

Beyond Victor's Justice?
The Tokyo War Crimes Trial
Revisited

Edited by

Yuki Tanaka, Tim McCormack and Gerry Simpson

MARTINUS

NIJHOFF

PUBLISHERS

LEIDEN • BOSTON
2010

Chapter 5

The Decision Not to Prosecute the Emperor

Yoriko Otomo¹

I. Introduction

Against a backdrop of threatened military annihilation, a call for unconditional surrender was issued to Japan by the Allied Forces on 26 July 1945. Nearly a month later, and after the atomic bombings of Hiroshima and Nagasaki, Japan capitulated. In performing the surrender the then sovereign of Japan, Emperor Hirohito, broadcast a speech across the nation, breaching tradition and speaking to his subjects – directly, as it were – for the first time in history. Following the United States’ ‘occupation’ of Japan, the Emperor was not brought to trial, but rather, made to renounce his divine origins. He was transformed from a sovereign head of State into a symbolic one: from a divine sovereign into a so-called secular one. Since 1945, there has been much debate amongst lawyers, historians and Japanologists about why the Emperor was not prosecuted for war crimes. This chapter returns to the texts of unconditional surrender and responds to this debate in three parts: first, by asking what the surrender signified (‘The Unrepentant Sovereign’); second, by examining the legal and political implications of the abstention from prosecution (‘A Lovers’ Discourse’); and third, by proposing some reasons for the decision (‘Recognition in the International Order’).

The question of Emperor Hirohito’s war responsibility is one which has been shielded from public inquiry, for the most part, since World War II. Recently, however, this has changed, with scholars and politicians aligning themselves with either one or another view on Hirohito’s accountability. The dominant school of thought proposes that the Supreme Commander General Douglas MacArthur ‘saved’ Hirohito to preserve public order within newly-occupied Japan.² According to MacArthur’s memoirs, the Emperor took full responsibility for the consequences of the war, and when the Australian representative to the United Nations War Crimes Commission (UNWCC) indicated that he would introduce a motion to prosecute

1 I would like to express my gratitude to the organisers of the Conference for giving me the opportunity to present in that forum, and thanks in particular to Gerry Simpson for comments on an earlier version of this chapter. I would also like to acknowledge the *Australian Feminist Law Journal*, in which some of this material has previously been published: Yoriko Otomo, ‘Of Mimicry and Madness: Speculations on the State’ (2008) 28 *Australian Feminist Law Journal* 53.

2 See, eg, John W Dower, *Embracing Defeat: Japan in the Wake of World War II* (1999); Herbert P Bix, *Hirohito and the Making of Modern Japan* (2000).

Yuki Tanaka et al., (eds.) *Beyond Victor’s Justice? The Tokyo War Crimes Trial Revisited*.

© 2010 Koninklijke Brill NV. Printed in The Netherlands. ISBN 978 9004 1XXXX X. pp. 63-78.

Hirohito, the Commander sent a telegram to Eisenhower saying that the Emperor was the symbol of Japanese unity, and that, if he were prosecuted, the nation would disintegrate.³ This view has been contested, with some scholars arguing that the decision to retain the Emperor was part of a more general US policy arising out of events as early as the late 19th century.

The question, however, extends beyond a simple debate as to whether Hirohito had knowledge of the Army's activities, and whether he was or should be held responsible for war crimes. While there were many political reasons for the decision not to prosecute, I propose that by looking at that decision within the context of the actual texts of unconditional surrender we can develop a broader understanding of its significance, both in terms of Japan's identity and in terms of the development of international law in the 20th century. By focusing on the act of 'legal speech' by the Emperor I seek to bring what the feminist poststructuralist Julia Kristeva calls the '*speaking body*' back into the analysis.⁴

The main argument developed in this chapter is that despite their demand for unconditional surrender and subsequent claim of *debellatio*, the Allied Forces chose to retain the Emperor (albeit as a *symbol* rather than as an official sovereign head of State)⁵ because they needed Japan to enter the emerging fraternity of States as a *secular* entity; an equal among brothers capable of recognising its others and of being sutured into the new international economic system. Following a brief background to Japan's surrender, this chapter will discuss the jurisdictional significance of the Emperor's speech and examine the colonial and patriarchal complicities evident in the discourses of both victor and vanquished.

So the story begins, perhaps, in 1852 when Commodore Perry sailed into Japan after several unsuccessful visits by US representatives to negotiate trade agreements. He visited again in 1854 with coal-fired war ships, forcing Japan to sign a 'Treaty

3 Rudolf V A Janssens, '*What Future for Japan?: US Wartime Planning for the Postwar Era, 1942-1945*' (1995) 394-5.

4 Kristeva's work includes, among others: Julia Kristeva, *Sēmeiōtikē: Recherches pour une sémanalyse* (1969); Julia Kristeva, *Le Texte du roman* (1970); Julia Kristeva, *La Révolution du langage poétique* (1974); Julia Kristeva, *Polylogue* (1977). This call is in response to Derrida's work on writing, which concluded that

even when a text *tries* to privilege speech as immediacy, it cannot completely eliminate the fact that speech, like writing, is based on a *différance* ... between signifier and signified inherent in the sign ... [Furthermore], [t]he hidden but ineradicable importance of writing that Derrida uncovers in his readings of logocentric texts in fact reflects an unacknowledged, or 'repressed,' *graphocentrism* [the privileging of the written, over spoken, word]. It may well be that it is only in a text-centered culture that one can privilege speech in a logocentric way. The 'speech' privileged in logocentrism is not literal but is a *figure* of speech: a figure, ultimately, of God.

Barbara Johnson, 'Writing', in Frank Lentricchia and Thomas McLaughlin (eds), *Critical Terms for Literary Study* (2nd ed, 1995) 43, 47 (emphases in original).

5 This in fact mirrored the Emperor's traditional role, where s/he would act as a symbolic head of State, not directly involved in politics and the day-to-day running of the country.

of Peace and Amity'.⁶ The pretext of commerce lay hand-in-hand with what the US saw as being also the civilising mission of 'carrying the "G[ospel] of G[od]" to the H[eathen]'.⁷ This was the first encounter between the US and Japan, ending Japan's seclusion from the rest of the world and beginning a gradual militarisation of the nation and leading to its brutal expansion of empire throughout East Asia and South-East Asia from 1867 to 1945.⁸ On 15 August 1945, nearly 100 years after Commodore Perry's visit and toward the end of WWII, a second encounter between the two States took place: this time involving the use of nuclear weapons, and this time, ending in Japan's unconditional surrender.

II. The Unrepentant Sovereign

The demand for surrender was drafted by the Allied Powers pursuant to an agreement made at Potsdam following the unconditional surrender of Nazi Germany, and was issued on 26 July 1945.⁹ The US call for unconditional surrender moves from almighty force ('the threshold of annihilation' and 'complete destruction of the Japanese armed forces') and salvation ('the path of reason'; 'a new order of peace, security and justice') to 'revival and strengthening of democratic tendencies among the Japanese people' and the establishment of 'fundamental human rights'.¹⁰ It ends with the promise that '[e]ventual Japanese participation in world trade relations shall be permitted' once Japan establishes 'responsible government'; the product of the 'freely expressed will of the Japanese people', it would be 'permitted' into the international Allied fraternity.¹¹ Japan, as evidenced in these texts, was the quintessential patient of what Upendra Baxi identifies as "'Operation Infinite Justice"/"Enduring Freedom"'.¹² The ultimatum was rejected by Japan on 29 July 1945; on 6 and 9 August 1945 the US dropped atomic bombs on Hiroshima and Nagasaki respectively. On 15 August 1945, Japan capitulated.

It was the Emperor himself who decided to break precedent and speak, for the first time in history, directly to his subjects. He completed the text of the declaration of surrender close to midnight and recorded it on a Japanese phonograph the next day. There were two attempts by Japanese military leaders to prevent the recording from being broadcast – once at the Emperor's palace (the recording was smuggled out in

6 Japan-US, signed 31 March 1854, 9 Bevens 351 (entered into force 21 February 1855).

7 As described in the painting by James G Evans: 'U.S. JAPAN FLEET, *Com* PERRY carrying the "GOSPEL of GOD" to the HEATHEN, 1853' (Oil on canvas).

8 The drive to access raw materials and new markets led to the push for what was termed a 'Greater East-Asian Co-Prosperity Sphere'.

9 Potsdam Proclamation (Terms for Japanese Surrender), US-China-UK, signed 26 July 1945, 3 Bevens 1204, [5] ('Potsdam Proclamation').

10 Ibid [3], [4], [6], [10].

11 Ibid [11], [12].

12 Upendra Baxi, 'Operation Enduring Freedom: Towards a New International Law and Order' in Antony Anghie, Bhupinder Chimni, Karin Mickelson and Obiora Okafor (eds), *The Third World and International Order: Law, Politics and Globalization* (2003) 31, 46.

a laundry basket), and again at the radio station. The coups were both unsuccessful, and the recording was aired. John Dower notes that '[d]espite its chaotic genesis, the rescript emerged as a polished ideological gem'.¹³ Here is one of several translations of the speech, called the *Gyokuon Hōsō* (literally, 'Jewel Voice Broadcast'):¹⁴

My subjects, I have ordered the Imperial Government
To inform the Joint Governments of the United States,
Great Britain, China and the Soviet Union
That our Empire is willing to accept the provisions of their Joint Declaration

In addition, the enemy has recently used a most cruel explosive,
The frequent killing of innocents and the effect of destitution it entails
Are incalculable

The thought of our Imperial subjects dying in the battlefields
Pains my heart and body to the point of fragmentation

I am willing to endure the unendurable,
Tolerate the intolerable,
For peace to last thousands of generations

We must rally the nation
And continue from generation to generation
To entrench the imperishability of this sacred state.

The sovereign's speech was the diction of law, a juris-diction.¹⁵ As such, the Emperor, by recording and broadcasting his voice throughout Japan, re-transcribed the *Empire* Japan as the *Nation* Japan. In a single act, he simultaneously performed an unconditional surrender *and* established a total jurisdiction over the new demos. Promising a future of perpetual peace, the Emperor's speech signified the re-birth of a nation always-already formed. In this reading, the Emperor performs a sleight of hand and re-marks his territory by re[state]ing sovereign jurisdiction on and in Western terms – by speaking directly to the people.

Delivered in archaic aristocratic Japanese over crackly airwaves, the speech was not immediately understood by the public, although subsequently, particular phrases were replayed and repeated by the broader public.¹⁶ The Emperor proposes that by accepting the 'terms of surrender' (being unconditionality), there would be a perpetual peace. He offers himself up as the sacrifice for this peace, exclaiming that his body is torn to the 'point of fragmentation'. In doing so the Emperor does

13 Dower, above n 2, 35.

14 *Gyokuon Hōsō* (Imperial rescript on the termination of the war via phonograph).

15 Costas Douzinas, 'Speaking Law: On Bare Theological and Cosmopolitan Sovereignty' in Anne Orford (ed), *International Law and its Others* (2006) 35, 41 ('Jurisdiction speaks the law: it is juris diction, the diction of law, law's speech and word').

16 See generally, Dower, above n 2, 4.

not absolve himself of war responsibility, but rather, proclaims an absolute and unconditional responsibility – for ‘the whole of humanity’. ‘Endure the unendurable’, he says, ‘tolerate the intolerable’ – it appears as if this is the aporetic moment of law *par excellence*; what Jacques Derrida calls an unconditionality of the ethical act at its purest.¹⁷ We could even go so far as to say that this act of hospitality is given not only by the Emperor-as-host,¹⁸ but that such an act of unconditional hospitality requires the mortgaging of part of the body (the Emperor’s voice) for the whole (the Nation’s body).¹⁹ The capacity to host thus relies on a concomitant existence as hostage (interestingly, an etymologically-related term),²⁰ hence exposing the speaker’s body to the risk of fragmentation.²¹

17 Douzinas further states:

Against the triumphalism of the liberals and the knee-jerk reaction of cosmopolitans, Derrida has consistently emphasized the aporetic nature of sovereignty. He reminds us of its auto-immune ability; the proximity of its absoluteness with the unconditionality of the ethical act at its purest ...

And of this act:

the similarity between the indivisibility of sovereignty and that of the individual. Both the victim of sovereignty and the beneficiary of human rights, the modern individual was born as a mirror image of the Sovereign.

Douzinas, above n 15, 37. In thinking about unconditionality, I am looking in particular at unconditional hospitality and unconditional forgiveness, two terms which arise again and again in discussions within critical legal theory, and each addressed by Douzinas. The Emperor’s oath to account for, endure and tolerate the ‘incalculable’, ‘unendurable’, and ‘intolerable’ hints at the unimodular structure of sovereignty.

18 The hosting body is a concept which seeks to problematise the coding of relations by dialectical categories (active/passive, strong/weak, etc).

19 Douzinas, above n 15, 35, 43:

The confusion, the rolling together through the rhetorical figure of *metalepsis* ([where] the part stands in for the whole) is implicit in the nature of all jurisdiction and not only in constitution-making after revolutionary upheavals.

20 The term ‘host’ is defined in Douglas Harper, *Online Etymology Dictionary* (2010), available from <<http://www.etymonline.com>>, as follows:

host (1) ‘person who receives guests,’ late 13c., from O.Fr. *hoste* ‘guest, host’ (12c.), from L. *hospitem* (nom. *hospes*) ‘guest, host,’ lit. ‘lord of strangers,’ from PIE **ghostis-* ‘stranger’ (cf. O.C.S. *gosti* ‘guest, friend,’ *gospodi* ‘lord, master,’ see *guest*). The biological sense of ‘animal or plant having a parasite’ is from 1857 ...

host (2) ‘multitude’ mid-13c., from O.Fr. *host* ‘army’ (10c.), from M.L. *hostis* ‘army, war-like expedition,’ from L. *hostis* ‘enemy, stranger,’ from the same root as *host* (1) ...

host (3) ‘body of Christ, consecrated bread,’ c.1300, from L. *hostia* ‘sacrifice,’ ...

If I may draw the parallel, the female body also receives and ‘hosts’ other bodies, and in this sense the idea of the hosting body may be subject to a feminist reading. Interestingly, the word ‘hostage’ circa 1275 derives either from Old French *hoste* ‘guest’ via the meaning of ‘a lodger held by a landlord as security’, or from the Latin *obsidanus*, ‘condition of being held as security’. The modern use of ‘hostage’ in discourses of terrorism dates from the 1970s.

21 Fragmentation between host and hostage; between voice and body; between sacred and the profane.

Calling upon an ancestral past and promising a future of perpetual peace, the Emperor's speech invoked the re-birth of a nation always-already formed²² and attempted to establish a secular sovereign jurisdiction over Japan, before and beyond that of the victors. It was at this moment, 'sentimental royalists would soon put it, [that people actually heard] the sovereign's *true* voice'. 'It was "as if the sun had at long last emerged from behind dark clouds."²³ One way of understanding this act of speech, then, is to think of it as a resistance against the call for unconditional surrender. In this reading, the Emperor performs a sleight of hand and re-marks his territory by re[state]ing sovereign jurisdiction on Western terms.²⁴

There is, however, perhaps more to this story. The Emperor's rhetorical sleight of hand functions to remake his territory and re-establish power (albeit on Western terms), without losing at any point his position as the privileged signifier. Whilst mimicking a language of unconditional hospitality ('endure the unendurable', 'tolerate the intolerable'), the Emperor obscures a dual operation: first, that the unconditional hospitality he offers is pegged to the always-already hosting or hostage bodies of his subjects and the victims of Japanese colonisation, and second, that the image of the new nation he promises – the Emperor's new body – is conditional upon entry into the fantasy of the fraternal relation.

By 'fraternal relation' I refer to the story of the modern international order, which is imagined as a story of nation States comprising relations between men: of fathers, of sons and brothers.²⁵ The US' offer to spare Japan from annihilation was made only on the condition of Japan's subsequent participation in fraternal exchange called the international economy. The desire of sovereigns for a whole, white, clean-and-proper body, *a priori*, is manifest in these particular texts as the positioning of the US and Japan as what (in today's vocabulary) is called 'developed', as compared

22 Douzinas, above n 15, 40:

There is no community without jurisdiction, since it comes together in the speaking of the law. We can call this minimal expression of community, the zero degree of sovereignty or bare sovereignty ... Bare sovereignty is the setting of the origin and the ends of a community, the act or acts by means of which a community gives itself to itself. If community is a coming together, it must gather itself by asserting its bare sovereignty, as the outward expression and inner arrangement of its very facticity. This assertion often presupposes the positing of a mythical or heroic past or of a promised glorious future.

See also Hardt and Negri:

Identity is thus conceived not as the resolution of social and historical differences but as the product of a primordial unity. The nation is a complete figure of sovereignty *prior* to historical development; or better, there is no historical development that is not already prefigured in the origin. In other words, the nation sustains the concept of sovereignty by claiming to precede it.

Michael Hardt and Antonio Negri, *Empire* (2000) 101 (emphasis in original). In other words, the nation was the bourgeoisie's solution to the democratic deficit of sovereignty.

23 Dower, above n 2, 37 (emphasis in original).

24 Not only in capitulating to the terms of unconditional surrender, but by speaking, as in the Roman law tradition, directly to the people.

25 See, eg, David Kennedy, 'Receiving the International' (1994) 10 *Connecticut Journal of International Law* 1, 8, 16.

to ‘developing’ – countries who are written as nonetheless traversing a trajectory towards the same-yet-infinitely-retreating object of desire.²⁶

III. A Lovers’ Discourse

Both countries invoke a perpetual peace and the spectres of a genealogy past perfect – both call and answer are written in the language of Empire. To demonstrate this I have put together a dialogue between Hirohito (the then Emperor of Japan) and Truman (the then President of the US). This exchange – a fiction on my part since in reality the texts only address each other through the third term – their subjects – is a haiku collage from the US demand and the Emperor’s speech. Here, call and answer begin to sound not unlike a conversation, and the demand for unconditional surrender is revealed to be a demand for unconditional love:

Incalculable
The ... killing of innocents
Of this sacred State²⁷

Following are our terms
There are no alternatives
We shall brook no delay²⁸

Most cruel explosive
Pains my ... body
To the point of fragmentation²⁹

Unconditional³⁰
The time has come for Japan

26 Luce Irigaray, *Speculum of the Other Woman* (Gillian C Gill trans, 1985 ed) 293:
[man] will only be able to move close to the infinite or away from it in asymptomatic fashion, by more or less good, true, enlightened visions, by more or less harmonious numerical relationships, by more or less appropriate language. ...

And further (at 291) (emphases in original):

Syntax dominated by the desire for Truth which makes the decisions of agreements ‘between’ without ever having recourse to distinguishing, defining, recognizing those who gaze and speak ... Because it is not represented, because it is forbidden to appear in the show, auto-reproduction is able to inform and mobilize its economy: *the search for more and more copies of the same*, of the *autos* whose term is eclipsed by the domination of the Idea.

See also Peter Fitzpatrick, “‘We Know What It Is When You Do Not Ask Us’: Nationalism as Racism’ in Peter Fitzpatrick (ed), *Nationalism, Racism and the Rule of Law* (1995) 3.

27 *Gyokuon Hōsō*, above n 14.

28 Potsdam Proclamation, above n 9, [5].

29 *Gyokuon Hōsō*, above n 14.

30 Potsdam Proclamation, above n 28, [13].

The path of reason³¹

Peoples of the world³²

In fraternal contention³³

New order of peace³⁴

Tolerate the intolerable

For peace

To last thousands of generations³⁵

On [a] world conquest³⁶

The Empire of Japan

The United States

Shortly following the surrender on 7 September 1945, the Emperor presented himself at the Occupation Force Headquarters, saying, ‘I come to you, General MacArthur, to offer myself to the judgement of the powers you represent as the one to bear sole responsibility for every political and military decision made.’³⁷ ‘A tremendous impression swept me’, wrote General MacArthur later in his journal. ‘This courageous assumption of a responsibility implicit with death, a responsibility clearly belied by facts of which I was fully aware, moved me to the very marrow of my bones.’³⁸ Faced with Hirohito’s Abrahamic gesture of unconditional hospitality (to sacrifice his body to save his divine office), the Christian General granted a double salvation: he spared the body of the Emperor in exchange for his faith. A few months later in January 1946, Hirohito, at the direction of the head of the occupying forces, General MacArthur, renounced his divine ancestry in another radio transmission to the people.³⁹ In this pronouncement Hirohito stated:

[Appealing to] ‘the desires of the people’ [he declared that] ‘a bright future will undoubtedly be ours, not only for our country, but for the whole humanity.’ ... The ties between Us and Our people have always stood upon mutual trust and affection ... They are not predicated on the false conception that the Emperor is divine’.

31 Ibid [4].

32 Ibid [3].

33 *Gyokuon Hōsō*, above n 14.

34 Potsdam Proclamation, above n 28, [6].

35 *Gyokuon Hōsō*, above n 14.

36 Potsdam Proclamation, above n 28, [6].

37 Kyoko Inoue, *MacArthur’s Japanese Constitution: A Linguistic and Cultural Study of its Making* (1991) 162.

38 Ibid.

39 Imperial Rescript on National Revitalisation (*Nentō, Kokuun Shinkō no Shōsho*) available in William P Woodard, *The Allied Occupation of Japan 1945–1952 and Japanese Religions* (1972) 316.

Here, ‘the people’ are named the objects of war; however, peace is not described as having been brought about by *their* sacrifice. Rather than recognising the people as victims to be venerated, the Emperor has already substituted his own ‘fragmented body’ in the initial broadcast and his divine office in this second broadcast as the sacrifice. Furthermore, future violence is mitigated and a ‘bright future’ ensured by creating a harmonious brotherhood. The secularisation of the sovereign’s body and democratisation of the State initiated in this speech is predicated upon ‘mutual affection’ within the fraternal relation which then stands in for ‘the whole humanity’.

Consequently, the reply to the demands amounts to a confession,⁴⁰ with an exchange of the part (the word) for the whole (a s(p)ecular body).⁴¹ What begins as a religious conflict between the two States is transformed into an exchange of desire for mutual fraternal recognition of their respective possessions and occupations of land. Sacrifice of the divine office, both by the US and by Japan, enables the rearticulation of authority over the subjects of both States by the Emperor.

This resurrection of sovereignty through the act of Imperial speech, the re-appropriation of the language of nation and empire, and the repositioning of Japan from the role of ‘occupier’ to ‘occupied’, signifies the beginning of Japan’s re-writing of post-war history, where ‘issues of war responsibility have more often than not deflected and bypassed the questions of Japanese colonialism’.⁴² This was possible, as another commentator notes, because ‘Japanese nationalism itself could accommodate U.S. imperial nationalism, or even be an organ thereof’.⁴³ The

40 See Jennifer L Beard, *The Political Economy of Desire: International Law, Development and the Nation State* (2007) 27–52, where the author undertakes a detailed discussion of the ‘mimetic traces’ of the practices of religious confession on Western discourses of development (of colonised nations).

41 According to Hardt and Negri, above n 22, 94–5:

The transformation of the absolutist and patrimonial model consisted in a gradual process that replaced the theological foundations of territorial patrimony with a new foundation that was equally transcendent. The spiritual identity of the nation rather than the divine body of the king now posed the territory and population as an ideal abstraction.

There is one interpretation of this pronouncement which argues that renunciation of divinity was not the purpose of the rescript, but rather, that the Emperor wished to emphasise the existence of Japan’s democratic nature prior to the occupation (during the Meiji era): see Dower, above n 2, 314. This argument, however, merely supports my proposition that the renunciation *as such* was not undertaken with the purpose of absolving the Emperor of power, but rather, to rearticulate and redefine the foundation of sovereign authority.

42 Leo Ching, “‘Give Me Japan and Nothing Else!’: Postcoloniality, Identity, and the Traces of Colonialism’ in Tomiko Yoda and Harry Harootyan (eds), *Japan after Japan: Social and Cultural Life from the Recessionary 1990s to the Present* (2006) 142, 147–8.

43 According to Naoki Sakai:

Even today, Japanese nationalists are incapable of confronting the complicity between their nationalism and U.S. hegemony ... they would never be able to engage in serious negotiation with people in East and Southeast Asia who were directly victimized by ... Japanese imperial nationalism.

Naoki Sakai, “‘You Asians’: On the Historical Role of the West and Asia Binary’ in

‘purification and sanitization of the social body’,⁴⁴ performed through Hirohito’s exchange of divine body and office for entry into the white fraternity simultaneously enabled the preservation of the discourse of ‘nation’ within Japan and the creation of a new discourse of the State.

This same moment is similarly related by the Russian director Alexander Sokurov in his 2004 film *‘Solnze’* (‘The Sun’), where one scene depicts the character of the Japanese Emperor standing in the garden of the Imperial Palace after Japan’s unconditional surrender. Posing for US wartime photographers, Hirohito begins to mimic the American mime Charlie Chaplin, seemingly subverting their orientalisng gaze. It may be helpful at this point to refer to Homi Bhabha’s discussion of colonial imitation:

It is ... this area between mimicry and mockery, where the reforming, civilising mission is threatened by the displacing gaze of its disciplinary double ... Mimicry does not merely destroy narcissistic authority through the repetitious slippage of difference and desire. It is the process of the *fixation* of the colonial as a form of cross-classificatory, discriminatory knowledge within an interdictory discourse ... The ambivalence of colonial authority repeatedly turns from *mimicry* – a difference that is almost nothing but not quite – to *menace* – a difference that is almost total but not quite.⁴⁵

For Bhabha, inherent in the mimicry of the coloniser is a potential for the ‘displacing gaze’: a potential to unsettle, if not emancipate, the mimic. In Sokurov’s scopic exchange, however, parody becomes pastiche,⁴⁶ and the director’s keen observation produces later scenes of fraternal intimacy between Emperor Hirohito and General Macarthur which reveal the emptiness of that earlier exchange, devoid of the satirical impulse.

The substitution of the ‘fragmented body’ of the sovereign as the symbolic sacrifice obscures the structural sacrifice of a relation to the maternal feminine, as both States ‘now work towards love of mankind’. The US demand for the Emperor’s surrender of divine authority could perhaps be interpreted as being a demand for surrender of the maternal divine and maternal origin – a surrender of the Emperor’s claimed ancestor, the sun goddess Amaterasu. The prophecy of ‘a bright future’ will

Tomiko Yoda and Harry Harootunian (eds), *Japan after Japan: Social and Cultural Life from the Recessionary 1990s to the Present* (2006) 167, 186–7.

44 Todorov Tzvetan, ‘In Search of Lost Crime’, *The New Republic* (New York, US), 29 January 2001, 29, 30.

45 Homi K Bhabha ‘Of Mimicry and Man: The Ambivalence of Colonial Discourse’ in Homi K Bhabha, *The Location of Culture* (1994) 121, 123, 129, 131 (emphases in original).

46 Fredric Jameson terms ‘pastiche’ – a blank parody:

Pastiche is, like parody, the imitation of a peculiar or unique, idiosyncratic style, the wearing of a linguistic mask, speech in a dead language. But it is a neutral practice of such mimicry, without any of parody’s ulterior motives, amputated of the satiric impulse, devoid of laughter ...

Fredric Jameson, *Postmodernism, or, the Cultural Logic of Late Capitalism* (1991) 17.

indeed be revealed as the Emperor ascends out of the ashes to bask in the secular image of a body *a priori*, complete, in time and space. What we see here is the reincarnation of the divine corporeal guarantor as secular phallic avatar within the mimetic discursive economy, precluding any recognition of the origin(al) sacrifice. Through *phōne* (sound, voice), the avatar's *jurisdiction* enables the remaking of territory in his (mirror) image: Hirohito ascends from his cavernous bunker after renouncing his maternal divinity – to speak as the Father.⁴⁷

IV. Recognition in an International Order

I return to our initial question: why is Hirohito absent from this picture? The analysis developed in this chapter is underwritten by the argument that the US chose to retain the Emperor (albeit as a symbol rather than as an official sovereign head of State) because they needed Japan to enter the emerging fraternity of States as a secular entity.

The State, imagined as this kind of unitary subject, must be *capable of being recognised as such* by other sovereign States,⁴⁸ and herein lies a fundamental problem for international law. In order for an unconditional relation to be maintained between States (ie for political communities to be able to identify one another as distinct entities with absolute jurisdictions), their individual subjectivities must be recognised in some way. Up until the creation of territorialised States, however, jurisdiction (the authority to speak Law) in Europe had been derived from God. With the wresting of power away from the Catholic Church in the Middle Ages and its subsequent secularisation,⁴⁹ there was no longer a transcendental figure to provide any direct authorisation of violence.

Jurisdictional authority, then, had to be figured in another way and States were subsequently recognised as existing either on the basis of meeting certain structural criteria as outlined according to the Montevideo Convention⁵⁰ (the 'declaratory' theory of Statehood), or on the basis of what is known as the 'constitutive' theory of Statehood, where recognition is a political gesture (but one with juridical consequences) made by one State towards another. Both forms of recognition

47 Through *ultrasound*, he speaks-sees into the cave of ghostly shapes, using echoes to locate its interior and ensure access to the fruit of its labours.

48 See, eg, Ti-Chiang Chen, *The International Law of Recognition* (1951); Hersch Lauterpacht, *Recognition in International Law* (1947); Hans Kelsen, *Principles of International Law* (2nd ed, 1966) 387–416; Phillip C Jessup, *A Modern Law of Nations: An Introduction* (1948) 43–67; James Crawford, *The Creation of States in International Law* (1979) 10–25; Sean D Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *International and Comparative Law Quarterly* 545.

49 Weber famously describes this move towards secularisation as a '*monopoly of the legitimate use of physical force in the enforcement of its order*': Max Weber, *Max Weber: The Theory of Social and Economic Organization* (A M Henderson and Talcott Parsons trans, 1964 ed) 154 [trans of: *Wirtschaft und Gesellschaft*].

50 Montevideo Convention on the Rights and Duties of States, opened for signature 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934).

beg the question of where jurisdictional authority is derived from, since the first is a mere acknowledgement of fact, and the second is a gesture made by an entity which itself must be the recipient of that very same gesture of recognition.⁵¹ The following section of this chapter will borrow from feminist psychoanalysis in order to understand the function of ‘equality’ and the operation of ‘recognition’ within the fraternal conformation of sovereign States.

The operation of ‘recognition’ – what modern international law deems to be a foundation for our existing structure of civilised States – is by no means a simple one. If the concept of recognition is the result of a post-Westphalian jurisdictional crisis and if jurisdiction ‘is linked to the articulation or nomination of desire’,⁵² we may turn, perhaps, to psychoanalysis for a response to this question. A feminist engagement with this story subsequently demonstrates how the creation of a subjectivity for the sovereign State becomes reliant upon a gendered binary structure which seeks to institute the masculine gaze⁵³ as the transcendental authority through which the State is able to recognise itself. Keeping in mind that the psychoanalytic schema can itself be ‘phallogentric in its perspectives, methods, and assumptions’,⁵⁴ this critique resists essentialising sovereign State relations (either through conflating gender and physiology, or by cementing the masculine/feminine hierarchied binary).⁵⁵ Rather, this critique takes the metaphors drawn together by psychoanalytic theories to demonstrate how particular politico-historical events have compelled a fantasy of autonomous sovereign States, and asks what is lost in it.

Let us first turn, then, to the work of Jacques Lacan,⁵⁶ who ‘add[s] the powerful insights of semiology to [the] Freudian bedrock’.⁵⁷ Lacan’s ‘mirror stage’ describes a time in childhood development where the child, seeing their own image reflected in the mirror, feels a rivalry with their own image because the totality presented by the image threatens them with fragmentation. In order to resolve this rivalry the subject

51 Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 87–8.

52 Shaunnagh Dorsett and Shaun McVeigh, ‘Questions of Jurisdiction’ in Shaun McVeigh (ed), *Jurisprudence of Jurisdiction* (2007) 3, 7 (discussing the work of Peter Goodrich).

53 By ‘gaze’ I use here Lacan’s definition – ‘The gaze I encounter ... is, not a seen gaze, but a gaze imagined by me in the field of the Other’: Jacques Lacan, *The Four Fundamental Concepts of Psycho-analysis* (Alan Sheridan trans, first published 1973, 1977 ed) 84 [trans of: *Le Séminaire de Jacques Lacan, Livre XI, Les quatre concepts fondamentaux de la psychanalyse*].

54 Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction* (1990) 3. Feminist psychoanalytic thinkers critiquing Freud’s work include Helene Deutsch, *Psychoanalysis of the Sexual Functions of Women* (Eric Mosbacher trans, first published 1925, 1991 ed) [trans of: *Psychoanalyse der weiblichen Sexualfunktionen*]; Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); Nancy Chodorow, *Feminism and Psychoanalytic Theory* (1989); Nancy Chodorow, *The Power of Feelings: Personal Meaning in Psychoanalysis, Gender, and Culture* (2001).

55 See generally Karen Knop, ‘Borders of the Imagination: The State in Feminist International Law’ (1994) 88 *American Society of International Law Proceedings* 14.

56 1901–81. Lacan practiced as a psychoanalyst, psychiatrist, philosopher and doctor.

57 Grosz, above n 54, 4.

identifies with this image, cementing the Ego and thereby sustaining a promise of future wholeness. At this instance, the subject feels a sense of mastery over, and a boundary between, itself and the world.⁵⁸ The subject, in other words, at once recognises and misrecognises itself as representing a whole, unified, self (while at the same time realising that it is separate from its mother and the rest of the world).⁵⁹ This leads to what is called a ‘split subject’, whereby its subjectivity is divided into Self and Other: ‘a necessarily alienating structure because of the unmediated tension between the fragmented or “fragilised” body of experience; and the “solidity” and permanence of the body as seen in the mirror.’⁶⁰

While the subject’s ‘identification with its specular image impels it nostalgically to seek out a past symbiotic completeness’,⁶¹ explains Elizabeth Grosz, it simultaneously realises the impossibility of (re)unification with the (m)Other. The image of the (m) Other must then be incorporated in order to deny the ‘internal rupture and conceive of itself as the source of its own origin and unity.’⁶² This imaginary relation, however, ‘although structurally necessary, is ... ultimately stifling and unproductive’⁶³ and must be mediated by a ‘third term’:

This ‘third term’ is the Father; not the real, or rather, the imaginary father, who is a person ... [although] ... It is generally the father who takes on the role of (symbolic) castrator and the Name-of-the-Father.

Through the ‘name-of-the-father’, the child is positioned beyond the structure of dual imaginary relations within the broader framework of culture, where genuine exchange may become possible ...⁶⁴

The subject’s entry into culture (the symbolic order) is therefore predicated on the further introjection of a regulatory Father, with whose name and image the subject must develop a specular (or ocular) identification. This process of introjection takes place through the binding exchanges of language and law with the symbolic Father.

Thus far, this story of subjectivity appears to pertain exclusively to the development of the infant. It must be noted, however, that from the early 1950s

58 Jacques Lacan, *Écrits* (1966) 93–100.

59 Grosz, above n 54, 34–5. Grosz states at 35 (emphases in original):

[R]ecognition of absence is the pivotal moment around which the mirror stage revolves ... Only at this moment does it become capable of distinguishing itself from the ‘outside’ world, and thus of locating itself *in* the world ... In other words, its recognition of itself as a (potential) totality is correlative with its recognition that the world as a whole is *not* its own.

60 Ibid 42.

61 Ibid 39.

62 Ibid 47.

63 Ibid 46.

64 Ibid 47. Grosz describes the parallels between Lacan’s orders and Freud’s oedipal theory thus (at 51): ‘Lacan’s understanding of the name-of-the-father, on which the child’s entry into the symbolic order depends, is a reading and rewriting of Freud’s oedipal model in linguistic and socio-cultural terms.’

onward Lacan considered the ‘mirror stage’ as having primarily general structural value in describing what he calls the ‘Imaginary’ order, over its historical value in describing infants in the particular. It is within this socio-psychoanalytic frame that the concept of the mirror stage is used to develop an understanding of how the jurisdiction of international law interpellates the subjectivity of sovereign States. Thus, at this point in the story we can note that if territorialised communities are to recognise themselves as complete *a priori* unitary subjects (in the form of a sovereign State), they require an image with which to identify. This process of identification, I argue, occurs through mimicry of other States who reflect back the subject’s own imaginary clean-and-proper body.

Furthermore, without a transcendental with which to guarantee this relation (with whom to exchange language and law), the mimicry is only possible when enacted between equals since man can only be recognised by those whom he himself can recognise.⁶⁵ This somewhat paradoxical relation ensures that the existence of the sovereign State in a metaphysical sense is entirely conditional, held hostage by the necessity (and failure) of seeing the symbolic image of itself through the other, seeing him. This stands in stark contrast to the Westphalian discourse of recognition which revolves around a fantasy of unconditionality: the political existence of a subject who can remain as the one-and-only, whole, complete, without an outside; immortal.

The notion of *equality* as a fundamental aspect of sovereign State relations is highlighted by Carl Schmitt, who argued that the shift from medieval to modern international law is characterised by the substitution of State sovereignty for religion as law’s foundation: ‘from the 16th to the 20th century ... [t]he formal reference point for determining just war no longer was the church’s authority in international law, but rather the *equal sovereignty of states* ... Any war between states, between equal sovereigns, was legitimate.’⁶⁶ The equivalence of sovereign bodies, in other words, is evidence in itself of moral good. Yet what is presented today as a secular set of relations between States can be revealed to be a *trompe l’œil* – the substitution of a patriarchal authority for a papal one. Understanding the mimetic appellations at the coalface of international law requires the identification of the ‘unavowed theologism’⁶⁷ in what is normatively portrayed as being a secular relation.⁶⁸ Lacan himself noted that ‘the myth of *the God is dead* ... perhaps ... is simply a shelter against the threat of castration’.⁶⁹ The subject, in other words, moves away from God’s line of sight, only to enter the field of a masculine gaze through which the State is able to recognise itself. Here we see encounters between sovereign States mediated

65 On Kojévian recognition, see, eg, Alexandre Kojève, *Outline of a Phenomenology of Right* (Bryan-Paul Frost and Robert Howse trans, 2000 ed).

66 Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulmen trans, 2003 ed) 120–1 (emphasis in original).

67 Jacques Derrida, *Rogues: Two Essays on Reason* (Pascale-Anne Brault and Michael Naas trans, 2005 ed) 110.

68 Schmitt describes ‘[t]he decisive step from medieval to modern international law – from the theological system of thought predicated on the church to a juridical system of thought predicated on the state’ in depth in above n 66, 121.

69 Lacan, above n 58, 27.

by a specular identification with the masculinity of the other, under whose imagined gaze the sovereign subject becomes empowered to recognise himself. Jennifer Beard notes that ‘colonised subjects are required both materially and politically to bring themselves into subjection to Empire, “not to make themselves equal” to use the words of Augustine, but rather to maintain recognition by an international audience that promises salvation.’⁷⁰ I argue that similarly to this neo-colonial operation, gender (as with race) becomes co-opted as a basis for recognition. In the name of global fraternity, a utopic space is created within which what the literary critic Eve Sedgwick describes as ‘homosocial’⁷¹ relations are played out.

In this utopic space, desire becomes entangled with recognition. The modern subject’s desire for a white, developed, clean-and-proper territory becomes coded as a masculine one, which itself is predicated upon its binary opposite: the idea of a feminine object of desire. This desire for a recognisable territorial body can be understood in terms of homosociality: desire by one sovereign subject for the other which reflects/refracts its ‘Sameness – in itself and for itself’.⁷² Sovereignty thereby remains as a promise for all States equally. This promise is sealed by harmonisation through the spoken and written exchange of words (what we know as international law); themselves guaranteed, not by God, but by the exchange of resources (bodies and land). Thus, the jurisdiction of international law as it pertains to bilateral or multilateral relations works to reproduce an order maintained on the basis of sameness (under the masculine gaze), which itself is predicated upon the radical alterity of the feminine. Within this gendered story, the myth of origin is located firmly with the metonymic reproductive capacity of the masculine gaze.

The modern subject is only capable of experiencing the body of the sovereign State as territory: a space to be possessed and occupied, and a resource to be exchanged (among other masculine subjects), but not as a part of its ontological whole. The surplus of desire for masculine subjectivity is symbolised by these excesses of the sovereign body. Furthermore, the masculine subject’s ‘Other’ can only be reincarnated within the symbolic order as icon (virgin or queen) or as a monstrous, abject, feminine.

To return to our initial question: why is Hirohito absent from the Tokyo Trial? In short, I propose that what appears merely to be a reprieve from (or missed opportunity for) prosecution, in fact signifies a critical moment in the history of international law. Divine violence within an emerging order is enacted in a

70 Beard, above n 40, 27 (citation omitted). For a detailed account of the historical shift from colonial tutelage towards a neo-colonial mode of relations (the ‘recognition’ of colonies as equal States) initiated in the inter-war period, see Antony Anghie, ‘Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations’ (2002) 34 *New York University Journal of International Law and Politics* 513; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004).

71 Eve Kosofsky Sedgwick, in her book *Between Men: English Literature and Male Homosocial Desire* (1985), inverts Rene Girard’s idea of mimesis to demonstrate the oppressive nature of what she calls ‘homosocial’ relations between men.

72 Irigaray, above n 26, 229.

spectacular form as the Emperor's two bodies (material and symbolic, temporal and atemporal) are saved in the name of perpetual peace, subsumed into the so-called secular fraternity. Within a psychoanalytic idiom, moreover, it is possible to read the Emperor's fragmenting body as a symptom of anxiety which resists such easy commerce. If we reformulate Freud's account of anxiety as arising from separation from the mother, and Lacan's definition of anxiety as a lack of that separation, then we arrive at a subject torn between loss and the threat of non-differentiation. Such tension is characteristic of international law, which fails to establish a discourse of separateness (particular-yet-connectedness). Through its emphatic prosecutions and non-prosecutions of sovereign subjects, the international criminal law machine thus continues to cleave the political away from the corporeal, while its docks remain haunted by the spectres of war.