'THE ADMIXTURE OF FEMININE WEAKNESS AND SUSCEPTIBILITY': GENDERED PERSONIFICATIONS OF THE STATE IN INTERNATIONAL LAW

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19th century international law textbooks were infused with the gendered personification of states. Legal academics, such as Johann Casper Bluntschli, John Westlake, Robert Phillimore and James Lorimer, relied on gendered personification to ascribe attributes to states. Masculine states, reasonable, bounded and strong, were the backbone of Western civilisation, while feminine states were irrational, permeable and lacking in the reasonability necessary for full statehood. Britannia may have represented the British Empire at its zenith but the allegory was not intended as a rallying call for women's political participation. John Bull represented the actuality of citizenship. Recent scholarship recognises the import of 19th century international legal academia to contemporary law. This article argues that the personifications, which suffused the writings of these authors, set the terms in which contemporary international law understands statehood. Explicitly gendered language may no longer be invoked but the terms of statehood remain sexed. When scholars return to the writings of 19th century international legal academia, attention to the negative gendered bequests of the era is required.

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I   INTRODUCTION

> The State, as the nation, consciously determining and governing itself, cannot afford to weaken its manly character by the admixture of feminine weakness and susceptibility.[1]

Personification of states reached its apex in the 19th century. Britannia ruled the waves, Marianne sustained the French Republic and 'feminine' peoples, due to their lack of reason or rationality, had limited chances of statehood. Equally, masculine states, from John Bull to *Der Deutsche Michel*, overflowing with order, rationalism and bordered nationalism, epitomised the height of European civilisation. Contemporaneously, the first modern academic international lawyers consolidated the field into its modern form. These academic brethren established the first international legal societies, journals and international law textbooks. Texts, in a break from their antecedents, were produced from the view of the

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1   Johann Caspar Bluntschli, *The Theory of the State* (Clarendon Press, 1885) 193.

homo academicus.[2] Used as part of international law courses into the next century these texts formed the basis on which many of those who would shape the first half of 20th century international law learned its form and structure. They set the template for modern international law textbooks,[3] and are replete with gendered personifications of states. This article first queries the intentions of these authors in utilising personification. Second, it examines their enduring influence. Finally, it argues for caution in invocations of this era as a progressive pivot around which modern international law emerged.

'The State is humanity organised, but humanity as masculine, not as feminine: the State is the man'.[4] Personification is not always as blatant as this quote from Johann Casper Bluntschli but at its core it is the attribution of human qualities to inanimate objects, animals and, of particular import here, abstract legal and political forms. Personification builds upon metaphor where the latter is 'an *additive*, and not *substitutive* instrument of knowledge'.[5] Long personified as Justitia or Themis, Justice as a Greek mythological woman resplendent in her robes is familiar to all who work within law. Yet, as Marina Warner argues, invocations of the female form are not emblematic of female empowerment nor perceived female acumen for legal practice. Instead, these allegorical forms depend 'on the unlikelihood of women practising the concepts they represent'.[6] In contrast, a male figure as Justice is an active figure to be imitated. Male personifications of law adopt a specific commanding attitude, such as the 'Authority of Law', a male figure who accompanies Justice at the front of the United States Supreme Court.[7]

The choice of 19th century authors rests upon several premises. First, as Mark Mazower explains, it is the era in which global governance based around a semi-legal fulcrum takes shape.[8] Second, and related to this, legal academics possessed an opportunity to define modern international law, by moving it

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[2] Pierre Bourdieu, *Homo Academicus* (Peter Collier trans, Stanford University Press, first published 1984, 1988 ed).

[3] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) 2–3.

[4] Bluntschli, above n 1, 32.

[5] Umberto Eco and Christopher Paci, 'The Scandal of Metaphor: Metaphorology and Semiotics' (1983) 4 *Poetics Today* 217, 219 (emphasis in original).

[6] Marina Warner, *Monuments and Maidens: The Allegory of the Female Form* (Pan Books, 1987) xx. French Prime Minister Manuel Valls' invocation of the image of bare breasted Marianne as representative of ideals of French statehood in repudiation of the Birkini was not intended as a command that 'real' French women should go bare breasted. The allegory was invoked to create otherness rather than as a model of action: see Angelique Chrisafis, 'French PM Suggests Naked Breasts Represent France Better than a Headscarf', *The Guardian* (online), 30 August 2016 <https://www.theguardian.com/world/2016/aug/30/france-manuel-valls-breasts-headscarf-burkini-ban-row> archived at <https://perma.cc/VX7C-LVMD>.

[7] The statue is described by the artist, James Earle Fraser, as 'powerful, erect, and vigilant. He waits with concentrated attention, holding in his left hand the tablet of laws, backed by the sheathed sword, symbolic of enforcement through law'. Quoted in Office of the Curator, 'Statues of Contemplation of Justice and Authority of Law' (Information Sheet, Supreme Court of the United States, 25 May 2010) <https://www.supremecourt.gov/about/FraserStatuesInfoSheet.pdf> archived at <https://perma.cc/X68X-WM6W>. Other examples of male personification of Justice include 'The Majesty of Justice' who is also accompanied by 'The Spirit of Justice', a female figure of Lady Justice in the US Department of Justice.

[8] Mark Mazower, *Governing the World: The History of an Idea* (Allen Lane, 2012) 65–94.

beyond Hugo Grotius and Emer de Vattel and making it relevant to the new era of imperialism and the nation state. Third, their texts became the basis on which those who would author the *Covenant of the League of Nations*, the *Statute of the Permanent Court of International Justice* and the *1907–08 Hague Conventions* and other key 20th century international law documents learned their craft. Fourth, and finally, examinations of this era by John Anthony Carty in the 1970s and more recently Antony Anghie, David Kennedy, Martti Koskenniemi, Anne Orford and Alexander Orakhelashvili reveal how 19th century authors established some of international legal academia's longstanding traditions.[9] This article builds upon their critique of 19th century writers by challenging the recent valorisation of some of these figures and the lack of explicit recognition of the misogyny that stands alongside the racism and imperialism in these texts. It is in the 19th century that international law's contemporary structure and language were established and the authors of this period remain the touchstone figures of today.

Perhaps this endeavour is anachronistic. But, as Orford maintains, the claim 'that international lawyers should not study the movement of concepts across time raises serious problems in relation to meaning and understanding in international law'.[10] For instance, it shuts down critical approaches including Third World Approaches to International Law ('TWAIL') and feminist analysis. Given the specific status afforded to international legal writing within international law, the reliance on past authors requires us to look not only at the contemporaneous context of their writing but also their reception over time.[11] Karen Knop argues that contemporary personification of the state exposes international legal norms as male, but little work has been done to trace its inculcation into international law textbooks by their originators.[12] Work on the continued influence of 19th century authors has become more commonplace; in particular, the work of Koskenniemi in *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* ('*The Gentle Civiliser of Nations*') presents a hagiographic view of the men of this era.[13]

States would take time to follow the aspirations of Bluntschli and his fellow writers, but the modern international legal discipline emerged in the 19th century. The *Montevideo Convention on the Rights and Duties of States* ('*Montevideo*

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[9] Koskenniemi, above n 3, 3; Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' in Mark Toufayan, Emmanuelle Tourme-Jouannet and Hélène Ruiz Fabri (eds), *Droit international et nouvelles approaches sur le tiers-monde: Entre répétition et renouveau* (Société de Législation Comparée, 2013) 97, 106–7; Alexander Orakhelashvili, 'The 19th-Century Life of International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar Publishing, 2011) 441; David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1996) 65 *Nordic Journal of International Law* 385; John Anthony Carty, *19th Century International Textbooks* (PhD Thesis, University of Cambridge, 1972); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005).

[10] Anne Orford, 'International Law and the Limits of History' in Wouter Werner, Alexis Galán, and Marieke de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press, 2017) 297, 304.

[11] Ibid.

[12] Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law & Contemporary Problems* 293, 295.

[13] Koskenniemi, above n 3.

Convention') set the template for contemporary statehood,[14] but it did not emerge in a vacuum. Rather, it was framed by those who learned their law from 19th century textbooks.[15] Hilary Charlesworth and Christine Chinkin highlight how the *Montevideo Convention*'s criteria affirmed a test of statehood that, in its constituent elements, negatively impacts on the advancement of women's rights, continues the dominance of the public–private divide and influences our ideas of governance and control.[16] This article does not repeat this effort by examining the definition of statehood but rather demonstrates that gendered language and personification were an integral part of 19th century textbooks and, due to the continued influence described by Koskenniemi and others, our modern understanding of statehood.

In scrutinising personification, we must look beyond law to wider understandings of the personified state. This article examines personification and its use as a persuasive tool in literature before turning to the 19th century texts and the implications of gendering the state. The article examines the contemporary implications of state personification and the shadow that these authors cast within legal academia.[17] Charlesworth argues that 'little attention has been given to the sex attached to the notion of statehood … [yet] the character of the central person in international law, the nation state, rests on particular beliefs about sexual difference'.[18] This article argues that we must focus on how 19th century international legal academics inculcated this difference into international law and asks what this means for our contemporary understanding of the role of gender within international law. 'Modern law has much at stake in maintaining these boundaries: between male and female, inside and outside, law and violence, civilization and savagery'.[19]

This articles charts for the first time the explicit gendering of the state in 19th century texts, arguing that this ought to impact on how we perceive the academics of this era and their authoring of the modern discipline. Establishing the importance of metaphor and personification to rhetoric by looking at the debate within English, the piece also explores their fixed place within law and international legal discourse. The piece reveals the extent to which 19th century international legal texts, all of which are still cited, make use of personification as part of an explicitly interlinked misogynist and racist discourse, often for the purpose of imperialism, but also for the purposes of a domestic audience, and places those debates within their broader political and historical context. The piece then turns to the contemporary era to demonstrate both the ongoing use and extolling of these authors alongside the enduring use of gendered language. The

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14   *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 135 LNTS 19 (entered into force 26 December 1934) art 1.

15   Thomas D Grant, 'Defining Statehood: The *Montevideo Convention* and Its Discontents' (1999) 37 *Columbia Journal of Transnational Law* 403, 416–17.

16   Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 124–70.

17   Knop, above n 12, 294.

18   Hilary Charlesworth, 'The Sex of the State in International Law' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 251, 253.

19   Ruth Buchanan and Rebecca Johnson, 'The 'Unforgiven' Sources of International Law: Nation-building, Violence, and Gender in the West(ern)' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart, 2004) 131, 133.

article argues that more vigilance is necessary when lauding the virtues of the 19th century legal academia and calls for a halt to the gendered personification of the state.

II   METAPHOR AND PERSONIFICATION

> Personification … the rhetorical figure by which something not human is given a human identity or 'face', is readily spotted, but the figure's cognitive form and function, its rhetorical and pictorial effects, rarely elicit scholarly attention. As a communicative device it is either taken for granted or dismissed as mere convention.[20]

At the heart of this article are personification and metaphor. Significantly and intimately linked within language, thought and philosophy across several disciplines must be considered in tandem.[21] Umberto Eco and Christopher Paci propose that metaphor is

> [t]he 'most luminous, and therefore the most necessary and frequent' … of all tropes, the metaphor, defies every encyclopaedic entry. Above all because it has been the object of philosophical, linguistic, aesthetic and psychological reflection since the beginning of time.[22]

Metaphor exists everywhere we use language (and other communicative forms). For James Greensough and George Kittredge '[l]anguage is fossil poetry … Our commonest words are worn-out metaphors'.[23] Within philosophy, metaphor is regarded as the site of language's birth.[24] Jacques Derrida considers metaphor and figurative language as inextricably linked to philosophy, arguing that figurative representation is at the heart of linguistic constructions.[25] Such representations signify the relationship between constructing ideas and representing them in language. The centrality of metaphor and figurative language to communication has intensified the contestation of these forms.[26] Rather than attempting to encapsulate this debate, this section focuses on the

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[20] Walter S Melion and Bart Ramakers, 'Personification: An Introduction' in Walter S Melion and Bart Ramakers (eds), *Personification: Embodying Meaning and Emotion* (Brill, 2016) 1.

[21] James J Paxson, *The Poetics of Personification* (Cambridge University Press, 1994) 8.

[22] Eco and Paci, above n 5, 217 (citations omitted).

[23] James B Greenough and George L Kittredge, *Words and Their Ways in English Speech* (MacMillian, 1929) 11.

[24] Max Black, *Models and Metaphors: Studies in Language and Philosophy* (Cornell University Press, 1962); Warren A Shibles, *Metaphor: An Annotated Bibliography and History* (Language Press, 1971); Aristotle, *Poetics* (Malcolm Heath trans, Penguin Classics, 1996); Jean-Jacques Rousseau, *On the Origin of Language* (John H Moran and Alexander Gode trans, University of Chicago Press, 1986) [trans of: *Essai sur l'origine des langues* (first published 1762)]; Quintilian, *The Orator's Education* (Donald A Russell trans, Harvard University Press, 2001).

[25] Jacques Derrida and F C T Moore, 'White Mythology: Metaphor in the Text of Philosophy' (1974) 6 *New Literary History* 5, 7.

[26] For instance, for a semantic and pragmatic twist alongside comparativist and brute force accounts of metaphor, see David Hills, 'Metaphor' in Edward N Zalta (ed), *The Stanford Encyclopaedia of Philosophy* (Stanford University, Winter 2012 revised ed, 2011) <http://plato.stanford.edu/archives/win2012/entries/metaphor/>. See also Michel Foucault, *The Order of Things: An Archaeology of the Human Sciences* (Routledge, 2005) [trans of: *Les mots et les choses: Une archéologie des sciences humaines* (first published 1966)].

aims behind the invocation of metaphor and personification and evaluates what its usage may mean for law.

Amongst the multiple accounts of metaphor's use there is a shared understanding that its underlying rationale is to communicate a specific impression to the observer. This impression requires the observer to contemplate, besides the original object, a supplementary meaning.[27] Metaphors consider two things at once: the subject of the discussion and the subject of the metaphor. The former is likened to the latter, 'inviting our listener to register the parallelism and ponder its significance'.[28] Although a chosen metaphor may not be like the object under consideration in any physical or theoretical form, the metaphor operates by utilising resemblance or equivalence.[29] Metaphors can also obfuscate by making a comment, either positive or negative, about an object without declaring that opinion outright. As Gérard Genette argues, they introduce 'a sense of figure … [whose] existence depends completely on the awareness that the reader has, or does not have of the ambiguity of the discourse that is being offered'.[30]

In the political context metaphors offer

> a unique cognitive function quite different from the logical function of abstract concepts … metaphors operate through the associative powers of the imagination, and, in order to communicate ideas persuasively, they exploit the resources of conceptual development …[31]

Giuseppa Saccarco-Battisti suggests that personification goes beyond metaphor to elicit a specific response from the audience.[32] Metaphor explicates while personification intends the audience to have a particular reaction to that object and to act in a particular way towards it. Personification possesses a mnemonic function by creating an artificial memory that links the personified object with other spaces or constructs.[33] George Lakoff and Mark Johnson use inflation to illustrate this point:

> Inflation has attacked the foundation of our economy … but the metaphor is not merely INFLATION IS A PERSON. It is much more specific, namely, INFLATION IS AN ADVERSARY. It not only gives us a very specific way of thinking about inflation but also a way of acting toward it. We think of inflation as an adversary that can attack us, hurt us, steal from us, even destroy us. The INFLATION IS AN ADVERSARY metaphor therefore gives rise to and justifies political and economic actions on the part of our government: declaring war on

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27 Eco and Paci, above n 5, 221.

28 Hills, above n 26.

29 Ibid.

30 Gérard Genette, *Figures of Literary Discourse* (Alan Sheridan trans, Columbia University Press, 1982) 54. This is somewhat different to figures that reinforce existing ideas that a reader may have about a subject. See Elaine Freedgood, *The Ideas in Things: Fugitive Meaning in the Victorian Novel* (University of Chicago Press, 2010) 2–4.

31 Giuseppa Saccaro-Battisti, 'Changing Metaphors of Political Structures' (1983) 44 *Journal of the History of Ideas* 31, 31 (citations omitted).

32 Ibid 35.

33 Genette, above n 30.

inflation, setting targets, calling for sacrifices, installing a new chain of command, etc.[34]

The ubiquity of personification is such that often we do not recognise it or ponder its principally feminine nature and what, in particular, giving the object stereotypical feminine characteristics achieves.[35] In giving the subject human characteristics, such as an implied binary quality of gender, the author is attempting to make us understand the subject in familiar terms and associate with those attributes. It relies both on common knowledge and the existence of stereotypes within a society and our reaction to those stereotypes. This personification's mission belies suggestions that we sometimes assign feminised or masculinised characteristics to sexless objects without an underlying intent to influence the reader to consider that object from a gendered perspective. Rather, as personification intends to make us think about an object in a particular way, to influence our thoughts, it is a significant tool of language and persuasion.

Use of the female or male to personify states dates from the pre-modern period.[36] Into the 17th and 18th centuries the embodiment of the continents and the emergent modern state as gendered became more frequent.[37] Personifying the state as male or female is an attempt to not only represent something we are familiar with, but also to grant specific attributes to those states.[38]

> *Nation-as-woman* expresses a spatial, embodied femaleness: the land's fecundity must be protected against invasion and violation. It is also a temporal metaphor: the rape of the body/nation not only violates frontiers but disrupts — by planting alien seed or destroying reproductive viability …[39]

Gendered personification relies on socially constructed behaviours, activities and attributes of being male or female rather than a set of physical factors to determine sex.[40] While the binarity of these divisions is complicated by the fluidity of some states who could possess both male and female genders at the same time, the socialised construction of both is essential to understanding their coexistence. Sexing a state takes on its gendered character by the process of personification.

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[34] George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 2003) 33–4.

[35] Ernst H Gombrich, 'Personification' in R R Bolgar (ed), *Classical Influences on European Culture AD 500–1500* (Cambridge University Press, 1971) 248.

[36] Bart Ramakers, 'Lady World in Rhetoricians' Drama' in Walter S Melion and Bart Ramakers, *Personification: Embodying Meaning and Emotion* (Brill, 2016) 287.

[37] Shirley Samuels, *Romances of the Republic: Women, the Family, and Violence in the Literature of the Early American Nation* (Oxford University Press, 1996) 3–8.

[38] The low frequency of the use of political metaphors in utopias and science fiction may suggest that such rhetorical devices have seldom been considered adequate or appropriate to depict new, more complicated and imaginary societies. See Saccaro-Battisti, above n 31, 32.

[39] V Spike Peterson, 'The Intended and Unintended Queering of States/Nations' (2013) 13 *Studies in Ethnicity and Nationalism* 57, 62 (emphasis in original).

[40] Mary Anne C Case, 'Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence' (1995) 105 *Yale Law Journal* 1, 2–3; Myra J Hird, 'Gender's Nature: Intersexuality, Transsexualism and the "Sex"/"Gender" Binary' (2000) 1 *Feminist Theory* 347; Francisco Valdes, 'Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex", "Gender", and "Sexual Orientation" in Euro-American Law and Society' (1995) 83 *California Law Review* 1.

During this period emphasis on the female form came in two varieties; first, as embodying weakness, childishness and emotionality[41] and second, as mythical allegorical figures such as Britannia, Marianne or Hibernia. Warner in *Monuments and Maidens: The Allegory of the Female Form* describes female personification as a tool to 'lure, to delight, to appetize, to please, these confer the power to persuade: as the spur to desire, as the excitement of the senses, as the weapon of delight'.[42] Warner is clear that portrayals of Britannia or Justice as armoured womanly figures are not intended as ideals or aspirational forms for women. Personification in this form confines women 'to the world of metaphor rather than active participation'.[43] By their nature mythical personifications were apart from the everyday female form, which in the Victorian era was weak, childish, irrational and low.[44] Personification aims to make us regard an object in a particular manner. In doing so, distinct traits are ascribed; the mythical allegory of the female state was not intended to bear any relation to the political and often masculinised calls to enter politics. Instead, real women were confined to the private non-political sphere, where their emotional nature prevented them from governing. Personification of states is not static; states' genders are fluid depending on the aim of the writer. An allegorical state can be personified as female whilst its political governance is male, so England can be both Britannia and John Bull. This paper now turns to ask what impact the admixture of personification and law has on our understandings of legal form.

III   LAW AND PERSONIFICATION

Law utilises personification in a wide variety of contexts. Harold Berman describes how metaphor is at the core of common legal language.

> The defendant, by refusing to pay, broke his contract' — conveying the idea of financial default in terms of a violent act, a breaking. The implication is that the defendant ought to repair the contract, either put it together again or pay its value.[45]

Legal language evolves through analogy (specifically metaphor and metonymy) by substituting meanings on the basis of similarity.[46] This process enables legal terms to expand but also sets their limits. In *The Common Law*, Oliver Wendell Holmes suggests that personification is necessary to understand law (in this case admiralty) as 'only by supposing the ship to have been … endowed with personality, that the arbitrary seeming peculiarities of the

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41   Heather A Hughes, 'The Four Continents in Seventeenth-Century Embroidery and the Making of English Femininity' in Walter S Melion and Bart Ramakers, *Personification: Embodying Meaning and Emotion* (Brill, 2016) 736.

42   Warner, above n 6, xx.

43   Browen Walter, 'Irishness, Gender, and Place' (1995) 13 *Environment and Planning D: Society and Space* 35, 37.

44   Warner, above n 6, 55.

45   Harold J Berman, *Law and Language: Effective Symbols of Community* (Cambridge University Press, 2013) 96.

46   Ibid 99.

maritime law can be made intelligible, and on that supposition they at once became consistent and logical'.[47]

Ngaire Naffine considers law's relationship with personification and personhood as central to legal language:

> Certain analytical jurists posit a technical definition of law's person; they insist that the person is pure, legal artifice, and have little time for philosophical speculation. The legal concept of person, they affirm, does not and should not depend on metaphysical presuppositions about persons. In reply, it will be said that lawyers are unable to avoid speculation about what it is to be a person: the legal term is constantly contaminated by non-legal moral meanings and may even be unintelligible without them.[48]

Law necessarily draws toward personification and personhood. While Naffine does not address international law, she reveals how ubiquitous such practices are, arguing that these techniques trick us into thinking legal persons are something more than 'pure abstraction of law' and tied to wider societal perceptions.[49] Personification works when it operates in conjunction with prevailing conventions. These conventions fill what would otherwise be a person devoid of characteristics with a distinct set of attributes that law recognises.

International law explicitly engages with both personhood and international personality, often utilising gender in times of invasion or economic crises.[50] Other characteristics also play a role in our perceptions and this focus on gender does not exclude these other narratives, but rather, as Charlesworth argues, 'locating the mechanisms by which international law sexes the state, so that the state cannot be plausibly presented as an abstract, neutral subject' is critical to understanding what law attempts to do in these circumstances.[51] The admixture of statehood and gender became entrenched under the *Montevideo Convention* and its constituent elements still negatively impact women.[52] But this particular admixture became entrenched in the 19th century as the next section describes.

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[47] Oliver Wendell Holmes Jr, *The Common Law* (Dover Publications, 1881) 27. For a history of maritime personification in law, see George K Walker, 'The Personification of the Vessel in United States Civil in Rem Actions and the International Law Context' (1991) 15 *Tulane Maritime Law Journal* 177.

[48] Ngaire Naffine, 'Who Are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *Modern Law Review* 346, 349. See, eg, Suzanna Sherry, 'States Are People Too' (2000) 75 *Notre Dame Law Review* 1121; Gregory A Mark, 'The Personification of the Business Corporation in American Law' (1987) 54 *University of Chicago Law Review* 1441, 1441; Charlesworth, above n 18; M Moran, *Rethinking the Reasonable Person* (Oxford University Press, 2003).

[49] Naffine, above n 48, 353, 356. See also Ngaire Naffine, 'Can Women be Legal Persons?' in S James and S Palmer (eds), *Visible Women* (Hart Publishing, 2002) 69; Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009).

[50] Charlesworth, above n 18, 253; Teemu Ruskola, 'Raping like a State' (2010) 57 *UCLA Law Review* 1477, 1479; Edwin DeWitt Dickinson, 'The Analogy between Natural Persons and International Persons in the Law of Nations (1917) 26 *Yale Law Journal* 564.

[51] Charlesworth, above n 18, 255.

[52] Charlesworth and Chinkin, above n 16, 125–37.

IV   19ᵀᴴ CENTURY INTERNATIONAL LAWYERS

Though for today's academics the 19th century seems distant it remains important.[53] Koskenniemi, in *The Gentle Civilizer of Nations*, maintains that 'a small number of intellectual assumptions and emotional dispositions' of 19th century academics retain a surprising hold on international law describing these men as members of a '[r]omantic [p]rofession'.[54] Orakhelashvili posits that in this era the quasi-legal and semi-constitutional normative structure of international law gained acceptance.[55] Over the past two decades an ever-increasing insistence of the continued relevance and impact of 19th century scholars on both the international legal profession and international law itself emerged.[56] Some scholarship is both critical and self-reflective. Anghie, B S Chimni and Orford raise doubts by documenting the racist and imperial character of these texts,[57] but others treat these authors with undue reverence. International law no longer engages in explicitly racist characterisations, yet the impact of its imperialist heritage continues to resonate, such that apparently neutral terms of engagement, including how we categorise states and their motives, echo and repeat the vestiges of 19th century imperialism.[58] This argument is just as valid when we regard the gendered and misogynist language of that era.

This section focuses on Bluntschli, James Lorimer, Robert Phillimore and John Westlake, amongst others.[59] A Euro-American centric group typical of its time, these authors represent a spectrum of political and philosophical perspectives and all were influential in both developing international law and academia.[60] Choice of language and structural forms were central to the modernisation of international law. While Orakelashvili argues that certain authors such as Lorimer bordered on racism, and Koskenniemi describes the

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53   Kennedy, above n 9, 386.

54   Koskenniemi, above n 3, 42.

55   Orakhelashvili, above n 9, 441. See also James Thuo Gathii, 'Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy' (2000) 98 *Michigan Law Review* 1996; Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of force in International Law* (Cambridge University Press, 2008).

56   Some of the most recent include the *European Journal of International Law's* special edition on James Lorimer: see, eg, Stephen Tierney and Neil Walker 'Through a Glass, Darkly: Reflections on James Lorimer's International Law' (2016) 27 *European Journal of International Law* 409. See also Jean d'Aspremont, 'The Professionalisation of International Law' in Jean d'Aspremont et al (eds), *International Law as a Profession* (Cambridge University Press, 2017) 1.

57   See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Antony Anghie, 'Francisco De Vitoria and the Colonial Origins of International Law' (1996) 5 *Social and Legal Studies* 321; Orford, above n 9, 1; John D Haskell, 'The Choice of the Subject in Writing Histories of International Law' in Jean d'Aspremont et al (eds), *International Law as a Profession* (Cambridge University Press, 2017) 244.

58   Orford, above n 9, 1.

59   See Bluntschli, above n 1; James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (William Blackwood and Sons, 1883); Robert Phillimore, *Commentaries upon International Law* (Butterworths, 2nd ed, 1871–74) vols 1–4; John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894).

60   See Koskenniemi, above n 3; Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789–1914* (Clarendon, 2004); Kennedy, above n 9.

language as 'striking',[61] both accounts underplay blatantly racist and misogynist language. Such language was neither inevitable nor can it be passed off as contextual to the time.[62] Before turning to that discussion, it is important to look to the texts themselves.

In this era, the personification of the state was not hidden, it was blatant:

> The manly character of the State. The State, as the nation, consciously determining and governing itself, cannot afford to weaken its manly character by the admixture of feminine weakness and susceptibility … The great danger, that political struggles would become more passionate and less amenable to the guidance of reason. The State would suffer if its passive elements were thus increased, and the active diminished … Hence, while we may tolerate such exceptions as female succession to the throne, which in favourable circumstances and in a civilised country may do no harm, it would be disastrous to bestow political rights on women more generally.[63]

Bluntschli typifies this era's mélange of ideas meshed together to depict the state. First, there is the character of the state, its attributes as self-governing and active, second, the dangers of feminine characteristics, third, the calamity of actual female governance and fourth, the disastrous consequences which would flow for the integrity of the Westphalian state should women be enfranchised. A clear view of what is masculine and what is feminine and the latter's unsuitability to either governance or political rights emerges. Also evident is the link between civilisation and masculine states. The degree to which feminised governance would lead to the disintegration of states is evident. The reasonability of the masculinised state enables it to hold together even when civilisation is in doubt, an attribute which could be undermined by the presence of women as constituents or constituted power holders. That non-civilised states in particular were at risk from feminised governance structures was played out in various imperial undertakings. For example, in Nauru, German colonisers removed women from the governance structure of the island.[64] British colonisers imposed a patriarchal order upon the Igbo in what is now Southern Nigeria and

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[61] Orakhelashvili, above n 9, 441; Koskenniemi, above n 3, 103.

[62] For an excellent discussion of the use of sexualised and gendered language with regard to China in the 19th and early 20th centuries, see Ruskola, above n 50, 1501.

[63] Bluntschli, above n 1, 193.

[64] Germany was granted Nauru under the *Anglo-German Agreement 1886*: see Douglas L Oliver *The Pacific Islands* (University of Hawaii Press, 3rd ed, 1989) 219. *Declaration between the Governments of Great Britain and the German Empire relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific*, House of Commons Paper No C 4656, Session 1886 (1886) (signed and entered into force 6 April 1886). Despite having been altered by colonialism, the negative impact of some of these traditional practices on the lives of women should not be underestimated: see Sue Farran, *Human Rights in the South Pacific: Challenges and Changes* (Routledge, 2009).

in Ireland the dismantlement of the Brehon legal structure removed women's entitlement to land ownership, divorce and public office.[65]

Not all authors are as explicit as Bluntschli. Not all were as misogynistic. The context in which these authors sexed the state is more complex than what may first appear and alternative narratives were possible. For instance, Phillimore, who was also a women's rights advocate, is adamant in his argument that women had a role within international law and could represent the state, including possessing immunities, as ambassadors; a state cannot reasonably refuse to receive an ambassador on the grounds of sex.[66] Margaret of Austria and Louisa of Savoy were both involved in the negotiation of treaties, and an ambassadress was sent by Henry IV to Constantinople — indeed, Phillimore stated that the first female diplomat, the Duchess of Orleans, negotiated as Plenipotentiary the Treaty between France and England.[67]

In stark contrast, Bluntschli argues that '[w]omen who have been famous in politics have generally done harm to the State and their friends'.[68] Phillimore found women engaging in international law acceptable, others disdaining their presence altogether.

Nonetheless, Phillimore's language choices also betray an understanding of statehood which allies itself with stereotypical male attributes:

> the individual man should attain to the full development of his faculties through his intercourse with other men … so it is divinely appointed that each individual society should reach that degree of perfection of which it is capable, through its intercourse with other societies … is as much the normal condition of a single nation, as to live in a social state is the normal condition of a single man.[69]

He continues, switching genders, that

> when a new State springs into being, and demands to be admitted into the great Commonwealth of States, International Law requires that her political status be so far considered by other States, as to satisfy them that she is capable of discharging international obligations.[70]

Here, Phillimore aligns the female pronoun not with the divinely appointed position of the male state reaching its point of perfection. Allying femininity with the 'new' state that must, as yet, prove her worth rather than possessing a 'normal' position as a matter of right.[71] The male state represents the natural

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65   See Ifi Amadiume, *Afrikan Matriarchal Foundations: The Igbo Case* (Karnak House, 1987); Sophie Bryant, *Liberty Order & Law under Native Irish Rule: A Study in the Book of the Ancient Laws of Ireland* (Encyclopedia Press, 1923); Ann Rosalind Jones and Peter Stallybrass, 'Dismantling Irena: The Sexualizing of Ireland in Early Modern England' in Andrew Parker et al (eds), *Nationalisms and Sexualities* (Routledge, 1992) 157, 162–4, 166. For a discussion of the portrayal of the continent of America as a woman who was a threat to the male enterprise of colonisation and, as such allows for slaughter, see also Samuels, above n 37, 3–8.

66   Phillimore, above n 59, vol 2, 170.

67   Ibid 170–1. Phillimore was also quite liberal for his time regarding women in the clergy. See Brian Heeney, 'The Beginnings of Church Feminism: Women and the Councils of the Church of England 1897–1919' (1982) 33 *Journal of Ecclesiastical History* 89, 90.

68   Bluntschli, above n 1, 193.

69   Phillimore, above n 59, vol 1, 3.

70   Phillimore, above n 59, vol 2, 16.

71   Ibid.

order of social states, while the female state, not possessing this pre-ordained position, before admittance, must be adjudged by the Commonwealth to be capable of acting as they do and executing her obligations before gaining her rights. New states by being female are not yet fully capable of being members of the Commonwealth or, perhaps, as is more commonly articulated in the *Statute of the Permanent Court of International Justice* and the *Statute of the International Court of Justice*, must prove they are amongst the civilised nations.[72]

Bluntschli defines the state in masculine terms:

> — the State is a combination or association (*Gesammtheit*) of men, in the form of government and governed, on a definite territory, united together into a moral organised masculine personality; or, more shortly, — the State is the politically organised national person of a definite country.[73]

Such personification asks the reader to associate particular masculine stereotypes with specific attributes of government. The masculine state, just as the male body is bounded and not subject to childbirth or penetration, does not allow for emissions or entries being in complete control of its borders and governance. The state is also a moral fraternity whose structure forms part of the natural order. Bluntschli links his definition to an organismic view of statehood in both domestic and international law; '[t]he recognition of the personality of the State is thus not less indispensable for Public Law (*Statsrecht*) than for International Law (*Völkerrecht*)'.[74] These definitions idealise the nation state as having a set of characteristics reminiscent of the *Montevideo Convention* definition of statehood, which would thereafter become customary international law, a fixed border and population, control of internal and external affairs. As Carty observes, in the writings of this era only weak states betray 'womanish fears'.[75]

Bluntschli links independent and ordered government to masculinity while connecting feminine qualities to a lack of governance and dependence:

> Strictly speaking, only those peoples in which the manly qualities, understanding and courage, predominate are fully capable of creating and maintaining a national State. Peoples of more feminine characteristics are, in the end, always governed by other and superior forces.[76]

Bluntschli suggests that states can progress toward masculine, or regress toward feminine, attributes but there are also peoples who are wholly incapable of ever developing masculinised governance and that this, as well as being part of the inevitable order of things, is a basis for imperialism. These peoples are, as

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[72] Sir Ian Sinclair, 'International Law: The Court, Commission and Judges' in Erik Jensen and Thomas Fisher (eds), *The United Kingdom — The United Nations* (Palgrave Macmillan, 1990) 120; Stephen M Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48 *International & Comparative Law Quarterly* 889.

[73] Bluntschli, above n 1, 23.

[74] Ibid 22.

[75] Carty, above n 9, 294.

[76] Bluntschli, above n 1, 98. Bluntschli he also links this to the reason why otherwise masculine nations become effeminate due to climate, 'The Romans in the East became effeminate, the Germans on the African coast lost their vigour, the English easily become lazy and sensual in India': at 211.

feminine, underdeveloped and will forever lack the virtues we ascribe to the mature man and civilised state.

The masculinity of the internal state and the external replication and representation of such masculine characteristics are common themes. Lorimer argues that for international law there is a particular governance trajectory:

> When contrasted with other branches of jurisprudence, there are several points of view in which the law of nations may be regarded as modern. There were not only men and families but there are unions of families into clans and tribes, bound together with ties of blood … and neighbourhood before there were those ethnological and geographical combinations which we call nations.[77]

Lorimer reaches back to a mythical era, a typical strategy of 19th century nationalism, which interlinks the natural male headed household as at the core of the operative state.[78] Robert Lansing, writing in the first edition of the *American Journal of International Law* in 1907, makes a similar point by stating that the 'inherent weakness of woman is still recognized in the states of the world, and the possession of sovereignty is deemed today a masculine prerogative just as it has been for thousands of years'.[79] Part of the colonising method was to remove women from governance so as to more fully resemble the Western male governance order. Lorimer ties the modern state to the possession of full internal control as masculinised governance.

Bluntschli aligns this perspective with the Church's role in the state:

> The French expression, *L'état c'est l'homme*, does not merely signify 'the State is Man in general' (*der Mensch im Groszen*), but 'the State is the man, the husband (*der Mann*) in general' as the Church represents the womanly nature in general, the wife (*die Frau*) … The highest conception of the State — which however has not yet been realised — is thus: The State is humanity organised, but humanity as masculine, not as feminine, the State is the man.[80]

Although Warner argues that too much can be read into the evolution of gendered nouns, Bluntschli clearly regards his use of pronouns as central to understanding the roles of the state and the Church and further that these pronouns offer guidance on how we ought to view international law.[81] While there may be little consistency in linguistic terms to the gender of words in any language, Bluntschli and others believed it was significant in both their own writing and how they articulated the nature of statehood.

Echoing Bluntschli, Westlake sets out the natural maleness of the state:

> The society of states, having European civilisation, or the international society, is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of the men who compose them.[82]

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77 Lorimer, above n 59, vol 1, 11.
78 Mazower, above n 8, 49–55.
79 Robert Lansing, 'Notes on Sovereignty in a State' (1907) 1 *American Journal of International Law* 105, 115.
80 Bluntschli, above n 1, 24, 32.
81 Warner, above n 6, 66–70.
82 Westlake, above n 59, 78.

While perhaps Westlake is using men in a generic sense, we must remember that when he was writing in 1894 women were yet to gain the vote at national level for legislatures (except in New Zealand), were excluded from public office and admitted to few universities and even then, often could not gain degrees.[83] Upon the foundation of the American Society of International Law in 1906 women were forbidden from becoming members.[84] The founders of the American Society of International Law were adamant that the impartiality and self-control necessary for the science of international law was entirely male.[85] In this era, any idea that 'men' was a generic term that included both sexes was rejected by courts and legislatures. For instance, during the 1867 debate on women's suffrage in the United Kingdom Parliament, an interpretation of 'man' as a generic term for both sexes was rejected.[86] Indeed, as late as 1914 in *Bebb v The Law Society*, the UK Court of Appeal found that 'persons' in the *Solicitors Act of 1843* was not intended to include women.[87] As such, the generic in the 19th century was male.

Westlake often uses the female pronoun for states and, as with Phillimore, not always in a negative sense, albeit he still relies on gendered stereotypes. Indeed, Westlake was a supporter of married women's property rights but argued that 'it will always be necessary to preserve to the husband some degree of authority'.[88] Westlake's description of the state is different to Bluntschli's but both maintain that the composition of the state as male makes the state sovereign. Westlake is clear that the creation and maintenance of international law is firmly tied to constituent power within the state and, in particular, that consent within international law is linked to masculine society:

> [T]he social nature of man, and his material and moral surroundings … are the ultimate source of international law … And consent is the immediate source of international law, in the sense that the social nature of man and his material and moral surroundings may furnish principles of action, but only the consent of a society can establish rules.[89]

Westlake takes this a step further, including himself and other international lawyers as central to international law's composition, '[t]he opinions of private writers must of course be counted towards the general consent of men, especially when the writer's reputation proves that he represents many persons besides

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83 The first woman to gain a degree (a PhD) was Juliana Morell in Spain in 1608. 1732 saw the first woman to teach at a European University, Laura Bassi. Wesley College opened in the US in 1839. 1880 was the first year that women in the UK graduate with degrees. From 1891, German women could attend lectures. In 1901, women were allowed into the Chinese education system. In 1910, Professor Millicent MacKenzie became the first female professor in the UK. 1947 Cambridge was the last UK university to allow women to graduate.

84 Alona E Evans and Carol Per Lee Plumb 'Women and the American Society of International Law' (1974) 68 *American Journal of International Law* 290, 290.

85 Benjamin Allen Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (Oxford University Press, 2016) 74–5.

86 Carole Pateman, *The Disorder of Women: Democracy, Feminism, and Political Theory* (Polity Press, 1989) 212.

87 *Bebb v The Law Society* [1914] 1 Ch 286, citing *Solicitors Act 1843* (UK) 6 & 7 Vict, c 73.

88 Quoted in Ben Griffin, 'Class, Gender, and Liberalism in Parliament, 1868–1882: The Case of the *Married Women's Property Acts*' (2003) 46 *The Historical Journal* 59, 65. Westlake was for a brief period an MP at Westminster.

89 Westlake, above n 59, 81.

himself'.[90] This is an early iteration of art 38(4) of the *Statute of the Permanent Court of Justice* and art 38(d) of the *Statute of the International Court of Justice*.[91] Certainly, he regards international legal academia as a fraternity whose masculine reasonability is mirrored both internally and externally by the state.[92] This notion of the fraternity of scholars is replicated elsewhere including in Pomeroy's idea of the 'brotherhood of nations'.[93] The characteristics and symbolism connected to the international legal academic was established in the absence of women and in repetition of a process of exclusion of women from the public sphere of action that dates back to Greek philosophy.[94] Homosociality is put at the core of international legal academia's right to influence legal development.[95]

Evident in these writings is the intermixing of civilisational views with gendered assumptions. In particular, a form of dualism, the civilised and non-civilised mirroring the Western dichotomy of masculine and feminine.[96] What becomes plain in these texts is the combination of the feminine as a negative characteristic linked to either weakness or failure to attain statehood and as a justification for imperialism. Those not reaching the highest echelons of civilisation are thus not first order states or states at all due to their feminine attributes:

> Alexander the Great … He wished to wed the manly spirit of the Greeks with the feminine quickness and susceptibility of the Asiatics. The East and the West were to be united and mingled together, and from the mingling of both, as in a cup of love, the new mankind was to issue … The mingling of diverse elements was unnatural, the leading idea itself was not clear.[97]

Westlake intermixes his civilisational views of states with particular gendered assumptions, albeit he, unlike most of his contemporaries, is willing to admit China, Japan, Persia and Turkey as civilised states, though differently civilised to the US and Europe:[98]

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[90] Ibid 84.

[91] *Statute of the Permanent Court of International Justice* art 38(4); *Statute of the International Court of Justice* art 38(d).

[92] This idea that academics could be a source of law was rejected outright by other authors at the time. See, eg, Carty, above n 9, 98.

[93] See also William Edward Hall, *Treatise on International Law* (Clarendon Press, 3rd ed, 1890) 7; John Norton Pomeroy, *Lectures on International Law in Time of Peace* (Riverside Press, 1886) 6. Though there were others who were not so complementary about their predecessors, see Richard Wildman, *Institutes of International Law: International Rights in Time of Peace* (William Benning & Co, 1850) vol 1, 26.

[94] Rebecca Grant, 'The Quagmire of Gender and International Society' in V Spike Peterson (ed), *Gendered States: Feminist (Re)Visions of International Relations Theory* (Lynne Rienner Publishers, 1992) 83, 85–6.

[95] Sharon R Bird, 'Welcomes to the Men's Club: Homosociality and the Maintenance of Hegemonic Masculinity' (1996) 10 *Gender & Society* 120.

[96] Susan Bordo, 'Feminist Scepticism and the "Maleness" of Philosophy' (1988) 85 *The Journal of Philosophy* 619, 626.

[97] Bluntschli, above n 1, 27. This harking back to Ancient Greece and the negative implications for women as political actors in utilising this era is discussed in Eva Cantarella, *Pandora's Daughters: The Role and Status of Women in Greek and Roman Antiquity* (Johns Hopkins University Press, 1987).

[98] Westlake, above n 59, 102.

> The case of Turkey must in this part of our subject be left out of sight, because of the anomalous position of that empire, included on account of its geographical situation in the political system of Europe, but belonging in other respects rather to the second group of contrasted populations. She may benefit by European international law so far as it can be extended to her without ignoring plain facts, but her admission to that benefit cannot react on the statement of the law, which is what it is because it is the law of the European peoples.[99]

This is echoed in Lorimer, who argues that 'at the stage of civilisation which they have reached, their intercourse may best be conducted with a view to the attainment of their freedom as separate political entities'.[100] But he also maintains that some groups will never attain this status; '[e]ven now the same rights and duties do not belong to savages and civilised men, and consequently, it not ignorance alone which prevents the former from discovering the law by which the rights and duties of the latter are defined'.[101]

Lorimer sets forth that just as individuals within states are naturally unequal, women are not capable of being constituents, so too states:

> Even within the sphere of plenary political recognition, States are no more equal to each other, in the absolute sense, than their citizens are equal. They differ in powers, and consequently in rights, and the recognition which they are entitled to claim from each other is proportioned to their power and rights.[102]

Further, he argues that states are 'entitled to jural recognition by other States, just as a citizen in a corresponding position is entitled to the suffrage, or a person is entitled to buy, and to sell, and to marry'.[103] This analogy relies upon an acceptance that as citizens women do not hold corresponding positions to men and are thus not as entitled to buy, sell and marry. Lorimer utilises gendered personification to note the difference between masculine and feminine characteristics and how these are manifested in juridical structures both internally and externally. In fulfilling the requirements of internal and external control, states must possess the juridical structures maintained by European states as a hallmark of Western civilisation. Just as gender inequality is a natural part of internal governance so too state inequality in external governance and thus inequality between states is to be expected.

Koskenniemi suggests that by the time of publication of Lorimer's work divisions between civilised and uncivilised states were considered crude, but Bluntschli and others continued to employ similar tropes and divisions well into the start of the 20th century.[104] Combined with this civilisational view is a disregard for women, due to their lack of rationality and reasonability, as not possessing the agency necessary for competent government. Groups holding, or

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[99] Ibid 103.

[100] Lorimer, above n 59, 5–6.

[101] Ibid 13. Even more objectionably, Lorimer goes on to suggest that for some people, slavery may be an option: 'slavery itself, indeed, in all its forms, except perhaps when it is employed, under very stringent regulations, as an educational institution for the benefit of the inferior races of mankind': at 32.

[102] Ibid 103.

[103] Ibid 135.

[104] Koskenniemi, above n 3, 131. For an excellent overview of the evolution of civilisation language see Martin Clark 'A Conceptual History of Recognition in British International Legal Thought' (2018) 87 *British Yearbook of International Law* (forthcoming).

purporting to hold, feminine stereotypical attributes, would never reach the juridical status of statehood as their feminised governance was innately uncivilised. There is variance amongst these authors. Phillimore was, for example, willing to recognise the potential for women ambassadors, quite a radical claim given that the UK's Foreign and Commonwealth Office did not admit women until the 1950s.[105] Nonetheless, though the degree of racism and misogyny varies there remains a clear link between masculinity and statehood and femininity and the incapacity to fulfil the characteristics of the state. Misogyny and racism go well beyond Lorimer and are clearly evident among his 'liberal' fellow international law professionals who founded modern international law.[106] Explicit reliance on Lorimer is now rightly regarded as highly problematic and, as this section demonstrates, his fellow travellers also grounded their views of international law and statehood in sexism and racism.

V   PERSONIFICATION AND THE STATE BEYOND LAW

If personification aims to produce a particular reaction in its audience, then what is the purpose of using it regarding the state? What has been the effect of personification and the admixture of masculine or feminine traits upon our understanding of the state's internal constitutional structure and its external actions?[107] Personification is not a single process, each invocation varies the attributes singled out impacting on our view of the object.[108] Focusing on the legal text alone obscures the context in which 19th century personifications were invoked. The context in which a pronoun is sexed, independent of its linguistic heritage, is significant. The following section sets out how identity, sex, gender and governance were regarded while these first modern international lawyers were creating the groundings for their profession and international law.

Politics is mediated by 'systems of cultural representation'.[109] Cynthia Weber's identification of statecraft as 'mancraft' and the genderisation of sovereignty unsettles the accepted formalist and pervasive ideals of the state born in the 19th century.[110] Identity and gender, in particular, are crucial to the conception of the modern nation and citizenship. As gender and power are intertwined, gender is also significant in how we understand relations amongst states.[111] The nation state as it emerged into its contemporary international legalised form is equally suffused with identity and gender as that mediated by

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[105] Helen McCarthy, *Women of the World: The Rise of the Female Diplomat* (Bloomsbury, 2014) 228.

[106] Martti Koskenniemi, 'Race, Hierarchy, International Law, Lorimer's Legal Science' (2016) 27 *European Journal of International Law* 415, 415.

[107] Stephen D Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999) 152.

[108] Lakoff and Johnson, above n 34, 33.

[109] Glenda Sluga, 'Identity, Gender, and the History of European Nations and Nationalisms' (1998) 4 *Nations and Nationalism* 87, 88, quoting Joan Landes 'Representing the Body Politic: The Paradox of Gender in the Graphic Politics of the French Revolution' in S Melzer and L Rabine (eds), *Rebel Daughters: Women and the French Revolution* (Cornell University Press, 1988) 2.

[110] Cynthia Weber, *Queer International Relations: Sovereignty, Sexuality and the Will to Knowledge* (Oxford University Press, 2016) 21.

[111] Joan W Scott, 'Gender: A Useful Category of Historical Analysis' in Elizabeth Weed (ed), *Coming to Terms: Feminism, Theory, Politics* (Routledge, 1989) 81, 94.

politics at the domestic level.[112] Moira Gatens explains that '[p]erhaps the metaphor of the human body is an obvious way of describing political life; so obvious that the metaphor passes into common usage, no longer mindful of its origins' that this practice has placed women at social and political disadvantages.[113] This political life, however, is a 'dream of men' or male 'psychosis' of which women and other groups were not part.[114] Women did not possess what was required to participate fully in governance, as the parameters of the state had already been set by the masculine ideal.[115]

The modern notion of the state as a person emerged in the writings of John Locke, Niccolò Machiavelli, Benedictus de Spinoza and Thomas Hobbes.[116] The usage of the human body remains ubiquitous and no alternative metaphor has replaced it.[117] The state did not exist without the prince and the prince did not exist without the state and, as such, man and state became intertwined as they took their modern form.[118] Hobbes' Leviathan is a superman who brings peace to individual men of whom he is composed. Hobbes, Spinoza and Locke used the human, as composed of soul and body, to symbolise the relationship between sovereign authority and citizens.[119] For Spinoza, the duality of body and mind and that inter-relationship was fundamental to understanding reality.[120] His rejection of the personification of God due to the miscomprehension that follows reinforces both the ramifications of personification and his decision to utilise the body in broader political discourse.[121]

The notion of the state as a body, and critically as a European male body, appeared alongside the creation of national symbols such as flags and anthems or other 'invented traditions'.[122] Eric Hobsbawm argues that from 1740 'the personification of the "nation" in symbol or image, either official, as with Marianne and Germania, or unofficial, as in the cartoon stereotypes of John Bull, the lean Yankee Uncle Sam and the "German Michel"' sat alongside other national symbols to morph into our perceptions of what has always existed as the

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112 Peterson, utilising queer theory, interrogates how, throughout history, heteronormativity reproduces inequality through statehood. See Peterson, above n 39.

113 Moira Gatens, *Imaginary Bodies: Ethics, Power and Corporeality* (Routledge, 1996) 23.

114 Ibid 26.

115 Ibid.

116 Ernst H Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press, 1957) 241.

117 Erik Ringmar, 'On the Ontological Status of the State' (1996) 2 *European Journal of International Relations* 439, 439–43; Alexander Wendt, 'The State as Person in International Theory' (2004) 30 *Review of International Studies* 289, 289–90. For a critique of Wendt's position, see Peter Lomas, 'Anthropomorphism, Personification and Ethics: A Reply to Alexander Wendt' (2005) 31 *Review of International Studies* 349.

118 Ringmar, above n 117, 457; Gatens, above n 113, 21–2.

119 Ringmar, above n 117, 457; Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'Etat and Its Place in Modern History* (Douglas Scott trans, Yale University Press, 1962) 210–15 [trans of: *Die idee Staatsraäsib ub der neuren Geschichte* (first published 1925)]; Thomas Hobbes, *Leviathan* (Cambridge University Press, revised ed, 1996); Saccaro-Battisti, above n 31, 35; Gatens, above n 113, 22.

120 Benedictus de Spinoza, *Ethics* (W H White and A H Stirling trans, Wordsworth Editions, 2001) 1–43 [trans of: *Ethica, ordine geometrico demonstrate* (first published 1677)].

121 See also Michael Bratman, *Faces of Intention and Agency* (Cambridge University Press, 1999) 297, 298–9.

122 Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger (eds), *The Invention of Tradition* (Cambridge University Press, 2000) 8.

natural order.[123] For instance, in the tumult of Jacobin France, radical forces of reaction and treachery were linked to 'the disorder of women', which, in turn, began a political and societal process of withdrawing women to the private sphere.[124] Wars in Europe against the French Revolution and Napoleon were waged by invoking patriotism and morality both of which became central to emerging national consciousness.[125] As part of this process, the activities of political women in the pre-revolutionary period were negatively depicted and the boundaries between public and private, between orders, genders and religions, which had been blurred, re-emerged.[126] Glenda Sluga suggests that both those in favour and against the revolutionary ideals of France 'prophesied and even diagnosed social revolution in the blurring of gender hierarchies. Any activity by women in public that challenged the gender "order" could be depicted as subversive'.[127] Using the female form during the revolution was intended to demonstrate a break from the Kingdom of France which had often been depicted as a male figure. Thus, after the French Revolutionary period depictions of Marianne became unpopular.[128] It was not until the mid-19th century that Marianne was revived, before falling out of favour after the Second Republic and returning again after the restoration of the Third Republic.[129]

In the UK, following the French Revolution, drawing contrasts between patriotic English women as distinct from their revolutionary and unfeminine French counterparts was in turn linked to what made the UK strong and rational.[130] George Mosse demonstrates a similar reaction in Germany to the forces of Napoleon that set the tone for a form of bourgeois respectability centred on a particular view of masculinity and nationalism which in the 20th century became an essential element of German national identity.[131] The growing import of both the official character of the state as male is evident as is the notion that politically active females were subversive and would inevitably lead to revolution. Indeed, this seems to be borne out within international legal writing. Bluntschli argued that women in politics do harm and that the 'history of Rome, the French Revolution, the courts of the French kings, all tell the same tale'.[132] Westlake similarly asserted, regarding France's denouement following the fall of Napoleon, that it 'should be deprived of the immense conquests *she*

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[123] Ibid 7.

[124] Sluga, above n 109, 90–1; Pateman, above n 86, 17.

[125] George L Mosse, *Nationalism and Sexuality: Respectability and Abnormal Sexuality in Modern Europe* (Howard Fertig, 1985) 6.

[126] Joan B Landes, *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press, 1988) 147; Sluga, above n 109, 90–1. There were some exceptions of course, such as England's Queen Elizabeth I, but here we have a virgin Queen with the head and stomach of a man.

[127] Sluga, above n 109, 91.

[128] Maurice Agulhon, *Marianne into Battle: Republican Imagery and Symbolism in France, 1789–1880* (Janet Lyod trans, Cambridge University Press, 1981) [trans of: *Marianne au combat*: *L'imagerie et la symbolique républicaines de 1789 à 1880* (first published 1979)].

[129] Ibid.

[130] Sluga, above n 109, 91. There was a similar withdrawal of women to the private sphere in US debate. See Samuels, above n 37, 13–14.

[131] Mosse, above n 125, 6.

[132] Bluntschli, above n 1, 193.

had made, and accordingly … the new boundary of France was fixed and she renounced all that lay beyond it, without saying to whom'.[133]

19th century philosophers, across a broad spectrum, from Georg Wilhelm Friedrich Hegel to Giuseppe Mazzini, made the differentiation between the public and the private and the centrality of the family core elements of state organisation.[134] As Genevieve Lloyd argues, '[t]he maleness of the Man of Reason … is no superficial linguistic bias', and the maleness of culture as opposed to the femaleness of nature, to which reason is opposed, is a central feature of Western philosophical thought.[135] The 19th century emergence of the bourgeoisie classes and the differentiation between the public and private sphere are central elements of nationalist gender identity.[136] Middle class values based upon family and individualism became the basis on which sexual difference and inequality became the foundation for participation in the public sphere.[137] Conservative societal perspectives underscored political action and was the impetus behind regarding the state as reliant upon masculine qualities of reasonability and independence, which became central to the perception of the state within international law. The male state takes the public role of responsible government, whereas women were left in the private sphere as is necessary for the patriotic state.

The rise of nationalist propaganda in the 18th and 19th centuries created idealised notions of masculinity as at the core of both the nation and the state. Women, on the other hand, were shallow and frivolous but were also the guardians of continuity, respectability and the unchangeability of the state.[138] This is realised in the political cartoons of the time. For instance, in *Punch*, Hibernia is depicted as a virginal maiden, threatened by Fenians and other Irish radicals and sorely in need of rescue by paternal John Bull.[139] What is peculiar to Hibernia's character in these cartoons is her helplessness and passivity. Britannia is most frequently depicted as a warrior woman, often wearing a helmet and armour and linked to the figure of the charioted Boadicea.[140]

Yet, these depictions are not a call to arms for women; rather they hark back to Athena born of Zeus, emerging from his forehead, emphasising the male line of succession. Such classical figures also invoke the Athenian *polis,* which

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[133] Westlake, above n 59, 94 (emphasis added).

[134] Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (Samuel W Dyde trans, Cosimo, 2008) 193 [trans of *Grundlinien der Philosophie des Rechts* (first published 1821)]; Jean Bethke Elshtain, 'Sovereignty, Identity, Sacrifice' (1991) 58 *Social Research* 545, 547–8; Giuseppe Mazzini, *The Duties of Man* (Chapman & Hall, 1862) 95–7; John Stuart Mill, *The Subjection of Women* (Longmans, Green, Reader and Dyer, 1869) 60, 81; Sluga, above n 109, 93.

[135] Genevieve Lloyd, *The Man of Reason: 'Male' and 'Female' in Western Philosophy* (Routledge, 2nd ed, 1993) xx.

[136] Sluga, above n 109, 93.

[137] Ibid 91; Lloyd, above n 135.

[138] Mosse, above n 125, 17–18.

[139] C L Innes, 'Virgin Territories and Motherlands: Colonial and Nationalist Representations of Africa and Ireland' (1994) 47 *Feminist Review* 1, 6, 8.

[140] Innes, above n 139, 6. The gendering of Ireland as female had begun much earlier. See Rosalind and Stallybrass, above n 65, 157–71.

according to Peterson 'exemplifies the gendered pattern of state-making'.[141] While the Amazonian state might suggest alternate classical invocations of women as rulers and warriors, their soldering was insufficient to regard them as rational actors and Amazonian governance structures were not accepted as part of the norm.[142] Britannia and Germania are gendered feminine but 'this iconography operates despite, or rather *because* of the actual experiences of their female populations'.[143] John Bull represents the everyday active male citizen. Hibernia — which of course was part of the UK at this point — resonates with the imperialist preference of the era where the weak feminine state requires protection from its own barbarous population.[144]

Athena is an armoured virgin whose sexless virtue sets her apart and whose armour renders invisible her sexual characteristics.[145] Hibernia, as an unarmoured female, reflects women as they are perceived to be weak and in need of protection from Britannia, an armoured personification not of every-woman but of a virtuous armoured virgin free from the inadequacies of womanhood such as childbirth. While John Bull or Uncle Sam may represent the typical Englishman or American citizen, Britannia is not relatable, she is not a familiar citizen rather she represents something apart.[146] Britannia is not a female role model of political activism, nor is she intended as a paradigm for women's leadership: she, like Athena, on whom she is modelled, is rather a mythical, abstract ideal.[147] Female personification represents civil and martial virtues but the active state is male.[148] The UK, seemingly without contradiction, is both Britannia and John Bull.

Jean-Jacques Rousseau identified the 'disorder of women' as bringing a state to ruin through their innate subversive nature and as apart from the natural state of men as rational actors.[149] Rousseau placed patriarchal patriotism at the centre of both the new nation state and the citizen and the notion of fatherland was of particular import to his work as was the ideal of the Spartan mother who brings

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[141] V Spike Peterson 'Security and Sovereign States' in V Spike Peterson (ed), *Gendered States: Feminist (Re)Visions of International Relations Theory* (Lynne Rienner Publishers, 1992) 35.

[142] Grant, above n 94, 88–9.

[143] Andrew Parker et al, 'Introduction' in Andrew Parker et al (eds), *Nationalisms and Sexualities* (Routledge, 1992) 1, 6 (emphasis in original).

[144] Lorimer was particularly scathing of the Celts' ability to self-govern:

> It is conceivable that a corresponding ethnical divergence may count for more than we are willing to admit amongst the causes which have hitherto rendered own Celtic problem insoluble … Germs of incipient State-existence may possibly come to light when the old Brehon laws and clan-system have been carefully and dispassionately looked into.

Lorimer, above n 59, 97. America is also at times portrayed as Britannia's daughter. See Samuels, above n 37, 8–11.

[145] Warner, above n 6, 63–177.

[146] Like Marianne, depictions of Britannia and her links to Empire or constitution evolved: ibid 38–42.

[147] However, in the late 20th Century UK Prime Minister Margaret Thatcher was at times depicted as Britannia: ibid.

[148] Grant, above n 94, 89. See also Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Zed Books, 1986).

[149] Jean-Jacques Rousseau, *Politics and the Arts: Letter to M D'Alembert on the Theatre* (Allan Bloom trans, Cornell University Press, 1968) 100–1, 109 [trans of: *Lettre à M D'Alembert sur les spectacles* (first published 1758)].

up her sons to die in battle. The willingness to serve and protect the motherland is predicated on a mother's presence in bringing up the child to this civic virtue in the private family sphere.[150] These gendered ideals of statehood and citizenship were central to his thinking of what the state ought to be.[151] As Sluga argues:

> Rousseau suggested that it was *only* through the cultivation of familial interests in the image of the social order that patriotism, loyalty to a larger community, defined by the territorial boundaries of the state, could be assured. The state became the fatherland and the family the microcosm of society. In Rousseau's schema the father's place in the family was affirmed and consolidated by his public role … just as the female's destiny as wife and mother defined both her domestic and national role.[152]

The motherland forms part of homely belonging that is central to many national anthems.[153] But here

> [t]he mother of the motherland is not any mother; she is certainly not a 'working' mother, for she is a totally 'devoted' mother ready to service those who need her. That is, *she is a woman totally subjugated to the patriarchal rule of the father*.[154]

As such, motherland and fatherland are completely intertwined:

> It is because of the superposition of these two functions that popular language refers to this homeland/motherland as fatherland when it is its law and order … the 'actual' fatherland is the land … of governmental and sovereign belonging.[155]

Patriotism only survives in the miniature fatherland, the home, when it is also the site of justice and order.[156] But these invocations are not without their contradictions.

There are few references to motherland or fatherland within international legal texts but, in the context of imperial or colonial expansionism, the treatment of states as childlike or developing is common.[157] European states act as parents

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[150] This was also part of Hegel's *Kriegstaat*: Jean Bethke Elshtain, 'Sovereignty, Identity, Sacrifice' in V Spike Peterson (ed), *Gendered States: Feminist (Re)Visions of International Relations Theory* (Lynne Rienner Publishers, 1992) 141, 143. See also the sacrifice of Australian mothers to fulfil national duty of motherhood: Marilyn Lake, 'Mission Impossible: How Men Gave Birth to the Australian Nation: Nationalism, Gender and Other Seminal Acts' (1992) 4 *Gender and History* 305, 307.

[151] Elshtain, above n 134, 546–8; Sluga, above n 109, 94; Jean-Jacques Rousseau, *Emile, or on Education* (Allan Bloom trans, Penguin, 1991) [trans of: *Émile ou de l'éducation* (first published 1762)].

[152] Sluga, above n 111, 93–4 (emphasis in original). See Rousseau, above n 149, 340; Ghassan Hage, 'The Spatial Imaginary of National Practices: Dwelling–Domesticating/Being–Exterminating' (1996) 14 *Environment and Planning D: Society and Space* 463, 469.

[153] Hage, above n 152, 463; Joanne P Sharp, 'Gendering Nationhood: A Feminist Engagement with National Identity' in Nancy Duncan (ed), *BodySpace: Destabilising Geographies of Gender and Sexuality* (Routledge, 1996) 97, 99.

[154] Hage, above n 152, 469 (emphasis in original). This bound up with the caring work which is largely done by women within a state: see R E Pahl, 'The Search for Social Cohesion: From Durkheim to the European Commission' (1991) 32 *European Journal of Sociology* 345, 352.

[155] Hage, above n 152, 475–6.

[156] Pateman, above n 86, 25.

[157] Roxanne Lynn Doty, *Imperial Encounters: The Politics of Representation in North–South Relations* (University of Minnesota Press, 1996) 79; Weber, above n 110, 47.

offering both caring and nurturing aspects as mothers, but also the firm hand of fathers when discipline is necessary. The differing views of 19th century international lawyers toward Liberia, Japan or Turkey as states capable of at least passing as somewhat civilised, versus those territories where such progress toward maturity was impossible, stand as testament to the utilisation of parental imagery, which survived the creation of mandate and trust territories in the 20th century.[158]

In the domestic sphere challenges from both feminism and socialism to the maleness of the state pushed against the dominant imagery of the 19th century. But the debate remained within the framework set by the male state.[159] Discussing John Stuart Mill and *The Subjection of Women*,[160] Laura Mayhall argues

> [i]n order to elevate women to the sphere of the political, Mill must first render their oppression in masculine terms. Arguing by analogy, therefore, he [Mill] removes their oppression from the sphere of the merely domestic and offers them the possibility of exercising their own will. Women must assert the masculine characteristic of independence …[161]

The suffragists also adopted masculine structures employing the language of emancipation utilised by the anti-slavery and labour movement.[162] The constitutional jurist Albert Venn Dicey directly critiqued any attempt to appropriate this language, arguing that 'the women of England cannot now be "emancipated", for they have never been slaves … They cannot be emancipated, because they are born free, are free, and will remain free whether they obtain parliamentary votes or not'.[163] Thus, as ever, in attempting to enter male discourse women articulated their political and social voicelessness within the male state structure.

The intersectional nature of the harm produced in these texts is also apparent. All women, alongside all other non-white males, were not rational or mature enough for governance and thus shared this space. While women, in what would become the Global North, were moving out of the private sphere through a variety of women's movements, women living in so-called feminine states were burdened not only with imperialism and its legacies but also a position in societies often dictated by Western constitutional models that excluded them and failed to acknowledge their agency — a process aided and supported by international law.

Two points come to the fore. First, in the 19th century the state can only be supported by women acting according to their correct, virtuous feminine nature in the private sphere. Second, any breaking away from this role would lead to the breakdown on the state into revolution. Thus, the strong state, the state that lasts and remains above revolution, was the one that personified the masculine traits

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158 Matthew Craven, 'Statehood, Self-determination, and Recognition' in Malcom D Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 201, 237–8.

159 Laura E Nym Mayhall, 'The Rhetorics of Slavery and Citizenship: Suffragist Discourse and Canonical Texts in Britain, 1880–1914' (2001) 13 *Gender & History* 481, 485.

160 See generally Mill, above n 135.

161 Mayhall, above n 159, 488.

162 Ibid 481–2.

163 A V Dicey, 'Woman Suffrage' (1909) 210 *Quarterly Review* 276, 285–90.

of reasonability, strength, resolve and rationality.[164] These were the states that succeed and are the exemplars of civilisation at its height. In doing so, gender difference became inculcated as part of national and state identity.[165] Nationalism and statehood became intertwined just as modern international law was taking form. Using personification to categorise states was of particular utility to European imperialist projects, making Eurocentric notions of statehood global and steadfast.

VI   IMPACT ON THE PRESENT

Ghassan Hage writes that 'nations, like any social reality, never reach a stage where they can just 'exist'; they are not only constructions, but also *continually in the making*'.[166] In this iterative process there is an ongoing need to revisit the language that describes states, to retell narratives and to ensure that the story's culmination is a state able to withstand threats from outside or usurpation from within. Martin Clark demonstrates that the blatant civilisation language of the 19th century simply morphed into other forms.[167] Cynthia Weber aptly describes the ongoing relationship between underdeveloped, undevelopable and gender.[168] While challenges to the narrative of the bourgeois nation state, from within the municipal political and social realm, overturned elements of these constructions, we still tackle the remains of that discourse in international law.[169] The personification of states as motherlands and fatherlands, as Britannia or Uncle Sam, as he or she and as children, predates the 19th century. But, it was in this period that international lawyers, to fit their often colonial, misogynist and imperialist world view, used personification to articulate the form that international law ought to take. Today, internal and external self-mastery, sovereignty as capacity for government, fatherland and recognition are at their purest as states seek recognition by the United Nations.[170] But, this validation pre-dates the *Charter*, self-mastery as a characteristic of statehood was a pre-eminent theme within 19th century international legal scholarship and while certain linguistic tropes have disappeared, others stay visible and their impact remains pungent.

The 19th century personified state led to some of the 20th century's most abhorrent moments, from fascism and totalitarianism to genocide.[171] Conceiving the state as an organism (or personified collective) enabled 'normative claims on behalf of state persons themselves, or as *raison d'état*'.[172] In *The Origins of Totalitarianism*, Hannah Arendt explains how, by such contrivances, criticism of one part of society or a single individual is criticism of the leadership of totalitarian states, as all formed the same collective organism.[173] The devastating

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164   Peterson, above n 141, 38–41.
165   For the importance of narrative, see Ringmar, above n 117, 457.
166   Hage, above n 152, 465 (emphasis in original).
167   Clark, above n 104.
168   Weber, above n 110, 47.
169   Peterson, above n 141, 43.
170   Hage, above n 152, 481.
171   Wendt, above n 117, 289–92.
172   Ibid 292.
173   Hannah Arendt, *The Origins of Totalitarianism* (André Deutsch, 1968) 332–3.

consequences flowing from state personification explains why organismic state descriptions are rejected across most social sciences.[174] The contribution by 19th century international lawyers' proclivity for personification and organismic language to these 20th century outcomes may be indirect, but it equally cannot be overlooked.

The influence of these legal academics on those that read their work is plain. For instance, Bluntschli had a long influence on both the practice and teaching of international law in Canada, Europe and the US.[175] Woodrow Wilson studied Bluntschli and his study of international law affected his later views on the settlement that followed 1919 including the creation of new states.[176] Oppenheim studied under Bluntschli.[177] Bluntschli's work was translated into French, Hungarian, Russian, Spanish and, demonstrating its spread, Chinese.[178] A French jurist writing in 1885 stated that his work was 'almost the only one which is today consulted by the diplomats and by all those obligated by their profession to possess some notion of international law'.[179] His work became part of the Oxford syllabus (which was then taught across the UK) and influenced writers such as Elvin Jellinek and William Hall.[180]

Today, these writers are still cited and quoted with approval across international law textbooks. The 'primitivist' view of the state, as at the centre of international law, pervades the contemporary discipline.[181] For example, in Malcom Shaw's *International Law*, Westlake is cited regarding territory, Hall concerning state practice and Phillimore in relation to the Permanent Court of International Justice and state jurisdiction.[182] In James Crawford's most recent edition of *Brownlie's Principles of International Law*, Westlake is cited on the law of sea and the common law tradition within international law and Hall on statehood and territory.[183] Antonio Cassese cites Bluntschli, Lorimer, Hall and Westlake.[184] In Malcom D Evan's *International Law*, these authors appear across several chapters.[185] Bluntschli, Lorimer and Phillimore are mentioned by Stephen Neff in his history of international law, while in his chapter

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174 Wendt, above n 117, 289–92.
175 Betsy Baker Röben, 'The Method behind Bluntschli's "Modern" International Law' (2002) 4 *Journal of the History of International Law* 249, 255.
176 Ibid 255–6.
177 Mathias Schmoeckel 'Lassa Oppenheim (1858–1919)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1152, 1152.
178 Carty, above n 9, 105.
179 Pradier-Fodéré, quoted in ibid 105.
180 Duncan Kelly, 'Revisiting the Rights of Man: Georg Jellinek on Rights and the State' (2004) 22 *Law and History Review* 493; Hall, above n 93, 47, 49, 61, 84.
181 David J Bederman, 'The 1871 *London Declaration*, Rebus Sic Stantibus and a Primitivist View of the Law of Nations' (1988) 82 *American Journal of International Law* 1, 2.
182 Malcom Shaw, *International Law* (Cambridge University Press, 7th ed, 2014) 21, 363, 764.
183 James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 8th ed, 2012) 62, 260.
184 Antonio Cassese, *International Law* (Oxford University Press, 2nd ed, 2005) 31, 126, 143.
185 Malcom D Evans (ed), *International Law* (Oxford University Press, 2014, 4th ed) 16, 29, 211.

Koskenniemi recognises the importance of Westlake to statehood.[186] Lorimer and Westlake's roles in setting out the terms of state recognition in the 1880–1890s, its distillation and partial sanitisation through Oppenheim into the 1919 Peace Conference and beyond is documented by Clark.[187] Matthew Craven, singularly amongst these texts, takes a critical approach highlighting the impact of civilisational language, promulgated by Hall, Lorimer and Westlake. Their ideas, he notes, did not vanish but rather were remodelled and given institutionalised form in the League of Nations.[188]

Koskenniemi suggests that:

> For a long time, Europe's use of international law was determined from its position of overwhelming power. Vitoria was a scholar of empire and Bluntschli — the first to write about universal human rights in a manual on international law — dined with Bismarck. For these men, the fact that international law was both European and universal peaked in the practice of the *mission civilisatrice* of their particular country.[189]

What is striking about Koskenniemi is that while he recognises international law's imperialistic foundation, he fails to find these scholars problematic.[190] Bluntschli is commended for his universality and human rights, never mind that his universality was a fraternity where women were absent as juridical incompetents, incapable of acting as constituents and so too the states he believed resembled their sensitivities. Male universality and the ideal of the masculine state provided the basis of both Bluntschli and his contemporaries' scholarship. Women were not present as constituents within the state and those states that had feminised attributes were not members of the international legal order. Lorimer is widely recognised as highly problematic but what is perhaps more inexcusable is that he tends to be presented as an outlier.[191] Koskenniemi states that while 'most of them were liberals of one or another sort … Lorimer espoused an openly racist ideology'.[192] In fact, as the direct quotes in this piece demonstrate, their liberalism was based in racism and misogyny and they were just as open with it as Lorimer.

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[186] Stephen C Neff, 'A Short History of International Law' in Malcom Evans (ed), *Internaitonal Law* (Oxford University Press, 4th ed, 2014) 3, 16; Martti Koskenniemi, 'What is International Law For?' in Malcolm Evans (ed), *International Law* (Oxford University Press, 4th ed, 2014) 29, 33.

[187] Martin Clark, 'British Contributions to the Concept of Recognition during the Interwar Period: Williams, Baty and Lauterpacht' in Robert McCorquodale and Jean-Pierre Gauci (eds), *British Influences on International Law 1915–2015* (Brill Nijhoff, 2016) 110, 113–17.

[188] Craven, above n 158, 211–12, 237–8. See also Matthew Craven, 'The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law' in Luigi Nuzzo and Miloš Vec (eds), *Constructing International Law: The Birth of a Discipline* (Vittorio Klosterman, 2012) 363.

[189] Martti Koskenniemi, 'International law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113, 117.

[190] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2006) 476, 479. For discussions on Lorimer, Bluntschli and Merignac and the countervailing arguments of Calvo, see Emmanuelle Jouannet 'Universalism and Imperialism: The True–False Paradox of International Law' (2007) 18 *European Journal of International Law* 379, 381–4.

[191] Tierney and Walker, above n 56, 409–10.

[192] Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 *European Journal of International Law* 415, 415.

Woman as nation, or what Peterson describes as 'heterosexist ideology', underpins these texts:

> [E]xemplified when European colonizers used notions of bourgeois 'respectability' (read: heteronormative, well-bred) to legitimate their domination of 'Others' and when any state power justifies foreign interventions as 'rescue/civilising missions', ostensibly to 'save' women from oppression by their 'own' men.[193]

In the imperial context personifications transferred gendered structures beyond Europe, muting women on whom imperialism bared down. States categorised to possess feminine characteristics were incomplete making colonisation an imperative. Failure to account for the gendered context of the creation of modern statehood in these texts where half the population are silenced perpetuates their authority into the 21st century.

The *Montevideo Convention*'s criteria on statehood are most often presented in contemporary textbooks as neutral qualities of statehood. Yet the permanent population, the defined territory, possession of a government and capacity to enter into relations with other states are demonstrated to be quite the opposite.[194] Each of these criteria operate upon a particular set of assumptions that, as Orford argues, has 'no place for those portrayed as unruly, disordered, subversive, primitive or irrational'.[195] To be a feminine state is to be incomplete.[196] To function within international law, a state must cohere to these stereotypes and scholars demonstrate that such underlying assumptions continue to resonate. This piece demonstrates that this can be directly drawn from the work of 19th century scholars.

Full-blown personifications in the 19th century form rarely appear but when they do they draw from the same socialised stereotypes. Gendered rhetoric is common in discussions of 'Responsibility to Protect' or humanitarian intervention. Paradigmatically invoked during the 2002 invasion of Afghanistan, it was replete with narratives of 'muscular' intervention in which the 'masculinised hero (the UN, NATO or the US) rescues the feminised developing state'.[197] Before the first Gulf War, Kuwait was regularly depicted as a weak feminised state ravished by the predatory (male) state of Iraq and needing rescue by the virtuous masculine strength of Western forces.[198] At the same time, Iraq was presented as having female traits: 'being capricious, irrational and temperamental in contrast to the sober, calculated behaviour of the allies'.[199] Kuwait was a woman to be saved, and the deeply engrained image of the 'homeland as a female body whose violation by foreigners requires its citizens

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[193] Peterson, above n 39, 62.

[194] Charlesworth and Chinkin, above n 16, 126.

[195] Anne Orford, 'The Uses of Sovereignty in the New Imperial Order' (1996) 6 *Australian Feminist Law Journal* 63, 72.

[196] Robert O Keohane argues that reciprocity between states is both individualistic and egoistic, with each equally associated with Western stereotypes of masculine behaviour: Robert O Keohane, 'International Relations Theory: Contributions of a Feminist Standpoint' (1989) 18 *Millennium Journal of International Studies* 245, 247.

[197] Buchanan and Johnson, above n 19, 242.

[198] Charlesworth and Chinkin, above n 16, 138.

[199] Ibid.

and allies to rush to her defense' is a powerful image.[200] But it depended upon 'woman' being received as a chaste, dutiful daughter or maternal figure. Conversely, Iraq was a woman to be chastised for acting outside the norm, whose actions granted a right to outsiders to invade both states.[201] Prior to the bombing of Libya in 2011, descriptions of Gaddafi were fused with effeminate language; his Bedouin tents, his female bodyguards, even his dress all intended to create an image of irrationality and intemperance.[202] In 2018, the US administration stated that 'a century ago, civilized nations joined together' to ban chemical weapons and they are once again sending their warriors out to save women and children from a Syrian monster incapable of taking care of its own people.[203] Syria abdicating its role as caregiver and must be punished by the civilised warriors who banned weapons of their own creation.

Charlesworth posits that

> [e]ntities of less than sovereign status that cannot assert control over a coherent unified territory, such as many indigenous minority peoples, do not qualify as full subjects and are at the margins of international law. This type of organised group is seen as having permeable, negotiable, penetrable, vulnerable boundaries in the same way that women's bodies have been constructed in criminal law. Images of orderly national domestic spaces separated by state boundaries from exterior dangerous (female) chaos and anarchy …[204]

Contradictory images, such as Iraq contemporaneously embodying undesirable male and female traits, might suggest that such analysis cannot be rooted in personification. But, as with Britannia and John Bull, apparent inconsistent gendering of states is coherent when we take account of the rationale of personification. Personification persuades us to consider a state in an entirely gendered context and whether it is idealised as Britannia as an abstract entity without political activity, the everyday women who is capricious and weak or the masculine state that is strong and vigorous, each is intended to obscure our vision of that state and what is lawful regarding it. International law enables the state to ward off unwanted interference and those states that cannot do so are unnatural.[205]

Naffine proffers that 'the principal concern of law is (the policing of the boundaries of) the bounded heterosexual male body. Bodies which are not like

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200 Parker et al, above n 143, 6.

201 For example, in acts both misogynist and homophobic US bombardiers inscribed 'Bend Over, Saddam' on ordinances before dropping. See Parker et al, above n 143, 6.

202 'Libya: Profile of Colonel Muammar Gaddafi, the "Mad Dog of the Middle East"', *The Telegraph* (online), 22 August 2011, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8715250/Libya-profile-of-Colonel-Muammar-Gaddafi-the-mad-dog-of-the-Middle-East.html>.

203 White House, 'Statement by President Trump on Syria' (Briefing Statement, 13 April 2018) <https://www.whitehouse.gov/briefings-statements/statement-president-trump-syria/> archived at <https://perma.cc/VNS5-S2XR>.

204 Charlesworth, above n 18, 259. A non-state-based example of this is Derry/Londonderry, which is described as the maiden city whose walls were never breached. See Gareth Johnson, 'The Maiden City of Northern Ireland', *Huffington Post* (online), 18 March 2013 <https://www.huffingtonpost.co.uk/gareth-johnson/derry-maiden-city-of-northern-ireland_b_2899109.html?guccounter=2> archived at <https://perma.cc/4777-H7Z3>.

205 Charlesworth, above n 18, 259.

this, or are not allowed to be like this, are somehow deviant and undeserving'.[206] Women's bodies leak,[207] while male bodies are 'bounded, stable, and non-permeable',[208] and both assumptions, with both their misogynist and homophobic attributes, have pervaded international law by regarding the state in its ideal form as impermeable.[209] The legal criteria of statehood depend on isolation and separation to ensure a coherent, bounded state with one voice is established.[210] While the notion of the single voice is contested, such critique does not trouble the legal test for statehood, which maintains the organismic links that resulted in such horrific harm in the 20th century. Although the terms of contemporary debate are perhaps not as crude as the 19th century writings, conceptualisations of the state change little. Gendered metaphors may have been removed from the textbooks, but the attributes ascribed by the 19th century texts to masculinity and femininity remain attached to the state and the scholars still cited with approval.

19th century writers employed the masculine for fully engaged legal actors and the feminine to describe attributes of those countries whose status was less than civilised. This parallel would have been familiar within the state as the place of women as non-constituents existed throughout the American-Euro world. A feminine state was lesser, was not a constituent, was to be patronised and in many circumstances colonised. The concept of progression or regression of statehood is on a spectrum from feminine to masculine and now couched in the language of development and failed statehood, but the substance of the discussion remains the same. This is most obvious in how we define states but also, and following from this conception, on who may or may not sign treaties, how we recognise actors in international law and perhaps most obviously within international development law, what is developed and what is not developed or even more conspicuously what is least developed. Much of what is written about international law retains the state at its core and much of what is recognised as the legally legitimate exercises of power comes from this source. This fixation upon statehood in international law obscures other sites of decision-making. The strong, bounded, reasonable state possessing internal and external control of power still forms the core of most international law textbooks, which continues to have a negative impact upon women throughout the world today. The roots of this problem, as this article demonstrates, lie in the 19th century authors of international law textbooks on which most modern articulations of statehood remain reliant for original inspiration. These textbooks entrenched 19th century attitudes towards women into international language and structures and their ongoing influence must then be seriously reflected upon.

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206   Ngaire Naffine, 'The Body Bag' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of Law* (LBC Information Services, 1997) 79, 84.

207   Julia Kristeva, *Powers of Horror: An Essay on Abjection* (Leon S Rousdiez trans, Columbia University Press, 1982) [trans of: *Pouvoirs de l'horreur: Essai sur l'abjection* (first published 1941)]; Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (Routledge, revised ed, 2015).

208   Sally Sheldon, 'ReConceiving Masculinity: Imagining Men's Reproductive Bodies in Law' (1999) 26 *Journal of Law and Society* 129, 129.

209   For an overview of Plato and Aristotle's discussion of the female body and its relationship with the state, see Peterson, above n 141, 37.

210   Charlesworth, above n 18, 260.

The legacies of these authors are twofold; on our conception of the state and on international legal academia. The former allows imperialism and misogyny to flourish, the latter perpetuates this harm and makes idols of men who may have founded our societies, journals and textbooks but whose bequests are damaging to both international legal academia and those whom international law subjugates.

VII   Conclusion

The Venerable Bede suggested that metaphor is 'a genus of which all the other tropes are species'.[211] Metaphor and more specifically personification lie at the heart of language, guiding its audience's thoughts. It would be easy to dismiss the authors who revelled in personification as distant and 'forget' their contribution to the field, as Kennedy suggests we have, but as he also demonstrates, we stay reliant upon them.[212] Koskenniemi treats these academics, with the odd exception, as worthy forefathers whose legacies to both the profession and substantive law are invaluable.[213] The present narrative on the international legal profession rarely stands ready to disown its forefathers beyond acknowledging some racist terminology.[214] This is inadequate.

This article instead insists that 19th century gendered personifications impacts on how we understand statehood and that we must add a feminist critique to the existing work on the imperial and racist legacies of this era. Analysing both how personifications reflect upon the time in which they were written and the influence of such writing today, this article entreats us to stop exalting the role of 19th century legal academia in shaping our current (apparently neutral) international law. International legal personification in the 19th century reflects the conservative imperialist era in which it was written, but the extent of these authors' misogyny and racism was neither inevitable nor can be explained as being of an era as the gradation amongst the writers' attests.

Understanding how preconceptions of gender were adopted into statehood personification guides us through the terminological choices of the 19th century and sheds light on that scholarship's bequests. Connections between nation state-building and imperialism in the 19th century found its full form within international law textbooks and their use of personification brought gender, as a key descriptor, into this mix. The establishment of fixed ideas revolving around the character of a state as containing masculine attributes such as independence, resolve and reasonability informed how we now perceive the contemporary state. Further seeing states as weak, irrational, immature or lacking full legal capacity enables us to find the solution in masculine leadership from the Global North.

Some authors may not have entirely ostracised women from their discourse on international law, but taken as a whole, these texts have a clear misogynist voice.

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[211] Quoted in Eco and Paci, above n 5, 217.

[212] Kennedy, above n 9, 386–8.

[213] Matthew Nicolson, 'Psychoanalyzing International Law(yers)' (2017) 18 *German Law Journal* 441.

[214] With the exception of some authors such as Haskell who are willing to look deeply into the ramifications of this work. See Haskell, above n 56, 244. And of course the work of TWAIL, Queer Theorists and Feminists who are rarely called into the core to challenge these conceptions.

TWAIL shows the ongoing ramifications of these writing for the Global South, while feminist critique proves that contemporary international law is often antithetical to women's interests. This article proves that 19th century international legal academics, in setting the terms of how statehood is both described and adduced, incorporated this antithetical role into international law. Current scholarship must be vigilant when either creating idols of these writers or uncritically following the forms of scholarship these men passed down.