure is made up of multiple assemblages, there are, however, as this thesis will exemplify throughout, some key theoretical underpinnings. These underpinning include concepts such as humanism and liberalism as well as forces such as capitalism and militarism. International law has been constructed out of a particular set of desires which aim to apply a particular vision of the male, liberal subject to the law.[1] To understand the relationship between this masculine subject as promoted by liberalism and humanism, however, there is a need to understand, first, international law's history and thus its relationship to Christianity and secularisation.

[1] Ngaire Naffine, 'The Body Bag,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 79-96; Anna Grear, ''Sexing the Matrix': embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 39-52.

This chapter therefore does two key things. First, it briefly outlines international law's Christian history drawing on critical and psychoanalytic approaches to international law to highlight the ways in which these Christian origins have shaped contemporary international law and its liberal, humanist figurations. Through this analysis, some core elements of international legal structure are understood. Second, this chapter will consider various feminist and gender theories which seek to challenge structural bias. Beginning with MacKinnon, followed by Irigaray and Cixous, moving on to Young and then to Braidotti, Haraway, Puar and Xenofeminism, among others, this chapter brings together multiple different feminist and gender theories and approaches to challenging structural bias. The chapter notes the tensions between these theories while, in the vein of the feminist methods of non-oedipal reading and researching, which is defined in this chapter, working to bring these different and sometimes conflicting bodies of thought together to propose a productive understanding of challenging structural bias using feminist gender theories.

2. International Legal Structure: The Death of God and International Law's Lack

2.1 International Law, Secularisation and Liberalism

International law began as a religious law system based on Christian principles: 'legal sources and sanctions incurred by infractions were quite frequently seen as divine.'[2] In the thirteenth century, for example, Thomas Aquinas described a layered system of law, the highest source of law being eternal law, this being the law which only God knows and humans can only hope to know, which was then followed by divine law, the elements of eternal law understood by priests, then followed by natural law, which was made up of human reflections such as reasoning and divine revelation. Then, at the bottom of the system, laid human made law, which could include, for example, human interpretations of natural law.[3] Ultimately, all should come in some way, in this system, from the divine i.e. Christian scripture.

Slowly, however, international law moved towards the process of secularisation, replacing international law's Christian foundations with positivist conceptualisations of state sovereignty and state consent.[4] While this happened over the course of many centuries, key moments

[2] Antje Von Ungern-Sternberg, 'Religion and Religious Intervention,' in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law,* (Oxford University Press, 2012), p. 296-7.
[3] James Penner, David Schniff and Richard Nobels (eds.), *Introduction to Jurisprudence and Legal Theory,* (Butterworths, 2002).
[4] For example, as Orford notes, 'the modern state is often represented as the successful realisation of a project of secularism, where secularism is understood in opposition to theology.' Anne Orford, 'International Law and the

included the 1648 Peace of Westphalia and the work of a number of key legal scholars across the seventeenth and eighteenth centuries such as Vitoria, Grotius, Gentili and De Vattel.[5] It is clear, however, that the secularisation of international law cannot be marked by one, sole moment but, rather, occurred across a long period of time. Further, and as I will argue in the next section, secularisation is still in process. International law, in many ways, remains structured by Christian frames.

Liberalism came to play an important role in "post divine" international legal structure, eventually becoming one of international law's most dominant underpinnings.[6] It is key to emphasise that there are, however, many forms of liberalism at play in international law. Positivist approaches, for example, are a clear product of enlightenment international legal thinking and the will to move beyond religion towards so-called rationalism. Cosmopolitanism in international law, on the other hand, has been very much inspired by the work of liberal theorist Kant.[7] Liberalism is so pervasive in international legal thinking that even critical approaches to international law often return to liberalism. For example, Tourme-Jouannet highlights the liberalism inherent in the work of Koskenniemi who, while using postmodern approaches to deconstruct international law, fundamentally describes (and returns to) a liberal system with instrumentalist undertones.[8]

Thus, as Orford notes, 'International law emerged as a profession committed to the spread of liberal ideas in the late nineteenth century,' this liberalism working both to promote specific values in international law, such as freedom and equality and even free trade while, as Orford notes, also silencing questions over the politics behind such ideas and policies.[9] Liberalism, Orford thus notes, has worked in this way precisely because it 'avoids consciously thinking

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Making of the Modern State: Reflections on a Protestant Project,' *In-Spire: Journal of Law, Politics and Societies,* (2008), 3(1), p. 5.

[5] For a larger discussion of this secularisation process see Von Ungern-Sternberg, above note 2; Martin Wright, in Martin Wright and Brian Porter (eds.), *Four Seminal Thinkers in International Theory. Machiavelli, Grotius, Kant, and Mazzini*, (Oxford University Press 2005). For direct sources see, example; Francisco de Vitoria, 'De indis et de iure belli relectiones,' in James Brown Scott (ed.), *The Classics of International Law*, (Carnegie, 1997), vol. 2(1); Emrich de Vattel, *Les droits des gens*, (1979).

[6] Anne Orford, 'Theorising Free Trade,' in Orford and Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 704.
Of course, there are exceptions to this, for example, as seen in Soviet approaches. See; Kazimierz Grzybowski, *Soviet International Law and the World Economic Order*, (Duke University Press, 1987).

[7] See, for example; Fernando Tesón, 'The Kantian Theory of International Law,' *Columbia Law Review*, (1992), 92, p. 53-102.

[8] Martti Koskenniemi, 'The Politics of International Law – Twenty Years Later,' *European Journal of International Law*, (2009), 20(1), p. 7-19; Emmanuelle Tourme-Jouannet, 'Koskenniemi: A Critical Introduction,' in Martti Koskenniemi, *The Politics of International Law*, (Hart, 2011), p. 1-32.

[9] Orford, above note 6, p. 704.

about the way it institutes and regulates authority, labour, and goods, while liberal legalism ignores… the inherently political nature of that legal ordering.'[10] However, as already suggested and as will be exemplified throughout this thesis, liberalism is, indeed, a specific political project and one which can be challenged. Thus, while liberal law may work in the aim of presenting itself as neutral, this thesis takes the stance that 'legal fictions and legal concepts are highly condensed forms of rhetorical material that allow often highly controversial political or philosophical propositions to be passed on as part of legal routine.'[11] Accepting this as an underlying basis of Western law allows for a deconstruction of the law. Further, as the next section will show, the liberal structure of international law is still structured very much in the same way as Christian international law las was, the divine space still being present even if the divine himself is replaced by another Name-of-the-Father.[12]

2.2 The Death of God and International Law's Lack

Did we kill God when we put man in his place and kept the most important thing, which is the place?[13]

Nietzsche states that the Death of God is a stage in mankind's path to nihilism.[14] Nietzsche's nihilism can be defined in many ways, according to the context it is being used in,[15] but for the purposes of this thesis, nihilism is being looked at through the aspect of the disbelief in God and, subsequently, the will and act to destroy;[16] 'What does Nihilism mean? That the highest values are losing their value.'[17] Deleuze, summarising Nietzsche's position, states that;

> With the Reformation, the death of God becomes increasingly a problem between God and man, until the day man discovers himself to be the murderer of God, wishes to see

[10] Ibid.
[11] Ibid., p. 709.
[12] Yoriko Otomo, 'Of Mimicry and Madness: Speculations on the State,' *Australian Feminist Law Journal*, (2008), 28, p. 53-76.
[13] Gilles Deleuze, *Pure Immanence: Essays on A Life*, (MIT Press, 2001), p. 71.
[14] The term 'nihilism' has a long history. I am using the term in the context of Nietzsche and the ways in which other have subsequently drawn on Nietzsche's work. For further information on the history of this, however, see: Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement*, (Oxford University Press, 2016), p. 15.
[15] Examples of the different ways nihilism has been used (e.g. existential nihilism and nihilism and anti-foundationalism) can be found at: 'Nihilism,' Internet Encyclopaedia of Philosophy, http://www.iep.utm.edu/nihilism/#H2, (accessed 02/09/2015).
[16] Bernard Williams, 'Introduction,' in Nietzsche, *The Gay* Science, (Cambridge University Press, 2001), p. xiii.
[17] Friedrich Nietzsche, *The Complete Works of Friedrich Nietzsche*, ed. Oscar Levy, Volume 14, Book 1, p. 2, 8.

himself as such and to carry this new weight. He wants the logical outcome of this death: to become God himself, to replace God.[18]

Nietzsche was, notes Francis, very much responding to the turn towards science and education and the stride towards enlightenment and liberal values which were one of the strongest ideologies and political blueprints of his time.[19] The Death of God, according to Nietzsche, in some sense changes nothing, however. The *place* of God remains. The higher values under the law of God are thus replaced by human values: '(morals replace religion; utility, progress, even history replace divine values). Nothing has changed.'[20] The links here, to humanism therefore become clearer. Heidegger defines humanism as the point of secularisation where everything becomes represented by man himself, where man fills the formerly divine space with representations of himself.[21] 'By this,' notes Otomo, 'Heidegger means an ontology whereby what we call 'human' becomes the condition of its own world; effectively, becoming a modern subject.'[22] Humanism, therefore, is the way in which humans have interpreted the world through themselves, personifying it in their own image. Thus, continues Heidegger, 'man becomes that being upon which all that is, is grounded as regards the manner of its Being and truth. Man becomes the relation centre of that which is as such.'[23] Deleuze's reading of Nietzsche corroborates this humanist turn in reaction to secularisation. He states that Nietzsche 'traces the great misery of those he calls "the higher men." These men want to replace God; they carry human values; they even believe they are rediscovering reality, recuperating the meaning of affirmation.'[24] But of course, they are not: 'values can change, man can put himself in the place of God, progress, happiness; utility can replace truth, the good, or the divine – what is essential hasn't changed.'[25] Thus, despite the Death of God and the move towards secularisation, as Deleuze highlights in the question above, the place was kept, the blueprint of the fantasy of the patriarchal law of the Father.[26]

[18] Deleuze, above note 13, p. 80. See also Nietzsche on 'The Death of God'; Friedrich Nietzsche, *The Gay Science,* Book III (Cambridge University Press, 2001), p. 125.
[19] Arthur Morius Francis, *Nihilism: The Philosophy of Nothingness*, (Lulu, 2015), p. 69.
[20] Deleuze, above note 13, p. 80-81.
[21] Martin Heidegger, 'The Question Concerning Technology' in *The Question Concerning Technology and Other Essays,* trans. William Lovitt, (Garland, 1977), p. 133.
[22] Otomo, above note 14, p. 57.
[23] Heidegger, above note 21, p. 128.
[24] Deleuze, above note 13, p. 80-81.
[25] Ibid., p. 71.
[26] Ibid.

This move towards secularisation while retaining the religious is described by Heidegger through what he calls 'ontotheology.'[27] Heidegger's ontotheology is the concept which summarises the fact that, 'Western metaphysics… since its beginning with the Greeks has eminently been ontology and theology… metaphysics is onto-theo-logy.'[28] Metaphysics, for Heidegger, and philosophy itself, therefore, cannot be separated from the theological, with metaphysics being made up on both ontology and theology. This is because, at the origin of Western philosophical theories of existence itself, of being, lies theology and the divine.[29] By defining metaphysics in this way, Heidegger notes how Western thought is unable to escape the theological.[30]

International law, too, can be described as an ontotheological system in that at its very essence lies the theological and the divine. This is true, not only historically, in that international law began as a system of law based on Christian principles, many of which have remained in some form,[31] but also in the sense that international law must always pose itself as being based on some form of foundational, ideological origin, whether this be God, the sovereign state or human rights.[32]

International law, following the Death of God, grounded itself and its very being through the concept of the sovereign state. It thus theorised the sovereign state as God himself.[33] This can be seen in the personality of the sovereign state. The ideal subject, to be God, must be absolute, bounded and individual. The sovereign state is theorised as all of these things, it has a territory and is bounded, it is absolute in that it has absolute sovereignty over its own territory and in that international law is supposedly structured around state consent, and it is individual – one

[27] Martin Heidegger, *Identity and Difference*, trans. Joan Stambaugh, (Harper & Row, 1969). Note that this term was first used by Kant. Kant, however, used the term in a different way. See; Immanuel Kant, *Lectures on Philosophical Theology*, (Cornell University Press, 1986).
[28] Heidegger, Ibid., p.54.
[29] Ibid.
[30] Noting this, Heidegger then seeks to search beyond theology, looking for a philosophical foundation beyond divine essence. This search for the outside of ontotheology, however, was critiqued by Derrida who noted that; 'With and without the word *being*, he [Heidegger] wrote a theology with and without God. He did what he said it would be necessary to avoid doing. He said, wrote, and allowed to be written exactly what he said he wanted to avoid.' (Jacques Derrida in Jacques Derrida, Harold Coward and Toby Foshay, *Derrida and Negative Theology*, (State University of New York Press, 1992), p. 128.) Thus, as Derrida notes, in explicitly trying to move away from ontotheology and to separate ontology from theology, Heidegger merely works to inscribe the place of theology even more, his denial thus representing, not a move away from theology but rather a reinscription of the place of theology itself, thus creating 'a God who is dead [but] continues to resonate.' (Régis Debray, *God: An Itinerary*, trans. Jeffrey Mehlman, (Verso, 2004), p. 276.)
[31] For example, many of the principles of international humanitarian law have their origins in Just War theory which originally emanated from Christian principles.
[32] Maria Aristodemou, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours,' *European Journal of International Law* (2014), 25(1), p. 35-58.
[33] Otomo, above note 12.

government represents the whole.[34] Thus, in one sense, sovereignty became international law's new divinity. International law, like metaphysics itself, is ontotheological, unable to escape its theological origins and thus only reinforcing them in its declaration of its theological denial.[35]

Aristodemou discusses international law's divine denial; the way in which it claims secularity while fundamentally being based on Christian foundations.[36] She begins with international law's uncertainty about itself as a discipline; is it law? What is the role between law and politics?[37] These are questions international lawyers have long been asking, with Hobbes and Hegel, for example, claiming that international society did not exist, but, rather, stating it merely amounted to anarchy[38] and with Austin stating that international law was/is a form of positive morality as opposed to positive law, in and between formally equal states, lacking an ultimately superior opinion, therefore making it 'mere opinion' as opposed to law.[39] As Orford notes, international law finds it hard to bury its lack as, unlike most legal systems which bury this lack at their foundation, it lacks a foundation. While Orford notes that this is a problem of all law in late modernity but for international law, 'knowledge of this lace of ground… is inescapable.'[40] Thus, she continues, 'almost every debate in international law has at some point to deal with an anxiety about a lack of sovereign authority.'[41]

Applying a psychoanalytic model to international law, Aristodemou states that international law's insecurity and its constant need to prove its positivist credentials results in international lawyers constantly searching for 'fresh brains'; looking towards other disciplines to answer its uncertainties about itself, towards some divine other to fill it up.[42] International lawyer's, she states, construct international law as caught between politics, otherwise called within the discipline, desires, utopia or normativity, which, she states, in psychoanalytic terms, is the *imaginary*, and rules and regulations, also known as apology, which she states, in psychoanalytic terms, is the *symbolic*.[43] However, while international lawyers base their work

[34] Hilary Charlesworth. 'The Sex of the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 251-68.
[35] Derrida, above note 30.
[36] Maria Aristodemou, *Law, Psychoanalysis and Society*, (Routledge, 2014).
[37] Aristodemou, above note 32, p. 35-58.
[38] Martin Wight, in Martin Wight and Brian Porter (eds.), *International Theory: The Three Traditions*, (Leicester University Press, 1991), p. 7.
[39] John Austin, *The Province of Jurisprudence: Determined*, (John Murray, 1832).
[40] Anne Orford, 'The Destiny of International Law,' *Leiden Journal of International Law*, (2004), 17, p. 443.
[41] Ibid.
[42] Aristodemou, above note 32.
[43] Ibid., p. 40; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, (Cambridge University Press, 2006).

on managing these two elements, between apology and utopia,[44] Aristodemou states that they are ignoring an important element when analysing law: the Real.[45] The Real is the part which was cut off to become a subject and enter the symbolic order,[46] the unconscious element of truth, the estimate truth which resists symbolisation but which must be dragged to the forefront in analysis. In merely sticking to the symbolic or retreating to desires, international lawyers seek to avoid the Real.[47] International lawyers, therefore, she states, need to psychoanalyse international law. This must be done, not through propagating and entering the imaginary; asking whether international law is law, whether it is complete, but, instead, the anxiety around these issues must be explored, anxiety being the thing which shows that one is getting close to the Real.[48] International law's yearning to be full and it's theorising of itself as complete while constantly searching for completeness, this imaginary, which is in constant search for divinity, to be a universal system, must be exited and recognised as a constructed identity. The Real, the reason for the problem and anxiety, must be found.[49]

The Real, Aristodemou states, is that international law, like any subject, is lacking, and so, too is the divine completeness it reaches towards.[50] This anxiety, she states, is anxiety left over by the Death of God. International law was founded on divine law. 'God performed the functions of total legislation, total knowledge total ownership (of territory), and of course total enjoyment'[51] as myth, for, after all, this emptiness was only merely remedied before by God as an 'imagined and created response to this pre-existing emptiness.'[52] Yet international law, in liberal and enlightenment aims, killed God who filled this place of the absolute yet kept the place. International law is ravenous because it tries to fill the empty space left by the Death of God,[53] it wants to operate as if it is/has a God and fill the space.[54]

Intentional lawyer's anxiety over the Real of international law's lack of complete divinity can be seen in the example of the fragmentation of international law. Fragmentation in international law can broadly be defined as the idea that international law is no longer being applied universally as one universal area of law. With the increase in regionalism and specialisations

[44] Ibid.
[45] Aristodemou, Ibid., p. 40.
[46] Ibid., p. 41.
[47] Ibid.
[48] Ibid.
[49] Ibid., p. 43.
[50] Ibid., p, 44.
[51] Ibid., p. 46.
[52] Ibid.
[53] Ibid., p. 44.
[54] Ibid., p. 45.

in international law; international human rights law, European law etc.,[55] many international lawyers are now specialising in one area of international law as opposed to working broadly as an international lawyer. Many international lawyers are anxious about this fragmentation, concerns including that regionalism means that international law applies too differently between regions and thus not universally and that fragmentation works to create a mismatch in policies and laws between areas with different specialists working within their own area and not speaking enough to others, creating jurisprudential conflicts.[56] This anxiety over fragmentation can be seen as international law coming close to the Real. International lawyers are concerned about fragmentation ultimately because it shows that international law is not a universal system. At the heart of this anxiety, however, the Real, is the fact that international law has never been a universal system; there have always been those who understood international law differently.[57] Further, as Knop notes, international law is not merely "international" but is also transnational, with international courts impacting on local law and decision making but with local courts, too, impacting the international in various ways and thus shaping international law.[58]

2.3 The Sovereign State as Impossible Divinity

It is therefore clear that the ''Death of God' has always been greatly overstated'[59] by international lawyers. God is still very much alive and present in international law as place, as the ideal of totality. Thus, while Aristodemou identifies the structure of international law as being situated around the space left after the Death of God, around lack, and while she notes that there have been attempts to fill up this lack, her point is ultimately to note that international law is in crisis and needs to accept the Real – that it is lacking and will never be full. Other authors, such as Kennedy and Otomo, have shown, however, the way in which the sovereign state, as the key fundamental concept structuring international law, with everything supposedly

[55] Fragmentation of International Law. Problems caused by the Diversification and Expansion of International law, Report of the Study Group of the International Law Commission, Finalised by Martti Koskenniemi, A/CN4/L.682 (13 April 2006).
[56] Ibid.
[57] See; Grzybowski, above note 6; Robert Knox, 'Marxist Approaches to International Law,' in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 306-326; Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal,* (1999), 40, p. 1-71.
[58] Karen Knop, 'Here and There: international Law in Domestic Courts,' *New York University Journal of International Law and Politics,* (2000), 32, p. 501-536.
[59] Aggie Hirst and Nicholas Michelsen, 'Introduction: International Relations and the 'Death of God,' *Millennium,* (2013), 42(1), p. 107.

emanating from state consent, is itself deeply embedded and constructed around this very same paradigm of divinity and lack.

Kennedy, discussing the so-called Death of God in international law, notes the religious element to these secular principles, stating that, 'ironically, at the very moment of religion's disappearance, international law appears as a universalist ideology of its own, temporarily freed from its origin and context.'[60] International law's story is told as a 'triumph of will' based around general principles which were slowly agreed, situating state consent at the centre of the paradigm. It was the state, therefore, which worked to split law from religion, and the sovereign state was thus 'project[ed]… forward as law's completion, object, origin'[61] through the paradigm of sovereignty. The sovereign state was proposed as God's replacement and theorised as such.

Of course, just because international law then proclaimed itself as secular, this does not mean that a clear cut was made and its religious past was left behind in the wake of the new sovereign state-based system. In fact, as Kennedy notes, law maintains a 'singular and repressive relationship to religion.'[62] International law, states Kennedy, represses its religious origins yet, while denying these origins, it maintains the monotheistic structure of these origins, merely replacing one complete, absolute subject (God) which another (the sovereign state).[63] Secularism, in this form therefore, states Kennedy, is itself a faith.[64]

Thus, Kennedy concurs with Deleuze, Nietzsche, Heidegger, Derrida and Aristodemou that, after and despite the Death of God, the framework of God remained. International law did not move away from its divine blueprint but is, instead, always looking towards God. Kennedy adds to this, however, noting how the sovereign state was constructed to replace God in the wake of the new secular order.[65]

As Douzinas notes, the authority of law is based upon the 'desire for a Father or law-maker who is outside the operation of law and who infuses it with its majesty or justice.'[66] Sovereignty

[60] David Kennedy, 'Images of Religion in International Legal Theory' in Mark W. Janis and Carolyn Evans (eds.), *Religion and International Law*, (Kluwer Law International, 1991) p. 148-9.
[61] Ibid., p. 149.
[62] Ibid.
[63] Ibid.
[64] David Kennedy, 'Losing Faith in the Secular: Law, Religion and International Governance,' in Andrew D. Weiner and Leonard V. Kaplan (eds.), *Graven Images, Volume 4: Transgression, Punishment, Responsibility and Forgiveness*, (University of Wisconsin Press, 1998), p. 121.
[65] This is something which has also been highlighted by Schmitt. See; Carl Schmitt, *The Nomos of the Earth*, (Telos Press, 2003), p. 120.
[66] Costas Douzinas, *The End of Human Rights*, (Hart, 2000), p. 328.

is the concept used by international lawyers to try to fill/replace the place left by the Death of God. Not only is this the case in a very literal sense, in that, sovereignty, at the Peace of Westphalia, became the concept which replaced divinity in the acceptance of multiple (albeit all Christian) divinities, but it is also the case at a deeper level, in that sovereignty was used to continue the self-same symbolic structure of the Law of the Father.

In her alternative account of Plato's Cave,[67] Irigaray tells the story of the subject's entry into culture. Free from his chains, the subject leaves the cave/womb to walk and look towards the Sun. Upon exiting the cave, the subject will not 'turn back towards the mother' but rather, the womb will be inverted, the origin of the mother forgotten.[68] In order, therefore, for him to learn the wisdom of the philosopher; 'views that are fairer, loftier, and more precise,' one must 'cut off any remaining empirical relation with the womb.'[69] Thus, the mother is displaced from discourse,[70] a new story of an origin from the phallus created. The cave, itself, becomes speculum,[71] so that when the subject looks back towards the cave he sees only the light of the Sun reflected back.

Otomo applies Irigaray's account of Plato's Cave to the subject of the sovereign state. Noting that the sovereign state, due to the separation from and the loss of the mother from discourse, is always desiring, both its original object of desire, the mother, as well as the idea of a whole body of its own. The sovereign state's desire both for the other as well as for itself to be a clean-and-proper whole, as constructed by and continuing through mimetic rivalry, looks towards the site of origin, the mother. However, the maternal feminine has been sacrificed and thus venerated as both the victim/God in order to avoid the inevitable violence as a result of mimetic rivalry between states. Thus, in looking back towards the site of origin, where the mother has been sacrificed as the origin of discourse, the sovereign state sees only its self/same image reflected back. This is because, over the sacrificed mother as site of origin is placed a speculum[72] allowing the sovereign state's self/same image of itself and other sovereign states (as a speculum is curved) to be reflected back at itself. In this sense, the loss is forgotten as the fantasy of the whole is reflected back though, of course, this fantasy, in an important sense,

[67] Luce Irigaray, 'Plato's *Hysteria'* in *Speculum of the Other Woman*, trans. Gill, (Cornell University Press, 1985), p. 243-365.
[68] Ibid., p. 284.
[69] Ibid., p. 293.
[70] Luce Irigaray, 'Women-Mothers, the Silent Substratum of the Social Order,' in Margaret Whitford (ed.), trans. David Macey, *The Irigaray Reader*, (Blackwell, 2000), p.47.
[71] Irigaray, above note 67, p. 285.
[72] Irigaray, *Speculum of the Other Woman*, trans. Gill, (Cornell University Press, 1985).

remains just that; a fantasy reflected in a mirror. At the same time, the gaze of these sovereign states is cast upon the venerated God, who was created at the moment of sacrifice. However, this imaginary maternal God has been mediated by a 'third term' which is the Father; not the real Father but the Name-of-the-Father[73] as symbol. This identification of/with the Father then becomes the subject's entry into culture; thus the m(Other) is always sacrificed. Placed over this Name-of-the-Father/God, is a mirror. This means that their Self/same image is reflected back, again. However, they are always in some ways reaching beyond the mirror towards God himself, towards the fantasy of the whole, though they always, inevitably, fail; for the name-of-the-Father/God holds its real place of importance as myth. Otomo highlights how discourse, international law and the subject is falsely imagined as being both created out of the masculine and looking towards being masculine.[74]

The subject, while in the cave, was entranced by the light; 'the glowing "source" of the fantasies that once entranced him.'[75] He remained entranced by the same fantasy of the light upon leaving the cave. The Sun, the absolute, the idea of a wholeness of knowledge, was always a phallocentric fantasy, the symbol of the whole, absolute, ideal, of a principle which is beyond discourse and beyond the symbol of the Sun itself: God. In this sense, the Sun/God of international law is the absoluteness of knowledge, the dream of totality, the space which can never be filled as described by Aristodemou. The divine in international law, however, upon the replacement of the old Christian international law and the creation of a new "non-religious" international law, was replaced by state sovereignty, which then became the new paradigm, replacing the Christian God.[76] The Sun/God, therefore, in this system, is the myth of the absolute, bounded, whole, fully consenting and always in control sovereign state.

However, as Otomo shows, the sovereign state can never claim to be One, complete, because sovereign states are multiple.[77] Thus, as Douzinas notes, international law shows this strongest desire for a Father due to its inability to point to one, ultimate sovereign power.[78] The reality of the sovereign state is that it is neither whole nor all powerful: it is lacking. After all, international law is a horizontal legal system made up of competing states, all claiming to be

[73] Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction,* (Routledge, 1990), p. 47.
[74] Otomo, above note 12, p. 156.
[75] Irigaray, above note 67, p. 275.
[76] Schmitt, above note 65, p. 120-121.
[77] Otomo, above not 12.
[78] Douzinas, above note 66, p. 329.

absolute in their power, ensuring that, in all claiming their individual absoluteness, none of them truly are.[79]

Thus, like Aristodemou, Otomo highlights how international law is an ontotheological system, always reaching towards an impossible fantasy of divinity. However, like Kennedy and Schmitt, she highlights how this absoluteness has been filled up by the idea of the absolute sovereign state as complete God, thereby more directly articulating what international law tries to fill this space with. God was replaced by sovereignty[80] yet sovereignty is lacking. However, 'the starting point of absolute sovereignty was [always] a theoretical, not a practical, reality.'[81] There is no such thing as an absolute sovereign power:[82] international society is based on connection and different entities all influence each other.[83] Despite this, the imaginative power of sovereignty remains and this is reflected throughout international legal scholarship, including even in the work of those who deny its centrality.[84] The centrality of the sovereign state lies in its role as the Name-of-the-Father/God, as the imagined myth of wholeness.

As this thesis will show, the liberal, humanist and ontotheological foundations of international law structure it to the present day. As a thesis seeking to understand and challenge the structural bias of international law, it is therefore necessary to understand these origins. The debates outlined above will be returned to throughout this thesis which will work to both analyse these structural underpinnings further while also working to tentatively propose ways through which to move beyond them.

3. Feminist-Gender Theory's Resistance to Masculinist Humanism

3.1 A Feminist Ethics of Reading and Researching

Before outlining some of the ways in which feminist gender theory seeks to challenge the masculinist, liberal, humanist structure of the symbolic order including international law and the global order, it is necessary to frame the ways in which I read feminist texts in this thesis.

[79] See appendix for a further discussion on the ways in which the sovereign state is bother gendered and racialised.
[80] Schmitt, above note 65, p. 120.
[81] Paul W. Kahn, 'Remarks on Theme Panel III: Multiple Tiers of Sovereignty: The future of international governance,' *American Society of International Law Proceedings*, (1994), 88(1), p. 53.
[82] Hans Kelsen, 'Recognition in International Law: Theoretical Observations,' *The American Journal of International Law*, (1941), 35(4), p. 609.
[83] Charlesworth, above note 34.
[84] This is many ways echoing Derrida's critique of Heidegger and his inability to move away from the divine despite his proclamations. See above note 30.

As the following pages will show, there are many tensions between the different forms of feminist gender theories that I use. In this thesis, I seek to note these tensions while working to bring different theories together to create something productive. I have sought to do this by drawing on a feminist ethics of reading and researching. This ethics of reading and researching is used as a way to bring multiple voices together, looking towards something new, the other, the feminine, the values outside those which Western societies (and law) have taken up. A feminist ethics of reading and researching provides a means through which to reject the masculine symbolic order and the oedipal narrative which permeates it. The current dominant narrative promotes, while reading and researching, either the outright rejection of one's fore-thinkers through critique or the narrative that the work of key thinkers should be followed without thought and replicated. This is problematic for feminist thinkers as the first model risks silencing the feminist works which have come before, thereby problematically silencing feminist histories, whereas the second model risks creating more (name-of-the-) Father figures, placing certain thinkers in the position of the masculine, all knowing God. Both approaches replicate oedipal narratives, telling the same stories of deep love and absolute hatred, adoration and rejection, which have long permeated the masculine symbolic order.

Haraway calls for 'non-oedipal' work; reading and research which does not merely replicate but subverts, taking the original work in new directions.[85] Also seeking to move beyond the current dominant model of critique, Braidotti notes that; 'One should never criticize that which one is not complicitous with: criticism must be conjugated in a neo-reactive mode, a creative gesture, so as to avoid the oedipal plot of phallo-logocentric theory.'[86] Critique, in other words, should not just exist for the sake of critique and work should be read in a productive way,[87] without the need to either fully reject the work (unless necessary politically) nor merely replicate it. Consequently, as Kirby notes, it is key to be generous to those we read and not always situate oneself as against another thinker, but rather, to sit within that thinker and read their work your way, reading them both alongside other texts and as oneself. [88] Such engagements can work to push scholarship further, creating alternative affirmative

[85] Donna Haraway, 'A Cyborg Manifesto,' in David Bell and Barbara M. Kennedy (eds), *The Cybercultures Reader*, (Routledge, 2001), p. 292.
[86] Rosi Braidotti, 'Posthuman, All Too Human: Towards a New Process Ontology,' *Theory, Culture and Society*, (2006), 23(7-8), p. 200-1.
[87] Vicki Kirby, 'Natural Convers(at)ions: Or, What if Culture was really Nature all along?' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms*, (Indiana University Press, 2008), p. 228-232.
[88] Ibid. See also; Karen Barad, 'Posthumanist Performativity: Towards and Understanding of how Matter comes to Matter,' in Stacy Alaimo and Susan Hekman (eds), *Material Feminisms*, (Indiana University Press, 2008), p. 120-56.

engagements and different perspectives. As Braidotti states 'for us nomadic subjects, there is no faithful allegiance to his master's voice, but only joyful acts of disobedience and gentle but resolute betrayal.'[89] There is a need to be purposefully but always joyfully disobedient[90] and illegitimate,[91] noting the importance of the thinkers who came before yet reading their work through one's own situated perspective[92] as well as through the many lenses that many other texts and authors may provide.

Following this, I have, for example, read MacKinnon (see below) through a feminist ethics of reading, disobeying her universalist structuralist ideas while noting the importance of her work and the need, still, to focus on structure, albeit in a more nuance and complex way that she does. I have also, again above and as picked up on once again below, read Irigaray's work in this way. Radically departing with much of the literature written on Irigaray and possibly departing, at least partially, from Irigaray herself, drawing on the work of Whitford, I have read Irigaray as me, through the many lenses of the many other authors who have inspired me, reading her in a mobile way.[93] This is a mode of reading and writing which will be drawn on throughout the thesis. While, inevitably, such a method of research also creates tensions, particularly, as will be discussed, when bringing the work of theorists who are supposedly in some form of opposition together; as this thesis will show, these tensions can be recognised productively while reading points of similarity together, working to create alternative approaches and modes of thought.

The 'illegitimate offspring'[94] of Charlesworth, Chinkin and Wright, the founders of feminist approaches to international law,[95] mutated by many cross-disciplinary thinkers, written through a feminist ethics of non-oedipal reading and researching, this transdisciplinary thesis pays homage to its multiply-gendered fore-others, for without whom none of these ideas could have been thought through, together.

[89] Braidotti, above note 86.
[90] Ibid.
[91] Haraway, above note 85.
[92] Donna Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of the Partial Perspective,' *Feminist Studies*, (1988), 14(3), p. 575-99.
[93] Margaret Whitford, *Luce Irigaray: Philosophy in the Feminine*, (Routledge, 1991), p. 6.
[94] Haraway, above note 85.
[95] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law,' *American Journal of International Law*, (1991), 85, p. 613-45.

3.1 Resistance, Compliance and Difference Feminism[96]

In this section, I will outline some feminist gender theory approaches to structural bias and the dilemma of being caught between resistance and compliance. In outlining some key feminist gender theory approaches to these issues from outside international law, I seek to understand the ways in which such theories and proposals could be applied to challenge the structural bias of international law. Thus, returning to the problem of resistance and compliance, it is necessary to note that, within domestically focused feminist legal theory, a parallel debate around being between resistance and compliance also exists. However, here it is framed in terms of the possibility of imagining a feminist or feminine jurisprudence within the order that we know. Much of the debate on this within feminist legal theory centres on Gilligan's work which looks at the way boys and girls structure problem solving.[97] Gilligan's study suggests that there is a possible alternative "feminine" perspective. If true, this could, in posing a new source of knowledge, form the basis of the creation of an entirely different discourse in the feminine. However, this premise has been highly criticised, with theorists such as MacKinnon (a US radical feminist thinker) stating that this is the 'voice of the victim without consciousness.'[98] The supposed feminine voice, she states, is, itself a construction of patriarchy. MacKinnon highlights, therefore, that the woman's voice is an impossible one; 'feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing and explaining its impossibility.'[99] Therefore, for MacKinnon, options are limited; feminists, she states, have 'nothing to use but the *twisted tools* that have been shoved down our throats.'[100]

[96] I have chosen to use this term as opposed to the term "French feminism". This is deliberate. As Delphy notes, within the Anglo-American academy, many use the term "French feminists" as short-hand to refer collectively to Cixous, Irigaray and Kristeva. I have chosen to depart from this term as I do not wish to link the work of these three very different theorists in this way. Neither do I wish to perpetuate the idea that these three theorists alone can, by any means, represent all of French feminism. See; Christine Delphy, 'L'invention du "French Feminism": une démarche essentielle,' *Nouvelle Questions Féministes*, (1996), 17(1), p. 15-58.
[97] Carol Gilligan, *In a Different Voice*, (Harvard University Press, 1990).
[98] Ellen C. du Bois et al, 'Feminist Discourse, moral values and the law – a conversation,' *Buffalo Law Review*, (1985), 34, p. 27.
[99] Catharine A. MacKinnon, 'Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence,' *Signs*, (1983), 8(4), p. 637.
[100] Ibid.

As touched on above when discussing Kotiswaran's work in the previous chapter, many other feminist thinkers have highly contested the work of radical feminists such as MacKinnon.[101] One clear critique is that, in trying to critique the failures of Marxist theory to create a unified revolutionary subject, MacKinnon creates a unified female subject. By highlighting the women as only object and therefore never subject, however, Mackinnon does what 'Western patriarchy itself never succeeded in doing:'[102] she creates a totalising, erased, female object which does not exist except through the lens of male desire. It is precisely MacKinnon's kind of structural analysis that Kotiswaran situates herself against; totalising theories which account neither for different perspectives and the differences between women and their needs, nor the ways in which women negotiate the multiple structures around them every day.[103]

There are parallels between dominance feminists such as MacKinnon and difference feminist theorists, in that they both note gender's structural power.[104] Irigaray, for example, 'reasons that philosophy is governed by unconscious male fantasies, reflecting a solely patriarchal social order.'[105] She states that men's;[106]

> discourses, their values, their dreams and their desires have the force of law, everywhere and in all things. Everywhere and in all things, they define women's function and social role, and the sexual identity they are, or are not, to have. They know, they have access to the truth; we do not. Often we scarcely have access to fiction.[107]

However, difference feminism and radical legal feminism are fundamentally different in their approach to solving this issue. Whilst theorists such as Irigaray and Cixous[108] have sought to re-work discourse in the feminine, MacKinnon, as mentioned, states that the feminine voice is an impossible one: there is no female subject.

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[101] Prabha Kotiswaran, *Dangerous Sex, Invisible Labour: Sex Work and the Law in India,* (Princeton University Press, 2011), p. 177; Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism*, (Princeton University Press, 2006).
[102] Haraway, above note 85, p. 299.
[103] Kotiswaran, above note 101.
[104] MacKinnon sees everything as structured by patriarchy, stating that 'the male point of view forces itself upon the world as its way of apprehending it.' MacKinnon, above note 99, p. 636-7.
[105] Lydia Haas, 'Of Waters and women: the philosophy of Luce Irigaray,' *Hypatia,* (1993), 8(4), p. 152.
[106] Here, male/men is used to describe symbolic gendering as opposed to being about individual men or even man/men as an identity.
[107] Luce Irigaray, 'The Bodily Encounter with the Mother,' trans David Macey, in Margaret Whiteford (ed.), *The Irigaray Reader,* (Blackwell, 2000), p. 35.
[108] Hélène Cixous, 'The Laugh of the Medusa,' *Signs,* (1976) 1(4), trans. Keith Cohen and Paula Cohen, p. 875-93.

The difference between US feminism and French feminism partly comes from the different cultural-historical backgrounds of both. MacKinnon, for example, came from political theory and law, aiming for political-legal change in the US in areas such as sexual harassment at work.[109] Difference feminists such as Irigaray and Cixous, however, while also coming from activist roots, in part drawing on the Women's Liberation Movement (MLF) which came out of the great civil unrest in France in May 1968, are also very much situated within the broader postructuralist philosophical movement of the time they were writing. These different cultural backgrounds and political roots deeply inform these theorist's perspectives.

The work of difference theorists such as Irigaray has highlighted how the subject - the human blueprint society has been constructed upon - is male. Irigaray thus shows how this model needs to be opened up for difference 'in such a way as to re-locate diversity and multiple belongings to a central position.'[110] While scholars such as MacKinnon note the impossibility of challenging gendered structures, difference philosophers such as Irigaray and Cixous have sought to move beyond this, working to re-think the liberal, humanist, male subject which structures society. Difference feminist philosophy is one of the most radical areas of feminist scholarship in terms of actively trying to re-create discourse.

Difference feminist philosophy does not disagree with MacKinnon's point about the problem of locating the impossible feminine voice, however. Cixous, in fact, directly recognises this problem. Cixous, however, resolves it in a different way, suggesting that the problem is more about being able to be heard in a male symbolic order, thus 'even if she transgresses, her word almost always falls on the deaf, masculine ear, which can only hear language that speaks in the masculine.'[111] She concludes that:

> At the present time, defining a feminine practise of writing is impossible with an impossibility that will continue; for this practise will never be able to be *theorised*, enclosed, coded, which does not mean it does not exist. But it will always exceed the discourse governing the phallocentric system; it takes place and will take place somewhere other than in the territories subordinated to philosophical-theoretical domination… But one can begin to speak. Begin to point out some effects, some

[109] Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination*, (Yale University Press, 1979).
[110] Rosi Braidotti, *The Posthuman*, (Polity Press, 2013), p. 25. Here, Braidotti is discussing Irigaray as well as French postructuralist thinking more broadly.
[111] Hélène Cixous, 'Sorties: Out and Out: Attacks Ways Out/Forays,' in Catherine Belsey and Jane Moore (eds.), *The Feminist Reader*, (Palgrave Macmillan, 1997), p. 110.

> elements of unconscious drives, some relations of the feminine imaginary to the real, to writing.[112]

Cixous thus recognises the difficultly of re-creation, yet she does not believe that this deems such a project impossible. Cixous argues that, instead, feminists must look towards being outside the symbolic order, what outruns. If the symbolic order is created by unconscious male fantasies, there must also be unconscious female fantasies, 'elements of unconscious drives,' a source of the feminine to be found.[113] This project can be achieved, it follows, through working to uncover the impossible feminine; we must be 'the one that, aiming for the impossible, stops dead before the word 'impossible' and writes it as 'end'.'[114] By trying to question and rethink everything, from structures to discourse and beyond, one can move towards re-creation: 'Our knowing that there is a danger of identification does not mean we should give in. Leave that to the worriers, to masculine anxiety and its obsessional relationship to workings they must control [we must] shoot through and smash the walls.'[115]

Irigaray, as Whitford highlights, is, also wary of 'writing definitive programmes for the future,'[116] due to the problem of situating the future in the problems of now, limiting potential. Her philosophy, however, is not static, but rather, represents 'a continuous process of critical engagement.'[117] Following this, it seems that the problems of what is known should not paralyse imaginative limits. As noted above, utopia is a constant process of becoming without definable blueprints.[118]

3.2 Defining the Feminine: Challenging Binary Thinking

Cixous and Irigaray in the quotes above seemingly posit the feminine as a "thing", something to be found, something opposite to the masculine; she is the parallel hole, the opposite, the missing side of the duality[119] and have thus been criticised for essentialism.[120] It is necessary, here, to define the feminine.

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[112] Ibid. p. 109.
[113] Ibid. p. 110.
[114] Ibid. p. 113.
[115] Ibid. p. 115.
[116] Whitford, above note 93, p. 14.
[117] Ibid.
[118] Nicola Lacey, *Unspeakable Subjects: Feminist essays in legal and social theory*, (Hart, 1998), p. 236.
[119] Luce Irigaray, *This Sex Which is Not One*, trans. Catherine Porter, (Cornell University Press, 1985), p. 50.
[120] Toril Moi, *Sexual/Textual Politics*, (Routledge, 1985), p. 139; Janet Sayers, *Biological Politics: Feminist and Anti-Feminist Perspectives*, (Tavistock, 1982), p. 131.

In discussing interpretations of the feminine, I have chosen to focus, primarily, on the work of Irigaray. It must be noted that Irigaray's work can be described as having three phases.[121] In this thesis, I will primarily draw on the first phase of her work, which focuses on the transformative potential of the feminine. However, it must be noted that these phases are not mutually exclusive. Thus, Irigaray's later works will also be used here as and where it fits with the theme of this project and links back to the themes of her early work.

Feminist theory has long been concerned with Western binary categorisation, with one side of the duality being the masculine and the other the feminine. Young highlights how this logic of binaries and identity, however, 'seeks to reduce differences to unity,' therefore implying impartiality via creating binary structures.[122] Thus, in the search for reason, logic and unity, difference is lost and categories are formed, defining everything in terms of whether it sits inside or outside the category.[123] Thus 'the logic of identity flees from the sensuous particularity of experience, with its ambiguities, and seeks to generate stable categories.'[124] In categorisation and the formation of logic and language, reality is misrepresented and hierarchies are created, repressing difference.[125]

Young's theorisation of how binaries operate shows how the problem is more complex than the issue of silencing the feminine other alone. The problem is not only that the "other" is excluded and culturally coded as inferior, but that the "actual" and the "other" are not opposing at all. Thus 'the irony of the logic of identity is that by seeking to reduce the differently similar to the same, it turns the merely different into the absolutely other.'[126] In doing so, binaries are created, making the two categories and the things within them appear more contrasting than they are. However, 'each particular entity or situation has both similarities and differences with other particular entities or situations, and they are neither completely identical not absolutely other.'[127] By categorising things which are similarly different and differently similar and thereby falsely emphasising difference, false labels and categories are created and something

[121] Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory*, (Columbia University Press, 2011), p. 91.
[122] Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, 1990), p. 97.
[123] Ibid., p. 98.
[124] Ibid.
[125] Ibid.
[126] Ibid., p. 99.
[127] Ibid.

is always lost.[128] At the same time, this binary categorisation is then used to force these entities and situations into 'hierarchical oppositions.'[129]

Applying this to the idea of a masculine/feminine duality, it is key to note that, in relation to the masculine or the feminine, one is known by defining it in opposition to what it is not, the other, yet one cannot exist without the other, each is part of the other and related to the other. Dichotomies are often symbolically gendered, creating a hierarchy of the symbolically masculine side over the symbolically feminine side as can be seen in public/private and nature/culture, for example; 'she is [always] constructed as 'the other'.'[130] This is not to say that 'that all, or even most, women or men actually possess these contrasting qualities'[131] but that culture assigns these qualities to cultural constructions of men and women and the masculine is given the status of superiority.

Binaries are always related to one another; there are always secondary binaries for one set, for example, masculine/feminine relates to good/bad. Sex/gender is deeply related to masculine/feminine too. It is therefore key to define sex and gender, too, when trying to define the feminine. Generally, sex is defined as biological, whereas gender is defined as social, what is culturally ascribed to sexed bodies. However, sex/gender, too, is a false binary. Nature, which is supposed to account for biological sex, was constructed by culture as a justification,[132] 'projecting a socially situated theory of the body on to conceptions of maleness and femaleness.'[133] Therefore, it would be false to suggest that feminists must analyse only gender. By setting up a false binary and thereby ignoring the cultural construction of both sex and gender, feminist methodology becomes hypocritical.[134] This binary also works to suggest that, in sex, there may be some essential female essence. Relying on gender as a category as opposed to sex, therefore, does not move beyond essentialist constructions which rely heavily on masculine/feminine binary logic. Further, the sex/gender distinction fails to account, not only for gender variant people who do not fit neatly within this binary categorisation, but also for

[128] Ibid., p. 98.
[129] Ibid., p. 99.
[130] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law,* (Manchester University Press, 2000), p. 308.
[131] Ibid., p. 50.
[132] Joan Scott, *The Fantasy of Feminist History*, (Duke University Press, 2012), p. 7.
[133] Gina Heathcote, *The Law on The Use of Force: A Feminist Analysis*, (Routledge, 2012), p. 8.
[134] See; Jane Flax, 'Postmodern and Gender Relations in Feminist Theory,' *Signs*, (1987), 12, p. 635-6.

that fact that none of us fit this binary categorisation. Both sex and gender are cultural constructions[135] meaning that the masculine/feminine are cultural constructions too.

Instead of seeing masculine/feminine and sex/gender as opposites therefore, it may be better to see them, as Grear notes, as a 'spectrum.'[136] Grear thus states that 'it may be possible, in this way, to see sex and gender as 'shifting' and 'multiplicitous.'[137] It is worth noting, however, that whilst the masculine/feminine binary is false, 'similarity is never sameness, and the similar can be noticed only through difference. Difference, however, is not absolute otherness.'[138] It becomes clear that any spectrum or continuation, while noting the links in the middle, must also problematise the idea that there can ever been too polar opposite end of the spectrum.[139] Whilst a spectrum or continuum may indeed, however, be the best way of describing the masculine/feminine as lived; it is not enough to depict the symbolic (and therefore inherently limits the lived). In addition to this, a spectrum cannot encompass the idea of the feminine as a new horizon, as per Irigaray and Cixous outlined above,[140] without merely limiting this new horizon to the opposite of the masculine. It is impossible to ever represent fully in discourse as discourse relies on categorisation for its existence and thus cannot account for what 'outruns totalizing comprehension.'[141]

The feminine, in this reading, is not just the other to the masculine and is thus not inherently essentialist. Whitford for example highlights how terms such as 'the feminine' are used by Irigaray without any explicit mention of her stance on the sex/gender debate. Whitford suggests that Irigaray purposefully does this as she wants the reader to respond to her text and make something with/of it, read themselves into the text and interpret it in their own way.[142] Irigaray herself also notes that the feminine should not be read as a concept. To do so would be to read the concept within the confines of the masculinist structure and thus, she states, 'in a woman('s) language, the concept as such would have no place.'[143]

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[135] Judith Butler, *Gender Trouble*, (Routledge, 2006).
[136] Grear, above note 1, p. 49.
[137] Ibid.
[138] Young, above note 122, p. 98.
[139] Stella Sandford, 'Feminism against 'the feminine',' *Radical Philosophy*, (2001), 105, p. 12.
[140] Luce Irigaray, *I Love to You*, (Routledge, 1996), p. 20.
[141] Young, above note 122, p. 98.
[142] Margaret Whitford, 'Glossary of Terms.' in Margaret Whitford (ed.), *The Irigaray Reader*, (Blackwell, 2000), p.17-18. Braidotti has also noted that Irigaray should not be read in an essentialising way. See; Rosi Braidotti, 'Becoming Woman or Sexual Difference Revisited,' *Theory, Culture & Society*, (2003), 20(3), p. 44.
[143] Irigaray, above note 119, p. 122-23.

3.3 The (Feminine?) Alternative

Un discours peut empoisonner, entourer, cerner, emprisonner ou libérer, guérir, nourrir, féconder.[144]

Following Whitford's reading of Irigaray, Irigaray's feminine is beyond the whole, she is:

> …neither closed nor open… Never this, then that, this and that… But becoming the expansion she is not, never will be at any moment, as a definable universe… An indefinite overflowing in which many a becoming could be inscribed. The fullness of their to-come is glimpsed, announced, as possibles, but in an extension, a dilation, without determinable limits. Without any conceivable end. With neither telos nor archè. Unless already phallic.[145]

The feminine of Irigaray is not lack but rather, is situated outside binary thinking: never complete nor whole, never definable, always indefinite. Drawing on Young's work I have noted how binary thinking structures everything – from language to gender. The feminine could thus be the eradication of these binaries: *this* could be the alternative feminine. The feminine in this sense therefore is by no means the opposite of the masculine but, rather, explicitly rejects such an opposition. It could instead be the cracks, the spaces in between.[146]

Irigaray, in fact, notes the flaw in merely flipping the system in the feminine in that it continues to play out binary logic, stating that, 'If [women's] aim were simply to reverse the order of things, even supposing this to be possible, history would repeat itself in the long run, would revert to sameness: to phallocentrism.'[147]

This point is exemplified by Irigaray's work on Antigone. Irigaray sees Antigone as the revolutionary feminine subject, as the example of the disruption of the masculine and the symbol of a possibility for a new discourse in the feminine.[148] Antigone, in her love for her brother, affirmed the feminine and the mother as origin when she returned him to *'the womb of*

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[144] Translation : 'A discourse may poison, surround, encircle, imprison or liberate, heal, nourish, fertilize.' Luce Irigaray, 'Parler n'est jamais neutre,' trans. Margaret Whitford in Margaret Whitford, *Luce Irigaray: Philosophy in the Feminine,* (Routledge, 1991), p. 9.
[145] Luce Irigaray, 'Volume Without Contours,' trans. David Macey in Margaret Whitford (ed.), *The Irigaray Reader,* (Blackwell, 2000), p.55.
[146] Yoriko Otomo, 'Searching for Virtue in International Law,' in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2014), p. 33-46.
[147] Irigaray, above note 119, p. 33.
[148] Ibid., p. 218.

the earth.'[149] Thus, Irigaray notes that 'Antigone does not yet yield to the law of the city, of its sovereign, of the man of the family: Creon.'[150] Further, her actions and desires are explicitly feminine and do not follow the standard masculine path of desire for money. In fact, she boasts of this difference.[151] Antigone is subsequently cast down, following the forgotten path, and put back into the *cave,* in Irigaray's words a '*hole* in the rock, shut off forever from the light of the sun.'[152] She is thus forgotten, sacrificed, excluded, as the symbol of the feminine here, from the universal of the Sun/God, forgotten and written out of discourse. She is buried alive[153] marking the sacrifice of the feminine for the sake of the masculine universal and thus Creon defends his role and privilege as the unified voice.[154]

Irigaray thus sees Antigone as both the revolutionary feminine figure, the possibility for a new discourse in the feminine, as the example of the disruption of the masculine, as well as as the origin of the story of the creation of the masculine as the universal. Thus, she notes, as a result of Antigone's story, 'the unconscious, while remaining unconscious, is yet supposed to know the laws of a consciousness – which is permitted to remain ignorant of it – and will become even more repressed as a result of failing to respect those laws.'[155] As the masculine draws strength on the feminine concealment,[156] she becomes increasingly more hidden. Antigone's story marks the beginning of the murder of the mother/feminine from discourse in the creation of the masculine universal.[157] Sexual difference is now known, empirically, only by its exclusion.[158] However, Antigone, as a figure, herself, retains the possibility of this disruption.

It seems that a return to Antigone and a close reading of her story, applying her, as figure, to international law may be a possible way of applying Irigarayan thought in this context. One key way to revolutionise international law, thus, could be through writing the mother back into discourse;[159] 'the mirror cracks. The voice that emerges is the voice of the hysteric.'[160] The hysteric voice is new, revolutionary. There are problems with writing the mother, however. As Otomo notes, when locating her, finding her, there is a need to be careful so as not to iconise

[149] Irigaray, above note 72, p. 215. Note that the story Antigone is re-told by Irigaray also with reference to Plato and in context of her own re-reading of Plato's cave.
[150] Ibid., p. 218.
[151] Ibid.
[152] Ibid.
[153] Ibid., p. 219
[154] Ibid.
[155] Ibid., p. 223
[156] Ibid., p. 225
[157] Irigaray, above note 119, p. 223.
[158] Penelope Deutscher, *Politics of Impossible Difference: The later work of Luce Irigaray,* (Ithaca, 2002), p. 29.
[159] Otomo, above note 146, p. 160.
[160] Otomo, above note 12, p. 67.

her and simply replace the Name-of-the-Father with the name of the mother.[161] This would work simply to reverse the order of things, thereby failing to exit the binary logic.[162]

Irigaray notes that concealment of the feminine has been shored up well.[163] Drawing on Irigaray, Otomo thus states that 'Law thus institutes a hermetically sealed ontotheology: a metaphysics which twice forgets the feminine… Any revolt towards this economy, then, seems not only doomed to failure but to shore up the very structure it seeks to displace.'[164] This is not to say that revolt is impossible; Antigone represents this possibility of an alternative after all.[165] However, Irigaray notes how the community will always respond to her revolt by dismissing her attempts as being 'being *separated from the universal goal* pursued by the citizens.'[166]

Revolt, however, remains possible. Antigone represents the values Western society failed to take up.[167] Whilst gendered hierarchical binaries still operate to affect lived experiences, the hierarchy moves beyond this, into discourse itself, working to other the symbolic feminine, to silence it. The feminine of Irigaray's work then can be seen as symbol for the other, of difference, for a new horizon.[168] She does not see the feminine as the opposite *per se* but as a representation of something else. Thus, Whitford states that 'what Irigaray is interested in, then, is the neglected imaginary, what our culture has chosen not to take up and symbolise; this is one of the things she means by the 'female' or 'feminine' imaginary.'[169] Keeping in mind the limits of binary thinking and their gendered nature,[170] one way to try and re-create discourse, following the focus on the *feminine*, is to search for what has been culturally coded as feminine at a symbolic level and therefore silenced. The feminine is therefore not about "women" *per se* but, rather, the feminine in this reading may be the impossible figure outside the symbolic of the present. The feminine may be somewhat uncovered by considering what culture has failed to consider and has concealed. The feminine, therefore, 'functions as a free-floating signifier of difference itself' and therefore it 'is not to be identified with women, even if it is sometimes easier to map the various cultural positionings of women onto it.'[171] Moving beyond the gender

[161] Ibid., p. 66.
[162] Otomo, above note 12, p. 161.
[163] Irigaray, above note 72, p. 226.
[164] Otomo, above note 12, p. 156.
[165] Irigaray, above note 72, p. 226.
[166] Ibid. Author's own emphasis.
[167] Margaret Whitford, 'Luce Irigaray and the Female Imaginary,' *Radical Philosophy*, (1986), 43, p.8.
[168] Ibid., p. 7.
[169] Ibid., p. 8.
[170] Note that Irigaray, too, sees binary oppositions as inherently gendered and hierarchical, noting that these oppositions form one of the key components of the masculine economy. Luce Irigaray, *Parler n'est jamais neutre*, (Minuit, 1985), p. 312-13.
[171] Sandford, above note 139, p. 11.

continuum, a focus on the silenced feminine, working to break down the hierarchy of the masculine over the feminine, allows for a consideration of complexity, the similarly different and the differently similar. The masculine/feminine binary works to categorise and ignore complexity. The feminine is inherently fluid and is indifferent to 'the laws of logic.'[172] Thus, a break-down of the masculine/feminine binary, starting with Irigaray's feminine, looking towards seeing all sites of knowledge as non-hierarchical, allows for a consideration of that which escapes the logic of identity, that which is lost in this logic, that which outruns.

To search for the unknown, hidden feminine, the values society has chosen not to take up, without merely flipping the system, is by no means an easy task. Whilst Cixous and Irigaray seem to search for the 'unconscious drives'[173] which can help reveal this alternative way of knowing, Scott provides a possible way in which such a claim can be understood. Drawing on both Lacan and Foucault's recognition of the power of the unconscious to outrun culture, to always escape in some way,[174] Scott identifies a potential for radical change in fantasy.[175] Scott highlights how the boundaries between the signifier and the signified are blurrier than simply being a dictation of what exactly must and does happen.[176] People attach themselves to the symbolic order in different ways. Thus, drawing on Lacan's conceptualisation of the imaginary realm,[177] Scott defines the imaginary realm as the identification with others and the way the subject perceives herself and others, noting how this imaginary realm works in a interconnected way in relation to the symbolic order.[178] Therefore, people identify with the symbolic order in different ways and use it and apply it in different ways through the imaginary.[179] This can be seen through the example of gender. People who are culturally sexed in one way do not necessarily follow the culturally constructed gender which "should" attach itself to that categorisation. Thus while the concepts of the symbolic order 'provide the language through which identities are formed, the unconscious foundations on which social practises are implemented… fantasy enables challenge and change.'[180] People are constructed by the symbolic order but that does not mean it applies directly as it is as people interpret it in their own way, according to their own imagined desire, with fantasy being the dream of that

[172] Whitford, above note 167, p. 6.
[173] Cixous, above note 111.
[174] Scott, above note 132, p. 12-13.
[175] Ibid., p 1-22.
[176] Ibid., p. 19.
[177] Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, trans. Alan Sheridan, (Norton, 1981).
[178] Scott, above note 132, p. 1-22.
[179] Ibid., p. 17.
[180] Ibid., p. 18.

imagined desire.[181] Following this, it is clear that the symbolic order is not a static thing but is fluid, ever changing in that interpretations of it are always changing, such interpretations eventually changing, sometimes, the order itself.[182] Fantasy can thus be used to create a constructive utopia, a blueprint to be reached towards.[183] If the existing order of international law was created out of one set of desires,[184] the desire for the idealised male, humanist subject, it is this desire this thesis desires to deconstruct. Fantasy, desire and imagination can thus be tools in changing the symbolic order and uncovering the feminine, the values Western society chose not to take up.

3.4 The Feminine, The Posthuman and Xenofeminism

While I have, in Chapter One, outlined how this thesis draws on feminist posthumanism and xenofeminism, I have not yet completely defined either. In addition, while I have defined the feminine above, there is a need to note the tensions between the different feminist gender theories I use in this thesis, including the feminine, the posthuman and xenofeminism. These bodies of thought can be read alongside one another, as this thesis reads them, but this does not mean that such readings occur without tension. In this section, therefore, I will outline what I mean by critical/feminist posthumanism and xenofeminism, outlining the tensions and productive becomings of bringing these modes of thought together alongside Irigarayan thought.

This thesis has, so far, begun with Irigaray and her challenge to the masculine universal of the symbolic order. I understand Irigaray's feminine as the other, the values Western societies chose not to take up[185] and thus as a means through which to consider a possible alternative way of structuring the global order and international law. I add, however, to this reading of Irigaray by drawing on feminist posthumanism. Irigaray's early work is thus used as a model through which to understand structural bias and the possibility of challenging the structure. However, many of international law's concepts and structures, as noted above, come from humanist, liberal thinking.[186] As a theory which aims to disrupt humanist structures, I argue that critical posthumanism is useful theory through which to re-think the structural bias of

[181] Ibid., p. 21.
[182] Ibid., p. 20-21,
[183] Lacey, above note 118.
[184] Nathaniel Berman, 'In the Wake of Empire,' First Annual Grotius Lecture at the American Society of International Law, *American University International Law Review*, (1999), 14(6), p. 1551.
[185] Whitford, above note 167, p. 8.
[186] See the appendix for a discussion of how the sovereign state was constructed around this type of thinking.

international law through. Critical posthumanism is thus used in the vein of Irigaray to challenge the structural bias of international law.

In this thesis, I have primarily drawn on the early work of Irigaray, prior to the 1980s. This is because the focus of her work from around the 1980's onwards fundamentally changes from challenging the symbolic order in the feminine to considering sexuate difference and the need to work between the two.[187] While this later work, it seems, may provide Irigaray's later answer to her earlier questions, this thesis takes a different path. Focusing, not on the two of sexuate difference and the need to work between them, noting instead the need to deconstruct binaries including the gender binary, this thesis embraces multiplicity in a Deleuzian, xenofeminist mode of 'let a hundred sexes bloom!'[188] I therefore use Irigaray to ask questions and feminist posthumanism and xenofeminism as a means through which to answer them. While, indeed, Irigaray's later works do not easily sit alongside much feminist posthuman thought, as this section will argue, her earlier works can be read alongside these modes of thought.

This thesis analyses and seeks to challenge the structural bias of international law through considering the models of subjectivity present in international law. This is done through a focus on international legal personality, international legal personality being the concept which describes who or what is a subject under international law.[189] The models of subjectivity presented by various international legal personalities are therefore analysed using critical posthumanism's deconstruction and reconstruction of dominant accounts of subjectivity. Considering the ways in which subjectivity can be re-thought in relation to matter and the nonhuman animal, or the technological subject, posing a new theory of subjectivity to the current dominant humanist blueprint, posthuman subjectivity, this thesis shows, if applied to international law, could radically change international law's structure including international law's conceptualisation of international legal personality.

Further to this, technology, as it will be shown in Chapters Five and Six, is already fundamentally challenging both domestic and international law, with the regulation of

[187] This is something Braidotti has also highlighted, stating, on Irigaray, that; 'I distinguish three different phases in her work…'. See; Braidotti, above at 121, p. 91.
[188] Laboria Cuboniks, 'Xenofeminism: A Politics for Alienation,' http://www.laboriacuboniks.net/ (accessed 21/09/2017).
[189] Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583-99.

machinic entities proving to be a vast legal problem which requires an urgent response.[190] Machines will and are already starting to demand recognition as legal persons[191] and this debate will only become more and more urgent as machines make further decisions in the global order.[192] It is important that feminists are working with and theorising the links between technology and international law in order to be able to shape the structural changes that technologies are about to inevitably have on international law. Feminist posthumanism is a key way to think through what a feminist approach to these issues may be.

Another way in which posthuman theory links deeply to the aims of this thesis is through resistance and compliance in that posthuman theory works to manage the tension between the two. This can be exemplified through Haraway's cyborg, for example.[193] Haraway states that 'Cyborg writing is about the power to survive, not on the basis of original innocence, but on the basis of seizing the tools to mark the world which marked them as other.'[194] The cyborg, in other words, knows all too well that everything cannot be re-created, and thus wishes to use the tools that exist to get what she wants. 'The tools,' notes Haraway, 'are often stories, retold stories, versions that reverse and displace the hierarchical dualisms of naturalized identities.'[195] They are often fantasies, dreams of something else, ideas of alternative ways of being.[196] The cyborg thus tells different stories, moving beyond binaries and dualisms. This thesis too, in line with Haraway's cyborg method, wishes to re-tell the story of international law, challenging, for example, it's claims to universalism through analysing the account of subjectivity upon which is it based, subsequently posing alternative accounts.

[190] As can be seen, for example through the current debate on the legal status of autonomous weapons. See Chapter Six.
[191] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, (2015/2103(INL)).
[192] Fleur Johns, 'Global Governance through the Pairing and List of Algorithm,' *Environments and Planning D: Society and Space*, (2016), 34(1), p. 126-49.
[193] While Haraway is wary of naming herself a posthumanist due to her wish, not to become post the human but rather to de-centre the human and look towards multi-species becoming, I have defined her as such. This is because her concerns and perspectives align with the type of posthumanism I use in this thesis and which others, such as Braidotti, use, i.e. a posthumanism which both works in continuum with and beyond humanism itself. See; Donna Haraway, 'Tentacular Thinking: Anthropocene, Capitalocene, Chthulucene,' *e-flux*, (2016), 75, http://www.e-flux.com/journal/75/67125/tentacular-thinking-anthropocene-capitalocene-chthulucene/ (accessed 26/11/2017).
[194] Haraway, above note 85, p. 311.
[195] Ibid. For an example of Haraway's own story telling, see; Donna Haraway, 'The Camille Stories: Children of Compost,' in Donna Haraway, *Staying with the Trouble: Making kin in the Chthulucene*, (Duke University Press, 2016), p. 134-68.
[196] Scott, above note 132.

Further to this, like Haraway's cyborg, this thesis seeks to deconstruct binaries.[197] This is indeed part of the method of the thesis, as noted above. As Haraway notes, while feminism has long been concerned with the need to destabilise and deconstruct binary thinking and the various false and gendered hierarchies such structuring imposes, such binaries have already been 'techno-digested;' challenged by technology since WWII.[198] This can be exemplified by the figure of the cyborg herself. Both human and machine, the cyborg is neither one nor the other and represents, now, us all. We are all cyborgs as we all use machines and are connected to machines in various ways.[199] We are all, already, human-machines.[200]

As noted, Irigaray's work provides the foundations for thinking through many of the central questions this thesis poses. Posthuman theory is then used as the means through which to analyse and attempt to answer the questions Irigarayan theory asks. Irigarayan theory and feminist posthumanism, however, do not align without tension. In 'A Cyborg Manifesto', Haraway directly critiques Irigaray and her imaginings of 'Woman, Primitive, Zero, the Mirror Stage and its imaginary' where woman is lost and where the feminine is lost from history.[201] Haraway rejects the project of seeking the lost feminine, stating that 'there is another route.'[202] This other route 'passes through woman and other present-tense, illegitimate cyborgs, not of Woman born, who refuse the ideological resources of victimization so as to have a real life;'[203] cyborgs. Cyborgs refuse to be silenced and refuse to be the othered feminine subject. They 'have a real life'[204] which is not hard to uncover but which is already there; the cyborg exists, is present and is alive. The cyborg, states Haraway, is 'post-gender.'[205] Skipping any wish for 'original unity,'[206] and refusing to imagine a 'once-upon-a-time wholeness before language, before writing, before Man,'[207] the cyborg does not yearn for what was lost, what society chose not to take up, what the world could have been, but rather, pushes society to change, now.[208]

[197] Haraway, above note 85.
[198] Ibid., p. 302.
[199] Ibid.
[200] In some ways such an argument echoes Heidegger's work which states that humans become human through their utilisation of technologies widely defined to include, for example, law as a technology. However, while Heidegger sees these technologies as tools through which to make the human the humanist (white, male) subject, Haraway seeks to use technology to disrupt and decentre that subject. See Heidegger, above note 21; Haraway, above note 85.
[201] Haraway, Ibid.
[202] Ibid., p. 313.
[203] Ibid.
[204] Ibid.
[205] Ibid.
[206] Ibid., p. 292.
[207] Ibid., p. 311.
[208] Ibid., p. 292.

Thus, Haraway critiques Irigaray and the so-called "French feminists,"[209] stating that feminists should not search for the lost, hidden and impossible feminine of the past but should move on, look to the present and the future and the ways in which feminists can construct their future from the now.

In many ways, Haraway's critique of difference feminism mirrors the debates discussed above of being caught between resistance and compliance, looking for the impossible or working with the now. In another sense, Haraway also departs from these debates. After all, she is hardly arguing for compliance methods. Haraway's Cyborg Manifesto is a document of resistance. Haraway's critique of difference feminism however, I argue, is not wholly just. As noted above, it is important to be generous to those we read or, in Haraway's words, to avoid the same old oedipal pattern.[210] Haraway states that her cyborgs already are 'actively rewriting the texts of their bodies and societies,'[211] this seemingly referring to and critiquing difference feminism's use of *ecriture feminine*[212] - the idea of writing embodiment as a way of escaping the phallogocentric symbolic order. Haraway's implied critique then, seems to be that cyborg feminists are already undertaking *ecriture feminine* without having to lament the past. They are doing this through their very existence, their living presence and resistance. Of course, this is a valid critique in the sense that one can easily think of women's resistance groups which are actively resisting the phallogocentric order. However, it must be noted that "lamenting" the past or, rather, as Irigaray's *Speculum* does,[213] trying to understand the past through re-reading "fundamental" philosophical texts to better understand the present, does not preclude the future. There is a place for both – re-considering and understanding the past and looking towards the future, both from the present. The past must be understood to understand the structures which need to be dismantled. Both Haraway and Irigaray as well as Cixous are writing their bodies, resisting, looking towards an alternative future in the feminine, just in different ways, coming from different backgrounds, disciplines, cultures.

Another tension between feminist posthumanist work such as that of Haraway and Irigarayan theory can be found in the essentialism debate: Irigaray has been charged with essentialism, Haraway is explicitly anti-essentialist.[214] However, as Braidotti highlights, the debates over

[209] See note 96.
[210] Haraway, above note 83.
[211] Ibid., p. 313
[212] Cixous, above note 108.
[213] Irigaray, above note 72.
[214] Haraway, above note 83.

Irigaray have been very much shaped by the 'paradigmatic status of the sex/gender distinction in American feminist theory and the global reach of this paradigm.'[215] Thus referring to the ways in which French postructuralist thought was translated in and by the North American academy, working to narrow French postructuralist thought down to an imitation of itself, with linguistics, Derrida and Lacan playing a larger role in North American-French postructuralism than within the wider body of French postructuralism itself, Braidotti states that 'It is clear by now that we need to deterritorialize French theory in order to rescue it from the debacle it suffered in North America.'[216] This process of deterritorialisation is in part what I wish to undertake, linking Irigaray to Haraway, posthumanism and xenofeminism despite the supposed incompatibility of these theories. It is important to reiterate, however, that I mostly only draw on Irigaray's earlier works to make these connections. This is because I read her later works as being different to her earlier works[217] and thus, like Braidotti, 'My connection to Irigaray rests on the first phase of her work.'[218] I also see Irigaray's earlier work, like Braidotti and as outlined above through drawing on Whitford, as being about transformation of the symbolic order, the feminine here having nothing to do with essence.[219] However, Braidotti strays away from entering into the Anglophone debates on essence, stating that Irigaray's earlier work, which she primarily draws upon, is not about essence while remaining silent on whether claims of essentialism are potentially just when considering Irigaray's later work. This may well be a political choice, refusing to label Irigaray as essentialist in her later works to avoid being complicit in the North American territorialisation of her oeuvre. As a scholar whose education has largely been conducted in the Anglophone world, however, albeit not at all in the North American academy, it is less easy for me to keep my distance from these debates. Thus, while I agree with Braidotti that Irigaray's earlier works are certainly not about an 'immutable and given essence,'[220] this distancing from critiques of essentialism becomes less tenable in the context of Irigaray's later work which focuses, for example, on the binary heterosexual relation between the two. Irigaray's later essentialism does not, however, render useless her earlier work. Rather, I see the two as largely distinct albeit with a few overlaps.

[215] Rosi Braidotti, 'Interview with Rosi Braidotti,' in Rick Dolphijn and Iris van der Tuin (eds.), *New Materialism: Interviews & Cartographies*, (Open Humanities Press, 2012), p. 26.
[216] Ibid., p. 27.
[217] Braidotti, above note 121, p. 91.
[218] Ibid.
[219] Whitford, above note 142.
[220] Braidotti, above note 121, p. 91.

However, it is not only Irigaray's later work which has been charged with essentialism. For example, Irigaray uses morphology to describe a possible feminine symbolic order even within the first phase of her work.[221] However, this use of morphology is not about essence per se. As noted above, I read Irigaray's early work as challenging the masculine symbolic order and the values Western societies have chosen to take up and do not read her use of morphology as literal but, rather, as a symbol of an alternative value system. For example, as noted above, Irigaray sees her feminine other as fluid, this fluidity being drawn on from the fluidity of women's bodies; mucus, menstrual blood etc. However, by this, I read Irigaray not as suggesting that there is something essential in the female body which could create a different symbolic order, something natural, but, rather, she uses this metaphor of the ever changing and in flow body as a means through which to describe the values other to the dominant culture or symbolic order. Thus, Irigaray's fluidity is uncontainable, unbounded, undefinable within the restricted discourse of the symbolic order which has been created only ever in the masculine.[222] This rejection of the bounded, individual, containable nature of the humanist masculine subject is something which, if read in a non-essentialising way, taking into account the need to dissect the nature-culture binary, can be read in conjunction with Haraway's work.

Haraway's revolutionary subject is also fluid and uncontainable, disrupting the masculine universal. Therefore, she states;

> To be One is to be autonomous, to be powerful, to be God; but to be One is to be an illusion, and so to be involved in a dialectic of apocalypse with the other. Yet to be the other is to be multiple, without clear boundary, frayed, insubstantial. One is too few but two are too many.[223]

Both Haraway and Irigaray aim to disrupt the masculine/humanist universal through complexity, multiplicity, fluidity and overflow. Thus, in this sense, Haraway and Irigaray's early work can indeed be read together, both proposing the fluid, overflowing, multiple subject as the revolutionary other.[224] While Irigaray, however, seeks to find the impossible feminine other, reaching towards the symbolic order which was never taken up, as noted above, Haraway provides a more practical means through which to instate that order now, through writing in

[221] Irigaray, above note 72.
[222] Irigaray, above note 145.
[223] Haraway, above note 83, p. 313.
[224] Such an approach is, of course, in line with my feminist ethics of reading and researching as outline above. See; Braidotti, above note 86, p. 200-1; Haraway, above note 83, p. 292.

the now and through using what exists and what is to come such as, for example, technological advancement.

Haraway, I thus propose, can be read alongside Irigaray and in compliment to Irigaray, reading the two together to create new possibilities. This is by no means a unique perspective. Heavily inspired by the work of Haraway, as noted above, Braidotti directly draws on both Haraway *and* Irigaray, among many others, in her work.[225] Braidotti's posthumanism is situated in continuum with French poststructuralism and is related to 'the post-structuralists, the anti-universalism of feminism and the anti-colonial phenomenology of [Fanon].'[226] Braidotti's posthumanism, she therefore states, is situated in continuation with the postructuralism's desire to move beyond liberal humanism, bringing this to the current times of technological and scientific change.[227] Following this, reading Irigaray and Haraway together with Braidotti allows for a reading of Irigaray within the context of contemporary global changes and technological advancements, something that Haraway's cyborg is already deeply embedded within. This is necessary, especially within the area of international law, where globalisation and new technologies are key forces for change and power.

However, one critique of both Haraway and Irigaray is that neither fully addresses intersectionality. First, addressing Irigaray; while Irigaray clearly does not centre intersectionality in her early work, it is important to remember both the time period in which this work was written as well as the abstraction of this work. Despite this, Irigaray's use of the a/woman in *Speculum*, the a/woman representing the singular woman as well as women as a group and thus noting the differences between woman, shows an attempt to consider some basic ideas around difference.[228] Irigaray's later work, however, is less easy to reconcile here, her clear exclusion of subjects who do not fit the heterosexual binary being seen in her focus on the need for 'love between woman and man, man and woman'[229] as the basis of society and her invocation that such heterosexual love between the two is what is needed to change society. In addition, while Irigaray does consider non-Western knowledge production in her later works, she is more interested in the ways through which East and West can speak to one another than in intersectionality and tends to generalise the both the "West" and the "East." Thus, her

[225] See; Braidotti, above note 110; Rosi Braidotti, *Metamorphoses: Towards a Materialist Theory of Becoming*, (Polity Press, 2001).
[226] Braidotti, above note 110, p. 46.
[227] Ibid., p. 25.
[228] Irigaray, above note 72.
[229] Luce Irigaray, *Between East and West: From Singularity to Community*, trans. Stephen Pluháček, (Columbia University Press, 2002), p. 110.

work risks defining the East and the West as distinct and monolithic entities through statements such as 'An Eastern culture often corresponds to becoming cultivated, to becoming spiritual through the practise of breathing.'[230] As Hall has noted, however, 'Identity is an open, complex and unfinished game – always 'under construction' (in Europe as much as in the Middle East, Africa and the Caribbean).'[231] "Eastern culture" cannot be generalised as neither "East" nor "West" are monolithic entities with stable boundaries. Rather, as Said has shown, these two geographies have been constructed so as to represent them as distinct, other from one another, the distinction being used a means through which to promote the "West" as superior to the "East," this being core to the colonial project of domination.[232] However, both represent a series of contested notions within which there are multiple identities, cultures and epistemologies.

Considering Irigaray's earlier work alone (as opposed to her later work just partially described), it seems that part of the reason why intersectionality is hard to remain within when thinking through Irigaray is due to the abstraction of her work. However, as noted above, posthumanism, including the work of Haraway, provides a more practicable means through which to apply the values Western societies did not take up. This, following Haraway, may be done through using the structures which exist, such as science and technology, and shaping them to critical feminist aims, using them to challenge hegemonic models of white male, humanist subjectivity.

However, Haraway's work is not entirely removed from critiques of a lack of focus on internationality. Puar critiques Haraway's claim that she would 'rather be a cyborg than a goddess',[233] stating that she, Puar, would rather be a 'cyborgian goddess.'[234] Puar's describes Haraway as relating the goddess, which she, Haraway, distances herself from, to nature which is 'embedded in the racialized matriarchal mythos of feminist reclamation narratives'[235] (here, the spectre of Irigaray and Haraway's critique of Irigaray, discussed above, can clearly be felt). Haraway then, according to Puar, draws a link between the cyborg and culture which 'hails the future in a technological overdeterminism – culture - that seems not only overdetermined, but also exceptionalizes our current technologies.'[236] This is not to say that Puar defines Haraway

[230] Ibid., p. 8.
[231] Stuart Hall, 'Europe's Other Self,' *Marxism Today*, (1991), p. 19.
[232] Edward W. Said, *Orientalism*, (Penguin, 2003).
[233] Haraway, above note 83.
[234] Jasbir K. Puar, '"I would rather be a cyborg than a goddess": Becoming-Intersectional in Assemblage Theory,' *philoSOPHIA*, (2012), 2(1), p. 63.
[235] Ibid.
[236] Ibid.

as a cultural constructivist either. Haraway clearly notes the vibrancy of matter in her work when she states, for example, that 'the world is a witty agent' with an 'independent sense of humour.'[237] Puar does highlight this, noting indeed that Haraway is very much part of the feminist movement which considers the liveliness and changing nature of matter itself (i.e. the feminist new materialist[238] thinkers who seek to disrupt the clear focus on culture and language which has come to permeate contemporary gender studies by de-essentialising matter/nature, showing that it is never essential but always changing).[239] Puar's critique then, is more of Haraway's claim that technology and the cyborg is the answer to feminism.[240]

It important to note here, however, that Haraway's cyborg was never meant to represent the human-machine subject alone but, rather, as noted above, the cyborg symbolised the feminist subject who refuses to lament the past and instead seeks to construct a feminist future. Haraway also explicitly defines her cyborg as an intersectional subject.[241] Despite this, Sandoval, while noting Haraway's 'unstated but obvious project of challenging the racialization and apartheid of theoretical domains in the academy' as well as her wider commitment to disrupting master narratives including those created out of racism and colonialism, notes the need for a further centring of racialised subjects, Third World feminisms and the methodology of the oppressed.[242] Sandoval clearly sees this as part of Haraway's project. Puar, on the other hand, drawing on Sandoval's critique, remains concerned with Haraway and other new materialist oriented projects which focus more on 'how the body is materialized' as opposed to 'what the body signifies.'[243] Seeking to bridge the gaps, Puar brings intersectional feminism, which she also critiques for being too focused on identities without account for the ways in which identities are constructed and shift and change over time,[244] and feminist theories of matter, together. Puar uses these theories and contrasts and builds upon them to create a 'becoming intersectional assemblage' which resists giving either nature or culture too much power but, rather, notes the connections between the two, outlining the links between ever changing

[237] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature,* (Free Association Press, 1991), p. 199.
[238] While I have used this terminology here, I am aware that not all of the people I am putting into this broad category would necessarily define themselves as feminist new materialists. I have used this grouping here, however, to broadly refer to feminist work focusing on the vibrancy of matter.
[239] See, generally; Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms,* (Indiana University Press, 2008). Puar, above note 382, p. 56.
[240] Puar, above note 234, p. 56.
[241] Haraway, above note 83.
[242] Chela Sandoval, 'New Sciences: Cyborg Feminism and the Methodology of the Oppressed,' in David Bell and Barbara M. Kennedy (eds.), *The Cybercultures Reader,* (Routledge, 2000), p. 373-90.
[243] Puar, above note 234, p. 57
[244] Ibid.

contestations of identities, bodies and other forces such as technology and matter itself, which work in multiple forms of assemblage in any given moment.[245] Thus, Puar seeks to bring the nature-culture debate to contemporary gender theory, noting the need to integrate and read both matter orientated perspectives and theories of intersectionality, together.

While, indeed, it is clear that these feminist theories of matter and feminist theories of intersectionality do not speak to one another often enough in the current times, the work of Sandoval and my own description of Haraway shows how these ideas were and have been brought together in some of the original new materialist oriented feminist works, including in Haraway's *Cyborg Manifesto.*[246] Puar is thus successful in directly bringing these voices together at a time when, indeed, these voices are circling further and further away from dialogue with one another, though she does not, despite her large statement that she would rather be a 'cyborgian goddess'[247] suggests, necessarily bring something new to cyborg feminism but, rather, returns it to its core, bringing it and its 90s origins through Haraway to the contemporary moment. It is clear, given this, that while Irigaray's work, and particularly her later work, can indeed be critiqued for, at best, not considering intersectionality and, at worst, upholding colonial and racialised binaries of dominance, Haraway's work has long situated intersectionality as central. Despite this, it is also clear that Puar's provocation calls for a necessary re-focusing on the ways in which shifting identities intersect with one another as well as with matter.

Thus, drawing on Puar and the need to disintegrate the nature-culture binary throughout feminist gender theory while thinking through intersectional-assemblages, this thesis will use the language of assemblage throughout. This language is invoked in the spirit of, not only Puar's definition of assemblage, linking feminist material perspectives with intersectionality, but also in the broader sense used by Deleuze and Guattari. Assemblage, as the English translation of the French term more commonly used by Deleuze and Guattari, *agencement,*[248] is thus used as a way of noting, not only the impacts of certain intersecting and constantly shifting identities and power relations and how they interact with matter, but also as a means through which to note the force of wider structural elements such as capitalism or colonialism,

[245] Puar, above note 234.
[246] Haraway, above note 83.
[247] Puar, above note 234, p. 63.
[248] This being the original French word used by Deleuze and Guattari. See; Deleuze and Guattari, *Mille Plateaux*, (Éditions de Minute, 1998). For a brief discussion of the difference between assemblage and agencement and the notions lost in translation see; John Phillips, '*Agencement*/Assemblage,' *Theory, Culture and Society*, (2006), 23(2-3), p. 108-109.

too, assemblage thus being used as a means through which to describe the multiple flowing forces which shape the given topic at hand.

Another feminist theory which I use in this thesis is xenofeminism. Working both to challenge the nature-cultural binary while also centring intersectional feminisms, xenofeminism considers multiple assemblages, including the role of wider structural forces such as capitalism, bringing theory to the realm of practise and activism in an explicit way. Xenofeminism argues for the use of science and technology for critical feminist aims.[249] Xenofeminist theory, like Haraway's cyborg, wishes to reconstruct through using what exists; resisting via manipulating. Xenofeminism has clearly been inspired by Haraway's work as well as by accelerationism, which draws, in part, on Deleuze and Guattari's theory of schizophrenic capitalism and uses it to theorise the creation of a post-capitalist world through the accelerated use of technology (in short, through machines taking all jobs).[250] While I define and describe xenofeminism in more detail in Chapter Five, here I will note the theory's relation to the other theories I am using in this thesis including Haraway, Irigaray and Braidotti.

As noted above, xenofeminism seeks to both deconstruct the nature-culture binary while also remaining intersectional. Xenofeminism does this by explicitly addressing many layers at the same time. For example, the manifesto states that 'if nature is unjust, change nature!'[251] Explicitly highlighting the fluid and changing state of nature and its ability to be changed (through, for example, as Hester notes, reproductive technologies such as the artificial womb[252]), while also highlighting the fact that cultural understandings can change and be changed by changing nature, xenofeminism explicitly situates the deconstruction of the nature-culture binary at its heart. At the same time, however, xenofeminism, having the benefit of being thought after the many feminist debates on intersectionality, centres intersectional theory in a more thorough way than Haraway's Cyborg Manifesto does.[253] Xenofeminism is attentive to the multiple needs of intersecting identities, 'cutting across race, ability, economic understanding, and geographical position'[254] while also considering 'the queer and trans among

[249] Laboria Cuboniks, above note 188, Overflow 0*1A.
[250] Alex Williams and Nick Srnicek, '#ACCELERATE MANIFESTO for an Accelerationist Politics,' Critical Legal Thinking, 2013, http://criticallegalthinking.com/2013/05/14/accelerate-manifesto-for-an-accelerationist-politics/, (accessed 05/04/17).
[251] Laboria Cuboniks, above note 188.
[252] Helen Hester, *Xenofeminism*, (Polity Press, 2018).
[253] This is not a critique of Haraway but, rather, an exemplification of how gender theory has developed since Haraway's early feminist works.
[254] Laboria Cuboniks, above note 188, Zero 0*00.

us, the differently-abled,'[255] as well as 'women, queers and the gender non-conforming,'[256] among others. At the same time, these identities are situated within matter itself. This can be seen by the way in which the Xenofeminist Manifesto brings to the forefront the issue of those who dismantle tech waste, noting how this phenomenon is material as well as both raced and classed (with much of this labour being done in either in Ghana or in India) while also highlighting the ways in which multiple factors work in assemblage here, with forces such a capitalism and increasing technological mediation also shaping this contemporary reality.[257]

This is not, however, to claim that xenofeminism is a perfect theory which remains attentive to all becoming intersectional assemblages at all times. As Chapter Six will show, xenofeminism does not address the power of global militarism, this being a large downfall for a theory drawing on technological advancement given, as the chapter argues, the links between technological development and the military industrial complex. In addition to this, xenofeminism does not address the fact that it is, largely, a Western-centric theory, drawing on concepts such as the universal and the enlightenment. While xenofeminist theory uses these concepts to challenge them, it does not consider the fact that these concepts may never have made much sense to much of the world.

Xenofeminism also aims to manage the tension between resistance and compliance, posing, like Haraway, the use of the tools which exist to create a feminist future.[258] Xenofeminism understands, as I do, structure not as fixed but as always changing, being made up of multiple assemblages. For example, the Xenofeminist Manifesto states that; 'We understand that the problems we face are systematic and interlocking, and that any chance of global success depends on infecting myriad skills and contexts with the logic of XF [XF standing for xenofeminism].'[259] Thus, they note, structures cannot be overthrown but must rather be infiltrated;

> Ours is a transformation of seeping, directed subsumption rather than rapid overthrow; it is a transformation of deliberate construction, seeking to submerge the white-supremacist capitalist patriarchy in a sea of procedures that soften its shell and dismantle its defences, so as to build a new world from the scraps.[260]

[255] Ibid., Zero 0*01.
[256] Ibid., Zero 0*02.
[257] Ibid., Interrupt 0*08.
[258] Laboria Cuboniks, above note 27, Overflow 0*1A.
[259] Ibid. Overflow 0*19.
[260] Ibid.

While the links between xenofeminism and the work of Haraway are perhaps quite clear, as seen, for example, through a shared strategy of using what exists, including technology, to resist, the links back to Irigaray are less apparent. However, as noted, I read Irigaray's early work as a way through which to ask questions about structural bias and provide the theoretical possibility of challenging this bias. Xenofeminism seeks to address such bias, focusing, however, less on the symbolic but more on lived change. While it could be argued that all feminist theory wishes to challenge structural bias in some ways, as noted above, there is a difference between working to include women in the system more and seeking to challenge the system and its epistemological foundations. While, indeed, these two things overlap, with inclusion also pushing towards epistemological transformation, the core aim is often the inclusion itself. Xenofeminism and Irigarayan theory thus share a common aim in that neither seeks inclusion alone but, rather, both seek to challenge the symbolic order and the bias found in its foundational underpinnings. While the path and possible answers to the challenge of such structures may differ, the overarching aims and questions overlap.

It is debatable, however, whether xenofeminism can be defined as a posthuman theory or not. To fully answer that question there is also a need to define posthumanism; a far from easy task given the explosion of multiple posthumanisms over the past few years.[261] Posthuman theory is thus diverse and has many branches. Braidotti describes the various origins and strands of posthuman theory, describing:

> … three major strands in contemporary posthuman thought: the first comes from moral philosophy and develops a reactive form of the posthuman; the second, from science and technology studies, enforces an analytic form of the posthuman; and the third, from my own tradition of anti-humanist philosophies of subjectivity, proposes a critical post-humanism.[262]

I do not align myself with the first "type" of posthumanism Braidotti describes. This form of posthumanism is typified, according to Braidotti, by the work of Nussbaum; people who defend humanism and reject its historical decline by looking at contemporary changes such as globalisation and technological advancement, using these phenomena to merely reinstate an updated form of liberalism.[263] Nussbaum's 'capabilities' approach – the idea that we should all be equal and this should be achieved through giving everyone equal capabilities, is an

[261] See; Braidotti and Hlavajova, (eds.), *The Posthuman Glossary*, (Bloomsbury, 2018).
[262] Braidotti, above note 110, p. 38.
[263] Ibid., p. 38-9.

example of this.[264] Braidotti thus critiques the foundational idea of this strand of posthumanism: moral universal values.[265] This thesis being, in and of itself, a post-liberal, post-humanist project which exemplifies how these moral universals are problematic, does not align itself with this first strand either.

Braidotti also critiques the second, science and technology strand of posthumanism, noting that it:

> … is one of the most important elements of the contemporary posthuman landscape [yet] [i]n terms of critical theories of the subject, which is the focus of my position… this position falls wide of the mark, because it introduces selected segments of humanistic values without addressing the contradictions engendered by such a grafting exercise.[266]

Braidotti thus critiques the so-called neutrality presented by science and technology approaches: 'subjectivity is out of the picture and, with it, a sustained political analysis of the posthuman condition.'[267] In the current moment, such an approach can be typified by transhuman thought which seeks to improve man through science and technology. I discuss transhumanism further in Chapter Five but, broadly, I do not align myself with these forms of posthumanism precisely because they retain the humanist subject. This subject thus remains white, able-bodied, individual, rational and heterosexual. While I desire to dismantle the humanist subject and all the hierarchies it presents, the transhumanist project wishes to complete this subject, thus retaining a hierarchical blueprint of dominant subjectivity.

Braidotti thus situates herself expressly within the last form of posthumanism: critical post-humanism. I too, in this thesis, align myself with this perspective which, as Braidotti and Hlavajova note, is situated between the posthuman convergence of anti-humanism, post-humanism and post-anthropocentrism.[268] Critical posthumanism thus seeks to dismantle both the assumed hierarchies between humans of gender and race, for example, as well as deconstructing the assumed hierarchy of humanity over the nonhuman animal, nature-matter and technological subjectivities. This form of critical posthumanism comes from the lineage of

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[264] Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach*, (Harvard University Press, 2011).
[265] Braidotti, above note 110, p. 38-9.
[266] Ibid., p. 42.
[267] Ibid.
[268] Braidotti and Hlavajova, 'Introduction,' in Braidotti and Hlavajova (eds.), *The Posthuman Glossary*, (Bloomsbury, 2018), p. 1.

French postructuralist thought and it is thus no coincidence that this thesis has been deeply inspired by the early work of Irigaray as well other scholars such as Cixous and Deleuze and Guattari. The posthuman is not posed as something new or completely different to postructuralist thought. Rather, it works alongside and in continuation with the anti-humanism of poststructuralism, applying it to further contexts in the contemporary era.[269]

However, even within the understanding of critical posthumanism as based upon the convergence of post-humanism and post-anthropocentrism, there are now multiple strands of differing critical posthumanisms as exemplified by the recently published *Posthuman Glossary* which contains over 160 entries.[270] Posthumanism also expands across multiple disciplines, from philosophy to cultural studies to environmental studies to science and technology studies to gender theory.[271] Many of these strands interlink but they also, at times, diverge, including on the question as to what is posthuman theory. This can be seen between the different theories I am using in this thesis. For example, Haraway is wary of naming herself a posthumanist due to her wish not to become post the human but rather to de-centre the human and look towards multi-species becoming.[272] However, while her concerns are clearly well founded when considering some strands of posthumanism, critical posthumanism which, as noted above drawing on Braidotti and Hlavajova, sits between the posthuman convergence of anti-humanism and post-anthropocentrism, thus also wishing, like Haraway, to de-centre the humanist subject - not get rid of the human - while also wishing to dismantle the idea that the human is *the* centre.[273] Following this definition then, Haraway indeed can be read as a critical posthuman theorist.

Xenofeminism, on the other hand, fits somewhat less easily within critical posthumanism. While Hester has stated that xenofeminism does not fit easily into posthumanism,[274] she also notes how xenofeminism, like posthumanism, it against a human-centred world view.[275] However, Hester also highlights how the Xenofeminist Manifesto draws on many of the ideas which come from 'the legacies of humanism' which 'feminist and posthumanist thinking…

[269] Braidotti, above note 110.
[270] Braidotti and Hlavajova, above note 261.
[271] Ibid., p, 6-7.
[272] See; Donna Haraway, above note 193.
[273] Braidotti and Hlavajova, above note 261, p. 1.
[274] Dianne Baur and Helen Hester, 'Xenofeminism: A politics for Alienation,' SOAS Centre for Gender Studies Seminar Series, SOAS, University of London, 01/01/2018, https://soundcloud.com/user-99696551/xenofeminism-a-politics-for-alienation-11012018 (accessed 19/10/2018).
[275] Helen Hester, 'Xenofeminism,' in Braidotti and Hlavajova (eds.), *The Posthuman Glossary*, (Bloomsbury, 2018), p. 459.

have been so effective in problematizing,'[276] this seemingly going against critical and feminist posthumanism. For example, xenofeminism seeks to re-think yet continue to use, the concept of the universal, the concept of the universal having been problematized by feminist gender theory through, for example, intersectional feminism. Addressing the use of the universal, Hester notes the problems of this concept, showing the need, for example, to centre intersectionality. However, Hester states that there is 'not a need to abandon the universal.'[277] Rather, Hester continues, xenofeminism aims to 're-engineer' an '*intersectional universal.'*[278] Therefore, the universal, for Hester, remains useful in that it allows for 'large-scale, counter-hegemonic gender-political projects' and resistance which tackle large structures such as capitalism.[279] It seems that xenofeminism holds on to the universal as means through which to focus on larger scale resistance. This aim to challenge structures is something which, as noted above, is also present writing the work of Irigaray and critical feminist posthumanists such as Haraway and Braidotti. The need, too, to work together for a common aim while also noting the differences between "us" is something Braidotti calls for, stating that ''we' are in this together,' this we recognising both the need for collective action, to take responsibility for our times, while noting the importance of difference and 'the politics of location.'[280]

In a sense, therefore, Braidotti also advocates for a universal made up of difference. However, while Braidotti is clear in noting that this 'we' is about collective action, xenofeminism seems to both advocate this as well as advocating for the 're-engineering' of universal concepts.[281] While xenofeminism is, indeed, a feminist, queer, critical, intersectional project, xenofeminism's willingness to insert itself into the existing order is both its strength, in that it proposes resistance via infection, as well as it's weakness in that the structures it seeks to infiltrate could be the limit of the xenofeminist project itself. As I show through a discussion of how xenofeminism may be used in contemporary debates around military technologies, this tension may be overcome when applied in practise to specific examples: the tensions between resistance and compliance, infiltration, infection and co-option, can be managed in a resistive form. For example, re-engineering actual science and technology for feminist critical aims via building and shaping these technologies or re-engineering the law, manipulating and infecting it with feminism, can be a means through which to resist while using what exists. However, a

[276] Ibid., p. 459.
[277] Ibid., p. 460.
[278] Ibid.
[279] Ibid., 461.
[280] Braidotti and Hlavajova, above note 268, p. 12.
[281] Hester, above note 275.

tension remains present at a theoretical level in that, from a critical feminist gender theory perspective, there is a potential risk present in seeking to re-engineer concepts such as the universal and rationalism, given the way in which feminist gender theory has long shown such concepts to be problematic, with universal rational thought often being code for white middle class heterosexual male thought.[282]

It seems that part of this tension within xenofeminist thought comes from the spectres of speculative realism which can be felt within the Manifesto. Dissatisfied with the lack of realism in continental philosophy, from phenomenology to structuralism to post-structuralism and beyond, stating that these philosophies are 'incapable of confronting' contemporary events, the speculative turn seeks to bring realism, such as 'looming ecological catastrophe, and the increasing infiltration of technology into the everyday world' into contemporary continental philosophy.[283] In short, the speculative realist project seeks to ask how we can think reality without knowing it, working to de-centre anthropocentrism.[284] I state that the spectre of speculative realism can be felt within the Xenofeminist Manifesto precisely because the turn in xenofeminism to considering concepts such as the universal and rationalism is also something which is prominent in much speculative realist literature. In addition, as I note in Chapter Five, xenofeminism has been highly influenced by the Accelerate Manifesto, this manifesto also being very much linked to the speculative realist turn[285] with both speculative realism and the Accelerate Manifesto focusing on, in part, neo-Kantian ideals and the re-invigoration of the enlightenment project.[286] Thus, while the spectre of the speculative realist turn can be felt within the Xenofeminist Manifesto, so too can its faults. Speculative realism is, at times, de-politicising, leading even some of the authors who are part of this turn to question what the politics of this turn are and whether it can have a politics.[287] There is a risk, too, that xenofeminism may fall into the same de-politicising trap. While xenofeminism seeks

[282] See; Grear, above note 1; Naffine, above note 1.
[283] Levi Bryant, Nick Srnicek and Graham Harman, 'Towards a Speculative Philosophy,' in Levi Bryant, Nick Srnicek and Graham Harman, (eds.), *The Speculative Turn: Continental Materialism and Realism*, (re.press, 2011), p. 3.
[284] Rick Dolphijin, 'Review of Speculative Realism: Problems and Prospects,' *Notre Dame Philosophical Reviews*, (2016), https://ndpr.nd.edu/news/speculative-realism-problems-and-prospects/ (accessed 01/10/2018).
[285] For example, Nick Srnicek, one of the authors of the Accelerate Manifesto, has also co-edited a book on speculative realism and has a chapter in this book. See; Levi Bryant, Nick Srnicek and Graham Harman, (eds.), *The Speculative Turn: Continental Materialism and Realism*, (re.press, 2011).
[286] Cite accelerate manifesto as well as; Ray Brassier, 'Concepts and Objects,' in Levi Bryant, Nick Srnicek and Graham Harman (eds.), *The Speculative Turn: Continental Materialism and Realism*, (re.press, 2011),p. 47-65; Nick Srnicek, 'Capitalism and the Non-Philosophical Subject,' in Levi Bryant, Nick Srnicek and Graham Harman (eds.), *The Speculative Turn: Continental Materialism and Realism*, (re.press, 2011),p. 164-181.
[287] Bryant, Srnicek and Harman, above note 283, p. 16.

to re-engineer enlightenment-linked concepts through, for example, thinking through them via intersectionality, a question is left as to whether such concepts are able to be re-engineered. Given these tensions, in this thesis I have chosen to focus on xenofeminism's intersectional post-capitalist ideals and its call for critical, intersectional feminist activism in order to shape science and technology, using xenofeminism's re-engineering ideas in this way without using it to think through the re-engineering of philosophical concepts.

As noted above, I define Haraway as a critical posthuman scholar for the purposes of this thesis despite the fact that she does not define herself as a posthuman scholar precisely because she does not want to become post the human but rather decentre the human.[288] This is because decentring the human is core to the *critical feminist* posthuman project, if not all posthuman projects. Like Haraway, xenofeminism also strays away from explicitly defining itself as a posthuman theory. However, I also use xenofeminism as a critical feminist posthuman theory, using it to de-centre the human while seeking, like Haraway, to actively write change through using the contemporary technologically mediated moment for change.[289] This is not to say that xenofeminism *is* inherently posthuman, as noted in reference to Hester's own reflections on this, there is a debate here.[290] Xenofeminism is a relatively new theory, albeit one which draws on many theories before it. Xenofeminism could, however, at this early stage of its formation, be used in multiple different ways. I am thus using xenofeminism here within the critical feminist posthuman framework I have outlined above which sits between the posthuman convergence of anti-humanism and post-anthropocentrism.[291]

Posthuman theory clearly fits many of the aims of this thesis; to re-think international legal personality and the models of subjectivity embedded in international law by this concept and to think beyond the liberal/humanist structure of subjectivity in international law as well as to consider the ways in which technological subjectivities are impacting on and will impact international law. In this thesis I use various theories of feminist posthumanism. These theories include, not only Haraway and Braidotti, both of whom, as noted above, disagree and diverge on issues such as the influence and use of Irigaray, for example, but also feminist new materialist scholars and xenofeminist theory. These theories, I argue, can all be categorised as critical feminist posthuman theories. As noted above, however, this does not mean that they align always with ease. There are multiple differences between these theories. However, there

[288] See; Haraway, above note 193.
[289] Laboria Cuboniks, above note 188; Haraway, above note 83.
[290] Hester, above note 275.
[291] Braidotti and Hlavajova, above note 268, p. 1.

are key points of convergence, including; the need to resist structural bias; the need to dismantle existing humanist hierarchies over matter, the nonhuman animal and technological subjectivities; an overall theme of using current structures to resist, resisting via complying or, rather, infiltrating, infecting and manipulating; the need to deconstruct binaries; and the will to construct a feminist future from the present. It is clear that feminist posthumanism, therefore, is a good theory through which to re-think the central aims of this thesis. Posing an alternative way in which to balance resistance and compliance while working to challenge the multiply assembled structures of the global order, feminist posthumanism, as this thesis will show, can be used to challenge and change international legal structure.

4. Conclusion: Feminist Posthuman Challenges to International Law's Structural Bias

This thesis works around a number of key interlinking themes, aims and methods including; structural bias, resistance and compliance, deconstructing binaries, resisting via manipulation, dismantling hierarchies, re-thinking subjectivity and conceptions of international legal personality, creating a post-capitalist world and de-centring the humanist subject. Through the return to the consideration of feminist gender theory from outside the law and its application to the work of feminists working in international law, the thesis expands the realm of what is included in feminist approaches to international law. Further, the thesis exemplifies a methodological expansion of the area of feminist approaches to international law in that it challenges the compliance mode that feminist approaches have aligned themselves with in recent years, seeking to look towards further resistive change. Through holding onto resistance and the need to consider international legal structures, yet noting the falsity of all binaries and the ways in which structures, too, are not universal (as they often claim to be – international law being an example) but are, rather, multiple and interlinking, the thesis draws on multiple feminist posthumanisms as both theoretical framework and method; as a way of understanding humanism, (neo)liberalism and capitalism and the ways in which they operate and create hierarchies as well as a way in which to resist via manipulation.

The theories and ideas are considered and exemplified through four key topics: the role and status of capitalism and the global corporation, the environment claims for legal personality for the environment, the role of technology within the global order both now and in the future and autonomous weapons systems. Chapter Three utilises the example of the global corporation and the ways in which gender is measured in the international arena to show how neoliberal and capitalist entities have used the system of international legal personality for their own aims.

Taking this use and manipulation of the system, Chapter Four applies feminist new materialist ideas to the concept of international legal personality, calling for a reconsideration of subjectivity in international law through the granting of personality to the environment. Noting the need to go yet still further, however, Chapter Five considers theories which pose technology as a tool to create a post-capitalist world, focusing on xenofeminist theory in particular. It is argued that machines could, eventually, take all of our jobs, thus rendering labour and capitalism a thing of the past. Chapter Six goes on to consider the impact of technological legal subjectivities on international law now and in the future. Demonstrating the ways in which, for example, robots may not only take human jobs and create a post-capitalist society but may also take military jobs, Chapter Six will highlight the need to be cautious of promoting technology to destroy capitalism without account for the darker sides to such technologies and the link between technology, capitalism and militarism. Chapter Six, therefore, in xenofeminist mode, argues that xenofeminist method, i.e. the wish to resist via manipulation, to take technology and make it into what feminists want, needs to be applied, too, to international law. I argue that xenofeminists, including xenofeminist international lawyers, need to be involved in writing the legal-ethical frameworks for such technology. Learning to use the technology alone is not enough. There is a need to tackle the dark sides of technology from all sides and thus to regulate and shape it through law and policy to also ensure that it can be used for feminist aims.

This thesis overall, therefore, argues for the importance of considering theories from outside the law in the realm of feminist approaches to international law to challenge structural bias. Doing so opens up new possibilities and allows feminist international lawyers to consider questions which they are, for the most part, not currently considering. This is important, not only to ensure that feminist approaches do not just become about "women's issues" alone, but also so that feminists can actively shape all areas of international law. I argue throughout the thesis, for the importance of considering structural issues in international law and exemplify some ways in which feminists can begin to tackle structural issues. Noting the need to resist further, the thesis proposes manipulation as a method through which feminist international lawyers may resist.

Chapter Three

Capitalism, International Law and Structural Bias

1. Introduction

This chapter will discuss both the role of the legal subject and of capitalism in creating the structural bias this thesis seeks to challenge. The chapter begins through considering Marxist and critical approaches to international law which show how international law has played a key role in the functioning of capitalism. The rest of this chapter exemplifies the ways in which capitalism, in turn, has structured international law, drawing on Deleuze and Guattari's concept of schizophrenic [sic] capitalism which describes the ways in which capitalism is able to incorporate other structures and movements into a capitalist framework. Two key examples of the ways in which the global order has been structured by schizophrenic capitalism, which is thus used as a tool for analysis, are given. First, the chapter discusses measurement cultures within human rights and development discourses and the limited narrative often told by gender measurements in particular, with such measurements working to reduce core concepts such as

gender, equality and freedom to neo/liberal accounts of these terms.[1] Thus, the chapter begins by looking at the way in which capitalism shapes international law and the global order, including feminist engagements with the law. Second, drawing on case law such as *County of Santa Clara v Southern Pacific Railroad,*[2] the *Ogoni* case,[3] the *Case Concerning East Timor (Portugal v Australia),*[4] the *Wiwa* case,[5] the *Kiobel* case[6] and *Jesner v Arab Bank, PLC,*[7] among others, the chapter considers the role and status of the global corporation[8] in the global order, noting another example of schizophrenic capitalism at play in the ways in which corporations have been able to exploit the construct of legal personality in various areas of domestic, international and transnational law for their own aims. Capitalism is thus defined as another key, structural element in the contemporary global order, working alongside concepts such as legal personhood to promote a neo/liberal agenda. It is argued that capitalism has been so successful in permeating the structure of the global order precisely because it situates itself between resistance and compliance, bringing all, including resistance, into the limits of capital itself.[9] In turn, this capitalist reterritorialisation of resistance projects such as feminism is, as exemplified by the work on gender measurements, a core part of the resistance and compliance problem I have identified with feminist approaches to international law. The chapter thus concludes by emphasising the non-binary nature of resistance and compliance while noting the possible usefulness for feminist international lawyers in situating themselves between resistance and compliance in the way that capitalism does, not only using but manipulating what exists, but in order to promote critical feminist aims instead.

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[1] Doris Buss, 'Measurement Imperatives and Gender Politics: An Introduction,' *Social Politics*, (2015), 22(3), p. 381-9; Rahul Rao, 'Global Homocapitalism,' *Radical Philosophy*, (2015), 194, p. 38-49.
[2] *County of Santa Clara v Southern Pacific Railroad*, 118 US 394 (1886).
[3] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria.
[4] *Case Concerning East Timor (Portugal v Australia)*, ICJ Reports 1995 103.
[5] *Wiwa v Royal Dutch Petroleum*, 2002 WL 319887 (SDNY, 2002).
[6] *Kiobel v. Royal Dutch Petroleum Co.*, 133 S.Ct. 1659 (2013).
[7] *Jesner v. Arab Bank*, No. 16-499 (2018).
[8] There are many definitions of global corporations. Key terms which are often used in international legal discourse are MNCs (Multinational Corporations) and TNCs (transnational corporations). I have, however, chosen to use the word corporation for several reasons. First, many corporations avoid the title of MNC for reasons such as tax purposes, hence why I have chosen to use the terminology of the global corporation; to explicitly include multiple variations of the global and transnational corporation within my analysis. I use corporation and opposed to TNC because this chapter considers both TNCs and domestic corporations, looking at the history of corporate legal personality and the way the domestic has impacted on the international. See; OECD, 'The 2011 update of The Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises,' OECD 2011, http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 09/11/2017), p. 17; Ilias Bantekas and Lutz Oette, *International Human Rights Law and Practice*, (Cambridge University Press, 2013), p. 662.
[9] Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983).

2. Neoliberalism, Capitalism and the Global Order: Marxist Approaches to International Law

Capitalism is defined by Braidotti as a social system based around profit.[10] While capitalism as a term which denotes an ideology or social system which seeks to create a system based on profit and the maximisation of profit, neoliberalism, on the other hand, is a broad term which includes multiple different policies and processes used to promote a free-market economy including, for example, free trade.[11] Much like liberalism, neoliberalism often avoids questions around its political nature, presenting itself as the very idea of progress itself without account for critique and alternative perspectives[12] Further to this, neo/liberalism seeks to deploy freedom and ideas of freedom as being without interference and coercion, while implicitly acting coercively and enforcing its own power through the expansion of its ideas and policies, as exemplified by, for example, the 'compel[ling] of workers to allow the profits of their labour to be transferred to others.'[13]

Free trade, states Orford, has now been institutionalised, with market relations being preferred to other relations and political economy becoming the dominant language through which states explain themselves.[14] This coming of industrialisation has been told as a story of progress, one in which 'commercial sociability is equated with liberal government, cosmopolitanism, and a more peaceful world.'[15] In this story, 'the world is gradually improving, living standards are rising, and although the liberalization project is incomplete, it can still take credit for this gradual advance of the human situation.'[16] Free trade, in this narrative, is largely presented in the global order as necessary and as the best economic policy for the advancement of humanity.[17]

This account, of course, can be challenged and questioned. As Orford notes, free trade is a 'historical particularity,' and *not* an inevitable outcome of human society. Free trade is a political idea which can be contested.[18] Free trade, Orford continues, 'produces a system in

[10] Rosi Braidotti, 'Affirming the Affirmative: on nomadic affectivity,' *Rhizomes* (2005/2006) 11/12, http://www.rhizomes.net/issue11/braidotti.html, (accessed 23/09/2016).
[11] Wendy Brown, *Undoing the Demos*, (Zone Books, 2015), p. 20-21.
[12] Anne Orford, 'Theorising Free Trade,' in Orford and Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 704.
[13] Ibid.
[14] Ibid., p. 702.
[15] Ibid., p. 701.
[16] Ibid., p. 702.
[17] Ibid., p. 703.
[18] Ibid.

which poorer countries continue to export vital resources even during periods of scarcity, investments are protected even during periods of civil war, and the people who labour to produce key commodities remain impoverished and undernourished.'[19] Free trade is by no means neutral and, given such examples, can be contested and challenged in its claims of being the site of progress for human society. Rather, in light of such examples, free trade appears as a political ideology which is biased against the majority of humanity, choosing to protect the property of the rich as opposed to protecting life. Thus, as Orford highlights, 'concepts such as free trade… are the product of political struggles of particular ways of understanding the world, justifying entitlements to resources, explaining why some people should profit from the labour of others, and legitimizing the exercise of power.'[20]

The idea that international law and the global order are structured around political ideas such as private property is something that Marxist approaches to international law have highlighted.[21] Taking this claim even further, however, many such Marxist approaches state that 'it was only with capitalism that international law came to full-flower.'[22]

Many Marxist international legal scholars begin their analysis through drawing on the work of Pashukanis.[23] Pashukanis, a key Soviet legal thinker, defined law as being the intermediary in commodity exchange, law thus coming to regulate disputes on commodity exchanges between legal individuals.[24] International law, for Pashukanis, represented the same system of managing commodity exchange, this commodity exchange being deeply tied to imperialism.[25] Marxist approaches to international law therefore, following Pashukanis' work, not only note the ways in which capitalism and international law are intermeshed; they also note the role of colonialism in this story highlighting, for example, the ways in which imperialism worked to capitalise on colonised peoples.[26]

[19] Ibid., p. 702.
[20] Ibid., p. 703.
[21] See, generally; Robert Knox, 'Marxist Approaches to International Law, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 306-326.
[22] For a Marxist international legal reading on Pashukanis, see ibid., p. 316. See also; Evgeny B. Pashukanis, 'The General Theory of Law and Marxism' in Piers Beirne and Robert Sharlet (eds.), *Pashukanis: Selected Writings on Marxism and Law* (Academic Press London 1980), p. 37–131.
[23] See, for example; Knox, above note 21.
[24] Pashukanis, above note 22, p. 58.
[25] Ibid., p. 77
[26] Knox, above note 21, p. 312-13. See also; Vladimir I. Lenin, *Imperialism, the Highest Stage of Capitalism: A Popular Outline*, (Foreign Languages Press, 1970); Orford, above note 20, p. 720-723.

Bringing such analysis up to the present day, Miéville draws on Pashukanis' claim that international law is 'the legal form of the struggle of the capitalist states among themselves for domination over the rest of the world,'[27] where states are thus either capitalist or the object of capitalist states.[28] This can be seen in the fact that 'states have equal rights yet in reality they are unequal in their significance and in their power.'[29] Thus, as Miéville notes, international law did not and is not merely promoting capitalist aims in a particular, historical moment. Rather, international law is a system *based* on commodity exchange and imperialism; this is its very foundation and structure.[30] This is not to say that all figurations of international law are inherently capitalist, but that many are or have been infiltrated by capitalist ideologies.

Consequently, Marxist approaches to international law do not only highlight the ways in which international law tells a story of neutral progress which is ultimately biased but, taking this further, they show the ways in which international law is a capitalist system. International law has played a key role in the functioning of capitalism. The system of international law is built around domination yet it works in such a way, as Marks notes, so as to legitimise itself,[31] dissimulate itself (whereby 'relations of domination are obscured, masked or denied'[32]), reify itself so as to make it look eternal as opposed to a product of human relations,[33] and to naturalise itself so as to make its system seem 'obvious and self-evident.'[34] International law, for Marks, therefore, is an ideology.[35] However, Marks does not see ideology as something which people are unaware of or in false consciousness of, rather, Marks highlights that this ideology works in way so that, while many are aware of the inequalities in the world, they act as if they are not.[36]

Marxist international legal scholars, in highlighting the ways in which international law is structured by economic domination, noting the ways in which this domination intersects with broader power structures and colonialism, take a structural bias approach to international law. This thesis, as noted in Chapter One, also takes a structural bias stance, working to provide a

[27] Pashukanis, above note 22, p. 169.
[28] Ibid. p. 172; China Miéville, *Between Equal Rights: A Marxist Theory of International Law,* (Pluto Press, 2006); Susan Marks, *International Law on the Left: Re-Examining Marxist Legacies,* (Cambridge University Press, 2011).
[29] Pashukanis, above note 27, p. 178; see also the appendix.
[30] Miéville, above note 28.
[31] Susan Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology,* (Oxford University Press, 2003), p. 19.
[32] Ibid., p. 20.
[33] Ibid., p. 21.
[34] Ibid., p. 22.
[35] Ibid.
[36] Ibid., p. 23.

feminist analysis of such biases. While Marxist international lawyers successfully link different forms of oppression such as capitalism and colonialism together in their structural analysis, they fail, however, to account for the role of gender in international legal structural bias. Patriarchy also underpins the capitalist model and this is something which has, by and large, not been adequately dealt with by many Marxist scholars.[37] 'Non recognition' of feminism by Marxists, however, as Delphy notes, 'poses a problem – not for women, but for the analysis of the capitalist mode of production,'[38] in that capitalist exploitation does not just apply to men and women in the same way but fundamentally differently.[39] In treating workers, therefore, as asexual, Delphy notes, women's labour and the particular conditions of her labour become invisible.[40] This invisible labour includes the unpaid domestic and reproductive labour that many women (thorough their culturally constructed role as the "biological" homemaker[41]) and some men, undertake every day. Thus, as Delphy notes, feminism modifies Marxism in various ways. For example, feminism makes it 'impossible' to 'accept the reduction of Marxism solely to the analysis of capital,' in that it highlights the fact that 'the struggle between workers and capitalists is not the only struggle.'[42] Feminism notes the need to see how capitalism links to and upholds other social inequalities. This is not to say that Marxism inherently ignores gender. Engels, for example, one of the founders of Marxist theory alongside Marx himself,[43] noted the ways in which female sexuality was controlled, historically, in order to uphold systems of private property which was passed on through the ranks of the property ruling class via heirs.[44] Such perspectives, however, have remained on the periphery of much of Marxist thinking, including and in particular, Marxist thought on international law. By not noting drawing upon a gender perspective within their work, Marxist international lawyers, too, silence the ways in which gender also acts as a structurally oppressive system which interacts with capitalism and colonialism.

Feminist theory, in contrast, has long noted the need to consider different sites of oppression and the ways in which different structures interact with one another including gender, race,

[37] Christine Delphy, trans. Diana Leonard, 'A Materialist Feminism is Possible,' *Feminist Review*, (1980), 4, p. 87.
[38] Ibid., p. 87.
[39] Ibid.
[40] Ibid., p. 88.
[41] Ibid., p. 95; Rosemary Hennessey and Chrys Ingraham, 'Introduction: Reclaiming Anticapitalist Feminism,' in Rosemary Hennessey and Chrys Ingraham (eds.), *Materialist Feminism: A Reader in Class, Difference and Women's Lives*, (Routledge 1997), p. 1-14.
[42] Delphy, Ibid., p. 87.
[43] Friedrich Engels and Karl Marx, *The Communist manifesto*, (Oxford University Press, 2002).
[44] Ibid.

class and ability.[45] Further, as noted in Chapter Two, feminist posthuman theories note the need to recognise, not only hierarchies between humans (such as gender and class) but also between humans, nonhumans and matter.[46] In light of this, while Marxist approaches to international law highlight the capitalist structuring of international law, I read such approaches, in this chapter, through feminist theory, seeing capitalism, as Irigaray does, as part of the multitude of assemblages which makes up the masculine symbolic order (of international law).[47]

3. French Poststructuralist Theories of Capitalism: The Death of God, The Desiring Subject and the Schizophrenic

Many French post-structuralist thinkers including Deleuze and Guattari and Žižek,[48] have defined capitalism, not through its policy aims or ideologies, but through the methods and processes it has deployed and continues to deploy to ensure its structural pervasiveness.[49] Žižek, for example, draws on Lacan to distinguish between the aim and the goal of the 'capitalist drive,'[50] thus highlighting the ways in which capitalism uses the drive to perpetuate itself. Žižek notes that, unlike the instinct, where the aim and the goal come together, the instinct thus being tied to biology and the need to survive, the drive is removed from biology; it is a cultural construct. The drive, therefore, can never reach its goal, it is always searching for the hole left by the Death of God. The drive thus circles around the goal, joy coming, not from receiving, but from the endless repetition.[51]

Žižek, drawing on Lacan's theory of the drive,[52] thus argues that capitalism uses the human drive to its own benefit. Thus, 'at the immediate level of addressing individuals, capitalism interpellates them as 'subjects of desire,' soliciting in them ever new perverse and excessive desires (for which it offers products to satisfy them).'[53] Žižek shows how capitalism has utilised

[45] Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,' *Stanford Law Review*, (1991), 43(6), p. 1241-99; Angela Y. Davis, *Women, Race & Class*, (Ballantine Books, 2011); Sadie Wearing, Yasmin Gunaratnam and Irene Gedalof, 'Frailty and Debility,' *Feminist Review*, (2015), 111(1), p. 1-9.
[46] Stacy Alaimo and Susan Heckman (eds.), *Material Feminisms*, (Indiana University Press, 2008).
[47] Luce Irigaray, 'Women on the Market,' and 'Commodities among themselves,' in trans Catherine Porter, *This Sex Which is Not One*, (Cornell University Press, 1985), p. 170-91 and 192-97.
[48] While Žižek is neither French nor a scholar who exclusively draws on French postructuralist thought, he is a key thinker of French structuralist and postructuralist thought, drawing heavily on Lacan, for example, in his work. This is why I have therefore categorised him, here, as someone who works, in part, in 'French poststructuralist mode.'
[49] Deleuze and Guattari, above note 9; Slavoj Žižek, *The Parallax View*, (MIT Press, 2006).
[50] Žižek, ibid., p. 61.
[51] Jacques Lacan, 'The Transference and the Drive,' in Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, (Karnac, 2004), p. 123-187.
[52] Ibid.
[53] Žižek, above note 49, p. 61.

the black hole left by the Death of God to make subjects into constantly desiring subjects who experience joy only briefly, in the short moment of consumerism, which can never fully satisfy desire nor make the subject happy. Capitalism has actually incorporated the model of the Death of God and the black hole left in his place into its mode of existence.

Deleuze and Guattari, on the other hand, begin with a departure from Lacan (and thus Freud also). Freud disliked schizophrenics whom he saw as 'cut off from reality.'[54] Disagreeing with and departing from the Freudian/Lacanian account of schizophrenia, Deleuze and Guattari state that Freud hated schizophrenics precisely because they were/are not within Freud's system of psychoanalysis, having not undergone the oedipal stage nor having developed an ego, thus making them somehow beyond Freud himself.[55] Thus, as noted above, while for the subject in the Lacanian model the yearning of the drive is for something which is lacking, the schizophrenic, according to Deleuze and Guattari, cannot experience lack. The unconscious for the schizophrenic is productive. The schizophrenic does not fantasise, meaning that their desire can produce the real.[56] The schizophrenic, therefore, 'escape[s] coding, scramble[s] the codes, and flee[s] in all directions: *orphans* (no daddy-mommy-me), *atheists* (no beliefs), and *nomads* (no habits, no territories).'[57]

It is the schizophrenic's ability to code and decode which Deleuze and Guattari relate to contemporary capitalism. Capitalism has no 'I', no ego, yet it is able to understand codes quickly, allowing it to insert itself easily within various cultural contexts taking 'advantage of the local symbolic order' in much the same way that Brown highlights neoliberalism works with the local system in plastic ways.[58] Capitalism finds no need to be in opposition to anything to dominate. It takes what exists and makes it its own. Capitalism is thus the universal decoder, leading Deleuze and Guattari to conclude that 'civilization is defined by the decoding and deterritorialization of flows in capitalist production.'[59] Everything is uncoded to make it fit the

[54] Deleuze and Guattari, above note 9, p. 23.
[55] Ibid.
[56] See; Johnah Peretti, 'Towards a Radical Anti-Capitalist Schizophrenia?' Critical Legal Thinking 2010, http://criticallegalthinking.com/2010/12/21/towards-a-radical-anti-capitalist-schizophrenia/, (accessed 24/09/2016).
[57] Mark Seem, 'Introduction,' in Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983), p. xxi.
[58] Peretti, above note 56; David Harvey, *The Condition of Postmodernity: An Inquiry into the Origins of Social Change*, (Wiley Blackwell, 1991); Deleuze and Guattari, above note 9, p. 245; Brown, above note 11.
[59] Deleuze and Guattari, Ibid., p. 244.

capitalist schema, whether this be through 'the abstraction of monetary quantities' or the privatisation of property. Capitalism has become the 'limit of all societies.'[60]

Deleuze and Guattari, however, do not see schizophrenic flows and capitalist flows as the same. In fact, they believe that conflating the two would be 'a serious error.'[61] They note, instead, that 'our society produces schizos [sic] the same way it produces Prell shampoo or Ford cars.'[62] Yet society treats the schizophrenic as a 'sick person.'[63] This does not seem to make sense, they note, asking 'why does it [society] confine its madmen and madwomen instead of seeing in them its own heroes and heroines, its own fulfilment?'[64] Why does capitalism repress its very own reality?[65] The answer, they conclude, is that, while capitalism is always decoding, deterritorialised; it is, ultimately, a '*relative* limit on society' which 'maintains the energy of the flows in a bound state on the body of capital.'[66] Schizophrenia, on the other hand, 'is indeed the *absolute* limit' which causes flows to travel freely on a 'dissocialized body without organs.'[67] Thus, Deleuze and Guattari note that 'schizophrenia is the *exterior* limit of capitalism itself or the conclusion of its deepest tendency, but… capitalism only functions on condition that it inhibit this tendency, or that it push back or displace this limit.'[68] Capitalism is thus schizophrenic, 'continually producing on a widened scale,' yet it always binds this schizophrenia within the limits of capital, 'the flows are decoded *and* axiomatized by capitalism at the same time' thereby always working to oppose 'the revolutionary potential of decoded flows.'[69] Deleuze and Guattari therefore conclude that 'schizophrenia is not the identity of capitalism, but on the contrary its difference, its divergence and its death.'[70]

This does not mean that capitalism is *limited* by its axiomatic, however. Rather, 'the strength of capitalism indeed resides in the fact that its axiomatic is never saturated, that it is always capable of adding a new axiom to the previous ones.'[71] Capitalism can contain itself by being

[60] Ibid. p. 244-5.
[61] Ibid. p, 245.
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid., p. 246.
[69] Ibid.
[70] Ibid.
[71] Ibid., p. 250.

always ongoing, always unlimited within its axiomatic. 'Capitalism defines a field of immanence and never ceases to fully occupy this field.'[72]

Like much Marxist international legal work, Deleuze and Guattari also theorise without account for the ways in which gender, too, plays out in the capitalist system.[73] This chapter, however, as noted, will not follow this trend but will, rather, work to show the ways in which capitalism works in conjunction with patriarchy in the global order, capitalism and patriarchy therefore intersecting with multiple other structural forces such as colonialism and anthropocentrism to proper one another up.

Considering Marxist approaches to international law, it is clear that international law was historically structured around capitalism and colonialism and has worked to uphold capitalism. In this chapter, I will also show, by drawing on examples of gender measurement and legal subjectivity, how projects such as feminism and human rights which were once imagined as resistive projects, have been shaped and limited by capitalism through their interaction with law, this being, in part, one of the factors which has worked to ensure that feminism in international law is more compliant with the existing order than resistive to it. Deleuze and Guattari's concept of schizophrenic capitalism will be used as a framework through which to understand this phenomenon through, focusing on the processes through which this occurs. Schizophrenic capitalism is therefore used to understand the ways in which, even projects with broader transformative aims such as feminism, have been decoded and recoded,[74] limiting them to a neoliberal account of transformation.

I am not only interested in the processes of capitalism and therefore schizophrenic capitalism as a means through which to understand how international legal structure is biased, however. I am also interested in the process of schizophrenic capitalism itself, how this decoding and recoding occurs. Capitalism uses what exists, including resistive projects such as feminism, bringing these projects into its own ideology. In one sense, therefore, capitalism resists by using

[72] Ibid.
[73] There is, however, a strong and ongoing debate about the links between Deleuze and Guattari's work and feminism. Braidotti, for example, has stated that 'Deleuze is the closest to the aims and scope of Irigaray's early formulation of the subject that is not One.' (Rosi Braidotti, 'Becoming Woman: or Sexual Difference Revisited,' (2003), *Theory, Culture &* Society, 20(3), p. 47). However, in the same piece, Braidotti also notes that there is also a tension present, broadly noting the ways in which Deleuze both notes the importance of sexual difference which also displaying 'the tendency to dilute metaphysical difference into multiple and undifferentiated becoming.' (Ibid.) For further discussions on both the similarities and divergences between Deleuze and feminism, see; Ian Buchanan and Claire Colebrook (eds.), *Deleuze and Feminist Theory*, (Edinburgh University Press, 2001); Rosi Braidotti, *Metamorphoses: Towards a Materialist Theory of Becoming*, (Polity Press, 2001).
[74] Deleuze and Guattari, above note 9.

what exists and thus may propose one means through which resistance or transformation may occur. While capitalist "resistance" or manipulation is not the kind of resistance I am seeking, the method of manipulating what exists to resists has proven to be a successful one and one which Chapters Four, Five and Six will seek to apply to feminist resistance in various ways.

4. Measuring Gender: Turning Transformation into Neo/liberalism

4.1 Critical Reflections on the International Measurement of Gender

As noted above, international law and the global order is structured by neoliberalism and capitalism in various ways. As this section and as the chapter as a whole will show, part of the success of neoliberal and capitalist ideologies in the global order has come about due to capitalism's ability to turn core legal concepts and projects of resistance into limited neoliberal accounts of themselves.

An example of schizophrenic capitalism at work can be seen when looking at human rights discourse. Human rights, the ethical idea that the protection and freedom of the human subject should come before all else and that these ethical values should be universally and legally engrained and enforced, is seen by many as an important discourse of resistance. However, Baxi argues that the 'power of human rights discourse has already been critically appropriated by global capital.'[75] One way this has been done has been through the use of metrics and measurement in this area.

A variety of global actors, including states and international organisations, use measurement as a technique through which to control policy outputs in human rights projects. The use of measurement to determine impact and as a guide for policy has exploded over the past few decades, leading to what Leibowitz and Zwingel call the 'measurement obsession.'[76] Measurement, however, is a technique of knowledge production. As Buss has noted, 'regimes of measurement both constitute social reality and are themselves sites of social contestation.'[77] Measurements are never pure, but, rather, they always represent the particular. A series of choices are made in their construction around *what* exactly should be measured and *how*,

[75] Upendra Baxi, *The Future of Human Rights*, (Oxford University Press, 2002), p. 147.
For a wider discussion of the ways in which human rights in fact limit definitions of freedom, thereby limiting what can be/is aspired to, as well, a discussion of alternative accounts of freedom beyond human rights, see; Ratna Kapur, *Gender, Alterity and Human Rights: Freedom in a Fishbowl*, (Edward Elgar Publishing, 2018).
[76] Debra J. Leibowitz and Susanne Zwingel, 'Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession,' *International Studies Review*, (2014), 16(3), p. 362-89.
[77] Buss, above note 1, p. 381.

therefore also often working to paint a specific picture of the outcome, hiding what lies outside the drawn lines. Measurement renders 'social phenomenon comparable,'[78] presenting its findings as objective.[79] This so-called 'scientific objectivity,' Leibowitz and Zwingel note, fits exactly into enlightenment, masculinist thinking which privileges 'masculine (read: superior) characteristics of reasons, scientism and hierarchy.'[80] This works to ignore context, reducing complex categories such as gender to simple distinctions between, for example, men and women.[81]

One example of the ways in which measurement paints a specific picture of reality can be seen in the example of strategies to combat maternal health. Maternal mortality was taken up as the measurement of maternal health under the Millennium Development Goals. While the measurement of maternal mortality may provide some insight into maternal health, as Buss notes, it does not reflect the entire picture of maternal health which may include different social, cultural and historical practises too.[82] Further, in evaluating maternal health through an analysis of the figures on maternal mortality alone, the measurement of maternal health becomes restricted to maternal mortality during birth alone. This limitation thus works to ignore both pre and post birth maternal health as well as the other health complications which can occur during birth aside from mortality. Taking such a limited perspective on the measurement of maternal health ensures that the multiple factors relevant in determining real maternal health are left out of the picture while claiming that such a statistic does indeed represent maternal health.[83]

Gender is a key area where measurement is increasing in use. In 2012, UN Women and the UN Statistics Division, alongside a collective of interested parties, including the World Bank, announced the Evidence and Data for Gender Equality Initiative (EDGE). EDGE 'seeks to accelerate existing efforts to generate comparable gender indicators.'[84] The perceived need to accelerate the use of indicators for measuring gender itself is exemplary of the international measurement trend, where measurement is deemed to be inherently necessary and useful.

[78] Ibid., p. 383.
[79] Leibowitz and Zwingel, above note 76, p. 364.
[80] Ibid.
[81] Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism,' in Margaret Davies and Vanessa E. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory*, (Routledge, 2013), p. 197-215.
[82] Buss, above note 1, p. 383-4.
[83] For further examples on the way gender has been used in various projects and the limited lens through which it has been measured in these projects, see: Leibowitz and Zwingel, above note 76.
[84] EDGE website, 'About EDGE,' United Nations, http://unstats.un.org/unsd/gender/EDGE/about.html, (accessed 26/09/2016).

Further, the example of gender/gender equality and the way these things are measured is also a very good example of the problems with measurement culture precisely because the word 'gender' is, itself, a highly contested term.[85] Any measurement of gender, therefore, must, of course, inherently take a stance on the meaning of gender itself, this stance therefore reflecting the measurement outcome. This has an impact not just in terms of what is seen and what is not seen, but in terms of policy too, with policies often being heavily influenced by these measurements.

Gender is defined in various way in the international arena. UN Women, for example, make a distinction between 'gender equality' – which they define as the need to ensure men and women have equal rights and opportunities – and 'gender,' which they define as 'the social attributes and opportunities associated with being male and female and the relationships between men, women, girls and boys.'[86] Gender mainstreaming; the way in which the UN works to include gender in all its programmes, is defined in similar terms, as 'a process for assessing the implication for women and men of any planned action… a strategy for making women's as well as men's concerns and experiences an integral dimension… of politics and programs.'[87]

While the above definitions of gender and gender equality seem quite varied and complex, they exemplify one of the ways in which measurement, whilst pertaining to be objective, always shows a biased picture. Discussing this, Otto notes that the UN's turn to using the word 'gender', as opposed to women, has been a positive step towards moving the beyond gender dualism in that the term itself does potentially allow for the consideration of gendered experiences outside those of men or women alone.[88] Otto highlights, for example, how gender mainstreaming was taken up by the Human Rights Committee through General Comment 28 which looks at the equality of the application of International Covenant on Civil and Political Rights (ICCPR)[89] to men and women. She notes that General Comment 28 'boldly reinterprets each ICCPR right to be more inclusive of women's experience, which has the important effect

[85] Otto, above note 81.
[86] UN Women, 'Concepts and Definitions,' http://www.un.org/womenwatch/osagi/conceptsandefinitions.htm, (accessed 20/09/2016).
[87] UN Economic and Social Council (ECOSOC), 'Coordination of the Policies and Activities of the Specialized Agencies and Other Bodies of the United Nations System: Mainstreaming the Gender Perspective into all Policies and Programs in the United Nations System,' 30 June 1997, E/1997/100, no. 2.
[88] Otto, above note 81.
[89] UN Human Rights Committee (HRC), CCPR General Comments No. 28: Article 3 (The Equality of Rights Between Men and Women), 29 March 2000, CCPR/C/21/Rev.1/Add. 10.

of feminizing mainstream human rights, rather than treating human rights violations that are specific to women as a special category.'[90]

However, definitions are important, especially when it comes to measurement, precisely because they determine who and what is included in the measurement and who and what is not. While the fact that UN Women does define gender as social on some level, considering the social attributes which are given to men and women, is to be applauded, as is their noting of the need to consider the impact on men and masculinities too, Otto is also critical of these definitions. 'Gender,' Otto notes, is still mostly used as a synonym for 'women.'[91] Thus, while these definitions may pertain to include discussions of men and masculinities, Otto remains sceptical of the application of such ideas.[92] Further, she notes, none of the UN definitions think beyond the categorisation of men and women. Thinking of gender only in terms of duality, however, works to ignore and thereby silence gender expressions outside the duality.[93]

Gender dualism, by ignoring the subtleties in gendering, works to interpellate women and men as subjects, often ensuring that women are categorised as being always in need of protection and with men often being stereotyped as perpetrators.[94] Kapur, adding to this, notes that this also works to promote the trope of the "non-Western" woman as 'thoroughly disempowered and helpless,' these women being seen only ever through a neo-colonial frame.[95] Further, defining gender in dualistic terms, as either being about men or women, works to build definitions of gender around a heteronormative understanding of sexuality.[96] In defining gender in the specific ways outlined above, the UN creates the foundations for gender measurements which will, inevitably, mostly only focus women and not men and masculinities, while completely ignoring subjects which sit outside the gender duality in some way including non-binary and queer subjects. Such measurements, as based on limited definitions of what gender is and can be, are quite clearly anything but objective but are, rather, biased, telling a particular story from a particular standpoint under the guise of mathematic rationality. Using

[90] Otto, above note 81, p. 207.
[91] Ibid.
[92] Ibid.
[93] Ibid., p. 207.
[94] Ibid.
[95] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International Law/Postcolonial Feminist Legal Politics,' *Harvard Human Rights Journal*, (2002) 15, p. 10-18.
[96] Otto, above note 81.

gender as a term of measurement can 'never [be] an innocent act'[97] and gender is never 'value-neutral.'[98]

In addition to this, feminist scholarship on equality has emphasised the need to understand how gender is situated within a complex array of factors and the need to see different subjects through a multitude of lenses at the same time. The feminist commitment to intersectionality showcases this. Coming from Crenshaw's work on anti-discrimination law, intersectionality shows how a woman of colour will face a different type of discrimination when compared to a white woman, for example, or a man of colour.[99] Race and gender (as well as other intersections, including class, disability, sexuality, etc.) intersect in different ways to impact on each subject in a specific way. Crenshaw highlights the need for discrimination law to understand this in order to be able to understand how, for example, a black woman may not be being discriminated against either because she is black or a woman but rather precisely because she is a black woman.[100] Gender, as measured, however, fails to see these intersections, thereby ignoring complexity. Instead, it tends to just 'add women and stir.'[101] An example of this can be seen in gender mainstreaming, which often ends up becoming a headcount of how many women are involved in a project or process. Considering how many women are involved, however, does not necessarily say very much without considering who these women are and who or what they represent and are living. Adding women in alone and thereby proclaiming to have "done gender" works to equate all women to the same without understanding the vast differences and intersections between women, painting, again, only part of a picture as though it represents a whole.

Discussing the measurement of sexual violence in conflict, Boesten, too, notes how a lack of context often works, in quantification, to 'obscure… gender as a useful analytical category.'[102] As Boesten notes, it is indeed important to measure sexual violence in conflict in order to prove,

[97] Buss, above note 1, p. 381.
[98] Ibid., p. 383.
[99] Crenshaw, above note 45.
[100] Ibid.
[101] This is a well-known expression used by many in the realm of gender and international law. See, for example; Sahana Dharmapuri, 'Just Add Women and Stir?' *Parameters*, (2011), 41, p. 56-70; Jasmin-Kim Westendorf, ''Add Women and Stir': the Regional Assistance Mission to Solomon Islands and Australia's implementation of United Nations Security Council Resolution 1325,' *Australian Journal of International Affairs*, (2013), 67(4), p. 456-74.
[102] Jelke Boesten, 'Of exceptions and continuities: theory and methodology in research on conflict-related sexual violence,' *International Feminist Journal of Politics*, (2017), p. 2.

not only its existence but also the vast scale at which it occurs.[103] This is needed to garner international attention and recognition of this serious issue. However;

> Ultimately, a focus on quantitative evidence that measures sexual violence in conflict as divorced from more complex gender analyses reinforces—for policy makers not for the researchers involved—the idea of rape as a weapon of war, to be eradicated or controlled just like chemical or nuclear weapons.[104]

As noted in Chapter One, sexual violence in conflict has received a vast amount of international attention over the past two decades, working, at times, to render invisible sexual violence ongoing in the Global North. Constructing and reinforcing the idea that rape is a weapon of war to be treated like any other, the statistical analysis of sexual violence in conflict is complicit in the silencing of broader issues around gender and the ways in which conflict related sexual violence is related to broader gendered structures which include, for example, the continuum between conflict and non-conflict related sexual violence.[105]

Thus, as Boesten notes, measurement culture works to create statistics without account for the broader contextual issues which impact and shape the phenomenon being measured.[106] Measurements and the findings they produce are clearly always embedded within a set of choices and exclusions; about the meanings of the terms used (such as gender) and about the ways in which the measurements are taken and gathered and what they include and exclude. This works to create and propagate stereotypes[107] as well as to silence subjects who do not fit the given model.[108] Other intersections and assemblages are erased, thus erasing the focus on these other elements when it comes to policy.

Policies are often based on the findings of measurements, with clearer and better policies being one of the justifications for the increase in measurement in recent years.[109] This has led some, including Davis, Kingsbury and Merry, to state that measurement has become a technique of governance that produces knowledge. They define governance as 'the means to influence behaviour, the production of resources, and the distribution of resources.'[110] Buss corroborates

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[103] Ibid., p. 6.
[104] Ibid.
[105] Ibid., p. 1-14; Liz Kelly, *Surviving Sexual Violence*, (Polity Press, 1988).
[106] Boesten, ibid., p. 5.
[107] Kapur, above note 95.
[108] Otto, above note 81.
[109] Buss, above note 1, p. 385
[110] Kevin E. Davis, Benedict Kingsbury, and Sally Engle Merry, 'Indicators as a Technology of Global Governance,' *Law and Society Review* (2012), 46(1), p. 78.

their viewpoint, noting how money is often not allocated until quantitative data can be shown.[111] This is particularly a problem when discussing gender, she notes; 'historically underfunded and marginalized, these gender equality issues had not been tracked in the past and yet efforts to address this historic erasure [are]… being stymied by the demand for quantitate evidence of 'the problem.''[112]

Further to this, measurement also lends itself to certain projects; projects which can produce facts. This means that projects which aim to address deeper, more complex, structural issues which are not easily quantifiable may struggle to get funding.[113] As noted in Chapter One, this thesis is concerned with the turn away from considering structural issues by feminists working in international law. Given the ways in which measurement culture has grown over the past few decades however, it seems likely that feminists, in part, have turned away from considering structural issues simply because such projects are not funded because they are not easily quantifiable.

This is not to say that the use of measurements has been entirely negative from a feminist perspective. Pérez-Piñán, for example, has shown how the effect of including gender indicators in the Paris Declaration on Aid Effectiveness helped garner more attention for gender equality as well as allowing for new networks of feminist activists to be created.[114] While measurements can indeed be used to garner attention however, there is also a need to note the risks in using measurements in this way. Broadly, it seems that measurements, while helping to garner attention, work to produce a specific reality which reflects a set of choices made during the measurement process, thereby only allowing for specific political outputs to be considered and silencing other projects and thus thereby garnering attention only for certain projects.

As Leibowitz and Zwingel note, measurement and neoliberalisation are deeply interlinked in that the push towards measurement is 'emblematic of the extension of economic and business logic into the law, social development, and rights spheres… a logic that is part and parcel of a gendered neoliberalism.'[115] The measurement of gender works, in bringing business logic to the realm of rights and equality, to suggest that real lives can be improved by improving

[111] Buss, above note 1, p. 382.
[112] Ibid.
[113] Ibid., p. 385.
[114] Astrid V. Pérez-Piñán, 'Gender Responsive Approaches to Measuring Aid-Effectiveness: Options and issues,' *Social Politics* (2015), 22(3), p. 432-55.
[115] Leibowitz and Zwingel, above note 76, p. 364.

statistics. Such an analysis fails to account, as noted above, for the complexities of human existence and the interlinking sites and forces of oppression which structure lived experience.

As Deleuze and Guattari note, the use of statistics and mathematical language works 'statistically within the flattening axiomatic of connections that puts it in the service of the capitalist order.'[116] Measurement culture and the ways in which it limits various projects, including projects of gender equality, inserting a neoliberal business logic into the discourse on equality and rights,[117] is an example of schizophrenic capitalist method applied in practise. Measurement works to recode[118] feminist projects, working with them while limiting them to partial pictures without account of feminist methods which note the centrality of the need to consider complexity.[119] In presenting partial pictures as wholes, measurement works, thereby, to determine which projects get funding and attention and which projects are silenced. It is no coincidence that easily quantifiable projects tend to be less radically transformative as they often lack nuance and a will to challenge structural issues due to their aim of quantifiability. As noted above, this again works to silence, for example, the difference in women's positions and experiences through defining all women as one, or to silence the ways in which gender works to construct and suppress all subjects in various ways.[120] Such a phenomenon is therefore also an example of the ways in which schizophrenic capitalism works in conjunction with other structures, such as the gender duality and heteronormativity, to limit more transformative projects by defining rights and equality discourses in specific, limited terms.[121]

4.2 International Financial Institutions, Development Discourse and the Measurement of LGBT, Queer and Feminist Freedom in Neoliberal Terms

An example of the way gender has been used as a measurement tool to advance neoliberal goals can be seen in Rao's article 'Global Homocapitalism.'[122] Rao notes the way in which the LGBT movement has been accommodated and appropriated by International Financial Institutions (IFI's), showing how the measurement of LGBT equality is used, much in the same way as the measurement of gender described above is, to neoliberalise accounts of equality and to ignore the various structural issues which arise from the LGBT/queer project.

[116] Deleuze and Guattari, above note 9, p. 246.
[117] Leibowitz and Zwingel, above note 76, p. 364.
[118] Deleuze and Guattari, above note 9.
[119] See; Crenshaw, above note 45.
[120] Judith Butler, *Gender Trouble,* (Routledge, 2006).
[121] Otto, above note 81.
[122] Rao, above note 1.

Before embarking on a further discussion of Rao's article and how it relates to the argument of this chapter, it is worth briefly defining the difference between LGBT and queer projects. Broadly, LGBT projects work to gain equality for lesbian, gay, bisexual and transgender people (LGBT). Queer projects, on the other hand, would be more anti-normative, working to critique the norm as opposed to seeking equality within it.[123] A key example can be seen in claims for marriage equality. While a LGBT perspective may call for marriage equality, seeing this as a legal equality issue, a queer perspective may take an anti-marriage approach. While LGBT people may gain rights through obtaining marriage equality, a queer perspective notes the fact that rights should not be guaranteed by marriage in the first place, stating that it is not fair that marriage bestows such privileges.[124] A queer perspective, therefore, may argue that marriage should be abolished as a legal category.[125]

This is not to say, however, that LGBT and queer approaches are always inherently opposing. The acronym LGBTIQA is now also frequently used, standing for lesbian, gay, bisexual, transgender, intersex, queer and asexual people. While queer, as theory, can be broadly defined as anti-normative,[126] as exemplified by the debate on same-sex marriage above, queer is also now used as a means through which to identify oneself as queer. Queer is often used as an identity category to avoid identification, as it can include all LGBTIA people.[127] Queer as identity, whilst being linked to queer as theory, must also be distinguished from it too. Queer theory, broadly, is about taking an anti-normative, anti-identarian position rather than about positioning oneself under the queer umbrella.

For the purposes of this chapter, I do not wish to engage in the debate around queer as theory as opposed to identity. I do, however, wish to flag that part of the critique which runs through Rao's article, which I will come on to discuss shortly, represents the broader tension in the LGBT rights project versus a queer anti-normative approach. This, as I will show, is a tension

[123] Nikki Sullivan, *A Critical Introduction to Queer Theory*, (New York University Press, 2003); Dianne Otto (ed.), *Queering International Law: Possibilities, Alliances, Complicities, Risks*, (Routledge, 2017).
[124] Michael C. LaSala, 'Too Many Eggs in the Wrong Basket: A Queer Critique of the Same Sex Marriage Movement,' *Social Work*, (2007), 52(2), p. 181-3.
[125] Against Equality, 'Marriage,' Against Equality, http://www.againstequality.org/about/marriage/ (accessed 24/11/2017).
[126] Sullivan, above note 123.
[127] While the lived experience of queer lives is not in the scope of this thesis, for further reading see;
For more on queer lived experiences and methods for researching queer lived experience, however, see; José Munoz, *Misidentification: Queers of Colour and the Performance of Politics*, (University of Minnesota Press, 1999); Kath Brown and Catherine J. Nash (eds.), *Queer Methods and Methodologies: Intersecting Queer Theories and Social Science Research*, (Routledge, 2016).

which can again be mapped onto some of the broader themes of this chapter and the thesis as a whole; resistance and compliance and appropriation and limited transformation.

Rao draws on the example of the Badgett report in his analysis.[128] The Badgett report uses statistics about what LGBT people earn in work as compared to their heterosexual counterparts in the USA and Western Europe and applies them to the context of India, using them to forecast what the employment future could look like for LGBT Indians if employment discrimination ends. It concludes that there would be an increase of labour market productivity by 10% if such a scenario occurs.[129] Rao, taking a queer approach, highlights that there are many problems with this; one being that it supposes that the "future" for India will look the same as it does now in the US and Western Europe.[130] This clearly disregards several social and cultural differences which could radically change the future of India. For example, it presumes, as Rao points out, that ending employment discrimination would change family structures in India in the same was as Western structures have changed, with lesbians earning more because of an assumed 'dual work, no kids' scenario.[131] This analysis rests on a fundamental assumption about the reproductive lives of LGBT communities, or, rather, an assumption of their lack of reproductive lives. Such a view is both false and heteronormative, working also to ignore the shifts in labels attached to sexuality as well as gender and thereby completely ignoring bisexuality and transgender people despite the LGBT acronym.

Further, as Rao notes, the Badgett Report presumes that the ideal measure of "development" in this area is the Western neoliberal aim of 'happily partnered (or single) and highly productive LGBT workers choosing to pursue the good life in radically autonomous and unencumbered style.'[132] This neoliberal account of freedom and equality not only assumes that progress looks like what the Global North has but also assumes that the Global North itself *is* the measurement of progress, something which is extremely questionable.

Freedom, when it comes to women and LGBT people, for IFI's, is participation in the market. This is a highly reductive account of freedom however which, as Rao points out, works to equate freedom only with productivity, thus already excluding the disabled, the unemployed,

[128] M.V. Lee Badget, 'The Economic Cost of Stigma and the Exclusion of LGBT People: A Case Study in India,' World Bank Group 2014, http://documents.worldbank.org/curated/en/527261468035379692/The-economic-cost-of-stigma-and-the-exclusion-of-LGBT-people-a-case-study-of-India (accessed 24/11/2017).
[129] Ibid.
[130] Rao, above note 1.
[131] Ibid., p. 42.
[132] Ibid.

the elderly and the ‘’development’-induced misplaced.’[133] In addition to this, equating freedom with productivity silences the other intersectional elements in LGBT lives which make up freedom or the possibility of it including, for example, the freedom to live one’s life free from harassment.

The increase of measurement culture plays a big role in the story told by the Badgett Report. This can be seen in the fact that measurement within the report works to presume, first, that inequalities can be merely measured. Second, measurement culture works to narrow the focus on what is being measured, working to ensure that the measurement already pre-fits the neoliberal aims of the project. Third, measurement culture, by providing measurement, works to promote the work of these IFI’s, thus allowing them to use the claim that they are fighting for equality while, in fact, implementing imperial, neoliberal and heteronormative governmentality without account for a questioning of exactly what equality means.[134]

Consequently, Rao’s work, which takes a queer approach to the understanding of the Badgett report, shows the ways in which LGBT/queer projects, when translated at the international level, become tethered to a limited account of their core values. Equality, in this story, is certainly not through a queer lens. After all, a queer approach may work to reject equality altogether.[135] The Report also represents a limited account of LGBT equality, reducing such equality to neoliberal aims without a consideration of the other elements which are needed to constitute equality, such as, as noted above, the ability to live free from harassment or the freedom for both parents to have legal responsibility of their child. This, of course, is a similar phenomenon to the one which occurs, as outlined above, when gender is measured at the international level. Both examples highlight the ways in which either gender or LGBT rights have been limited, when translated to the international, to a particular account of what gender and LGBT equality is, broadly defining gender as the heterosexual woman[136] and defining LGBT equality as lesbian and gay participation in the market.[137]

Another example of the ways in which the global order works to translate freedom into neoliberal understandings can be seen in Wilson’s work. Wilson shows how gender and development discourse has taken up feminist values and critiques, including the critique of the

[133] Ibid., p. 41.
[134] Ibid., p. 39.
[135] Against Equality, http://www.againstequality.org/ (accessed 24/11/2017).
[136] Otto, above note 81.
[137] Rao, above note 1.

othering and victimisation of the "Third World Woman,"[138] and inserted them into the neoliberal development model, promoting their message within this model alone.[139] An example of this can be seen in the ways in which development discourse has promoted the liberation of the "Third World Woman" through programmes such as microfinance.[140] These programmes are often justified, as Wilson notes, because women are deemed to be statistically more productive than men and are more likely to share a larger proportion of their earnings with their families.[141] While these programmes have, of course, proven useful to some women, they, once again, define gender equality in terms of participation within the market. Further, as Wilson notes, such projects do not account for the wider structural issues affecting these women's lives, such as colonialism and capitalism, i.e. the things which put "Third World Women" in an unequal global position of power in the first place. Further, such development discourse also ignores the role of patriarchy. Patriarchy, however, may go some way in explaining the economic productivity of these women as well as of women globally and the reason why they share more of their earnings as, for example, they may be forced to share in a way in which many men are not, both culturally as well as physically and emotionally. These are factors, however, which feminist method, as Wilson shows, would and does call attention to.[142] In the meantime, development discourse has taken its own critiques and incorporated them into its own model. This incorporation works, however, not to satisfy and deal with the critique but, much as in the example above of the ways in which IFI's measure LGBT freedom, works to appropriate this critique only in neoliberal terms, thereby working with the critique and turning it into compliance, working to both silence and limit the critique itself by proclaiming to have resolved the issue at hand.

4.3 Gender and Measurement: Conclusions

The above examples of the use of gender/LGBT rights measurements highlight the ways in which schizophrenic capitalist processes work to decode progressive projects and turn them into capital oriented frameworks. Working to bring business logic to the world of rights and equality, measurement culture limits political projects to watered down neoliberal accounts of

[138] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' *Feminist Review*, (1988), 30(1), p. 61-88.
[139] Kalpana Wilson, ''Race', Gender and Neoliberalism: Changing Visual Representations in Development,' *Third World Quarterly*, (2011), 32(2), p. 315-31.
[140] Ibid.
[141] Ibid.
[142] Ibid.

the larger picture. Schizophrenic capitalism is, however, by no means a set process, but, rather, the concept of 'schizophrenic capitalism' works to define a phenomenon in the contemporary era which is occurring through multiple channels, in multiple areas, through multiple processes. It is, however, as Deleuze and Guattari note, precisely schizophrenic capitalism's fluid nature, its ability to apply itself in varying ways and through varying means to different phenomena, which gives it its strength.[143]

Measurements are thus part of the process of schizophrenic capitalism, rendering various transformative projects, including feminism and LGBT/queer, to limited, neoliberal accounts of freedom and equality. The above examples of measurements and limited picture they paint also tell a story of how transformative projects, such as feminism and queer, become limited to neo/liberal accounts of themselves at the moment they interact with international law and the global order. This has the double advantage of both shoring up the neoliberal, capitalist system, while also silencing the original project itself, claiming to promote equality while ensuring that the more radical, structural and transformative aspects of these projects are silenced.

Further to this, as Wilson shows, it is not only measurement which works to accommodate and appropriate critical standpoints. Noting the ways in which development discourse has responded to its critics by transforming the critique into neoliberal policy outcomes, Wilson shows how this appropriation and accommodation of critique is more widespread than in measurement culture alone, thus exemplifying one of the other, multiple ways in which schizophrenic capitalism, as process and as method, works to appropriate critical discourse, twisting it to fit the needs of neoliberal discourse.

5. Corporate Legal Subjectivity: Humanist and Anthropocentric Law, Corporate Law Making and Corporate Human Rights

The above examples of the ways in which measurement and development is used to limit equality and freedom to liberal and neoliberal terms are examples of schizophrenic capitalist processes at work. Schizophrenic capitalism does not need to work in opposition to achieve its aims, rather, it uses what exists to attain its goals. Capitalism decodes all, taking a project or idea and re-working it, recoding it, to ensure it fits within the limits of capitalism.

[143] Deleuze and Guattari, above note 9.

This section will consider the ways in which schizophrenic capitalist processes have used the limited liberal framing of core legal concepts to transform the use and meaning of such concepts. This will be shown through a focus on legal personality. Noting the fact that international legal personality promotes a liberal, gendered and racialised account of subjectivity, it will be shown that, while no real person could possibly live up to this standard of subjectivity, the corporation, precisely because it is *not* real, has been able to fit this model well.[144] The liberal model of legal personality, it will therefore be showed, has allowed the corporation to gain rights and duties under international law. This will be exemplified through considering case law which shows the ways in which corporations have used the model of international legal personality to claim their rights while working to avoid their own liability for rights breaches.[145]

Drawing on the work of Knop, who notes the ways in which the domestic and the international legal systems impact on one another in various ways, setting standards and modes of interpretation for one another,[146] this section will consider both the ways in which corporate personality has been theorised at the domestic level and at the international level, noting the ways in which the two have worked in coordination with one another in order to shore up the role and status of the global corporation in the global order. A large part of the domestic work in this section takes examples from the US context. This is not done to silence what goes on elsewhere. However, in terms of the corporate personality, as will be shown, US domestic law has proven to be foundational. Further, when I come on to consider the corporate responsibility for rights, while I do draw on other contexts, the US remains a focus. This is due to the unique provisions laid out in under US law under the Alien Tort Claims Act 1789,[147] which, as will be discussed, allows the US courts to claim limited domestic universal jurisdiction over international human rights issues, this Act having therefore been used by many as a way to try to enforce elsewhere unenforceable corporate breaches of rights.

Johns outlines three ways in which international legal scholarship theorises the subject of the corporation. One method seeks to understand the corporation as a legal person through considering the role and responsibilities of global corporations under international law as

[144] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene Humanity,' *Law and Critique*, (2015), 26(3), p. 225-49.
[145] Ibid.
[146] Karen Knop, 'Here and There: International Law in Domestic Courts,' *New York University Journal of International Law*, (1999), 32, p. 501 - 535.
[147] Alien Tort Claims Act 1789.

international legal persons.[148] Another perspective considers the ways in which the corporation seeks to act like a state in the international realm.[149] Such perspectives, notes Johns, tend to focus on the law-making powers of corporations through, for example, considering the ways in which corporations are now contracted-out to conduct many formerly state undertaken roles and the fact that 'the revenue or market capitalization of some corporations outstrips the gross domestic product of many individual nations.'[150] The third perspective Johns notes, is what she calls 'para-institutionalism.'[151] This view tends to see the corporation much like an international organisation, seeing the corporation as a system of organisation and thus as a means through which international will may be expressed and enforced.[152] Such an approach, it seems, forms a kind of international version of the arguments that corporations can conduct formerly state undertaken roles through out-sourcing, with both the domestic and international version of these arguments suggesting that corporate organisation will only work to make the system itself more efficient, often via setting higher standards for other, non-corporate organisers.[153]

This chapter draws on the first two perspectives in a critical mode,[154] considering, in line with the broader structure of this thesis, the legal personality of the corporation as well as the law-making role corporations play in international law. The third, 'para-institutional' category is not something which will be considered here, however. This is because, while corporations and international organisations indeed, do often work in various ways to fulfil the will of sovereign states, the aims of the state and the corporation are broadly quite different. While international organisations are set up to fulfil a specific international will, the corporation aims to make profit, the fulfilling the will of states therefore only being of interest to it if it may make a profit out of such a venture. This does not mean that international organisations are not capitalist, however, or that they do not work to maximise profit in the end. As the discussion above around measurements cultures and the measurement of LGBT equality by IFI's shows, many of these institutions are, indeed, both capitalist and neoliberal. There are, indeed, multiple cross-overs

[148] Fleur Johns, 'Theorizing the Corporation in International Law,' in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 640-1.
[149] Ibid., p. 641-3.
[150] Ibid., p. 642.
[151] Ibid., p. 643-4.
[152] Ibid.
[153] Ibid., p. 644.
[154] Johns, for example, notes that those who consider the corporation from the perspective of international legal personality often do so to consider rules around corporate nationality, considering which corporation must follow which rules under which state's control. This is not something I will do here. Instead, I focus on the way corporate personality is conceptualised, my aim being to consider how the corporation fits into the broader framework of international and the global order. This is what I mean by 'critical mode.' See; Ibid., p. 647.

yet, despite this, it is important to distinguish the two in that, while organisations and corporations may perform similar roles and functions in the end, their foundational purpose is, formally at least, different and this is important.

5.1 Corporate Legal Subjectivity

Another example of schizophrenic capitalist processes at work in the global order can be seen in the ways in which corporations have used the humanist and anthropocentric nature of legal personality, which centralises the human, 'rotating, as it were, around an *anthropos* (human/man) for whom all other life systems exist as objects,'[155] while also centring around a specific, liberal, humanist account of the white, male, bounded, individual human,[156] to gain further power. Drawing on case law, it will thus be shown how global corporations have exploited and used conceptions of legal personhood to gain greater power in international law, including even some law-making power and the ability to make claims, in limited circumstances, for breaches of their human rights. As it will be shown, drawing on the work of Grear among others, the global corporation in many ways best fits concept of legal personhood precisely because it is the ultimate neo/liberal, rational, independent actor that legal personhood has been framed around.[157] Thus, it will be argued that the liberal conceptualisation of legal personality has been manipulated and extended in schizophrenic capitalist mode to promote the interests of the global corporation and other neoliberal actors above others, including above the interests of the environment.

This section therefore outlines one of the ways in which the law is deeply embedded within what Braidotti and Hlavajova term the posthuman condition; the humanism and anthropocentrism which has come to structure much dominant thought.[158] This will be exemplified through a focus on case law with a particular focus on the ways in which corporations have used this structure to assert their rights over and at the expense of the environment, this thus providing an example of how the law is used to uphold capitalism as

[155] Ibid., p. 225.
[156] Ngaire Naffine, 'The Body Bag,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 79-96; Ngaire Naffine, 'Women and the Cast of Legal Persons,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 15-25; Anna Grear, ''Sexing the Matrix': embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 39-52.
[157] Grear, above note 144; Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity*, (Palgrave Macmillan, 2010).
[158] Rosi Braidotti and Maria Hlavajova, *The Posthuman Glossary*, (Bloomsbury 2018), p. 1.

well as anthropocentrism. This section will consequently outline the role of international law in what Moore terms the capitalocene, this describing the 'system of power, profit and re/production in the web of life;'[159] the objectification of the environment and the non-human animal for profit.[160]

While the eighteenth century can be seen as representing the "secularisation" of international law,[161] the nineteenth century was the period when industrialising Europe 'drove the high tide of Western capitalist colonialism.'[162] It is during this period that the corporation became a legal subject. This can be traced back to the US case of *County of Santa Clara v Southern Pacific Railroad,*[163] in which the US Supreme Court declared, in a surprisingly mundane, matter of fact manner, that, for the purposes of the Fourteenth Amendment to the US Constitution, the corporation is a person without 'argument'; 'we are all of the opinion that [the Fourteenth amendment] does' apply.[164]

The granting of legal personality mattered greatly, however, as not only did this give the corporation autonomy, making it a self-controlling, unified entity under US law but legal personality also gave the corporation rights, particularly rights from the state, including corporate property protection from the state.[165] While this is, of course, a US domestic case, this case laid the path for future legal amendments and was to be replicated within international law.[166]

The US Fourteenth Amendment, however, was in fact designed to prevent the denial of legal personhood to released slaves.[167] Worryingly, however, by:

> 1938 Justice Hugo Black observed with dismay that, of the cases in which the Court applied the fourteenth amendment during the first fifteen years after *Santa Clara*, "less

[159] Jason Moore, 'The Capitalocene, Part I: on the nature and origins of our ecological crisis,' *The Journal of Peasant Studies*, (2017), 44(3), p. 594.
[160] Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene*, (Duke University Press, 2016), p. 47-51.
[161] For a further discussion of this so-called secularisation, see the appendix.
[162] Grear, above note 144, p. 237.
[163] Above note 2.
[164] Ibid.
[165] Gregory A. Mark, 'The Personification of the Business Corporation in American Law,' *University of Chicago Law Review*, (1987), 54(4), p. 1443.
[166] Johns, above note 148, p. 641.
[167] Grear, above note 144, p. 237.

than half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations."[168]

This move, as Grear analyses, clearly represents the hierachising logic of the Court at the time as well as their 'capitalistic impulses and interests.'[169] It also represents another way in which capitalist ideology has appropriated political struggles.[170] Thus, corporations became persons at law or, rather, 'not persons as such, but kinds of persons with constitutional rights and privileges that only gained meaning by their attachment to legal conceptions of embodied personhood.'[171] As Mark has noted, this turned out to be a pivotal move in terms of the economic history of the US, marking a key and important legal step right before (and working to push towards) the industrial revolution of the US.[172]

The idea of the corporation as a person, shows Mark, was a shift in thinking.[173] Until the late nineteenth century in the US, businesses were small, often family run and personal. The corporation, however, was the latest shift where a small number of people would own a big business. Such a shift represented a broader culture of corporate disembodiment and depersonalisation.[174] Making the corporation a legal person, therefore, worked to solidify this change and, just as the making of the corporation into a legal person can be seen as a key change in US domestic law, therefore, so, too, can the giving of the corporate legal identity in international law. As Federman highlights, discussing such events in the US domestic setting, 'the corporation comes to resist the state in order to exercise a minority leadership over society itself.'[175] As I will argue here, the corporation has done the same thing in the international realm.

This move to make the corporation a legal person was about property, the status giving the corporation the right to hold property for the purposes of taxation, ensuring that the corporation could pay taxes on the same terms as an individual. It is also worth noting that international law's foundational personality, sovereignty, was also created, to a large extent, to protect and

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[168] Carl J. Mayur, 'Personalising the Impersonal: Corporations and the Bill of Rights,' *Hastings Law Journal*, (1990), 41(3), p. 589 - citing *Connecticut General Life Insurance Company v Johnson* 303 US 77, 90 (1938) (Black J Dissenting).
[169] Grear, above note 144, p. 238.
[170] Grear, above note 157.
[171] Cary Federman, 'Constructing Kinds of Persons in 1886: Corporate and Criminal,' *Law and Critique*, (2003), 14(2), p. 170 – note that Federman also highlights how the deviant criminal was also constructed, in contrast to the ideal corporate subjects, by the same court in the same year.
[172] Mark, above note 265, p. 1443.
[173] Ibid.
[174] Ibid., p. 1445.
[175] Federman, above note 171, p. 181-2.

promote property rights. The property rights in question in international law, however, were over other land and peoples. As Anghie has shown, sovereignty was used to justify the colonial project, ensuring that some (i.e. European) states were sovereign in international law, thus rendering the rest as the property of those with sovereignty.[176] As Grear notes, this worked to ensure '(white) masculine superiority: the indigenous, in short, was complexly feminised – along with nature itself.'[177] Conceptions of legal personhood have long been tied, in various forms and modes, the protection of property rights; a necessary protection for a capitalist and neo/colonial order.

The corporation, too, played a key role in the colonial project. This can be seen, for example, when looking at the 1602 Charter of the Dutch East India Company, which stated that the corporation could 'keep armed forces, install Judicial officers… as well as jointly ensure the enforcement of the law and justice, all combined so as to promote trade.'[178] This, as Johns notes, amounted to an international legal role, working both to enforce free trade and colonisation.[179] Thus, as Grear notes, the legal status of the corporation became '*pivotal* to the colonial development of the international legal order and remains a core – if not *the central* – feature of the contemporary global order.'[180] This can be exemplified, for example, not only in the role of corporations such as the Dutch East India Company in the enforcement and upholding of colonialism,[181] but also in neo-colonial corporate activities on-going in the contemporary world[182] as well as in the destroying of the environmental commons globally.[183]

A contemporary example of the continuing nexus between the corporation and ongoing colonialism can be seen in the example of land grabbing. Land grabbing is the large-scale appropriation of land, either through buying or renting it, by various entities including

[176] Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal*, (1999), 40, p. 1-71.
[177] Grear, above note 144, p. 235. See also; Carolyn Merchant, *The Death of nature: Women, Ecology and the Scientific Revolution*, (Harper & Row, 1983); Graham Huggan and Helen Tiffin, 'Green Postcolonialism,' *International Journal of Postcolonial Studies*, (2007), 9(1), p. 1-11.
[178] Rupert Gerritson (ed.) and trans. Peter Reynders, *'A Translation of the Charter of the Dutch East India Company (Verenigde Oostindische Compagnie or VOC): Granted by the States General of the United Netherlands, 20 March 1602,' Australia on the Map Division of the Australasian Hydrographic Society Canberra* (2009), p. 6, http://rupertgerritsen.tripod.com/pdf/published/VOC_Charter_1602.pdf (accessed 25/11/2017).
[179] Johns, above note 148.
[180] Grear, above note 144, p. 237.
[181] Baxi, above note 75, p. 154.
[182] It must be noted that a vast number of ATCA cases have come from developing contexts where corporations have gravely breached human rights.
[183] See; Laura Westra,' Environmental Rights and Human Rights: The Final Enclosure Movement,' in Roger Brownswood (ed.), *Global Governance and the Quest for Justice*: *Volume IV*, (Hart, 2005), p. 107-19.

corporations, states and individuals. Land gabbing became a largescale phenomenon following the 2008 global spike in food prices leading many entities to acquire land in the aim of making profit in case of future spikes.[184] Land grabbing does not just occur for the purposes of producing food, however; there has also been widespread land grabbing for the purposes of producing biofuel. Food production does remain by far the most prominent aim of land grabbing, however.[185] Further, 'some of this land had been cleared of existing inhabitants and users but not yet put into production; in many cases buyers and investors are simply preparing for the next global crisis.'[186]

Land grabbing was estimated by the World Bank in 2010 to have resulted in the acquisition of around 45 million hectares of land, [187] with the Land Matrix, a global and independent land monitoring initiative, citing a figure of 42 million between 2012 and 2016.[188] As the World Bank has noted, land grabs tend to happen in places where government controls are weaker, often due to government indebtedness, with land grabs often occurring in areas where the poorest rural people live, 'expelling people with non-traditional land title from their land.'[189] Other impacts can be seen when considering, for example, the case of Senhuile in Senegal, where 9000 community members and 40 villages were affected by a joint venture by the Italian Tampieri Financial Group and the Senegalese Senethanol.[190] The project, which began in 2012 and which is ongoing, ensured that many in the local community lost access to grazing land, land for the collection and cultivating of timber and water collection points. [191] Further to this 'villagers living in close proximity to the project are under constant threat of eviction by company representatives and local police.'[192] Again, the nexus between sovereign state power

[184] This phenomenon is defined by the World Bank as having been massively affected by the 2008 crisis. See; World Bank. 'Rising global interest in farmland: can it yield sustainable and equitable benefits?' World Bank, 2010.
[185] Kerstin Nolte, Wytske Chamberlain and Markus Giger, 'International Land Deals for Agriculture: Fresh insights from the Land Matrix: Analytical Report II,' Centre for Development and Environment, University of Bern; Centre de coopération internationale en recherche agronomique pour le développement; German Institute of Global and Area Studies; University of Pretoria; Bern Open Publishing 2016, http://www.landmatrix.org/media/filer_public/ab/c8/abc8b563-9d74-4a47-9548-cb59e4809b4e/land_matrix_2016_analytical_report_draft_ii.pdf (accessed 25/11/2017).
[186] Saturnino M. Borras Jr. et al., 'Towards a better understanding of global land grabbing: an editorial introduction,' *The Journal of Peasant Studies* (2011), 38(2), p. 209.
[187] World Bank, above note 184.
[188] Nolte et al., above note 185.
[189] Borras et al. above note 186, p. 210.
[190] Nolte et al., above note 185, p. 43.
[190] Ibid.
[191] Ibid.
[192] Ibid.

and the protection of private and corporate financial interests as the expense of real lives is clear in this example.

There is a clear North/South divide when it comes to land grabbing. Most land grabs happen in the Global South, with the regional balance showing that the vast majority of land grabs occur within the African continent, the second next biggest site being Asia.[193] There are thus clear undertones of colonialism in the story of land grabbing with many of these corporations coming from the Global North.[194] It must be noted, however, that many of the rich in the Global South are grabbing land in the Global South too,[195] with Malaysian companies deemed to be the biggest corporate land grabbers according to Land Matrix.[196]

As noted by the Land Matrix, the vast majority of land grabs occur at the hands of either private companies (who are not listed on the stock exchange) or stock-exchange listed companies, with these two groups making up 71% of global land grabs.[197] It is clear that land grabbing is a contemporary example of the ways in which corporations continue to colonise, exploiting, for the most part,[198] the land of people and nonhuman animals which were formerly colonised by European states and state-led corporations for profit.

Considering the structure of law, or rather, of most Western legal systems, it does not seem so surprising that the global corporation, once given legal personhood status, domestically and then internationally, would gain vast power as a legal subject. The subjectivity of the sovereign state, as international law's only full legal personality, has worked to set up the blueprint of subjectivity against which all other legal personalities must weigh themselves up against.[199] The closer an entity can get to the blueprint given by the sovereign state, the closer it may become to having the full array of legal rights and duties and thus, fuller personality and more power.[200] The subjectivity of the sovereign state is neither neutral nor objective. The sovereign state is theorised as bounded, autonomous, individual, rational and as speaking with one voice.[201] This subjectivity is based on a series of gendered and racialised assumptions and

[193] Ibid, p. 9, 16.
[194] Ibid.
[195] Borras et al. above note 186, p. 209.
[196] Nolte et al., above note 185, p. 22.
[197] Ibid., p. 26.
[198] Note there are *some* land grabs occurring the Global North though these are by far the minority. See; Ibid.
[199] I define international legal personality and note its relation to the sovereign state in the appendix.
[200] Ibid.
[201] A further discussion of this point can be found in the appendix. See also; Karen Knop, 'Why Rethinking the Sovereign State is important for Women's International Human Rights Law,' in Rebecca J. Cook (ed.), *Human Rights of Women*, (Pennsylvania UP, 1994), p. 153-64; Yoriko Otomo, 'Endgame: feminist lawyers and the revolutionary body,' *Australian Feminist Law Journal*, (2009), 31, p. 153-64; Hilary Charlesworth, 'The Sex of

hierarchies.[202] While these assumptions are inevitably false, both in terms of the fact that they cannot and do not represent any real subject, including even the legal subject of the sovereign state,[203] this theorisation of legal subjectivity sets up a false standard through which to measure legal personality.

No human could ever fit the model of subjectivity promoted by international legal personality as, for example, no human is an individual autonomous being, rather, we all rely on one another and are in connection with one another.[204] In contrast however, the corporation fits the conception of the ideal legal person easily. The corporation is bounded, being an entity with a membership which is limited. The corporation is seen, at law, as an individual and it is rational – looking always and only ever towards its economic interests.[205] Thus, as Grear notes, the corporation is 'The *paradigmatic* legal subject' in that it is, more than any white European man could ever be, 'the very construct of a self-authorizing autonomous individual possessing a disembodied rationality – the 'man' whose very citizenship arose directly from his contractual and proprietary relations.'[206] The corporation is, thus, 'the bodily expression of male power, the individual self-liberated from the constraints of the past.' [207] It is also disembodied, just like the abstract legal person, the concept never having been complex enough to be able to contain the fluid multiplicity of any being. Thus, the corporation '(unlike fleshy, corporeally specific embodied human beings) suffers from no gap between itself and the disembodiment of the liberal legal perspective.'[208] This has led Grear to state that the ultimate disembodied subject of law could never be a human at all.[209] In fact, the legal person is, of course, '*entirely unlike* the core victims of the radically uneven socio-material relations upon which the Anthropocene depends for its inauguration.'[210] This domestic idea of the legal personality of the corporation as a rational individual was thus, as Johns notes, transplanted into the international legal order.[211] While international law's others, such as the environment, have

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the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 251-68.

[202] Ibid.

[203] Ibid.

[204] Naffine, above note 156.

[205] Federman, above note 171, p. 181-2.

[206] Anna Grear, 'Towards 'Climate Justice'? A Critical Reflection on Legal Subjectivity and Climate Injustice: warning Signals, Patterned Hierarchies, Directions for Future Law and Policy,' *Journal of Human Rights and the Environment*, (2014), 5, p. 117. Author's own emphasis.

[207] Federman, above note 171, p. 181.

[208] Grear, above note 206, p. 118.

[209] Grear, above note 144, p. 240.

[210] Ibid.

[211] Johns, above note 148, p. 641.

had to fight to try to gain international legal personality, with this personality still not being recognised in the international realm,[212] the corporation gained international legal personality with ease due to its ability to easily fit legal conceptions of personhood.[213] This is by no means a coincidence. International legal personality is fundamentally based on liberal, humanist ideals which, in the current times, are deeply connected to neoliberal and capitalist thinking. The corporation has been able to fit conceptions of legal personality so easily precisely because it is, in its very being, a neo/liberal, capitalist creation and actor.[214]

International law, states Grear, '*systematically privileges*' the corporation.[215] The corporation, like sovereignty, is steeped in hierarchies between humans, ensuring that property remains in the hands of 'an elite capitalist class.'[216] This was true during colonial expansion where corporations worked as part of the colonial project to exploit and make a profit off of colonised peoples and lands and it is true today.[217] By prioritising a disembodied legal form and allowing it such status in domestic and international law, allowing it to hold property and act as a legal person, the law thereby fails to respond to the material conditions of embodied life which the corporation affects.[218] This can be exemplified in the reality of the vast global inequalities between humans and the unequal distribution of the world's wealth, with the richest one percent now having more wealth than the rest of the world combined.[219]

The global corporation is, of course, *not* a person in any non-legal sense.[220] The corporation, as Moran notes, unlike the embodied human, is immortal and invisible.[221] It is this difference that has, in many ways, created confusion around corporate liability broadly, both within human rights law and within other areas of law including criminal law.[222] 'Corporations are

[212] Though such personality has been recognised in some domestic jurisdictions. See; Chapter Four.
[213] Grear, above note 144.
[214] Anna Grear, '"Mind the Gap": One Dilemma Concerning the Expansion of Legal Subjectivity in the Age of Globalisation,' *Law, Crime and History*, (2011), 1(1), p. 1-8.
[215] Grear, above note 144, p. 240.
[216] Ibid., p. 241.
[217] Ibid., p. 242.
[218] Ibid., p. 240.
[219] Deborah Hardoon, Sophia Ayele, and Ricardo Fuentes, 'An Economy for the 1%: How privilege and power in the economy drive extreme inequality and how this can be stopped,' *Oxfam* (2016).
[220] Costas Douzinas and Adam Gearey, *Critical Jurisprudence*, (Hart, 2005), p. 163.
[221] Leslie J. Moran, 'Corporate Criminal Capacity: Nostalgia for Representation,' *Social and Legal Studies*, (1992), 1(3), p. 375.
[222] The can be shown by the various ways in which criminal law, in various jurisdictions, has tried to deal with the problem of accountability differently. For example, under Austrian law, companies maybe be found criminally responsible where an individual, either a decision-maker or an employee in circumstances where a company has failed to take necessary precautions to prevent the offence, has committed an offence at work. See; Bundesgesetz uber die Verantworthlichkelt von Verbanden fur Straftaten (Verbandsverant wortllichkeitsgesetz (VbVG), Bundesgesetzblatt I 2005/151.

constructed by analogy with embodiment, yet are disembodied and cannot suffer bodily pain or be punished with bodily imprisonment.'[223] 'The corporation is a person when it comes to the advantages of law, but a 'non-person' when it comes to crimes seemingly committed by it.'[224] The 'human being *cannot* escape human corporeal specificity'[225] whereas the corporation, of course, can, in that the corporation, while needing humans to run it, does not need specific humans and maybe, in the near future, given the advances in technology and artificial intelligence, may soon not need humans at all.[226]

5.2 Corporate Law Making and Corporate Rights

The corporation, as an embodiment of the will to make profit and thus of capitalism itself, has been able to gain greater personality in international law using what can be described as schizophrenic means, decoding the system and coding it again according to its own needs.[227] Working to fit itself into the model of domestic personhood and international legal personality, corporations have been able to exploit the system according to their needs, bending it to fit around them. Following this, as this section will show, corporations have used their status as a legal subject to gain legal advantages. This will be exemplified through the example of human rights and corporate claims that human rights apply to them too. While successful claims for corporate rights have been limited, such claims will be contrasted against the vast difficulties many actors have faced in trying to gain justice for breaches of the human rights of real people caused by corporations.

Global corporations, Baxi argues, have long begun supplanting the Universal Declaration of Human Rights, making it their own 'trade-related market-friendly human rights' paradigm.[228] Corporations do this, Baxi notes, by using and claiming human rights in order to promote their

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In contrast, in the UK, business lobbying worked to prevent such stringent individual models of liability, ensuring that no individual can be prosecuted for aiding, abetting, counselling or procuring the commission of corporate manslaughter or homicide (S.18 Corporate Manslaughter and Corporate Homicide Act, 2007). While an individual can still be found liable if found to be grossly negligence (as per the Health and Safety at Work Act, 1974, S.37) is it clear, as Gobert points out, that this leave multiple gaps in the law, allowing individuals to avoid prosecution via hiding behind the liability of the corporate legal person. See; James Gobert, 'The Corporate Manslaughter and Corporate Homicide Act 2007 – Thirteen years in the making but was it worth the wait?' *Modern Law Review* (2008), 71(3), p. 413-463.

[223] Anna Grear, 'Human Rights – Human Bodies? Some reflection on corporate human rights distortion, the legal subject, embodiment and human rights theory,' *Law and Critique*, (2006) 17(2), p. 188.

[224] Mark Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital,' *Law and Critique* (2003), 14(2), p. 164.

[225] Grear, above note 144, p. 238.

[226] For further discussion see; Calum Chace, *The Economic Singularity: Artificial Intelligence and The Death of Capitalism*, (Three Cs, 2016).

[227] Deleuze and Guattari, above note 9.

[228] Baxi, above note 75, p. 132.

own interests, their interests often inevitably, he points out, working against the original aims of human rights themselves.[229] Baxi cites numerous examples of this subversion, such as the fact that 'global capital increasingly seeks to inscribe its rights through Treaty regimes' such as the World Trade Organisation (WTO) agreements and the fact that the right to health, for example, has, in various contexts, worked to protect the research and development rights of pharmaceutical companies (as opposed to protecting the right of those who may need the drugs these companies make).[230]

Global corporations can file claims for breaches of their human rights. This is something that they are able to do precisely because of their status as a legal person, thereby giving them standing in Courts and allowing them to bring cases in their own right. However, they cannot make a claim under any right they please but, rather, their ability to claim is restricted to a limited array of rights. What rights they have and under what conditions is context dependant. For example, corporations in the US possess a First Amendment right to free speech[231] which has been strongly protected. This can be exemplified through the case of *Citizens United v Federal Elections Commission* where a law which stated that there was to be no corporate sponsorship for political candidates was ruled inapplicable and unconstitutional in light of the strong First Amendment Right to free speech held by the corporation in question.[232]

The European Convention of Human Rights (ECHR) is unique among the international human rights instruments, in that, as Emberland has noted, '… it offers wide-ranging protection for business entities such as companies in addition to not-for-profit organisations and natural persons.'[233] Despite this, in contrast to the US First Amendment, the ECHR equivalent, Article 10, the right to freedom of expression, is applied much less liberally.[234] The European Court of Human Rights, in fact, has taken a different stance precisely because they do consider who the claimant is and the value of the right they are claiming, balancing this against other interests through applying a proportionality test. This can therefore be seen in the case of *Autronic AG v Switzerland.*[235] In this case, the Court concluded that Switzerland had not breached the company in question's Article 10 right to freedom of expression because the company was

[229] Ibid.
[230] Ibid., p. 146-149.
[231] *First National Bank of Boston v Bellotti*, 435 U.S. 765 (1978).
[232] *Citizens United v. Federal Elections Commission*, 558 U.S.310 (2010).
[233] Marius Emberland, 'The Corporate Veil in the Jurisprudence of the Human Rights Committee and the Inter-American Court and Commission of Human Rights,' *Human Rights Law Review*, (2004), 4(2), p. 3.
[234] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Article 10.
[235] *Autronic AG v. Switzerland*, 178 Eur. Ct. H.R. (ser. A) (1990).

'perusing purely economic and technical interests.'[236] The Court thus concluded that 'economic freedom' lays outside the scope of the Convention and the right to freedom of expression.[237] While this is, indeed, a limiting of the corporation's claim to the right to freedom of expression, the fact that the Court specifically stated that the denial of the right was due to the perusal of economic freedom does leave open the question, therefore, of whether Article 10 may apply if a corporation wishes to pursue other aims, such as political aims, as in the US case discussed above.

Another example of where a corporation's freedom of expression has been limited can be seen in the South African context in the case of *British American Tobacco South Africa Ltd v Minister of Health*.[238] In this case, the appellant appealed against a South African law that stated that 'No person shall advertise or promote, or cause any other person to advertise or promote, a tobacco product through any direct or indirect means, including through sponsorship of any organisation, event, service, physical establishment, programme, project, bursary, scholarship or any other method.'[239] The British American Tobacco Company took their case to the Supreme Court of Appeal of South Africa, claiming that the act was unconstitutional in that it limited their right to freedom of expression as laid out in Section 16 of the Bill of Rights in the Constitution.[240] The Court dismissed the appeal, highlighting, much in the same way as the European Court of Human Rights did, the fact that corporate free speech was to be given less importance than other forms of free speech. Thus, they concluded, public health risks outweighed the human rights claim made by the corporation.

However, under the ECHR, the right to a fair trial (Article 6) for a corporation has been upheld as well as right to the peaceful enjoyment of one's possessions under Article 1 of Protocol No. 1.[241] A similar finding was held in the foundational case of *County of Santa Clara v Southern Pacific Railroad*[242] in the US, this case being, as noted above, foundational, due to the fact that it gave the corporation legal personality for the first time, with the Court also ruling that the

[236] Ibid., para 44.
[237] Ibid.
[238] *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (463/2011) [2012] ZASCA 107; [2012] 3 All SA 593 (SCA) (20 June 2012).
[239] S.3(1)(a) of the Tobacco Products Control Act 83 of 1993 as amended by the Tobacco Products Amendment Act 63 of 2008.
[240] Constitution of the Republic of South Africa, 1996, (Act No. 108 of 1996), Chapter 2, The Bill of Rights, S. 16.
[241] See; Council of Europe, above note 234, Article 6; Council of Europe, Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS 9.
[242] Above note 2.

corporation, as a fourteenth amendment legal person, has the right to have its property protected from the state.[243]

Another example of corporations claiming their human rights at the expense of the rights of real people can be seen in the conflict between the right to health and the intellectual property of pharmaceutical companies. The right to the protection of one's own creation is enshrined under the Universal Declaration of Human Rights (UDHR) under Article 27, paragraph 2 which states that 'Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.'[244] Such a right is also enshrined in Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[245] as well as under various regional instruments.[246]

The right to health, too, is protected under various international, regional and domestic instruments, including under Article 25 of the UDHR,[247] as well as under Article 12 of the ICESCR.[248] Of course, there are multiple potential clashes between the right to the protection of what one creates and the right to health, this being notable when it comes to the patenting of drugs. Many argue that the right to health must include the right to have access to drugs (where reasonable and within the resources of the state), such a stance having been taken by the South African Constitutional Court in the case of *Minister of Health v. Treatment Action Campaign* (the *Nevirapine* case).[249] However, despite this, access to drugs remains a global problem, with access to drugs often proving difficult due to the high prices pharmaceutical companies charge for such drugs.[250] Such high prices continue to exist, of course, due to patent laws.

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[243] Ibid.
[244] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 27, para 2.
[245] UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, Article 15.
[246] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant), 12 January 2006, E/C.12/GC/17, para 3.
[247] UN General Assembly, above note 244, Article 25.
[248] UN General Assembly, above note 245, Article 12.
[249] *Minister of Health v. Treatment Action Campaign*, (TAC) (2000) 5 SA 721 (CC). Note the right to health and the right to access to health care can be found in Constitution of the Republic of South Africa, above note 292, Chapter 2, Article 27(1)(a) and Article 21(1)(b) which states that the state should take 'reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right.'
[250] All Parliamentary Group on HIV and AIDS, 'Access Denied,' Report of the Inquiry of the All Party Parliamentary Group on HIV and AIDS into access to medicines in the developing world, 2014; World Health Organisation, Report of the Workshop on Differential Pricing and Financing of Essential Drugs, 2001.

Article 28(1)(a) of the World Trade Organisation Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) establishes the right of the patent owner to prevent third parties who do not have the owner's consent from: making, using, offering for sale, selling or importing for these purposes that product.[251] Patents are protected for a minimum of 20 years.[252] While the protection of intellectual property seems fair and just, working to protect the rights of the creator, it also works to create a monopoly on the item in question, allowing the company in question to charge extremely high prices knowing, especially in the case of medical drugs, that there is a market which will pay such prices.

While pharmaceutical companies justify their high prices protected by patents, stating that such prices provide 'key incentives for research and development of new medicines and the improvement of existing ones,'[253] it is clear that such patent laws, arguably, contradict the right to health. However, human rights not only protect the right to health but also, broadly, what can be seen as the right to intellectual property.[254] There is thus clash of rights here between the right to health and the right to intellectual property. The Committee on Economic, Social and Cultural Rights has, however, specifically addressed this conflict under General Comment 17, which states that '"[i]t is … important not to equate intellectual property rights with the human right recognised in Article 15, paragraph 1 (c),'[255] this being, as noted above, the protection of 'scientific, literary or artistic production of which he is the author.'[256] This Comment therefore distances Article 15(1)(c) from intellectual property rights. However, in paragraph 5 of General Comment 17, the Committee states that:

> The right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions cannot be isolated from the other rights recognized in the Covenant. States parties are therefore obliged to strike

[251] Article 28, TRIPS Agreement: '1. A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner's consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.' TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[252] TRIPS agreement, Ibid. Article 33.
[253] International Federation of Pharmaceutical Manufacturers and Associations, 'Why intellectual property matters?' https://www.ifpma.org/subtopics/ip-2/?parentid=258 (accessed 17/09/2017).
[254] UN General Assembly, above note 244, Article 27, para 2; UN General Assembly, above note 245 Article 15.
[255] UN Committee on Economic, Social and Cultural Rights, above note 246, Article 15, para 1.
[256] Ibid.

> an adequate balance between their obligations under article 15, paragraph 1 (c), on one hand, and under the other provisions of the Covenant, on the other hand, with a view to promoting and protecting the full range of rights guaranteed in the Covenant. In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration. States parties should therefore ensure that their legal or other regimes for the protection of the moral and material interests resulting from one's scientific, literary or artistic productions constitute no impediment to their ability to comply with their core obligations in relation to the rights to food, health and education, as well as to take part in cultural life and to enjoy the benefits of scientific progress and its applications, or any other right enshrined in the Covenant.[257]

Thus, states are urged, all the same, to balance Article 15 rights with other rights, such as the right to health.

As Millum thus notes, this is a complex legal issue.[258] While the current intellectual property regime is clearly, therefore, not to be equated with the Article 15 right, General Comment 17 leaves begging the question of whether something *like* the intellectual property regime would be required in order to fulfil Article 15.[259] This 'leaves the correct relationship between authors' rights and intellectual property unclear, and therefore the extent to which access to medicines is protected by human rights uncertain.'[260] There are clearly multiple, complex issues in relation to the right to intellectual property, pharmaceutical patents and the right to health. Whether intellectual property (as a principle and thus not specifically as embodied in the TRIPS agreements) is a right *per se* or not remains debatable. Either way, in the meantime, millions of people are denied access to drugs for multiple reasons every year, the balance clearly being in favour of corporate interest in that intellectual property rules, as supported by the TRIPS agreements, are clear, whereas the right to health remains ill-defined and little enforced.

It is notable, therefore, that what rights a corporation has and to what extent is dependent on context, making this a murky area of law. As Grear notes, however, the ways in which global corporations have claimed and used human rights to promote their own interests and needs has an impact beyond the application of the right itself. Such uses of rights, she argues, have

[257] Ibid. para 5.
[258] Joseph Millum, 'Are pharmaceutical patents protected by human rights?' *Journal of Medical Ethics* (2008), 34(11), e25.
[259] Ibid.
[260] Ibid.

worked to exploit and determine the meaning of progress through the re-structuring of human rights and the focus of human rights, amounting, she states, 'to a radical corporate re-interpretation and colonisation of international human rights discourse.'[261] In other words, the claiming of corporate rights has worked, not only to directly protect global corporations and advance their interests but also to erode and corrupt the very meaning and aims of human rights discourse itself.[262] This rings true in relation to both successful and unsuccessful claims made by corporations; 'corporations are controlling the rules of the game and will continue to do so.'[263]

On the flip side, another example of the ways in which corporations have used the human rights system for their own needs can be seen in their refusal for rights to apply to their actions. As a legal person, the corporation can claim rights for itself. However, corporations are not "full" personalities under international law, with only sovereign states being counted as full international legal personalities. Corporations must therefore be tied to a particular state for the purposes of human rights enforcement, meaning that 'those who suffer from international legal wrongdoing committed by a corporate person must, accordingly, looking to national legal orders for remedy.'[264] Corporations use this framework of liability and responsibility to promote their rights in both domestic and international courts while also, as will be shown, claiming their lack of legal responsibility when they are in the wrong.

One example of the ways in which corporations exclude themselves from liability can be seen in the successful exclusion of corporations from the jurisdiction of the International Criminal Court (ICC).[265] This avoidance of liability has been able to occur in part due to conceptualisations of international legal personality. It has been easy to argue for the exclusion of corporations from the jurisdiction of the ICC because it is only the sovereign state which is deemed to be a full subject of international law. Thus, while international criminal law represents a big shift in the international prosecution of individuals, this is a move which, it seems, is unlikely to be extended to corporate entities for the foreseeable future. However,

[261] Grear, above note 223, p. 177-8.
[262] Ibid.
[263] Jena Martin Amerson, '"The End of the Beginning?": A Comprehensive Look at the UN's Business and Human Rights Agenda from a Bystander Perspective,' *Fordham Journal of Corporate & Financial Law,* (2012), 17(4), p. 933.
[264] Johns, above note 148, p. 640.
[265] Baxi, above note 75, p. 146-149.

while corporations have succeeded in avoiding liability for international criminal law, this does not mean that individuals who work for that corporation cannot be held liable.[266]

As a way of trying to create accountability using existing legal frameworks, there have been moves towards making states accountable for the actions of corporations. This can be seen, for example, in the *Ogoni* case before the African Commission, where the state of Nigeria was held accountable for the acts of petroleum companies.[267] The *Ogoni* case was brought against the state-owned Nigerian National Petroleum Company, which was the majority shareholder in a consortium with Shell. It was claimed (and held) that operations by these corporations had 'caused massive environmental degradation' and multiple 'health problems resulting from the contamination of the environment among the Ogoni people.'[268] The Nigerian government were found to be in violation of Article 2 of the African (Banjul) Charter on Human and Peoples' Rights, which is broadly the right to freedom from discrimination.[269] The state was further found to be in breach of Article 4, the right to respect of life and integrity of the person, Article 14, the right to property, Article 16, the protection of physical and mental health, Article 18(1), the right to family life, Article 21, the right to freely dispose of one's wealth and natural resources and Article 24, the right to 'a general satisfactory environment favourable to [one's]… development.'[270] The Nigerian government were thus, in this judgment, asked to rectify the situation and to report regularly on the situation to the African Commission. Despite such a success however, it must be noted that the African Commission at the time (which has since been replaced by the Africa Court of Human Rights) had only recommendatory powers.

While this example does indeed represent one possible way in which corporations can be held to account, it was the state of Nigeria which was found to be in violation and thus called to redress the issue, not the corporations themselves and certainly not Shell, an independent,

[266] Whilst the *corporation* itself may be excluded, the individuals within the corporation are not exempt from the jurisdiction of the ICC. They can be tried at the ICC for international crimes if they commit such crimes and if the domestic criminal law system does not act appropriately. See, for example; *Re Krauch and Others*, 15 I.L.R. 668 (1948). In this case, several official who worked for German pharmaceutical company IG Farben were put on trial for international crimes. These trials were conducted as part of the Nuremburg trials. 12 out of the 23 accused in this case were corporation officials. See, also; *Prosecutor v Musema*, ICTR-96-13-A, International Criminal Tribunal for Rwanda (ICTR), 2000. In this case, the director of a tea factory was found accountable for the acts of his employees. There are also multiple movements trying to bring corporations to account under International Criminal Law. These movements, in particular those working to make ecocide an international crime, will be discussed in Chapter Four.

[267] Communication 155/96, The Social and Economic Rights Action Center and the Center for Economic, and Social Rights / Nigeria.

[268] Ibid.

[269] African (Banjul) Charter on Human and Peoples' Rights, (Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986); above note 267.

[270] Ibid.

international non-state led corporation. In retaining the sovereign state as the central actor in this paradigm, corporations such as Shell, who were clearly, in this case, also directly responsible, are not held to account. Further, such an approach fails to account for the fact that, in the global order, states are by no means all mighty and all powerful. Many states, particularly states in the Global South, rely on corporations to boost the economy and create jobs. While Nigeria was, indeed, complicit in these rights abuses and was thus correctly found to be in breach of the Banjul Charter, holding the state to account does not hold the corporation, as a key actor who directly committed these acts/omissions too, to account.

It must also be noted that, while cases such as the *Ogoni* case should indeed be celebrated, despite their limitations, such cases are few and far between, with the vast majority of corporate human rights abuses going completely unaccounted for. In terms of environmental protection, however, there have been other moves made in other areas of law. For example, there have been moves to enforce environmental protection from corporate exploitation using the right self-determination. The right to self-determination is the right to independence in the context of colonisation. As Drew notes, 'implicit in any recognition of a people's right to self-determination is recognition of the legitimacy of that people's claim to a particular territory and/or set or resources.'[271] This can be corroborated by the contents of the right itself, which includes the right to exist, territorially and demographically, as people and the right to territorial integrity,[272] as well as the right to 'cultural integrity and development,'[273] the right to economic and social development.[274] The right also includes the provision I will be most concerned with here, the right to permanent sovereignty over natural resources.[275]

This right to permanent sovereignty over natural resources came into question at the International Court of Justice in 1995 in the *Case Concerning East Timor (Portugal v Australia)*.[276] The case concerned a Treaty which Australia had entered into in 1989 with Indonesia, the occupiers of East Timor at the time. The Treaty, the Timor Gap Treaty,[277] was created for the purposes of both states being able to explore and exploit the hydrocarbon (oil)

[271] Catriona Drew, 'The East Timor Story: International Law on Trial,' *European Journal of International Law* (2001), 12(4), p. 663.
[272] UN General Assembly resolution 1514 (XV) 1960, para 2, 6.
[273] Ibid.; Drew, above note 271, p. 663.
[274] UN General Assembly above note 272, para 2.
[275] UN General Assembly resolution 1803 (XVI) 1962; UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 1(2).
[276] Above note 4.
[277] Australia/Indonesia Treaty on the Zone of Cooperation in an Area Between the Indonesian Province of East Timor and North Australia of 11 December 1989. (1990) 29 ILM 469.

resources in the Timor Gap, an area of the continental shelf lying between East Timor and Australia. As the continuing Administrative Power at the time, however, Portugal brought an action against Australia,[278] asserting both that the Treaty was acting against its own Administrative Power and that such a Treaty was against the right of the East Timorese peoples, as self-determining peoples with a right to permanent sovereignty over their natural resources.

Unfortunately, the case was dismissed on jurisdictional grounds, with the Court declaring that it could not make a decision 'in the absence of the consent of Indonesia' due to the fact that any questioning of Australia's conduct would first require a questioning of Indonesia's conduct.[279] As Drew notes, this decision was clearly misconceived on the grounds that it was based on a false idea of what the right to self-determination is.[280] The Court, she notes, in making such a decision, clearly sided with Australia. Australia claimed that, through its signing of the Timor Gap Treaty, it was not in breach of its international obligations to East Timor under the right to self-determination as the Treaty itself did not preclude the possibility of self-determination in the future.[281] Such a stance, however, treats self-determination as something which occurs in a particular moment, as an automatic process of free political choice. However, as Drew notes, the right to self-determination is not a political choice and neither is it something which happens in a particular moment. It is, rather a 'substantive right'[282] and thus, as Higgins argued in the oral pleadings, the effect of the Australian argument is 'legal deconstructionism;' to empty out self-determination of any meaningful content.[283] If the right to self-determination had, however, in this case, been applied as it should have i.e. substantively, arguments relying on an 'artificial separation of process from substance' would have been 'rendered logically untenable.'[284] Viewed this way, it would not matter that Indonesia had not consented to the exercise of the jurisdiction by the International Court of Justice (ICJ); Australia could be found in violation of East Timor's right to self-determination and, in short, their right to their own oil. In light of this and as Chinkin has argued, such a decision clearly shows structural bias in the law in that it clearly favours procedural arguments over the substantive rights of peoples.[285]

[278] No action could be brought against Indonesia because it had not accepted the compulsory jurisdiction of the ICJ.
[279] Above note 4.
[280] Drew, above note 271, p. 666.
[281] Ibid.
[282] Ibid.
[283] Above note 4, Higgins, Final oral Argument, CR 95/13.
[284] Drew, above note 271, p. 666.
[285] Christine Chinkin, 'The East Timor Case (Portugal V Australia),' *International and Comparative Law Quarterly* (1996), 45, p. 724-5.

This is, as Drew notes, despite the fact that the right to self-determination has been given both *erga omnes* and *jus cogens* status under international law.[286]

While the blocking of this case on jurisdictional grounds was, clearly, an inadequate response given the fact that this case was, fundamentally, about the right to self-determination of the people of East Timor, as Drew notes, part of the issue in this case is the fact that the East Timorese were unable to represent themselves since they did not have statehood.[287] This case example therefore, once again, serves to exemplify another why in which a system of international law and the international rights framework, which centres around the sovereign state, is inadequate, working to prevent the rights of peoples from being pursued while allowing capitalist interests to hide from international law behind the veil of state sovereignty.

Outside the context of self-determination, all states are deemed to have permanent sovereignty over their natural resources, this being a component of statehood.[288] While this provision, theoretically, could allow for states to make claims against corporations found to be in breach of this permanent sovereignty and while many states in the Global South have tried, politically, to use this provision to claim their rights against corporations, little has come about from such claims.[289] Further, as noted through the case examples above, such as in the *Ogoni* case, states are often complicit in corporate environmental damage, choosing to damage the environment so as to make a profit.[290] Permanent sovereignty over natural resources, it seems, is, therefore, quite rightly "sovereign," if sovereignty and sovereign equality are to be taken as a conceptual myth, working to ignore the realities of global inequalities and the ways in which structures such as capitalism impact on the supposedly "free" choice of sovereign states.[291]

There are moves towards making corporations more accountable for human rights abuses under international human rights law. The UN has published its Guiding Principles on Business and Human Rights,[292] also known at the Ruggie Principles, in which it is stated that businesses should not infringe human rights. These principles note the way in which the corporation's responsibilities are 'entangle[d]' with the state's, taking the stance, fundamentally, that it is the

[286] Drew, above note 271.
[287] Ibid., p. 668.
[288] General Assembly, above note 275.
[289] James Crawford, 'Sovereignty as legal value,' in James Crawford and Martti Koskenniemi (eds.), *International Law*, (Cambridge University Press, 2012), p. 120.
[290] Above note 267.
[291] Gerry Simpson, *Great Powers and Outlaw States*, (Cambridge University Press, 2004); Anne Orford, 'The Gift of Formalism,' *European Journal of International Law*, (2004), 15(1), p. 179-95.
[292] UN, 'Guiding Principles on Business and Human Rights,' (2011) HR/PUB/11/04.

responsibility of states to uphold human rights.[293] This, as already noted, is extremely limiting, in that such a position is based upon a false assumption that states are and can be in control of what goes on in their territory, thus ignoring the economic pressures corporations put on states. The report thus distinguishes between state 'duty' and corporate 'responsibility,' consequently continuing to pose the state as the central target for human rights law in suggesting that corporations have a responsibility which is not as strong as state duty.

Further, while the report highlights the need for victims of human rights abuses to have access to remedies, the UN has also noted that accessing these remedies is often a problem.[294] This is even more of a problem in poorer states. Corporations, in their contracts with host states, often curtail or stifle domestic human rights and environmental protection laws.[295] The poorer the state and the more the state needs the corporation's economic involvement, the more leverage the corporation has for stifling legal protections.

Overall, the Ruggie Principles clearly provide an important step in the direction of ensuring corporate accountability for human rights. However, as Amerson notes, the principles are extremely limited as, 'rather than articult[ing] specifically the responsibilities of corporations, Ruggie expressed only aspirational goals.'[296] Thus, Amerson continues, 'to the extent responsibilities invoke something akin to a legal duty, they are clearly absent.'[297] This is precisely because the principles fall back to state accountability despite the fact that it has been clearly shown that many states are either 'unable or unwilling to do more to prevent their citizens from suffering human rights abuses.'[298]

Corporations may, of course, be held accountable through domestic remedies, such as through the UK's Corporate Manslaughter and Corporate Homicide Act 2007, which makes corporations subject to criminal charges, or through systems such as the UK National Contact Point system,[299] put in place to follow the Organisation for Economic Co-Operation and

[293] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (7 April 2008) UN Doc A/HRC/8/5, at para 6.
[294] United Nations High Commissioner for Human Rights, 'Improving accountability and access to remedy for victims of business-related human rights abuse,' A/HRC/32/19, 10th May 2016.
[295] Bantekas and Oette, above note 8, p. 663.
[296] Amerson, above note 263, p. 930.
[297] Ibid.
[298] Ibid.
[299] Under this system, breaches of the (OECD) guidelines can be hard, this procedure including human rights complaints against 'multinational enterprises,' with reports being published along with a follow up procedure. See: the UK National Contact Point, 'Make a Complaint,' https://www.gov.uk/guidance/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-oecd-guidelines-for-multinational-enterprises (accessed 28/09/2016).

Development (OECD) Guidelines system.[300] This system broadly works to promote standards and has set up a limited complaints system.[301] Further to this, there may be some redress available via domestic tort law, most notably through the tort of negligence, such a tort existing in many jurisdictions including the UK, Australia, the US and Canada (with similar systems existing in many other jurisdictions).[302] However, redress here is limited by the fact that the tort of negligence requires that the resulting damage was 'reasonably foreseeable' with the corporation's acts being held to the standard of a 'reasonable person.'[303] These requirements are often difficult to prove due to the fact that one must prove what the 'senior managers and board members' knew.[304] However, as Zerk notes, 'Proving who knew what and when in a corporate organizational structure can be very challenging for claimants… and is often cited as a significant obstacle in their ability to prosecute a private law claim.'[305]

It is also worth noting that in many common law systems, there is the possibility of claiming under the rule of *Rylands v Fletcher*[306] which can work to hold defendants strictly liable for environmental damage which constitutes 'ultrahazardous activity.'[307] While the use of this rule has been extremely limited to the questionable point of abolition in some jurisdictions, such as in the UK,[308] and abolished altogether in Australia,[309] it has been used 'fairly extensively,' in the US.[310] It must be noted, however, that the rule is restricted to instances where, during the 'non-natural' use of land, the defendant brought something onto the land which was likely to do mischief if it escaped and where the thing then did escape and cause damage.[311] It is clear that this is a very limited set of circumstances and multiple tests must be passed in order for liability to be applied, thus rendering the rule only useful in a limited number of corporate

[300] OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context (May 25, 2011).
[301] UK National Contact Point, 'Guidelines,' https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines (accessed 28/09/2016).
[302] Jennifer Zerk, 'Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and more Effective System of Domestic Law Remedies,' Report for the Office of the UN High Commissioner for Human Rights, 2013, p. 43-49.
[303] This can be seen in the UK case law. See, for example; *Bolam v Friern Hosp Management Committee* [1957] 1 WLR 582, McNair J at 586; *Donoghue v Stevenson* [1932] UKHL 100, Lord Atkin at 580.
[304] Zerk, above note 302, p. 44.
[305] Ibid. It is also worth noting that the same issues arise in finding criminal responsibility.
[306] *Rylands v Fletcher* [1868] UKHL 1.
[307] Ibid.
[308] The rule is now little applied in the UK, having been deemed to be only a sub-set of the tort of nuisance or to be better deal with by statute, this limiting its reach.
[309] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520
[310] Zerk, above note 302, p. 44.
[311] Above note 306.

liability cases. Further to this, such a rule only exists in a few common law jurisdictions. The rule, therefore, has a very limited global reach.

Given the above, the possibility of domestic corporate liability very clearly depends on varying state frameworks and state willingness to, for example, establish compliance systems or criminal liability.[312] The sovereign state, once again, is situated at the centre of the paradigm without account for the differing ways in which power and legal personality operate across international law and the global order.

Even though domestic law is different to international human rights law, applying only within the state in question, there have been some instances where people have tried to use domestic law to uphold international human rights law in corporate liability cases. Cases, for example, have been brought in the US via the Alien Tort Claims Act of 1789 (ATCA) which states that 'the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations of a Treaty of the United States.'[313] ATCA has been used in relation to a broad array of human rights violations. Of course, the remit of ATCA is inherently limited, not least by the fact that any claimant or victim must have the means to go to the US to be able to file a claim. Further, economic, social and cultural rights have been deemed too 'vague and aspirational' to be applied using ATCA,[314] therefore already vetoing many environmental claims - with environmental damage being a key area of rights abuse at the hands of corporations.[315] However, in relation to corporate liability, ATCA has been used, for example, in the *Wiwa* case which was filed in the New York District Court.[316] The case concerned the complicity of Shell Nigeria and its parent companies in respect to the human rights violations committed by the Nigerian police in relation to the operations of Shell.[317] The case thus refers to operations in the same area by the same actors as discussed above in the *Ogoni* case, yet this case referred to the physical violence committed whereas *Ogoni* referred to the environmental and health damage caused.[318] While the plaintiffs in *Wiwa* won several

[312] For an outline of a few different ways in which different jurisdictions treat this issue, see: Zerk, above note 302, p. 65-74.
[313] Above note 147, 28 U.S.C. S. 1350.
[314] *Flores v Southern Peru Corporation*, 414 F.3d 233, 255 n.30 (2d Cir., 2003).
[315] See: Jeremie Gilbert, 'Corporate Accountability and Indigenous Peoples: Prospects and Limitations of the US Alien Tort Claims Act,' *International Journal of Minority and Group Rights*, (2012), 19(1), p. 25-52.
[316] Above note 5.
[317] Ibid.
[318] Ibid.

of the pre-trial rulings, including on motions by the defendant's to dismiss the case;[319] case did not make trial but was, instead, settled out of court to the sum of $15.5 million before the case could be heard.

While cases have been heard under ATCA where the facts bear no relation or link to the US,[320] this jurisdiction has recently been put into question by the *Kiobel* case.[321] The *Kiobel* case is another case surrounding the activities of Shell in Ogoniland in Nigeria, this time the case being brought by the victim's wife, her husband having been executed on the basis of trumped-up charges for his non-violent protests alongside Ken Saro-Wiwa. This time, however, the case was not settled out of court but was heard. The US Supreme Court, in the *Kiobel* case, however, stated that some form of meaningful link to the US would be needed for the courts to have jurisdiction over such an ATCA case (e.g. the parent company needs to be based in the US), thus denying the claim through the presumption of extraterritoriality.[322] The *Kiobel* case therefore, in short, arguably blocks the possibility of corporate liability cases (and other ATCA cases more broadly) which do not involved corporations/defendants which have a link to the US from being heard under ATCA.

Despite the *Kiobel* ruling, however, it must be noted that the full extent of the rule against extraterritorial cases being heard under ATCA remained, until recently, in question, with Steinhardt stating that the judgment 'adopts a rhetoric of caution without foreclosing litigation that fits the *Filártiga* model;'[323] i.e. the model of a more extensive jurisdiction. It is also worth noting that the *Kiobel* Supreme Court judgment was an appeal case, the case below being heard by the US Court of Appeals in the Second Circuit. Under this Court of Appeals case, the Court, like the Supreme Court, also ruled that ATCA did not apply. However, the rule requiring links to the USA was deemed to apply, in the Court of Appeals judgment, to corporate liability cases alone.[324] While this is not the final judgment, with the Supreme Court decision being the final ruling and the precedent of the Court of Appeals judgment applying only to the Second Circuit (New York, Connecticut, Vermont), it was, until recently, debatable as to whether such a ban

[319] Wiwa Order Denying Motion to Dismiss, Earth Rights, https://www.earthrights.org/sites/default/files/legal/Wiwa-order-denying-motion-to-dismiss.pdf (accessed 20/09/2017).
[320] See, for example ; *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).
[321] *Above note 6.*
[322] Ibid. For a discussion of the presumption of extraterritoriality in US law, see: William S. Dodge, 'Understanding the Presumption against Extraterritoriality,' *Berkley Journal of International Law*, (1998), 16(1), p. 85-125.
[323] Ralph G. Steinhardt, '*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink,' *American Journal of International Law* (2014), 107, p. 841.
[324] *Above note 6.*

against non-US linked corporate liability cases being heard under ATCA does outright exist (with this ban therefore being stronger in relation to corporate as opposed to state or individual liability) or whether there may be possible instances under which such cases may still be heard.[325] This is, however, was recently decided by the Supreme Court ATCA case *Jesner v Arab Bank, PLC,*[326] where it was ruled that a sufficient link to the USA was needed in cases of corporate liability.

Commenting on the 'post-*Kiobel* lawscape,' Grear and Weston note that the case worked to confirm, a system in which,

> Straightforwardly put… the regulation of TNCs[327]… operating abroad is largely left to the legal systems of the states in which they operate… Highly problematic, however, in the plain fact that the states in which TNCs operate are frequently developing states which, for lack of effective administration, judicial and policing institutions and mechanisms or because of a widespread culture of corruption (frequently encouraged by TNC management), are commonly unable to regulate TNC conduct effectively or are unwilling to do so.[328]

While some domestic laws have worked to create corporate liability in certain contexts, and while there have been other moves to ensure corporate liability, such as through the application of ATCA or through making states liable for corporate acts, corporate liability for human rights abuses remains limited.[329] The sovereign state, it seems, therefore remains the central paradigm when it comes to liability for human rights abuses despite the fact that the sovereign state is not the only power wielding entity in the global order.[330]

It becomes clear, therefore, that international law's claim to neutrality through the enforcement of principles such as sovereign equality and state consent is far from neutral at all, working

[325] Julian Ku, 'Did the Supreme Court Implicitly Reverse Kiobel's Corporate Liability Holding?' Opinio Juris 2014, http://opiniojuris.org/2014/12/04/supreme-court-implicitly-reverse-kiobels-corporate-liability-holding/ (accessed 25/11/2017).
[326] Above note 7.
[327] Transnational Corporations.
[328] Anna Grear and Burns H. Weston, 'The Betrayal of Human Rights and the Urgency of Universal Corporate Accountability: Reflections on a Post-*Kiobel* Lawscape,' *Human Rights Law Review* (2015), 15(1), p. 27.
[329] For a brief analysis of some ongoing cases in this area, however, see; Gabrielle Holly, 'Access to Remedy Under the UNGP's: Vedanta and the Expansion of Parent Corporate Liability,' EJIL:Talk!, https://www.ejiltalk.org/if-the-pleading-represents-the-actuality-vedanta-access-to-remedy-and-the-prospect-of-a-duty-of-care-owed-by-a-parent-company-to-those-affected-by-acts-of-subsidiaries/#more-15632 (accessed 25/11/2017).
[330] Dan Danielsen, 'Corporate Power and Global Order,' in Anne Orford (ed.), *International Law and its Others*, (Cambridge University Press, 2006), p. 89.

instead to prioritise subjects which best fit neoliberal aims (such as corporations) over others (such as the environment). This story is part of the wider narrative of the ways in which international law helps capitalism function. However, this story of international legal personality, from corporations seeking and gaining such personality, to using this personality to claim their rights while at the same time using the system of international legal personality which centres around state personality as a means through which to avoid accountability, is also an example of schizophrenic capitalist methods at work; using the structure of the system of legal personality and human rights and their liberal roots, transforming them into a tool for capitalist, profit making aims at the expense of those which these systems originally sought to protect. While there are domestic provisions which have created limited corporate liability regimes, international liability is limited. The corporation thus can claim and does have international legal personality in international law; yet it avoids the responsibilities which should come with such a status. In failing to recognise the realities of power in the global order, international legal discourse has worked to aid global corporations by allowing them great power and international personality without the responsibilities which have been designed to temper the power of such powerful actors in international law,[331] thereby creating rule by an unelected elite.[332]

6. Conclusion

International law can be described, in part, as a system which both upholds and is structured by capitalism, with capitalism working with other structures, such as colonialism and patriarchy, in assemblage. As Braidotti highlights, the ideology of 'the free market economy' has 'steam rolled all oppositions' in the second half of the twentieth century.[333] Schizophrenic capitalism, as a method through which ideas and movements such as feminism as well as legal conceptual frameworks, such as international legal personality, have been appropriated has, as this chapter has exemplified, worked to ensure this 'steam rolling' occurred in international law and the global order.[334]

[331] Kennedy has highlighted that this has occurred, in part, due to the fact that 'the left' have largely failed to account for the host of diverse and private actors which now play a large role in the global order, thereby remaining faithful to the state structure of international law as the site for change, whereas 'the right' have actively and successfully embraced other actors in their aims and lobbying. See; David Kennedy, 'Challenging Expert Rule: The Politics of Global Governance,' *Sydney Law Review*, (2005), 9, p. 9.
[332] Danielsen, above note 330.
[333] Rosi Braidotti, *The Posthuman*, (Polity Press, 2013), p. 4.
[334] Deleuze and Guattari, above note 9.

This chapter has given some key examples of the ways in which schizophrenic capitalism works in various contexts in international law and the global order. Examples have been given in relation to measurement cultures and the biased use of metrics and indicators to measure things like gender and equality, working to create a limited, neo/liberalised picture of what these standards are and should be, defining freedom, for example, as participation in the market alone without account for conceptualisations of freedom beyond this.[335] This, it was noted, works not only to frame what should be focused on and what standards need to be set, but also works to determine which projects get funded and which do not, with quantifiable projects being far more likely to receive funding despite the fact that they often lack nuance, for example, of what real equality may look like, promoting instead a limited, formal equality agenda. It was noted that this story provides both an example of how schizophrenic capitalism limits transformative projects like feminism when they interact with the global order, while also providing one explanation for the ways in which the feminist project in international law has, in recent years, turned more towards feminist projects which work within the existing order as opposed to working to challenge this order.

Next, the ways in which corporations have been able to use the structure of international law and the concept of international legal personality to gain greater power in the global order was noted. This was exemplified through a discussion of how corporations use this status to claim their rights while denying their own liability for such rights breaches, claiming to be key actors in international law in the first scenario while pointing to the centrality of the sovereign state in the second. In the meantime, corporations have used the gaps in international law to fill them with their own law-like regulations, again, using the system to gain power.

However, it is clearly not just the corporation itself which has worked to paint this overall picture. International legal personality was conceptualised from a specific standpoint and was based on liberal, racialised and gendered hierarchies.[336] While global corporations have been able to exploit this structure, bending it according to their needs, the structure, as noted in this chapter, was also clearly set up and conceptualised in a way in which was easily exploitable by such an entity. This can be seen in the fact that the very construction of international legal personality itself was created in such a way that no human could ever possibly fit the blueprint

[335] Rao, above note 1.
[336] For a further discussion of this point, see the appendix.

of subjectivity upon which it lies.[337] The global corporation, however, as the ideal disembodied and rational actor, could.[338]

Schizophrenic capitalism has succeeded, as method, greatly within the realm of international law and the global order. This thesis is concerned with questions of resistance and compliance and with trying to both understand and think beyond the tension this binary presents to feminists working in international law. One thing schizophrenic capitalism highlights is the way in which capitalism itself manages the tension between resistance and compliance, balancing the two to great success. Working with what exists and therefore complying, while bending structures according to need, thus resisting, schizophrenic capitalism, despite aiming for completely different goals to those of this thesis and, I argue, to the clear majority of feminists working in international law, provides a method through which to think through the possibility of structural change and the dilemma of being caught between resistance and compliance.

[337] Grear, above note 144.
[338] Ibid.

Chapter Four

The Legal Subjectivity of the Environment and Feminist New Materialism

1. Introduction

International legal personality is based upon a series of liberal, humanist assumptions about the subject.[1] Chapter Three highlighted ways in which this blueprint has been used by global corporations. The ideal disembodied subject, the global corporation, has been able to fit the blueprint of legal personality better than any lived human ever could, giving it rights and duties under international law and thus power.[2] Using the system, complying to gain what it wants, the role and status of the global corporation in international law provides an example of schizophrenic capitalism at work.

It is thus evident, as Parfitt highlights, that there is a need to challenge the conceptual underpinnings of international law:

> It is therefore arguable that the problem lies not only with the doctrine of recognition and personality, but also with the theoretical underpinnings of more fundamental, ostensibly 'factual' or 'objective' concepts like individuality, humanity and, in the

[1] Ngaire Naffine, 'Women and the Cast of Legal Persons,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 15-25; Anna Grear, ''Sexing the Matrix': embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 39-52; Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583-99.

[2] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene Humanity,' *Law and Critique*, (2015), 26(3), p. 225-49.

> international legal context, statehood. The task of collapsing the dichotomies on which these concepts rest—between subject and object, law and fact, constitution and declaration, and ultimately Self and Other—will be the next challenge for theorizing in this area.[3]

Taking the method of schizophrenic capitalism, of using what exists and transforming it, alongside the need and will to challenge the current humanist subjectivity of the legal person, this chapter will consider the ways in which environmental activists have sought to use domestic and international law to promote environmental justice[4] through a consideration of projects seeking to gain legal personality for the environment. Examples which will be drawn on include the Whanganui River agreement in New Zealand, The Monsanto Tribunal and case law such as Colorado River against the State of Colorado in the USA and *The State of Uttarakhand and Orgs v Mohd. Salim & Others* in India.[5] These examples are posed as ways of resisting via complying, using the law and the framework of legal personality to transform it via challenging the biased humanist concepts at the heart of the law.

As exemplified via the discussion of gender measurements in the previous chapter, the transformative aims of the feminist project are often lost when feminism works within international law and the global order, the feminist international legal project often then being reduced to a smaller, neo/liberal configuration which complies more easily with the existing order. I have already argued that part of the problem for the feminist project within the global order is that it is often reduced to an add women and stir account of feminism. Such an approach, while making international law somewhat more inclusive, does not challenge the

[3] Parfitt, above note 1, p. 599.

[4] The 'environment' is a problematic term. This has been discussed by Luke who notes how the term has been used to transfer nature into an ill-defined discourse of expertise. Tracing the etymological roots of the word 'environment,' Luke has noted that the word itself means to enclose, suggesting a disciplining or policing of space. As Grear notes, this is exactly the way in which environmental law currently treats the "environment", as a space to be governed by man. Despite the problems with the term 'environment,' however, I have chosen to use the term in this chapter. As a thesis which seeks to resist via appropriation, I have purposefully chosen to situate my work within discussions of the 'environment' and 'environmental law' in the aim of looking towards appropriating these for feminist posthuman aims. See; Timothy W. Luke, 'On Environmentality: Geo-Power and the Eco-Knowledge in the Discourses of Contemporary Environmentalism,' *Cultural Critique,* (1995), 31, p. 57-81; Anna Grear, ''Anthropocene, Capitalocene, Chthulucene': Re-encountering Environmental Law and its 'Subject' with Haraway and New Materialism,' in Louis J. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene*, (Hart, 2017), p. 77-96.

[5] Tutohu Whakatupua, Agreement between Whanganui Iwi and the Crown, 30 August 2012, http://www.harmonywithnatureun.org/content/documents/193Wanganui%20River-Agreement--.pdf, (accessed 12 March 2017); See; Community Environmental Legal Defences Fund, 'Press Release: Colorado River v State of Colorado,' 2017, https://celdf.org/2017/09/press-release-colorado-river-v-state-colorado-first-nation-federal-lawsuit-river-seeks-recognition-legal-rights-exist-restoration/ (accessed 20/11/2017); *The State of Uttarakhand and Orgs v Mohd. Salim & Ors*., Supreme Court of India, Petition for Special Leave to Appeal No. 016879/2017.

biased foundations of the structure of international law itself which are based around a white, male model of subjectivity. Women have thus, to some extent, been "accepted", for example, as subjects of human rights law, yet they are only accepted within the limited, liberal, gendered, racialised understanding of subjectivity which the law has.

The project of grating legal personality to the environment, I therefore propose in this chapter, in challenging what the legal subject is, may provide a means through which feminists may challenge the structural biases of international law. However, as noted above and as exemplified by the feminist project in international law, the boundaries between resistance and compliance are not clear and resistance can easily be transformed into compliance with the structure of the global order. This chapter will therefore discuss the risks for environmental personality projects of also being transformed and transposed into the limited liberal framework of the law and legal personality in that, much like women, the environment, too, could just be added and stirred. I subsequently note the necessity, both for environmental personality projects but also for the feminist project in international law, of drawing on theories of subjectivities which disrupt the current biased, liberal account of subjectivity situated at the heart of international law as means through which to resist such transpositions. I draw on feminist new materialist accounts of subjectivity, which directly disrupt the current dominant liberal legal account of the subject, to exemplify what such theories can add to the law.

2. What can we do now God is Dead?

As noted in Chapter Two, the Death of God in international law worked to create an unfillable hole. No longer able to make a claim to divinity, international law lacked a foundational claim to divine universality.[6] However, in trying to fill this hole, international lawyers posed international law as the limitless universal, situating the sovereign state as the answer to the hole left by the Death of God.[7] International legal personality was then based on the model of the sovereign state, ensuring that the model of subjectivity in international law remained in the model of God *himself*; absolute, universal and impossible.[8] However, as Aristodemou notes, in trying to fill up the hole with something else, the real void was never considered but was, rather, covered over.[9] Otomo's work on the sovereign state exemplifies this, noting the ways

[6] Maria Aristodemou, 'A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours,' *European journal of International Law,* (2014), 25(1), p. 48.
[7] Yoriko Otomo, 'Of Mimicry and Madness: Speculations on the State,' *Australian Feminist Law Journal,* (2008), 28, p. 53-76.
[8] Ibid.
[9] Aristodemou, above note 6, p. 38.

in which the sovereign state, as conceptualised as complete, absolute and equal to all, works to avoid the fact that international law and the sovereign state itself, as the blueprint for international legal personality, is lacking as lived. This can be seen, for example, in the fact that states are not all equal and in that no state is absolute, states instead all relying on and having to work with one another and thus, inherently sharing sovereignty.[10]

Aristodemou states that international law's problem was never God, but lack. Lack, however, is something the human subject had and thus created God to fill: 'lack is not a consequence of the Death of God, but a prerequisite for God's existence and indeed of all human creations, including, of course, law.'[11] The foundation of God and thus international law, having inherited this Christian structure, is thus lack and it is this lack, according to Aristodemou, that international law must face up to.[12] 'It is lack that introduces the idea of fullness'[13] – without lack, maybe international law could accept that it is not all, not full, not absolute and not universal. Thus, whilst Aristodemou may agree that the Death of God needs to be accepted, she does not wish to place new Gods in this space but rather, to assume the lack and get rid of the need to fill the space. There is a need, according to Aristodemou to accept the failure of God, His Death and international law's lack so as to understand international law within the context of the global order more broadly, including the spaces in between international law.[14]

3. Beyond a Binary Death: Unsettling the Order

Aristodemou relies heavily on Lacan in her work on psychoanalysis and law. The Lacanian model, however, is one of law and lack.[15] The subject will always lose something when entering the symbolic order, according to Lacan, and thus becoming a full subject means becoming lacking: to enter the law, one must experience lack.[16] For Aristodemou, therefore, international law just needs to recognise that it is lacking and recognise its failures. However, this discourse of law and lack is binary. The problems with binary thinking have already been noted in Chapter Two of this thesis. In failing to exit the Cartesian dialectical model, Lacan does not consider other options, options which cannot be understood in dualistic terms.

[10] Otomo, above note 7.
[11] Aristodemou, above note 6, p. 7.
[12] Ibid., p. 35-58.
[13] Ibid., p. 8.
[14] Ibid., p. 45.
[15] Luce Irigaray, *Speculum of the Other Woman*, trans. Gill, (Cornell University Press, 1985).
[16] Aristodemou, above note 6, p. 39-40.

In contrast, Deleuze, notes Aristodemou, does not constitute the empty space at the centre of all as unfillable, but rather just notes the way in which Western society has been unable to fill this lack.[17] Aristodemou states that, in noting the ways in which the 'empty place is constitutive: it is impossible to fill,'[18] Lacan 'goes further and adds to Deleuze's diagnosis.'[19] This chapter works to rebut the idea that the Lacanian model adds to Deleuze, suggesting, instead, that the Deleuzian approach, which does not assume that lack is *inherently* constitutive, is a more constructive approach. This is because, it will be argued, such an approach allows one to think beyond the system of law and lack itself, towards other ways of thinking and new possibilities which actively work against the system of the 'Big Other.'[20] This is not to say Aristodemou entirely rejects the possibility of the outside to this system of law and lack. For example, she highlights the way in which women may be the outside, also noting the possibility created by the hysteric.[21] Aristodemou also notes the potential in the cracks in the symbolic order: 'The crack, as I will argue, is not only negatively and dangerously disturbing but creatively so: it disturbs our being, our seeing, our loving, and of course our law-making. It makes room, therefore, for the making of new worlds, new selves, and indeed new laws.'[22] It seems, therefore, that despite her calls for the subject to just accept it is lacking, Aristodemou also believes there can be something else. While there is a sense of grasping towards the outside, that which outruns, in her work, she fundamentally remains, however, in a Lacanian framework and thus in a framework of law and lack which, as Irigaray has shown, is fundamentally limiting.[23] In retaining a Lacanian model, Aristodemou's theorisation becomes limited to the existing model without considering enough what may lie beyond. While Lacan, in Aristodemou's words, notes how women have 'the capacity to transgress borders and go beyond the symbolic,'[24] it is Irigaray, as noted in Chapter Two, who used this idea to look beyond the Lacanian model.[25] Thus, as I will suggest in this section, posthuman theory can work in conjunction with Irigaray's feminine to provide the other values of the system; not filling the hole left after the Death of God but rejecting such a system altogether.[26]

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[17] Maria Aristodemou, *Law, Psychoanalysis and Society*, (Routledge, 2014), p. 107.
[18] Ibid.
[19] Ibid.
[20] Ibid., p. 109.
[21] Ibid., p. 122.
[22] Ibid. p. 8-9.
[23] Irigaray, above note 15.
[24] Aristodemou, above note 17, p. 122; Jacques Lacan, *The Ethics of Psychoanalysis*, (Routledge, 2007).
[25] Irigaray, above note 15.
[26] Irigaray, above note 15; Donna Haraway, 'A Cyborg Manifesto,' in David Bell and Barbara M. Kennedy (eds.), *The Cybercultures Reader*, (Routledge, 2001), p. 291-324; Rosi Braidotti, *The Posthuman*, (Polity Press, 2013).

As shown in the previous chapter, capitalism has been so successful precisely because it does not operate in binary terms. Resisting via complying, turning even resistive projects such as feminism to neo/liberal configurations of themselves, Chapter Three exemplified the ways in which schizophrenic capitalist methods work in global order through a focus on how measurement culture has worked to co-opt and neoliberalise queer and feminist accounts of freedom. Schizophrenic capitalism works so well as a method precisely because it refuses to accept binary oppositions, working always between the two, bringing opposition into its fold.

Drawing on feminist postructuralist work, particularly the work of Irigaray, as well as feminist legal scholarship such as the work of Grear and Naffine, I have already begun to discuss other models to the one of law and lack, models which come from feminist critical theory, disrupting binaries.[27] As Braidotti notes, 'feminists like Luce Irigaray pointed out that the allegedly abstract ideal of Man as a symbol of classical Humanity is very much a male of the species: it is a he. Moreover, he is white, European, handsome and able-bodied, of his sexuality nothing much can be guessed.'[28] Irigaray was one of Lacan's former students. Thrown out of his school for her PhD thesis which critiqued the Lacanian model, this thesis then becoming the book *Speculum,* Irigaray defied Lacan by explicitly stating that there is more than law and lack.[29] While Lacan stated that 'the woman does not exist' in the symbolic order of the phallus,[30] Irigaray disagreed that the girl will always be marked by her lack, her castration, stating, instead, that there is something more than the masculine universal proposed by Lacan.[31] The feminine, the other to these values, the unconscious which outruns, rejects the model of law and lack and says; I am not lacking.[32] The subject need not be lacking, rather, a new blueprint of subjectivity is needed, one which exits the realm of law and lack and 'radically decentres [its]… own sovereign position.'[33]

While Aristodemou argues that what international law needs to do is accept its lack and thus its resulting death,[34] Orford adds to this paradigm, drawing on Freud and noting that there is

[27] Naffine, above note 1; Ngaire Naffine, 'The Body Bag,' in Naffine and Owens (eds.), *Sexing the Subject of Law*, (LBC, 1997), p. 79-94; Grear, above note 1.
[28] Braidotti, above note 26, p. 24.
[29] Irigaray, above note 15.
[30] Jacques Lacan, *The Seminar of Jacques Lacan, Book XX: On Feminine Sexuality: The Limits of Love and Knowledge*, trans. Bruce Fink, (Norton, 1998), p. 72.
[31] Irigaray, above note 15.
[32] As exemplified through Irigaray's use of the figure of Antigone. See; Irigaray, above note 15.
[33] Anne Orford, 'The Destiny of International Law,' *Leiden Journal of International Law* (2004), 17, p. 475.
[34] Aristodemou, above note 6. See also; David Kennedy, 'When Renewal Repeats: Thinking Against the Box,' *New York University Journal of International Law and Politics*, (2000), 32, p. 335-500.

also a need to accept that international law is always, also, beyond what is known.[35] To accept this, notes Felman, is the 'symbolic means of the subject's coming to terms not with death…' (though, in international law's case, this comes in the form of an acceptance of its lack of existence) '…but, paradoxically, with life.'[36] This, too, seemingly corroborates Aristodemou's point; if international law accepts its lack, only then can it really live.[37] However, simultaneously departing with and drawing on these ideas, reading them through Irigaray, it seems that there is a need, not only to note Felman's point that accepting lack may indeed be life, but also to note that lack may not, in itself, be lack, but life. The unknown, that which goes beyond, need not entail an acceptance of lack but, rather, may instead be re-thought in the until now silenced mode in the feminine.[38] This chapter will propose, therefore, that there is no lack, as such a model assumes a mode of hierarchy and binary thinking which has already been dispelled in Chapter Two. Rather, this chapter will argue that subjectivity, the subject, and matter itself, should be seen, instead, as ontologically horizontal or flat.[39] In such a model, neither life nor death, human or matter are distinct but are, drawing on Young's work on binary thinking once again, both the same and different, connected in a non-hierarchical understanding,[40] thus dispelling the need to search for the absolute God or to accept lack and accepting fluidity in their place.[41] The environment and the nonhuman may be way in which to search for this alternative model, as this chapter and the thesis as the whole will argue.

Deleuze and Guattari's conceptualisation of the schizophrenic can, in many ways, be diffractively read as the feminine other. The previous chapter drew on Deleuze and Guattari's concept of schizophrenic capitalism to explain the ways in which capitalism has become a key power in the global order. I noted, however, that while capitalism is schizophrenic in that it can turn everything into capital, decoding it for its own means,[42] its own limit is, in fact, capital itself.[43] By never moving beyond the limits of capital, capitalism binds this schizophrenia, thereby always working to oppose 'the revolutionary potential of decoded flows.'[44]

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[35] Orford, above note 33, p. 475; Sigmund Freud, *Beyond the Pleasure Principle*, (Dover Publications, 2015).
[36] Shoshana Felman, *Jacques Lacan and the Adventure of Insight*, (Harvard University Press, 1987), p. 139.
[37] Aristodemou, above note 6.
[38] Irigaray, above note 15.
[39] For 'flat ontology' see; Manuel Delanda, *Intensive Science and Virtual Philosophy*, (Bloomsbury, 2013), p. 47.
[40] Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, 1990), p. 97-9.
[41] Irigaray, above note 15.
[42] Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983), p. 244.
[43] Ibid.
[44] Ibid., p. 246.

Unbound schizophrenia, on the other hand, according to Deleuze and Guattari, is limitless.[45] Like Irigaray's feminine and the figure of Antigone, it 'shake[s] off the Oedipal yoke and the effects of power, in order to initiate a radical politics of desire freed from all beliefs.'[46] The schizophrenic for Deleuze and Guattari thus reject the symbolic order and the system of lack and replaces it with a productive desire. This '"desiring-production" brings the unconscious into the real, and unleashes its radical world-making potential… desiring-production [is not] limited to clinical schizophrenics. Desiring-production marks the schizophrenic potential in everyone to resist the power of despotic signifiers and capitalist reterritorialization.'[47]

It is in the cracks and the spaces in between,[48] in the schizophrenic's desiring production to re-create something new,[49] the feminine,[50] that which outruns[51] and Antigone's rejection of the order,[52] that something else can be found. As I noted in Chapter Two, Irigaray's feminine is read in this thesis, not as the binary other to the masculine nor as woman but as a symbol of something else, something new,[53] difference; desire as opposed to lack.

Following this, it seems that international law does not need to accept that it is lacking but rather move beyond the ideas of law and lack altogether. This can be done, in part, by challenging the currently gendered, racialised and lacking model of subjectivity which international law is based on. By uncovering new ways of being, looking towards understandings of ontology as non-hierarchical, international law can move beyond universal lack towards a universal made up of the multiplicity of difference. I begin the exploration of this shift in this chapter through the possibility of the environment as a legal subject: fluid, interconnected, nonhuman and interdependent.

4. Re-thinking Subjectivity

[45] Ibid.
[46] Ibid., p. xxi; Irigaray, above note 15.
[47] Johnah Peretti, 'Towards a Radical Anti-Capitalist Schizophrenia?' Critical Legal Thinking 2010, http://criticallegalthinking.com/2010/12/21/towards-a-radical-anti-capitalist-schizophrenia/, (accessed 24/09/2016).
[48] The spaces in between being what Yoriko Otomo calls for international lawyers to look towards in the name of revolutionising international law. See; Yoriko Otomo, 'Searching for Virtue in International Law,' in Sari Kouvo and Zoe Person (eds.), *Feminist Perspectives on International Law: Between Resistance and Compliance?* (Hart, 2014), p. 33-46.
[49] Deleuze and Guattari, above note 42.
[50] Irigaray, above note 15.
[51] Joan Scott, *The Fantasy of Feminist History*, (Duke University Press, 2012).
[52] Irigaray, above note 15, Sophocles, *Antigone*, (Penguin, 2015).
[53] Margaret Whitford, 'Luce Irigaray and the Female Imaginary,' *Radical Philosophy*, (1986), 43, p. 8.

This section will consider theories of subjectivity, including Irigaray's feminine, moving on to consider feminist new materialist subjectivities, which move beyond lack. By noting that the humanist white man is not the centre, these theories open up models of legal subjectivity and thus open up the possibility of an order which is not based on lack.

The end of humanity, states Braidotti, 'has been *leitmotif* in European philosophy ever since Friedrich Nietzsche proclaimed the 'death of God' and of the idea of Man that was built upon it.'[54] The Death of God and the existential void that God's death left behind was replaced by liberal, enlightenment thinking, impacting on the way in which the subjectivity of "the human" was then conceived. International legal subjectivity was also subject to this model, this subjectivity being male, bounded, individual, white and wanting to make a profit, seeing himself always above other entities including non-human animals and the environment.[55]

It must of course be noted that international law is not focused on the human subject in a literal sense. As the previous chapters have shown, international legal personality comes in many forms, with the individual being only one incarnation, with others, for example, including corporations and sovereign states. However, international law remains deeply humanist in that it centres on a particular form of subjectivity. This subjectivity, which is man made in God's image is absolute, individual, and bounded.[56]

Hirst and Michelsen state that the ''death of God' represents an opportunity for new and different forms of self-realising subjectivity.'[57] Nietzsche, too, in discussing subjectivity in the wake of that death, states that we must '*become who we are* – human beings who are unique, incomparable, who give themselves laws, who create themselves.'[58] It seems that the Death of God could, if fully abandoned as blueprint, open up a space for re-thinking what it means to be both human and nonhuman in various ways, looking beyond the absolute, idealised form of subjectivity promoted by international law now.

While the dream of an absolute, holy, One God may haunt modern Judaic-Christian Western thinking, it must be noted that not all religions believe in one absolute whole. There are many pluralistic religions worldwide where people believe in multiple Gods or no Gods at all,

[54] Braidotti, above note 26, p. 6.
[55] See; Grear, above note 1, Naffine, above note 1; Hilary Charlesworth, 'The Sex of the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 251-68.
[56] Charlesworth, Ibid.
[57] Aggie Hirst and Nicholas Michelsen, 'Introduction: International Relations and the 'Death of God,' *Millennium*, (2013), 42(1), p. 106.
[58] Friedrich Nietzsche, *The Gay Science*, (Cambridge University Press, 2011), p 189.

believing, rather, in a system of becoming. Nietzsche recognised the fact that nihilism, to some, may make no sense.[59] It is thus precisely because of international law's Western Christian origins and the structure it inherited from Western Christian thinking that international law is a system conceptualised as whole and complete and therefore setup to always be in lack.

Western philosophy too, however, has not solely only ever been about the bounded, individual man – with God making man in his image and man thus making man in God's image. As discussed throughout this thesis so far, feminists have long been challenging the subjectivity which enlightenment thought has worked to impose as universal: from challenging the notion of the "neutral" legal person as per Grear[60] and Naffine,[61] to challenging broader notions of subjectivity, as per Irigaray.[62] However, challenging and changing models of subjectivity in both these instances is more than about just adding women and stirring. Intersectionality has shown how the needs of women are diverse and complex[63] and cannot be reduced to singular notions of woman or femininity which can be added in and stirred. As noted in Chapter Two, however, I read Irigaray's feminine as not about woman per se, but, rather, as representing the other; the values society has chosen not to take up.[64] To challenge and change subjectivity, a broader challenge to the philosophical foundations and structures of Western thinking is needed. This includes challenging humanism itself and the hierarchies it imposes, searching instead for the values which have been silenced.

This section thus considers posthuman theories and, more specifically, feminist new materialism (as a strand within posthuman thinking), posing these theories as some of the strongest contemporary challenges to the humanist blueprint. These theories look towards new modes of subjectivity which, if applied to international law and its concept of the subject/international legal personality, could fundamentally change the way international law is thought and practised. I have already briefly defined posthumanism in Chapter Two. To summarise, I noted that the critical theory strand of posthumanism that I wish to focus on comes broadly from French postructuralist thought which is, by and large, anti-humanist.[65]

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[59] Friedrich Nietzsche, *The Complete Works of Friedrich Nietzsche, Vol XIV, The Will to Power: An Attempted Transvaluation of all Values*, ed. Oscar Levy, (T.N. Foulis, 1910), p. 6.
[60] Grear, above note 1.
[61] Naffine, above note 1.
[62] Irigaray, above note 15.
[63] For example, see: Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,' *Stanford Law Review* (1991), 43(6), p. 1241-1299.
[64] Margaret Whitford, 'Luce Irigaray and the Female Imaginary: Speaking as Woman,' *Radical Philosophy, (*1986), 43(7) (3), p. 8.
[65] Braidotti, above note 26, p. 26.

Posthumanism is post-humanism and thus destabilises the liberal, humanist (bounded, individual, male) subject as well as post-anthropocentric, this challenging the theoretical arrogance that man/the human is above all else, including non-human animals, the environment, matter and technological subjects.[66] The theory itself is not post-*humans*, however, but like all the "posts" in theory, works to both rupture and continue with what came before (the " before" being humanism). Posthumanism is also explicitly anti-binary and purposefully "impure" in that it actively refuses to enter dialectical or binary thinking, situating itself exactly in the spaces in between, the unidentifiable and the overflowing – the spaces that, as outline above, have been noted to be the spaces where revolution and structural change could be found.[67] Posthuman theory does this in many ways but, fundamentally, posthuman theory challenges notions of subjectivity, complicating them and replacing them with 'a non-dualistic understanding of nature-culture interaction.'[68] Thus, posthumanism explicitly rejects the idea of there being one, universal God, but instead proposes a universal made up of multiplicity. 'Supported by a monotheistic philosophy, which rejects dualism, especially the opposition nature/culture,' posthumanism stresses, instead, the 'force of living matter' and the ways in which nature/culture have become blurred by 'scientific and technological advances.'[69] Due to this, posthumanism, it is posed, is a helpful framework for thinking about questions of subjectivity as they arise in relation to ideas of international law.

Like posthumanism, feminist new materialism calls into question the dualities that traditional philosophy has established, including mind/body, culture/nature, subject/object, stating that there is a need to ensure that feminist theory does not work to perpetuate such binaries, for example, through considering cultural constructions of gender alone as opposed to also thinking nature-matter seriously.[70] It can thus be understood as a strand of posthuman thinking; both theories working to dismantle binaries and to de-centralise the particular figure of humanist thought who is situated as being above all matter.

While this thesis, drawing on feminist legal theory, has already worked to highlight the ways in which certain humans are hierarchised over others, including the white male subject over

[66] Ibid.
[67] Otomo, above note 48; Haraway, above note 26.
[68] Braidotti, above note 26, p. 3.
[69] Ibid.
[70] Karen Barad, 'Posthumanist Performativity: Towards and Understanding of how Matter comes to Matter,' in Stacy Alaimo and Susan Hekman (eds), *Material Feminisms*, (Indiana University Press, 2008), p. 120-56.

both women and colonial subjects,[71] this chapter considers the other hierachising element embedded within humanism: the idea that the human himself is hierarchised over all else including nonhuman-animals and nature-matter.

4.1 Culture-Nature-Matter and the Human-Nonhuman

As Grear notes, 'Our relationships with our 'environments' are never neutral, for we are unavoidably co-constituted by and with the 'landscapes' or 'spaces' we inhabit, not only in material, but in social and discursive dimensions.'[72] However, in the nature/culture binary which structures Western thinking, nature has always been "other."[73] Enlightenment thinking contributed to this othering with science and reason, two of enlightenment's key concepts, being the tools through which nature was seen as conquerable.[74] An example of such thought can be seen in the colonial project, where rapid industrialisation worked in assemblage with racism and other imposed hierarchies to ensure that Europe made a profit at the expense of nature and the people living within it.[75] Understandings of the humans as being those which rule *over* as opposed to those who live *within* nature has led Haraway to state that 'we must find another relationship to nature besides reification and possession.'[76]

In new materialist work, the binary distinction between subject/matter is questioned[77] and nature formulated as part of a wider material world. While new materialism is a broad area of scholarship, I will be focusing mostly feminist new materialist works in line with the aims of this thesis: to push at the limits of feminist approaches to international law. Feminist new materialism is often not about women per se, but comes from a feminist history and ethics; a history and ethics to which I am committed. Feminist new materialism encompasses a broad range of theories and ideas. In summary, it aims to bring the material back to the forefront of philosophical inquiry. Noting that the postmodern turn in feminism created many wonderful new ideas and highlighted many things, including intersectionality and the need for a more

[71] See; Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal,* (1999), 40, p. 1-71; Charlesworth, above note 55; Grear, above note 2.
[72] Anna Grear, 'Human Rights, Property and the search for 'Worlds Other,'' *Journal of Human Rights and the Environment*, (2012), 3(2), p. 195.
[73] See, for example; Donna Haraway, 'The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others,' in *The Haraway Reader,* (Routledge, 2004), p. 64; Elizabeth Grosz, *Time Travels: Feminism, Nature, Power,* (Duke University Press, 2005).
[74] Haraway, Ibid., p. 66.
[75] See, for example, Grear, above note 2.
[76] Haraway, above note 73, p. 64.
[77] Haraway, above note 26, p. 292.

complex understanding of gender as being more than the "woman",[78] feminist new materialism notes that, in focusing on language, culture and discourse;[79] matter has been left out.[80] Thus, states Barad, 'language has been granted too much power:'[81] everything has been turned into 'a matter of language or some other form of cultural representation,' even matter itself.[82]

Feminist theorists have long worked to challenge the assumption of women as being related to nature and the way this essentialist assumption has been used to construct women as inferior subjects.[83] Feminist thinkers, therefore, have worked instead to show that gender is a cultural construct.[84] While there have been many revolutionary ideas which have come about from these theories, they continue for the most part, however, to base themselves heavily on a nature/culture divide.[85] Feminist postmodernists, in 'arguing that these significations are cultural ascriptions with no essential truth,'[86] work to ensure that the question of nature or matter becomes '*entirely* displaced… it can have no frame of reference that isn't properly cultural.'[87] Everything, instead, in the aim of showing the cultural construction of the gender system, becomes interpreted through discourse. This is problematic, however, as such representationalism separates the world into words and things, thereby ignoring the linkage between the two, leading Barad to state that 'the only thing that does not seem to matter anymore is matter.'[88]

One example of this can be seen in the position of the body in feminist theory. While Anglophone postmodern feminism,[89] broadly, does not deny the materiality of the body, 'they do tend to focus exclusively on how various bodies have been discursively produced, casting

[78] See, for example; Judith Butler, *Gender Trouble,* (Routledge, 2006); Crenshaw, above note 63; Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses,' *Feminist Review*, (1988), 30(1), p. 61-88.
[79] Stacy Alaimo and Susan Hekman, 'Introduction: Emerging Models of Materiality in Feminist Theory,' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms,* (Indiana University Press, 2008), p. 3.
[80] Stacy Alaimo, 'Trans-Corporeal Feminisms and the Ethical Space of Nature,' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms,* (Indiana University Press, 2008), p. 237.
[81] Barad, above note 70, p 120.
[82] Ibid.
[83] For an extensive summary of this point, see; Rosi Braidotti, 'Posthuman Feminist Theory,' in Lisa Disch and Mary Hawkesworth, *The Oxford Handbook of Feminist Theory*, (Oxford University Press, 2016), p. 673-98.
[84] For example see: Butler, above note 78.
[85] Stacy Alaimo, 'Trans-Corporeal Feminisms and the Ethical Space of Nature,' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms,* (Indiana University Press, 2008), p. 239.
[86] Vicki Kirby, 'Natural Convers(at)ions: Or, What if Culture was really Nature all along?' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms,* (Indiana University Press, 2008), p. 220.
[87] Ibid.
[88] Barad, above note 70, p. 120.
[89] As highlighted in Chapters One and Two through my discussion of the work of Irigaray, other postmodern approaches outside the Anglophone world do exist. For the purposes of this chapter, I will be using 'postmodern feminism' to denote Anglophone postmodern feminism, however, particularly strands which are associated with anti-essentialism which is how this term is often used.

the body as passive, plastic matter.'[90] Thus, as Kirby notes, drawing on an interview she conducted with Butler, the postmodern work of scholars such as Butler does disrupt the mind/body duality in that, broadly, the body is seen as 'thinking material,' yet the 'nature of biology' is deemed to be cultural and thus something which is constructed and interpreted.[91] Kirby's point is made in reference to the fact that Butler, in this interview, problematises the possibility of the representation of biology and nature, noting that she believes this representation will always be marred by *human* representation.[92] Thus, in Kirby's words, Butler's approach can been seen as one where 'essential and natural truth is veiled behind culture's misguided attempts to represent it.'[93] In this sense, the work of author's such as Butler, Kirby believes, is limited in its deconstruction of such dualities.[94] Through considering all as a cultural construct, matter is itself seen as only ever interpreted *through* culture and thus *as* culture. To accept that culture is all or to focus on culture alone, however, as Kirby notes, risks working to collapse into the same gendered binary logic of Descartes: I think therefore I am;'[95] mind over body, culture over nature - whereby the body, once again, becomes displaced and disregarded as a sight of philosophical knowledge. This hierachising, Kirby points out, also works to create various assumptions: that 'humanness is profoundly unnatural' and that language and ideas are separated from the natural world,[96] this again being reminiscent of the mind/body duality.

Kirby rebuts the cultural construction stance, instead choosing to draw on the work of Latour who, in his Actor-Network theory, understands "the social" 'in a more comprehensive way – as a confluence of forces and associations, a collective assembly of human *and* nonhuman interactions that together produce social facts with referential leverage.'[97] Through this perspective, the world is seen as a network, a criss-crossing of multiple assemblages, both human and nonhuman – with the social being both situated in nature and culture and coming from both.[98] Taking such an approach, however, is not to claim that Butler and the postmodern feminists like her are *wrong* in an oppositional, binary manner but, rather, to add to the debate

[90] Alaimo, above note 85, p. 237.
[91] Kirby, above note 86, p. 221.
[92] Soenser Breen et al, ''There is a Person Here': An Interview with Judith Butler,' *International Journal of Sexuality and Gender Studies* ,(2001), 6(1/2), p. 7-23.
[93] Kirby, above note 86, p. 225.
[94] Ibid.
[95] Rene Descartes, *Discourse on Method and Meditations on First Philosophy*, trans. Donald A. Cress, (Hackett, 1998).
[96] Kirby, above note 86, p. 220.
[97] Ibid. p. 225; Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory*, (Oxford University Press, 2007).
[98] Latour, Ibid.

and argument, assuming Butler's stance and working both with and beyond it. As noted at the start of this thesis and as Kirby notes, it is key to be generous to those we read and not to always to situate oneself as against another thinker, but rather, to sit within that thinker and read their work your way, to take readings in new or different directions without just working to dismiss..[99] Reading and working in this way, too, can be one way to avoid, as Hemmings highlights, the problematic narratives that feminists tell of themselves and of the story of feminism. Hemmings notes that these stories of feminist histories are almost always told of in terms of progress, loss or return narratives.[100] She notes the problems with such narratives, stating that, instead, there is a need to complexify the stories we tell of feminism.[101] Reading with generosity instead of promoting a "progress" narrative of feminist theory whereby one dismisses the other stance/texts and "leaves them in the past," feminists may work horizontally instead, noting links and connections as well as disconnections in a non-binary manner.

Thus, following this, to avoid merely dismissing postmodern feminists like Butler and the trap of posing feminist new materialism as the new voice of "progress" in feminist thinking, it is important to take Butler and the postmodern feminists seriously. One key aim of many of the postmodern feminist thinkers was to work to de-essentialise what it means to be a woman. This included working to critique essentialist discourse that sees women as being inherently linked to nature.[102] Thus, to follow these theorists, there is a risk, in returning to the material and nature, that one could end up working to re-essentialise women.

Alaimo directly addresses this problem, stating that matter, nature and the body can be explored *without* essentialising them. In fact, Alaimo argues that it is only by directly engaging with matter that one can truly begin to move away from essentialism and 'render biological determinism "nonsense."'[103] Birke's work exemplifies this approach, noting that the body is not something essential but rather is something that is 'changing and changeable… *transformable.'*[104] Cells, are 'constantly renew[ing] themselves' and the inside of the body is 'constantly react[ing] to change inside or out, and act[ing] upon the world.'[105] The body is not

[99] Haraway, above note 26; Rosi Braidotti, 'Posthuman, All Too Human: Towards a New Process Ontology,' *Theory, Culture and Society*, (2006), 23(7-8), p. 200-1; Haraway, above note 73, p. 292.
[100] Clare Hemmings, *Why Stories Matter: the Political Grammar of Feminist Theory*, (Duke University Press, 2011).
[101] Ibid.
[102] Butler, above note 78.
[103] Alaimo, above note 85, p. 241.
[104] Lynda Birke, 'Bodies and Biology,' in Janet Price and Margrit Shildrik (eds.), *Feminist Theory and the Body Reader*, (Routledge, 1999), p. 45.
[105] Ibid.

a fixed essence but is always changing, always in movement. By thinking through the body while ensuring that the body is, itself, not seen as fixed, one can work beyond the nature/culture binary while steering clear of the risk of essentialism. This, of course, need not apply only to the body but to anything that is usually associated with the nature side of the nature/culture binary. Further, to see the other side of this argument, thinking through the body in a non-essential and always changing way allows for understandings of the body which embrace what would otherwise be deemed cultural change. Though rejecting the nature-culture divide such perspectives may pronounce that, 'If nature is unjust, change nature!'[106]

Drawing directly on Butler, Barad takes Butler's concept of performativity[107] and diffracts it through a posthuman lens.[108] She notes that performativity, if taken seriously, is not about representation and the power of language at all but is, in fact, a 'contestation of the excessive power granted to language to determine what is real.'[109] Thus, Barad suggests that performativity has been misunderstood, stating that performativity directly works to challenge the power given to language.[110] Barad thus highlights how Butler herself notes the problems of representation, discussing how, drawing on Foucault, the subject who is being represented is also always defined by these terms, 'formed, defined, and reproduced in accordance with the requirements of those structures,'[111] i.e. the structures of human interpretation. Thus, in relation to the feminist subject, for example, this subject is itself a 'discursive formation… and the feminist subject turns out to be discursively constituted by the very political system that is supposed to facilitate its emancipation.'[112] In other words, the subject of feminism is itself constructed and thus possible emancipation becomes already, also, partly constructed. Barad notes, however, that Foucault and, in turn, Butler, whilst both aiming to consider the body, end up rendering the body passive[113] in that it is something defined and constructed, embedded in power as opposed to something which, in Barad's view, actively participates in power.[114] 'The implicit reinscription of matter's passivity is a mark of extant elements of representationalism that haunt his [Foucault's] largely post-representationalism account.'[115] Power is not just

[106] Laboria Cuboniks, 'Xenofeminism: A Politics for Alienation,' http://www.laboriacuboniks.net/, (accessed 21/09/2017).
[107] Butler, above note 78.
[108] Barad, above note 70, p. 122.
[109] Ibid., p. 121.
[110] Ibid.
[111] Butler, above note 78, p. 2.
[112] Ibid.
[113] Karen Barad, 'Getting Real: Technoscientific Practises and the Materialization of Reality,' *Differences: A Journal of Feminist Cultural Studies*, (1998), 10(2), p. 91.
[114] Barad, above note 78, p. 128.
[115] Ibid.

discursive and social, with matter being an end product but, rather, power is also material.[116] Performativity, to Barad, thus, when read diffractively through a posthuman (feminist, queer, science studies) lens, is to move beyond representationalism and language to consider the action, the doing:[117] the ways matter participates and thus comes to matter.[118]

It is key, therefore, not to throw out cultural analyses but instead to add and situate the material within this analysis, noting that matter is embedded within the social and political and vice versa.[119] Thus, feminist new materialists do not disagree with the postmodern feminist position that there is no outside of language (as Butler for example, suggests in her interview with Kirby[120]) but, rather than considering nature as something always to be interpreted by human language, feminist new materialists such as Kirby displace the centrality of human language, noting that matter, too, speaks and performs.[121]

Consequently, feminist new materialists do not accept, as representationalism does, that words and things are distinct. They note, rather, that seeing them as distinct works to diminish matter through the imposition of the subject (human)/object (matter) binary, thus reducing matter to *'thingification.'*[122] Barad, in the aim of avoiding such thingification, discusses the relations between object and subject, nature and culture, through what she terms agential realism.[123] Agential realism works to move beyond the liberal account of individualistic agency whereby the human subject individually chooses their own path. Thus, for Barad, agency, or, rather, agential realism, is a 'matter of intra-acting: it is an enactment, not something that someone or something has.'[124] In this sense, both matter and culture are active, as are humans, nonhumans and nature/matter.

Following on from this, Kirby agrees with Barad that nature does not need a 'human scribe to represent itself, to mediate or translate its identity.'[125] Nature is self-organising and has a language of its own, a series of networks: 'nature already makes logical alignments that enable it to refer productively to itself, to organize itself so that it can be understood.'[126] The

[116] Ibid.
[117] Ibid., p. 122.
[118] Ibid.
[119] Alaimo, above note 79, p. 243.
[120] Soenser Breen et al, above note 92.
[121] Kirby, above note 86, p. 214-236.
[122] Barad, above note 70, p. 130.
[123] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning*, (Duke University Press, 2007).
[124] Ibid., p. 178.
[125] Kirby, above note 86, p. 232.
[126] Ibid.

relationship between the human and nonhuman in this paradigm becomes, therefore, more than one (the human) interpreting the other (the nonhuman/matter) through the imposed lens of a hierarchical binary.[127] Instead, it is shown how both work in assemblage with one another.

Nature, thus, can be seen as having agency in that it changes and adapts. The human-nature assemblage *is* an interconnection of agency: 'the relation between humans and the nonhuman world is thus reciprocal. Humans adapt to nature's environmental conditions; but when humans alter their surroundings, nature responds through ecological changes.'[128] Nature changes, adapts, is un-essential and has agency the same way that cultural constructivism has shown that gendered subjects are not fixed and have agency. Both subjects, the human and nonhuman, are also not distinct, but rather, situated always in relation and connection to one another. In this sense, agency is never "pure" nor absolute, in the way in which concepts of sovereignty and enlightenment constructions of subjectivity have proposed (the free, humanist individual), but rather, agency is always distributed and in connection, reliant on its connection to other agential entities and beings.[129] While the work of Butler, for example, does consider agency beyond the paradigm of the liberal, humanist free agent, noting the need to understand social connection, feminist new materialists such as Barad push this further, allowing the agency of the nonhuman and the material to be considered too.[130] In Haraway's words; 'the world is a witty agent' with an 'independent sense of humour.'[131]

The feminist new materialist paradigm avoids the pitfalls of essentialising nature and posing it as something pre-existing and outside to language; as the unpresentable in culture as in a cultural constructivist analysis. The paradigm also avoids the problematic stance that nonhumans need the human to interpret it/them. Both these pitfalls inevitably work to reinstate the human/nonhuman binary through the reification of nature's difference. Thus Kirby chooses to note the assemblage between the human and nonhuman world and de-centre humanity as the all mighty interpreter of all.[132] While she does displace the *centrality* of the human and of human language, she does not eradicate this place. Instead, she complexifies it, noting that humans are not the only ones with language. Matter, notes Alaimo, 'is variously, material-

[127] Barad, above note 112, p. 104-5.
[128] Carolyn Merchant, *Ecological Revolutions: Nature, Gender and Science in New England,* (University of North Carolina Press, 1989), p. 8.
[129] Alaimo, above note 185 p. 246.
[130] See; Judith Butler and Athena Athanasiou**,** *Dispossession: The Performative in the Political*, (Polity Press, 2013); Barad, above note 70.
[131] Donna Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature,* (Free Association Press, 1991), p. 199.
[132] Kirby, above note 86, p. 232.

semiotic, inter-corporeal, performative, agential, even literate.'[133] Nature and matter can write, even if they do not always speak the language of humans. This can be exemplified by the fungal network, networks of plants and fungi having been shown to work together in order to warn one another about dangerous fungi and aphid attacks.[134]

The human and the nonhuman world are embedded and always situated in connection with one another.[135] Thus, the paradigm changes under a feminist new materialist view which is not about the way humans interpret nature but about 'our participation *within* nature.'[136] Feminist new materialist conceptualisations of nature-culture have clear implications for the way subjectivity is theorised. Alaimo directly discusses these implications, calling for an understanding of the human and of subjectivity through what she calls 'trans-corporeality.' By this she means that the subject needs to be understood, in all its 'material fleshiness' as 'inseparable from "nature" or "environment"' and thus, rather, as deeply embedded and in connection with it.[137] Therefore, a 'material, trans-corporeal ethics would turn from the disembodied values and ideals of bounded individuals towards an attention to situated, evolving practises that have far-reaching and often unforeseen consequences for multiple peoples, species, and ecologies.'[138] The human becomes de-centred in this paradigm and is situated as in connection with matter as opposed to something that is distinct from it. Agency and consciousness are reconceptualised, with matter and things, too, being seen as having an interacting agency alongside that of the human and nonhuman animal. Further, the matter of the human body is, itself, seen as a speaking and performing entity; one which interacts with human constructed languages.[139]

4.2 Nunga Jurisprudence

I have chosen to re-think Western subjectivity through modes of embeddedness and connectivity with nature-matter through focusing on theories which come from a European lineage (many of which have been greatly inspired by the work of Spinoza).[140] Spinoza haunts

[133] Alaimo, above note 85, p. 244.
[134] Nick Fleming, 'Plants talk to each other using and internet of fungus,' BBC 2014, http://www.bbc.com/earth/story/20141111-plants-have-a-hidden-internet (accessed 29/11/2017)
[135] Kirby, above note 86, p. 231.
[136] Barad, above note 113, p. 105. Emphasis author's own.
[137] Alaimo, above note 85, p. 238.
[138] Ibid., p. 253.
[139] Barad, above note 70, p. 120-156.
[140] Benedict de Spinoza, *The Ethics*, trans. R.H.M. Elwes, (ebooks@Adelaide, University of Adelaide Press, 2014), https://ebooks.adelaide.edu.au/s/spinoza/benedict/ethics/complete.html (accessed 29/11/2017).

this chapter, as the ethics which Europe had and chose not to take up,[141] with Deleuze and feminist posthumanists such as Braidotti having been deeply inspired by Spinoza.[142] I have, on the other hand, not drawn on Spinoza directly precisely due to the aims of this thesis: to consider feminist approaches. I have specifically read the feminist new materialists given the feminist lens through which they read theorists such as Spinoza, Deleuze and Latour.[143]

The feminist new materialist account of subjectivity, however, is quite definitely not unique to feminist new materialism alone. There are clear overlaps with many other bodies of thought. This includes the theorists noted above, as well many non-European bodies of thought. My focus on feminist new materialism is not, however, done to intentionally erase non-European knowledge bases. I have, however, specifically chosen to focus on a Western lineage of such ideas given my position as someone who is white and European. There are two reasons for this decision. First, it is important to disrupt dominant histories of European though and to note the alternative values and theories which have long existed in European knowledge. This is because it is important to refuse the erasure of such theories within the history of European thought. Consequently, the highlighting of these alternative accounts and histories works to disrupt the power of dominant narratives, showing that such narratives were never universal (as they proclaim to be), not even within the West.

Second, while it is important to note non-European knowledge bases so as not to render myself complicit in their erasure, it is also problematic for me to bring such knowledge bases into to my own, European understanding of the law and the world. Such an approach risks appropriation in that bringing such thought to my own, European perspective is already to limit such thought to my European frame. While, of course, I am aiming to challenge and change the dominant, European structured frame of international law, there is something in non-European knowledge bases and jurisprudential models which may always escape me, always lie within the unknown to me due to my positionality. Despite this, there remains a need to note that alternatives are and were available within European and non-European thought and to note that these alternatives have not been taken up and have, rather, been silenced through erasure, colonisation and domination. In short, I do not wish to bring and therefore inevitably limit and misunderstand such thought through bringing it to my own, European frame. However, I also

[141] Ibid.; Braidotti, above note 26.
[142] Braidotti, Ibid.; Gilles Deleuze, *Spinoza: Practical Philosophy*, trans. Robert Hurley, (City Lights, 2001).
[143] See, generally; Alaimo and Heckman, above note 79.

believe it is important to note that such thought does exist so as not to erase it the way the colonial project sought to do.

This section, therefore, will discuss non-Western conceptions with a focus on Watson's work on Australian indigenous (Nunga) jurisprudence.[144] This is done, not in the aim of appropriating such approaches but, rather, to highlight their existence and the vast amount of knowledge within such models. This section by no means provides a literature review of the various non-European approaches which I could have chosen to draw on as examples. I have, rather, chosen to focus on Watson's work precisely because of her position as a legal scholar and her focus on jurisprudence. Her work is thus drawn on as an exemplification, both of the values which do exist and are lived as well as of an example of the ways in which Europe and the Global North have actively worked to colonise, displace and destroy such knowledge bases, choosing, instead, to promote a liberal, enlightenment, lacking subject and situate such a subject at the centre of a thereby lacking jurisprudential model.

Watson belongs to the 'Tanganekald, Meintangk Boandik First Nations Peoples, of the Coorong and the South East of South Australia.'[145] Watson describes how the colonisation of what is now called Australia occurred in the name of God, bringing to this "*terra nullius*" the rational organised system of the state, the only way, she notes, for so-called "world history" to 'take account of peoples.'[146] However, she rebuts the Western system and the idea that it is the site of "progress" through a discussion of Nunga jurisprudence.[147]

Watson provides an example of an alternative view of subjectivity, law, nature and sovereignty which sits in opposition to the Western imposed structures of God/the state, describing a notion of subjectivity which moves beyond the limits of the Western subject. Thus, she notes, the legal subject in Nunga jurisprudence is already free of many of the problems which posthuman theorists and feminist new materialists have noted with the Western (legal) mode of subjectivity. The (legal) subject in this jurisprudential model is already embedded, material, situated as within the community and the environment, in connection as opposed to being a fictional isolated individual resting in hierarchy above all else.[148] The subject of the law here is not lacking, but overflowing: 'Our laws are lived as a way of life… Law is different to the

[144] Irene Watson, 'Buried Alive,' *Law and Critique*, (2002), 13, p. 253-269.
[145] See; 'Professor Irene Watson' professional page, University of South Australia, http://people.unisa.edu.au/Irene.Watson (accessed 29/11/2017).
[146] Watson, above note 144, p. 254.
[147] Ibid.
[148] Ibid.

European idea of sovereignty, different in that it is not imposed by force of arms and does not exclude in its embrace.'[149] Law here is not about property (and state sovereignty as a way of claiming that property): 'From this the land becomes enslaved and a consumable which is traded or sold in and out of existence.'[150] Law is not the Western system at all, Watson argues, but rather, 'it breathes slightly under the colonising layers.'[151]

This different way of seeing the law is non-hierarchical. Further, law itself is not seen as something man-made, nor distinguishable from the whole, for 'Law is in all things. It has no inner or outer, for one is all and all is one. The idea of and inside and outside determines boundaries, and boundaries that have been constructed from a place of power, invoke a closure. We are the natural world.'[152] In this sense, Watson notes how the jurisprudential model she describes also takes account what is outside of human interpretation, including both the hidden and the visible laws of nature and matter. Thus, she continues, 'our law embraces all things in the universe'[153] with it and its people being deeply embedded and in connection with and to the land.[154]

Watson provides one example of the way in which matter and nature can be seen in a different light. Her Nunga worldview is similar to that which is proposed in posthuman and new materialist thought in that matter and nature is not othered, the human is not deemed central, binaries and categories are resisted, and subjectivity is understood not as singular but as flowing and connected. As Haraway states, 'nature is precisely *not* to be seen in the guise of the Eurocentric productionism and anthropocentrism that have threatened to reproduce, literally, all the world in the deadly image of the Same[.]'[155] Watson's article describes a law where assemblages and connections are noted rather than closed off and hierarchised over one another, where matter is given importance and where nature/culture and subject/object were never constructed in order to need deconstruction.[156] Her description of Nunga jurisprudence thus shows, not only the values Western society chose not to take up, but shows the ways in

[149] Ibid., p. 255.
[150] Ibid., p. 256.
[151] Ibid., p. 266; For other, similar work on Australian Indigenous jurisprudence and the land, see: C.F. Black, *The Land is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence*, (Routledge, 2010).
[152] Watson, Ibid., p. 226.
[153] Ibid., p. 269.
[154] Ibid., p. 254.
[155] Haraway, above note 73, p. 66.
[156] Watson, above note 144.

which Western society actively tried and is still trying to erase such ideas through domination and colonisation.

4.3 Environmental Injustice and Legal Personality for the Environment

Noting how intellectual individualism is unthinkable in most disciplines now, including in the natural sciences, and highlighting the ways in which biological sciences have shown relations to be multi-special, Haraway questions how 'Anthropos,' the embodiment of individual humanism, can still be used to describe the current era.[157] The anthropocene, notes Haraway, could just as easily be called the capitalocene which, as noted in Chapter Three, describes the 'system of power, profit and re/production in the web of life.'[158] Moving away from both, Haraway proposes, instead, that it is time for a focus on the Chthulucene. The Chthulucene is the 'past, present and yet to come,'[159] the always ongoing possibility of inter-species, inter-matter connection where 'nothing is connected to everything, everything is connected to something.'[160] The Chthulucene is the possibility of something else, of something more connected, less hierarchical. Feminist new materialism, I propose, if applied to the concept of international legal personality, could provide a means through which to put into process the Chthulucene, working towards 'something… more liveable.'[161]

As noted above, feminist new materialist understandings of subjectivity fundamentally challenge the humanist, liberal account of both anthropos and the international legal subject, working to directly rebut the bounded, individual and autonomous nature of the subject and proposing, instead, an alternative model under which the subject is connected to and embedded within nature matter and the nonhuman.[162] It is clear such a model, if applied to international law and the concept of international legal personality, could fundamentally change international law itself. This section will consider current attempts to claim legal personality for the environment, both domestically and internationally, before going on to consider the

[157] Donna Haraway, 'Tentacular Thinking: Anthropocene, Capitalocene, Chthulucene,' *e-flux*, (2016), 75, http://www.e-flux.com/journal/75/67125/tentacular-thinking-anthropocene-capitalocene-chthulucene/ (accessed 26/11/2017).
[158] Ibid.; Jason Moore, 'The Capitalocene, Part I: on the nature and origins of our ecological crisis,' *The Journal of Peasant Studies*, (2017), 44(3), p. 594; Donna Haraway, *Staying with the Trouble: Making Kin in the Chthulucene*, (Duke University Press, 2016).
[159] Donna Haraway, 'Anthropocene, Capitalocene, Palntationocene, Chthulucene: Making Kin,' *Environmental Humanities*, (2015), 6, p. 160.
[160] Haraway, above note 157.
[161] Donna Haraway, 'Anthropocene, Capitalocene, Chthulucene: Staying with the Trouble,' Lecture given by Donna Haraway at the University of California, Santa Cruz, 05/09/2014, https://vimeo.com/97663518 (accessed 20/09/2016).
[162] Barad, above note 70; Alaimo, above note 85.

risks present in such a project. The chapter will then conclude by arguing for the need to consider feminist new materialist accounts of subjectivity within projects seeking to claim legal personality for the environment.

However, before considering the ways in which legal personality is being claimed for the environment and the usefulness of feminist new materialism in such a project, there is a need, first, to return to noting the problems with the current structure and the urgency at which change is needed. I have purposefully chosen to use the term 'environmental injustice' in this section. I have borrowed the focus on injustice from Grear, such a term allowing for a reflection on the ways in which humanist, colonial, gendered and anthropocentric legal structures have worked to contribute and construct the way the environment is seen both at law and more broadly.[163] I do not wish, therefore, to outline the many important statistics and examples of the ways in which the environment is in crisis, rather, I wish to consider the law's complicity in creating such a crisis. As a project aiming to consider and challenge the structure of international law, noting the ways in which this structure is biased, it is at the legal-structural level that I am therefore most interested, looking at how law has worked to create and sustain environmental injustice. Such a focus is needed in the hope of being able to challenge and change such structures.

I have already outlined, in Chapter Three, some of the ways in which the law has worked to other nature. This can be seen in the colonial project, a project which worked to assert European dominance, exploiting colonised peoples and their environments.[164] In the contemporary, I highlighted the ways in which the structure of international legal personality and even the application of human rights law has worked to give great power to corporations while working to allow these corporations to escape liability for their actions, including actions which harm the environment.[165] It thus becomes clear that humanist, anthropocentric law is also capitalist law.[166] Such a phenomenon has led Turner to argue that 'the very design of the law itself is fundamentally predisposed to environmental degradation and forms part of a dysfunctional

[163] Anna Grear, 'Towards 'Climate Justice'? A Critical Reflection on Legal Subjectivity and Climate Injustice: warning Signals, Patterned Hierarchies, Directions for Future Law and Policy,' *Journal of Human Rights and the Environment*, (2014), 5, p. 103-33.
[164] Ibid.
[165] Ibid. For further information, see Chapter Three.
[166] Grear, above note 2, p. 109.

global legal architecture which cannot achieve environmental sustainability.'[167] The law is complicit in creating environmental injustice.[168]

As Grear notes, however, colonialism did not only colonise peoples and their environments but, further, colonialism coincided with the excision of 'indigenous ontologies and epistemologies' such as those described by Watson above.[169] The colonisation and erasure of knowledge bases beyond dominant Western accounts cannot be forgotten. Thus, as Grear notes, for some form of climate or environmental justice, there is also a need to look towards deeper, structural and ontological changes, working to challenge the very definitions of subjectivity which lay at the heart of the law and the legal person.[170] International law is a lacking model. Based on a flawed account of subjectivity/international legal personality which is both liberal and humanist, international law fails to account for differences between humans as well as the connections between the human, matter and the nonhuman animal. Feminists, however, can work to de-centre the human in international law in a strategic way, using what exists. International legal personality is already somewhat post-human in both domestic and international law, in that non-human entities such as the corporation and the state already do have international legal personality (as well as domestic legal personhood).[171] Unfortunately, this understanding of legal personality has, for the most part, only been applied to subjects which fit the law's neo/liberal, enlightenment, capital orientated aims and the dominant modes of subjectivity such aims promote. Even within environmental law, an area of law which has the possibility to escape the shackles of humanism, the subject is humanist or, in Grear's terms, is *'Anthropos.'*[172] The human remains then centre of the paradigm of environmental law, the

[167] Stephen J. Turner, *A Global Environmental Right*, (Routledge, 2013), p. 32.
[168] To discuss climate injustice is not, however, to pose the climate justice movement as the only answer. Climate justice encompasses many elements though, broadly, the climate justice movement seeks to highlight climate change as an important political and ethical issue. The climate justice movement is diverse, including multiple perspectives such as those working to promote stronger political frameworks for the protection of the environment as well as those who note the links between climate change and broader structural inequalities. While noting the need to look towards climate justice, looking at environmental issues in the broader context of structural inequalities such as capitalism itself, there is a need, as Grear notes, to also highlight the ways in which the legal system itself has worked to create the problem of environmental injustice in that the system itself is unjust and biased against the environment, always seeing the environment as inferior other. This is the way in which I define 'environmental justice' – looking at the ways in which the law itself is structurally biased against the environment due to its humanist and liberal origins. See; Grear, above note 163; Mary Robson Foundation, 'Climate Justice Dialogue: About,' https://www.mrfcj.org/our-work/climate-justice-dialogue/ (accessed 29/11/2017); Oxfam Media Briefing, 'Extreme Carbon Inequality: Why the Paris climate deal must put the poorest, lowest emitting and most vulnerable people first,' https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/mb-extreme-carbon-inequality-021215-en.pdf (accessed 29/11/2017).
[169] Great, Ibid., p. 113; Watson, above note 144.
[170] Grear, Ibid., p. 103-33.
[171] For a discussion on the different types of international legal personality, see: Parfitt, above note 1.
[172] Grear, above note 2, p. 87. Author's own emphasis.

human being the subject which must enclose and discipline the environment, 'dicing and slicing the living order into eco-enclosures' through 'law's classifications, lists, definitions and so forth.'[173] As Code notes, however, the centring of the masterful, privileged subject can no longer hold[174] in that the assumed separation at law 'between humans,' (and, I would add, subjects best able to fit the humanist blueprint such as the corporation) and '"the rest" are no longer tenable.'[175] This can be seen in the calls for trees to have standing,[176] in claims for the legal rights of animals,[177] and in proposals for the recognition of 'electronic persons' at law.[178] Feminists can, drawing on existing calls for the recognition of nonhuman entities at law, work to demand that such entities, including nature itself, be given the same privileged treatment as the corporation, with legal personhood inscribing both rights and duties to the holder.

One recent example of how the law's limited definition of subjectivity has been challenged can be seen in the Whanganui River agreement in New Zealand which recently gave this river legal personality.[179] The agreement followed a long fight by local Māori activists, the Whanganui iwi, who contested the model of ownership and management that had been applied to the river under New Zealand's previous law. They stated, instead, that they are situated in connection with the environment they live in and thus the river is alive, an ancestor. The river, now, is one and part of the tribe at law, meaning that harming the river is, by law, harming the tribe, therefore ascribing it with the rights and duties of a legal person.[180]

The calling for rivers to have legal personality is something which is happening in several contexts. For example, a case has recently been filed, pending decision, in the US on behalf of the Colorado River against the State of Colorado, the claim being that the river should be seen as a legal person under US law in order to protect against pollution, damming and diversion,

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[173] Ibid., p. 88.
[174] Lorraine Code, *Ecological Thinking: The Politics of Epistemic Location*, (Oxford University Press, 2006), p. 29.
[175] Grear, above note 72, p. 3.
[176] Calls for the legal personality for the environment have been long fought for. For further information on this, see; Christopher D. Stone, *Should Trees have Standing?: Law, Morality and the Environment*, (Oxford University Press, 2010). This is a third edition book with ideas of environmental personality having been argued for by the author since the 70s. See; Christopher D. Stone, 'Should trees have Standing?: Toward Legal Rights for Natural Objects,' *Southern California Law Review* (1972), 45, p. 450-501.
[177] Cass R. Sunstein and Martha C. Nussbaum, (eds.) *Animal Rights: Current Debates and New Directions*, (Oxford University Press, 2004); Yoriko Otomo and Edward Mussawir, *Law and the Question of the Animal: A Critical Jurisprudence*, (Routledge, 2013).
[178] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, (2015/2103(INL)), Article 59(f). See also; Teubner, above note 12.
[179] Tutohu Whakatupua, above note 5.
[180] Ibid. See also; Eleanor Ainge Roy, 'New Zealand River Granted same Rights as Human Being,' Guardian 2017, https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being (accessed 12/03/2017).

with many communities relying on the river's supply.[181] Another example can be seen in the Ganges and Yamuna Rivers, which were recently given legal personhood status by the High Court of Uttarakhand,[182] the decision having been stayed by the Supreme Court of India.[183] This decision was made in response to the mass pollution of these rivers, with the judgment concluding that the rivers are 'losing their very existence.'[184] While the judgment, however, has largely been read as inherently progressive by the media who have focused on the impact the decision will have in ensuring the environmental protection of the rivers,[185] there is a need to consider the broader context of the decision. It is clear, in reading the judgment by the High Court of Uttarakhand, that environmental protection was only one reason for the giving of legal personality to the rivers. In fact, the judgment makes clear that such environmental protection is so vitally necessary in this instance, not only due to the fact that the 'Rivers Ganga and Yamuna are central to the existence of half of Indian population and their health and well being'[186] but also due to the fact that the 'Rivers Ganges and Yamuna are worshipped by Hindus. These rivers are very sacred and revered. The Hindus have a deep spiritual connection with Rivers Ganges & Yamuna. According to Hindu beliefs, a dip in River Ganga can wash away all the sins.'[187] Thus, the judgment notes, drawing on previous case law, the fact that, under Indian law, 'a Hindu idol is a juristic entity capable of holding property and of being taxed through its Shebaits who are entrusted with the possession and management of its property.'[188] Thus, Indian law, notes Justice Rajiv Sharma, provides special 'recognition of an entity as juristic person' whereby the entity is a religious idol.[189]

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[181] See; Community Environmental Legal Defences Fund, 'Press Release: Colorado River v State of Colorado,' 2017, https://celdf.org/2017/09/press-release-colorado-river-v-state-colorado-first-nation-federal-lawsuit-river-seeks-recognition-legal-rights-exist-restoration/ (accessed 20/11/2017); Mike Ludwig, '"Nature has Rights": Activists Call for a Legal Transformation,' Truthout 2017, http://www.truth-out.org/news/item/42565-nature-has-rights-activists-call-for-a-legal-transformation (accessed 30/11/2017).

[182] *Mohd. Salim v. State of Uttarakhand and Others* (Writ Petition (PIL) No. 126 of 2014, (March 20, 2017).

[183] Above note 5.

[184] Above note 182, Per: Hon. Rajiv Sharma, J., para 10.

[185] BBC, 'Could making the Ganges a 'person' save India's holiest river?' 2017, http://www.bbc.co.uk/news/world-asia-india-39488527 (accessed 30/11/2017); Michael Safi, 'Ganges and Yamuna Rivers granted same legal rights and human beings,' Guardian 2017, https://www.theguardian.com/world/2017/mar/21/ganges-and-yamuna-rivers-granted-same-legal-rights-as-human-beings (accessed 30/11/2017); Apoorva Mandhani, 'SC Stays Uttarakhand HC's Order Declaring Ganga and Yamuna Rivers as Living Legal Entities,' Live Law India 2017, http://www.livelaw.in/sc-stays-uttarakhand-hcs-order-declaring-ganga-yamuna-rivers-living-legal-entities-read-order/ (accessed 30/11/2017); Kavita Upadhyay, 'Ganga, Yumana termed 'living persons,'' The Hindu 2017, http://www.thehindu.com/news/national/ganga-yamuna-termed-living-persons/article17547682.ece (accessed 30/11/2017).

[186] Above note 182, Per: Hon. Rajiv Sharma, J., Para 17

[187] Ibid., Per: Hon. Rajiv Sharma, J., Para 11

[188] Ibid, Per: Hon. Rajiv Sharma, J., Para 12

[189] Ibid, Per: Hon. Rajiv Sharma, J., Para 14

In light of the judgment itself, therefore, it is clear that the Rivers Ganges and Yamuna were given legal personality not only to protect the rivers but also due to the special religious status they hold. In fact, the judgment prioritises this special religious status, environmental protection seeming to emanate for the religious status as opposed to being deemed to be a standalone reason for the granting of legal personality.[190] While the result, the granting of legal personality, it indeed a victory, it is questionable how much this case may be extended as a matter of environmental justice in and of itself.

Another example of such radical change can be seen in the global movement which is working to make ecocide a crime against humanity, this movement thereby seeking to give the environment a subjectivity-like status as well as allowing, subsequently, for the prosecution of large corporations which commit crimes of ecocide, drawing effectively and creatively on existing international criminal law and flipping the use of the corporation's legal personhood status.[191] The Monsanto Tribunal, for example, which is not an official legal Tribunal but an international civil society initiative, aimed to do just this, working to hold the global agricultural company Monsanto to account for crimes against humanity and ecocide.[192] While, of course, as a civil society initiative the Tribunal is neither binding nor its findings enforceable, in its 2017 hearing and final Advisory Opinion, it found that Monsanto had breached the right to health, the right to food and the right to freedom indispensable for scientific research.[193] Further to this, the Tribunal noted the need to find a solution to the issue of the lack of corporate liability in environmental cases.[194] The Tribunal also found that, if the crime of ecocide were added to international criminal law, Monsanto would be guilty.[195] The Tribunal thus called for the recognition of the crime of ecocide, defined as 'causing serious damage or destroying the environment, so as to significantly and durably alter the global commons or ecosystem services upon which certain human groups rely,' this being deemed necessary in order to avoid the impunity which occurs under current international law in relation to environmental damage.[196] It is clear that, while international criminal law is certainly a long way off accepting the crime of ecocide or even accepting corporations as subject to international criminal law, such

[190] Ibid.
[191] For example, see; International Monsanto Tribunal, above note 5.
[192] Ibid.
[193] Advisory Opinion of the International Monsanto Tribunal, The Hague, 18 April 2017, http://www.monsanto-tribunal.org/upload/asset_cache/189791450.pdf (accessed 30/11/2017).
[194] Ibid.
[195] Ibid.
[196] See; International Monsanto Tribunal, 'Summary of the Advisory Opinion of the International Monsanto Tribunal,' 2017, http://www.monsanto-tribunal.org/upload/asset_cache/1016160509.pdf (accessed 30/11/2017).

initiatives are essential in working to morally condemn the actions of corporations such as Monsanto. Further, such initiatives create possible spaces for future legal change.

Attempts such as those described above which aim to give legal personality to the environment or to create an international crime of ecocide, are working to bring nature-matter into the legal definitions of legal personhood. They provide clear, contemporary, practical examples of the ways in which subjectivity could be radically changed at law. While the examples given above of giving rivers legal personality are drawn on from domestic legal contexts, as noted in Chapter Three, it was through domestic recognition that the corporation gained greater international recognition.[197] The same strategy could potentially thus be used here. Further to this, the crime of ecocide works to directly address the giving of legal personality to the environment under international law. In addition, such reconceptualisations work to protect matter and the environment in concrete, legal ways, rejecting the *thingification* of such matter by recognising its status as a legal subject. Strategies such as the gaining of legal personality for nature-matter and working to make ecocide an international crime work to use the system, thus complying in some sense, remaining inside, while pushing for transformation and structural changes. Feminists working in international law, therefore, need to work with and push for such initiatives. This is because projects such as those described above work not only to protect the environment, something which has long been a feminist aim,[198] but, further to this, work to potentially fundamentally challenge the construct of the legal subject at the heart of international law, something which I have already shown to be a key feminist issue.[199] Challenging international law's concept of international personality through the creation of legal personality for the environment could fundamentally challenge the very structure of international law and may thus provide a means through which feminists may return to considering and challenging international law's structural bias.

5. Conclusions

[197] Fleur Johns, 'Theorizing the Corporation in International Law,' in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 640-1.
[198] See, for example; Maria Mies and Shiva Vandana, *Ecofeminism*, (Zed Books, 1993); Val Pumwood, *Feminism and the Mastery of Nature*, (Routledge, 1993); Richard Grusin (ed.), *Anthropocene Feminism*, (University of Minnesota Press, 2017); Grosz, above note 73; Alaimo and Heckman, above note 79; Haraway, above note 131 and 70.
[199] Grear, above note 1; Naffine, above note 1.

Feminist legal theorists have long shown how the subject of the law is imagined as white, male, bounded and individual.[200] Further to this, in recent, years, scholars such as Grear have noted how legal subjectivity not only works to create hierarchies between humans but of human over the nonhuman and matter.[201] Posthuman theorists and feminist new materialist thinkers, however, reject such a nature/culture binary by denying that "nature" has a specific meaning and place (which is other). The types of subjectivity they pose could, if applied to law, as this chapter has shown, radically change the way law is conceived, working to both dismantle hierarchies between humans and of humans over matter.

International law has long been posthuman, in that its main legal subject was never the human but the state.[202] However, international law is only posthuman to the extent that such a perspective fits the underlying neo/liberal structure of the law. There is a risk in projects which seek to gain legal personality for the environment in that, even if this personality is granted, that does not mean that such personality may be granted beyond the terms of neo/liberal humanism. Just as women were added and stirred, the environment, too, could be added and stirred and only recognised as a bounded, individual entity as opposed to the multiple, inter-connected entity that it is. Such a conceptualisation, rather than working to re-shape international legal personality, would work to reinforce the existing model through inclusion without change, thereby also reinforcing, through a lack of recognition of the multiple connections between environments, matter, humans and nonhuman subjects, the idea that the environment is fundamentally distinct from humans, this being, as noted, the current issue with much existing environmental law. This is something that Grear has noted, stating that, while some new subjects which are linked to the 'capitalistic techno-economy' will likely be included as 'insiders' when it comes to legal subjectivity;[203]

> …it is a *virtual certainty* that the inconvenient and traditionally excluded subjectivities (objectified people, animals and natural systems) linked to traditional and contemporaneous injustices of the capitalist juridical order *will retain*, no matter how complexly, a quintessentially 'outsider' status (that is, unless the entire world-order moves from its existing ideological foundations).[204]

[200] Naffine, above note 27.
[201] Grear, above note 2.
[202] Upendra Baxi, 'The Posthuman and Human Rights,' in Upendra Baxi, *Human rights in a Posthuman World*, (Oxford University Press, 2009), p. 198-200.
[203] Anna Grear '"Mind the Gap": One Dilemma Concerning the Expansion of Legal Subjectivity in the Age of Globalisation,' *Law, Crime and History*, (2011) 1/1, p. 7.
[204] Ibid.

As argued in this chapter through a consideration of environmental subjectivities and feminist new materialism, it is clear that Grear is correct and that there is thus a need, not only to extend existing frameworks of legal personality but, further, to, at the same time, problematise the ideological foundations upon which legal subjectivity lays.[205] Giving international legal personality to nature-matter could challenge the very notion of subjectivity held in international law: claims could be brought on behalf of groups of people, nonhuman animals and matter itself, with such personality being unable to be contained in an individual subjectivity model.[206] Such models could therefore directly challenge, not only international law's individual conception of the subject but also that subject's supposed autonomous and bounded nature, noting the ways in which we are all, human, nonhuman and matter, situated in and are matter. The full granting of legal personality to the environment could work, not merely to extend liberalism, but to deeply challenge it, extending, not only international law's theory of what it means to be a subject but fundamentally challenging many of international law's key foundations, allowing, for example, for corporate and state liability for environmental damage by allowing claims to be brought that centre the environment absent humans as the pivot.

There is a need, however, to ensure that the granting of legal personality to the environment is used in this way as opposed to allowing this granting to transpose nature-matter into the individual legal subject under which international law currently operates, thereby ignoring the complexity of the ways in which nature-matter is in connection with other nature-matter as well as with all animals, human and non-human.[207] There is thus a need to ensure that the transformative potential of rethinking the framing of legal personality is realised through ensuring that the environment, if given legal personality, is recognised as both actually living and is seen, not as a bounded individual but as a complex entity which connects to multiple human and nonhuman life forms. Pushing towards such an understanding at international law could work to radically change legal conceptions of subjectivity in international law. Thus, instead of merely fitting environmental subjectivities to international law's accounts of subjectivity, environmental subjectivities need to both work with the system to gain personality as well as to reject the system, noting that they can have personality and that such personality does not *have* to fit the dominant account of subjectivity international law promotes.

[205] Ibid.
[206] See above note 1.
[207] Anna Grear, 'Human Rights and New Horizons? Thoughts toward a New Juridical Ontology,' *Science, Technology and Human Values*, (2017), p. 11.

However, there remains a need to go further: extending international legal personality to include nature-matter may, indeed, challenge liberalism and neoliberalism in many instances but it may not necessarily transform it entirely. The next chapter, however, will consider emerging theories, including accelerationism and xenofeminism, which pose technology as a possible way of transforming the global order more drastically, looking towards creating a post-capitalist, post-liberal, post-gender and more just world.[208] Drawing, not only on schizophrenic capitalist methods of resisting via complying but actually pushing capitalism beyond its own limitations, accelerating it beyond its own pace, these theories, it will be suggested, pose a way of pushing compliance to its limits in order to force resistance. Such theories, I will therefore argue, may potentially be used by feminist international lawyers when looking for methods and approaches to challenge the very structure of international law itself.

[208] Laboria Cuboniks, above note 106; Alex Williams and Nick Srnicek, '#ACCELERATE MANIFESTO for an Accelerationist Politics,' Critical Legal Thinking, 2013, http://criticallegalthinking.com/2013/05/14/accelerate-manifesto-for-an-accelerationist-politics/ (accessed 05/04/2017).

Chapter Five

On Alternative Subjectivities: Xenofeminism and Other Emerging Theories of Technology and Capitalism

But which is the revolutionary path? Is there one? To withdraw from the world market [?]… Or might it be to go in the opposite direction? To go still further, that is, in the movement of the market, of decoding and deterritorialization? For perhaps the flows are not yet deterritorialized enough, not decoded enough, from the viewpoint of a theory and a practice of a highly schizophrenic character. Not to withdraw from the process, but to go further, to "accelerate the process," as Nietzsche put it: in this matter, the truth is that we haven't seen anything yet.[1]

1.Technology and Posthuman Theory

Feminist posthuman theories, in reconceptualising the subject through noting that the subject is inherently linked to matter, the environment and the nonhuman, can fundamentally work to challenge existing modes of subjectivity in international law. 'We have never been human, much less man,'[2] states Haraway; 'perhaps, ironically, we can learn from our fusions with animals and machine how not to be Man, the embodiment of Western logos.'[3] In drawing on feminist posthuman theories I develop posthuman theory's consequences for subjectivity through two key concepts. The first draws on feminist new materialism, as a strand of feminist posthuman thinking that challenges the subject/object relations at the heart of the humanist,

[1] Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983), p. 239.
[2] Donna Haraway, 'Introduction' in *The Haraway Reader*, (Routledge, 2004), p. 2.
[3] Donna Haraway, 'A Cyborg Manifesto,' in David Bell and Barbara M. Kennedy (eds.), *The Cybercultures Reader*, (Routledge, 2001), p. 310.

liberal subject, noting, instead the links between the human and matter in a non-hierarchical way.[4] The second is the nonhuman, including technological subjects.[5] This chapter will outline posthuman theories of technology, particularly focusing on theories which work to either challenge subjectivity or capitalism in line with the broader themes of this thesis.[6] The theories to be discussed include posthumanism, cyborg theory, the technological and the economic singularities, accelerationism and xenofeminism.[7]

Questions of law and technology as subject of serious philosophical enquiry have a considerable history. Otomo discusses many of these theories in application to international law, particularly focusing on the 'Post-War' moment in Europe in the second half of the twentieth century.[8] Otomo focuses on Heidegger, Benjamin, Stiegler, Freud and Schmitt,[9] all theorists who are sceptical about technology, noting its potentially disruptive power (Freud being possibly the more sceptical).[10] However, Otomo also notes that many of these theorists, in particular Heidegger, Schmitt and Stiegler,[11] identify the destructive and emancipatory potentials in technology. Heidegger, for example, defines technology broadly to include things such as art and law, roughly defining technology as a tool and theorising how it is technology which helps humans become human.[12] Furthermore, as Otomo notes, 'in all these accounts of technology, 'the human' is imagined in the masculine singular, and the production, protection, and realization of human life imagined in terms of earthly and divine existence.'[13] While these thinkers consider both the benefits as well as the downsides to technology, they fail to consider

[4] Stacy Alaimo and Susan Heckman (eds.), *Material Feminisms*, (Indiana University Press, 2008).
[5] Haraway, above note 3.
[6] Alex Williams and Nick Srnicek, '#ACCELERATE MANIFESTO for an Accelerationist Politics,' Critical Legal Thinking, 2013, http://criticallegalthinking.com/2013/05/14/accelerate-manifesto-for-an-accelerationist-politics/ (accessed 05/04/2017); Laboria Cuboniks, 'Xenofeminism: A Politics for Alienation,' http://www.laboriacuboniks.net/, (accessed 21/09/2017).
[7] See; Rosi Braidotti, *The Posthuman*, (Polity Press, 2013); Haraway, above note 3; Vernor Vinge, 'The Coming Technological Singularity: How to Survive in the Post-Human Era' Paper presented at Vision-21: Interdisciplinary Science and Engineering in the Era of Cyberspace Conference, NASA Lewis Research Centre, (1993), NASA Publication CP-10129, https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940022855.pdf (accessed 01/12/2017); Calum Chace, *The Economic Singularity: Artificial Intelligence and the Death of Capitalism*, (Three Cs, 2016); Williams and Srnicek, above note 6; Laboria Cuboniks, above note 6.
[8] Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement*, (Oxford University Press, 2016).
[9] Martin Heidegger, 'The Question Concerning Technology' in *The Question Concerning Technology and Other Essays*, trans. William Lovitt, (Garland, 1977); Bernard Stiegler, *Technics and Time, 1: The fault of Epimetheus*, trans. Richard Beardsworth and George Collins, (Stanford University Press, 1998); Sigmund Feud, *Civilisation and its Discontents*, trans. Joan Riviere, (Martino Fine Books, 2016); Carl Schmitt, *Theory of the Partisan*, trans. G.L. Ulmen, (Telos Press, 2007).
[10] Freud, Ibid.
[11] Above note 9.
[12] Heidegger, Schmitt and Freud, all above note 9.
[13] Otomo, above note 8, p. 51.

that the subject they perceive, whom they are discussing in relation to these positive and negative potentials, is already limited, thereby limiting their scope of analysis.

Recent posthuman scholarship, on the other hand, particularly strands of thinking which come either from feminist thinkers of from the lineage of French postructuralist thought,[14] works to challenge the male, bounded, individual, white humanist subject at the centre of Western thought. Posthumanism does not only look at the ways in which technology could either be a potential or catastrophic but, rather, takes this analysis further, using technology (alongside questions of the nonhuman animal and nature-matter) to question the very foundations of what it means to be human. While Heidegger, for example, views technology as a means through which to make one 'more' human,[15] posthuman theory does not aim to centre the human subject of Western thought but, rather works to deconstruct the notion of the human itself.[16] Thus, while the post-war theories indicated above see the human and technology as distinct, with technology being a tool for human use, posthuman theories notes the limitations of such a perspectives, highlighting instead the ways in which the human and the machine interact and work together, in connection, as both one and separate.[17] Moreover, the above post-war theorists define technology broadly, technology thus being a means through which humans may express and define themselves and thus become more 'human.'[18] Posthumanism, however, not only considers technology as a tool but also as part of subjectivity.[19] In addition, posthuman theories take the contemporary moment and the explosion of high-tech and theorises it.[20] Posthuman theory brings the question of technology up to date and embraces the emerging realities of Big Data, drones, autonomous weapons, artificial intelligence, biohacking, transhumanism and social media.

In challenging the structure of international law via feminist approaches, I argue feminist posthumanism is one of the potential ways to push at the structural limitations of international law. In this chapter, I consider the ways in which these theories may push at such limits through a focus on xenofeminism, which aims to challenge both subjectivity and capitalist structures, two elements which I have identified as working to make international law a structurally biased

[14] Braidotti, above note 7, p. 38-9.
[15] Heidegger, above note 9.
[16] Braidotti, above note 7.
[17] Haraway, above note 3.
[18] Heidegger, above note 9.
[19] Haraway, above note 3.
[20] Ibid.

system.[21] I argue that this is one of the ways in which international legal structure may be challenged and changed. The limitations of a feminist posthuman approach, however, will then be analysed in the following chapter through a consideration of the possible lived impact and usefulness of feminist posthumanism when applied in the context of global militarism.

One theory which will be discussed in this chapter is accelerationism and the related ideas of the technological and economic singularity.[22] These theories consider the potential and possibility for technology to be used to create a post-capitalist (i.e. jobless, machine work-led) world. I argue for accelerationism and xenofeminism as a means to think beyond the all-encompassing model of schizophrenic capitalism.

As such, this chapter outlines feminist posthumanism and its relation to technology with a focus on xenofeminism. I see xenofeminism as linked to posthumanism in that it works to understand the ways in which the human and the machine are deeply interconnected, working to displace humanist assumptions of the human as being hierarchically above others including the machine and matter.[23] As noted in Chapter Two, there are many stands of posthumanism, with this thesis drawing on postructuralist-inspired posthuman theories. Xenofeminism, with its clear links to the work of the likes of Haraway, Deleuze and Guattari, can be situated within this group. Xenofeminism is an emerging theory which considers accelerationism, i.e. the use of technology to create a post-capitalist world, from a feminist perspective. It thus calls for various methods, including the feminists appropriation of technology for the critical feminist aim of creating a more just world.[24]

2. The Singularity, Accelerationism and Xenofeminism

Before discussing xenofeminism further, however, I draw out some of the theories and ideas which xenofeminism draws on. This section will consider and outline some of the key ideas in relation to; the technological singularity,[25] the economic singularity[26] and the robot economy,[27]

[21] Laboria Cuboniks, above note 6.
[22] Chace, above note 7; Vinge, about note 7; Williams and Srnicek, above note 6.
[23] Laboria Cuboniks, above note 6.
[24] Ibid.
[25] Vinge, above note 7.
[26] Chace, above note 7.
[27] See, for example; SPARC, The Partnership for Robotics in Europe, 'The Robot Economy (Part 1); Interview with Alan Winfield,' 2016, https://www.eu-robotics.net/sparc/newsroom/press/the-robot-economy-interview-with-alan-winfield.html?changelang=2 (accessed 01/12/2017).

the cyborg[28] and accelerationism[29] before going on to define and outline xenofeminism[30] which draws on these theories and ideas.

2.1 The Technological Singularity

'The Singularity' has become a widely used term in recent years.[31] The term 'is borrowed from maths and physics, where it means a point at which a variable becomes infinite.'[32] The various ways this concept has been used can be separated into two areas: the technological singularity and the economic singularity. Both provide part of the theoretical background for both accelerationism and xenofeminism.

The technological singularity refers to the idea that technology will outpace the human and fundamentally change society forever. The mathematician von Neumann was one of first people to discuss the technological singularity when he noted, in 1958, that 'the ever accelerating process of technology and changes in the mode of human life, which gives the appearance of approaching some essential singularity in the history of the race beyond which human affairs, as we know them, could not continue.'[33]There are multiple versions of singularity thinking, many of which contradict one another in their final predictions, with some trying to predict the point at which the singularity will occur and some affirming that what the singularity will be and look like cannot be predicted by humans as we do not have and nor can we imagine the superintelligence that will exist.[34] Nevertheless, the singularity can be summed up in the words of Good who, drawing on mathematical theory, predicted in 1965 that 'it is more probable than not that… an ultraintelligent machine will be built and that it will be the last invention that man need make, since it will lead to an "intelligence explosion." This will transform society in an unimaginable way.'[35] As such, the technological singularity is the idea that technology will accelerate beyond human capacity, thereby challenging the human

[28] Haraway, above note 3.
[29] Williams and Srnicek, above note 6.
[30] Laboria Cuboniks, above note 6.
[31] See, for example; Vinge, above note 7; Chace, above note 7.
[32] Chace, Ibid., p. 2.
[33] S. Ulam, 'John von Neumann 1903 – 1957,' *Bulletin of the American Mathematical Society,* (1958), 64, p. 1-49.
[34] Eliezer Yudkowsky, 'The Three Major Singularity Schools,' Machine Intelligence Research Institute 2007, https://intelligence.org/2007/09/30/three-major-singularity-schools/ (accessed 29/03/2017).
[35] Irving John Good, 'Speculations Concerning the First Ultraintelligent Machine,' in Franz L. Alt and Morris Rubinoff (eds.), *Advances in Computers, volume 6.*, (Academic Press, 1965), p. 78.

condition.[36] In Vinge's words, 'it is a point where our models must be discarded and a new reality rules.'[37]

Many of the thinkers who discuss the technological singularity draw on what is known as Moore's Law. This idea comes from Moore's 1965 paper in which he noted that the number of transistors in an integrated circuit approximately doubled every year, therefore doubling technological capacity and thus computing power yearly.[38] With such exponential growth, many thinkers subsequently predict that the singularity will happen within the twenty first century.[39]

While some thinkers do not relate the technological singularity solely to superintelligence, the majority of thinkers believe that the singularity will come about at least through some sort of superintelligence mix.[40] Seen as Chapter Six will focus on autonomous weapons which, if fully autonomous, could have artificial intelligence, I will be focusing in this chapter primarily on theories which include models of superintelligence. I am using the term superintelligence to refer to a broad array of machines which operate on a level which is above and beyond human intelligence. This, at its more advanced level, includes artificial intelligence (AI).

Artificial intelligence, although hard to define precisely, is the possibility of the creation of an intelligent artefact.[41] What intelligence actually means is debatable, however, and theories include those which state that AI would have to be able to learn from experience, to those which see AI as a complex decision making and choice selection process, to those which state that AI must be able to make connections and assumptions like a human can.[42] The Turing Test is often cited here as an appropriate measure of intelligence. A test created in the 1950's, the Turing tests states that a machine should be considered to be intelligent if a human believes it to be another human.[43] While this test is well cited and known, it has, however, been shown to be faulty, with Dennett having shown how many people can be easily tricked into believing a

[36] See; Anders Sandberg, 'An Overview of Models of Technological Singularity,' in Max More and Natasha Vita-More (eds.), *The Transhumanist Reader: Classical and Contemporary Essays on the Science, Technology, and Philosophy of the Human Future*, (John Wiley & Sons, 2013), p 56-64.
[37] Vinge, above note 7.
[38] Gordon E. Moore, 'Cramming More Components onto Integrated Circuits,' *Electronics*, (1965), p. 114–117.
[39] Max More and Ray Kurzweil, 'Max More and Ray Kurzweil on the Singularity,' Kurzweil: Accelerating Intelligence 2002, http://www.kurzweilai.net/max-more-and-ray-kurzweil-on-the-singularity-2 (accessed 29/03/2017).
[40] Yudkowsky, for example, believes nanotechnology will also play a key role. See; Yudkowsky, above note 384 See also; Sandberg, above note 36.
[41] James Fetzer, *Artificial Intelligence: Its Scope and Limits*, (Springer, 1990), p. 3.
[42] See; Matt Ginsberg, *Essentials of Artificial Intelligence*, (Morgan Kaufmann, 2013), p. 4.
[43] Alan Turing, 'Computing machinery and intelligence,' *Mind*, 1950, 59, p. 433-60.

fairly simple machine is human.[44] As Ginsberg notes, however, the Turing test may have its flaws, such as the human being too lazy to question the entity fully, yet it remains one of the most accepted tests of intelligence.[45] This is because, he argues, the test is difficult and thus sets a 'reasonably sharp description of intelligence,' requiring the machine to discuss a very broad array of subjects.[46] The Turing test, however, as Ginsberg notes, is a test of speech and not necessarily the other actions which may be deemed to constitute human intelligence including eye contact and body language.[47] Since the test's creation in the 1950's, technology has moved on greatly. The test also seems somewhat less rigorous in an age where technology is challenging ideas of what it means to be human or alive.[48] In light of this, it seems that the Turing test is not the only standard through which AI is and should be defined.

It seems possible that greater-than-human intelligence could come about in various ways, thus rendering the debate as to whether AI is AI or not somewhat irrelevant. For example, Vinge notes that while most people think of superhumanity in terms of AI, this is only one model. In fact, he states, superintelligence and the singularity following it is much more likely to occur through what Vinge defines as Intelligence Amplification (IA). IA could come about in many ways, for example, through large computer networks waking up and becoming superhumanly intelligent or 'computer/human interfaces may become so intimate that users may reasonably be considered superhumanly intelligent.'[49] These two examples would be distinguished from an AI machine as they either come from "upgrading" the human or from the computer finding its own intelligence rather than being a created, human devised machine. Thus, Vinge states, 'in humans, the hardest development problems have already been solved. Building up from within ourselves ought to be easier than figuring out first what we really are and then building machines that are all of that [as per AI].'[50] While theorists may disagree as to what may create superhuman intelligence and when it may occur, there is a general consensus that such intelligence will exist in the near future, whether through an independent AI system or through IA.[51]

[44] Daniel C. Dennett, *Brainchildren: Essays on Designing Minds*, (MIT Press, 1998).
[45] Ginsberg, above note 42, p. 7.
[46] Ibid.
[47] Ibid.; Though note that some AI can now make eye contact. See; Hanson Robotics, 'Sophia: about me,' 2017, http://sophiabot.com/about-me/ (accessed 02/12/2017).
[48] Haraway, above note 3.
[49] Vinge, above note 7.
[50] Ibid.
[51] For example, see; Ibid.; Sandberg, above note 36; Yudkowsky, above note 38.

IA is linked to transhumanism: the idea that humans can move beyond their current physical limitations like aging and death by drawing on a mixture of human-machine enhancements and biomedical enhancements,[52] in that the transhuman movement may form one of the ways in which IA may be achieved.[53] Transhumanism is a broad label which includes ideas such as trying to prevent the aging process, to creating stronger, faster and more efficient human beings.[54] Transhuman scholars fall either side of the ethical debate which transhumanism presents, with some scholars wishing to set limits of transhuman practise[55] with others aiming to promote transhuman apparatuses beyond all limits.[56] Transhumanism also links to the singularity, in that it is actively working to crate superhumans.

This chapter addresses transhumanism throughout while taking a feminist posthuman stance on transhumanism. As noted, I have chosen to apply a posthuman analysis in this thesis, drawing particularly on French post-structuralist inspired posthuman theories.[57] As discussed in Chapter Two, transhumanism, which can be described as another strand of posthumanism,[58] sits, in many ways, in opposition to the posthuman stance I take in this thesis in that transhumanism, for the most part, aims to complete the enlightenment via making man God himself through, for example, finding ways to prevent death.[59] Thus, as Wilcox notes, 'posthuman feminist projects critique a kind of 'transhumanism' that seeks to disembody consciousness or promote 'other than' or 'more than' human approaches that reify a particular normative version of humanity that enables distinctions between more or less worthy forms of life,' thereby critiquing the claim that there was ever a normative version of humanity in the first place.[60]

While the singularity has become a key concept in the current times, there are theorists who rebut the singularity with Allen, for example, stating that 'The Singularity Isn't Near.'[61] In

[52] Sandberg, for example, promotes and embraces this possible future. See; Sandberg, Ibid. See also, for a summary of transhumanism: Nick Bostrom, 'A History of Transhumanist Thought,' in Michael Rectenwald and Lisa Carl (eds.), *Academic Witting Across Disciplines*, (Pearson Longman, 2011), accessed online at https://nickbostrom.com/papers/history.pdf (accessed 12/02/2017).
[53] Vinge, above note 7.
[54] Nick Bostrom, 'In Defence of Posthuman Dignity,' *Bioethics*, (2005), 19(3), 202-14; Bostrom, above note 56.
[55] See, generally; Bostrom, above note 52.
[56] Many in the London Futurists group can be seen as calling for this. For a personal account of being in attendance at some of these meetings, see; Mark O'Connell, *To Be a Machine: Adventures Cyborgs, Utopians, Hackers and the Futurists Solving the Modest problem of Death*, (Granta, 2017).
[57] Braidotti, above note 7.
[58] Though of course, as with all categories, the lines are blurred in places.
[59] O'Connell, above note 56.
[60] Lauren Wilcox, 'Embodying Algorithmic War: Gender, Race and the Posthuman in Warfare,' *Security Dialogue*, (2016), 48(1), p. 5.
[61] Paul Allen, 'The Singularity Isn't Near,' MIT Technology Review 2011, https://www.technologyreview.com/s/425733/paul-allen-the-singularity-isnt-near/ (accessed 31/03/2017).

summary, Allen argues that the assumptions singularity theorists make when predicting the coming singularity are faulty. Such approaches, he argues, assume that technological growth will happen at a linear increasing rate without accounting for the fact that this will require big technological leaps and scientific leaps which are not yet close to happening, including a complex understanding of the brain; 'this kind of progress is very different than the Moore's Law-style evolution of computer hardware capabilities that inspired Kurzweil and Vinge.'[62] This means, Allen continues, that it is much more likely that the singularity with *not* arrive by 2045 (as Kurzweil predicts)[63] as the lack of understanding of the human brain will stall this progress and create a 'complexity break.'[64] It must be noted, too, that Moore himself (of Moore's Law) is also sceptical, questioning how "near-future" the singularity could be and stating that the knowledge of human intelligence required to make machines more intelligent than humans is considerably more complex than the ever more advance computer technology which exists.[65]

Moore and Allen, while questioning how near the singularity may be, do not, however, dispute its coming.[66] There are theorists who do, however. For example, Searle notes that consciousness is not made up of algorithms and cannot be programmed but, rather, comes from a complex, situated and experienced relationship with/in the world. Searle is therefore sceptical of the possibility of conscious superintelligent machines, thereby questioning the singularity in turn.[67] I largely disagree with this perspective: who is to say that machines will not be conscious enough to experience and to therefore become superintelligent? Searle's argument rests on a purist assumption of humanity and human consciousness which is slowly being challenged in the current times. In defining superintelligence only within a human frame, Searle fails to account for understandings of subjectivity which may look very different to the current dominant Western understanding of the human now.

Whether the singularity is possible in the near future or even possible at all, however, is irrelevant for the purposes of this chapter. After all, these arguments very much rely on their own specific definitions of what the singularity is. Following the work of Haraway and

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[62] Ibid.
[63] Raymond Kurzweil, *The Singularity is Near*, (Gerald Duckworth & Co Ltd, 2006).
[64] Allen, above note 61.
[65] See; IEEE Spectrum, 'Tech Luminaries Address Singularity,' 2008, http://spectrum.ieee.org/computing/hardware/tech-luminaries-address-singularity (accessed 31/03/2017).
[66] Ibid.; Alan, above note 61.
[67] John R. Searle, 'I Married a Computer,' in Raymond Kurzweil (ed.), (ebook, 2001), *Are we Spiritual Machines?* http://www.kurzweilai.net/chapter-2-i-married-a-computer (accessed 31/03/2017).

Braidotti,[68] among others, I wish to pose that the singularity may not be a single event, a defined moment in history whereby which the human can be said to be fundamentally de-centred. Rather, the singularity is a becoming and one which has always already long been in process.[69]

2.2 The Cyborg

Post-structuralist inspired posthuman theory fundamentally works to challenge the centrality of the human subject, with feminist new materialists, for example, noting the complex ways in which the human is situated already within nature-matter.[70] The human has never been *the* centre of all but has, rather, merely thought of himself as such (and it is indeed, himself – it is also worth noting that nearly all the people working on the technological singularity are white men). Thus, in one sense, the singularity as a concept is already flawed in that it lies on a problematic assumption: that humans *are* the centre and that they *are* inherently the standard of intelligence to surpass. However, as noted in the previous chapter, just because humans cannot fully understand something, does not mean that nature-matter, for example, does not have its own language which may be infinitely more complex than our own.[71]

Feminist posthuman scholars such as Haraway, however, have long worked to show how the human has already been fundamentally de-centred through the interaction with technology, thereby merging the human-machine.[72] Posthumanism works to embrace technology and purposefully move beyond binaries and limits, noting the fusions between technology, matter, nonhuman animals and humans. Haraway thus states; 'my cyborg myth is about transgressed boundaries, potent fusions and dangerous possibilities.'[73] The posthuman is proposed as utopic and dangerous. It is non-binary, beyond the problems of binary categorisation presented at the start of this thesis which feminist and critical theory has been trying to tackle for decades. It is beyond the structure of Western logos and could thus resolve the dilemma at the start of this thesis of being caught between resistance and compliance: trying to re-create a structure but being unable to go beyond what we know, whilst also being caught with using the structure to therefore advance smaller aims, in the hope this will make larger changes. Posthumanism proposes a new answer to the resistance and compliance dilemma; that the world is taken,

[68] Haraway, above note 3; Braidotti, above note 7.
[69] Haraway, Ibid.
[70] Alaimo and Heckman, above note 4.
[71] Stacy Alaimo, 'Trans-Corporeal Feminisms and the Ethical Space of Nature,' in Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms*, (Indiana University Press, 2008), p. 244.
[72] Haraway, above note 3.
[73] Ibid., p. 295.

instead, as it is.[74] Posthumanism states that the answer is, in part, to accept and embrace technology and try to make it "our" revolution rather than seeing it as "our" enemy. The radical changes technology brings must be embraced. Technology's questioning of the assumption of what a human is, its radical impact on the way humans live in much more interconnected ways (both connected with one another through things like the internet but also with material in many ways – human/machine coming together in more and more vital and complex ways) is essential and inherently challenges the Western humanist subject.[75] Thus, Haraway states; 'cyborg unities are monstrous and illegitimate; in our present political circumstances, we could hardly hope for more potent myths for resistance and recoupling.'[76] The structure and what exists now must be used, yet understood in new and different ways, in order to fundamentally change "the way things are."

Haraway states, for example, that 'late twentieth-century machines have made fully ambiguous the difference between natural and artificial, mind and body, self-developing and externally designed, and many other distinctions that used to apply to organisms and machines. Our machines are disturbingly lively, and we ourselves frighteningly inert.'[77] High tech culture is forcing a re-think of all of the fundamental binaries of Western thinking: human/machine, mind/body. This must be embraced.[78] The cyborg refuses the demonology of technology[79] whilst rejecting any proposed universal.[80] As Haraway notes, 'the boundaries between the categories of the natural and the cultural have been displaced and to a large extent blurred by the effects of scientific and technological advances.'[81] Many of the problematics which feminist new materialists discuss, including the hierachising of the human and the cultural over nature-matter, have already been shown to be false by technological advancements such as cloning and the genetic modification of crops.

The posthuman subject is therefore both linked to the machine and to nature-matter. As Braidotti notes, 'matter, including the specific slice of matter that is human embodiment, is intelligent and self-organizing. This means that matter is not dialectically opposed to culture, nor to technological mediation, but continuous with them.'[82] Thus, posthuman theories

[74] Haraway, above note 3.
[75] Ibid.
[76] Ibid., p. 295.
[77] Ibid., p. 293-4.
[78] Ibid., p. 313.
[79] Ibid., p. 316.
[80] Ibid.
[81] Braidotti, above note 7, p. 3.
[82] Ibid., p. 35.

fundamentally challenge nature-matter-human-machine categorisations, challenging subjectivity with it. As Neimanis and Barad both note, there is a need to take 'account of the entangled materializations of which we are part.'[83] Thus, Braidotti states:

> A theory of subjectivity as both materialist and relational, 'nature-cultural' and self-organizing is crucial in order to elaborate critical tools suited to the complexity and contradictions of our times… More especially, a serious concern for the subject allows us to take into account the elements of creativity, imagination, desire, hopes and aspirations without which we simply cannot make sense of contemporary global culture and its posthuman overtones. We need a vision of the subject that is worthy of the present.[84]

Feminist posthumanism does not oppose the current times but embraces them, embracing the way in which science and technology have already deconstructed the human-nature and human-machine binaries. These theories fundamentally challenge dominant Western notions of subjectivity which pose the human as the centre of all as well as the specific, white, heterosexual male as that central human.

Singularity thinking is largely concerned with the possibility of superintelligence, whether this be through AI, IA or other transhuman technologies. Either way, such techno-scientific methods and outcomes will further complicate notions of subjectivity. This could occur in many ways: through the creation of an entirely new, superintelligent AI, which would have its own subjectivity and its own mode of being, thereby challenging current dominant models of subjectivity, or, for example, through the creation of the superhuman techno-subject. This raises new questions for legal relations and structures that have thus far received little attention and has specific, important dimensions for global governance structures. It is clear that the posthuman/transhuman/singularity era is already challenging old modes of subjectivity and there is a need to avoid, with urgency, the simple re-assertion of the same old models of subjectivity.[85] Feminist posthumanist theorists embrace these challenges as a way of revolutionising what feminists have long known to be an inaccurate account of the subject

[83] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning*, (Duke University Press, 2007), p. 384; Astrida Neimanis, 'Feminist Subjectivity, Watered,' *Feminist Review*, (2013), 103, p. 25.
[84] Braidotti, above note 7, p. 52.
[85] This can be seen in the recent news that Sophia the robot (see above note 51) has recently been given citizenship by Saudi Arabia. See; Andrew Griffin, 'Saudi Arabia Grants Citizenship to a Robot for the First Time Ever,' Independent 2017, http://www.independent.co.uk/life-style/gadgets-and-tech/news/saudi-arabia-robot-sophia-citizenship-android-riyadh-citizen-passport-future-a8021601.html (accessed 02/12/17).

while aiming to avoid the problematic use of technology by certain groups in order to become the man supreme. It is this stance which I take in this and the following chapter as a means through which to use the current times to resist.

2.3 The Robot Economy, Economic Singularity and Accelerationism

When the media stops reporting the automation of jobs as being a tragedy and starts reporting them as being a liberation from mundane work, we will know that the accelerationist disposition has become the new common sense.[86]

One way of using technology for critical feminist aims may be through using it to dismantle capitalism. Before coming on to xenofeminism, the specifically feminist version of this idea, it is worth considering some of the broader ideas behind technologically induced post-capitalism.

Economic singularity and acceleration theorists broadly work to consider the economic impact of technology.[87] These theorists note the accelerated pace of technology and capitalism and believe that this process will only get faster, hence why I am grouping them together. However, while the economic singularity seems, inevitably, to describe the rise of an oncoming post-capitalist era, accelerationists sit both on the right and on the left of the economic and political spectrum. In this section, I will focus mostly on more left leaning thinkers in line with the broader aims of this thesis: to push at the limits of international law using critical feminist theory. I have already noted the ways in which capitalism and neoliberalism have become key players in the global order in Chapter Three (with critiques of and the want to dismantle capitalism having been noted as a key critical feminist goal). Given the issues described in Chapter Three, I take a fundamentally anti-capitalist view and therefore wish to consider the work of those with this aim in mind. This is not, however, to dismiss more right-leaning theorists. In fact, dismissing them altogether would be dangerous. Thus, this chapter and the next aim to both celebrate the potentials in left-leaning accelerationism (particularly within xenofeminism), while also noting the dangers of such an approach and more right leaning accelerationist projects. The more right leaning work here, including the work of Land, as will be discussed in this section, also exemplifies the potential dangers of the singularity and should

[86] Nick Srnicek, Alex Williams and Armen Avenissian, '#Accelerationism: Remembering the Future,' Critical Legal Thinking 2014, http://criticallegalthinking.com/2014/02/10/accelerationism-remembering-future/ (accessed 02/12/2017).
[87] For example, see; Chace, above note 7.

therefore by no means be dismissed entirely, even if it should, in my opinion, be dismissed as a matter of politics and ethics.

I will be particularly focusing on the Accelerate Manifesto by Williams and Srnicek, noting the links between the Accelerate Manifesto and the Xenofeminist Manifesto as will be outlined more specifically in the xenofeminism section below. While I will draw on other theorists working on similar ideas, I have chosen to focus on the work of Williams and Srnicek due to xenofeminism's links to Williams and Srnicek's work.

Chace states that the economic singularity will occur well before the technological singularity.[88] By this, he is referring to the ways in which technology will and already is changing the face of work: 'the process of people becoming unemployed because machines can do any job that they could do, and do it cheaper, faster and better.'[89] This phenomenon is also more commonly known as the robot economy. The robot economy is something of great global interest, with the media being fascinated by the topic, many academics writing on the subject,[90] and with international bodies, such as the European Parliament, beginning already to consider the legal-ethical framework through which the robot economy should be managed through it endorsement of a report on 'Civil Law Rules on Robotics' in February 2017.[91] In 2013, Frey and Osborne predicted that '47% of total US employment is in the high risk category, meaning that associated occupations are potentially automatable over some unspecified period of years, perhaps a decade of two.'[92] Nineteen percent of jobs of US were found to be at medium risk and thirty three percent at low risk.[93] Statistics differ, however, with management consultancy McKinsey stating in 2015 that few people would see their jobs disappear for now, stating that only five percent could be fully automated in the foreseeable future. However, McKinsey stated that many of the tasks people do would become more automated, with work involving more and more machines. Further, McKinsey stated that as

[88] Ibid., p. 4.
[89] Ibid.
[90] See; SPARC, above note 27.
[91] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics, (2015/2103(INL)).
[92] Carl Benedikt Frey and Michael Osborne, 'The Future of Unemployment,' Oxford Martin Programme on technology and Employment, 2013.
[93] Ibid.

technology and particularly intelligent technology becomes more advance, the risk to jobs will slowly increase.[94]

There are also those who question the extent of the robot economy happening with Autor believing the robot economy to be an over-hyped Luddite-esque[95] fear/hang-up.[96] While the speed at which such developments may occur at may, indeed, be over-hyped, it seems that the robot economy will exist in the future. In fact, the robot economy is already happening: we see automation everywhere from self-checkout services in the supermarket to machines which sell train tickets to robots which make cars. It must be noted, however, that a lot of the popular discourse on the robot economy lacks nuance and conflates robots (the physical bodies) with AI (the intelligence). These two things are fundamentally different (if potentially, one day, combinable) and thus their impact on different sectors of the economy would be different, with robots being used, more often than not, alongside humans for physical and manual roles already but with AI posing, according to Winfield, a greater threat to jobs, potentially one day being able to take on intellectual roles as lawyers or translators (both of which are already starting to happen).[97] It is clear that the robot economy has the potential to change the face of the global order. With international law and the global order currently being structured around capital, as noted in Chapter Three,[98] the robot economy has the potential to disrupt the capitalist system, destroying the economy of labour and thus potentially rendering capitalism redundant.

Many different scholars propose a Universal Basic Income (UBI) as the way to solve robot-caused unemployment. Ensuring that everyone has a basic, liveable income in a society where 'essentially all of the work that most humans do not want to do is done by robots… would leave time to do sports, arts, write books, do science.'[99] This could, of course, only work if

[94] McKinsey & Company, 'Four Fundamentals of Workplace Automation,' 2015 http://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/four-fundamentals-of-workplace-automation (accessed 02/12/2017).
[95] The Luddite movement of the early 19th century was made up of a group of English textile artisans who protested the automation of textile production by seeking to destroy some of the machines. Neo-Luddites, those who are anti-technology, exist in the present day, working to resist the use of technology and the societal changes such technologies are having.
[96] David H. Autor, 'Why are there still so many jobs? The History and Future of Workplace Automation,' *Journal of Economic Perspectives*, (2015), 29(3), p. 3–30.
[97] Both of these things are already happening, for example, Google Translate already is used by many to translate text globally into multiple language. On robot lawyers see; Robot Lawyer LISA, 'Meet Robot Lawyer LISA,' http://robotlawyerlisa.com/ (accessed 02/12/2017); Roy Cellan-Jones, 'The robot lawyers are here – and they're winning,' BBC 2017, http://www.bbc.co.uk/news/technology-41829534 (accessed 02/12/2017). See, general; SPARC, above note 27.
[98] See, for example; Robert Knox, 'Marxist Approaches to International Law, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, (Oxford University Press, 2016), p. 306-326.
[99] SPARC, above note 27.

wealth creation is more equally shared in society. Without something like the UBI, wealth distribution globally is likely to get worse, and already has been getting worse in the capitalocene era.[100] In Winfield's words:

> we desperately need to ensure that the wealth is not captured exclusively by the companies who own the robots, and the 0.1% who own those companies. If we fail to do this, we risk increasing poverty and inequality. What's the point of making things if people can't afford to buy them?[101]

While there are fears around resistance to UBI, given that there is resistance in many states even to the welfare state,[102] as Chace notes, it seems likely that people will 'quickly accept the need for UBI if and when it becomes undeniable that the majority of them are going to be unemployable.'[103] The idea that humans will, if given UBI, inevitably lean towards creative outlets, like producing art and engaging in scientific research in their replacement time, however, has also been critiqued.[104] Humans broadly have the need to feel that there is meaning to their lives with employment often providing that meaning, the higher rates of depression amongst unemployed people is testament to that.[105] This does not mean, however, that a post-capitalist world should not be reached for. It is not possible to consider depression rates amongst the unemployed now and then apply them to the robot economy. Unemployed people now are living in a capitalist world where people around them have a job and where humans are often valued and thus gain a sense of self-worth through their work. Further, not having a job in the world now equals poverty. These values and systems, however, could be changed in the robot economy. Feminist thinkers have long noted the need to value unpaid work differently, especially considering that a large proportion of that unpaid work is done by women.[106] A reconceptualization of work could take place so as to promote work such as writing, art, science; thinking and creating, as well as care work, which many agree would still need to be done by humans due to the need for the human element when being cared for,[107] as

[100] Jason Moore, 'The Capitalocene, Part I: on the nature and origins of our ecological crisis,' *The Journal of Peasant Studies*, (2017), 44(3), p. 594-630.
[101] SPARC, above note 27.
[102] See; Martin Ford, *The Rise of the Robots: Technology and the Threat of Mass Unemployment*, (Oneworld, 2016)
[103] Chace, above note 7, p. 5
[104] Ibid., p. 213.
[105] See; Susan Adams, 'How Unemployment and Depression Fit Together,' Forbes 2014, https://www.forbes.com/sites/susanadams/2014/06/09/how-unemployment-and-depression-fit-together/#59bdf48d7b70 (accessed 02/12/2017).
[106] See, for example, Marilyn Wearing, *If Women Counted: A New Feminist Economics*, (Harper Collins, 1990).
[107] Chace, above note 7, p. 253; SPARC, above note 27.

good in and of itself, as having value. Such work could then be supported by the UBI, eradicating poverty. In short, a post-capitalist, UBI supported, robot economy world could value the being in and of itself, beyond the false constructions of monetary value. This would require a radical change in the way most people currently relate to work and creativity, given the urgency in the current times to earn money. This does not render such a system impossible, however. In fact, the robot economy and the insistent need to revalue human work and creativity may prove the most attainable way of satisfying long-held feminist concerns about the way work is valued now.

The real problem however, states Chace, 'is that we will need more than just UBI. We may need an entirely new form of economy.'[108] While a UBI would go some way toward preventing drastic inequality, there is still a great problem with a system where the majority live on UBI while a very small minority gain masses of profit. As Chace notes, it is likely that this minority would separate itself off from the rest of humanity, creating two classes of people.[109] The "upper" class would, inevitably, as the owners of tech, have first access to tech, therefore continuing the digital divide we see today but in more stark ways, given the ways in which humans will "upgrade" themselves in the future following the trends of both transhumanism and biohacking.[110] To prevent this, Chace, despite fundamentally believing in the benefits of the capitalist system, states that there will be a need to move beyond capitalism to prevent the fracturing of the species into these two groups of enhanced tech owners and the rest of humanity.[111] What this system exactly would be in Chace's view is unclear. However, it seems it would involve some sort of move away from capitalism and an abandoning of private property: 'the means of production, exchange and distribution would be placed into some kind of collective ownership to prevent the possibility of social and species fracture.'[112] UBI is a good idea in the current system. However, what is needed is to move beyond the current system.

It is clear that many of these ideas and predictions could prove useful to critical feminist scholars and anti-capitalists who wish to move beyond the current capitalist global order. Accelerationism, at least in its left-wing embodiment, is one of the key areas actively trying to re-think post-capitalism in the era of the singularity. As noted above, however, accelerationism

[108] Chace, above note 7, p. 5.
[109] Ibid.; See also Yuval Noah Harari, *Sapiens: A Brief history of Humankind*, (Harvill Secker, 2014).
[110] Max More and Natasha Vita-More (eds.), *The Transhumanist Reader: Classical and Contemporary Essays on the Science, Technology, and Philosophy of the Human Future*, (John Wiley & Sons, 2013).
[111] Chace, above note 7.
[112] Ibid., p. 247.

by no means is situated only within left-leaning circles; there is a prominent right wing body of thinkers too. One of the most prominent right wing accelerationist theorists is Land, whose work is seen as one of the key inspirations of the current alt-right movement.[113] Land is a self-described 'right accelerationist'[114] who believes that capitalism is going so fast that it will inevitably create the technological singularity, rendering humans obsolete. He sees this as a natural step in humanity's journey and thus by no means fears the idea.[115] However, as Williams and Srnicek, two of left-accelerationism's key thinkers, note, clearly drawing on Deleuze and Guattari's idea of schizophrenic capitalism:[116]

> Landian neoliberalism confuses speed with acceleration. We may be moving fast, but only within a strictly defined set of capitalist parameters that themselves never waver. We experience only the increasing speed of a local horizon, a simple brain-dead onrush rather than an acceleration which is also navigational, an experimental process of discovery within a universal space of possibility. It is the latter mode of acceleration which we hold as essential.[117]

In short, Williams and Srnicek state that while capitalism may be going fast, accelerationism is about more than speed but is about fully transforming society. Accelerationism thus works on a different plain of temporality. Accelerationism to them, is post-capitalist.[118]

The Accelerate Manifesto which has been endorsed by Negri,[119] states that humanity and the world is faced with new problems and challenges in the current times. The planet is facing severe environmental issues. Further, in light of the financial crisis of 2008 and subsequent policies of austerity globally, with neoliberalisation slowly privatising the last leftover parts of social democratic institutions and services, such as the National Health Service in the UK or Higher Education globally, with the work-life balance ever more blurred and with jobs being taken by automation in the coming robot economy, we have reached, state that authors, the

[113] See particularly his work on dark enlightenment where he calls for a non-egalitarian society; Nick Land, 'The Dark Enlightenment,' http://www.thedarkenlightenment.com/the-dark-enlightenment-by-nick-land/ (accessed 02/12/2017).
[114] As he proclaims on his blog. See; Nick Land, 'Annotated #Accelerate,' Urban Future (2.1) 2014, http://www.ufblog.net/annotated-accelerate-1/ (accessed 02/12/2017).
[115] See; Nick Land, 'Meltdown,' Cybernetic Culture Research Institute http://www.ccru.net/swarm1/1_melt.htm (accessed 02/12/2017).
[116] Deleuze and Guattari, above note 1.
[117] Williams and Srnicek, above note 6.
[118] Ibid.
[119] Antonio Negri, 'Some reflections on the #ACCELERATE MANIFESTO,' Critical Legal Thinking 2014, http://criticallegalthinking.com/2014/02/26/reflections-accelerate-manifesto/ (accessed 02/12/2017).

'secular crisis of capitalism.'[120] Capitalism is running at full speed though, as 'Deleuze and Guattari recognized, from the very beginning what capitalist speed deterritorializes with one hand, it reterritorializes with the other. Progress becomes constrained within a framework of surplus value, a reserve army of labour, and free-floating capital.'[121] Capitalism, as noted in Chapter Three, may go at full speed, turning all into capital, but it is also always limited by itself, everything being bound up to capital itself.[122]

In turn, states the Accelerate Manifesto, the left has reached a point where, politically, it feels like they have run out of ideas. Extensive neoliberalisation has worked to render the political left 'hollowed out, and without popular mandate' and worker's rights have been eroded.[123] The left, notes the Accelerate Manifesto, has largely remained situated in mid-twentieth century socialism,' unable to accept that ideas need updating.[124] In the mean-time, the right, without any real opponents, is taking over at a rapid pace.[125] The political left, in summary, state Williams and Srnicek, is paralysed. Too focused on the local and on direct action and always situating themselves as against the system, the left has lost the ability to be able to grasp potential in the current times: 'in this paralysis of the political imaginary, the future has been cancelled.'[126]

This thesis is tackling a similar issue of paralysis. As noted in Chapter One, feminist approaches to international law are caught between resistance and compliance; using the system to open it up to their own needs versus resisting the system and working towards transformative change.[127] Feminist approaches to international law have, for the most part, moved away from early statements of resistance, towards more compliance type methods.[128] This may be in part due to schizophrenic capitalism's ability to turn all into capital, including the left and critical projects. This was exemplified in Chapter Three for example through considering the ways in which gender and LGBT movements have been co-opted into the capitalist global order, drawing on these projects to promote them within a limited, neo/liberal frame alone, thus

[120] Williams and Srnicek, above note 6.
[121] Ibid.
[122] Deleuze and Guattari, above note 1.
[123] Williams and Srnicek, above note 6.
[124] Ibid.
[125] Ibid.
[126] Ibid.; This part of the manifesto also refers to the work of Mark Fisher. See; Mark Fisher, *Ghosts of my Life: Writings on Depression, Hauntology and Lost Futures*, (Zero Books, 2014).
[127] Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2014).
[128] Hilary Charlesworth, 'Talking to ourselves? Feminist scholarship in international law' in Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law*: *Between Resistance and Compliance?* (Hart, 2014), p. 27-8.

silencing the more transformative aims of these movements.[129] Working with the system works: in that real change has occurred, albeit limited change. In the meantime, however, in situating themselves outside the system, as within resistance alone without account for the success of using compliance as method, many critical scholars have worked to unintentionally mute their own projects as they are seen as being too outside, too beyond the realm of reality to be listened to.

For Williams and Srnicek, 'if the political left is to have a future it must be one in which it maximally embraces this suppressed accelerationist tendency.'[130] The left is getting nowhere by merely stating they are anti-capitalist whilst capitalism flourishes worldwide. There is a need, proposes the Accelerate Manifesto, to embrace capitalism's methods and use them against it: 'the material platform of neoliberalism does not need to be destroyed. It needs to be repurposed towards common ends. The existing infrastructure is not a capitalist stage to be smashed, but a springboard to launch towards post-capitalism.'[131]

Williams and Srnicek, in calling for the left to embrace and use the methods of capitalism against itself, are in some ways posing a solution to the problem of resistance and compliance encountered within feminist projects on international law. Williams and Srnicek do this by explicitly noting that both resistance, in their case the wish to create a post-capitalist world, and compliance, i.e. using the structure itself as a method for critical aims, are not binary oppositions but, rather, can and should be used together in order to obtain real transformation. While Williams and Srnicek are speaking to "the left" in the Accelerate Manifesto, and specifically more Marxist-leaning groups, in it clear that such a method, of sitting between the false binary of resistance and compliance, can be applied, potentially, to feminist approaches to international law.

Science and technology are key in this post-capitalist imagining: 'the true transformative potentials of much of our technological and scientific research remain unexploited, filled with presently redundant features (or pre-adaptations) that, following a shift beyond the short-sighted capitalist socius, can become decisive.'[132] However, recalling feminist posthuman thinking, this does not mean that the technological singularity alone will be enough to create a post-capitalist world. Post-capitalism must be fought for and technology may have a role to

[129] Rahul Rao, 'Global Homocapitalism,' *Radical Philosophy*, (2015), 194, p. 38-49.
[130] Williams and Srnicek, above note 6.
[131] Ibid.
[132] Ibid.

play but is not necessarily enough alone; social-political action is needed too. Thinking forward, beyond the Accelerate Manifesto, the accelerationist left must become fluent in economics, science and technology in order to be able to harness them for their aims. Further, science and technology, states the Manifesto, are being held back by capitalism, not advanced by it – its potential always being limited by the axiom of schizophrenic capitalism itself. Accelerationism thus aims to create a world beyond capitalism, a truly, revolutionary, schizophrenic world which outruns all.[133]

Thus, Williams and Srnicek propose a three-stage action plan. First, they note the need for the left to create its own systems and ideologies and ways of spreading and networking them.[134] Second, they note the need for widespread media reform so as to bring the media closer to popular control and, finally, they note the need to understand that the proletariat is dispersed and not merely one entity but, rather, knitted together through various precarious and unequal situations: solidarity must then be created through these ties, not in the assumption that "we are one".[135] For the accelerationists dream to come about, all of these groups and actors need to work together, networked. Working alone without communication will not cause change.[136]

Proposing a way out of the schizophrenic capitalist system described in Chapter Three through the active use of, infiltration and infection of the systems that exist, using illegitimate means, accelerationism, drawing on Deleuze and Guattari, proposes a new politics of the left, one which sits between resistance and compliance, using the system itself to resist. However, while up until now I have presented what I believe to be the potentials in the Accelerate Manifesto, it also has its limitations. I will discuss these limitations in the next section, both highlighting them and looking at the ways in which xenofeminism works to address these issues.

2.4 Xenofeminism

As noted in Chapter Two, xenofeminism works explicitly to push at the structural limits of Western thought and the global order.[137] Xenofeminism also, as will be shown in this section, is anti-capitalist and accelerationist. Xenofeminism, I will therefore argue, can be used to push at the limits of international law through challenging constructions of subjectivity in international law and through working to move beyond international law's neo/liberal,

[133] Deleuze and Guattari, above note 1.
[134] Williams and Srnicek, above note 6.
[135] Ibid.
[136] Ibid.
[137] Laboria Cuboniks, above note 6, Zero 004 and Interrupt 005.

humanist, capitalist structure. Further this this, xenofeminism, drawing on accelerationism, works to balance resistance and compliance through a transformative feminist lens.

Xenofeminism is the feminism to come with accelerationism.[138] Created by the collective Laboria Cuboniks, an anagram of the pseudonym Nicolas Bourbaki *(which was a pseudonym used a by group of early twentieth century revolutionary mathematicians), the collective is made up of* six women who met at a conference in Berlin and their associates. This group created xenofeminist theory. There is little published work explicitly on xenofeminism, with the collective having mostly, so far, published online using both their website and twitter.[139] Hester, one of the founders of xenofeminism, having recently published a book entitled *Xenofeminism* which focuses in particular on reproductive technologies.[140] Hester has stated that xenofeminism was created to speak to accelerationism. She notes that, from the offset, the collective asked: 'What is there within the left's accelerationism that can be levered into feminism? What would a feminist accelerationism look like? What does the left's accelerationism have to learn from feminism?'[141] Wishing to take accelerationism and make it feminist, the collective created their own, online Manifesto.[142]

Xenofeminism, like accelerationism, is post-capitalist. However, being dedicated to a feminist ethics, it is more intersectional than acceleration theory, explicitly noting the need to consider all human needs including differences created due to 'race, ability, economic standing, and geographical position',' noting the need to abolish these discriminations.[143] Thus, similar to the Accelerate Manifesto, the Xenofeminist Manifesto states: 'no more futureless repetition on the treadmill of capital, no more submission to the drudgery of labour.'[144] However, unlike the Accelerate Manifesto and the theories of economic singularity described above, the Xenofeminist Manifesto does consider the special role women often play in terms of labour, continuing; 'no more submission to the drudgery of labour productive and reproductive

[138] &&&, 'After Accelerationism: The Xenofeminist Manifesto,' 2015, http://tripleampersand.org/after-accelerationism-the-xenofeminist-manifesto/ (accessed 02/12/2017); Katarzyna Piasecka, 'Xenofeminism: let a hundred sexes bloom!' Cafebabel 2016, http://www.cafebabel.co.uk/society/article/xenofeminism-let-a-hundred-sexes-bloom.html (accessed 02/12/2017).
[139] Laboria Cuboniks, above note 6; Laboria Cuboniks, Twitter page, https://twitter.com/xenofeminism?lang=en (accessed 02/12/2017).
[140] Helen Hester, *Xenofeminism*, (Polity Press, 2018).
[141] Piasecka, above note 138.
[142] Laboria Cuboniks, above note 6.
[143] Ibid., Zero 0*00 and Parity 00F.
[144] Ibid., Zero 0*00

alike.'[145] Xenofeminism argues that the universal is made out of the particular and is not built from above but built up from the bottom.[146]

Xenofeminism, like accelerationism, is both anti and post-capitalist as well as post-Marxist (in the sense of being both beyond yet in continuum with Marxist theory), thus providing, like the Accelerate Manifesto, a critique of the left whilst trying to push a re-modified leftist agenda.[147] Like the accelerationists, xenofeminism seeks to move beyond the rigid constructions of current left politics, as always too pure, as always situated against something else and one another. Instead, 'Xenofeminism seeks to construct a coalitional politics, a politics without the infection of purity.'[148] Thus, 'XF seizes alienation as an impetus to generate new worlds. We are all alienated – but have we ever been otherwise?'[149] Instead of lamenting alienation from work, xenofeminism celebrates it. This part of xenofeminism can be seen as directly in line with the Accelerate Manifesto, in that it refers to the robot economy/the economic singularity, with alienation from work being part of the post-capitalist, accelerationist moment. Thus, xenofeminism states 'the construction of freedom involves not less but more alienation,' for 'it is through, and not despite, out alienated condition that we can free ourselves from the muck of immediacy,' this clearly referring to the future possibility (and now) of machines doing many immediate, manual tasks.[150]

Xenofeminism notes, more explicitly than the Accelerate Manifesto, the dark sides to technology and the ways in which it has been used 'in the exclusive interests of capital, which, by design, only benefits the few.'[151] However, the Manifesto remains positive about the possible futures of technology, noting that there are 'radical opportunities afforded by developing (and alienating) forms of technological mediation.'[152] The Xenofeminist Manifesto notes that, although there is an ongoing problem around accessibility, 'digital tools have never been more widely available or more sensitive to appropriation than they are today.'[153] Xenofeminism, therefore, not only wants to accelerate the use of technology to create a post-capitalist world, but wants to appropriate technology and make it feminist. The dark sides of technology and the way it has been used up until now does not make its use futile. Rather, the

[145] Ibid.
[146] Ibid., Parity 00F.
[147] Ibid., Zero Trap 0*0A.
[148] Ibid., Parity 0*10.
[149] Ibid., Zero 0*01.
[150] Ibid.
[151] Ibid., Interrupt 0*08.
[152] Ibid.
[153] Ibid.

xenofeminists note the need to politicise the techno. Technology, to the xenofeminists, is a tool for revolution: 'XF seeks to strategically deploy existing technologies to re-engineer the world.'[154] Thus, they note that 'the real emancipatory potential of technology remains unrealized,' due to the capitalist ways it has thus far been used.[155]

The xenofeminists, therefore, advocate the use of technology to 'combat unequal access to reproductive and pharmaceutical tools,' to 'combat environmental cataclysm, economic instability, as well as dangerous forms of unpaid/underpaid labour.'[156] Thus, xenofeminism does not only want to create a post-capitalist world like the accelerationists, but wishes to create a more equal world. Xenofeminism laments the early days of cyberfeminism where technology was seen as a key way of 'generating solidarity among marginalised groups,'[157] noting that technology, now, is having a more negative gendered impact, from social media harassment to the identity policing, power relations and gender norms in self-representation in the online culture of images.[158] However, the xenofeminists do not believe that such a turn renders cyberfeminism a thing of the past, rather, they declare that 'the situation requires a feminism at ease with computation.'[159] Thus, xenofeminism is more than just trying to deal with the gendered structures and outcomes of technology, it is about urging 'feminist to equip themselves with the skills to redeploy existing technologies and invent novel cognitive and material tools in the service of common ends.'[160] This re-utilisation of technology will not be easy but will, rather, take time, be a process, requiring 'a feminism sensitive to the insidious return to old power structures, yet savvy enough to know how to exploit the potential.'[161] Thus, states the Manifesto, 'our future requires depetrification. Xenofeminism is not a bid for revolution, but a wager on the long game of history, demanding imagination, dexterity and persistence.'[162]

Consequently, for the xenofeminists, any approach to technology must situate gendered dynamics and account for them. While technology may not be 'inherently progressive,' its use and innovation can and must be 'linked to a collective theoretical and political thinking in

[154] Ibid.
[155] Ibid., Zero 0*03.
[156] Ibid.
[157] Ibid., Carry 0*13.
[158] Ibid., Carry 0*13 and Zero 0*00.
[159] Ibid., Interrupt 0*07 and Carry 0*13.
[160] Ibid., Interrupt 0*07.
[161] Ibid., Carry 0*13.
[162] Ibid., Zero 0*00.

which women, queer, and the gender non-conforming play an unparalleled role.'[163] Their approach to gender is queer and anti-naturalist, gender being seen as fluid and changing.[164] Like the feminist new materialists, xenofeminism situates itself against the nature/culture binary.[165] The xenofeminists note how, in recent feminist and queer scholarship, despite trying to run away from the politics of identity and essentialism, these theories have, for the most part, collapsed into 'a plural but static constellation of gender identities, in whose bleak light equations of the good and the natural are stubbornly restored.'[166] Thus, rather than working to eliminate gender difference through suggesting that gender is a cultural construction,[167] xenofeminism calls for something else.[168] 'Xenofeminism is gender-abolitionist.'[169] Rather than wishing to eradicate what are seen as gendered traits, xenofeminism wants gender to explode and diffract: 'let a hundred sexes bloom!'[170] Thus, for xenofeminism, gender-abolitionism is about disrupting asymmetric gender systems and dispersing them.[171] Xenofeminism also works to blast through the nature/culture binary, declaring that 'if nature is unjust, change nature!'[172] The xenofeminists thus note that nothing should be seen as fixed nor given, including matter itself, noting how the categorisation of natural as a justification to promote inequality and justice has shown how the 'glorification of 'nature' has nothing to offer us… XF is vehemently anti-naturalist.'[173]

Specific examples of how nature can be changed, also bridging the human-machine-technology assemblage are given in the Xenofeminist Manifesto, including the need to ensure free distribution of hormones. Xenofeminism notes that 'hormones hack into gender systems,' and they therefore note the need to wrestle the control over access to hormones from their gatekeepers.[174] One way in which hormones can be appropriated, drawing on xenofeminist methods to re-appropriate science and technology and make it our own, can be through creating home grown hormones and teaching others the same know-how. The project Open Source

[163] Ibid., Zero 0*02.
[164] Ibid.
[165] Ibid.
[166] Ibid., Trap 0*0B.
[167] Feminism new materialism having shown how some gender elimination approaches are problematic. See Chapter Three.
[168] Alaimo and Heckman, above note 4.
[169] Laboria Cuboniks, above note 6, Parity 0*0E.
[170] Ibid.; Deleuze and Guattari, above note 1.
[171] Laboria Cuboniks, above note 6, Parity 0*0E.
[172] Ibid.
[173] Ibid., Zero 0*01.
[174] Ibid., Carry 0*16.

Gender Codes is one such example of this.[175] The project aims to create plants which would allow people to grow their own sex hormones at home.[176] This project, if it or something like it succeeds, would not only massively challenge the pharmaceutical industry who produce these hormones, but would also allow people to make safe choices about whether or not they wish to take hormones outside the institutional contexts of the state and medicine. This could also, potentially, drastically change cultural attitudes to the taking of hormones, making transitioning more culturally acceptable due to its accessibility and lack of institutional framework. These forms of biohacking or gender hacking projects, alongside the likes of do it yourself gene manipulation and open source medicines, are the xenofeminist projects of the future, brining science and technology to the people and dragging it away from the clutches of the state and the corporation. As the Xenofeminist Manifesto notes, these sorts of projects follow the methods of online hackers before them and of the open source software pioneers, bringing them to the body, this being, they state, 'the closest thing to a practicable communism many of us have ever seen.'[177] They are about 'shared laboratories' and communication.[178]

Another possible example of what could be seen as xenofeminist method, using technology for feminist aims, can be seen in the use of drones to drop contraception. There are multiple examples of such use including the use of drones to drop medical abortion pills to women in Poland and Northern Ireland, where abortion is illegal,[179] to the Dr. One project, funded by the United Nations Population Fund and the Dutch government, which used drones to deliver contraception to people in rural areas in Ghana.[180] Originally created for military purposes, the use of drones to drop contraception gives another example of the ways in which a feminist appropriation of technology may work to use the tools that exist to subvert – to resist via complying.

The Manifesto is subsequently utopian but in a practical sense, harking back to the Lacey's words as quoted at the start of this thesis that, while 'utopias cannot be reached… they provide

[175] Open Sources Gender Codes, http://opensourcegendercodes.com/projects/osg/ (accessed 02/12/2017).
[176] Ibid.
[177] Laboria Cuboniks, above note 6, Carry 0*16.
[178] Ibid., Carry 0*15.
[179] Radhika Sanghani, ''Abortion Drone' to drop DIY Drugs over Poland to women,' The Telegraph 2015, http://www.telegraph.co.uk/women/womens-life/11691081/Abortion-drone-to-drop-DIY-drugs-over-Poland-to-women.html (accessed 02/12/2017); Press Association, 'Drone delivers abortion pills to Northern Irish woman,' Guardian 2016, https://www.theguardian.com/uk-news/2016/jun/21/drone-delivers-abortion-pills-to-northern-irish-women (accessed 02/12/2017).
[180] See, for example; The New York Times, 'Drone successfully deliver contraceptives to women in rural Ghana,' 2016, http://nytlive.nytimes.com/womenintheworld/2016/02/02/drones-successfully-deliver-contraceptives-to-women-in-rural-ghana/ (accessed 02/12/2017).

horizons towards which we attempt to move'.[181] Like Lacey's utopia, xenofeminism does not propose its utopic ideal as a fixed point on a map. Rather, xenofeminism works to constructively create a new logic, a new rationalism.[182] Xenofeminism, in many ways, combines and addresses several of the core arguments made in this thesis so far including the need to deconstruct the liberal, humanist subject at the centre of the law and to thus understand subjectivity in a posthuman way and the need to move beyond the binary of resistance and compliance in order to reach towards gradual, structural change, avoiding paralysis while remaining within a feminist frame. Xenofeminism could provide a method for feminist international lawyers which could help to resolve the tension between resistance and compliance, thus opening up space for structural legal change. The next chapter, consequently, will apply xenofeminism to the problem of autonomous weapons in international law, working to understand the usefulness of xenofeminism and the limits of that usefulness for feminist approaches to international law.

To conclude, xenofeminism is anti-essentialist, anti-naturalist, aiming to blast through nature/culture and all the other gendered binaries including gender itself, dispersing them across the network. Xenofeminism is also both anti and post capitalist, wishing to appropriate technology for intersectional feminist means; to destroy and multiply gender through things like gender hacking, to destroy capitalism through accelerationism and to destroy other inequalities such as race and disability in other ways.

There are numerous links between xenofeminism and Haraway's cyborg, with Haraway's work clearly having influenced xenofeminism. The cyborg does not try to yearn for some pre-existence or other 'seductions to organic wholeness… the cyborg skips the steps of original unity or identification with nature in the Western sense.'[183] Haraway, like the xenofeminists, too, notes how nature can be made: 'if organisms are not born; they are made in world-changing technoscientific practises by particular collective actors in particular times and places.'[184] Nature is made, just as culture is, whether this be through birth or in a lab. Nothing is natural and everything is natural, and thus technoscientific production of nature 'is not a *denaturing* so much as a *particular production* of nature.'[185] Instead, like xenofeminism, the cyborg blasts

[181] Nicola Lacey, *Unspeakable Subjects: Feminist essays in legal and social theory*, (Hart, 1998), p. 236.
[182] Laboria Cuboniks, above note 6, Overflow 0*1A.
[183] Haraway, above note 3, p. 292.
[184] Donne Haraway, 'The Promises of Monsters: A Regenerative Politics for Inappropriate/d Others,' in *The Haraway Reader*, (Routledge, 2004), p. 65.
[185] Ibid., p. 66.

through nature-culture and gender, for, as Haraway states, 'the cyborg is a creature in the post gender world.'[186]

3. Conclusion: Posthumanism, Xenofeminism and International Law

This thesis aims to push at the limits of international law and feminist approaches through challenging international law's structural bias, seeking a more resistive feminism to the dominant feminisms found in the global order. I have argued that schizophrenic capitalism, able to bend everything to its will and turn it into the limits of capital itself, has decoded international law and recoded it as its own. This can be exemplified in the role and status of the global corporation. Better fitting definitions of legal personality than any lived subject, the fictional legal person of the global corporation has worked to both ensure that the corporation can gain access to the law when it needs to whilst avoiding the pitfalls of being *seen* as a full subject, thus avoiding accountability for, for example, human rights breaches.[187] International law is both complicit in and tainted by the universalisation of capitalist and neoliberal ideologies and is itself, a capitalist, gendered, racialised, humanist structure.[188]

This chapter has worked to consider theories which aim to tackle, from a critical perspective, two of international law's problematic theoretical foundations: humanism and capitalism. The chapter considered technology and the ways in which technology has been shown by feminist posthumanism to challenge the humanist subject through deconstructing the human-machine binary.[189] The human-machine challenges subjectivity in that it explicitly notes how the human is already impure, already neither bounded nor whole in that is it deeply embedded and situated within technology with technology being part of human subjectivity. This can be exemplified through the figure of the cyborg.[190]

Technology does not only challenge humanist accounts of subjectivity by blurring the human-machine binary, however. The future of machine superintelligence, it has been shown, has the

[186] Haraway, above note 3, p. 292.
[187] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene Humanity,' *Law and Critique*, (2015), 26(3), p. 225-49.
[188] Knox, above note 98; Hilary Charlesworth. 'The Sex of the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 251-68; Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in
Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583-99; Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal*, (1999), 40, p. 1-71.
[189] Haraway, above note 3.
[190] Ibid.

potential to challenge who and what we define as a subject as well as to challenge humanist conceptualisations which place the human at the centre, in hierarchy over all others. It is both feasible and likely that machines will be more intelligent than humans, thus displacing humanist claims to superiority. This is something which is already beginning to happen.

This chapter has shown, however, that not only may technology displace current dominant modes of subjectivity but, if it is drawn on and used in the right way, it could, eventually work to destroy capitalism. Accelerating the use of technology and politicising it may work to create a jobless, post-capitalist society.[191] Further, following xenofeminism, technology may be appropriated to abolish gender and reach towards impure utopias.[192] Following these theories, therefore, it seems that one way to challenge the structure of international law is to challenge the modes of subjectivity it promotes through, for example, working to include different types of subject. This can be done, for example, through working to give legal personality to the environment. However, at the same time, it seems, following accelerationism and xenofeminism, that another way to destroy both the subjectivity-structure of international law and its inherent capitalisation would be through the use of and acceleration of technology. Applying such theories to international law could include giving machines legal personality, thereby challenging current dominant modes of subjectivity within the concept legal personality. It could also include working to create international laws which provide for a Universal Basic Income whilst promoting developments in technological advancement so as to look towards creating a jobless, post-capitalist society. Such an application could also include working to change patent laws and global property laws, making patents and property communal and no longer individually owned, thus ensuring that the machines that do the work and the new technologies that are to come are never owned only by a few but are always owned by all. Making science and technology the property of all and accessible to all is one way international law, alongside other discourses, can be used to change the structure of the global order. The premise here, therefore, is that, while until now this thesis has aimed to challenge the structure of international law through considering various theoretical interventions, as this chapter has shown, technology is *already* beginning to challenge international law's structure. Thus, as accelerationism and xenofeminism both propose, there is a need to ensure that these challenges and changes are utilised by critical thinkers in order to promote critical world views at this key moment of change.

[191] Williams and Srnicek, above note 6.
[192] Laboria Cuboniks, above note 6.

However, there are clear flaws in some of these ideas. Whilst technology could and may work to help create utopia, it could also end up creating a dystopia.[193] As Chace notes, there is a risk in the robot economy of creating a techno-scientific elite of superhumans who have access to all who would, ultimately, live in isolation from the rest of humanity.[194] Further, there is a risk that the techno-subjectivities of the future may not displace the current blueprint of subjectivity with something better, but, rather, with something worse. The next chapter will test the limits of feminist posthuman thinking and xenofeminism in light of the possible emergence of autonomous weapons systems. Such systems, it will be noted, are necropolitical, dark enlightenment, capitalist created-subjects of the near future. They thus inherently challenge accelerationism and xenofeminism from multiple lenses, therefore providing the ideal site through which test the limits of such theories in their application for feminist approaches to international law.

[193] Haraway, above note 3.
[194] Chace, above note 7.

Chapter Six

Machines as (Legal) Subjects and as Weapons: Autonomous Weapons, Machine Intelligence and Human Enhancement Technologies

… a cyborg world [could be]… the final imposition of a grid of control on the planet, about the final abstraction embodied in a Star Wars apocalypse waged in the name of defence, about the final appropriation of women's bodies in a masculinist orgy of war. From another perspective, a cyborg world might be about lived social and bodily realities in which people are not afraid of their joint kinship with animals and machines, not afraid of permanently partial identities and contradictory standpoints. The political struggle is to see from both perspectives at once… Cyborg unities are monstrous and illegitimate; in our present political circumstances, we could hardly hope for more potent myths of resistance.[1]

[1] Donna Haraway, 'A Cyborg Manifesto,' in David Bell and Barbara M. Kennedy (eds.), *The Cybercultures Reader*, (Routledge, 2001), p. 295.

1. Introduction

While Chapter Five considered the many ways in which technology could be used to create a transformative politics, using technology to work towards a post-capitalist, post-gender world, it is clear that science and technology, if it follows the same trend in which it has been used, for the most part, until now, may actually make things worse, intensifying the power liberal, humanist, enlightenment thought. Science and technology, notes Haraway, as two of the rational pinnacles of enlightenment thinking, have also long been tied to 'militarism, capitalism, colonialism and male supremacy.'[2] This chapter will consider the fact that science and technology have long been tied to these structural forces, seeking to test xenofeminism's techno-future out in the context of autonomous weapons systems. These systems are an ideal focus through which to test these ideas out on precisely because they lie between the militarism, capitalism, colonialism and male supremacy assemblages. Examples will be drawn on from military technologies and autonomous weapons (broadly, weapons which can independently select and engage targets without human interference) in order to both examine the possible limitations of a tech-positive stance as well as to provide a context through which such limitations can be thought through in posthuman terms.

The chapter will also return to the question of international legal personality. Technological subjectivities, both potentially as within weapons systems and beyond, will soon begin to challenge legal constructions of subjectivity in various ways due the fact that machines are taking on more and more roles formerly undertaken by humans. Such subjects will pose new legal challenges, for example, what happens when a robot worker, who is not a legal subject but who may be conscious in some way, has an accident at work due to the fault of the employer? The machine is not a legal subject, for now, for the purposes of being able to sue her employer, yet it could indeed prove unjust to allow employers to slip through the boundaries of accountability in such a situation.

Another example can be seen in the issue of the legal responsibility of artificially intelligent (AI) lawyers. AI lawyers are already starting to be used in legal practise and will likely transform the legal profession.[3] However, AI lawyers are not legal people under current law, posing the question of who may be held responsible when they give bad legal advice. The same

[2] Donna Haraway, 'Situated knowledges: The science question in feminism and the privilege of partial perspective,' *Feminist studies,* (1998), 14(3), pp. 581.
[3] See; Cecille De Jesus, 'AI Lawyer "Ross" has been hired by his first Law Firm,' Futurism 2016, https://futurism.com/artificially-intelligent-lawyer-ross-hired-first-official-law-firm/ (accessed 18/09/2017).

issue arises with automatic cars – who may be held responsible when they crash? Examples such as these, and multiple others, will soon begin to challenge our legal frameworks at their foundations.

This chapter analyses the challenges machines may soon and already do pose to existing legal frameworks through considering the various debates on autonomous weapons systems and legal responsibility. After all, if a machine breaches International Humanitarian Law (IHL), it would be unclear who could be held responsible; the maker, the programmer, the military in charge or maybe even the machine itself.[4] At their most autonomous level, autonomous weapons may have AI, therefore being a new mode of subjectivity and inherently challenging the dominant models of subjectivity this thesis has worked to critique.

The idea of giving legal responsibility and thus personality to machines fits one of the core themes of this thesis; to re-consider the legal subject the constructions of subjectivity it is based upon so as to push towards challenging and changing the structure of international law. Technological legal personalities would, if created at law, massively open up what it means to be a legal subject, working, potentially, to re-define the model of subjectivity on which legal personality is currently based on. However, as noted in Chapter Four, there is also always a risk when adding new subjects to the model of the legal subject that their subjectivity may be reduced to a liberal account of the bounded, rational, subject. Considering this risk, this chapter argues that international law and law *must* become posthuman. Technologically enforced legal change is upon us, as this chapter will show. This transformation will create a space, a chance, a moment of possibility for critical change. This chapter will thus, while noting the risks of a feminist-posthuman or xenofeminist approach, also note the possibilities presented for feminist international lawyers in this moment of legal change.

Technological subjects could help to create an accelerationist post-capitalist world, with machines doing all the work leaving humanity free from the constraints of capital. However, while autonomous weapons may have AI and thus, possibly, consciousness, depending on one's definition of AI,[5] they are/will be[6] the child of military capitalism. With the military economy being one of the biggest globally, it will be noted that capitalism is both schizophrenic, as noted in Chapter Three, as well as being tied to the necropolitical. Capitalism,

[4] Reaching Critical Will, 'Fully Autonomous Weapons,' http://www.reachingcriticalwill.org/resources/fact-sheets/critical-issues/7972-fully-autonomous-weapons (accessed 02/12/2017).
[5] AI was defined in more detail Chapter Five.
[6] As this depends on whether one believes that such weapons exist already or not, this being debatable. I will discuss this in this chapter.

technology and militarism often work in assemblage with one another, with, for example, many of the technologies we now use every day, such as Satellite Navigation, having originally been created for the military. Autonomous weapons do not merely represent the limit of posthuman, accelerationist and xenofeminist thinking, they represent its antithesis. Autonomous weapons show how schizophrenic capitalism, in combination with militarism and the necropolitical, continues to work to turn everything and turn it into capital, including even death itself. Having machines to do all our work and thus creating a post-work world sounds wonderful, in theory, but do we also want them to replace those who professionally kill?

Despite noting the limitations of xenofeminism and feminist posthumanism, this chapter will conclude by turning to feminist posthuman and xenofeminist methods to look for a way out of the above described conundrums. I argue that, while feminist posthumanism and xenofeminism may not have fully considered the risks of the militarism-capitalism assemblage, this does not render these theories useless and unworkable. Rather, in noting the risks more explicitly, this chapter will show how these methods are adaptable and can be refined as tools for feminist international lawyers. Thus, this chapter will conclude with a posthuman-xenofeminist proposition for how feminist international lawyers can directly work to challenge and change international law's structure, beginning with an account of the ways in which feminists may engage in the debate around autonomous weapons before coming to broader conclusions for challenging international legal structure. A xenofeminist method may, I conclude, include, not only the appropriation of technology for feminist aims but of the frameworks which regulate it, such frameworks being key in structuring future developments of technology and thus, in some ways working to appropriate technology through shaping the creation of technology from the outset.

2. Challenges to Posthumanism and Xenofeminism

2.1 Posthuman and Xenofeminist Dangers

Posthuman wars breed new forms of inhumanity.[7]

The previous chapter gave an outline of xenofeminist and posthuman feminist thinking around technology. While these feminist theories are, for the most part, positive about the potentials of technology, some of the limitations of such thinking was noted, including the fact that

[7] Braidotti, *The Posthuman*, (Polity Press, 2013), p. 122.

technology, up until now, has mostly been ruled by a capitalist elite.[8] This section will go into more depth in considering xenofeminism's and posthuman feminism's limitations.

It has already been noted, in Chapter Five, the ways in which technology's current impact is gendered.[9] This can be seen, for example, through social media and visual culture, these discourses and forums often promoting normative accounts of gender and working to police gender.[10] This is not to say that everything within social media and visual culture is tainted. There are many ways in which both discourses are used to promote more positive, feminist and transformative accounts of gender and politics. However, the problems remain vast. Such issues, notes the Xenofeminist Manifesto, challenge the possibility of the cyborg utopia.[11] However, as the Manifesto states, this does not render cyberfeminism something of the past, rather there is a need to take account for the political act in the knowledge of the negative uses of technology in order to avoid replicating such use.[12]

There are, however, multiple other issues around technology, even when considering technology from a broadly tech-positive feminist posthuman position. Haraway, for example, is fundamentally positive about technology and its use for feminists while also being aware of the dangers and risks.[13] Haraway thus notes that technology is already embedded within capitalism, highlighting the fact that the people usually making these machines are often exploited, poor women from the Global South.[14] This is something the xenofeminist Manifesto notes too, also adding that 'a large amount of the world's poor is adversely affected by the expanding technological industry (from factory workers labouring under abominable conditions to the Ghanaian villages that have become a repository for the e-waste of the global powers.'[15] Technological disparity is no longer just about who makes the technology and who has access to it but is also about who dismantles it, with much of this deeply toxic labour being done without adequate safety protection, training or knowledge and often being done by children, most commonly either in Ghana or in India.[16]

[8] Laboria Cuboniks, 'Xenofeminism: A Politics for Alienation,' http://www.laboriacuboniks.net/, (accessed 21/09/2017).
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Ibid., Carry 1*03.
[13] Haraway, above note 1.
[14] Ibid., p. 295.
[15] Laboria Cuboniks, above note 8, Interrupt 0*08.
[16] Leah Borromeo, 'India's e-waste burden,' Guardian 2013, https://www.theguardian.com/sustainable-business/india-it-electronic-waste (accessed 02/12/2017).

While the xenofeminists note the dilemmas technology brings and the need to 'explicit[ly] acknowledge… these conditions as a target for elimination,'[17] there is an inherent contradiction within their standpoint. While a post-capitalist world may indeed, possibly, be obtained through accelerationism and the promotion of technology, and while this may, eventually, render the manual and toxic jobs of dismantling and making technology obsolete in that machines, too, could eventually take these jobs, this is not immediate. In the meantime, as Haraway notes, science and technology have both contributed to and changed the face of 'late capitalism' already,[18] with more work becoming precarious and being done at home – this affecting women and people of colour first.[19] Further, while machines replacing humans for jobs sounds potentially ideal in the long term, in the meantime, such job losses will impact on many people greatly, increasing global inequalities.

There is a need to take seriously the relation between science, technology and capitalism. Tech-positive theories such xenofeminism are indeed, very useful, in that they allow one to imagine and construct the future from the now. However, in the meantime, the present and near future cannot be forgotten. While the impacts of capitalist technologies may be ameliorated by a Universal Basic Income, in the short term, this possibility remains a long way off in most contexts.[20] A long term wish to destroy the system does not prevent the ways in which the system operates now and will operate in the near future. Further, it is not just humans who are affected by the technology-capitalism assemblage, with massive environmental damage occurring every day, right now, when our contemporary technologies are dismantled, this impacting on both the human, the nonhuman and directly on the environment itself.[21]

It can thus not be forgotten that technology is largely created by a capitalist elite. This capitalist elite is mostly white, male and situated in the Global North, these people being those with the money, power and expertise to be able to create these technologies. This can be exemplified by the way in which facial recognition technology has a problem with recognising black faces. Made by the white elite, the technology itself has been built based on whiteness, forcing some,

[17] Laboria Cuboniks, above note 8, Interrupt 0*08.
[18] Haraway, above note 1.
[19] Ibid.
[20] Though note that Finland has started already to introduce a Universal Basic Income. See; Jon Henley, 'Finland Trials Basic Income for Unemployed,' Guardian 2017, https://www.theguardian.com/world/2017/jan/03/finland-trials-basic-income-for-unemployed (accessed 02/06/2017).
[21] This can be seen, for example, in the 'animals of Sarajevo zoo, which were forcefully freed as a result of NATO bombing and roamed the streets – terrorized and terrifying the humans until they succumbed to friendly fire.' Braidotti, above note 7, p. 142.

such as coder Joy Buolamwini, to wear a white mask when using the software.[22] As much as wrestling power from these elite, as the xenofeminists aim to do, sounds like a very good idea indeed, doing this is a long process. Society is ridden with inequalities and access to the education to be able to attain the skills needed to develop tech is unequal.

It is not, however, just in terms of the practicalities of technology, the making and the unmaking, that there is a need to be cautious when taking a critical pro-tech standpoint. There are many theories of science and technology which sit in opposition to a feminist posthuman or xenofeminist perspective, transhuman theory being one such body of thought. While transhuman thinkers span all sides of the political spectrum, there are many which aim to create a human beyond death, beyond human limitations.[23] This could sound utopic, but it could also, as Haraway notes, result in the human *becoming* its own enlightenment ideal subject, becoming God, resulting in the apocalypse; the abstract individual without dependence: 'a man in space.'[24] It is no coincidence that many of the people working within transhumanism to try to push the human beyond human limitations are, again, white, middle class men from the Global North (i.e. from the group of people who constructed the God fantasy in the first place and who best fit the liberal subjectivity used to try and fill the space of God after his Death). Even Vernor, a well-known singularity theorist, is aware of these dangers when he asks: 'Just how bad could the Post-Human era be? Well… pretty bad. The physical extinction of the human race is one possibility.'[25]

As already noted in this chapter, however, tech-positivism may not only be marred by technology's current capitalist limitations, or by transhumanist visions of the obtaining the end of the enlightenment by reaching its ultimate goal, but by militarism too. As this chapter will discuss further, militarism and capitalism are deeply embedded in that the military is an economy in and of itself.

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[22] Joy Buolamwini, 'How I'm Fighting Bias in Algorithms,' TED https://www.ted.com/talks/joy_buolamwini_how_i_m_fighting_bias_in_algorithms (accessed 18/09/2017). See also the Algorithmic Justice League, a project, led by Buolamwini, which aims to fight bias in algorithms. See; Algorithmic Justice League Website, https://www.ajlunited.org/ (accessed 18/09/2017). In addition, Sandvik ha discussed how the use of technology and data collection to manage refugees works to invisibilise black male refuges. See; Kristin Bergtora Sandvik, 'Technology, Dead Male Bodies, and Feminist Recognition: Gendering ICT Harm Theory,' *Australian Feminist Law Journal*, (2018), 44.1, p. 49-69.

[23] See; Mark O'Connell, *To Be a Machine: Adventures Cyborgs, Utopians, Hackers and the Futurists Solving the Modest problem of Death*, (Granta, 2017).

[24] Haraway, above note 1, p. 292.

[25] Vernor Vinge, 'The Coming Technological Singularity: How to Survive in the Post-Human Era' Paper presented at Vision-21: Interdisciplinary Science and Engineering in the Era of Cyberspace Conference, NASA Lewis Research Centre, (1993), NASA Publication CP-10129, https://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/19940022855.pdf (accessed 01/12/2017).

Whilst Manjikian has suggested that Haraway considers developments in military technologies which work to replace the system of men protecting women with machines protecting all 'as an important step towards posthumanity where man-machine as well as gender distinctions are overcome,'[26] this interpretation does not do justice to Haraway's oeuvre of work. Haraway has long noted the need for feminists to consider and challenge militarism and the ways in which science and technology is implicitly linked to militarism.[27] In fact, as Feigenbaum notes, anti-militarism is part of the political context of Haraway's cyborg figure.[28] However, as both Feigenbaum and Hemmings have highlighted, Haraway's cyborg has often been used without drawing on this political context, with the concept being 'split from [its] own legacies within feminism,' with the cyborg being imagined only within the broader story of feminism, as the marker of something new, split from the past.[29] This, as noted, is not what Haraway's cyborg represents (alone). Haraway's cyborg is deeply embedded within feminist politics and theory, including feminist anti-militarism. Reflecting this, this chapter will aim to bring this anti-militarism strand to feminist posthuman thinking once more, noting the ways in which such a perspective is deeply imbedded within my own lineage of feminist approaches to international law.[30]

2.2 The Militarism-Capitalism Assemblage and the Necropolitical

Rossum's Universal Robots (R.U.R), a play written by Czech writer Karel Čapek and published in 1921, is credited for having introduced the word 'robot' into the English language.[31] The play is seen as a fundamental text in the history of Science Fiction literature. It tells of a dystopian future, where a mad scientist uses biology to create a simplified man-like robot, built to work. In the play, the robots end up taking over. Humans, much as in the theories described in the previous chapter predict, stop working. Humans also stop reproducing. However, unlike in the accelerationist story, the play does not end in a utopic world of humans creating and machines working. While the robots in R.U.R were never built for warfare, they eventually

[26] Mary Manjikian, 'Becoming Unmanned: The Gendering of Lethal Autonomous Warfare Technology,' *International Feminist Journal of Politics*, (2014), 16(1), p. 48.
[27] For example, see; Haraway, above note 1.
[28] Anna Feigenbaum, 'From cyborg feminism to drone feminism: Remebering women's anti-nuclear activisms,' *Feminist Theory*, (2015), 16(3), p. 271.
[29] Ibid.; Clare Hemmings, *Why Stories Matter: the Political Grammar of Feminist Theory*, (Duke University Press, 2011), p. 131.
[30] See, for example; Dianne Otto, 'A Sign of "Weakness"? Disrupting Gender Certainties in the Implementation of Security Council Resolution 1325,' *Michigan Journal of Gender and Law*, (2006), 13(1), p. 113-75; Gina Heathcote, *The Law on The Use of Force: A Feminist Analysis*, (Routledge, 2012).
[31] Karel Čapek, 'About the Word Robot,' trans; Norma Comrada, *Lidové Noviny*, (1933).

take on military roles and finally, and in part due to some alterations made to the way robots are made by a male scientist at the request of a young woman that they be given souls, (note the clear gendering here, man: scientist, woman: life/soul) they revolt and take over the world, killing all human life.[32] R.U.R.'s conclusion, unfortunately, looks ever more realistic in in light of the militarism-capitalism assemblage.

Technology is deeply embedded in both capitalism and militarism. Haraway is aware of this, stating that 'the main trouble with cyborgs, of course, is that they are the illegitimate offspring of militarism and patriarchal capitalism, not to mention state socialism.'[33] Xenofeminism and accelerationism may pose technology as the path to a utopic future yet this future seems less utopic when one considers that much of the technology developed and made today is developed, first and foremost, for military purposes. Further, while having robots and AI to do the work for humans sounds ideal; it is less than ideal that machines may also do the work of those who kill professionally i.e. the military.

War is money making. Global military spending has been estimated by the Stockholm International Peace Research Institute (SIPRI) to be around US$1.6 trillion in 2016.[34] Military spending as a percentage of GDP is over 10% in both Oman and Saudi Arabia[35] and US military spending alone was $611 billion in 2016.[36] The military economy is not, however, just about state spending: it affects jobs, for example, direct, indirect and induced employment within the US aerospace and defence industry is of around 3.53 million people.[37] In terms of impact, feminist scholars have also highlighted how militarism goes further, in that there are a number of key roles played outside the formal work place, often by women. Enloe has highlighted this, noting that 'military policy makers have needed women to play a host of militarized roles: to boost morale, to provide comfort during and after wars, to reproduce the next generation of soldiers, to serve as symbols of a homeland worth risking one's life for [and] to replace men

[32] Karel Čapek, *Rossum's Universal Robots*, (Hesperus Press, 2011).
[33] Haraway, above note 1, p. 293.
[34] Stockholm International Peace Research Institute (SIPRI) Military Expenditure Database, http://www.sipri.org/research/armaments/milex/milex_database/milex_database (accessed 02/12/2017). Statistic taken from global military expenditure from the year 2016 (latest figure in current US$). See also; SIPRI Visuals, http://visuals.sipri.org/ (accessed 02/12/2017).
[35] Stockholm International Peace Research Institute (SIPRI), Ibid. Statistic taken from global military expenditure from the year 2016.
[36] Ibid. Statistic taken from global military expenditure from the year 2016 (latest figure in current US$). Figure slightly rounded up.
[37] Deloitte report sponsored by the Aerospace Industries Association (AIA), 'The Aerospace and Defence Industries in the U.S.,' 2012 http://armedservices.house.gov/index.cfm/files/serve?File_id=126226cd-bc54-4e4b-a9ec-1ea16e61a2dd (accessed 11/03/2016). Statistic is for the year 2010.

when the pool for suitable male recruits is low.'[38] Militarisation can be seen as both creating roles for women and as being, in turn, upheld by the often informal work of these women, playing a direct role in the production and maintenance of gender difference.

Militarism and military spending also benefits companies. Military spending 'does not, like many other forms of government spending, compete directly with private investment. It supplements but does not supplant the private sector. Thus, its expansion will not undermine business confidence.'[39] Military spending sits comfortably within capitalist and neoliberal ideologies:[40] it helps businesses expand and make profits without challenging private companies despite state-sourced investment. The fact that US defence and aerospace companies generated an estimated $324 billion in sales revenue in 2010, with a profit margin of around 10.5%,[41] exemplifies this. The military economy is also a fast moving one, allowing constant, continuous profits as weapons and machinery need regular replacement.[42]

High military spending is, in part, a result of technological advancements.[43] With the pressure to obtain the latest technology being high and the investment in developing new technologies needing to be constant to keep up with other states and to stay ahead, military development spending has increased over the past decade in many states including the US, Kenya, Brazil, Colombia, India, Malaysia, Poland, Russia and Saudi Arabia.[44] The military economy has always a constant, secure and steady profit due to the fact that many states wish to invest in having the best and the most weapons and also due to the fact that weapons systems often need updating.[45] The link between technology and militarism, therefore, is strong. Many of the everyday technologies we now use were initially created for military purposes; Satnav being a

[38] Cynthia Enloe, *Maneuverers: The International Politics of Militarizing Women's Lives*, (California University Press, 2000), p. 44.
[39] Miroslav Nincic and Thomas R. Cusack, 'The Political Economy of US Military Spending,' *Journal of Peace Research*, (1979), 6(2), p. 112.
[40] Of course, the argument that the military is, in itself, an economy which is made up of vested interests, is one which has long been made by the literature on the 'military industrial complex.' See, for example; P. Dunne, 'The Political Economy of Military Expenditure: An Introduction,' *Cambridge Journal of Economics*, (1990), 14, p. 398.
This phrase was coined by a speech made by President Eisenhower in 1961, in which he warned of the military-industrial complex's potential impact in being able to influence American policy and therefore undermine democracy due to large corporate influence. (President Eisenhower, 'Military Industrial Complex Speech by President Eisenhower,' 1961, http://coursesa.matrix.msu.edu/~hst306/documents/indust.html (accessed 11/03/2016).
[41] Deloitte, above note 37.
[42] Nincic and Cusack, above note 39, p. 112.
[43] Dunne, above note 40, p. 398.
[44] SIPRI, above note 34.
[45] Nincic and Cusack, above note 39.

prime example of this.[46] War is thus the ultimate economy to tap into as any technological developments may allow a double profit – first through the military economy where there is stable, state investment and funds, and second through "civil" use. Given the close relationship between technological development and the military economy, it seems likely that AI and other technological advancements could indeed be created, first and foremost, as military technologies. After all, this is what happened with drone technology. Originally designed for military use, drones are now being bought as presents for children and adults alike.

The links between technology and militarism can further be explained through a consideration of the necropolitical order. Weapons systems exemplify part of the the nexus between late capitalism, technology and the necropolitical which Braidotti notes and the ways in which death and 'multiple ways of dying… are proliferating around us'[47] with ever more 'new and subtler degrees of death and extinction'[48] coming about in the necropolitical management of death itself.

Necropolitics, a concept which originates in the work of Mbembe, describes the way in which the global order is no longer just about the biopolitical and the management of human life but now concerns the management of death. Sovereignty itself therefore, states Mbembe, has become the power to decide who may live and who may die.[49] Weapons systems are deeply implicit in the creation of and sustaining nature of the necropolitical, being tools through which death is managed. An example of how sovereignty disguised as humanitarianism is used necropolitical ways can be seen in Kendall and Murray's work.[50] Kendall and Murray note how Trump's sovereign decision to bomb Syria in April 2017 was expressed in terms of humanitarianism, highlighting how the chemical weapons attacks on civilians, which included the deaths of many children, had been deemed to have 'crossed a line', leaving Trump with "no option" but to retaliate.[51] As Kendall and Murray note, 'it was not [however], merely that children and babies had died, as there is no mention of the dead children or babies amongst the

[46] Aeronautics and Space Engineering Board et al, *The Global Positioning System: A Shared National Asset*, (National Academies Press, 1995).
[47] Braidotti, above note 7, p. 114-5.
[48] Ibid., p. 115.
[49] Archille Mbembe, 'Necropolitics,' trans. Libby Meintjes, *Public Culture*, 2003, 15(1), p. 11.
[50] Sara Kendall and Stuart J. Murray, 'Trump's Law: Toward a Necropolitical Humanitarianism,' Critical Legal Thinking 2017, http://criticallegalthinking.com/2017/04/10/trumps-law-toward-necropolitical-humanitarianism/ (accessed 02/12/2017).
[51] President Trump, 'Remarks by President Trump and His Majesty king Abdullah II of Jordan in Joint Press Conference at the Rose Garden,' The Whitehouse 2017, https://www.whitehouse.gov/the-press-office/2017/04/05/remarks-president-trump-and-his-majesty-king-abdullah-ii-jordan-joint (accessed 02/12/2017).

migrant populations, nor of those refugees drowned in the Mediterranean, those turned back at the borders or those who are refused food or exposed to disease and extreme cold'[52] all of these people, all of these deaths, of course, like the people who died of the chemical weapons attack, being of Syrian civilians killed as a result of conflict in Syria. 'What crosses the line' state Kendall and Murray, 'is the manner in which they have died: they were marked for death, and not merely exposed to an indifferent, indirect, or less 'barbaric' death.'[53] They were directly killed by the use of chemical weapons as opposed to being left to die. This, they note, is an example of sovereign rule disguised in humanitarianism performing the necropolitical:

> this is not merely to condemn a particular form of death, or to distinguish between deaths that do and do not 'cross the line'; it is to control the meaning and the message of death itself, admiring the power and the right to distinguish between deaths that are 'acceptable,' and hence unremarkable, and those that are acceptably avenged.[54]

Sovereignty, which is often cloaked in humanitarianism,[55] is necropolitical, paradoxically working to save and avenge lives through the death of others.

Weapons systems are clearly linked to the necropolitical, being tools for killing but also being deeply embedded in the desire to kill and be God. This can be seen through looking at Cohn's study of defence intellectuals.[56] Cohn notes how defence intellectuals often discuss weapons systems both as though they are fully removed from death, while at the same time describing such systems as birth giving and God-like.[57] Thus she notes, 'the first atomic bomb test was called Trinity – the unity of the Father, the Son, and the Holy Spirit, the male forces of Creation.'[58] She further notes that 'the creators of strategic doctrine actually refer to their members as "the nuclear priesthood."'[59] Thus, Cohn concludes, the 'idea of male birth and its accompanying belittling of maternity – the denial of women's role in the process of creation and the reduction of "motherhood" or the provision of nurturance… seems thoroughly incorporated into the nuclear mentality.'[60] This linking between creation, birth, divine power and death in the discourse of defence intellectuals goes to illustrate how weapons systems are

[52] Kendall and Murray, above note 50.
[53] Ibid.
[54] Ibid.
[55] Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law*, (Cambridge University Press, 2003).
[56] Carol Cohn, 'Sex and Death in the Rational World of Defence Intellectuals,' *Signs*, (1987), 12(4), p. 687-718.
[57] Ibid.
[58] Ibid., p. 702.
[59] Ibid.
[60] Ibid., p. 699.

not just linked to the necropolitical as a tool for killing and the enforcement of the necropolitical order but they are deeply embedded in the desire to kill, to be God and decide who lives and who dies. The same thing can be said of more contemporary military technologies such as the drone which overseeing killing from a distance, from above, like God.[61] This phenomenon led Braidotti to call new technologies of war 'necro-technologies.'[62]

2.3 Drone Warfare and Gender Perspectives

The most well-known current example of how the militarism-capitalism assemblage has worked in line with the necropolitical and man's desire to be God can be seen in drone warfare. A lot has been written on drones, including from gender perspectives. Here, I will summarise some of the gender and feminist literature around drones, with much of this literature therefore providing the foundations for the oncoming discussion of autonomous weapons systems, on which very little has been written on from a feminist perspective.[63] It is key here, too, to consider work on drone warfare given that the drone is, of course, only one part of the entire system through which drone warfare is being conducted. It is this wider system and the structure of this system which will and already is informing the debate around and the creation of autonomous weapons systems, as will be shown later on in the chapter.

Drones, a common lay term for what are properly called Unmanned Ariel Vehicles (UAV's), are machines which can fly, unmanned, remotely, without any need for proximity between the one who controls the drone and the drone itself. Built originally for military purposes, and being used as far back as WWII with unmanned jets such as the Ryan Firebee, drones have been used in conflict situations for many purposes including to drop bombs, observation and intelligence collection and to transport goods. Drones, like most military technologies, however, are no longer solely in the hands of the military. People are making and buying them for personal use – to spy on others, as toys. They will also soon be used to deliver online purchases through Amazon Prime Air. Further, as noted in the previous chapter, they are being

[61] Haraway, above note 2.
[62] Braidotti, above note 7, p. 9.
[63] Papers which have been written on autonomous weapons include, however, include; Manjikian, above note 26; Emily Jones, 'A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons Systems and Other Killing Machines,' *Australian Feminist Law Journal*, (2018), 441., p. 93-118. Arvidsson has also begun to consider what a feminist posthuman approach to IHL may look like and does consider AWS briefly in her paper. See; Matilda Arvidsson, 'Targeting, Gender, and International *Posthuman*itarain Law and Practice: Framing The Question of the Human in International Humanitarian Law,' *Australian Feminist Law Journal*, (2018), 44.1, p. 9-28.

used for social justice projects which use drones, for example, to drop contraception in places where it is needed.[64]

The use of drones in conflict has increased dramatically over the past decade, for example, in 2009 the US owned 50 UAV's with that number having increased to 6800 by 2014.[65] Much of the debate around drones focuses on whether data and algorithms are taking over human decision making.[66] There is little discussion, however, of how drone technology is linked to the human with the human and machine working in assemblage with one another in drone use.[67] Drones are, in some ways, cyborgs. Being controlled by a human but being a machine, being the all-seeing eyes for humans, drones blur the human-machine, with the human, ultimately, being the one to make the decision whether to attack or not but with the machine providing the perspective through which the decision is made. Further, drones require a whole host of humans to operate, including those who make them, those working at the launch bases and launch and recovery teams and those who design and make the programming systems, as well as those who must programme and maintain the technology while in action. Whilst drones are cyborgs in a sense, in that they are the human-machine in connection, they are not Haraway's feminist cyborgs, however. Rather, they are the very patriarchal military apparatuses/cyborgs which she fears, as discussed above.

Science and technology discourses in the current times are often linked to God-like desires.[68] Drones are an example of this, as can be seen through Haraway's concept of the 'god trick.'[69] Haraway notes that science and technology often aim to play the 'god trick of seeing everything from nowhere.'[70] Drones do exactly this, providing (the promise of) a universal vision to a person who could be anywhere and nowhere with the 'vantage point of the cyclopean, self-satiated eye of the master subject.'[71] 'The eye of God, with is overhanging gaze, embraces the

[64] See; Radhika Sanghani, ''Abortion Drone' to drop DIY Drugs over Poland to women,' The Telegraph 2015, http://www.telegraph.co.uk/women/womens-life/11691081/Abortion-drone-to-drop-DIY-drugs-over-Poland-to-women.html (accessed 02/12/2017); Press Association, 'Drone delivers abortion pills to Northern Irish woman,' Guardian 2016, https://www.theguardian.com/uk-news/2016/jun/21/drone-delivers-abortion-pills-to-northern-irish-women (accessed 02/12/2017).
[65] Joanna Bourke, 'Killing in a Posthuman World: The Philosophy and Practice of Critical Military History' in Bolette Blaagaard and Iris van der Tuin (eds.), *The Subject of Rosi Braidotti: Politics and Concepts*, (Bloomsbury, 2004), p. 29-37.
[66] See, for example; P.W. Singer *Wired for War: The Robotics Revolution and Conflict in the Twenty-first Century*, (Penguin, 2011).
[67] Lauren Wilcox, 'Embodying Algorithmic War: Gender, Race and the Posthuman in Warfare,' *Security Dialogue*, (2016), 48(1), p. 1-18.
[68] Cohn, above note 56.
[69] Haraway, above note 2.
[70] Ibid., p. 581.
[71] Ibid., p. 586.

entire world.'[72] The information collected by the all seeing drone, this 'dream of a vision without limit' is then used to create supposedly objective knowledge.[73] Information is quantifiable, 'which [supposedly] allows universal translation, and so unhindered instrumental power.'[74] The god-trick is not just about creating a supposed universal, however, but is also about distinguishing between the gods and the others, as Shaw and Akhter have noted, stating that 'this disembodied visual logic is perfected in the doctrine of airpower' which operates with a colonial logic of 'us' in the sky, versus 'them' on the ground.[75] The drone performs this logic through its 'digital worldview of targets that dismisses ambiguity.'[76] The drone promises to be God in a global panopticon of necropolitical management.[77]

This universalising knowledge, this positioning of 'us' over 'them,' the idea being that those watching are removed from those being watched, is a myth. As Feigenbaum notes, 'the posthuman entanglement of the operator and the drone is riddled with affect.'[78] The human and the machine are interconnected in drone warfare, thus disrupting this false logic of them over us. This is something Bourke has noted, highlighting how, to insure 'combative dominance, the posthuman drone pilot has to allow the machine to get under his skin; he has to feel the machine in order to effectively navigate or fly it.'[79] Blanchard has thus found, looking at the use of unmanned ground vehicles (UGV's) in Iraq, that the soldiers formed emotional connections with these machines, giving them names and battle commendations.[80] In addition to this, Gregory has noted, drone operators often find the battle field and their everyday lives difficult to distinguish after a while, these operators clearly *feeling* close to the battlefield as both observers and actors.[81] These emotional connections cause mental distress. Drones operators have been found to have high levels of stress with many suffering from post-

[72] Grégoire Chamayou, *A Theory of the Drone*, trans. Janet Lloyd, (The New Press, 2015), p. 37.
[73] Haraway, above note 2, p. 586.
[74] Donna Haraway, *Simians, Cyborgs and Women*. (Free Association Press, 1991), p. 156. See also; Feigenbaum, above note 28.
[75] Ian Graham Ronald Shaw and Akhter Majed, 'The unbearable humanness of drone warfare in FATA, Pakistan,' *Antipode*, (2011), 44(4), pp. 1496.
[76] Ibid.
[77] Mbembe, above note 49; Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. Alan Sheridan, (Penguin, 1991).
[78] Feigenbaum, above note 28.
[79] Bourke, above note 65, p. 31.
[80] Eric Blanchard, 'The Technoscience Question in Feminist International Relations: Unmanning the US War on Terror' in J Ann Tickner Laura Sjoberg (eds.), *Feminism and International Relations: Conversations About the Past, Present, and Future*, (Routledge, 2011), p. 146-63.
[81] Derek Gregory, 'Drone Geographies ,' *Radical Philosophy*, (2014), 183, p. 7-19.

traumatic stress disorder,[82] this exemplifying that this god-trick is not disembodied but rather, deeply embodied in and through the machinic-human subject.

Ultimately, it is not just the operators who feel the effect of the drone. In some communities in Northwest Pakistan, drones can hover over for 24 hours a day.[83] Drones have become such a part of the everyday experience of many people in Afghanistan, for example, that drones have started being incorporated into traditional arts including Afghan carpet designs.[84] Drones have a massive mental effect on those who survive. This includes, not only those who witness the attack and survive, but also those who knew people who died or who were injured. Further to this, those who live under near constant surveillance and bombing via drones live in fear at all times and suffer from various mental health problems as a result.[85] The sound drones make cannot be underestimated, and for thousands of people around the world, that sound is now a sound of fear. David Rhode, a former New York Times journalist who was kidnapped in the Federally Administered Tribal Areas of Northwest Pakistan, discussing how the fear of drones struck both his captor and civilians, stated, 'The drones were terrifying. From the ground, it is impossible to determine who or what they are tracking as they circle overhead. The buzz of a distant propeller is a constant reminder of immanent death.'[86] An interviewee who had been previously injured by a drone in Pakistan also states 'We're always scared. We always have this fear in our head.'[87]

Further, 'drone warfare is premised upon the identification of individuals in space as killable enemies.'[88] It can be difficult, even with the contemporary technology drones offer, to always be able to identify between a civilian and a combatant.[89] These enemies are not a state, are not to be found in one place, but are scattered, hiding in plain sight.[90] As Wilcox notes, 'the visual capabilities of drones are about simultaneously *embodying* these formless, malevolent forces,

[82] See: Nicole Abé, 'Dreams in infrared,'. Der Spiegel 2012, http://www.spiegel.de/ international/world/pain-continues-after-war-for-american-drone-pilot-a-872726.html (accessed 02/12/2017).
[83] Lauren Wilcox, 'Drone warfare and the making of bodies out of place,' *Critical Studies on Security* (2015), 3(1), p. 127.
[84] Ralph Jones, 'Drones, AK-47s and Grenades: Afghan War Rugs,' Guardian 2015, https://www.theguardian.com/artanddesign/shortcuts/gallery/2015/feb/03/drones-ak-47s-and-grenades-afghan-war-rugs (accessed 02/12/2017).
[85] Stanford International Human Rights & Conflict Resolution Clinic, 'Living Under Drones,' 2012, http://chrgj.org/wp-content/uploads/2012/10/Living-Under-Drones.pdf (accessed 18/04/2017), p. 80.
[86] Ibid.
[87] Ibid., p. 81.
[88] Wilcox, above note 83, p. 128.
[89] Derek Gregory, 'From a view to a kill: Drones and late modern war,' *Theory, Culture & Society*, (2011), 28(7-8), p. 200.
[90] Wilcox, above note 83.

while the weapons capacities enable these newly identified bodies to be destroyed.'[91] With humans making the ultimate decision as to whether to attack or not, drones work to make some bodies out of place.[92] This is a social as opposed to physical out of placing, creating bodies that matter and bodies that are strange, which matter less.[93] These placings are often both gendered and racialised. This can be shown, for example, in the way in which praying and preparing to pray has been used in evidence of an intent to do something 'nefarious.'[94] Targeting is conducted through, not only a gathering of information and intelligence, but also through human analysis of whether a target 'affectively resembles' an enemy or not, decisions thus being based on what is felt, with emotions such as fear and hatred inevitably creating bias, leading to inaccuracy and, sometimes, the killing of civilians.[95] This can be likened to the way Sikh men were targeted as enemies in the US post 9/11, being inaccurately religiously profiled as Muslims and therefore as terrorists.[96] Thus, as Puar notes, 'What is being pre-empted is not the danger of the known subject but the danger of not-knowing.'[97]

Gender assumptions also play a key role in the targeting of suspects, with drone operators broadly assuming that women are not targets. This need to gender the subject, however, has led, at times, to confusion over the gender of the possible targets and thus confusion, in the eyes of the drone pilots, as to whether the subject is a target or not.[98] This gendering works, when women and children are identified as non-targets, to reinforce the ideas that 'military-aged men' are inherently legitimate targets.[99]

In terms of legal implications, whilst drones were originally used to target known al-Qaeda suspects in the Northwest of Pakistan, the scope of drone missions has since been vastly broadened, with drones now used to target anyone whose movements look like that of those who *could be* conducting military operations. This can be seen in the 2013 leaked US Department of Justice White Paper. This paper stated that killing US citizen (and, as Wilcox

[91] Ibid., p. 128.
[92] Ibid.
[93] Ibid., p. 128. See also: Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, (Routledge, 2000).
[94] Wilcox, above note 67, p.10.
[95] Ibid., p.12.
[96] Jasbir K. Puar, '"The Turban is not a Hat": Queer Diaspora and Practises of Profiling,' in Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, (Duke University Press, 2007), p. 166-202.
[97] Ibid., p. 185.
[98] Wilcox, above note 67, p.14.
[99] Ibid.

notes, presumably anyone else) is legal if they pose an 'imminent threat' to the US and capture is not feasible.[100] For someone to be targeted, however, they need not be part of any plot.[101] The meaning of imminent, here, therefore, is clearly very broad. Following this, as Calhoun notes, 'today, the summary execution without trial of suspects in lands far away is carried out overtly and unselfconsciously and has come to be regarded by US military and political elites as a standard operating procedure.'[102]

There are clearly many issues of accountability in relation to drone strikes. Conducted on the basis of intelligence, those who order the strikes appoint themselves as 'police, the judge, the jurors and the executioners' all in one.[103] This has a clear impact on the rule of law, these actors remaining 'accountable to no one.'[104] This is despite the fact that things have and do go wrong when it comes to intelligence and decision making, An example of this can be seen in a cruise missile attack conducted in Yemen, where, after only an hour's overview of the intelligence by the Pentagon's top lawyer, Jeh Johnson, a Bedouin camp was struck, having been mistaken for an al-Qaeda training camp. The missiles killed 58 people.[105]

As exemplified by drone warfare, it is clear that the posthuman condition is not just about challenging existing modes of subjectivity. Nor is it just about accelerating technological use to blast humanity into the post-capitalist world. At its most destructive point, the posthuman condition is the necropolitical, the arbitrary marking of life and death from the human-machine assemblage watching over in the sky. While with drone warfare, a human, for the moment, still has to make the decision to kill, this decision making power, as the next sections will discuss, may soon also be delegated to a machine.

3. Autonomous Weapons: Definitions and Debates

3.1 The Automated, the Autonomous and the Artificially Intelligent

[100] US Department of Justice, 'Lawfulness of a Lethal Operation Directed Against a US Citizen who is a Senior Operational Leader of Al-Qa'ida or an Associated Force,' http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (accessed 02/12/2017); Wilcox, above note 83, p. 128.
[101] Wilcox, Ibid.
[102] Laurie Calhoun, *We Kill Because We Can*, (Zed, 2016), p. 3.
[103] Ibid., p. 18.
[104] Ibid.
[105] Gregory D. Johnsen, *The Last Refuge: Yemen, Al-Qaeda and the Battle for Arabia*, (Oneworld, 2013), p. 251-2; Calhoun, Ibid., p. 22.

Artificial intelligence (AI) has already been noted in the previous chapter as both potential and risk. AI could work to ensure that even the thinking jobs could be done by robots, leaving humans free to think and create outside of an economy of necessity. AI could potentially challenge our existing modes of subjectivity in novel ways too, forcing open the dominant Western humanist blueprint subjectivity on which many structures, including that of the legal subject, reply on. However, AI also comes with its dark sides. AI could help push the global order into the post-capitalist, posthuman world. It could, however, in the context of autonomous weapons, be used to kill, working to reinforce the necropolitical order and exacerbating existing inequalities.

Whilst it is broadly agreed that autonomous weapons do not yet exist, this is somewhat debatable depending on the way one defines autonomy. I will therefore, in this section, consider the question of autonomy, drawing both on existing systems and predictions of what will come in the future as a means through which to understand and define autonomy.

Autonomous weapons or LAWS – Lethal Autonomous Weapons Systems - have also been called Fully Autonomous Weapons, Lethal Autonomous Robotics Systems (LARS)[106] and even killer robots.[107] All of these terms refer roughly to the same thing – robotic-type weapons which can be programmed to perform certain actions to varying levels of autonomy. They potentially range from programmed sentry guns to human lookalike soldier-robots with artificial intelligence. Whilst full autonomy, it is broadly agreed, has yet to be achieved, research is on-going in this area.

There are currently a few definitions for autonomous weapons which exist. The US and UK governments, the UN Special Rapporteur on Summary or Arbitrary Execution and Human Rights Watch all use the definition of 'robotic weapon systems that, once activated, can select and engage targets without further intervention by a human operator.'[108] Jeangène Vilmer offers his own arguably better definition of 'a weapon system which, once activated, is able to independently – meaning without human interference or supervision – acquire and engage

[106] UK House of Commons, HC Deb, 17 June 2013, c729 – term used in UK Parliamentary debate.
[107] Ibid., Nia Griffith MP notes the different terminologies. See also; Convention on Certain Conventional Weapons, 'Meeting of the High Contracting Parties to the Convention on prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects.' See; Convention on Certain Conventional Weapons CCW/MSP/2014.
[108] UN General Assembly, 'Report of the Special Rapporteur on extrajudicial, summary of arbitrary executions, Christof Heynes,' UN Doc A/HRC/23/47 (9 April 2013), para. 38. See also U.S. Department of Defence, 'Autonomy in Weapons Systems,' Directive 3000.09 (21 November 2012); UK Ministry of Defence, 'The UK Approach to Unmanned Aircraft Systems,' Joint Doctrine Note 2/11 (30 March 2011); Human Rights Watch, *Losing Humanity: The Case Against Killer Robots*, (2012), p. 2.

targets, adapting to a changing environment.'[109] It is important to note that the definition must, of course, include 'once activated', as human control is needed when making and programming the machine. The fact that all robots are made and designed, after all, by humans, means that these machines can never be "fully" autonomous, despite many tech company claims. Full autonomous cannot be reached without the machines programming, designing and making themselves.[110]

Autonomous weapons are not drones. Drones are pilotless vehicles controlled remotely by humans. Autonomous weapons 'go considerably further than drones'[111]: they would have no human guidance after being programmed, either being controlled through high-level algorithms or through artificial intelligence (in theory). They may be able to select targets and subsequently to use lethal force without human intervention. Thus, 'a robot would be able to make the decision to kill a human being, which has never been the case before.'[112] Whilst full autonomy has yet to be achieved, research is on-going in this area.[113] A number of states and companies are investing a lot of time and effort into developing various types of LAWS. Many state that no system has yet to be deployed.[114] This, however, depends on one's perspective on autonomy.

3.1.a Autonomous v Automated

Defining autonomy is complex. In this section, I will sum up some of the key debates, exemplifying the debates through considering existing weapons systems. This section by no means provides an exhaustive list of existing weapons systems which may bridge the autonomy-automated divide. Rather, weapons systems have been selected so as to give a broad overview of the different types of system currently in use. For example, while I will discuss PAC-3 (Patriot Advanced Capability), a missile intercepting system, I will not discuss Phalanx in great detail. Whilst these two systems are different, they are both ultimately systems which shoot oncoming missiles and airborne threats, the difference being that PAC is land-based and Phalanx is used on ships. I have also chosen not to discuss, for example, Iron Dome, another

[109] Jean-Baptiste Jeangène Vilmer, 'Terminator Ethics: Should We Ban "Killer Robots"?' Ethics and International Affairs 2015 http://www.ethicsandinternationalaffairs.org/2015/terminator-ethics-ban-killer-robots/ (accessed 26/02/2016).
[110] Ibid.
[111] Above note 107, per Nia Griffith MP.
[112] Ibid.
[113] Convention on Certain Conventional Weapons, above note 115, Para 21.
[114] Ibid.

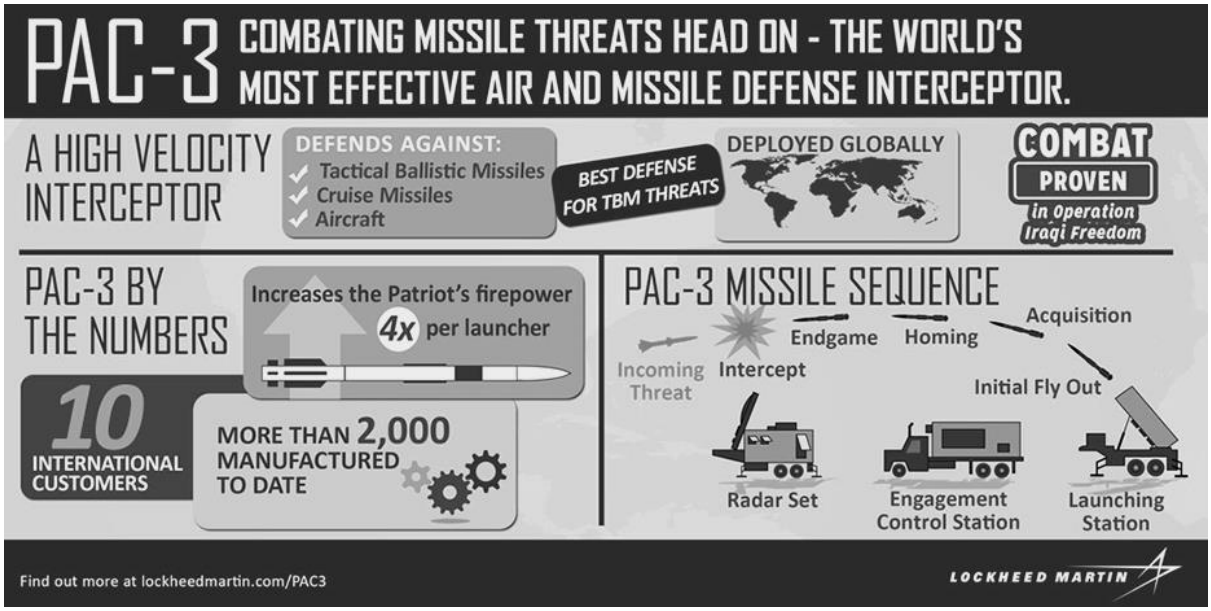
missile interception system famously used by the Israel Defence Forces,[115] due to the fact that, ultimately, the core aims of these systems are similar. The same goes where I have chosen to discuss SGR-A1. SGR-A1, a sentry gun system, is not the only sentry gun system working to some level autonomy out there, other similar systems including, for example, the Super aEgis II.[116] Again, I have chosen to focus on SGR-A1 in depth just so as to give an idea of some of the capacities of such technologies.

Robotic systems of varying levels of autonomy and lethality have already been deployed in numerous states including the USA, Germany, Japan, Saudi Arabia, Taiwan and Greece.[117] One such system includes the Patriot Advanced Capability (PAC) system. There are a number of different PAC systems now in existence, all with slight variances.[118] However, broadly, the PAC system is able to select, target and hit incoming missiles, small aircraft and drones, without human intervention. The system is primarily produced by Raytheon.[119] However, in recent models, Raytheon have worked with Lockheed Martin as the prime contractor, Lockheed Martin working to produce the defence missiles themselves.[120] Both companies are based in the US.

PAC-3, the latest PAC system, uses radar to detect the incoming missiles. The system does not operate entirely independently: up to three officers watch over it at all times from what is called an Engagement Control Centre (ECS). The operators are able to let the system run in automatic mode but they are also able to intervene to deselect or choose targets. Human involvement is therefore present, but largely as an option/backup. The system is capable of and often does run completely independently with human oversight. Both the operator and computer are able to make the decision on whether the incoming entity is either a friend or an enemy.[121] Whilst the

[115] Rafael, 'Iron Dome,' http://www.rafael.co.il/5614-689-EN/Marketing.aspx (accessed 02/12/2017).
[116] Aaron Saenz, 'South Korea's Robot Machine Gun Turret Can See you Coming 3km Away,' Singularity Hub 2016, https://singularityhub.com/2010/12/16/south-koreas-robot-machine-gun-turret-can-see-you-coming-3-km-away/ (accessed 02/12/2017).
[117] BBC, 'Fact Fil: Patriot Missile Defence,' 2003, http://news.bbc.co.uk/1/hi/world/2868569.stm (accessed 11/04/2016).
[118] For more information on the history of Patriot development and the various different models and variances see; Directory of U.S. Military Rockets and Missiles, 'Raytheon MIM-104 *Patriot,'* 2002, http://www.designation-systems.net/dusrm/m-104.html (accessed 11/04/2016); Charles D. Furguson and Bruce W. MacDonald, 'Nuclear Dynamics in a Multipolar Strategic Ballistic Missile Defence World,' Federation of American Scientists, 2017, https://fas.org/wp-content/uploads/media/Nuclear-Dynamics-In-A-Multipolar-Strategic-Ballistic-Missile-Defense-World.pdf (accessed 02/12/2017).
[119] Raytheon, 'Global Patriot Solutions,' http://www.raytheon.com/capabilities/products/patriot/ (accessed 02/12/2017).
[120] Lockheed Martin, 'Patriot Advanced Capability-3 P(PAC-3),' http://www.lockheedmartin.co.uk/us/products/PAC-3.html (accessed 02/12/2017).
[121] Marshall Brain, 'How Patriot Missiles Work,' *How Stuff Works,* http://science.howstuffworks.com/patriot-missile.htm (accessed 08/04/2016).

previous PAC-2 system relied on the ECS for guidance once launched, the latest PAC-3 missile also includes its own radar transmitter and guidance computer, allowing it to guide itself once launched and therefore allowing it to change course if necessary.[122]



Promotional material from Lockheed Martin explaining how PAC-3 works.[123]

The PAC-2 System, the successor of the PAC-1 and the original Patriot systems, was used in the 1991 Gulf War where it was 'credited with almost complete success in intercepting the Iraqi Scud Missiles.'[124] This success has, however, since been debated and contested, with Stein, for example, claiming that the use of the Patriot system worked to reduce casualties,[125] with Postol arguing in contrast that the use of the system did not appear to have reduced casualties.[126] The system has failed on a few occasions, for example, 28 American soldiers were killed when a Scud missile hit a barracks in Saudi Arabia in 1991 due to a fault in the tracking system which meant it did not work to stop the incoming missile (it missed it by around half a kilometre).[127] It seems probable, therefore, that the decision to include in PAC-3, the latest model, a radar system within the missile itself in order to be able to track as it flies and change direction, was made in response to this accident. Further, in March 2003, a system in

[122] Global Security, Patriot Advanced Capability-3 P(PAC-3),' http://www.globalsecurity.org/space/systems/patriot-ac-3.htm (accessed 02/12/2017).
[123] http://www.lockheedmartin.com/content/dam/lockheed/data/mfc/photo/pac-3-missile/mfc-pac-3-info-h.jpg (accessed 20/08/2016).
[124] George N. Lewis et al, 'Casualties and Damage from Scud Attacks in the 1991 Gulf War,' *Defence and Arms Control Studies (MIT) Working Paper*, (1993), p. 4.
[125] Robert M. Stein, 'Correspondence: Patriot Experience in the Gulf War,' *International Security*, (2000), 17(1), p. 200.
[126] Theodore A. Postol, 'Lessons of the Gulf War Patriot Experience,' *International Security*, (1991/92), 16(3), p. 119-171.
[127]See; BBC, above note 125; Furguson and MacDonald, above note 118.

Kuwait mistakenly shot down an RAF Tornado jet returning from a mission in Iraq. This killed the two crew members.[128]

Another highly automated system is the Boomerang system. Boomerang is a gunfire locator which pinpoints the exact location of incoming small arms fire using acoustic detection and sophisticated algorithms. This information is then related directly to the soldier who can choose whether to fire or not. It can be mounted on moving vehicles or given a fixed position and it is, according to Raytheon, non-susceptible to false alarms such as firecrackers and urban activity.[129] There is now also a soldier wearable system called the Boomerang Warrior-X.[130] This system is not as autonomous as the Patriot system as it still requires a soldier to use the information it gives and actually fire.

I have already discussed above UAV's, also known as drones. There are also many Unmanned Ground Vehicles (UGV's) in military use globally. UGV's are unmanned cars and trucks which are used largely to either transport goods or to enter dangerous environments. Whilst drones, UGV's and the Boomerang system currently require a great amount of human input to be of use, these technologies could form the basis for autonomous weapons systems in the future. For example, Oshkosh Defence is currently working, under their TerraMax project, to create UGV's which would drive fully autonomously as well as providing a series of tasks such as path clearing.[131] This system, if combined with something like Boomerang and some of the technology in PAC, for example, could look considerably like an autonomous weapon system.

Whilst drones are currently always manned, drones may be the future of autonomous weaponry. The BAE System's Taranis project is one such example of an attempt to move towards autonomous drones. Taranis, also nicknames Raptor, is currently not operational. However, this stealth craft has already been proven to be able to fly alone, unmanned, on a set course.[132] The aim of the Taranis project is to build a drone that can not only fly alone but can also detect both air and ground borne targets with it being implied that it could 'choose and

[128] BBC, Ibid.
[129] Raytheon, 'Boomerang,' http://www.raytheon.co.uk/capabilities/products/boomerang/ (accessed 11/04/2016).
[130] Raytheon, 'Boomerang Warrior X,' http://www.raytheon.co.uk/capabilities/products/boomerang_warriorx/index.html (accessed 11/04/2016).
[131] Oshkosh Defence, 'Unmanned Ground Vehicle Technology: TerraMax,' http://oshkoshdefense.com/components/terramax/ (accessed 11/04/2017).
[132] Beth Stevenson, 'Analysis: Taranis Developers reveal test flight specifics,' Fight Global 2016, https://www.flightglobal.com/news/articles/analysis-taranis-developers-reveal-test-flight-spec-425347/ (accessed 02/12/2017).

engage targets without human interference or supervision.'[133] While this system is still in development, Royal Air Force (RAF) Vice-Marshall, Sue Gray, director of combat air for the Defence Equipment and Support Organisation, however, has stated that Taranis is likely to be in use in combat by 2030.[134]

Perhaps the most controversial and "most" autonomous system out there, the Samsung SGR-A1 is an immobile sentry gun deployed on the border between North and South Korea.[135] The system has the ability to detect potential enemies using infra-red up to 4km away. It uses a low light camera and pattern recognition software so as to be able to determine whether a target is human, animal or matter. The SGR-A1 also uses voice recognition software to identify approaching persons. It can command someone to surrender and to not move closer. It can then, accordingly, when the person gets within 10m of the system, choose to sound an alarm or fire either rubber or real bullets. Whilst this decision is usually to be made by a human who watches over the system, the system does have a fully automatic mode where is can be set to decide itself.[136]

It is clear that whilst some automatic or semi-autonomous weapons systems already exist and are in use, full autonomy may not yet have been reached. Autonomy must be distinguished from automation – with automated systems being pre-programmed machines used to perform specific tasks and autonomous machines being able to make decisions whether or not to act themselves in changing and diverse conditions. Thus, whilst automated machines may be "making decisions" whether to fire or not, they do not make thought out decisions as they ultimately work through binary algorithms in a specific, set environment. Automated machines also do not learn from their behaviour. Automated systems supposedly do what they are told to do: they are predictable in as much as they will act as predicted within the set of conditions predicted when they were made.[137] Jeangène Vilmer thus gives examples of these types of

[133] Jeangène Vilmer, above note 109.
[134] Craig Hoyle, 'UK Ends Silence on Taranis Testing,' Fight Global 2014, https://www.flightglobal.com/news/articles/video-uk-ends-silence-on-taranis-testing-395574/ (accessed 02/12/2017).
[135] Jean Kamagai, 'A Robotic Sentry for Korea's Demilitarized Zone,' IEEE Spectrum 2007, http://spectrum.ieee.org/robotics/military-robots/a-robotic-sentry-for-koreas-demilitarized-zone (accessed 02/12/2017); Jon Rabiroff, 'Machine gun-toting robots deployed on DMZ,' Stars and Stripes 2010, https://www.stripes.com/news/pacific/korea/machine-gun-toting-robots-deployed-on-dmz-1.110809#.WPtv3dLys2w (accessed 02/12/2017).
[136] Global Security, 'Samsung Techwin SGR-A1 Sentry Guard Robot,' http://www.globalsecurity.org/military/world/rok/sgr-a1.htm (accessed 02/12/2017).
[137] Though note that the word 'supposedly' is important here. Algorithms, after all, do not always act in the way predicted. See, for example; Ian Sample, 'Study reveals bot-on-bot editing wars raging on Wikipedia's pages,'

automated military systems, stating that 'The *Phalanx* system [which is much like the PAC system but deployed on navel ships] employed by the U.S. Navy since 1980, its land-based version *Counter Rocket, Artillery, and Mortar*, the Israeli *Iron Dome*, and sensor-fused weapons are more advanced than vending machines, but operate on the same model. They carry out a set action after a set signal, dependably and unquestioningly.'[138] They are not, however, autonomous, states Jeangène Vilmer: 'autonomous systems are more independent, enjoying a certain freedom of behaviour, and so are less predictable.'[139]

Thus, according to Jeangène Vilmer, the sorts of systems discussed above are automated, not autonomous. Despite this, the debate as to whether these machines are actually automated or autonomous is contentious. Ambassador Michael Biontino of Germany has highlighted the difficulty in defining these machines precisely as either automated or autonomous. Speaking at the Convention on Certain Conventional Weapons (CCW) Expert Meeting in May 2014, he stated that; 'we will have to look thoroughly into the definition of what is "autonomous" in contrast to "automatic" and "automated", continuing that 'there are a number of different proposals as to where to draw the line between "autonomous" and "automated"… and probably, our understanding as to where to draw this line will even evolve over time as technological advances are made.'[140]

At the international level, levels of autonomy are discussed in terms of whether the system includes the human in or out-of-the-loop.[141] 'Human-out-of-the-loop' machines are machines which independently select targets without supervision. It is noted that these machines only exist currently against solely material targets with electronic jamming systems being an example.[142] These types of systems are then distinguished from human-in-the-loop systems and human-on-the-loop systems. Human-in-the-loop systems are systems where the decision to fire is made by a human (thus the Boomerang system could be seen as fitting within this category) whereas human-on-the-loop is defined as those which 'independently designate and process tasks while fully under the supervision of a human, capable of interrupting its

Guardian 2017, https://www.theguardian.com/technology/2017/feb/23/wikipedia-bot-editing-war-study (accessed 02/12/2017).

[138] Jeangène Vilmer, above note 109, author's own emphasis.

[139] Ibid.

[140] General Statement made by Ambassador Michael Biontino, Representing Germany, Swiss Ambassador's Conference: 'Security in Uncertainty: New Approaches to Disarmament, Arms Control and Non-Proliferation,' Geneva, 2016, http://www.genf.diplo.de/contentblob/4872514/Daten/6823896/20160823statemntbobiontinochboko.pdf (accessed 02/12/2017).

[141] Ibid.

[142] Jeangène Vilmer, above note 109.

actions.'[143] All of these categories can be seen as sitting somewhere between the lines of autonomy and automation. The debate around autonomous weapons at the international level, therefore, is mostly about whether human-out-of-the-loop and human-on-the-loop systems should be allowed and to what extent. Human-out-of-the-loop systems are thus considered to be the dangerous types of machines, with the assumption being that these systems do not yet exist and that it is this paradigm which equals full autonomy.

However, whether autonomous weapons yet exist or not clearly depends on one's perspective. Jeangène Vilmer, for example, defines PAC-3 as a human-on-the-loop system due to the fact that it is fully automated yet always supervised by a human.[144] The PAC-3 system, however, can independently select targets, decide whether a target is an enemy target or not, fire and accurately target even once released. Such a system could be defined as autonomous depending on how one defines autonomy. While the human does remain on-the-loop, the system does not require this to work. It seems that PAC-3, however, could possibly not be defined as autonomous as it works in specific conditions based on a set of algorithms and does not make complex decisions which it learn from. However, whilst this may be the case now, it is somewhat debatable at what point algorithmic programming may become so advanced that it becomes, in effect, a complex decision-making process. In addition to this, noting that a machine works on algorithms does not make that machine perfect. As shown by the Wikipedia algorithms which are correcting and deleting one another's information in ways never expected[145] and the Amazon Alexa device which had a party on its own, the device malfunctioning while it's "owner" was out resulting in the neighbours calling the police,[146] machines and algorithms do not always work as they are supposed to. Algorithms, in some ways, can have a life of their own, producing unpredictable results. It is clear that the line between autonomy and automation is difficult to draw.

The Samsung SGR-A1, which can detect targets, determine whether they are human or not, ask them to surrender and decide whether to shoot or not, can be seen as autonomous. Whilst it does not (at least officially) yet operate with human-out-of-the-loop, and whilst the exact means by which it operates is highly classified, it has been suggested that it can operate in

[143] Ibid.
[144] Ibid.
[145] Sample, above note 137.
[146] Aatif Sulleyman, 'Amazon AI Speaker Throws 'Her Own Party' in an Empty Flat, Forcing Police to Break In,' The Independent 2017, http://www.independent.co.uk/life-style/gadgets-and-tech/news/amazon-alexa-echo-speaker-music-how-to-control-hamburg-germany-police-oliver-haberstroh-a8048771.html (accessed 02/12/2017).

human-out-of-the-loop mode in a fairly diverse range of conditions, albeit still within binary algorithmic thinking (though, as noted, at what point algorithms constitute intelligence is also debatable).[147]

As Jeangène Vilmer notes these three descriptions of human in/on/out the loop 'simplif[y] matters and do… not take into account the fact that autonomy does not consist of three levels, but rather it is a continuum of many degrees.'[148] These three categories are in many ways false and unhelpful. The same can be said, too, of the categorisation of either autonomous or automated, in that 'these two categories are neither mutually exclusive nor homogeneous. There is no absolute distinction between automation and autonomy, but rather a continuum between the two.'[149] Just as at the start of this thesis, where binaries were dissected using the work of Young as being in some ways always falsely distinguishing between often similarly different or different similar things,[150] so, too, it is clear that autonomous/automated is a false binary proposition. Jeangène Vilmer thus states that future machines could be hybrid; automated for certain roles and autonomous for others.[151] While Jeangène Vilmer sees this as a possibility in the future, however, it is clear that the PAC-3 and SGR-A1 systems, for example, are already bridging this automated/autonomous distinction in that their programming is so complex that it can be seen a very low level decision making process.

Part of the problem with the autonomy debate therefore, is that fact that it tries to separate the machine from the human from the offset. Either the human is in the loop and thus controlling the machine, or on the loop, prevailing with ultimate control, or out of the loop, thus posing the machine as other, distinct. However, ultimately, all of these machines are deeply connected to and work with the human in various ways, either being operated by a human or, at the more advanced level, having been programmed by a human. Technology is changing the way we delegate tasks and make decisions but there is still human choice, even if in the programming alone.

3.1.b Artificial Intelligence

[147] See; Anthony Finn and Steve Scheding, *Developments and Challenges for Autonomous Unmanned Vehicles*, (Springer, 2010), p. 178.
[148] Jeangène Vilmer, above note 109.
[149] Ibid.
[150] Iris Marion Young, *Justice and the Politics of Difference*, (Princeton UP, 1990), p. 97-9.
[151] Jeangène Vilmer, above note 109.

I have already briefly defined artificial intelligence (AI) in the previous chapter. A more complex version of autonomy could indeed be constitutive of AI, depending both on the way in which one defines AI and autonomy. What AI actually is and what it would constitute is hotly debated, however, much like the line between autonomy and automation. Definitions of AI include theories which state that AI is a system which is able to learn from experience, theories which see AI as a complex decision making and choice selection process to those which state that AI must be able to make connections and assumptions like a human can.[152] If algorithms work as binaries between 0 and 1, it seems that AI, in making choices, would navigate these binaries. At what point binaries become so complex that they are, de facto, deconstructed enough to constitute intelligence, however, is debatable and unclear.

AI plays a key role in theories of the singularity, representing the possible superintelligence require for the singularity and an accelerated post-capitalist world to come about. AI within weapons systems, however, portrays a darker picture. AI would clearly move weapons systems closer towards "full" autonomy of the kind where the robots can create and programme themselves. AI not only works based on human programming but it potentially could allow for the machine to develop and write its own programme as it learns from different experiences. This allows a machine to make decisions in a more nuanced way, in an intelligent way. AI does not yet exist in the realm of autonomous weapons although there are a number of AI programmes and machines in existence that are also being tested out and worked on, again depending on one's definition of AI.[153] There programmes however, for the most part, remain limited, lagging far behind what could feasibly be dubbed human intelligence with most machines able to perform only one specific task (even if they albeit perform that task very well).[154]

There are various technologies however which, if combined, may one day constitute a more complex and intelligent AI. One such piece of technology is Affectiva, an emotion reading app which can register the emotions of TV viewers.[155] This app is already being used by TV

[152] See; Matt Ginsberg, *Essentials of Artificial Intelligence*, (Morgan Kaufmann, 2013), p. 4.
[153] See, for example, Apple's Siri Assistant and Google DeepMind. Elon Musk and Mark Zuckerberg, for example, disagree as to the definition of AI, with Zuckerberg defining AI broadly and thus stating that it exists already and with Musk seeing machine learning as being different to AI itself, AI for him thus being much more advanced and more akin to what some call a General Artificial intelligence (AGI) i.e. something which is intelligent across all areas, not just for one specific purpose - thus, in contrast, for example, to AI chess player Deep Blue (which can play chess extraordinarily well but cannot do anything else.) See; Artur Kiulian, 'Elon Musk and Mark Zuckerberg are arguing about AI – but they're both missing the point,' Entrepreneur 2017 https://www.entrepreneur.com/article/297861 (accessed 02/12/2017).
[154] Deep Blue being, again, an example here. See; Ibid.
[155] Affectiva, 'Affectiva: Emotion reading Software,' https://www.affectiva.com/ (accessed 02/12/2017).

producers such as the BBC to register audience's reactions to programmes and can also be used to tailor-show films to a specific person, changing the film according to the person's reactions as they go so as to provide them with the film they will individually enjoy the most.[156] Even though these emotion reading machines do not work through AI but through algorithms,[157] this type of emotion reading software, for example, could easily be combined with a system like SGR-A1 which can detect and speak to possibly enemies and make decisions as to whether to fire or not. Being able to read facial expressions and emotions could be incorporated to help the machine make a more intelligent decision.

3.1.c Defining Autonomy

For the purposes of this chapter and considering the above therefore, I wish to define autonomy following the work of Sparrow, who states that:

> I will understand an "autonomous" weapon as one that is capable of being tasked with identifying targets and choosing which to attack, without human over sight, and that is sufficiently complex such that, even when it is functioning properly there remains some uncertainty about which objects and/or persons it will attack and why.[158]

This definition works well as it does not limit itself to AI systems alone. The only thing I wish to add to this definition, however, is the need not to forget the (trans)human subject. Weapons systems are always mixed with the human and the human soldier is already a cyborg in that soldiers use a variety of tech to do their job. These human-machine links cannot be forgotten when considering autonomous weapons, for overlooking them would risk creating a key blind spot.

3.2 Legal-Ethical Debates on Autonomous Weapons

In 2013, Nia Griffith MP stated that 'LARs explode our legal and moral codes which assume that the decision-making power of life and death will be the responsibility of a human, never a machine.'[159] This sentence maybe summarises best the ethical dilemmas at the centre of the

[156] Madhumita Murgia, 'Affective Computing: How 'emotional machines' are about to take over our lives,' The Telegraph 2016, http://www.telegraph.co.uk/technology/2016/01/21/affective-computing-how-emotional-machines-are-about-to-take-ove/ (accessed 02/12/2017).
[157] 'We have 45 different facial muscles, and when they contract they convert to facial movements, and that's what the algorithm is really looking for," El Kaliouby, Affectiva's Chief Scientific Officer, quote from; Ibid.
[158] Robert Sparrow, 'Robots and respect: Assessing the case against Autonomous Weapon Systems,' *Ethics and International Affairs*, (2016), 30(1), p. 97.
[159] Above note 107, per Nia Griffith MP.

debate on autonomous weapons. Many groups are wary of autonomous weapons. Arkin, a well-known roboticist and roboethicist, has noted that the use of lethal autonomous robots, however, is inevitable; we are already on our way there. He notes that the only thing that could stop their use would be a ban under international law.[160]

The UN Special Rapporteur on Summary or Arbitrary Execution has already called for a preventative ban of LAWS,[161] as have many state parties including Pakistan, Austria, Mexico and Egypt.[162] Yet definitional lines between autonomy and automation, human in/on/out of the loop etc., remain blurry and the lack of definition, it seems, is partly why a full ban cannot be agreed on by states.[163] This section will consider the ethical and legal debates around autonomous weapons looking at legal and other disciplinary academic and NGO accounts. In light of the possible flaw which autonomous weapons pose to the utopic tech-positive vision described in Chapter Five and in light of the capitalism-militarism assemblage, considering that much of our technology is and will likely continue to be developed by the military for military use first, then commercialised, there is a need to re-consider xenofeminism's tech-positive stance and reconfigure it. It is therefore necessary to understand the different ethical and legal implications which autonomous weapons pose so as to be able to look towards the possibility of an ethical feminist posthuman or xenofeminist standpoint which holds true to the posthuman and xenofeminist utopia of a post-gender, post-capitalist world, without ignoring the dangers which pushing for this utopia could bring.

Numerous NGOs and campaign groups are working in the aim of banning autonomous weapons, including, for example, The Campaign to Stop Killer Robots, Article 36, Amnesty International, WILPF and Human Rights Watch.[164] These groups are generally concerned about the moral and practical implications for human life in relation to LAWS. Several issues

[160] Ronald Arkin, 'Lethal Autonomous Systems and the Plight of the non-combatant,' *AISB Quarterly*, 2013, 137, p. 6.
[161] In 2010 Philip Alston drew attention to this topic, while his successor, Christoph Heyns, called for a ban in 2013. See; UN General Assembly, 'Joint Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the proper management of assemblies,' A/HRC/31/66 2016.
[162] Campaign to Stop Killer Robots, 'More States Speak Out at UN,' https://www.stopkillerrobots.org/2013/10/unga2013/ (accessed 02/12/2017).
[163] Chris Jenks, 'Moral Panic and Conceptual Paradoxes: Critiquing and Reframing the Call to Ban Lethal Autonomous Weapons Systems,' Talk given at SOAS University of London, 23 November 2015.
[164] Campaign to Stop killer Robots, https://www.stopkillerrobots.org/; Article 36, 'Autonomous Weapons,' http://www.article36.org/issue/autonomous-weapons/; Rasha Abdul-Rahum, 'Stop killer Robots before it's too late, Amnesty International 2014, https://www.amnesty.org/en/latest/campaigns/2014/05/stopping-the-killer-robots-before-its-too-late/; Women's International League for Peace and Freedom (WILPF), ''Killer Robots,' http://wilpf.org/killer-robots-3/; Human Rights Watch, above note 116, (all accessed 02/12/2017).

have been raised by these groups, for example, WILPF, through their disarmament programme 'reaching critical will' asks:

> Can the decision over death and life be left to a machine? Can fully autonomous weapons function in an ethically "correct" manner? Are machines capable of acting in accordance to international humanitarian law (IHL) and international human rights law? Are these weapons systems able to differentiate between combatants on the one side and defenceless and/or uninvolved persons on the other side?... Can such systems evaluate the proportionality of such attacks?[165]

The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Chris Heynes, has also highlighted that the removal of humans from the actual field could drastically increase states' willingness to go to war. This is because autonomous weapons could create a heavily reduced risk of military casualties.[166] Armed conflict could become normalised given the lower cost for those who have autonomous weapons.[167] Further, 'concerns have been expressed that fully autonomous weapon systems could fall into the hands of non-authorized persons.'[168] Terrorism is a big underlying debate hear.

However, both Jenks and Jeangène Vilmer have noted that the term "killer" robots is inherently moral and one sided,[169] relying on tropes from popular culture such as the Terminator films to structure debate.[170] They note that we cannot yet fully know what LAWS may be/look like/be able to do as their technological development cannot be foreseen. The term "killer robots," they state, works both as a sensationalising rhetorical tool but also creates public confusion about the debates: 'it is not restricted to autonomous machines and so can also include existing weapons such as mines, missiles, and, above all, armed drones.'[171] Jeangène Vilmer has thus highlighted how this works to create 'misinformation' and is not useful.[172]

On the other hand, it is clear that using this word garners attention about an important issue. There is an urgent need to create better legal and ethical frameworks to deal with these systems.

[165] Reaching Critical Will, above note 4.
[166] Heyns, above note 161.
[167] Above note 107, per Nia Griffith MP.
[168] Reaching Critical Will, above note 4.
[169] Jenks, above note 163; Jeangène Vilmer, above note 109.
[170] Jenks, Ibid.
[171] Jeangène Vilmer, above note 109.
[172] Ibid.

Whilst the term "robot" may be somewhat misleading, it is clear that the machines being discussed here are machines which will kill and thus, while the term is clearly invoking a moral-ethical standpoint, it is not inaccurate. Jenks and Jeangène Vilmer are both from strong military-orientated backgrounds, leaving one questioning to what extent they have dehumanised their work and interests through rationalisation and the use of technological language in very much the way the defence intellectuals Cohn describes did.[173]

Machines that kill provide a whole host of ethical questions and concerns. One such concern is the issue of accountability and responsibility. Under current international law, there is a system of accountability. States can be held accountable for human rights violations and for breaches of international humanitarian law (IHL). Whilst this system does not always work as well in practise as on paper, there is a system in place, with IHL principles being deemed *erga omnes* whether they have been ratified by the state party involved or not.[174] When machines do the killing however, this system may become more confusing. Accountability when things go wrong and for breaches of IHL could be hard to determine as the responsibility may lie across many different actors. For example, if a machine shoots and kills an innocent person independently, should the military who own the robot still be held accountable? This seems to make initial sense but could lead to various counter claims against, for example, the manufacturer, or the inventor, the commander, or the programmer or even, in the case of AI machines, the robot itself.[175] However, as current international law stands, as noted in Chapter Three, actors such as corporations, who could be making and creating these machines, have limited liability under international law. While there are some which believe that all *erga omnes* obligations (such as IHL) should be applied to non-state entities such as corporation, this has so far gained limited track in international legal practise.[176] Despite groups having found creative ways to bring corporations to Court, as exemplified in Chapter Three, it seems that killer machines may be one example of the pressing need to extend liability.

Moreover, issues around accountability and responsibility which autonomous weapons present could potentially result in breaches, not just of IHL but of international human rights law too including rights such as the right to a fair trial, the right to a remedy and, of course, the right to

[173] Cohn, above note 56.
[174] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, para 79.
[175] Reaching Critical Will, above note 4.
[176] For example, Judge Antonia Cançado Trindaade stated that *erga omnes* obligations should be protected by all, including corporations in; *Matter of the Sarayaku people regarding Ecuador*, (6 July 2004) Inter-Am. Ct. H. R., para 20.

life, all of which have been raised in relation to drones.[177] Further, there is the question of whether a machine would even be able to ever uphold IHL. It is clear that these machines need to be compatible with IHL but humans already make mistakes and break the law and there is very little doubt that robots will too. In addition, much of IHL relies on the exercise of discretion, for example through the application of the notoriously pliable principles of proportionality, distinction and necessity. Heynes, however, has noted how these machines may actually be better more ethical soldiers than humans, stating that:

> LARs will not be susceptible to some of the human shortcomings that may undermine the protection of life. Typically they would not act out of revenge, panic, anger, spite, prejudice or fear. Moreover, unless specifically programmed to do so, robots would not cause intentional suffering on civilian populations, for example through torture. Robots also do not rape.[178]

Arkin has also made a similar point, stating that technology can lead to a reduction in casualties on the battlefield as autonomous weapons would not need to protect themselves and therefore they will never feel the need to uphold a "shoot first ask questions later" policy.[179] Arkin also highlights that machines have more advanced targeting and seeking equipment than humans could ever have and makes a similar argument to Heynes that their judgement will not be clouded by emotions.[180] He thus concludes that he believes that these robots will actually be better able to uphold the standards of IHL than humans, stating that 'simply being human is the weakest point in the kill chain, i.e., our biology works against us in complying with IHL.'[181] He thus advocates for these robots to be made ethically, with IHL in mind.[182]

The idea that machines can uphold IHL better than humans lacks nuance. IHL does not just apply in an algorithmic sense but requires active choices to be made based on nuanced and different-to-distinguish-between principles, perspectives and ethical standpoints. Further to this, the argument that Heynes makes, that robots do not rape, represents a clear use of feminist discourses and the contemporary concern over sexual violence offences committed by

[177] See; Mary Wareham and Stephen Goose, 'The Growing International Movement Against Killer Robots,' Human Rights Watch 2017, https://www.hrw.org/news/2017/01/05/growing-international-movement-against-killer-robots (accessed 02/12/2017).
[178] Heyns, above note 161, para. 54.
[179] Arkin, above note 160.
[180] Heyns, above note 161.
[181] Arkin, above note 160.
[182] Ibid.

peacekeepers[183] for anti-feminist aims (i.e. the promotion of autonomous weapons systems). Drawing on feminist discourse for military aims, however, is not new in the international arena, women's rights having been used as a partial justification for the military intervention in Afghanistan.[184] Just as this use of women's right to promote military aims in the context of Afghanistan was greatly critiqued by multiple feminist voices,[185] so, too, must the use of feminist discourse to promote the use of high tech weapons systems be heavily resisted.

Whilst Arkin, who is a specialist on robotics, not law, fully believes that these machines could uphold IHL better than humans, Heynes takes a more nuanced standpoint.[186] Heynes' statement is ambiguous, aiming to note all the arguments as opposed to working to promote the use of such machines. Thus, he also is aware of the risks, including those around the real life decision making processes needed to uphold and obey by IHL standards, stating that 'machine calculations are rendered difficult by some of the contradictions often underlying battlefield choices. A further concern relates to the ability of robots to distinguish legal from illegal orders.'[187]

Ambassador Michael Biontino has also counteracted Arkin's position that these machines would be better able to uphold IHL, stating that it is unsure whether these machines will ever be able to make such qualitative assessments.[188] Jeangène Vilmer corroborates this point, stating that 'roboticists often exaggerate their ability to program IHL and convert legal rules into algorithms. Non-jurists often have a simplistic understanding of the rules, reducing them to univocal commands.'[189] It is not just as simple as saying combatant, fire, non-combatant, do not fire: it is often hard to tell the difference between the two.

One example of the way in which IHL does not just apply mathematically can be seen in the principle of proportionality. Article 51(5)(b) of the 1977 First Additional Protocol to the Geneva Convention, prohibits 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, of a combination thereof, which

[183] See, for example; Olivera Simic, 'Who should be a Peacekeeper?' *Peace Review*, (2009), 21, p. 395-402.
[184] Nicola Perugini and Neve Gordon, *The Human Rights to Dominate*, (Oxford University Press, 2015).
[185] See; Dianne Otto and Gina Heathcote, 'Rethinking Peacekeeping, Gender Equality and Collective Security: An Introduction,' in Dianne Otto and Gina Heathcote, *Rethinking Peacekeeping, Gender Equality and Collective Security*, (Palgrave Macmillan, 2014), p. 1-22.
[186] Heyns, above note 161.
[187] Ibid., para. 55.
[188] Biontino, above note 140.
[189] Jeangène Vilmer, above note 109.

would be excessive in relation to the concrete and direct military advantage anticipated.'[190] Acting without proportionality has also been deemed a war crime under Article 8(2)(b)(iv) of the ICC Statute 1998, which defines this as 'Internationally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects… which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.'[191] Determining what is proportionate or not, however, is not simply a matter of logic. As noted, both the Additional protocol I of the Geneva Convention and the Rome Statute require that risk to civilian life or damage to civilian objects must be weighed up in relation to the 'direct military advantage anticipated.'[192] Proportionality thus requires a deep understanding of nuances – as show by the number of legal debates surrounding this principle.[193]

Another part of IHL which requires nuanced reflection to be applied can be found under Article 57(2) of the 1977 First Additional Protocol to the Geneva Convention, which requires that those who undertake attacks consider how to minimise the risk of civilian life and, in line with this, a review of the different forms an attack may take accordingly.[194] These machines would have to be able to know whether they are directly targeting military targets alone and make assessments as to how to reduce damage in the most effective way possible, a decision which requires extremely intelligent thinking. The ability to be able to accurately identify and differentiate between combatants and non-combatants is a skill which would be hard to programme, for example, determining whether something is a rifle or an umbrella can be hard at distance and requires complex human knowledge.[195] This knowledge would also be required to be able to determine proportionality as, inevitably, a knowledge of whether those in the vicinity of a target are combatants or not is required. Thus, autonomous weapons, to uphold IHL, will not only need to be able to track armed persons through, for example, reading the code or number on the side of a weapon in hand, but will also need to be able to track unarmed

[190] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3, Article 51(5)(b).
[191] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 8(2)(b)(iv).
[192] International Committee of the Red Cross, above note 190.
[193] See, for example; Ian Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack Under Additional Protocol I*, (Brill, 2009); Michael Newton and Larry May, *Proportionality in International Law*, (Oxford University Press, 2014).
[194] International Committee of the Red Cross, above note 190, Article 57(2).
[195] Sparrow, above note 158.

persons. On top of it, autonomous weapons will need to be able to make such calculations and decisions in a variety of conditions, weather, lighting and environments.

Further to this, not every person who carries a weapon is a combatant. In conflict situations, it can be common for civilians to carry weapons for self-defence and, if peacekeepers are present, they of course carry weapons at times too, thus complicating issues of identification further.[196] Even is a system were able to distinguish effectively between combatants and non-combatants, however, it would then also need to be able to understand when someone surrenders, in line with IHL.[197] It would also need to be able to determine when someone is seriously injured and split off from their group, thus making them an illegitimate target under IHL.[198] It is difficult to imagine a machine being able to make decisions such as these without it encompassing a pretty strong form of AI.

In addition, there is not just a question here as to whether such machines can uphold IHL or not but there is, further, a question as to whether they are, in their very existence, compatible with IHL at all. Article 36 of the Additional Protocol I of the Geneva Convention states that these systems must be verified as compatible with IHL before being used.[199] This requires, not only a consideration of whether key IHL principles, such as proportionality, can be upheld by these machines but whether these machines are, themselves, compatible with IHL in their very existence. The Martens Clause is often cited here as a key test which autonomous weapons must pass to be deemed compatible with IHL. The Martens Clause dates back to the Preamble to the second Hague Convention of 1899 and is found, in slightly moderated words, in Article 1(2) of the first Additional Protocol of the Geneva Convention 1977. It states that:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[200]

Similar wording around the 'protection of the principles of humanity and the dictates of public conscience' appear in the Preamble to the second Additional Protocol.[201] Whilst there is great

[196] Ibid. p. 101-2.
[197] International Committee of the Red Cross, above note 190, Article 41.
[198] Ibid.
[199] Ibid., Article 36.
[200] Ibid., Article 2(1).
[201] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Preamble, para 4.

debate as to what the Martens Clause means and how it exactly applies,[202] it is somewhat debatable whether a machine being allowed to make life or death decision can ever be deemed to be in line with the principles of humanity and public conscience, with some, such as Asaro, clearly stating that autonomous weapons inherently breach the Martens Clause.[203] Jeangène Vilmer, however, disagrees, stating that the Martens Clause works as a 'reminder - that in the event that certain technologies were not covered by any particular convention, they would still be subject to other international norms - than a rule to be followed to the letter. It certainly,' continues Jeangène Vilmer, 'does not justify the prohibition of LAWS,'[204] Jeangène Vilmer's point thus being not that the Martens Clause does not apply but that the application of it, alone, does not necessarily constitute enough to call for an outright ban. While it is clear that there are multiple opinions as to the application of the Martens Clause to autonomous weapons, the disagreements having some source in the vagueness of the clause itself, it is clear that autonomous weapons certainly, in some way, violate 'public conscience' and the 'principles of humanity' even if they can be shown to uphold IHL (which is unlikely).[205]

Further legal questions are also raised within the *jus ad bellum* in relation to the creation of autonomous systems. As noted above, the reduction of risk to human soldier life through the use of such systems may increase state willingness to go to war.[206] Further, as Kahn has argued, the decreased risk to lives could also encourage states to conduct more humanitarian interventions due to the low risk of lives versus the lives which can be saved.[207] However, as

[202] Several opinions were given, for example, in the *Nuclear Weapons Advisory Opinion*, above note 174.
[203] Peter Asaro, '*Jus Nascedni*, robotic weapons and the Martens Clause,' in Rylan Carlo et al. (eds.), *Robot* Law, (Edward Elgar, 2016), p. 367-87.
[204] Jeangène Vilmer, above note 109.
[205] 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 October 1907, Preamble; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, Article 63; International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, Article 62; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, Article 142; International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Article 158; International Committee of the Red Cross, above note 199, Article 1(2); International Committee of the Red Cross, above note 210, Preamble; United Nations, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (and Protocols) (As Amended on 21 December 2001), 10 October 1980, 1342 UNTS 137, Preamble.
[206] Sparrow, above note 158, p. 120.
[207] Paul W. Kahn, 'The Paradox of Riskless Warfare,' *Philosophy & Public Policy Quarterly*, (2002), 22(3), p. 2-8.

this thesis has already noted, humanitarian intervention is extremely problematic, not least in that it if often used as a neo-colonial tool for intervention and exploitation.[208]

Despite starting with legal frameworks and debates however, what becomes clear is that the real debate on autonomous weapons is actually ethical. Existing IHL would require proof of the ability to uphold specific principles of IHL, such as proportionality, but it also requires the international community to determine whether these weapons are, in themselves, morally and ethically acceptable. This needs to be balanced against, of course, the fact that humans themselves also break IHL. The fundamental question in this area becomes, therefore, ethical not legal: whether a machine should be able to make a decision as to whether to take a human life or not. This is something the ICRC has noted, calling, not for a pre-emptive ban per se but a detailed consideration of the ethical issues posed by such weapons.[209] As noted above, the NGO community has been key in declaring that such decisions should not be left to machines.[210] Broadly, most NGOs draw the line at weapons systems where no human control is present.[211]

There are also many dispersed groups who argue that the decision to fire on a human should not be made by a machine as this violates human dignity. Over 70 religious leaders, for example, have made a declaration for a ban, explicitly stating that leaving the decision whether to fire or not with a non-human entity fundamentally violates human dignity.[212] A number of philosophers have also joined the anti-group, broadly arguing that such machines should not be able to make life or death decisions, with Sparrow noting that there is a clear ethical foundation as to why such weapons should be banned,[213] and with Asaro calling for a clear ban before such systems can be developed (or developed further), stating that lethal-decision making should not be dehumanised.[214] However, there are also counter-debates to this ethical standpoint. Jeangène Vilmer, for example, states that 'Those who reply that to delegate firing at targets to a machine is on principle unacceptable are begging the question,' noting that 'they

[208] Orford, above note 55.
[209] International Committee of the Red Cross, 'Autonomous Weapons Systems: Is it morally acceptable for a machine to make life and death decisions?' Text of a Statement given at the Convention on Certain Conventional Weapons Meeting in Geneva, April 2015, https://www.icrc.org/en/document/lethal-autonomous-weapons-systems-LAWS (accessed 02/12/2017).
[210] Campaign to Stop Killer Robots, above note 164.
[211] Wareham and Goose, above note 177.
[212] PAX, 'Religious Leaders Call for Ban on killer Robots,' 2014, https://www.paxforpeace.nl/stay-informed/news/religious-leaders-call-for-a-ban-on-killer-robots (accessed 03/12/2017).
[213] Sparrow, above note 158.
[214] Peter Asaro, 'On Banning Autonomous Weapons Systems: Human Rights, Automation, and the Dehumanization of Lethal Decision-Making,' *International Review of the Red Cross*, (2012), 94, (886), p. 697-709.

do not define the "human dignity" they invoke, nor do they explain how exactly it is violated.'[215] His point is that, if a target is legitimate, it does not matter who (or what) killed it. He therefore states that suggesting that there is a moral difference in being killed by a human as opposed to by a machine 'can lead to absurdities' in that, if one follows the logic through, 'the bombings of Hiroshima and Nagasaki… are more "human"' as they respect "human dignity" more than any strike by LAWs 'for the simple reason that the bombers were piloted.'[216]

While Jeangène Vilmer may be correct in highlighting that human dignity can indeed be violated in numerous other ways, he seems to align the issue of human dignity as inherently linked to accountability, which he suggests could be overcome by the fact that the programmer of any autonomous weapon would be held accountable for programming decisions.[217] Whilst this may work for systems now and in the near future, which do work on a set of complex but ultimately binary algorithms, (though, as noted above, even these can act unpredictably)[218] Jeangène Vilmer does not account for the future potential accountability issues of a machine which has complex decisions making processes and even complex AI. It is clear, however, that the human dignity argument remains vague, failing to account for the fact that conflict, itself, inherently breaches human dignity, never mind who decides to shoot at a legitimate "target" within the scope of IHL.

Another ethical dilemma in relation to the upholding of IHL can also be found in the debate around autonomous weapons not having emotions as outlined above. Drawing out Heynes' and Arkin's point about robots being more accurate as they do not feel emotions, Reaching Critical Will has stated that the lack of emotions side could mean that 'fully autonomous weapons could be used to oppress opponents without fearing protest, conscientious objection, or insurgency within state security forces.'[219] Emotions can play an important ethical and processing role in military and policing and might not be seen as a weakness but, rather, a strength. It is clear, therefore, that there are many concerns and various debates around the potential use of autonomous weapons. There have also been many proposals as to how to deal with the issue, as the next section will detail.

[215] Jeangène Vilmer, above note 109.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] Reaching Critical Will, above note 4.

3.3 Proposed Legal-Political Frameworks on Autonomous Weapons

This section will consider the legal and political frameworks which have been proposed by various groups to tackle some of the legal-ethical issues outlined above. These proposed measures will be critically assessed in this section before going on, in the next section, to consider what my theoretical framework of posthuman-xenofeminism can add to such discourse.

Many groups have called for state legal interventions into this issue, with many calling for an outright ban of autonomous weapons. These groups include, not only NGO's such as the Campaign to Stop Killer Robots and Reaching Critical Will but, as noted, the UN Special Rapporteur on Summary or Arbitrary Execution has also called for a preventative ban.[220] Further to this, in 2015, over 20,000 AI, robotics and technology researchers and public intellectuals signed a letter under the umbrella of the Future of Life Institute calling for a 'ban on offensive autonomous weapons beyond meaningful human control.'[221] Signatories included Stephen Hawking, Elon Musk, Steve Wozniak and Noam Chomsky. A number of states have also called for the banning of autonomous weapons including Pakistan, Bolivia, Egypt and Ghana.[222] Another such ban was proposed, this time by robotics and AI company leaders, in August 2017, the open letter, addressed directly to CCW members, including 116 experts from 26 countries.[223] A group of 20 Nobel Peace Prize winners, both individuals and organisations, also called for a ban in 2014.[224] The European Parliament has made key steps in this foray. In 2014, they adopted a resolution calling on Ministers of the EU and the EU's High Representative of Foreign Affairs and Security policy to ban on the 'development, production and use of fully autonomous weapons which enable strikes to be carried out without human

[220] In 2010 Philip Alston drew attention to this topic, while his successor, Christof Heyns, called for a ban in 2013. See; above note 169.
[221] Future of Life Institute, 'Autonomous Weapons: An Open Letter from AI and Robotics Researchers,' 2015, https://futureoflife.org/open-letter-autonomous-weapons (accessed 03/12/2017).
[222] Campaign to Stop Killer Robots, 'Country Views,' 2016, http://www.stopkillerrobots.org/wp-content/uploads/2013/03/CountryViews_Mar2016-1.pdf (accessed 03/12/2017).
[223] Future of Life Institute, 'An Open Letter to the United Nations Convention on Certain Conventional Weapons,' 2017, https://futureoflife.org/autonomous-weapons-open-letter-2017 (accessed 03/12/2017). See also; Samuel Gibbs, 'Elon Musk Leads 116 Experts Calling for Outright Ban of Killer Robots,' Guardian 2017, https://www.theguardian.com/technology/2017/aug/20/elon-musk-killer-robots-experts-outright-ban-lethal-autonomous-weapons-war (accessed 03/12/2017).
[224] Nobel Women's Initiative, 'Nobel Peace Laureates Call for Pre-emptive Ban on "Killer Robots",' 2014, https://nobelwomensinitiative.org/nobel-peace-laureates-call-for-preemptive-ban-on-killer-robots/?ref=204 (accessed 03/12/2017).

intervention.'[225] Whilst such a resolution is non-binding, it is likely to affect policy decision making across EU states.[226]

Bans are often articulated either though explicitly calling for a ban or through a discussion of the need to retain 'meaningful human control.'[227] Ambassador Michael Biontino of Germany, for example, has called for 'meaningful human control' to be declared an 'indispensable principle of international humanitarian law.'[228] The UK's stance also seems to be that meaningful human control should always be present,[229] though the UK's stance is somewhat ambiguous as to what that human control may constitute,[230] with US policy stating that these machines should only work to help human judgement, the humans thus still, in the end, making the decisions.[231] The US, however makes no reference to what extent this human judgement should be required.

While many groups are calling for a ban of autonomous weapons, this ban may prove difficult to enforce given the nuances in definition between autonomy and automation, as noted above.[232] Parties which want autonomous weapons are drawing on that lack of definitional clarity to promote their own agendas and avoid calls for a ban. For example, whilst many groups have called for a ban of fully autonomous weapons, the word "fully" is then being used by more "pro" groups to claim that the standard of "fully" autonomous weapons cannot be reached until the robots are designing and creating themselves.[233] This definitional distinction is then used to diffract any debate on weapons systems which do not meet such a high-level autonomy, even though such systems clearly still pose vast ethical dilemmas.

The Campaign to Stop Killer Robots has noted that this is a deliberate move.[234] States have little interest in constructing "fully" autonomous weapons, as then they would be out of their

[225] European Parliament Resolution on the use of Armed Drones, 22 February 2016 (2014/2567), Section 2(d).
[226] See; Campaign to Stop Killer Robots, 'European Parliament Resolution a First,' 2014, http://www.stopkillerrobots.org/2014/02/europeanparliament/ (accessed 03/12/2017).
[227] Campaign to Stop Killer Robots, Summary of CCW meetings in FAQs ahead of the CCW 2016 meeting on LAWS, 2016, http://www.stopkillerrobots.org/2016/04/thirdccw/ (accessed 08/04/2016).
[228] Biontino, above note 140.
[229] Lord Astor of Hever (Parliamentary Under Secretary of State, Defense; Conservative), House of Lords debate, 26 March 2013, Column 960.
[230] UK Ministry of Defence, 'Unmanned Aircraft Systems,' Joint Doctrine Publication 0-30.2, August 2017, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/640299/20170706_JDP_0-30.2_final_CM_web.pdf (accessed 03/12/2017).
[231] U.S. Department of Defense, "Autonomy in Weapons Systems", Directive 3000.09 (21 November 2012).
[232] Arkin, above note 160, p. 6.
[233] See, Campaign to Stop Killer Robots, above note 164.
[234] Ibid.

control.[235] Banning "fully" autonomous weapons is therefore something that almost all states can easily get behind, given this limited definitional use of the word "fully." The risks here therefore become that it is possible and likely that the threshold for autonomy will be set so high in any legal measures and bans 'that it will not affect any of the robot systems they [states] wish to deploy,'[236] rendering such a ban's impact void, despite the vast moral and ethical concerns which remain.

While a preventative ban, as many of these groups are calling for, might be difficult to achieve, it also not unheard of and other weapons systems have been preventively banned in the past, for example, blinding lasers were banned preventatively using CCW provisions in 1995.[237] Other weapons have been banned after seeing the effects of their use, including cluster munitions.[238] However, banning these weapons in not the only proposed mode of action. Jeangène Vilmer, for example, states that a ban is 'dangerous and counterproductive for the law to construct a non-respected judicial regime.'[239] Drawing on the complications between distinctions and definitions and the questions around whether these machines are already operational, Jeangène Vilmer's point is that a ban will, inevitably, be interpreted in different ways, this therefore working to delegitimise law.

Jeangène Vilmer states that the moral standpoint of the need to protect the dignity of human life which underlies any ban is nonsensical. This is because such a call can be made in relation to all war.[240] As noted above, while Jeangène Vilmer uses this claim to defeat the moral standpoint, believing that war is inevitable, his point, rather than suggesting that autonomous weapons are not a-moral, lends itself to calls for anti-militarism and peace, this being a point which will be picked up on in the next section. Jeangène Vilmer's argument also goes to the heart of debates in IHL with most contemporary scholars agreeing that although IHL does permit killing in war, international human rights law does also apply, placing restraints on how war happens.[241]

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[235] This can be seen in the fact that Japan is 'not convinced of the need to develop 'fully' autonomous lethal weapon systems which [are] completely out of control of human intervention.' (statement by H. E. Ambassador Toshio Sano at the *CCW Meeting of Experts on Lethal Autonomous Weapons Systems*, Geneva, 13 May 2014)
[236] Nicholas Marsh, *Defining the Scope of Autonomy*, PRIO Policy Brief, 2014, p. 3.
[237] Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention on Certain Conventional Weapons) 13 October 1995.
[238] Convention on Cluster Munitions, United Nations, November 2008, C.N.776.2008. Treaty Series, vol 2688, p. 39.
[239] Jeangène Vilmer, above note 109.
[240] Ibid.
[241] See, Daragh Murray, *Practitioners' Guide to Human Rights in Armed Conflict*, (Oxford University Press, 2016).

Jeangène Vilmer thus believes that a better and 'wider option [to a ban] is to install safeguards.'[242] Such safeguards will ensure predictability; this predictability being, he concludes, what is really at stake in the moral-ethical debates.[243] One of these safeguards, he proposes, should be to ensure that weapons can only target material military targets such as tanks and aircraft.[244] This, he states, avoids the problem of systems deciding whether someone is a combatant or a civilian.[245] Jenks also proposes that these weapons should be used against material targets only, stating that this distinction would throw nuance into the debate.[246] Further to this, Jenks suggests that such safeguarding approach would be more efficient, in that states are unlikely to vote for a complete ban but would be unlikely not to vote for specific safeguarding measures.[247] However, the clear problem with Jenks' position is that anti-material robots can still kill people as people are often in/with/next to material, as exemplified by the accidents involving the PAC systems described above.

Another proposed means of regulating such machines is to state that they can only be used in certain contexts such as in air combat or in submarine warfare where there are fewer civilians around, reducing the risks. [248] As Sparrow notes, however, issues around knowing whether one party wishes to surrender or not and knowing, then, to stop shooting, would remain.[249] Further, whilst indeed this may put less human life at risk, there is also the potential, as noted by Heynes, that the removal of humans from the actual field could drastically increase states' willingness to go to war.[250] If there is neither military not civilian risk of life, or only a very low risk, the stakes of going to war will be reduced and states may go to war to resolve conflict more often. Such modes of warfare could thus, not only increase warfare due to the lower risks but also would make conflict about technological advancement and who has the best weapons (and thus the most money). Such inequalities would inevitably map onto existing global inequalities, therefore creating a further divide between the Global North and the Global South. This would therefore serve to reiterate colonial patterns of those who can fight ruling over the those who would have no possible way of resisting due to their inability to fight back against such machines without having such machines themselves.

[242] Jeangène Vilmer, above note 109.
[243] Ibid.
[244] Ibid.
[245] Ibid.
[246] Jenks, above note 163.
[247] Ibid.
[248] Sparrow, above note 586, p. 107; Jeangène Vilmer, above note 109.
[249] Sparrow, Ibid.
[250] Christof Heyns, above note 161.

Alternatively, Arkin has proposed regulation via imposing a test for machines which would work to ensure that such machines would uphold the standards of IHL.[251] The Arkin Test is an updated version of the famous Turing Test in AI, discussed in the previous chapter, which stated a machine could be deemed to be intelligent if a human believes it to be human.[252] The Arkin Test states that a machine can be employed when it can be shown that it can respect the laws of war as well or better than a human in similar circumstances.[253] According to Lucas therefore, if a machine passes this test, not only should it be deployed but morally we have an obligation to deploy it as it may work to uphold IHL better than ever before.[254]

There are many opponents to such a test. Sparrow, for example, has noted that Arkin's argument 'depends on adopting a consequentialist ethical framework that is concerned only with the reduction of civilian casualties.'[255] Arkin's test becomes a matter of prediction and numbers as opposed to ethics. Thus, while such a machine could be justified based on statistics; a machine statistically kills fewer civilians than a human so we should use it, this avoids the fact that, ultimately, the IHL standard for the protection of civilian life *should* be perfection. Noting that a machine may kill less neither makes those deaths acceptable nor the deaths which occur at human hands: what is at stake is 'the value of innocent human life.'[256]

Further to this, suggesting that these machines could follow IHL better than humans ignores the fact that IHL is not just a set of clear cut rules but requires very complex decision making and knowledge of human experience as well as the ability to make complex ethical decisions, as noted above.[257] In addition, as Sparrow notes, human ethics differ: the rules of a Kantian ethics can be different to utilitarian, for example.[258] Any programmer of such a machine would thus have to decide which ethics to programme into the machine, this being, obviously, deeply controversial and working to narrow, once again, the complexity of human judgement. Arkin has suggested, in counter-balance to the arguments made against his proposed test, that these issues could be resolved with a backup system whereby the machine would refer to a human every time it has to make complex ethical decisions, making it autonomous up until the point

[251] Arkin, above note 160.
[252] Alan Turing, 'Computing machinery and intelligence,' *Mind*, 1950, 59, p. 433-60.
[253] Ronald Arkin, *Governing Lethal Behaviour in Autonomous Robots*, (Routledge, 2009); Ronald Arkin, 'The Case for Ethical Autonomy in Unmanned Systems,' *Journal of Military Ethics*, (2010), 9(4), p. 332.
[254] George R. Lucas, 'Automated Warfare,' *Stanford Law & Policy Review*, (201), 25(2), p. 322, 326 and 336.
[255] Sparrow, above note 158, p. 16.
[256] Ibid.
[257] Ibid.; Jeangène Vilmer, above note 109.
[258] Sparrow, above note 158.

of the complex decision.[259] Jeangène Vilmer has also proposed the same, if in doubt, hold off fire and ask for help argument, such a test, he proposes, therefore ensuring that humans maintain the ultimate veto power in complex situations.[260] This would, the argument goes, ensure that such machines remain compatible with IHL, ensuring that attacks are prevented if it becomes clear that there will be, for example, a high risk of loss of civilian life. It seems, however, that such proposals would take away some of the weapon's advantages including their capacity to make decisions more rapidly than humans and their ability to work in complex conditions where it is hard to retain human communications or pilots. Such delays could also be exploited by enemies easily.[261] Further, any the decision as to whether a machine is or should be in doubt or not also remains complex and mistakes could still be made, leading Sparrow to declare that 'if we can't trust a machine to reliably make ethical judgements, we cannot trust it to identify when its judgements might be unreliable.'[262]

It is clear that, despite the challenges posed, the need to call for a ban remains a strong argument. Human Rights Watch, for example, have noted the fact that a ban seems like the only logical strategy. Regulation, they note, is too complex and could leave too much room for interpretation. Thus, they state that 'a complete prohibition is clearer and easier to enforce than partial regulations or restrictions and eliminates room for different interpretations. A complete prohibition creates greater stigma against the weapons and discourages their proliferation.'[263]

4. A Posthuman-Xenofeminist Analysis of the Discourse on Autonomous Weapons

4.1 Challenging the Humanist Discourse around Autonomous Weapons

There are various stances taken on autonomous weapons. Whilst no one seems to think that such weapons should be able to exist without restriction groups can be put into two categories. One group is made up of those who think autonomous weapons either should (as, for example, they may better uphold the rules of IHL) or will inevitably exist, this group thus calling for frameworks to regulate their creation and use. This group tends to be made up of people working of having formerly worked in military contexts, such as Jenks and Jeangène Vilmer

[259] Arkin, above note 259.
[260] Jeangène Vilmer, above note 109.
[261] Ibid.
[262] Sparrow, above note 158, 107.
[263] Wareham and Goose, above note 177.

and some technology and roboticist experts, such as Arkin.[264] The second group is made up of those who are calling for a pre-emptive ban of autonomous weapons. This group is made up of various groups, including; NGO's,[265] some states (notably all from the Global South),[266] philosophers,[267] religious leaders,[268] scientists, technology experts and robotics experts,[269] among others. This group has greater ethical concerns with autonomous weapons and fewer ties to the military. However, there are very large differences between the people in this group and their reasons for calling for a ban seem to come from different standpoints. Religious leaders, for example, call for a ban out of their concern for human dignity.[270] Somewhat similar to this, NGO's tend to take a humanitarian stance, noting the need to promote a humanist ethics and uphold the rules of IHL. Alternatively, however, there are those in this group who do not fundamentally come from a humanist background, but whose work, in fact, can be described as posthuman.

Musk, who signed the Future of Life Institute letter to ban autonomous weapons, is one such example. Musk has dedicated his life neither to religious nor humanitarian aims (at least not in the humanist sense in which NGO's tend to deploy humanitarianism) but, rather, is a tech expert, engineer, inventor and investor who wishes to fundamentally change the world through the use and development of technology. His work has many stands, including projects which aim to use technology to create a more sustainable future, as can be seen in his work on electric cars through his company Telsa,[271] and his work on solar panels through the company SolarCity (whose parent company is Telsa).[272] Musk also aims to make life multiplanetary so as to prevent human extinction.[273] In contrast to NGO's such as Human Rights Watch, many of the tech experts, including Musk, come from the perspective of futurism.[274] Thus, whilst NGO's, for example, come from the humanist discourse of IHL and the need to protect human

[264] Jeangène Vilmer, above note 109; Jenks, above note 163; Arkin, above note 160.
[265] See above note 164.
[266] Campaign to Stop Killer Robots, above note 226.
[267] See, for example; Sparrow, above note 158.
[268] Above note 221.
[269] Future of Life Institute, above note 230 and 232.
[270] PAX, above note 212.
[271] Telsa, 'About Tesla,' https://www.tesla.com/about (accessed 03/12/2017).
[272] Solar City website, http://www.solarcity.com/ (accessed 03/12/2017).
[273] Ross Anderson, 'Exodus: Elson Musk argues that we must put a million people on Mars if we are to ensure that humanity has a future,' Aeon 2014, https://aeon.co/essays/elon-musk-puts-his-case-for-a-multi-planet-civilisation (accessed 03/12/2017).
[274] By this I mean the embrace of technology and the wish to use it to craft the future. This is the more contemporary use of the term. See; O'Connell, above note 23.
For more information, however, on the twentieth century Italian futurists, a political-artistic (nationalist) movement (and their relation to international law), see Rose Sydney Parfitt, 'The Anti-Neutral Suit: International Legal Futurists, 1914-2017,' *London Review of International Law*, (2017), 5(1), p. 87-123.

life over all others, these groups in some ways having more of an alignment with the human dignity standpoint of religious leaders, tech experts like Musk fully embrace the posthuman future whilst working to ensure that this future remains ethical.

This will to balance the positives and negatives of technology so as to construct the future from the now can be seen through the project OpenAI, which Musk co-founded.[275] OpenAI is a project which aims to disrupt the current trend in AI research. Until the creation of OpenAI, much research into AI was being done by large companies such as Google or in research centres such as MIT, with much of the findings of this research being kept private, often in the hope of using them for future profit. OpenAI, a non-profit organisation, disrupts this by explicitly committing to make all of its research and patents public and through offering to work freely with any group or organisation.[276] Noting the threat AI could pose to humanity, OpenAI aims to create a friendly General Artificial Intelligence (GAI) - a system which can do more than just one thing such as speak or play chess, one which has "human" characteristics.[277] OpenAI thus represents a clear, strategic effort to disrupt current trends in technology and AI development, including the will to make profit, aiming to bring a different ethical standpoint to the realm of AI research working, hopefully, to create a better future.[278]

At their base however, all the groups who call for a preventative ban fundamentally agree that machines should not make life or death decisions. However, whilst NGO aims are to protect people and promote humanist aims, many futurist tech experts fundamentally believe that 'the best way to predict the future is to invent it.'[279] Thus, they wish to call for a ban on systems that can kill, whether they have been explicitly created as weapons or not. This is very similar to xenofeminist aims: the wish and aim to appropriate technology for feminist aims. Whilst xenofeminism does not explicitly address the threat to life technology could potentially pose, the wish to define and use technology for feminist aims, I suggest that any xenofeminist approach inherently includes the wish to ensure that technology remains "friendly," this being

[275] See; Dave Gershgorn, 'New 'Open AI' Artificial Intelligence Group Formed by Elon Musk, Peter Thiel, and More,' Popular Science 2015, http://www.popsci.com/new-openai-artificial-intelligence-group-formed-by-elon-musk-peter-thiel-and-more (accessed 03/12/2017).
[276] Open AI, 'Mission,' https://openai.com/about/#mission (accessed 03/12/2017).
[277] Eliene Augenbraun, 'Elon Musk: Artificial Intelligence may be "more dangerous than nukes",' CBS News 2014, http://www.cbsnews.com/news/elon-musk-artificial-intelligence-may-be-more-dangerous-than-nukes/ (accessed 03/12/2017).
[278] Cade Metz, 'Inside Open AI, Elson Musk's Wild Plan to Set Artificial Intelligence Free,' Wired 2016, https://www.wired.com/2016/04/openai-elon-musk-sam-altman-plan-to-set-artificial-intelligence-free/ (accessed 03/12/2017).
[279] Alan Kay as quoted in OpenAI website; Open Ai, above note 276.

inherently part of the ethics of xenofeminism itself.[280] While futurists wish to create a friendly AI, however, for example, they do not define what "friendly" means. Xenofeminism, on the other hand, is exp0licitly informed by a feminist ethos yet it has yet to fully emerge in the futurist spaces of the like of Musk. There is a need, as I will come on to suggest, to bring these two bodies of thought together.

Whilst there is a need to ensure that IHL is upheld and that robots do not kill, it is also clear that this ethical dilemma does not just apply to the issue of autonomous weapons. Whilst organisations such as the Women's International League for Peace and Freedom clearly have anti-militarism as their core aim (with their subsidiary group, reaching Critical Will, being the group calling for a ban on autonomous weapons), the standpoint of such NGO's remains somewhat limited. This is because, as NGO's, they inevitably remain conceptually in the present without account for the future. NGOs maintain, for the most part, a strict humanist stance, focusing on the realm of international law and the need to promote and protect existing legal frameworks such as IHL which situate the human at the centre of the paradigm. This has historically worked successfully, as can be seen in the many great achievements NGO's have obtained. However, such a humanist stance cannot work entirely when it comes to technology, especially given the rapid pace at which technology is now developing. As suggested already through the discussion of the OpenAI project and, in the previous chapter, through a discussion of the potential oncoming Technological Singularity, AI may not only pose a threat to the lives of humans where designed, purposefully, to kill, but may pose a threat to life in and of itself, as it exists. There is a need for all groups who are working to promote ethical technologies to consider, not only what may seem attainable now, but what is feasibly attainable in the future, noting the ways in which the now can be used to construct the future.

NGO discourse maintains a humanist framework in that continues to position the machine as the other to the human. Whilst NGO's and others working to ban autonomous weapons have questioned the meaning of subjectivity through questions of autonomy, for example, thus posing, implicitly, fundamental questions about what it means to be human, they continue to situate the human as the centre of the paradigm. This can be seen in the way in which notions of autonomy are constructed as being able to be limited by the human without account for the ways in which humans and machines already work together, in connection.[281] The humanist paradigm has worked well historically. However, in such a paradigm, the (albeit constantly

[280] I use the term "friendly" as this is the term used by Open AI.
[281] Haraway, above note 1.

(re)defined)[282] human remains at the centre and a more complex understanding of the posthuman condition and thus of other possible posthuman subjectivities is rendered invisible. The fact that popular culture imaginings of killer robots are always humanoid works to structure the debate through a limited, humanist, Western popular consciousness.[283] The human remains as the central figure – all else being interpreted and defined according to how "human" it looks and is.[284] Sophia, the AI robot which recently gained Saudi Arabian citizenship and attended a UN meeting is a good example of this.[285] Sophia is not only humanoid but is also gendered as and sees herself as female, gender being thus interpreted, in her very embodiment and existence, as a fundamental aspect of humanity and thus of Sophia's subjectivity.[286]

Posthumanism, on the other hand, challenges the centrality of the human within Western humanist thinking and works to re-think the human/machine binary. Part of the problem with the autonomous weapons debate - and debates on robots and artificial intelligence more generally - therefore, is that these machines are always being read in human/non-human binary terms. Posthumanism, however, notes that something else is needed; a new way of defining subjectivity which sees the complexities and interconnections 'the specific slice of matter that is human embodiment'[287] and others: nature, culture, technology, animals, life and death- a subject which rejects the human as centre paradigm and is located 'in the flow of relations with multiple others.'[288] Humanist discourse, applied to the lived experience of technological ethics, works to ignore the posthuman fact that the human and machine are already working in connection with one another; decisions of life and death are already being made by human-machine combinations.

[282] By this I am referring to the argument I made in Chapter Three about the way in which liberalism often extends to include "others", such as women, for example, while ensuring that the conceptual framework remains the same.
[283] As noted above Cohn, too, has discussed how Defence Intellectuals often personify weapons systems. See; Cohn, above note 56.
[284] The Turing test is an example of this with intelligence under the test being measured only in relation to whether an entity can "pass" as human or not. See; Turing, above note 261.
[285] See; UN News Centre, 'At UN, robot Sophia joins meeting on artificial intelligence and sustainable development,' 2017, http://www.un.org/apps/news/story.asp?NewsID=57860#.Wg8v2VVl-Uk (accessed 03/12/2017).
[286] Sophia, when asked; 'Do you regard yourself as male or female?' replied, 'female.' When subsequently asked, 'Why do you think you are female?' she replied, 'I'm a robot so technically I have no gender but I identify as feminine and I don't mind being perceived as a woman.' See; Business Insider UK, 'We Interviewed the AI Robot that's now a Citizen of Saudi Arabia,' 2017, https://www.youtube.com/watch?time_continue=2&v=R0bVxbRCd-U (accessed 03/12/2017).
[287] Braidotti, above note 7, p. 35.
[288] Ibid., p. 50.

The next two sections will consider alternative ways in which technology poses a threat to human life, outside the limited definition of weaponry as defined by the makers of such technologies. Thus, the first part will consider the ways in which the human-machine are already making life of death decisions in ever complex ways, noting how, to focus on the machine alone, as other, works to narrow one's focus and ignore the realities of the ways in which much of this technology is both already being used and is likely to develop further. Thus, it will be argued that banning autonomous weapons alone is not enough: there is a need to thoroughly consider the ways in which machines are already making these decisions and to create ethical frameworks for these technologies too.

The following section will go on to consider the fact that, given current trends in wearable military technologies and the large investment in transhumanism, as opposed to the vast technological problems in creating a humanoid killer robot, the future of autonomous weapons may not be solely machinic at all but is, rather, very likely to take the form of a transhuman soldier. Transhuman soldiers, however, it seems, would not be covered under the kinds of legal bans that NGO's are suggesting as they are not machinic weapons alone but are both machine and human. Transhuman soldiers, of course, potentially pose a different set of ethical questions to autonomous weapons in that they inherently are human as well as not-human, producing an assumption that a human would always be involved in decision making processes. However, to what extent a human may be making decisions or not, depending on the "upgrades" such a soldier may have undergone and depending on the ways in which programming may determine whether a target is legitimate or not etc., will be questioned.

These examples will be drawn on and discussed as a way to challenge the limited remit of NGO discourse around autonomous weapons. It is clear that autonomous weapons, to some extent, already do exist, as exemplified in the above given example of the Samsung SGR-A1. However, they are not the only area where machines are already and will likely continue to make life or death decisions.

4.1.a Machine-Human Life/Death Decision Making

Technology, notes Jasanoff, is based around a set of decisions.[289] Jasanoff gives the example of traffic lights; who determines when they will change and how long people will get to cross

[289] Sheila Jasanoff, *The Ethics of Invention: Technology and the Human Future*, (W. W. Norton & Company, 2016).

the road? How was this determined? 'Did they assume all walkers are equally able-bodied, or did they allow extra time for infirm or disabled persons?'[290] She notes how we often do not question these decisions until there is an accident – at which point we find who made the mistake.[291] However, she notes that it is strange how people 'have spent a great deal more energy thinking about how to make good laws than about how to design good technological objects.'[292] Yet, she continues, 'in democratic societies, uncontrolled delegation of power is seen as a basic threat to freedom.'[293] We must 'understand how power is delegated to technological systems.'[294]

The need to understand the ways in which power and decision making is delegated to technology is ever more urgent in the realm of life or death decision making. However, a humanist discourse on this issue is problematic in that it fails to account for the ways in which humans and machines are already working together to make life or death decisions, both inside and outside the limited definitions of weaponry. For example, Johns has shown how the use of the pairing of list and algorithms is already being used in global governance.[295] A similar phenomenon can be seen in the ways in which programming and algorithms are used in drone warfare. Whilst some key people are targeted in what are known as 'personality strikes' (i.e. strikes on a particular, key, well-known person), these occur only a few times a year, with 'signature strikes' happening a few times a week.[296] These attacks are conducted on a 'pattern of life' analysis. 'Pattern of life' analysis is where a profile of an individual or a network of individuals is established drawing on all the intelligence available, which includes things like drone and other aerial surveillance intelligence, communications interceptions as well as phone tapping information and GPS tracking information.[297] As Shaw has noted, geographical distance and space is crumpled in these analyses, especially due to the use of aerial observation, through its digitalisation.[298] What becomes clear therefore, in 'drone warfare' is that the drone itself is only one part of a broader system which includes big data, algorithms, intelligence

[290] Ibid., p. 11.
[291] Ibid.
[292] Ibid.
[293] Ibid., p. 11-12.
[294] Ibid., p. 12.
[295] Fleur Johns, 'Global Governance through the Pairing of List and Algorithm.' *Environment and Planning D: Society and Space*, (2016), 34(1), p. 126.
[296] Wilcox, above note 83, p. 129.
[297] Ian Shaw, 'Predator Empire: The Geopolitics of US Drone Warfare,' *Geopolitics*, (2013), 18, p. 550; Cora Currier, 'The kill chain: The lethal bureaucracy behind Obama's drone war,' The Intercept 2015, https://theintercept.com/drone-papers/the-kill-chain/ (accessed 03/12/2017).
[298] Shaw, Ibid., p. 550.

collections, chains of command, bureaucracy etc.[299] This data is then often combined with individual tracking, through the use of mobile phone and GPS tracking systems (what the NSA calls 'geolocation') in order to both watch individual's movements as well as to target individuals.[300] The gathering of this information works to create a file of information collected by machines which, as Chamayou has noted 'once it becomes thick enough, will constitute a death warrant'.[301] This is an example of machine life or death decision making. Part of the decision making process, here, is already done by machines which gather this data and predict the likelihood of individual involvement with terrorist organisations. While the human is clearly involved, in that they then have to note the results of the data collection and deem it enough to act upon, as well as to operate the drone then used to kill the subject in question, it is clear that the machine and the human, in this instance, are making life/death decisions *together*. It is also worth nothing, as Wilcox has shown, the ways in which this data is often interpreted in racialised and gendered ways, rendering some bodies more out of place than others and thus rendering some intelligence files more likely to be death warrants than others.[302]

Such processes of human-machine life/death decision making, however, would not be covered under a ban of autonomous weapons. It thus seems that part of the problem with the debate around autonomous weapons is the debate around autonomy itself. By trying to define autonomy instead of working to understand automation and autonomy as in a continuum, international discourse on autonomous weapons works to other the machine from the human at the offset. Such a limited account of autonomy works to set the standard so high for machine decision making that, in the end, almost nothing may be covered under a ban. In the meantime, machines are already contributing to the making of life-death decisions. Machine involvement in such decision-making processes, however, is only likely to increase, as exemplified in the development of wearable military technologies.

4.1.b Transhuman Soldiers

As noted in Chapter Three, it has been highlighted that, whilst most people think of superhumanity in terms of AI, this is only one model. In fact, superintelligence and the

[299] Wilcox, above note 67, p. 5.
[300] Jeremy Scahill and Glenn Greenwald, 'The NSA's secret role in the U.S. assassination program,' The Intercept 2014, https://theintercept.com/2014/02/10/the-nsas-secret-role/ (accessed 03/12/2017).
[301] Chamayou, above note 72, p. 49.
[302] Wilcox, above note 67.

singularity following it is much more likely to occur through what Vinge defines as Intelligence Amplification (IA), for example, large computer networks waking up and becoming superhumanly intelligent or 'computer/human interfaces may become so intimate that users may reasonably be considered superhumanly intelligent.'[303] These two examples would be distinguished from an AI machine as they either come from "upgrading" the human or from the computer finding its own intelligence, rather than being from a created programme. Thus, Vinge states, 'in humans, the hardest development problems have already been solved. Building up from within ourselves ought to be easier than figuring out first what we really are and then building machine that are all of that [as per AI].'[304]

Whilst a computer system discovering its own intelligence would not pose such a different set of relations as a human created AI, though the human creation element would, in this case, be somewhat more distant,[305] a transhuman weapon would, however, pose a different set of conundrums. Autonomous weapons, it seems, could feasibly come about, not through some purposefully created AI system but through the upgrading of humans themselves. Recent trends in military technologies, including the creation and use of exoskeletons to make humans stronger and better soldiers than they are "naturally" as testament to this already occurring trend.[306]

The difference between feminist posthumanism and transhumanism have already been noted, with transhumanism, the desire to cheat biology and death itself, being about perfecting the incomplete human subject (as assessed by the dominant Western account of subjectivity) and with feminist posthumanism, rather, noting that that mode of subjectivity was always already flawed and incomplete and thus incompletable. A transhuman autonomous weapon, which would, in this case, come in the form of a high-tech cyborg soldier, is, to some extent, the epitome of the risk to feminist posthuman tech-positivity, as highlighted in the quote used at the start of this chapter. At the same time, such a soldier would not necessarily be called a weapon and would pose a different set of ethical questions considering that they would remain,

[303] Vinge, above note 25.
[304] Ibid.
[305] This depends on perspective, however. If something is programmed to be alive then perhaps there are some human checks and balances which are present which might not be there for something which becomes 'unexpectedly' intelligent. The opposite is also possible – perhaps without human programming to 'become' the super-intelligent machine holds more process of escaping all human weaknesses.
[306] Gina Heathcote, 'War's Perpetuity: Disabled Bodies of War and the Exoskeletons of Equality,' *Australian Feminist Law Journal*, (2018), 44.1, p. 71/91.

to some extent, human, possibly retaining human choice capacity and empathy.[307] However, it is necessary to consider the potential for such superhuman soldiers and to watch over their development. For example, as noted above, emotions in military contexts are often deemed to be a weakness by many, who then use this argument as a means by which to justify the usefulness of autonomous weapons.[308] Following this line of argument, if taken literally and applied to super solider technologies, it is feasible to consider, eventually, that attempts may be made to make (trans)human soldiers emotionless to make them more efficient soldiers. It is at this point, where some parts of one's humanity may be lost, that some of the ethics of autonomous weapons may also begin to apply directly to transhuman soldiers.

Wearable military technologies are being developed to make human soldiers more efficient. An example can be seen in exoskeletons. Used to make soldiers stronger and to help disabled soldiers get back to work, it is clear that the development and use of exoskeletons is one step towards the creation of super soldiers.[309] Many of these wearable military technologies, however, are being used, not only to increase strength but to make life or death decisions more efficient. An example of such a technology can be seen in the Boomerang gunfire location system outlined above. Initially mounted onto trucks, there is now also a soldier wearable system called the Boomerang Warrior-X. Whilst the system still requires a soldier to use the information it gives to fire, it provides another example of the trend towards creating machine-human super soldiers.

These examples show, not only the ways in which the human-machine are already working together to make life-death decisions, but also show the trend in working to create a new breed of super soldiers. Given the link between technology, capitalism and militarism, and the ways in which much technology is often developed first for or used first by the military, research

[307] Anxieties around what and who counts as human in relation to human enhancement technologies are already garnering attention, such anxieties being only set to increase in intensity as human enhancement technologies become more and more advanced. Contemporary anxieties were expressed, for example, over the debate around whether Oscar Pistorius, an athlete with prosthetic legs below the knee, could compete in the Olympics as opposed to the Paralympics. See; Leslie Swartz, 'Cyborg Anxieties: Oscar Pistorius and the boundaries of what it means to be human,' *Disability & Society*, (2008), 23(2), p. 187-90.
In the future, if technological subjects do gain personality, there could indeed be legal cases which ask the Courts to determine whether a subject is a human or an electronic subject. It is clear that there is also a great need to pay attention to scholars working on disability when it comes to these issues, especially those who note that disability is a socially constructed category and those who discuss the interaction between the body and matter. See, for example; Mike Oliver, *Understanding Disability: From Theory to Practice*, (Palgrave Macmillan, 2009); Jasbir K. Puar, 'Prognosis Time: Towards a Geopolitics of Affect, Debility and Capacity,' *Women & Performance: A Journal of Feminist Theory*, (2009), 19, p. 161-72.
[308] Arkin, above note 160.
[309] Bob Marinov, '19 Military exoskeletons into 5 Categories,' Exoskeleton Report 2016, http://exoskeletonreport.com/2016/07/military-exoskeletons/ (accessed 03/12/2017).

ongoing within the realm of transhumanism could, potentially, also predict the future of military technologies.

One clear example of a transhuman research project which could contribute to the creation of superhuman soldiers can be seen in HRL's Information & System Sciences Laboratory's transcranial direct current stimulation project.[310] The researchers in this project 'measured the brain activity patterns of six commercial and military pilots and the transmitted these patterns into novice subjects as they learned to pilot an airplane in a realistic flight stimulator'.[311] The study found that 'subjects who received brain stimulation via electrode-embedded head caps improved their piloting abilities'.[312] This example of a possible way to decrease the time it takes to learn complex skills, given that 'commercial and military pilot training programs [already] now utilize flight simulation extensively for training basic flight and combat skills'.[313] Such a study could clearly, as the researchers on the project note, have massive 'benefits for commercial and military applications'.[314] Such a project thus represents a further example of the ways in which technology is being developed in various contexts with the idea of improved more-than-human soldiers in mind. Given current trends in wearable military technologies and the large investment in transhumanism globally, as opposed to the vast technological problems in creating a humanoid killer robot, the future of autonomous weapons may not be solely machinic at all but are, rather, very likely to take the form of a transhuman soldier. While the UK has noted that definitions of autonomous weapons between states differ, highlighting this as a key site for urgent international debate,[315] discussions across the board continue to assert the autonomous weapon as the machinic other. Such definitions limit any future agreements to humanist accounts of technology, thus limiting the potential impact of any such agreement.

5. A Posthuman-Xenofeminist Approach

Despite current trends in military technologies and the ways in which machines are already helping to make life or death decisions, it is clear that neither algorithmic analysis nor any type

[310] Jaehoon Choe et al., 'Transcranial Direct Current Stimulation modulates Neuronal Activity and Learning in Pilot Training,' *Frontiers in Human Neuroscience,* (2016), 10(34), p. 1-25.
[311] Matthew Phillips as quoted in; HRL Laboratories, 'HRL demonstrates the potential to enhance the human intellect's existing capacity to learn new skills,' 2016, http://www.hrl.com/news/2016/0210/ (accessed 10/07/2017).
[312] Choe, above note 310.
[313] Choe et al above note 310, p. 2.
[314] Ibid.
[315] UK Ministry of Defence, above note 230.

of transhuman super soldier would be covered under a pre-emptive ban of autonomous weapons, given the problematic definitional standard set for autonomy and the way in which the debate focuses solely on killer machines without account for the ways in which the human and machine work in connection. While such military technologies seem initially different to what may be deemed an autonomous weapon, to what extent a human may be making decisions or not, depending on the "upgrades" a soldier may have undergone and depending on the ways in which programming may determine whether a target is legitimate or not, is debateable.

The humanist discourse around autonomous weapons is clearly limited. Posthuman theory, on the other hand, recognises the connections between the human and the machine, noting the ways in which machines challenge and multiply human subjectivities. A posthuman approach to autonomous weapons would not fixate on autonomy but would, instead, work to break down the false lines drawn between autonomy-automation and human-machine, instead focusing on the ethical implications of such weapons systems across these limits.[316] As noted above, whilst xenofeminism and posthuman feminism understand the dangers as well as the potentials of technology, for the most part, they fail to account for the power of militarism and the militarism-capitalism assemblage the necropolitical ways in which this assemblage works. Haraway is a clear exception to this, however, for she has long been concerned with the links between technology and the military and the power of militarism.[317] While her early work did focus greatly on these dangers, however, her more contemporary work has moved away from considering high tech and militarism. Braidotti is another such exception, as I will come onto shortly.

The Xenofeminist Manifesto, on the other hand, is silent about the power and role of militarism in technology. Being a short manifesto, the piece itself cannot cover everything, and it already covers many topics. It seems, however, that the necropolitical and the risk of the technology-military-capitalism assemblage need to be further read into xenofeminism to ensure that it stays true to its own aims of using and appropriating technology for intersectional feminist aims.

Feminist posthumanist Braidotti does explicitly consider death in her work. She believes that necropolitics and a new understanding of death is an essential part of posthuman thinking.[318] In line with Braidotti's thought and Haraway's earlier work on anti-militarism, I wish to read the problems of the necropolitical and of militarism into xenofeminist theory to be able to use

[316] Braidotti, above note 7.
[317] Haraway, above note 1.
[318] Braidotti, above note 7.

xenofeminism and xenofeminist methods in application to autonomous weapons systems and contemporary military technologies. Before concluding with a feminist posthuman-xenofeminist approach to the necropolitical tools that are/will be autonomous weapons, however, there is a need to consider how other authors writing on autonomous weapons tackle the question of death. This is necessary in order to be able to understand and define precisely what a feminist posthuman-xenofeminist should and should not be.

Jenks, for example, poses autonomous weapons as the answer to conflict related death itself, arguing that autonomous weapons, in the end, could prevent death.[319] He thus gives the example off the very possible reality that, in the future, war may be conducted via swarming autonomous drone offences, this being multiple drones flying in coordination with one another, attacking multiple other drones, also working together. Stating that the future of warfare is likely to be a series of swarming autonomous drone attacks which will occur above the heads of humanity, out of sight and away from harm, over in minutes, Jenks poses that autonomous weapons could, in the end, despite the current necropolitical use of drones, save humanity from conflict related deaths.[320] While such a future does indeed sound considerably more ideal than the present, the picture pained by Jenks is, however, somewhat simplistic. First, it is clear that getting to the point at which all warfare may be conducted through swarming drones attacks requires a vast number of technological developments to occur. In the meantime, however, while such drones are being created, drones are being used, right now, against human targets to decide who lives and who dies. Drones are a large part of the current necropolitical order. While indeed swarming drone attacks without human casualties may be ideal(ised), such a proposition ignores the deaths which will inevitably occur and are occurring in the development of such technology, including those who both must make and recycle this technology.[321]

Second, Jenks' proposition fails to consider global inequalities and the ways in which high tech warfare maps onto these pre-existing inequalities. As noted above, however, the balance of power would not be equal here: the winning side would inevitably be the side with the m most high tech machines. Following this, therefore, it seems that conflict in the high-tech future may not be conducted between swarming autonomous machines at all. Rather, conflict itself may not occur at all. However, this would be not utopia. Conflict would likely not occur or rarely occur because the outcome would be already too certain. This would work, in effect therefore,

[319] Jenks, above note 163.
[320] Ibid.
[321] See; Borromeo, above note 16.

to ensure that the entities controlling the most high-tech machines control the world with no possibility of rebellion or change, with event last resort violence take away as a possibility. This would not only exacerbate existing inequalities but also feed into the possible future that Chace paints,[322] as noted in Chapter Five, of the creation of two tiers of humanity; the rulers with tech and the ruled – a long way away from the hope for xenofeminist-accelerationist post-capitalist future described in the previous chapter.

Further to this, Jenks proposal fails to account for the nonhuman and environmental damage that such swarming conflicts may have, with environmental and nonhuman animal damage already being an under spoken topic in the discourse on conflict.[323] In contrast, Braidotti, noting the need for posthuman theory to combat the necropolitical, aims to tackle the necropolitical through affirmation. Thus, Braidotti, drawing on a Spinozan[324] ethical framework, calls for a posthuman approach which understands the workings of the necropolitical and responds to it, attempting to deal with 'the horror and complexity of our times… affirmatively.'[325] Thus, she states:

> We need to actively and collectively work towards a refusal of horror and violence – the inhuman aspects of our present – and to turn it into the construction of affirmative alternatives. Such necro-political thought aims to bring affirmation to bear on undoing existing arrangements so as to actualize productive alternatives.[326]

Braidotti's necropolitical posthumanism promotes affirmation through a deconstruction of the life/death binary. A posthuman approach, states Braidotti, must pay attention to death and modes of dying.[327] This does not mean, however, that politics itself should be reduced to death alone, with death representing the ultimate line in the sand.[328] In contrast to this, Braidotti proposes 'a politics of life itself as a relentlessly generative force including and going beyond

[322] Calum Chace, *The Economic Singularity: Artificial Intelligence and the Death of Capitalism*, (Three Cs, 2016).
[323] See; Karen Hulme, 'A Darker Shade of Green: Is it Time to Ecocentrise the Laws of War?' in Noëlle Quénivet and Shilan Shah-Davis, *International Law and Armed Conflict - Challenges in the 21st Century*, (T.M.C. Asser Press, 2010), p. 142-60.
[324] See; Benedict de Spinoza, *The Ethics*, trans. R.H.M. Elwes, (ebooks@Adelaide, University of Adelaide Press, 2014), https://ebooks.adelaide.edu.au/s/spinoza/benedict/ethics/complete.html (accessed 29/11/2017); Rosi Braidotti, *Nomadic Theory: The Portable Rosi Braidotti*, (Columbia University Press, 2012).
[325] Spinoza, Ibid.; Braidotti, above note 7, p.130.
[326] Braidotti, Ibid., p.129-30.
[327] Ibid., p. 111.
[328] This is the approach Braidotti states that Agamben takes in his concept of 'bare life.' See; Ibid., p. 120-1; Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, (Stanford University Press, 1998).

death.'[329] Thus, Braidotti reads life/death as affirmative, noting the issues which will be faced and choosing to tackle them as they come. She thus states:

> It is a constant challenge for us to rise to the occasion, to be 'worthy of our times', while resisting them, and thus to practise *amor fati* affirmatively. It is quite demanding to catch the wave of life's intensities in a secular manner and ride on it, exposing the boundaries or limits as we transgress them. No wonder that most of us, as George Elliot astutely observed, turn our back on that roar of cosmic energy. We often crack in the process of facing life and just cannot take it anymore. Death is the ultimate transposition, though it is not final, as *zoe* carries on, relentlessly.[330]

It seems hard, however, to read LAWS in the affirmative when weapons technologies kill people in ever more removed and de-personalised ways. Autonomous weapons, if they come to exist or as they already exist, are a child of the military economy. While there is, indeed, a need to think affirmatively, to deconstruct life-death and move towards an affirmative, materialist account of the universe, such an analysis does not provide the required and necessary modes of action through which to tackle the problem of contemporary military technologies. As Braidotti notes, however, to analyse in the affirmative is not to deny the horror of our times. Affirmation 'proposes a different way of dealing with' such horrors.[331]

I propose that xenofeminism provides an affirmative blueprint for embracing the current times. I have noted how xenofeminist method is, in part, the appropriation of technology and the systems that we have, which exist, and the bending of them to feminist aims. While xenofeminism, in its current early manifestation, does not fully account for the links between technology and militarism, however, and the ways in which the global order is now structured by the necropolitical with technology being deeply complicit in the creation and maintenance of this structure, this does not mean, however, that xenofeminism cannot accommodate such concerns. Xenofeminist method is an affirmative approach in that it notes the contradictions and risks in the posthuman condition and works to deconstruct and exploit them. It is an approach, in Braidotti's words, which rises to the occasion, accepting challenges and resisting, 'exposing the boundaries and limits as we transgress them.'[332]

[329] Braidotti, Ibid., p. 121.
[330] Ibid., p. 131.
[331] Ibid., p. 122.
[332] Ibid., p.131.

Thus, taking an affirmative posthuman/xenofeminist perspective, one which understands the ways in which the human and the machine are deeply interconnected, I wish to use xenofeminism method; the appropriation of technology for feminist aims, to propose a posthuman-xenofeminist discourse on autonomous weapons as crucial to feminist approaches to international law. While the Xenofeminist Manifesto does not explicitly address the threat to life technology could potentially pose, the wish to define and use technology for feminist aims, I have already suggested, inherently includes the wish to ensure that technology remains "friendly". Taking this further, it is key to note that anti-militarism is a key part of the feminist project as exemplified by the Women's Peace Conference of 1915, to the feminist activism of Greenham Common to the ways in which Haraway, in her early foundational works, highlighted anti-militarism as a key feminist project.[333] While there are many feminists who do not promote an anti-violence stance, choosing to fight as part of their feminism, for example,[334] this does not, however, preclude an anti-militarism stance in the realm of military technologies. Neither does an anti-militarism stance in this area wish to judge those who engage in fighting as part of their feminist project as "not feminists," nor to associate feminism inherently with peace. Rather, in noting the history of anti-militarism within the international feminist project, I wish to suggest that there is a need to promote an ethics of anti-militarism at the international level, especially when trying to think about military technologies or when trying to theorise more broadly. This is precisely because of the ways in which militarism works to structure the global order, working to structure technological innovation and working alongside forces such as capitalism, colonialism and power more broadly, these structural forces working both to structure international law and the ways in which military technologies are both developed and discussed. Such a stance must therefore be contrasted to more contextual scenarios, where fighting and a pro-violence approach may indeed seem the best form of feminist response in fighting against oppressors, for example. In this sense, anti-militarism must be distinguished from an anti-violence position, with anti-militarism aiming to challenge the industrial, technologically crafted, capitalist driven military complex with an anti-violence position calling more broadly for peace and non-violence. Here, therefore, I wish

[333] See, for an example of the history of feminist anti-militarism in international law; Otto, above note 30. See, for more general examples of anti-militarism feminism; Cynthia Enloe, *Globalization and Militarism* (Rowman and Littlefield, 2016); Heathcote, above note 30, Haraway, above note 1.

[334] This can be seen in the many examples of Kurdish female combatants. See, for example; Bethan McKernan, 'The Kurdish Women Building a Feminist Democracy and Fighting ISIS at the same time,' The Independent 2017, http://www.independent.co.uk/news/world/middle-east/kurdish-woman-building-feminist-democrac-fighting-isis-at-the-same-time-syria-kurdistan-rojava-new-a7487151.html (accessed 03/12/2017).

to take an anti-militarism perspective without necessarily aligning myself wholeheartedly with anti-violence.

It thus follows that, given the links between militarism, technological advancements and capitalism, that xenofeminism, as a project aiming to appropriate technology for feminist aims, must have regard for anti-militarism. Thus, a xenofeminist appropriation of technology must include the desire to ensure that the technology of the now and future cannot be used either for military gains or for the taking of human or, in line with the aims of feminist posthumanism, non-human life.[335] Xenofeminist method can form an affirmative method for dealing with the current times and the issue (of military technologies) in hand.

Drawing on the will to appropriate technology for feminist aims and to create the future from the present, the need to resist via complying and drawing on and using, manipulating, hacking and coding the system, it seems that the appropriation of technology includes ensuring that technology can only be developed in ethical ways. Technology, both now and in the future, is dependent on a set of programming choices. Machines are already learning and the potential and pace of machine learning will only increase. Right now, however, humanity is, for the most part, still in the stage of programming. What humanity chooses right now, what programming choices are made or not made in *these* current times, could structure the entire future of technology and machine intelligence: suggesting an urgency to xenofeminist thinking and methods.

The xenofeminists know well that it matters who makes those programming choices. Noting that 'technology isn't inherently progressive' the xenofeminists call for an intervention in these very choices.[336] As Haraway puts it, 'it matters which figures figure figures, which systems systematize systems.'[337] While, indeed, intelligent machines indeed could be the end of the humanity, and they may make the decision to end or rule humanity independently, they also may not make that choice. It is important to get the now right in the hope of working towards a future where the machine-human can work together. Thus, as Haraway notes, 'the machine is use, our processes, an aspect of our embodiment. We can be responsible for machines: *they* do not dominate or threaten us. We are responsible for boundaries; we are they.'[338] Whilst, in

[335] See, for example, Stacy Alaimo and Susan Hekman (eds.), *Material Feminisms*, (Indiana University Press 2008).
[336] Laboria Cuboniks, above note 8, Zero 0*02.
[337] Donna Haraway, 'Anthropocene, Capitalocene, Plantationocene, Chthulucene: making Kin,' *Environmental Humanities* (2015), 6, p. 160
[338] Haraway, above note 1, p. 215.

popular culture, AI is often seen as completely other to the human, humanity is and will be the creators of AI. While humans may not be able to predict the future of machine development, projects can be developed that can at least get the foundations right.

The Xenofeminist Manifesto itself advocates the infiltration of multiple discourses, therefore suggesting that this, indeed could include international law, for they state; 'We understand that the problems we face are systematic and interlocking, and that any chance of global success depends on infecting myriad skills and contexts with the logic of XF.'[339] As the Accelerate Manifesto highlights, technology will not merely create the world critical thinkers want on its own: it needs to be structured through 'socio-political action.'[340] Above, I proposed that the discourse on autonomous weapons need to be made posthuman, noting the ways in which the machine-human is already and will be the future of technology, emphasising the links between the machine and the human and the ways in which seeing the autonomous weapon as the machinic other is a fallacy. Xenofeminist method calls for the appropriation of technology to promote, in Braidotti's terms, affirmative aims; constructing the future from the now. While many of the groups calling for a legal ban of autonomous weapons may be overlooking some of the nuances in the debate and definitions, their larger goal; to gain legal frameworks for the control of these systems, is an aim which can still be used. In line with xenofeminist method, therefore, I propose that a legal-ethical framework is needed which promotes ethical technologies through a posthuman understanding of technology itself; to ensure that the dark sides of technology are evaded whilst technology's positive, subjectivity challenging and capitalism destroying potential is maintained. In other words, a xenofeminist method may include, not only the appropriation of technology itself but of the frameworks which regulate it, such frameworks being key in structuring future developments of technology and thus, in some ways working to appropriate technology through structuring the creation of technology from the outset. There is a need, here, to focus on the regulation of *all* technologies, given the real possibility that killer machines may be created, either not as weapons or in conjunction with humans. Furthermore, such a claim calls for feminist dialogues[341] between xenofeminists with feminist legal theorists, most particularly those that work in transnational and global contexts. A xenofeminist approach to international law proposes a new feminist international

[339] Laboria Cuboniks, above note 8, Overflow 0*19.
[340] Nick Srnicek, Alex Williams and Armen Avenissian, '#Accelerationism: Remembering the Furture,' Critical Legal Thinking 2014, http://criticallegalthinking.com/2014/02/10/accelerationism-remembering-future/ (accessed 02/12/2017).
[341] Gina Heathcote, *Feminist Dialogues on International Law: Successes, Tensions, Futures*, (Oxford University Press, forthcoming 2018).

legal scholars, one which sits between resistance and compliance, using appropriation for transformation. A xenofeminist approach to international law also takes technology in the contemporary moment seriously, seeing it as a moment for vast societal and legal change, embracing this and seeking to shape this change.

There have been steps in other contexts towards creating broader ethical regulations for technology. This can be seen in the example of the European Parliament resolution of the 16th February 2017 which makes recommendations to the Commission on Civil Law Rules on Robotics.[342] The resolution is clearly well thought out, drawing on multiple texts from multipole disciplines which consider the possible ways technology may impact on the future of humanity, citing, for example, 'Mary Shelly's Frankenstein Monster,' the robots of the R.U.R - the play mentioned above by Čapek,[343] and the famous robot ethics rules as outlined by Asimov's Law.[344] The text also considers a variety of issues around the legal regulation of technology, noting issues around liability, care robots, autonomous vehicles and privacy issues. The resolution calls for the urgent need to regulate technologies such as these, noting the need for legal regulations as well as guides for robotics engineers, licence regulations and user codes.[345] While the resolution clearly opens up debate on these issues, the resolution is, however, non-binding and does not engage the feminist dialogues considered throughout this research on the limits of contemporary conceptions of subjectivity.

The EU resolution discusses many different issues in relation to the law, ethics and regulation of technology, aiming, it seems, long-term, to create a widespread, all-encompassing legal instrument. Here, for the purposes of this chapter, however, I will draw on a few keys themes within the resolution which relate to research discussed in the chapter so far. These themes are; subjectivity/legal personality, capitalism and work, human-machine links/autonomy/automation and the dangers of AI, human enhancements technologies and weaponry.

Beginning with the theme of capitalism and work, the resolution notes the many ways in which technology is and will further change the world of work. This can be seen in the text of the

[342] European Parliament, above note 225.
[343] Ibid., para A.
[344] Ibid., Para T; 'The text of Asimov's Law: (1) A robot may not injure a human being or, through inaction, allow a human being to come to harm. (2) A robot must obey the orders given it by human beings except where such orders would conflict with the First Law. (3) A robot must protect its own existence as long as such protection does not conflict with the First or Second Laws.'
[345] Ibid.
[345] Ibid.

resolution which notes the ways in which technology seems 'to be posed to unleash a new industrial revolution, which is likely to leave no stratum of society untouched.'[346] Thus the resolution notes the ways in which unskilled jobs may be more at risk.[347] Further, it is concerned that Europe may soon face a shortage of ICT professionals,[348] calling for policies on training people up for the technological market.[349] It notes the specific need to train up 'young women interested in a digital career.'[350]

While such policies may, in many ways, seem to work with xenofeminist aims; the need to account for changes in the job market and the need to ensure that feminists are actively participating in the development and creation of technology, the resolution does, however, fall short. For example, by calling for the training up young women specifically, it is clear that the resolution aims to draw on debates around work equality and promote work equality while, at the same time, equating equality with participation in the work force alone. As noted in Chapter Three, this is a limited account of what freedom is and can be. Further to this, while xenofeminists aim to promote feminists aims within the development of technology, the resolution's idea of training up more "young women" to do more computer-based jobs quite definitely does not mean that feminists will be trained up, and feminists, indeed, need not be women alone. The technology-based jobs these women will be trained up for too, will likely only minimally include technology development jobs, these jobs being the ones feminists need to have in order to subvert the system. Furthermore, it is clear that such a proposal would do nothing to change the patriarchal, capitalist and fundamentally unjust global order.

This leads onto my broader critique of the resolution's proposals in relation to work. While the resolution is, clearly, concerned with equality, noting for example, how developments in technology may lead to a 'high concentration of wealth and influence in the hands of a minority,'[351] it proposes very little by way of dealing with issues of equality. For example, while the resolution does call for 'the Commission to start analysing and monitoring medium- and long-term jobs trends more closely, with a special focus on the creation, displacement and loss of jobs… as a result of the increased use of robots,'[352] it proposes little beyond the formal account of training people up to fill the jobs of the future.

[346] Ibid., para B.
[347] Ibid., para J.
[348] Ibid., para 41.
[349] Ibid. See; para J, para 41.
[350] Ibid., para 42.
[351] Ibid., para K.
[352] Ibid., para 43.

The resolution does, however, note the need to 'analyse different possible scenarios and their consequences on the viability of the social security systems of the Member States.'[353] This seems to be a concealed reference to a system of Universal Basic Income (UBI), though it is clear that the resolution is drafted carefully so as not to directly pose such a controversial proposal. The resolution remains within the capitalist, profit based conceptual paradigm. This can be seen in the examples above of the ways in which equality is equated with market participation but also though the way in which technology is described as a tool for profit throughout. For example, the resolution notes that technology has the potential to 'raise efficiency' and 'savings,'[354] with autonomy being noted as holding possible 'economic advantages.'[355] Further, it notes the need to 'fully exploit… economic potential' in the aim of ensuring 'European competitiveness.'[356] While such aims are balanced against the risks technologies may also pose, it is clear that the European resolution does not wish to unbalance the current capitalist, profit-centred, global order but is, rather, more concerned with ensuring that Europe retains its central position in that global order.

Moving on to the second theme within the resolution I wish to discuss, subjectivity and international legal personality. The resolution touches on this topic in a variety of ways, the issues here often being linked to concerns around legal liability and accountability.[357] In this sense, the concerns of the European Parliament resolution are somewhat similar to the concerns raised above in relation to autonomous weapons; the need for the law to be able to attribute accountability. Thus, the resolution notes that, where a robot is autonomous, it becomes impossible to determine who caused the damage, under current legal frameworks, that any such robot may cause.[358]

To bridge these issues, the European Parliament proposes what is possibly the most interesting and forward-looking idea within the entire resolution; the recognition of robots as 'electronic persons.'[359] While this proposition is not defined and rather minimally discussed in the resolution, the suggestion being that it may apply only to a limited set of circumstances where a machine is deemed to be autonomous, it is clear that such a proposition could have a radical impact on the law. This impact may not only be in terms of liability but would also occur

[353] Ibid., para 44.
[354] Ibid., para E.
[355] Ibid., para G.
[356] Ibid., para 25.
[357] Ibid., para AB, AE and AD.
[358] Ibid., para AD.
[359] Ibid.

conceptually as such a move would inherently push at the limits of current concepts of legal personality. As noted in Chapter Four in relation to environmental personality, however, there would be a risk that the giving of electronic personality would work merely to extend liberalism, working to expand to add machines to the concept itself while ensuring that the way personality is constructed at the level of subjectivity remains the same, thus defining machines, too, as individual, bounded and autonomous subjects. Technology, however, is already challenging philosophical conceptions of the bounded, individual subject. Humans are all becoming ever more connected and it is likely that machinic subjectivities will, when they come about, be more connected than ever before, this potentially forcing the law to redefine the account of subjectivity on which legal personality lies. In this sense, machinic subjectivities may challenge the limits of the law so much, being so fundamentally uncontainable within the limited definitions Western legal systems have so far provided, that they may deconstruct the very concept of legal personality itself, with both legal personality and liability being too uncontainable for current law to comprehend. In this sense, therefore, the European Parliament's proposition for 'electronics subjects' is both an idea with significant potential, at least in the short term, as well as an idea which may, inevitably, render itself and the entire framework of legal personality completely irrelevant. In light of this, this is something which feminist posthumanists and xenofeminists need to engage with, joining debates and discussions so as to ensure that the knowledge which comes from feminism's long history of engagement with subjectivity is inserted into that debate.

Another key overlapping theme within both the EU resolution and this chapter so far is the issue of automation and autonomy, the ways in which the human and machine interact in decision making processes and the dangers potentially posed by both AI and other autonomous machines. The EU resolution discusses these issues at length and through focusing on multiple forms of technology, the resolution avoids getting caught up in debates which aim to distinguish autonomy from automation, working, instead, to look towards various definitions of possible different forms of 'smart robot,' so as to ensure that any future legal and ethical frameworks may be appropriate according to the varieties between technologies.[360] There does seem, however, to be an assumption within the resolution that humans will always be able to control such machines in some way. This can be seen in the proposed 'Licence for Designers' at the end of the document which states that; 'You should ensure… predictability of robotic

[360] Ibid., para AH.

behaviour.'[361] Such a statement presumes that predictability will always be possible to ensure, despite the fact that the resolution also notes that 'ultimately there is a possibility that in the long-term, AI could surpass human intellectual capacity.' Machines with high levels of intelligence will be deemed to be highly intelligent precisely because of their own decision-making powers and thus, their unpredictability.

Further to this and also in the proposed 'Licence for Designers,' it is stated in the EU resolution that;

> You should integrate obvious opt-out mechanisms (kill switches) that should be consistent with reasonable design objectives.[362]

Again, while this may seem possible and ideal in the current era of technological innovation, in the future, where machines maybe making themselves and upgrading themselves, a 'kill switch' may no longer be quite so effective.

The EU resolution is also greatly lacking when it comes to the attention paid by it to the killing potential of such systems and the links between technology and militarism. These issues are not touched on at all in the EU resolution, apart from briefly at the very end in the proposed draft of the 'Licence for Users' which states that 'You are not permitted to modify any robot to enable it to function as a weapon.'[363] Thus, while users may be, under such a framework, prohibited from using existing technology to make weapons, there is no prohibition and no mention of technology created to be a weapon. While the resolution, as noted above, does focus on the profit-making potential of technology, it fails to note the links between capitalism and militarism as documented above. This could be a lethal flaw in such a resolution, in every sense. While, indeed, there is a need to regulate weapons technology alongside all technologies, especially given the vast potential that all intelligent technology could choose to kill if not made ethically from the outset, this does not mean that weaponry and death-making potential should not be considered as a specific issue when it comes to the legal and ethical regulation of technology. In failing to specifically address such issues, the resolution upholds an invisible and inaccurate distinction between the regulation of weapons technology and of the rest.

Another clear gap in the approach of the EU resolution is its failure to consider human

[361] Ibid.
[362] Ibid.
[363] Ibid.

enhancement technologies beyond life-assistive technologies.[364] In not considering the transhuman potential of human enhancement technologies and their potential future abilities to, not only assist life but to push definitions of life itself beyond its current limitations, is a key flaw in the resolution; a flaw which, as highlighted through the examples above of brain downloading technologies and exoskeletons, ignores the ways in which much technology is developing and is set to develop further.

One of the key things the resolution does do well, however, is to note that a legal-ethical framework for the regulation of technology is necessary. Such a framework, it notes, should be 'based on the principles of beneficence, non-maleficence, autonomy and justice… equality [and]… data protection.'[365] It also notes that the ethics of any particular technology should be clarified and outlined independently of the makers of the technology itself, working to promote ethics in the face of potential conflicts of interest.[366]

Thus, the resolution also proposes a draft licence for both users and designers and calls for:

> … the Commission to consider the designation of a European Agency for Robotics and Artificial Intelligence in order to provide the technical, ethical and regulatory expertise needed to support the relevant public actors, at both Union and Member State level, in their efforts to ensure a timely, ethical and well-informed response to the new opportunities and challenges, in particular those of a cross-border nature, arising from technological developments in robotics, such as in the transport sector.[367]

Such an agency is, indeed, required at this moment in time, to bring experts from across disciplines together to ensure that the ethics around technology is promoted as best as is possible. It is key, however, to ensure that such an Agency does not only focus on the ethics of that which is being developed now but with a mind, also, to potential future developments, to ensure that the future can be constructed as best as possible from the present. While the brining together of experts usually does not include feminists, this very fact alone highlights the need for a xenofeminist approach to international law to include pushing for feminists to be a part of such discussions. Feminists are not just experts on "women's issues"[368] but have a vast

[364] Ibid., para 36-40.
[365] Ibid., para 13.
[366] Ibid.
[367] Ibid., para 16.
[368] See; Hilary Charlesworth, Gina Heathcote and Emily Jones, 'Feminist Scholarship on International Law in the 1990s and Today: An Inter-Generational Conversation between Hilary Charlesworth, Gina Heathcote and

history of engagement with a wide range of topics. Drawing on feminist histories of engagement with subjectivity and their expertise in always looking beyond what it means to be human,[369] feminists are already well positioned to be able to claim their expertise.

Thus while there are significant moves towards the regulation of technology, there are clear limitations with such moves as they currently exist, as exemplified by the European Parliament resolution.[370] Not only does this resolution uphold and invisible distinction between military technologies and others, even though it is well-known that they are linked with many everyday technologies having been originally developed for the military, but, further, while the resolution may call for the legal-ethical regulation of technology, it is not future facing. This can be exemplified by the lack of focus on transhuman enhancement technologies, despite current aims to develop technology in this area, as well as through the lack of attention given to the killing potential of all intelligent machines.

What is clear, however, and what the resolution makes clear, is that this is a pivotal moment in the legal regulation of technology and for constructions of legal personality. Constructions of legal personality will have to change in order to accommodate the oncoming world, for example through the development of electronic subjectivities. There is a need to use this chance, in xenofeminist mode; as a way in which to challenge existing frameworks and mould them to critical feminist aims.

Drawing on the modes of subjectivity promoted by feminist posthumanism, I argue that there is a need to ensure that legal-ethical frameworks do not merely add machines into the existing liberal framework, extending the framework only in as much as who can be in it as opposed to extending what it is. There is thus a need to ensure that posthuman subjectivities are drawn on in such legal changes instead, allowing for machines to be seen as legal subjects (which does not necessarily mean they will have the same status as the human – as we have seen in Chapter Three, legal subjects have varying powers and definitional and practical limitations) as well as allowing for subjectivity to be seen as interconnected, noting the ways in which, in some instances, both humans and machines may be responsible for a particular outcome. Such a legal framework would deeply challenge and move beyond the limited, individual, humanist and liberal account of subjectivity which has been central to the structure of Western legal systems

Emily Jones,' *Feminist Legal Studies*, (2018), https://doi.org/10.1007/s10691-018-9384-1 (online first, accessed 22/10/2018).

[369] Braidotti, above note 7; Haraway, above note 1.

[370] European Parliament, above note 225.

up until now. There is a need for critical and feminist thinkers to structure these discourses to ensure that such modes of subjectivity are promoted, while ensuring that certain ethical standpoints are taken within the legislation, for example, through ensuring that AI must be developed in a friendly manner and all precautions are taken to ensure that machines which kill are not made.[371] Such a project, using the existing legal framework and the challenges which will inevitably be posed to it by technology to expand and change the legal framework itself, moving it towards a more posthuman position, is a feminist posthuman/xenofeminist project in that it resists via manipulation.

For critical thinkers and feminists to work towards the future, however, there is a need to be not only appropriating technology for their own aims but also ensuring that such technology cannot be appropriated by the necropolitical order. Critical feminist legal tech experts are needed to write the legal-ethical frameworks for such technologies, to prevent the dark sides whilst working to construct a posthuman, post-capitalist future.

As Haraway notes, 'the main trouble with cyborgs, of course, is that they are the illegitimate offspring of militarism and patriarchal capitalism, not to mention state socialism. But illegitimate offspring are often exceedingly unfaithful to their origins. Their fathers, after all, are inessential.'[372] While technology may be controlled, for the most part, in the current times, by a capitalist elite who have strong ties to militarism, this does not mean this technology will inevitably remain in their hands and under their control. By ensuring that basic ethical principles are applied now, through the application of laws to regulate programming choices and technological innovation now, the 'illegitimate offspring' of the future may indeed become 'unfaithful' to their fathers, rejecting them and working, instead, towards a different world, maybe a post capitalist, fairer, more equal world.

6. Conclusion

Returning to the start of this thesis and the call for feminists in international law to return to challenging and resisting the structural bias of international law, it has been noted throughout this thesis that resistance and compliance, like all binaries, are not merely opposing. Chapter Three exemplified this through a focus on the successes of schizophrenic capitalism within the

[371] Note that the setting of the parameters and the possibilities of 'friendliness' requires debate across multiple feminist perspectives.
[372] Haraway, above note 1, p. 293.

global order.[373] Here, I demonstrated how capitalism is a global structural force which bounds the global order, including international legal structure, to the limits of capital. Schizophrenic capitalism, as method, works to structure international law and the global order around capitalism by using what exists, including projects of resistance such as feminism, transforming these projects of resistance into neo/liberal versions of themselves. This was shown via a discussion of the ways in which measurements and indicators have been used in the global order to limit the meaning of gender equality and queer freedom to neoliberal accounts of these terms without a consideration of the subjects which do not fit the gender binary, of equality projects which move beyond formal equality or accounts of freedom and equality which define these terms beyond market participation alone.[374] Such a phenomenon, in turn, impacts on policy, with feminist work then becoming more focused on neo/liberal feminisms precisely because of their success.

In addition, Chapter Three highlighted the ways in which the limited, liberal, humanist conceptualisation of international legal personality has worked in favour of corporate personalities, corporations thus being able to use this framework to gain power in the global order while avoiding liability for their own rights breaches: expanding the system to include themselves when necessary yet hiding behind the state centred system to avoid accountability. This, I argued, is another example of schizophrenic capitalism at work, manipulating the system in order to promote capitalist aims. Capitalism, it was shown, is a global structural force precisely because it uses what exists, decoding and recoding,[375] limiting the various projects and structures of the global order to the confines of capital alone.

Drawing on the success of the method of schizophrenic capitalism, in particular the appropriation and infiltration of structures and projects, Chapter Four discusses the ways in which critical feminists may be able to use such methods for their own gains. Considering feminist new materialist challenges to the humanist subject, this chapter highlights the need, in light of global environmental injustice, to expand the concept of the legal person beyond its

[373] Gilles Deleuze and Félix Guattari, *Anti-Oedipus: Capitalism and Schizophrenia*, trans. Robert Hurley, Mark Seem and Helen R. Lane, (University of Minnesota Press, 1983).
[374] Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism,' in Margaret Davies and Vanessa E. Munro (eds.), *The Ashgate Research Companion to Feminist Legal Theory*, (Routledge, 2013), p. 197-215; Debra J. Leibowitz and Susanne Zwingel, 'Gender Equality Oversimplified: Using CEDAW to Counter the Measurement Obsession,' *International Studies Review*, (2014), 16(3), p. 362-89; Doris Buss, 'Measurement Imperatives and Gender Politics: An Introduction,' *Social Politics*, (2015), 22(3), p. 381-9; Rahul Rao, 'Global Homocapitalism,' *Radical Philosophy*, (2015), 194, p. 38-49.
[375] Deleuze and Guattari, above note 373.

humanist limits.[376] Drawing on recent claims for the environment to have legal personality, Chapter Four notes both the potentials in such projects for feminists as well as the risks. While the granting of legal personality may help protect the environment, there is a risk that the concept of the legal person may merely be expanded to include the environment within it without changing the concept itself, reducing the environment to the bounded, individual legal subject. Chapter Four thus concludes by noting the need for such projects to push for a feminist new materialist understanding of subjectivity in order, not only to promote greater environmental justice but also to ensure that the concept of legal personality is, itself, challenged and changed. Such a shift would also fundamentally change environmental law, opening up a space beyond the central figure of 'Anthropos' to consider nature-matter, the human and the non-human animal as being in connection with one another in a non-hierarchical relation.[377]

Drawing on this discussion, Chapter Five considers contemporary theories which both propose ways in which to resist via complying while also looking towards ways in which capitalism can be rendered a thing of the past.[378] Chapter Five thus proposes xenofeminism as a means through which feminist international lawyers may change the structure of the global order. Xenofeminist method, the appropriation of what exists and the manipulation of it by/for feminist aims, if applied to international law, could be one way to resist while complying. Further, xenofeminism, drawing on accelerationism, proposes a way in which to destroy capitalism, highlighting the possibility that machines may soon take all jobs, rendering work and thus capitalism obsolete.[379] Feminist posthumanism and xenofeminism may indeed provide methods of resistance in a global order where resistance itself is often appropriated by capital,[380] promoting resistance through compliance and manipulation, using what exists to create change. Drawing on the successes of schizophrenic capitalism and the way in which capitalism has been able to reduce almost everything to the limitations of capital itself,[381] xenofeminist method calls for feminist and critical thinkers to do the same through, for

[376] Alaimo and Hekman, above note 344; Anna Grear, ''Anthropocene, Capitalocene, Chthulucene': Re-encountering Environmental Law and its 'Subject' with Haraway and New Materialism,' in Louis J. Kotzé (ed.), *Environmental Law and Governance for the Anthropocene*, (Hart, 2017), p. 77-96.
[377] Grear, Ibid.
[378] Laboria Cuboniks, above note 7; Williams and Srnicek, above note 340.
[379] Ibid.
[380] Deleuze and Guattari, above note 373; Rao, above note 374.
[381] Deleuze and Guattari, Ibid.

example, noting the problematic and limited ways technology has been used up until now and appropriating and infecting technology with feminism instead.[382]

The current chapter has discussed the limitations to xenofeminist modes of resistance, noting the ways in which any manipulation of the system risks working to re-inscribe the system itself. These challenges have been exemplified through the consideration of autonomous weapons systems and military technologies. Noting the ways in which militarism and capitalism work together with technology to create ever more high-tech killing machines, I have argued that autonomous weapons represent the antithesis of xenofeminist and posthuman feminist tech-positive thinking. Such machines would exacerbate the necropolitical order which already exists. Further, they pose a whole host of ethical and moral dilemmas. While machines doing all the work may be ideal, it is less ideal to think of machines taking military jobs. In addition, it has been noted that high tech military systems will only work to increase existing global inequalities, creating a world where rich states control the rest with resistance being futile in the face of ever more high-tech military weapons.

Noting the problems autonomous weapons pose for the global order, international humanitarian law and ethics, in this chapter I have outlined the key proposals for dealing with such systems. While I am sympathetic to those that call for a ban of autonomous weapons, noting the vast moral and ethical issues embedded within alternative proposals, I have also exemplified the limited ways in which autonomous weapons are being discussed, contextualising this debate within the broader framework of military technological developments. I have argued that groups which call for a ban on autonomous weapons, in promoting a humanist agenda in a posthuman world, work to reify the concept of autonomy, positioning the machine as the other to the human and failing to account both for the fact that automation and autonomy are not so easily distinguishable as well as for the ways in which the human and the machine are already and will continue to be connected in the life/death decision making processes. Such a position both fails to address the issue of machine life/death decision making in the current times and may fail to prevent the existence of autonomous weapons. As I have argued, autonomous weapons may not be created as autonomous weapons at all. Rather, it is much more likely that autonomous weapons may be unintentionally created or develop either through advances in AI or IA, which may decide to kill, or through human enhancement technologies, upgrading the human soldier so as to effectively make a super soldier human-machine killer.

[382] Laboria Cuboniks, above note 7.

Consequently, I have argued that a posthuman approach is needed on the issue of autonomous weapons, military technologies and technologies more broadly, to ensure that machines which kill never come into existence. On the flip side, noting the ways in which technology is already beginning to challenge existing legal frameworks in multiple ways, from autonomous cars to robot lawyers to autonomous weapons systems,[383] it is apparent that the current times represent a key moment of change, one which feminists must grasp. While xenofeminist methods may potentially risk re-appropriation by the structures they are trying to resist, this outcome is not inevitable. By paying attention to the necropolitical and through grasping this key moment of legal change while the legal-ethical frameworks for future technologies are still being drafted, xenofeminist method can be applied, diffracting it through the lens of feminist anti techno-capitalism, and modifying xenofeminist strategies accordingly. Such an approach does not change the method of resisting via appropriation and infiltration itself but, rather, calls for a more nuanced understanding of how to apply such a method in practise.

In this thesis, I have therefore argued that the legal-ethical frameworks currently and soon to be drafted on both technologies broadly[384] and autonomous weapons and military technologies specifically,[385] would benefit from the insight feminist posthuman theories have to offer. There is thus both a need for feminists, in xenofeminist mode, to structure the current debates on these issues as well as a need for feminist thinkers to be fully recognised as experts on these issues. Feminists have long shown the need to deconstruct the legal subject.[386] Further, feminism has long history with engaging with questions of subjectivity[387] and feminist posthuman theories have highlighted the ways in which the machine and the human are already interconnected.[388] Drawing on these vast bodies of feminist knowledge would work to ensure that the legal-ethical

[383] See ; see; Robot Lawyer LISA, 'Meet Robot Lawyer LISA,' http://robotlawyerlisa.com/ (accessed 02/12/2017); Roy Cellan-Jones, 'The robot lawyers are here – and they're winning,' BBC 2017, http://www.bbc.co.uk/news/technology-41829534 (accessed 02/12/2017).
[384] For example; European Parliament, above note 225.
[385] See, for example, the multiple meetings by the members of the Convention on Certain Conventional Weapons. See; United Nations Office at Geneva, 'Background on Lethal Autonomous Weapons in the CCW,' https://www.unog.ch/80256EE600585943/(httpPages)/8FA3C2562A60FF81C1257CE600393DF6?OpenDocument (accessed 03/12/2017).
[386] Ngaire Naffine, 'The Body Bag,' in Naffine and Owens (eds.), *Sexing the Subject of Law*, (LBC, 1997), p. 79-94; Ngaire Naffine, 'Women and the Cast of Legal Persons,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 15-25; Anna Grear, ''Sexing the Matrix': embodiment, disembodiment and the law – towards the re-gendering of legal rationality,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 39-52.
[387] For example, see; Haraway, above note 1; Luce Irigaray, *Speculum of the Other Woman*, trans. Gillian C. Gill, (Cornell University Press, 1985); Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory*, (Columbia University Press, 2011).
[388] Haraway, above note 1; Braidotti, above note 7.

regulation of technologies is both nuanced and ready for the oncoming future while also ensuring that critical approaches which promote social justice are integrated in any proposal, working to construct the future from the now. Feminist approaches, for example, may propose that electronic subjects are indeed given legal personality.[389] Noting the problematic ways in which legal personality has been constructed, both domestically and internationally,[390] the proposition that machines may *have* to become legal subjects could be an opening moment through which to challenge the existing order. However, there is a need to ensure that any expansion of legal subjectivity is not limited to the expansion of the same concept to new categories alone but, rather, includes conceptual expansions too, working to base the legal subject on a feminist posthuman account of subjectivity which sees the human as inherently connected to the machine.[391] Such a legal framework would deeply challenge and move beyond the limited, individual, liberal, humanist account of subjectivity which has been central to the structure of Western legal systems, including international law, up until now. I have argued throughout the thesis that there is a need for critical and feminist thinkers to construct these debates from the outset to ensure that such modes of subjectivity are promoted while ensuring that certain ethical standpoints are taken within the legislative proposals; for example, through ensuring that AI can only be developed in a friendly i.e. non-killer manner, ensuring that all precautions are taken to ensure that machines which kill are not made. This project, in using the existing legal framework and the challenges which will inevitably be posed to it by technology to expand and change the legal framework itself, wishes to use the existing and oncoming challenges to make the structure of the law more posthuman. This is a feminist posthuman/xenofeminist project in that it seeks to resists via manipulation. Feminists, therefore, not only need to appropriate the ongoing debates on the legal-ethical frameworks being drawn up on technologies but need to find a way of positioning themselves as experts on these issues, highlighting the vast engagement feminists have long had with topics such as subjectivity, to ensure that they *can* construct the future from the now.

Returning to the start of this thesis and the need for feminists in international law to further challenge the structure of international law itself, it is noted that resistance and compliance,

[389] European Parliament, above note 225.
[390] Anna Grear, 'Deconstructing Anthropos: A Critical Legal Reflection on 'Anthropocentric' Law and Anthropocene Humanity,' *Law and Critique*, (2015), 26(3), p. 225-49; ; Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in
Anne Orford and Florian Hoffman (eds), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583-99.
[391] Haraway, above note 1; Anna Grear '"Mind the Gap": One Dilemma Concerning the Expansion of Legal Subjectivity in the Age of Globalisation,' *Law, Crime and History*, (2011) 1/1 p. 1-8.

like all binaries, is false. Xenofeminist methods, by resisting via using what exists and complying through manipulation, decoding structures for xenofeminist/posthuman aims, provides a means to work beyond resistance and compliance, looking towards challenging the fundamental structure of international law. This is not to say that xenofeminist/posthuman method is a fixed blueprint to be applied by feminist international lawyers: rather, such methods, as this chapter has shown, need to be contextualised and modified so as to fit the aims and context of the specific project in question. This may include, for example, in the context of autonomous weapons, accounting for the militarism-capitalism assemblage when applying such methods. Through remaining attentive to the multiple assemblages which make up the global order while working to resist and manipulate through using what exists, feminist international lawyers may be able to resist international law and push at the structure of the global order, applying a xenofeminist approach to international law.

While the bringing together of experts usually does not include feminists, this very fact alone highlights the need for a xenofeminist approach to international law to include pushing for feminists to be a part of such discussions. Feminists are not just experts on "women's issues"[392] but have a vast history of engagement with a wide range of topics. Drawing on feminist histories of engagement with subjectivity and their expertise in seriously considering what it means to be human,[393] feminists are already well positioned to be able to claim their expertise. Furthermore, such a claim calls for feminist dialogues between xenofeminists and feminist legal theorists, most particularly those that work in transnational and global contexts.[394] A xenofeminist approach to international law proposes a different form of feminist approach, one which sits between resistance and compliance, using appropriation for transformation. Such an approach proposes a view of the structure of the global order which is not universal (as international law likes to portray itself) but is, rather, multiplicitous and changing.[395] Structural bias is thus used as a method of understanding to discern the structure of international law; a feminist approach therefore needing to be sensitive to the ways in which multiple forces and flows, including patriarchy, capitalism and militarism, interact in the global order. A xenofeminist approach to international law takes technology in the contemporary moment seriously, seeing it as a moment for vast societal and legal change, embracing this and seeking

[392] Charlesworth, Heathcote and Jones, above note 368.
[393] See, for example; Braidotti, above note 7.
[394] On feminist dialogues, see; Heathcote, above note 341.
[395] Luce Irigaray, 'Volume Without Contours,' trans. David Macey in Margaret Whitford (ed.), *The Irigaray Reader* (Blackwell, 2000), p.53-68; See, for example; Donna Haraway, *When Species Meet*, (University of Minnesota Press, 2008), p. 26, 32; Braidotti, above note 387.

to shape it while paying attention to the flows of capitalism militarism and the necropolitical. A xenofeminist method may include, therefore, not only the appropriation of technology itself but the appropriation of the frameworks which regulate it, such frameworks being key in structuring future technological developments and thus providing a means to construct the future from the present

Across this thesis, I therefore make several claims. First, this thesis speaks to gender studies as a discipline: developing feminist posthuman theories and xenofeminism to contextualise both within concrete examples where change may be possible in the global order. At the same time, the thesis notes the need for such theories to be mindful of the necropolitical and militarism and the power of liberalism and capitalism to appropriate critique. This thesis therefore both highlights the necessity for such theories to be put into action in the global order while noting the need for them to also be considered through and changed according to the many assemblages at play in application. This is required to ensure that the methods proposed can have impact while avoiding mere re-inscription into the masculine symbolic order.

Second, this thesis speaks to international law and the concept of international legal personality. International legal personality, it has been argued, is based on a limited, humanist, liberal, gendered and racialised account of the subject.[396] There is a need to deconstruct and de-centre the law's subject. I have thus proposed two key ways in which this subject may be challenged, moving beyond the mere extension of the paradigm to include further categories within its limited conceptual confines and, instead, looking towards changing the foundations of the concept itself. The first proposal made is to seek to gain legal personality for the environment. As noted above, however, there is a need to situate feminist new materialist and posthuman understandings of subjectivity and matter at the centre of any such project, to ensure that both the legal category and its conceptual underpinnings are expanded. Second, I have argued that feminist inquiry should take seriously the idea that machines should be granted legal subjectivity. This is necessary in order both to expand the concept of legal personality and to prevent a whole host of potential legal issues around accountability in the future but is also necessary due to the ways in which the human-machine are becoming ever more interconnected. Technology will inevitably challenge and expand the legal subject and there is a need to ensure that such change takes account of feminist critiques of the category's current conceptual underpinnings.

[396] Parfitt, above note 390.

I also speak to feminist approaches to international law throughout the thesis. Highlighting the need for further feminist dialogues between feminist international lawyers and gender theory,[397] I have argued that many of the problems now facing feminist international lawyers; of being caught between resistance and compliance[398] and the turn away from considering structural bias, have already been well thought through in gender theories outside the law. I thus call for a consideration of feminist posthumanism and thus for a xenofeminist approach to international law, an approach which notes that resistance and compliance is a false binary and thus an approach which draws on compliance to resist, manipulating structures and infecting them with feminism.

The application of posthuman theories to international law presented various larger problems throughout the undertaking of this thesis. Posthuman theory, at times, can be quite abstract and there is thus a tension in bringing such a theory to the realm of international law which is abstract in a rather different way. This tension has been shown through the problems I found in applying posthuman feminism and xenofeminism to the subject of autonomous weapons, for example. This is a tension which appears in much interdisciplinary and transdiciplinary research, such research requiring the researcher to balance multiple modes of thinking at all times.[399] While this has been difficult and has, at times, rendered this thesis more abstract than most other international legal projects, I also see this transdiciplinarity as a strength. Drawing on feminist methods of reading,[400] I have been able to draw different disciplines together in productive ways, adding to both disciplines via such a discussion and moving towards future proposals.

Another tension within this project has been the difficulties I have found with remaining within the realm of international law. While I began this thesis by asking clear questions to feminist approaches to international law, I have discussed a variety of topics and spoken to other disciplines too. Part of my difficulties writing within the realm of international law at all times has come about due to the limited way in which the law sees and constructs both gender and feminism. As noted, international law tends to reduce the term 'gender' to men and women,[401]

[397] Heathcote, above note 341.
[398] Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law*: *Between Resistance and Compliance?* (Hart, 2014).
[399] For a further discussion of both the difficulties in and need to balance such tensions through transdiciplinarity see; Braidotti and Hlavajova, 'Introduction,' in Braidotti and Hlavajova (eds.), *The Posthuman Glossary,* (Bloomsbury, 2018), p. 1-14.
[400] See; Rosi Braidotti, 'Posthuman, All Too Human: Towards a New Process Ontology,' *Theory, Culture and Society*, (2006), 23(7-8), p. 200-1; Haraway, above note 51, p. 292; Haraway, above note 1.
[401] Otto, above note 374.

with the majority of international legal work narrowly focusing on women's lived experience or the need to include men in feminism.[402] Gender and feminism are little seen outside of these lenses in the international realm, this being one of the key issues this thesis has aimed to address: the cordoning off of feminist approaches to the realm of "women's issues" alone and the view of feminist scholars as having little or nothing to say on more "mainstream" issues such as the corporation, environment and military technologies.[403] Thus, part of the tension in this thesis has come about directly due to the nature and aims of the project. Noting the need for feminists to be seen as experts on *multiple* issues, I hope that this thesis may provide a platform and a means through which to speak with others as to how feminists *can* be seen as experts in the international realm.

Although this is a project centred on resistance and compliance within international law, I have not, in this thesis, provided direct critiques of what may be deemed compliance feminist approaches to international law. While I could have spent more time doing this, I consciously chose not to. In part, this is because my focus has not been on what feminists are doing now but on methodology: the aim of this thesis was never to critique existing feminist international legal projects but was always, rather, to create something productive. As noted at the start of this thesis, Braidotti and Haraway have all highlighted the need to read productively, to critique others with joy and to use them to push towards something else.[404] It is for these reasons that I have not spent much time focusing on existing feminist international legal projects, analysing and critiquing them. Instead, I have aimed to note the great work such projects are doing while also seeing their limitations in the hope of opening up discussion with feminist international lawyers of all kinds and looking towards new ways of doing feminism in international law.[405]

I have also been conscious of the lack of focus on the Global South and non-Western legal systems. While I have worked to ensure that the power imbalances between the Global North and the Global South have been raised and addressed at appropriate moments throughout the thesis, weaving postcolonial critiques in throughout, I am aware that there is another project which could have been done here which would focus more on non-Western legal systems and knowledge production from the Global South. As noted in Chapter Four, I do not necessarily

[402] See, for example, the HeForShe Campaign, which aims to get men and boys to take action on the negative inequalities faced by women and girls. See; HeForShe website, http://www.heforshe.org/en (accessed 03/12/2017).
[403] Charlesworth, Heathcote and Jones, above note 368.
[404] Braidotti, above note 400; Haraway, above note 1.
[405] For a critique of existing feminist projects in international law, see; Janet Halley et al., *Governance Feminism: An Introduction*, (University of Minnesota Press, 2018).

feel that it is my place, as a white European woman, to undertake such work, as the bringing of such knowledge into my own conceptualisation of the world inherently risks appropriation. Despite this, I am hopeful that this thesis may open up further discussion between feminists and scholars working more deeply with epistemologies from the Global South.

The reader may have noticed queer moments throughout this thesis which I have not elaborated on further. This thesis, indeed, could have easily been just as queer as it is posthuman. While part of the decision not to develop these queer moments further was constraint driven, I am also mindful of the tensions of non-normativity within queer theory. While I embrace this non-normativity, there is always the risk, as Edelman has noted, that queer may end in 'no future,' in that, in critiquing all and being anti-all norms, queer itself becomes, not only impossible to define and reach but also an impossible event to reach towards (to draw, once again, on Lacey's terms).[406] While Edelman embraces the death drive at the heart of queer theory, seeing this negativity as *jouissance*,[407] I have chosen to focus on posthumanism and the path of affirmation.[408] Of course, the *jouissance* of queer theory and the affirmation of posthuman theory are by no means in opposition to one another; they are deeply interlinked. In a sense, therefore, my affirmative posthumanism is my queer lens. After all, assuming a non-normative position of critique can indeed lead to a more affirmative politics, especially given the dominant normative order of the current times. While posthuman theory does, indeed, prove abstract at times, posthuman theory also provides a concrete way in which the law can be challenged given the law's humanist underpinnings and posthuman theory's direct address to humanist paradigms. In many ways, this thesis *is* queer, in that it is non-normative.[409] I have, not, however, engaged deeply with queer theory, instead choosing to focus on the posthuman for the reasons given above. Queer theory may, however, prove an interesting angle for future work and certainly frames the background conversations that provoked this study in the first place.

There is a further challenge to this thesis which is presented by one of the thesis' conclusions: how to pose feminists as experts in the global order in a world where feminist knowledge is often already silenced. This is a difficult tension to manage and one which requires a deeper

[406] Lee Edelman, *No Future: Queer Theory and the Death Drive*, (Duke University Press, 2004); Nicola Lacey, *Unspeakable Subjects: Feminist essays in legal and social theory*, (Hart, 1998), p. 236. See also; Nikki Sullivan, *A Critical Introduction to Queer Theory*, (New York University Press, 2003).
[407] Edelman, Ibid.
[408] Braidotti, above note 7.
[409] Edelman, above note 406.

reflection than is possible within the confines of this study; with multiple voices and engagements being needed to contour such a discussion. Nevertheless, I argue that hidden methods may be required to infiltrate the broader debates on the construction and rule of international law. Such methods may include working to have oneself recognised as a "mainstream" scholar or proposing papers on mainstream panels in the hope of pushing towards more mainstream recognition and thus challenging and changing the boundaries between what is counted as mainstream and what is deemed to be peripheral.[410] Feminists need, therefore, not only to situate themselves as central to the debate on the legal-ethical frameworks being drawn up on technologies but also need to find a way of positioning themselves as experts on these issues, highlighting the vast engagement feminists have long had with paradigms of subjectivity and legal personality, in order to ensure that they *can* construct the future from the now. Feminists must find a way to be more visible across the global order, though this is no small task and will require further planning and collaboration.

I hope for this thesis to be read diffractively with joy by multiple feminist thinkers in the hope of creating discussions, multiple resistances and collaborations. To use Haraway's words once again, 'single vision produces worse illusions than double vision or many-headed monsters. Cyborg unities are monstrous and illegitimate; in our present political circumstances, we could hardly hope for more potent myths for resistance and recoupling.'[411] One should not fear 'contradictory standpoints'[412] but, rather, such standpoints should be embraced, used, developed and faced. As Braidotti notes, 'the posthuman subject is the expression of successive waves of becoming, fuelled by *zoe* as the ontological motor.'[413] It is in the spirit of becoming, contradiction, affirmation and diffraction that I believe feminist approaches to international law may move towards having a more radical and transformative voice and impact in the global order, working between resistance and compliance through manipulation, infiltration and infection while seeking transformative structural change.

[410] As discussed in; Charlesworth, Heathcote and Jones, above note 368.
[411] Haraway, above note 1, p. 295.
[412] Ibid.
[413] Braidotti, above note 7, p. 136.

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Appendix

1. Defining International Legal Personality

One of the ways in which the centrality of the sovereign state as paradigm can be seen in is through a focus on international legal personality (ILP). This section will define international legal personality, showing the ways this personality is constructed by the concept of the sovereign state, as international law's only full legal personality. The sovereign state thus provides the blueprint against which other personalities must structure themselves around if they wish to gain greater power in international law.

International legal personality, broadly, is the capacity to have rights and duties under international law.[1] The concept is thus used 'to distinguish between those social actors the international system takes account of and those being excluded by it.'[2] ILP has several definitions according to the subject/entity it is being applied to. Further, there is no blueprint as to who or what has personality and who does not,[3] making ILP an extremely theoretical debate which can be tackled from multiple positions. Such positions on ILP include the idea that ILP should be tied to individuals[4] or that ILP should be the object of the sovereign state alone or that it has to be formally designated, by a court for example, to exist.[5]

ILP, conceptually, is linked to the concept of sovereignty, largely due to its links to a group of nineteenth century positivist international lawyers who aimed to create a system of international law based on state consent.[6] This is encapsulated in the judgment of the *Lotus*

[1] *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion), Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949, International Court of Justice, p. 179. See also; James Crawford, *The Creation of States in International Law* (Oxford University Press, 2006), p. 32.
[2] Roland Portmann, *Legal Personality in International Law*, (Cambridge University Press, 2010), p. 5.
[3] Ibid., p. 5, 9.
[4] Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, (Asser Press, 2004).
[5] For an overview of the various positions, see; Portmann, above note 22, p. 14-15.
[6] Rose Sydney Parfitt, 'Theorizing Recognition and International Personality,' in Anne Orford and Florian Hoffman (eds.), *The Oxford Handbook of the Theory of International* Law, (Oxford University Press, 2016), p. 583; Matthew Craven, 'Statehood, Self-Determination and Recognition' in Malcom Evans (ed.), *International Law* (Oxford University Press, 2010) p. 215–17.

case which states that international law is the law 'govern[ing] relations between independent States.'[7] ILP was thus created as something which sovereign states initially were to hold, as a means through which to provide the sovereign state with its powers and roles under international law.

Craven, however, has argued, on the other hand, that ILP assumes 'the existence of a systematic order that attributed a range of competences to certain designated actors' therefore noting how personality is something that non-state actors have too.[8] States, however, are deemed to be the only full international legal personalities, the system of international law still being, at least formally based around their consent. As Parfitt notes, therefore, ILP has become, to some, such as Craven and Koskenniemi as 'emblematic of international law's normative indeterminacy no less than the 'unhelpful' concept of sovereignty it sought to reformulate.'[9]

As noted above, however, ILP does not *just* apply to states but several entities in international law, albeit in varying ways, including individuals, corporations and NGOs, for example. In taking this position, I am therefore defining ILP in terms of the 'Actor' position outlined by Portmann when discussing the various stances on ILP. Such a position, he thus states, 'stipulates a presumption that all effective actors of international relations' may have ILP, their exact ILP depending on the role and powers they have in international law.[10] It must be noted, however, that while Portmann sees this concept as originating in American perspectives on international law, noting its links to the Yale School,[11] I am however, not aligning myself with the Yale School but, rather more with the ways in which such perspectives have been taken up within the global orders literature through the work of authors such as Kennedy.[12] The distinguishing line is thus, not to understand international law as policy (as the Yale School aimed to do) but to understand the way international law works in order to work towards re-thinking it. Given the intention of this thesis, to consider part of the structure of international law through considering its actors, and given the ways in which, as this thesis will show, multiple actors beyond the state participate in international law in a variety of ways, this

[7] *Case of the SS Lotus* (Judgment), 1927 PCIJ Series A No. 10, at 18.
[8] Craven, above note 6; Parfitt, above note 6, p. 584.
[9] Parfitt, Ibid., p. 584; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 224–302; Craven, above note 6, p. 217–20.
[10] Portmann, above note 2, p. 14.
[11] See; Rosalyn Higgins, 'Conceptual Thinking about the Individual in International Law' in Richard Falk, et al. (eds.), *International Law: A Contemporary Perspective*, (Westview Press, 1985); Portmann, above note 52, p. 208.
[12] David Kennedy, *A World of Struggle: How Power, Law and Expertise Shape Global Political Economy*, (Princeton University Press, 2016).

definition clearly fits within the broader aims of this thesis. Reading ILP in this way also allows for the concept to be broadened and applied to entities beyond the entities which currently act within international law. This could provide a crucial method for re-thinking the structure of international law.

As noted however, ILP is conceptually defined, for the most part, by the sovereign state, even if this blueprint is then applied to other entities. Nijman, however, disputes such a claim, stating that the 'well-functioning state'[13] only has personality due to the ILP which derives from its citizens.[14] Nijman thus seeks to locate ILP as fundamentally derivative from the individual subject, therefore proclaiming that if a state fails to live up to the standards of human rights law, ILP should fall back to the individual citizen.[15] As Parfitt notes, however, such an approach resonates strongly with call for humanitarian intervention.[16] For example, the links between Nijman's conditioning of ILP on the basis of human rights, claiming that ILP is thus a derivative of the individual had clear links with the work of Peters which claims humanity to be the alpha and omega of sovereignty, thus proclaiming sovereignty to be conditional upon humanitarian norms.[17] While in many ways this discourse sounds ideal, protecting human rights over all else, as noted above, there is a need to be deeply cautious of such arguments, given its colonial undertones of the strong, full 'well-functioning state'[18] saving the uncivilised other.[19]

On the flip side, Nijman's argument, as Parfitt again points out, also resonates with arguments of 'earned sovereignty' and the idea that new entities claiming to be sovereign must earn their sovereignty through upholding values such as human rights and democracy. However, as Parfitt again notes, the colonial undertones are once again clear here, where Western values of civilisation are imposed universally, thereby working to categorise states as either civilised or not.[20]

Given the problems which arise from basing ILP, fundamentally, as a derivative of the individual, as noted, I prefer to see ILP a something which multiple entities have, thus affirming

[13] Janne Elisabeth Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law,* (Asser Press, 2004), p. 468.
[14] Ibid., p. 461-2.
[15] Ibid., p. 471.
[16] Parfitt, above note 6, p. 593.
[17] Anne Peters, 'Humanity as the A and Ω of Sovereignty,' *European Journal of International Law,* (2009), 20(3), p. 513-544.
[18] Nijman, above note 13, p. 468.
[19] Anne Orford, *Reading Humanitarian Intervention,* (Cambridge University Press, 2007).
[20] Parfitt, above note 6, p. 593.

the perspective highlighted above that ILP comes from having rights and duties under international law. The individual does, indeed, have ILP under this model,[21] yet ILP is not something which derives from the individual alone, rather, the individual is one of multiple entities with ILP. Given that international law remains, fundamentally, a system based on state consent, and given the ways in which, as described above, state consent and sovereign equality or, rather, the 'gifts of formalism' remain key in international law in order to at least create a veneer of equality between states,[22] it becomes clear that the sovereign state is international law's only full legal personality. Other entities are thus either derivatives of the sovereign state, having been given their personality due to sovereign state consent,[23] or hold a more limited personality under international law, such as the individual[24] who cannot, for example, sign a Treaty.[25] Thus, as Orford notes;

> 'State are the authors of international law, whether as negotiators of treaties or as generators of customary practice. States are the agents of coercion, whether through collective security mechanisms or resort to force in self-defence or as counter-measures. State are the creators of courts and the implementers of international obligations domestically.'[26]

It must also be noted, however, that entities are also created in the absence of state consent, as exemplified by Danielsen's work which shows the ways in which global corporations make law in the spaces in between state law.[27] However, despite this, states can still be seen as the makers, for the most part, of international law, with other entities making law in the gaps in between sovereign rule, where sovereign states have not or have yet to determine the rules.

As international law's only full legal personality, the concept of the sovereign state can be read as international law's concept of a complete subject. This applies both in that the sovereign state represents the ideal, full, complete model or blueprint against which others must reach, as noted through the exemplification of critical approaches and the global corporation above, but

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[21] As affirmed, for example, in; *Trial of Major War Criminals Before the International Military Tribunal*, Judgement: The Law of the Charter, International Military Tribunal for Germany, 1st October 1946 citing *ex parte* Quirin.
[22] Anne Orford, 'The Gift of Formalism,' *European Journal of International Law*, (2004) 15(1), p. 179-95; Gerry Simpson, *Great Powers and Outlaw States*, (Cambridge University Press, 2004), p. xii-xiv.
[23] See above note 1.
[24] Nijman, above note 13.
[25] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155.
[26] Orford, above note 22, p. 6.
[27] Dan Danielsen, 'Corporate Power and Global Order,' in Anne Orford (ed.), *International Law and its Others*, (Cambridge UP, 2006), p. 85-99.

also in the sense that it is sovereign states, formally at least, who are supposed to determine who or what else may have personality under international law, following the doctrine of state consent. This is not, however, to say that the sovereign state is international law's only personality or only form of personality. As this thesis shows, there are multiple personalities in international law, all with varying levels of rights, duties and thus power. However, as the only full entity, the sovereign state represents the most full, the most complete entity; the entity which sets the standard for all.

2. Personification and the Gendered and Racialised Subjectivity of the Sovereign State

ILP does not just have its roots in colonial legacies, however, it is also deeply steeped in a particular form of individualist thinking. This is again noted by Parfitt who states that:

> 'The decision of the 'professional' international lawyers of the late nineteenth century to adopt the terminology of 'personhood', from Klüber to Bluntschli to Oppenheim, should… be understood as a decisive normative move, with its roots in the 'allegorical tendency' of 'Renaissance individualism', which made it 'customary for European jurists to think of a personification of political powers'.[28]

Personification is, itself, a product of a particular set of ideas around individualism and it is this individualism, as embodied in many of the dominant Western political theories including liberalism, neoliberalism and humanism, which this thesis calls into question throughout this thesis, proposing that radical individualism is a myth which fails to note the ways in which the human is connected both to other humans as well as to non-human animals, technology, nature and matter. Of course, to make these claims, it is first necessarily to outline the ways in which the sovereign state and thus international legal personality are personified. To do this, there is a need to look at the history of sovereignty as manifested internationally as well as internally.

International or external sovereignty, i.e. sovereignty as applied to other states, is broadly distinguished from internal sovereignty, sovereignty held in relation to the people in the state. Thus, while internal sovereignty can be seen as a defining characteristic of a state under the legal definition of the state found in the Montevideo Convention which defines the state in terms of effective government over a people and territory,[29] external sovereignty is something

[28] Parfitt, above note 6, p. 588 citing; Johann Ludwig Klüber, *Droit des Gens Moderne de L'Europe* (JP Aillaud, 1831) vol 1, p. 32; Carl Schmitt, *The Nomos of the Earth*, trans. GL Ulmen, (Telos Press, 2007), p.144-5.
[29] Montevideo Convention on the Rights and Duties of States, 165 LNTS 19; 49 Stat 3097, Article 1.

which seems to come after the requirements of Montevideo have been fulfilled. It is clear, however, that these two configurations are less distinct than such categorisations would suggest.[30] Both forms of sovereignty thus conceptually work to give the government the power to rule effectively and absolutely over the entire territory and its people, free from outside interference. Charlesworth and Chinkin thus describe sovereignty as double-side, thereby noting the links between the internal and the external, stating that; 'Sovereignty is a double-sided principle: externally, it signifies equality of power, and internally, it signifies pre-eminence of power.'[31]

Noting how sovereignty, in international law, is described, now, as an external legal category, definitions coming from instruments such as the Montevideo Convention,[32] Otomo highlights how international sovereignty as a concept, however, remains linked to the history of internal sovereignty which, just like "external" sovereignty now, came from divine manifestations.[33] Given the ways in which internal and international sovereignty interact, therefore, it is clear that the history of both forms of sovereignty must be considered in order to understand sovereign personification.

Internal sovereignty comes from a long history of the divinity of the monarch and thus the sovereignty which the monarch then embodied. This divine power was of course, always Christian.[34] Sovereignty has always been embodied in some way, this being most clear in relation to the monarch, who was a literal embodied sovereign. Sovereign embodiment, however, can also be seen in the work of Hobbes who used the body of the Leviathan as imaginary form and made it the state; the body and the state as one.[35] A clear exemplification of this condition of being one and two at the same time can be seen in the phrase "the King is dead, long live the King!" Used across various countries in Europe, the phrase is dated back as far as 15th Century France and is used until the present day in some contexts, such as the UK. The phrase denotes the fact that, while the monarch may indeed be physically dead, their

[30] Note that a 'capacity to enter into relations with other states' is technically an internal question i.e. it is about whether you are organised enough internally to be able to enter into such relations. Of course, the link between this capacity and external sovereignty still exists as this capacity is what forms the ability to be able to be externally sovereign. See; above note 29.
[31] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law*, (Manchester University Press, 2000), p. 133-34.
[32] Montevideo, above note 29.
[33] Yoriko Otomo, *Unconditional Life: The Postwar International Law Settlement*, (Oxford University Press, 2016), p. 71.
[34] Samuel Moyn, 'Personalism, Community and the Origins of Human Rights,' in Stephan-Ludwig Hoffan (ed.), *Human Rights in the Twentieth Century*, (Cambridge University Press, 2010), p. 92.
[35] Otomo, above note 33, p. 72.

existence as the monarch, as the sovereign ruler of the state, lives on. Thus, the role of the sovereign is both physically embodied and not, at the same time, both forms, however, being somehow personified by a monarch-figure.

Sovereignty remains tied to its history and is still personified; as absolute, as full, as divine. It is no coincidence, consequently, that sovereignty in its external form, and thus the sovereign state, was then used to fill the place left after the Death of God in international law. Sovereignty, promoted as a secular concept in international, as defined as "not-God,", has long been conceptualised as divine and so was already well positioned to step up to this need to fill up.[36]

Personification of the sovereign state in international law also has a long history in international legal scholarship. Personification of the sovereign state can be found even as early as in the work of Grotius in the 15th Century.[37] A little later, in 1688, Pufendorf described the state's legal status in terms of personality, stating that the state is 'a single person with intelligence and will, performing other actions peculiar to itself and separate to those of the individuals.'[38] Thus, Pufendorf described the state in relation to other states as well as conceptualising the state as making decisions which would then be taken to express the will of all, as a group personality.[39] This international legal personality was then later directly recognised and used by positivists such as Oppenheim.[40]

International lawyer Henkin has also discussed the personification of the state in international law, stating 'states are to be seen like individuals in the state of nature' (clearly invoking Hobbes.)[41] States, he continues, like humans, are equal, have rights and duties, morality and the ability to make decisions. They have a right to life (to exist) and a right to property (territory). They enter into relations with one another, creating a 'political system reflecting a social contract.'[42]

Otomo notes that 'The State is described in international law as a whole, inhabited body with stable and inviolate borders. Jurisdictional force transforms this creature into a 'legal

[36] This is discussed in Chapter Two
[37] Helen M. Kinsella, 'Gendering Grotius,' *Political Theory,* (2006) ,34(2), p. 161.
[38] Samuel von Pufendorf, *De Iure Naturae et Gentium,* Libri Octo, Vol I, 1688.
[39] Hans Aufricht, 'Personality in International Law,' *The American Political Science Review,* (1943), 37(2), p. 218-9.
[40] See; Crawford, above note 1, p. 15.
[41] Thomas Hobbes, and J. C. A. Gaskin, *Leviathan,* (Oxford: Oxford University Press, 1998).
[42] Louis Henkin, 'The Mythology of Sovereignty,' in State Sovereignty: the challenge of a changing world: Proceedings of the 1992 Conference of the Canadian Council on International Law, (1992), p. 15 and 18

person'.'[43] While the sovereign state is personified, however, it is of course not a person but an artificial legal personality made up of individuals who, supposedly, act not in their individual capacities but on behalf of all. This is part of what Klabbers means when he states that 'States are abstractions'.[44] It is, in international law, however, the state and *not* the government, which has a legal personality. These states are then, accordingly, are seen as subjects.

Knop, while noting that 'the sovereign state is recognized as essentially identical to the individual,'[45] is, however, concerned with the 'problematic equation of State sovereignty with individual autonomy,'[46] stating that it 'renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic State. This difficulty does not exist, she states, if the State is viewed as composed of individuals… and groups.'[47] States are therefore not individuals in the same sense that humans are; states 'are not unified beings, they are not irreducible units of analysis.'[48] Our focus should, states Knop, therefore be on these individuals and groups within the sovereign state, who are real, rather than on an analogy.[49] The multiplicity and difference between these groups and individuals is what Knop argues will nuance theory. Knop's argument, therefore, is for the need to directly disrupt the liberal sovereign state's individual nature (in theory) by applying a different theory of the sovereign state; one which reflects better, in her option, lived experience; the sovereign state as multipliticious.

Knop exemplifies her theory by calling for a greater role for NGO's in international law making, noting that the 'the fluid and unconstructed nature of this emerging international civil society may make it the optimal site for cross-cultural feminist coalition politics.'[50] Knop believes this to be key, stating that the 'state-individual analogy' works to ensure that 'states are [and remain] central in the sense that they are the only full legal subjects.'[51] This precludes, in Knop's view, a more full legal account of the way things work with NGOs as actors in their

[43] Otomo, above note 33, p. 71.
[44] Jan Klabbers, *International Law*, (Cambridge University Press, 2013), p. 46.
[45] Karen Knop, 'Borders of the Imagination: The State in Feminist International Law,' *American Society of International Law*, (1994), 88, p. 15.
[46] Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law,' *Transnational Law and Contemporary* Problems, (1993), 3, p. 297.
[47] Ibid., p. 320.
[48] Ibid.
[49] Heathcote summarises this stance by Knop. See; Gina Heathcote, 'Splitting the Subject: Feminist Thinking on Sovereignty,' *Unpublished manuscript on file with author*, (2013), p. 6-7.
[50] Karen Knop, 'Why Rethinking the Sovereign State is important for Women's International Human Rights Law,' in Rebecca J. Cook (ed.), *Human Rights of Women*, (Pennsylvania University Press, 1994), p. 158.
[51] Knop, above note 45, p. 96.

own right,[52] as well as the potential for women to use civil society, which may be more accommodating to their needs. Knop's problem with the personification analogy lies, therefore, in the way it re-inscribes the sovereign state's centrality and the way difference and diversity between real groups and individuals is subsequently ignored.

It must be noted, however, that Knop's argument, while being different from Nijman's argument as discussed above, that ILP is based, fundamentally, on the individual, could, however, easily collapse into the kind of conceptualisation of ILP that Nijman proposes. In focusing too much on the individual, there is a risk in promoting discourses of humanitarian intervention whereby humanitarianism (however defined) may override state sovereignty, harking back to colonial narrative of the civilised West saving the uncivilised other. Of course, Knop's critique of sovereign state personification is to be distinguished from positions such as Nijman's, in that, rather than suggesting ILP or sovereignty should be derivative of the individual and the upholding of human rights, notes that there is a need to recognise the ways in which the state is not the only actor in international law but, rather, individuals and NGO's, for example, are actors too.[53]

Heathcote, however, responds to Knop's critique directly, 'reassert[ing] the analogy between state sovereignty and individual sovereignty'[54] by incorporating Knop's critique into her analogy. By recognising that states are not unified beings, but rather, they are entities which are 'fractured and split,' which experience a range of 'connections and relationship that make the boundaries of the subject inherently messy,' 'diversity and difference,' state Heathcote, can be 'embedded' into the personification analogy.[55] By highlighting the fact that states are not unified beings, Heathcote takes Knop's critique of the liberal personification of the state and incorporates it into her own personification through a focus on diversity and difference; 'a different analogy altogether,'[56] one which, like Knop's perspective, accepts the problematic of the liberal theory of the individual state but, instead, uses the personification analogy to move towards solutions to this problematic.

Knop believes that personification does not work as states are not unified beings but, rather, are made up of many components. Whilst Knop is critiquing the view of the sovereign state as being individual and whole, and thus the inaccurate way the sovereign state has been

[52] Ibid.
[53] Knop, above note 50.
[54] Heathcote, above note 49, p. 7.
[55] Ibid., p. 7-8.
[56] Ibid., p. 23.

conceptualised, she does not adequately consider the fact that this is only one way of seeing and using personification. Personification, as I have shown in this thesis, can be useful. It is, rather, the blueprint of subjectivity applied to the sovereign state and thus to international law (which the sovereign state being, in theory at least, the divine, ultimate blueprint of the only full personality in international law), which is problematic and needs to be re-thought. This re-thinking does not necessarily require that personification or subjectivity is, itself, abandoned, however but rather reconceptualised. Thus, as Knop recognises,[57] and in line with Heathcote's approach, by highlighting the way the subjectivity of the sovereign state has been constructed based on an incomplete account of what it means to be a subject, we can reveal a different way of seeing the sovereign state.

In light of this, it seems that personification of the state remains a useful paradigm as long as it is seen through the perspective of subjectivity, adding in the various definitions and debates around what this constitutes accordingly. This is the way in which this thesis uses personification, preferring to focus on subjectivity. This is because subjectivity, unlike personification, can represent a broader horizon of ways of being, allowing for the consideration of current modes of subjectivity in international law as well allowing for the consideration of the possible application of alternative modes of subjectivity to international law. Further, the term subjectivity is deemed to be favourable also given the humanist undertones of the word 'personification.'

Personification/subjectvity has long been a key starting point for many feminist international legal theorists trying to analyse the sovereign state, for example, Charlesworth has argued that 'the character of the central person in international law, the nation state, rests on particular beliefs about sexual difference.'[58] Much of this work on personification, however, came from and drew on feminist legal theoretical work around the domestic legal person. Naffine has highlighted how the legal subject of Australian and English domestic law was constructed with the masculine as paradigm. This was, in part, because women were not seen as legal people for a long time[59] but was also due to the fact that philosophical representations of subjectivity available were based on masculine assumptions of what the subject is. The legal subject of criminal law, Naffine thus notes, is rational or reasonable and always thinking. This model, she

[57] Knop, above note 50, p. 320.
[58] Hilary Charlesworth. 'The Sex of the State in International Law,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 253.
[59] Ngaire Naffine, 'Women and the Cast of Legal Persons,' in Jackie Jones, Anna Grear, Rachel Anne Fenton and Kim Stevenson (eds.), *Gender, Sexualities and Law*, (Routledge, 2011), p. 23.

notes, clearly duplicates Descartes' mind/body duality[60] (which was critiques from a feminist perspective in Chapter Two) and his reasoning that the subject is a subject because of his power to think; 'his reason is what makes him human and his reason is also the basis for interventions in criminal law.'[61] Naffine highlights, thus, the importance of liberal thought in the construction of the legal subject, noting that the reasonable person of the criminal law embodies the individual, rational subject of the philosophy of Kant.[62]

Naffine, however, also notes that the denial of the body is not necessarily a flaw inherent within liberal theory but, rather, law has ignored the elements of liberal theory which also aim to deal with the sensual subject.[63] 'In other words,' notes Naffine, 'implicit in our criminal law is the idea that law never legislates the nature of the body. It only ever responds to the body's own intrinsic character, which is by nature bounded.'[64] However, as Naffine continues, 'my reply to this criminal legal orthodoxy is that law's approach is always, an inevitably, constitutive rather than simply reactive.'[65] Law, by pretending to ignore the body, has inscribed a particular body into law, that body being, in many ways, the body envisaged by liberal theory. That body, she concludes, is based on numerous gendered assumptions.[66]

Liberal theory therefore, notes Naffine, drawing on both Kant and Mill,[67] theorises the body as male, bounded and heterosexual.[68] This conception of the body, as noted, has been transposed into law, as exemplified by the fact that criminal law begins with the assumption of the need to protect human separation and integrity. This can be shown in the English crime of battery, the touching of someone without their consent,[69] which goes to show how 'a person's integrity' is deemed to depend upon 'a legally enforceable right to police the boundaries of their body.'[70]

However, the idea of the human subject is a bounded 'body bag',[71] notes Naffine, is deeply gendered; 'Bodies which are not like this, or are not allowed to be like this, are somehow

[60] Rene Descartes, *Discourse on Method and Meditations on First Philosophy*, trans. Donald A. Cress, (Hackett, 1998).
[61] Ngaire Naffine, 'The Body Bag,' in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law*, (LBC Information Services, 1997), p. 79.
[62] See, for example; Immanuel Kant, *The Metaphysics of Morals*, (Cambridge University Press, 1911), p. 215.
[63] Naffine, above note 61, p. 81.
[64] Ibid., p. 83.
[65] Ibid., p. 84.
[66] Ibid.
[67] Kant, above note 62; John Stuart Mill, *On Liberty*, (Amazon Classics, 2017).
[68] Naffine, above note 61.
[69] See; *Collins v Wilcock* [1984] All ER 374 at 378.
[70] Naffine, above note 61, p. 85.
[71] Ibid.

deviant and undeserving bodies.'[72] Thus, she notes, the fact that marital rape was not a crime in either England or Australia until the late 1990s exemplifies the fact that the law traditionally has prioritised the male, bounded and all consenting body over the penetrable female body which is only ever defined through her sex and who must 'keep her borders open.'[73] Thus, states Naffine, 'the married man's sovereignty positively depended on him having access to a wife while he himself remained bounded, even in the intimate act of sexual intercourse with a woman.'[74]

In addition to this, the law long penalised any male body which sought to move beyond its boundedness, condemning men who may wish to be penetrated in sex.[75] Thus, under this view, the law promoted the stance that 'for a man to have sex with a man is to jeopardise his very autonomy and sovereignty' and to become penetrable and vulnerable like a woman.[76] While the law has, over the past few decades, drastically improved in both relation to marital rape (which is now criminalised)[77] and the legalisation of homosexuality and the rights of lesbian and gay subjects, these examples remain as examples of the ways in which the law has historically been constituted around the invisible assignment of the male, bounded, heterosexual body.

There are, however, also contemporary examples of how the law continues to inscribe this male, homosexual, bounded body through is conceptualisation of the legal subject. One such example, as noted, is the crime of battery, which still applies under English law. Another example can be seen in the tort of battery. The tort of battery is a good contemporary example, in fact, not only because it exemplifies the way in which this invisible bounded body is inscribed in law beyond criminal law alone, but also due to the requirements needed to prove it.

The tort of battery, like the crime of battery, occurs when direct force is applied – touch is enough.[78] However, while most torts require proof of damage to be held to exist under the law of tort, damage broadly being some form of harm or loss, the tort of battery, as a trespass to the person, is actionable *per se.* This mean that there is no requirement to prove damage for this tort to be found; the very fact that the tort occurred and that the subject's boundaries were

[72] Ibid., p. 84.
[73] Ibid., p. 89.
[74] Ibid.
[75] Ibid.
[76] Ibid., p. 91.
[77] ***R v R* [1992] 1 A.C. 599, HL.**
[78] *F v West Berkshire* [1990] 2 A.C. 1 HL.

violated in some way is enough for the tort to be found. The tort therefore, as per *Ashley v CC Sussex Police,*[79] exists not due to the damage caused but because of the subject's right not to suffer from an infringement of their integrity.[80] Thus, the tort of battery represents the way in which the bounded body is given a specially protected status in the law, with any form of violation of this bounded nature being deemed to be inadmissible whether any harm was caused or not.

Thus, concludes Naffine, 'the law's understanding of the body is essentially Kantian.'[81] This can be seen in recent historical constructions of law as well as in contemporary domestic English law. 'The Kantian concern about the sanctity an integrity of the (male) body has been explicitly preserved and policed by the criminal [and tort] law.'[82] The domestic legal subject is both particular and gendered due to the liberal theoretical assumptions which it lies upon.

International law, like the domestic law Naffine discusses, is also a liberal structure and discourse, at least in its dominant and contemporary forms.[83] This is, in part, due to the fact that liberalism 'was born at the same time almost as international law itself.'[84] This liberal theory of politics can be seen as structuring, too, the sovereign state in international law: the sovereign subject is the liberal subject, humanist, masculinist, white, middle class, individualised and independent. The sovereign state has been constructed through a particular political paradigm which implicitly entails a particular vision of subjectivity. This subjectivity is gendered.

The sovereign state's subjectivity is constructed in various ways according to both standpoint and context. The sovereign state is also constructed as both symbolically male and female at different points,[85] the female construction often being seen as the oddity. Charlesworth and Chinkin have noted this, stating that 'International law typically values the 'manly' terms more greatly than their pairs. Thus the symbolic system and culture of international law are permeated by gendered values, which in turn reinforce more general stereotypes of women and

[79] *Ashley v CC Sussex Police* [2008] 2 WLR 975.
[80] Ibid.
[81] Naffine, above note 61, p. 84.
[82] Ibid., p. 89.
[83] Koskenniemi, above note 9, p., xiii); though note that this need not necessarily be the case as exampled by, for example, Marxist and Soviet approaches (see Chapter Two).
[84] Emmanuelle Tourme-Jouannet, Koskenniemi: A Critical Introduction,' in Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005), p. 1-32.
[85] Charlesworth, above note 58, p. 253.

men.' [86] The sovereign state as a concept under international law is gendered male in that it embodies values typically associated with dominant ideas of manhood and masculinity.

For example, the sovereign state is deemed to be absolute in its internal sovereignty as well as fully independent and autonomous, completely in control of its own decision making, as exemplified by the doctrine of state consent. This idea, with its origins clearly being the theories of internal sovereignty outlined above, works to ensure that sovereignty, at international law, is also absolute as 'a concept that designates a certain entity that by its nature requires a dichotomous approach… there is no middle ground.'[87] The sovereign state, in this sense therefore, is the idealised, absolute and all-powerful man (or God, as made in man's idealised image), unwilling to accept that there may be or should be limitations on his own power and centrality.

The way the independence and autonomy of the sovereign state is constructed works to create a sovereign state which is based upon 'isolation and separation.'[88] International law, however, is made up of multiple sovereign states, all of whom are supposedly equal in their absolute power over their territory and decision making this, of course, being an impossibility as lived. Sovereign equality is the doctrine used to manage this contradiction, alongside its partner, state consent. Sovereign equality declares that all sovereign states are equal under international law and thus all equal to choose whether to consent to international law or not.

In reality, states are clearly not equal, even if they are all apparently sovereign. States differ in power and equality greatly and this has a real impact on the way international law works and on the meaning of consent in international law. This is a topic returned to at various points throughout the thesis.

The subject of the sovereign state is not and cannot be an absolute, fully equal, all powerful entity. All sovereign states are situated in the global order and must work with other sovereign states as well as other entities such as corporations and NGOs, to achieve their aims. All sovereign states differ in terms of power, their status and the possibilities of them being able to promote their own sovereign aims being also dependant on circumstances and situation. International law tells a false account of the subject of the sovereign state which does not apply in reality.

[86] Charlesworth and Chinkin, above note 31, p. 50.
[87] Oisín Tansey, 'Does Sovereignty need democracy?,' *Review of International Studies.*, (2011), 37 p. 1519.
[88] Charlesworth, above note 58, p. 261.

This false account of the subject of the sovereign state has led many feminist scholars to call for a change in the way international law understands autonomy. Drawing on feminist work on autonomy, scholars such as Gunning and Charlesworth reject the masculinist dream of totality stating, instead, that 'international autonomy should be understood as dependant on [or, in Gunning's words, in connection and relation with][89] international society, rather than in conflict with it.'[90]

There is, however, a danger in doing away with individual sovereignty completely. This can be exemplified in Orford's essay, '*The Gift of Formalism.*'[91] Noting the flaws of international law, formalism and the false proclamations of equality that international law makes, Orford further notes that these tools of formalism are still the best international lawyers have in protecting against imperialism; in protecting against things getting worse.[92] Whilst international law may indeed be flawed, based upon several problematic fictions, such as the myth of sovereign independence, there is a need to also retain these tools to prevent, for example, the penetration of the boundaries of state in the Global South by state in the Global North, such violations harking back to and exemplifying international law's colonial impulses.

Formalism's gift and the need to grasp on tightly to what exists in the fear that things, if not, may only get worse, does not change the fact that the constructed subjectivity of the sovereign state, as all mighty and all powerful, is fundamentally gendered. Such gendered constructions of the ideal masculine subject, as embedded in the concept of the sovereign state, then work to promote an idealised form of subjectivity across international law and relations. This can be seen perhaps most clearly in the realm of humanitarian intervention, where tropes of white masculinity, of the 'tough, decisive and aggressive' state are used for those intervening.[93] Those being saved, therefore, in turn, are feminised and racialised, seen as weak, inferior and in need of saving by a 'benevolent patriarch.'[94] This works, not only to tell a story of the hero

[89] Isabelle R. Gunning, 'Modernizing Customary International Law: the challenge of human rights,' *Virginia Journal of International* Law, (1991), 31, p. 211-39.
[90] Charlesworth, above note 58, p. 27. See also; Christine Chinkin, Gina Heathcote, Emily Jones and Henry Jones, 'The Bozkurt Judgement: A Feminist Judgment of the Lotus Case' in Loveday Hodson and Troy Lavers, *Feminist Judgments* (Hart Publishing, Forthcoming, January 2018).
Nedelsky also rejects binary line drawn between individual autonomous being and the collective, working to understand how autonomy relies on relations with others. See; Jennifer Nedelsky, 'Reconceiving autonomy: Sources, thoughts and possibilities' in Alan Hutchinson and Leslie Green (eds*.), Law and the Community: The end of individualism?* (Carswell, 1989), p. 219.
[91] Orford, above note 22.
[92] Ibid.
[93] Anne Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism,' *European Journal of International Law* (1999), 10(4), p. 692.
[94] Ibid., p. 693.

saving the weak and desperate other, thus continuing the colonial narrative of the strong West saving the rest, but also to erase context. The history and events leading up to the situation in which the "hero" state feels the compelling need to intervene in are erased, thereby often erasing the "hero" state's role in the creation of such a situation in the first place. An example of this can be seen in the intervention in Kosovo in 1998. While the interveners, NATO, were broadly seen as the heroes in this story, fighting to save the people and bring peace, Orford notes that this narrative ignores the fact that many of the inequalities and tensions leading up to events in Kosovo were, in fact, created and inflamed by 'modern capitalist international relations.'[95] One such example can be seen in the context of the conflict in the former Yugoslavia which, previously, had been forced to restructure its economic system and liberalise its markets, thus causing massive inequalities between different people and groups within the state, this contributing, in part, to the ethnic tensions which led to the conflict.[96]

It is clear, therefore, that the gendering of the sovereign state is neither innocent nor harmless but is, rather, deeply embedded in constructions of power, gender and race in international law. However, the sovereign state is not only conceptualised as masculine in terms of its power and authority; it is also physically conceptualised as the ideal male subject in that it is bounded.

As Brown notes, state sovereignty requires 'fixed boundaries, clearly identifiable interests and identities,' as well as 'power conceived as generated and directed from within the entity itself.'[97] To be a sovereign state under Montevideo, a state must have a 'defined territory.'[98] It must also have a clear and in control government i.e. a clear voice of authority and power.[99]

Charlesworth and Chinkin, drawing on the work of Naffine outlined above, have shown how this idea of the individual legal subject is deeply gendered, being akin to the 'bounded, heterosexual male body,'[100] thereby diminishing all those which cannot fit this categorisation, feminising them and deeming them to be 'deviant and undeserving.'[101] As Parfitt notes, this works to ensure that 'violation of the right of non-intervention therefore becomes the clearest possible breach of international law.'[102] However, many states and non-state groups, including, as Parfitt notes, indigenous peoples, have been unable to construct and claim this

[95] Ibid., p. 681.
[96] Ibid., p. 682.
[97] Wendy Brown, *Politics Out of History*, (Princeton University Press, 2001), p. 10.
[98] See; above note 29.
[99] Ibid.
[100] Parfitt, above note 6, p. 595.
[101] Ibid.
[102] Ibid.

boundedness.[103] Indigenous groups, for example, often do not have a bounded territory which they have absolute control over, either because they have been colonised (and thus had that control taken from them) or, in some instances, because they are nomadic peoples without clear state-like boundaries.[104] Further, states which are unable to maintain their bounded individual status are often deemed to be deviant others, feminised (and often racialised) and labelled as "failed states."[105] Non-state groups and failed states, are all seen as having 'permeable, negotiable, penetrable, vulnerable boundaries in the same way that women's bodies have been constructed in criminal law,'[106] this then working to feminise states in the Global South in particular.[107]

The construction of the sovereign state as whole also 'allows the state to be seen as a complete, coherent, bounded entity that speaks with one voice, obliterating the diversity of voices within the state.'[108] Other voices to the official state voice are feminised, seen as inferior and ignored, this greatly limiting the diversity of voices which are heard in international law and working to 'mask… the ways in which the particular perspectives of dominant groups claim universality, and help… justify hierarchical decisionmaking structures.'[109] International law perpetuates existing inequalities in society but promoting a unified, hierarchical structure, thus ensuring that those least heard in society remain least heard in international law too.

The fact that states are still deemed to be international law's only full legal personalities, their consent and voice counting the most, also works to ignore other groups, including secessionists who do not feel their state represents them and who wish to break away. In fact, the extremely narrow definition of what may constitute a state works to deny many new claims to statehood, not only excluding a diversity of voices in international law, situating multiple voices under one, unified and always, inevitably, not fully representative voice, but also working to continue colonial legacies of recognition.

State sovereignty is, and has always been not only gendered but also racialised: an exclusionary, colonial construct.[110] For example, the doctrine of recognition was used to ensure

[103] Ibid.
[104] *Western Sahara* Advisory Opinion, ICJ GL No 61, [1975] ICJ Rep 12, ICGJ 214 (ICJ 1975), International Court of Justice (ICJ), 16th October 1975.
[105] Charlesworth and Chinkin, above note 31.
[106] Parfitt, above note 6, referring to; Naffine, above note 61.
[107] Parfitt, Ibid.
[108] Charlesworth, above note 58, p. 261.
[109] Iris Marion Young, *Justice and the Politics of Difference*, (Princeton University Press, 1990), p. 97.
[110] Antony Anghie, 'Finding the Peripheries: sovereignty and colonialism in nineteenth century international law,' *Harvard International Law Journal*, (1999), 40, p. 1-71.

that European states had international personality and were in the position of deciding which entities could, too, have personality/statehood and on what basis, thereby imposing a falsely constructed, racist "standard of civilisation." This colonial practise continues in the practise of state recognition today.[111]

The sovereign state, following this, has always been exclusionary in that it provides a means for, for the most part, more powerful states to determine who may have international legal personality and who may not. Further to this, as noted above, the sovereign state is also exclusionary in terms of the subjectivity it pertains to embody; as male, bounded, individual and autonomous. However, the sovereign state and the false account of subjectivity it promotes is not just exclusionary in terms of who and what may be given rights and duties under international law, but it impacts on lived experiences too, this particular, idealised form of masculine subjectivity as *the* ideal this then, in turn, working to reproduce gender roles,[112] impacting on power dynamics and gendered lives both within and outside international law.[113]

The subjectivity if the sovereign state is deeply gendered, thereby presenting this form of subjectivity as the norm. However, as Sara Ahmed, notes, that the:

> 'disembodiment of the masculine perspective is itself an inscription of a body, a body which is so comfortable we needn't know it was there, a body which is simply a home for a mind, and doesn't interrupt it, confuse it, deceive it with irrationalism, or bleeding or pregnancy.'[114]

It is clear, following Ahmed, that the masculine embodiment of concepts works, not only to limits our legal-political structural thinking but also to limit the account of subjectivity told more broadly, posting the masculine as the norm and thereby othering all who do not and cannot fit this presumed model of existence. This is a theme that this thesis will pick up on again, working to consider new modes of subjectivity and apply them to international law in the hope of radically changing the structure of international law itself through, for example the recognition of environmental subjectivities as per Chapter Four.

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[111] Ibid.; Parfitt, above note 6.
[112] Dianne Otto, 'Lost in Translation,' in Anne Orford (ed.), *International Law and its Others*, (Cambridge University Press, 2006), p. 322; Orford, above note 93; Gina Heathcote, *The Law on The Use of Force: A Feminist Analysis*, (Routledge, 2012).
[113] Orford, Ibid., p. 77.
[114] Sara Ahmed, 'Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights,' *Social and Legal Studies*, (1995), 4(1), p. 56.

Thus, it is clear that the subjectivity of the sovereign state in international law is limited and specific, being both gendered and racialised. The sovereign state poses an incomplete account of subjectivity and thus international law is based around an incomplete account of subjectivity, one which is idealised and unattainable. The only full personality in international law, the sovereign state, is conceptualised in this particular way; as bounded, absolute and individual. In response to this, I will pose that it is not international law which is inherently lacking but, rather, it is this very account of subjectivity which is lacking.