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Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law

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I. INTRODUCTION

International law is universal. It is a body of law that applies to all states regardless of their specific cultures, belief systems, and political organizations. It is a common set of doctrines that all states use to regulate relations with each other. The association between international law and universality is so ingrained that pointing to this connection appears tautological. And yet, the universality of international law is a relatively recent development. It was not until the end of the nineteenth century that a set of doctrines was established as applicable to all states, whether these were in Asia, Africa, or Europe.

The universalization of international law was principally a consequence of the imperial expansion that took place towards the end of the “long nineteenth century.”² The conquest of non-European³ peoples for economic and political

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This Article is based on a chapter of my S.J.D. dissertation, *Creating the Nation-State: Colonialism and the Making of International Law* (1995) (unpublished S.J.D. dissertation, Harvard Law School) (on file with the author), and is part of a larger and ongoing project examining the relationship between international law and colonialism.

². Historians of the period tend to see the 19th century as ending in 1914 with the commencement of the Great War that marks the end of the century. See Eric Hobsbawm, *The Age of Empire: 1875-1914*, at 8 (1987).

³. By “non-European” I refer to the areas that were the subject of colonial expansion in the late 19th century, that is, principally, Asia, Africa, and the Pacific. The impact

advantage was the most prominent feature of this period, which was termed by one eminent historian, Eric Hobsbawm, as the “Age of Empire.”⁴ By 1914, after numerous colonial wars, virtually all the territories of Asia, Africa, and the Pacific were controlled by the major European states, resulting in the assimilation of all these non-European peoples into a system of law that was fundamentally European in that it derived from European thought and experience.

The late nineteenth century was also the period in which positivism decisively replaced naturalism as the principal jurisprudential technique of the discipline of international law.⁵ Positivism was the new analytic apparatus used by the jurists of the time to account for the events that culminated in the universalization of international law and the formulation of a body of principles that was understood to apply globally as a result of the annexation of “unoccupied” territories such as the Australian continent, the conquest of large parts of Asia, and the partitioning of Africa.

This Article focuses on the relationship between positivism and colonialism. My interest lies in examining the way in which positivism dealt with the colonial confrontation. Particularly, this is an attempt to examine how positivism sought to account for the expansion of European Empires and for the dispossession of various peoples stemming therefrom. In studying this relationship, I seek not only to outline an architecture of the legal framework, but also to question extant understandings of the relationship between colonialism and positivism and the significance of the nineteenth-century colonial encounter for the discipline as a whole.

Positivist jurisprudence is premised on the notion of the primacy of the state. Despite subsequent attempts to reformulate the foundations of international law, the fundamental positivist position, that states are the principal actors of international law and they are bound only by that to which they have consented, continues to operate as the basic premise of the international legal system. Positivism, furthermore, has generated the problem that governs the major theoretical inquiries into the discipline: how can legal order be created among sovereign states? Attempts to resolve this problem, as well as the critiques of these attempts, have, on the whole, constituted the central theoretical debate of the discipline over the last century.⁶ The defining character of this problem to the

of the Americas on the development of international law gives rise to an important and distinct set of issues, which I do not address here.

⁴. Hobsbawm, *supra* note 1.

⁵. As to the emergence of positivism, Henkin et al. provide a useful summary and a historical periodization: “The rise of positivism in Western political and legal theory, especially from the latter part of the 18th century to the early part of the 20th century, corresponds to the steady rise of the national state and its increasingly absolute claims to legal and political supremacy.” Louis Henkin et al., *International Law* at xxv (3d ed. 1993).

⁶. I am indebted to a number of important recent works that examine the importance of the 19th century to international law, as seen within this framework. *See, e.g.*, Anthony Carty, *The Decay of International Law: A Reappraisal of the Limits of Legal Imagination in International Affairs* (1987); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 *Quinnipiac L. Rev.* 99 (1997) [hereinafter Kennedy, *History*]; Martti Koskeniemi, *From Apology to Utopia* (1989)

discipline of international law is further reflected by the structure of many of the major textbooks of international law, which introduce the subject by outlining the problem and offering some sort of solution to it.⁷

Colonialism features only incidentally within this scheme. This appears inevitable, because the colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state that, according to the positivist jurisprudence of the time, was lacking in sovereignty. Such a confrontation poses no conceptual difficulties for the positivist jurist who basically resolves the issue by arguing that the sovereign state can do as it wishes with regard to the non-sovereign entity, which lacks the legal personality to assert any legal opposition. This resolution was profoundly important from a political point of view as its operation resulted in the universalization of international law. Nevertheless, it seemingly poses no theoretical difficulties; consequently, the colonial world is relegated to both the geographical and theoretical peripheries of the discipline.

Certainly, colonies were often exasperatingly troublesome, both in terms of their governance and international jurisprudence. But for the international lawyers, colonial problems constituted a distinct set of issues that were principally not of a theoretical, but rather a political character: how the colonized peoples should be governed and, later, what role international law should play in decolonization.

Even when the colonies were perceived to challenge some of the fundamental assumptions of the discipline, as in the case of the doctrine of self-determination, which was used in the 1960s and 1970s to effect the transformation of colonial territories into sovereign states, such challenges were perceived, mainly in political terms, as a threat to a stable and established system of international law, which was ineluctably European and was now faced with the quandary of accommodating these outsiders. The conceptualization of the problem in this way suggested again that the non-European world was completely peripheral to the discipline proper; and it was only the disconcerting prospect of Africans and Asians acquiring sovereignty in the 1950s and 1960s that alerted international lawyers to the existence of a multicultural world.⁸

[hereinafter Koskenniemi, Apology]; Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 2 Eur. J. Int'l L. 215 (1997) [hereinafter Koskenniemi, *Lauterpacht*]. I am also indebted to major works that deal with the entry of colonial states into the international system. See, e.g., James Crawford, *The Creation of States in International Law* (1979), Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (1984).

⁷. This problem is usually posed as one of "Is International Law Really Law?" Henkin et al., *supra* note 4, at 10–18. As discussed below, international lawyers, for over a century, have adopted the same practice.

⁸. For an examination of this period, see Adda Bozeman, *The Future of Law in a Multicultural World* (1971); *The Future of International Law in a Multicultural World* (R.J. Dupuy ed., 1983). The axiomatically European character of international law has been often proclaimed. In his monumental work on the history of the discipline, Verzijl states:

Now there is one truth that is not open to denial or even to doubt, namely that the actual body of international law, as it stands today, not only is the product of

Scholars focusing on the colonial world naturally adopted a very different approach. The principal concern of these scholars was to show how positivist international law subordinated non-European peoples. The naturalist international law that had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, European or non-European. By contrast, positivist international law distinguished between civilized states and non-civilized states and asserted further that international law applied only to the sovereign states that composed the civilized “Family of Nations.” The important work of these scholars focused, then, on the complicity between positivism and colonialism.⁹ Although the traditional view of the discipline downplays the importance of the colonial confrontation for an understanding of the subject as a whole, it is clear that much of the international law of the nineteenth century was preoccupied with colonial problems. It is explicitly recognized that special doctrines and norms had to be devised for the purpose of defining, identifying, and categorizing the uncivilized, and this was what the jurists of the period proceeded to do, for instance when listing “conquest” and “cession by treaty” among the modes of acquiring territory. While analyzing and critiquing these doctrines and their effects, however, even distinguished scholars such as Alexandrowicz implicitly tend to treat the colonial encounter as marginal by studying it principally in

the conscious activity of the European mind, but has also drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin.

J.H.W. Verzijl, *International Law in Historical Perspective* 435–36 (1968). It is not entirely surprising, then, that colonialism features only incidentally even in important recent works. See, e.g., Jens Bartelson, *A Genealogy of Sovereignty* (1995).

⁹ The most notable scholar in this area is C.H. Alexandrowicz, whose extensive and pioneering body of work includes *An Introduction to the History of the Law of Nations in the East Indies* (1967) [hereinafter Alexandrowicz, *East Indies*]; *The European-African Confrontation: A Study in Treaty Making* (1973) [hereinafter Alexandrowicz, *Treaty Making*]. Many scholars from developing nations have examined the effect of the 19th century in their broader treatment of the relationship between colonialism and international law. See, e.g., R.P. Anand, *New States and International Law* (1972); Taslim O. Elias, *Africa and the Development of International Law* (1972); Mohammed Bedjaoui, *Towards a New International Economic Order* (1979). These works were written at a time when the newly independent states of Africa and Asia were assessing the history of the international system of which they were now full members. Other recent important works that deal with the issue of the significance of 19th-century colonialism to international law include Georges Abi-Saab, *International Law and the International Community: The Long Road to Universality*, in *Essays in Honour of Wang Tieya* 31 (Ronald St. John Macdonald ed., 1994); Annelise Riles, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 *Harv. L. Rev.* 723 (1993); Siba N’zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (1996); James Thuo Gathii, *International Law and Eurocentricity*, 9 *Eur. J. Int’l L.* 184 (1998); Makau wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 *Mich. J. Int’l L.* 1113 (1995). I have also drawn upon the important work of scholars writing more generally in the tradition of developing nations. See generally B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (1993); M. Sornarajah, *Power and Justice in International Law*, 1 *Singapore J. Int’l & Comp. L.* 28 (1997). For a case study of the way in which international law dealt with colonial territories, see the sustained examination provided in Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (1992).

terms of the effects of positivism on the colonized peoples.

My approach both borrows from and differs from these two broad approaches to the relationship between international law and the colonial confrontation. My argument is that the colonial confrontation is central to an understanding of the character and nature of international law, but that the extent of this centrality cannot be appreciated by a framework that adopts as the commencing point of its inquiry the problem of how order is created among sovereign states. In attempting to demonstrate this centrality I have focused instead on how order is created among entities characterized as belonging to entirely different cultural systems.¹⁰ I suggest that the maneuvers engaged in by positivist jurists with respect to colonialism may be best understood in terms of what might be termed the dynamic of difference. Jurists, using the conceptual tools of positivism, postulated a gap, understood principally in terms of cultural differences, between the civilized European and uncivilized non-European world. Having established this gap they then proceeded to devise a series of techniques for bridging this gap—of civilizing the uncivilized.

Such an approach enables an exploration of both the relationship between ideas of culture and sovereignty, and the ways in which sovereignty became identified with a specific set of cultural practices to the exclusion of others. By adopting this framework, I hope to inquire into a series of related problems: what does it mean to say that international law consists of rules to which sovereigns have acquiesced when certain societies were denied sovereign status? What are the processes by which this denial was justified and enforced? How does an understanding of these processes of denial offer a means of reinterpreting contemporary understandings of sovereignty doctrine and of positivism itself? Exploring these issues might enable an appreciation of the distinctive and unique character of sovereignty as it developed in the non-European context. Such an appreciation is important for an understanding of the subsequent histories of the non-European states, even after decolonization.

My broader goal is to contest the received and traditional understandings of positivism and of sovereignty doctrine, which treat each of these concepts as independently and completely constituted within European thought and history. Within this framework, the relationship between positivism and colonialism is understood principally in terms of the crippling effect that an already established positivism had on non-European peoples. Similarly, sovereignty doctrine is understood as a stable and comprehensive set of ideas that was formulated in Europe and that extended inexorably and imperiously with empire into darkest Africa, the inscrutable Orient, and the far reaches of the Pacific, acquiring control over these territories and peoples and transforming them into European possessions. The effects of the operation of these doctrines are not insignificant.

¹⁰. I have adopted a similar framework in analyzing an international dispute involving questions of colonial exploitation and in discussing the works of a naturalist jurist, Francisco de Vitoria. See Antony Anghie, “*The Heart of My Home*”: *Colonialism, Environmental Damage, and the Nauru Case*, 34 Harv. Int’l L.J. 445 (1993) [hereinafter Anghie, *Nauru*]; Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 Soc. & Legal Stud. 321 (1996) [hereinafter Anghie, *Vitoria*].

My interest lies, however, not only in the important point that positivism legitimized conquest and dispossession, but also in the reverse relationship—in identifying how notions of positivism and sovereignty were themselves shaped by the encounter. In contrast to the view that the colonial confrontation illuminates a minor and negligible aspect of sovereignty doctrine, my argument is that no adequate account of sovereignty can be given without analyzing the constitutive effect of colonialism on sovereignty. Colonialism cannot be accounted for as an example of the application of sovereignty; rather, sovereignty was constituted and shaped through colonialism.¹¹

My argument is that what passes now as the defining dilemma of the discipline, the problem of order among states, is a problem that has been peculiar, from the time of its origin, to the specificities of European history. Additionally, the extension and universalization of the European experience, which is achieved by transmuting it into the major theoretical problem of the discipline, has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied. Within the axiomatic framework of positivism, which decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilizing mission, the process by which peoples of Africa, Asia, the Americas, and the Pacific were finally assimilated into a European international law. This is the history I am examining, not with a view to furthering it, but in an attempt to point to the “ambivalences, contradictions, the use of force, and the tragedies

¹¹. This follows, with a little adaptation, Edward Said’s concern to “regard imperial concerns as constitutively significant to the culture of the modern West.” Edward W. Said, *Culture and Imperialism* 66 (1993). Many of the themes and concerns of this essay are derived from the profoundly important work done by a group of scholars loosely and problematically termed “post-colonial.” Some of the major works that have emerged from these scholars and that have shaped my approach in this Article are Edward Said, *Orientalism* (1978) Gayatri Chakravorty Spivak, *In Other Worlds* (1987). For general works on these scholars, see Bart Moore-Gilbert, *Postcolonial Theory: Contexts, Practices, Politics* (1997). For the purposes of this essay, my major concern is to explore, in the context of international law, the broad idea developed by these theorists that Europe cannot be understood without reference to the non-European world and that there was an intimate connection between the development of various disciplines in the West and the colonial project. Important collections of essays that develop and apply different aspects of this body of theory include *Selected Subaltern Studies* (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988); *Colonialism and Culture* (Nicholas B. Dirks ed., 1992); *Tensions of Empire: Colonial Cultures in a Bourgeois World* (Frederick Cooper & Ann Laura Stoler eds., 1997). I am also indebted to the pioneering work done by critical race theorists on the relationship between law and race, particularly Patricia J. Williams, *The Alchemy of Race and Rights* (1991); Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law*, 101 *Harv. L. Rev.* 1331 (1988). For important recent works that apply critical race theory and post-colonial theory to various problems of international law, see Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 *Am. U. J. Int’l L. & Pol’y* 903 (1997); Dianne Otto, *Subalternity and International Law: The Problem of Global Community and the Incommensurability of Difference*, 5 *Soc. & Legal Stud.* 337 (1996).

and ironies that attend it.”¹² In attempting this sort of a history, I depart from the tendency, present even among writers such as Alexandrowicz who are sympathetic to the injustices of colonialism, to focus on positivism’s triumphant suppression of the non-European world. The violence of positivist language in relation to non-European peoples is hard to overlook. Positivists developed an elaborate vocabulary for denigrating these peoples, presenting them as suitable objects for conquest, and legitimizing the most extreme violence against them, all in the furtherance of the civilizing mission—the discharge of the white man’s burden.¹³ Despite this, it is incorrect to see the colonial encounter as a series of problems that were effortlessly resolved by the simple application of the formidable intellectual resources of positivism. Rather, I argue, positivists were engaged in an ongoing struggle to define, subordinate, and exclude the uncivilized native; my argument is that colonial problems posed a significant and ultimately insuperable set of challenges to positivism and its pretensions to develop a set of doctrines that could coherently account for native personality, a task that was crucial to the positivist self-image. The brutal realities of conquest and dispossession can hardly be ameliorated by asserting that the legal framework legitimizing this dispossession was contradictory and incoherent. But it is perhaps by pointing to these inconsistencies and ambiguities, by interrogating how it was that sovereignty became the exclusive preserve of Europe, and by questioning this framework, even while describing how it came into being, that it might be possible to open the way not only towards a different history of the discipline, but to a different understanding of the workings and effects of colonialism itself.¹⁴ This in turn is part of a larger project that has been the preoccupation of many jurists of the non-European world: to understand the relationship between international law and colonialism in order to formulate more adequately the potential of the discipline to remedy the enduring inequities and imbalances that resulted from the colonial confrontation.

The subject of this Article is colonialism in the nineteenth century. And yet, it is also part of a larger project that focuses on international law as a whole and seeks to understand the entire complex, convoluted, and fraught relationship between colonialism and international law. I am concerned with understanding the strategies by which international law rewrites its history, in different

¹². Dipesh Chakrabarty, *Postcoloniality and the Artifice of History: Who Speaks for “Indian” Pasts?*, Representations, Winter 1992, *extracted in* The Post-Colonial Studies Reader 386 (Bill Ashcroft et al. eds., 1995).

¹³. This corresponds exactly with Said’s notion of Orientalism: “Orientalism can be discussed and analyzed as the corporate institution for dealing with Orient—dealing with it by making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient.” Said, *Orientalism*, *supra* note 10, at 3.

¹⁴. The broad attempt, then, is to begin in some way the problematic task, which Dipesh Chakrabarty has formulated, of “provincializing ‘Europe.’” Chakrabarty, *supra* note 11, at 383. To attempt this project is paradoxical given that what I am examining is the process by which European international law became universal; as Chakrabarty notes, “The project of provincializing ‘Europe’ refers to a history which does not yet exist.” *Id.* at 385.

phases, and, in particular, how it seeks to suppress the colonial foundations of the discipline. The systematic neglect of the centrality of colonialism for the whole project of international law is far from coincidental. Rather, it is a consequence of a powerful set of attitudes and juristic techniques that need to be identified, understood, and contested. Thus the final sections of this Article use the nineteenth century as a means for examining the broader question of how international law, even while relying on the colonial past and the legal and political relations it created, nevertheless presents that past as inconsequential, both in terms of the theory of international law and the systems of power and inequality it brought into being. The conventional approach studies the nineteenth century in order to show how it has been overcome. My argument is that central elements of nineteenth-century international law are reproduced in current approaches to international law and relations.

This inquiry is conducted through an analysis of the works of prominent jurists of the nineteenth century, including James Lorimer,¹⁵ W.E. Hall,¹⁶ John Westlake,¹⁷ Thomas Lawrence,¹⁸ and Henry Wheaton.¹⁹ I have also considered the works of later jurists, such as Lassa Oppenheim²⁰ and M.F. Lindley,²¹ who wrote in the 1920s, but whose work adopts and elaborates the nineteenth-

¹⁵. 1 James Lorimer, LL.D., *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* 22 (London, Blackwood and Sons 1883).

¹⁶. William Edward Hall, M.A., *A Treatise on International Law* (1880), The first edition of this work was published in 1880 and was revised on numerous occasions. It was the major English treatise on the subject prior to the appearance of L. Oppenheim, M.A., LL.D. *International Law: A Treatise* (1912), *infra* note 19.

¹⁷. John Westlake was Whewell Professor of International Law at the University of Cambridge in 1894, at the time of the publication of his work, *Chapters on the Principles of International Law* (Cambridge, Cambridge Univ. Press 1894). The book's 11 chapters deal mainly with jurisprudential aspects of international law (the distinctiveness of international law and its status as "law") and the history of international law from the time of the Greeks to the 18th century. There are also several chapters discussing "colonial problems," as suggested by the titles "The Equality and Independence of States," "International Rights of Self-Preservation," "Territorial Sovereignty, Especially with Relation to Uncivilised Regions," "The Empire of India"; and a final chapter succinctly entitled "War." It is notable that, for a work which purports to be general in scope, 3 of the 11 chapters deal quite explicitly with issues regarding the status and treatment of colonies and natives.

¹⁸. Thomas Lawrence, *The Principles of International Law* (London, Macmillan 1895).

¹⁹. Henry Wheaton, *Elements of International Law* (George Grafton Wilson ed., The Carnegie Institute of Washington photo. reprint 1964) (1866). Wheaton's work, which has passed through several editions, was widely respected and used at this time.

²⁰. The first edition of Lassa Oppenheim's magisterial work was published in 1905 and could be regarded as a superb embodiment of positivist jurisprudence. The analysis of this Article is based on Lassa Oppenheim, *International Law* (2d ed., 1912), perhaps the last great international law text of the long 19th century. Subsequent editions have been edited by a series of extremely distinguished international lawyers, and Oppenheim's *International Law* continues to be, in all likelihood, the most authoritative and distinguished treatise on international law in the English language.

²¹. M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (photo. reprint 1969) (1926).

century framework.²²

Part II of this Article focuses on the basic elements of positivism—the analytical tools, methods, and ambitions of positivist jurists—in order to examine how issues of race and culture were always central to the very conceptualization and project of positivism, rather than a set of issues for which an established positivism developed an ancillary vocabulary. Furthermore, in studying the ambitions and methods of positivists, it becomes possible to appreciate their preoccupation with establishing the intellectual coherence and rigor of their discipline and, therefore, the significance of successfully overcoming the challenges colonialism posed to such ambitions.

Part III explores the first step in the dynamic of difference, the process by which a gap was postulated between European and non-European peoples; it examines how cultural distinctions became the basis for establishing a legal status, and how sovereignty doctrine was constituted by the elaboration of these distinctions so as to exclude non-European peoples from the realm of sovereignty.

Part IV examines the process by which the gap was bridged and the non-European world was brought into the realm of international law. It focuses, first, on the techniques of assimilation and, second, on the Berlin West Africa Conference of 1884–85, which provides an example of the broader diplomatic and political contexts in which these doctrines were applied.

Part V offers a reinterpretation of the significance of the nineteenth century to the discipline in the context of the previous analysis.²³

II. ELEMENTS OF POSITIVIST JURISPRUDENCE

A. Introduction

The philosophy of positivism provided the primary jurisprudential resource for the jurists of the late nineteenth century. In the naturalist scheme, the sovereign administered a system of natural law by which it was bound. Positivism, by way of contrast, asserts, not only that the sovereign administers and enforces the law, but that law itself is the creation of sovereign will. The sovereign is the foundation of positivist jurisprudence, and nineteenth-century positivist jurists essentially sought to reconstruct the entire system of international law based

²². For comprehensive accounts of the broader political contexts in which these judicial developments occurred, see Gong, *supra* note 5; The Expansion of International Society (Hedley Bull & Adam Watson eds., 1984); Adam Watson, *The Evolution of International Society: A Comparative Approach* (1992). For other useful but shorter works dealing with the same themes, see David Strang, *Contested Sovereignty: The Social Construction of Colonial Imperialism, in State Sovereignty as Social Construct* 22, 22–50 (Thomas J. Biersteker & Cynthia Weber eds., 1996).

²³. The language of the period is replete with racial references to the “uncivilized,” “natives,” “backward,” and so forth but I have refrained from placing these terms in quotations. I hope it is understood that the appearance of these terms in this essay does not reflect my acceptance of them.

on their new version of sovereignty doctrine. Two additional factors are important to an understanding of the positivist project. Positivist international lawyers were heavily influenced by the English jurist, John Austin, who questioned whether international law could be regarded as law at all. Accordingly, international legal positivists attempted to develop a jurisprudence that could address these objections. Moreover, they sought to present their discipline as “scientific” in character. Each of these factors was important to the positivist self-image and played a significant role in the development of positivist jurisprudence. Not only did positivism establish the legal framework that dealt with international disputes, but it also established the vocabulary and the set of constraints and considerations, that both shaped and was shaped by sovereignty doctrine.

B. Positivism and the Shift from Natural Law

Positivist jurists generally commenced their campaign of articulating new, distinctive versions of international law by employing the traditional technique of sketching the histories of their discipline up to their own time, and then distinguishing themselves from their naturalist predecessors. In broad terms, natural law consisted of a set of transcendental principles that could be identified through the use of reason. Still, even early jurists such as Francisco de Vitoria, a sixteenth-century scholar, made a distinction between “natural law” and “human law.”²⁴ Human law, as the term suggests, was created by secular political authorities, and positivism was an extended elaboration of this framework. Natural law, by contrast, was strongly identified with principles of justice and the notion that all human activity was bound by an overarching morality. Thus within the naturalist framework, sovereign states were bound by the principles of natural law.

The techniques of naturalists are illustrated by jurists such as Grotius who argued that reason revealed a set of rules that governed relations between nations.²⁵ Nineteenth-century writers such as Wheaton understood Grotius’s science²⁶ to have been,

First, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in a *state of nature*; and,

²⁴. Vitoria makes distinctions between three categories of law: divine, human, and natural law. See Francisco de Vitoria, *De Indis et de Ivre Belli Reflectiones* [On the Indians Lately Discovered] ¶ 342, at 131 (Ernest Nys ed. & J.P. Bate trans., The Carnegie Institute of Washington 1917) (1696). For an extended discussion of Vitoria’s use of these categories of law, see Alfred P. Rubin, *International Law in the Age of Columbus*, 39 *Neth. Int’l L. Rev.* 5 (1992).

²⁵. Earlier jurists such as Vitoria identified “international law” as natural law. Vitoria writes of “the law of nations (*jus gentium*) which either is natural law or is derived from natural law.” Vitoria, *supra* note 23, ¶ 386, at 351.

²⁶. The discussion here of naturalist jurisprudence is based on 19th-century understandings of this jurisprudence, rather than on my own analysis of the original works of jurists such as Grotius.

Secondly, to apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.²⁷

Naturalist jurists such as Grotius and Pufendorff continuously debated the questions of whether rules emanated from reason or custom, or whether custom could be regarded as a manifestation of reason.²⁸ Essentially, however, custom was still approached through the naturalist framework, which examined and assessed the validity of state behavior with reference to the transcendent principles originating from the “state of nature,” the model society whose laws could be identified and elaborated by reason and that, ideally, governed state behavior. A gradual shift in this approach is evident from the mid-seventeenth century onwards. Vattel, whose major work, *The Law of Nations*,²⁹ first appeared in 1758 is a pivotal figure in this shift towards positivism; while Vattel retained many aspects of naturalist thinking, he emphasized the power and authority of the sovereign to an extent that raised doubts as to whether international law could ever bind the sovereign.³⁰ Jurists in the late eighteenth century and early nineteenth century combined positivism and naturalism in various ways, noting that while a certain universal natural law applied to all nations without distinction between civilized and non-civilized, this system had to accommodate a considerable and emerging body of positive law specific to Europe.

Positivist law consisted of those rules that had been agreed upon by sovereign states, either explicitly or implicitly, as regulating relations between them.³¹ Several late-eighteenth-century jurists such as von Ompteda, Moser, Surland, and Martens, noting the powerful emergence of positivist law, attempted to reconcile positivism and naturalism into an overall scheme of international law.³² Traces of this reconciliatory approach may be found in some nineteenth-century jurists such as Lorimer who accepted that the law of nations comprised treaties and customs, but who argued that the overall purpose of the law of nations,

²⁷. Wheaton, *supra* note 18, ch. 1.2.

²⁸. As Wheaton notes, Grotius himself recognized that “natural law” was by no means a universal, self-evident category and that it was understood in different ways in different communities. Hence he makes the distinction between “natural law” and the “law of nations.” “For if a certain maxim which cannot be fairly inferred from admitted principles is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origins from positive institutions.” *Id.*, ch. 1.4. Within this scheme, consent is of importance, as it is the consent of the states which leads to the creation of “positive law” (the law of nations), which cannot be attributable to principles derived from the state of nature. *See id.*

²⁹. Emer de Vattel, *The Law of Nations or Principles of Natural Law* (C. Fenwick trans. & ed., 1916) (1758).

³⁰. *See* Koskenniemi, *Apology*, *supra* note 5, at 85–98; Carty, *supra* note 5, at 71–74. For a short and general treatment of Vattel, see Arthur Nussbaum, *A Concise History of the Law of Nations*, 156–58 (rev. ed. 1954).

³¹. *See generally* C.H. Alexandrowicz, *Doctrinal Aspects of the Universality of the Law of Nations*, 37 *Brit. Y.B. Int’l L.* 506 (1961).

³². *See id.*

derived from the law of nature,³³ was that of securing and furthering liberty.³⁴ Overall, however, the most influential late-nineteenth-century positivists such as Westlake and Hall were emphatically and exclusively positivist. This trend was such that by 1908, Oppenheim, probably the most eminent scholar of his time, emphasized that “we are no longer justified in teaching a law of nature and a ‘natural’ law of nations.”³⁵ For positivists, the sovereign state was the foundation of the whole legal system, and their broad project was to reconstitute the entire framework of international law based on this premise. Thus positivists rejected completely the naturalist notions that sovereign states were bound by an overarching natural law or that state action had to be guided by a higher morality. The sovereign was the highest authority and could only be bound by that to which it had agreed to be bound. Thus, for positivists, the rules of international law were to be discovered, not by speculative inquiries into the nature of justice or teleology, but by a careful study of the actual behavior of states and the institutions and laws that those states created.

Thus Westlake, for example, outlines his own approach in criticizing Pufendorff’s argument that the rules relating to the immunities of ambassadors may be sought in natural law. Pufendorff,

while insisting much on the social nature of man as the source of his duties. . . missed the essential facts that, if society is to exist, it must establish rules free from such undefinable elements as the principal purpose of an ambassador’s residence, and those rules must be acquiesced in by the members of the society.³⁶

The teleological basis of Pufendorff’s rule was unacceptable to positivists, for whom treaties and custom had replaced natural law as the exclusive and primary source of international law. Treaties were an expression of sovereign will. Furthermore, positivists argued, the practice of states was also a manifestation of sovereign will and could suggest consent—either expressly or implicitly—to a set of customary laws. Thus, for positivists, treaties and the developing body of custom were the best guides to the proper rules of international behavior.

³³. Lorimer insisted on “the exceptional dependence of the law of nations on the law of nature.” Lorimer, *supra* note 14, at 22.

³⁴. *See id.* at 15–27. Lorimer’s basic argument was that the positive law of nations was directed towards the goal, identified in natural law, of securing liberty. In this way, Lorimer was adopting the sort of teleological approach which Wheaton would have dismissed. In arguing for the “exceptional dependence of the law of nations on natural law,” Lorimer asserts:

In dealing with the law of nations, the jurist has always a preliminary function to perform, and as it is natural law that determines the objects of positive law in all its departments, the function is one which he can perform only by keeping it steadily in view.

Id. at 22.

³⁵. Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 *Am. J. Int’l L.* 313, 328 (1908).

³⁶. Westlake, *supra* note 16, at 63.

C. Reactions to the Austinian Critique of International Law

In focusing on the sovereign as the exclusive and ultimate source of law, positivist international jurists were following a long tradition that had been notably developed by eminent political philosophers such as Thomas Hobbes and Jean Bodin. The English jurists of the late nineteenth century, however, were most influenced by John Austin, the foremost spokesman for positivism at the time,³⁷ who asserted famously that “[l]aws properly so called are a species of *commands*. But, being a *command*, every law properly so called flows from a *determinate* source.”³⁸ The source is, for Austin, as for international jurists, a sovereign.

International law could conform in many respects to Austin’s notion of law: international lawyers based their legal framework on sovereign behavior and, like Austin, insisted on the distinction between law and morality or justice. Problematically, however, the international system lacked the global sovereign crucial to Austin’s scheme. Given his premise that all authority derived from a determinate source and the acknowledged absence in international relations of an overarching international sovereign, Austin argued that “the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author.”³⁹

Positivist international lawyers prided themselves on having rid the discipline of insupportable arguments regarding “natural law” and its associated idea of a higher morality. Austin, on the other hand, intent on defining law in such a manner as to establish a sound basis for a science of jurisprudence, and rescuing it from the muddled speculations of naturalists, threatened such pretensions by categorically asserting that international law itself was nothing more than morality.

Austin’s challenge was taken up, not only by the international lawyers of succeeding generations, but also by his contemporaries. Westlake,⁴⁰ Lawrence,⁴¹ Oppenheim,⁴² and Walker,⁴³ for example, commence their works with attempts at refuting or qualifying Austin. In effect, these responses present a modified and more specific version of what law and positivism meant to international lawyers, who set about establishing why international law was law despite its failure to meet Austinian criteria.

International jurists used both analytical and historical arguments,⁴⁴ often in

³⁷. The primary works of Austin are *Lectures on Jurisprudence* (London, J. Murry 1879), *Lectures in Jurisprudence* (1885), and *The Province of Jurisprudence Determined* 101 (David Campbell & Philip Thomas eds., Ashgate 1998) (1832) [hereinafter Austin, *Jurisprudence Determined*].

³⁸. Austin, *Jurisprudence Determined*, *supra* note 36, at 101.

³⁹. *Id.* at 152.

⁴⁰. See Westlake, *supra* note 16, at v–16.

⁴¹. See Lawrence, *supra* note 17, at 1–25.

⁴². See Oppenheim, *supra* note 19, at 4–5.

⁴³. See 1 Thomas Alfred Walker, *A History of the Law of Nations* 1–20 (Cambridge, Cambridge University Press 1899).

⁴⁴. Analytical arguments focused on the consistency and adequacy of definitions; historical arguments drew on what had been revealed by historical researches into other societies. For an outline of what the two approaches constituted for international

combination, to refute Austin. The analytical argument questioned the adequacy of Austin's definition of law itself. Lawrence, for example, meets Austin's objection by arguing that Austin's definition of law is not authoritative and that alternative definitions should also be taken into account. Thus Lawrence argues, "If we follow Austin and hold that all laws are commands of superiors, International Law is improperly so called. If we follow Hooker and hold that whatever precepts regulate conduct are laws, International Law is properly so called."⁴⁵ Lawrence seems to argue, in effect, that law can be said to exist as long as states observe a set of norms; it is irrelevant whether or not these norms are enunciated by some supreme, sovereign authority. Oppenheim similarly argued that Austin failed to take into account the reality of unwritten or customary law.⁴⁶ This law did not originate from a sovereign and hence failed to meet Austin's definition. And yet, even within national systems, such customary laws were recognized and administered by municipal courts.⁴⁷

The reality and efficacy of customary law was further illustrated by the historical work of writers such as Sir Henry Maine. Maine had been a consistent critic of Austin and Austin's fellow positivist Jeremy Bentham, and his works such as *Ancient Law* suggested powerfully that Austin's view of law was rather limited and that societies had generally been governed by conceptions of law that differed markedly from those defined by Austin.⁴⁸ International jurists such as Walker⁴⁹ and Lawrence⁵⁰ seized upon Maine's researches, the "hard facts of History"⁵¹ to point to the inadequacy of Austin's definition. International jurists had a particular interest in stressing the importance of customary law, furthermore, as customary law was one of the principal, if not the principal, sources of international law.

Austin had anticipated such criticisms by explicitly arguing that custom was not a proper source of law. Referring to the existence of custom in a domestic setting, Austin argued:

At its origin, a custom is a rule of conduct which the governed observe spontaneously, or not in pursuance of a law set by a political superior. The custom is transmuted into positive law, when it is adopted as such by the courts of justice, and when the judicial decisions fashioned upon it are enforced by the power of the state. But before it is adopted by the courts and clothed with the legal sanction, it is merely a rule of positive morality: a rule generally observed by the citizens or subjects but deriving the only force, which it can be said to possess, from the general diapprobation falling on those who transgress it.⁵²

This passage illustrates not only the indispensability of a sovereign to Austin's scheme, but the extent to which his whole concept of law is based on a rather

jurists, see Westlake, *supra* note 16, at vii-ix.

⁴⁵. Lawrence, *supra* note 17, at 25.

⁴⁶. See Oppenheim, *supra* note 19, at 5.

⁴⁷. See *id.*

⁴⁸. Sir Henry Sumner Maine, *Ancient Law* 6 (1864).

⁴⁹. Walker, *supra* note 42, at 8-19.

⁵⁰. For a discussion of Lawrence's use of Maine, see Riles, *supra* note 8, at 726.

⁵¹. Walker, *supra* note 42, at 8.

⁵². Austin, *Jurisprudence Determined*, *supra* note 36, at 21.

specific idea of society and political arrangements. The debate remained—and remains—unresolved. But to the extent that international jurists could make a case, it depended largely on establishing that a functioning system of rules governed the behavior of states, as exemplified by the operation of customary international law. This raised a further question for the jurist: in what circumstances, among which actors, could custom be said to arise in the dispersed international context? Custom, to international jurists, presupposed the existence of society. And “society” is the metaphor used elsewhere by Lawrence and by virtually all international lawyers of this period in their efforts to posit the existence of rules that are observed even in the absence of a supreme authority. “International law,” proclaims Westlake, “is the body of rules prevailing between states.”⁵³ He proceeds to explain this to mean that

states form a society, the members of which claim from each other the observance of certain lines of conduct, capable of being expressed in general terms as rules and hold themselves justified in mutually compelling such observance, by force if necessary; also that in such society the lines of conduct in question are observed with more or less regularity, either as the result of compulsion or in accordance with the sentiments which would support compulsion in case of need.⁵⁴

Within this scheme, sovereignty is important, inasmuch as society is constituted by sovereign states. Equally, however, it is because these states exist in society that international law can claim to be law. The interaction of the members of this society gives rise to rules that are regularly observed and enforced by sanctions. Consequently, “without society no law, without law no society.” It is through a complicated interplay between law and society that the result, the maintenance of international order and creation of international law, is circularly achieved. “Without society no law, without law no society. When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognise that there is a society of states, we recognise that there is international law.”⁵⁵

When focusing on the idea of law, Westlake writes that

perhaps no better account can be given of what is commonly understood by law than that it is a body of rules expressing the claims which, in a given society, are held to be enforceable and are more or less commonly observed.⁵⁶

Westlake unsurprisingly deviates here from the Austinian approach of looking to the source of these laws in order to locate the single authority, the sovereign, from whom they should all properly emanate. Law is not imposed from above by a sovereign but agreed upon by the relevant entities. Law exists where there is regularity in dealings, when the members of the society regard themselves as bound by the rules, and where sanctions of some sort would follow a breach. The notion of a “community,” “society,” or a “family”⁵⁷ becomes

⁵³. Westlake, *supra* note 16, at 1.

⁵⁴. *Id.* at 2.

⁵⁵. *Id.* at 3.

⁵⁶. *Id.* at 2.

⁵⁷. The terms “family of nations” or “community of nations” are used quite inter-

fundamental to the definition of law, as illustrated by Oppenheim’s argument that “law is a body of rules for human conduct within a community which by common consent of this community shall be enforced by external law.”⁵⁸

Thus, society, rather than sovereignty, is the central concept used to construct the system of international law. Despite the positivist claims that the sovereign was the exclusive basis for the international system, it was only if society was introduced into the system that positivists could approximate the idea of “law” to which they urged adherence. Society, therefore, provides the matrix of ideas, the analytical resource that, allied with sovereignty, could establish a positivist international legal order. This is an important shift, for implicit in the idea of society is membership; only those states that are accepted into society and agree upon principles regulating their behavior can be regarded as belonging to society. The concepts of society, furthermore, enabled the formulation and elaboration of the various cultural distinctions that were crucial to the constitution of sovereignty doctrine.

D. International Law as Science

The decisively important status accorded to natural sciences such as physics and biology profoundly influenced both domestic and international law. The epistemological validity of the scientific method was demonstrated, not only by the triumph of Darwin’s ideas⁵⁹ on natural selection, but by the massive success of the industrial revolution that had been made possible by scientific discoveries.⁶⁰ While jurists understood that jurisprudence could not achieve the same results as the natural sciences, it was important for them to be engaged in a “scientific inquiry”; this involved redefining their discipline in ways that appeared compatible with the scientific framework in an attempt not only to elevate their discipline, but their profession.⁶¹ The human sciences, of which

changeably by positivist jurists.

⁵⁸. Oppenheim, *supra* note 19, at 8. For Oppenheim’s general discussion on “community,” see *id.* at 8–9. “Innumerable are the interests which knit all the individualised civilised States together and which create constant intercourse between these States as well as between their subjects.” *Id.* at 10.

⁵⁹. On the importance of Darwin for validating the new “scientific method,” see J.M. Roberts, *A History of Europe* 344 (1996). As Roberts points out, Darwin’s ideas were extended to a number of fields. Darwinism could justify colonialism on the basis that it was because they were the “fittest” that the white races dominated the colored races. *Id.* The French historian Auguste Comte was one of the most forceful early proponents of science and positivism and stressed the importance of knowledge based on empirically verifiable facts rather than religious speculation. *Id.* at 342–43.

⁶⁰. On the place of science in society at the end of the 19th century, see generally Hobsbawm, *supra* note 1, chs. 10–11.

⁶¹. This issue is explored by David Sugarman, ‘*A Hatred of Disorder*’: *Legal Science, Liberalism and Imperialism*, in *Dangerous Supplements* 47 (Peter Fitzpatrick ed. 1991). Sugarman’s essay is also valuable as it clearly traces the importance that legal scholars attached—in a domestic context—to establishing law as a science in order to establish their disciplinary and professional status. In the international law context, as Koskenniemi notes, “By early 19th century, international law has become a science, an academic discipline taught separately from, on the one hand, theology, philosophy and natural law and, on the other, civil law.” Koskenniemi, *Apology*, *supra* note 5, at

international law was a part, could not, of course, be studied in the same way as natural sciences. But while asserting that international law is not a natural science, Westlake nevertheless, introduces his work as considering “the place of international law among the sciences,”⁶² and international lawyers of the period invariably refer to the “science” of international law.⁶³ The positivist self-image of being engaged in a scientific inquiry—and all that suggested in terms of rigor, consistency, and precision—played an important role in the method, elaboration, and application of nineteenth-century jurisprudence.

The positivists sought to develop a scientific methodology to identify and interpret relevant forms of state behavior in the midst of the general flux and confusion of international relations. Thus Lawrence writes that the great international lawyers of the nineteenth century produced “order from chaos, and made International Law into a science, instead of a shapeless mass of undigested and sometimes inconsistent rules.”⁶⁴

The term “science” was used in varied and complex ways by different international lawyers, but some of the core ideas as to the science of international law are illustrated by Lawrence, who

regard[ed] International Law, not as an instrument for the discovery and interpretation of a transcendental rule of right binding upon states as moral beings whether they observe it or not in practice, but as a science whose chief business it is to find out by observation the rules actually followed by states in their mutual intercourse, and to classify and arrange these rules by referring them to certain fundamental principles on which they are based.⁶⁵

Order could be established through classification, both of the legal phenomena of state behavior and of the rules of international law itself. Law is concerned, according to Westlake, with the “classification of institutions or facts”;⁶⁶

98 (footnotes omitted). For the attempts of more recent generations of international lawyers to establish the viability of their discipline, see David Kennedy, *A New Stream of International Law Scholarship*, 7 *Wis. Int'l L.J.* 1 (1988). For an illuminating examination of the relationship between the writing of history and disciplinary renewal, see Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 *Nordic J. Int'l L.* 481 (1996).

⁶². Westlake, *supra* note 16, at vi.

⁶³. Thus Oppenheim’s notable attempt to define the project of international law is titled *The Science of International Law: Its Task and Method*, see Oppenheim, *supra* note 34. For a very illuminating examination of the relationship between the writing of history and disciplinary renewal, see Outi Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery*, 65 *Nordic J. Int'l L.* 481 (1996).

⁶⁴. Lawrence, *supra* note 17, at 94.

⁶⁵. *Id.* at 1.

⁶⁶. Westlake, *supra* note 16, at 12. For the jurist who seeks to classify complex forms of state behavior that may fall, arguably, into several different categories, a certain blurring and inaccuracy may arise. Nevertheless, overall, the stability and coherence of international law is dependent, notwithstanding these inevitable confusions, on developing, maintaining and strictly applying a system of classification, by placing the appropriate species in the correct genus. Horwitz’s comments on the American jurisprudence of the period apply no less accurately to the international jurists of the time: “Nineteenth-century legal thought was overwhelmingly dominated by categorical thinking—by clear, distinct, bright-line classifications of legal phenomena. Late nineteenth-century legal reasoning brought categorical modes of thought to their high-

furthermore, it is “with law as an institution or fact that the legal student has to deal.”⁶⁷ Facts having been classified and the rules of international law having been identified, the further and broader task was to “classify and arrange these rules” in an effort to develop a coherent and overarching international law.

This endeavor pointed to a further tension in positivist jurisprudence. On the one hand, as its reliance on custom demonstrated, this jurisprudence encompassed the idea of flux and development. As the needs of states changed, so too would the treaties they entered into and the practices in which they engaged. The positivist differed from the naturalist precisely in asserting that there were no immutable, transcendent laws. At the same time, however, positivists argued that whatever the changes in international law, all the rules emerging from such developments referred back to certain “fundamental principles,” to use Lawrence’s terminology. Thus, whatever the haphazardness, flux, and uncertainty of state practice, it was ordered and understood by a fixed set of principles that classified and processed the raw material of practice and reconstituted it into a coherent and complete legal framework.⁶⁸

The origins and character of ordering mechanisms that performed these vital tasks, however, assumed a transcendental quality that seemed beyond history and inquiry. Indeed, to adopt any approach that denied the fixed quality of these principles could undermine the entire system of law. For many jurists, it was only by adopting an historical approach that international law could overcome Austinian objections. Nevertheless, once established as a discipline, international law repudiated the historical approach, which had the potential to challenge the implicit assumption that the principles used by jurists to order the world of legal phenomena were in some way eternal, beyond history. The danger of adopting such an approach was evident even to lawyers in the domestic sphere. Adoption of the historical or literary approach would result in a debilitating awareness of flux and contingency, warned Frederick Harrison, Professor of Jurisprudence at the Inns of Court in 1879.

It would lead to the utmost confusion of thought. . . if we come to regard historical explanations as the substantial or independent part of jurisprudence.

est fulfillment.” Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* 17 (1992).

⁶⁷. Westlake, *supra* note 16, at 12.

⁶⁸. An analogy might be drawn here with natural selection. Species evolved over time; but whatever the nature of the changes, they took place in accordance with the fundamental laws that had been identified by Darwin. Ideas of progress and evolution were embodied in international law thinking, and biological metaphors were often used by international lawyers. *See, e.g.*, Westlake, *supra* note 16, at 14–15. The same tension is manifested in thinking at the time about the English common law and is well encapsulated by Sugarman: “Scientific rationality was forever being mediated, refracted and sustained by an omnipresent irrationality: thereby lies the peculiar rationality of the common law mind. Thus the legal community could, with seeming effortlessness, eulogize the haphazard, particularistic, unsystematic evolution of the common law—and also trumpet its intrinsic rationalism.” Sugarman, *supra* note 60, at 45. The positivist idea that law was autonomous, comprehensive and scientific was also important in shaping the Classical Legal Thought which dominated American jurisprudence in the late 19th century. *See* Horwitz, *supra* note 65, at 9–32.

From history we always get ideas of. . . constant development, of instability. But in law, at any rate for the purposes of the practical lawyer, what we need are ideas of fixity, of uniformity. . . .

It is so great a strain upon the mind to build up and retrace the conception of a great body of titles reducible to abstract and symmetrical classification, and capable of statement as a set of consistent principles—and this is what I take jurisprudence to be—that we are perpetually in danger of giving to law a literary instead of a scientific character, and in slipping in our thoughts from what the law is into speculating upon the coincidences which make it what it once was.⁶⁹

This scientific methodology favored, then, a movement towards abstraction—a propensity to rely upon a formulation of categories and their systematic exposition as a means of preserving order and arriving at the correct “solution” to any particular problem. Legal science in the latter half of the nineteenth century was conceived of, even in the municipal sphere, as a struggle against chaos that could only be won by ensuring the autonomy of law, and establishing and maintaining the taxonomies and principles that existed in fixed relations to each other. What Harrison warns against is any attempt to examine the manner in which a particular mode of classification or system of law came into being; it is precisely this inquiry, however, that the “historical approach” that he condemns would advocate.⁷⁰ Thus, within the analytic approach, the myth of the state of nature is replaced, in positivist jurisprudence, with the myth of a fixed set of principles and a scheme of classifications that reveals itself to the scrutiny of the expert jurist who uses this scheme to establish and develop international law.

While thus outlining a sophisticated scientific technique, however, the question remained as to how these positivist jurists related these techniques (this emphasis on taxonomy and on the juridical character of state behavior) with the idea of “society,” which was indispensable to any claim that international law possessed the status of law and was the basis of the defense presented by Westlake and Lawrence against Austin’s charges. In order for the reconstructed system of positivism with all its claims to being a science to work, international lawyers had to develop a sociological vision, an understanding of various attributes of societies and their customs and the way in which they functioned, both internally and externally, in relation to each other. Society and history thus became the

⁶⁹. *Id.* at 51.

⁷⁰. It must be noted that other 19th-century writers such as Lawrence espoused the historical approach. See Lawrence, *supra* note 17, at 16, where he raises the issue of whether the inquiry into international law should be based on an historical method. As Lawrence himself makes clear, however, he uses these terms to signify the distinction between “what the rules of international intercourse ought to be, or an historical investigation of what they are.” *Id.* There is no inconsistency between Lawrence and Harrison, then, as they use the term “historical” in different respects. The larger historical challenge was presented by writers such as Sir Henry Maine, who pointedly criticized Austin’s attempt to outline a system of law based on logic rather than history. Maine himself elaborated the historical approach in his own famous works *Ancient Law*, *supra* note 47 and *Early History of Institutions* (1875).

subject of positivist scrutiny. For positivists, consequently, the concepts and classifications they employed could be used to order history and society, but these same concepts and classifications were outside and beyond history. This was one means by which positivism presented itself as universal and eternal, existing in a realm beyond the reach of historical scrutiny. Positivism, in this way, sought to suppress its own past. How could the positivist insistence on the primacy of concepts and on the autonomy of law accommodate and encompass this sociological aspect upon which it was so curiously and ambivalently dependent for its functioning?

The tensions and ambivalence generated by positivist attempts to articulate a new and scientific jurisprudence were as important a part of that body of thought as its self-consciously proclaimed modernity and rigor.

III. DEFINING AND EXCLUDING THE UNCIVILIZED

A. Positivism, Society, and the Uncivilized

A further central feature of positivism was the distinction it made between civilized and uncivilized states. The naturalist notion that a single, universally applicable law governed a naturally constituted society of nations was completely repudiated by jurists of the mid-nineteenth century.⁷¹ Instead, nineteenth-century writers such as Wheaton claimed that international law was the exclusive province of civilized societies. Wheaton's brief discussion of earlier jurists such as Grotius suggests a trend that culminated in Wheaton's own stance; Grotius states that law (*jus gentium*) "acquires its obligatory force from the positive consent of all nations, or at least of several."⁷² While this emphasis on the consent of nations foreshadows a central characteristic of positivism, Wheaton notes that Grotius makes no further distinction between different types of nations; nor does he suggest, while acknowledging these differences, that some nations should be granted priority as opposed to others, that some nations participate in the law of nations while others do not.⁷³ No distinction is made between the civilized and the uncivilized.

⁷¹. Hence Wheaton's critique of Wolf, who argued that the law of nations was something to which all nations had consented, basing this theory on "the fiction of a great commonwealth of nations (*civitate gentium maxima*) instituted by nature herself, and of which all the nations of the world are members." Wheaton, *supra* note 18, at 10 (footnote omitted).

⁷². *Id.*, ch. 1.11.

⁷³. This is an aspect of one of the central questions of Grotius's great work—the relationship between natural law and the law of nations. The tension is introduced in his preface, as cited by Wheaton. *Id.* at 10. That such is the condition of mankind that the strict law of nature cannot always be applied to the government of a particular community, but it becomes necessary to resort to laws of positive institution more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations.

The relative cosmopolitanism of Grotius contrasts with the narrower approaches of jurists such as Bynkershoek, who argued that only the practice of civilized states acquires legal currency. He states that “the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater part, and those the most civilised.*”⁷⁴ Despite this trend towards excluding the uncivilized states, non-European states were recognized as part of the law of nations even in the early part of the nineteenth century. In a decision handed down in 1825, *The Antelope*, the Supreme Court of the United States confronted the issue of whether slavery was an acceptable practice according to the law of nations. Chief Justice Marshall, in examining this issue, asserted:

The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them [the modern principles relating to the abolition of slavery]. Throughout the whole of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.⁷⁵

The passage is notable for its gesture towards including Africa within the law of nations and for suggesting that European states, indeed America itself, had to respect the law of nations as practiced within Africa.⁷⁶

By the latter part of the nineteenth century, however, whatever the systems of law existent on that “immense continent,” they are made irrelevant; the custom that counts as law is that which is practiced only among the “civilized countries.” By 1866, Wheaton argued:

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.⁷⁷

Naturalists such as Vitoria recognized the existence of important cultural differences between, for example, the Spanish and the Indians of the Americas.⁷⁸ Nevertheless, they asserted that all societies were bound by a universal natural law. The gap between the European and non-European worlds was as evident to Wheaton as it was to Vitoria. For Wheaton and the jurists who succeeded him, however, this gap was to be bridged, not by a universal natural law, but

⁷⁴. Wheaton, *supra* note 18, ch. 1.11 (emphasis in original). Montesquieu offers a further variation on these themes; even while dismissing the practices of non-European peoples, he suggests that all nations have some sort of “international law,” which governs their relations with their neighbors: thus “even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles.” *Id.*

⁷⁵. *The Antelope*, 23 U.S. (10 Wheaton) 5, 66 (1825).

⁷⁶. Marshall seems to be suggesting the existence of a regional African custom, which must be accepted as part of international law. Alternatively, of course, it seems as though the abolition of slavery was the “new custom” observed by certain states and that the legality of slavery was the older and more widely accepted principle of international law.

⁷⁷. Wheaton, *supra* note 18, at 15.

⁷⁸. See Anghie, *Vitoria*, *supra* note 9.

by the explicit imposition of European international law over the uncivilized non-Europeans. It was simply and massively asserted that only the practice of European states was decisive and could create international law. Only European law counted as law. Non-European states were excluded from the realm of law, now identified as being the exclusive preserve of European states, as a result of which they lacked both membership and the ability to assert any rights cognizable as legal. In its most extreme form, positivist reasoning suggested that relations and transactions between the European and non-European states occurred entirely outside the realm of law.⁷⁹

Thus the state of nature that naturalists such as Grotius used as a basis for the formulation of rules of international law was unsatisfactory, not only because it was subjective, imprecise, and based on transcendental principles rather than the realities of state behavior, but because it failed to make the distinction between the civilized and uncivilized. Westlake writes:

No theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce into his picture a difference between civilised and uncivilised man, because it is just in the presence or absence of certain institutions or in their greater or less perfection, that that difference consists for the lawyer.⁸⁰

The existence of a distinction between the civilized and the uncivilized was so vehemently presupposed by positivist jurists, that the state of nature—and therefore naturalism—becomes epistemologically incoherent because lacking this central distinction. Positivist jurisprudence was so insistent on this distinction that any system of law that failed to acknowledge it was unacceptable. In crude terms, in the naturalist world, law was given; in the positivist world, law was created by human societies and institutions. Once the connection between “law” and “institutions” had been established, it followed from this premise that jurists could focus on the character of institutions, a shift that facilitated the racialization of law by delimiting the notion of law to very specific European institutions.

As for the political implications following adherence to this distinction, Westlake himself immediately suggests how this distinction could be deployed by justifying his claim that “the occupation by uncivilised tribes of a tract, of which according to our habits a small part ought to have sufficed for them, was not felt to interpose a serious obstacle to the right of the first civilised occupant.”⁸¹ Once the distinction is made, then, completely different standards could be applied to the two categories of people. Whatever the practices of the “uncivilized tribes,” in a situation where these practices conflict with the assessment made by the civilized as to the “real needs” of the uncivilized in relation to land, it is the latter which prevails. Broadly, once non-European states were excluded from the realm of sovereignty, they were precluded from making any sort of legal claim in the realm of international law because only sovereign states were able

⁷⁹. See Gong, *supra* note 5, at 53–57.

⁸⁰. Westlake, *supra* note 16, at 137. For an important examination of the relationship between law and myth, see Peter Fitzpatrick, *The Mythology of Modern Law* (1992).

⁸¹. *Id.*

to participate as full members with all the attendant rights and powers. In summary, the distinction between the civilized and uncivilized was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework. The racialization of positivist law followed inevitably from these premises—as demonstrated, for example, by the argument that law was the creation of unique, civilized, and social institutions and that only states possessing such institutions could be members of “international society.” In distinguishing between the civilized and uncivilized on all these different levels, positivist jurisprudence created the first element of what I have termed the “dynamic of difference,” the postulation of a gap between the European and non-European worlds that had to be bridged by positivist international law.

B. The Uncivilized and Defining Sovereignty

The task of defining sovereignty was fundamental to positivist jurisprudence—and not merely because definition was such an integral part of positivist reasoning and methodology. The positivist insistence that sovereignty was the founding concept of the international system led naturally to a careful scrutiny of what entities could be regarded as sovereign. This was an important theoretical and practical issue, given the positivist argument that the sovereign had supreme authority. Such a project of definition was not so fundamental to the naturalist framework, since that jurisprudence proposed a system of law that applied to all human activity, whether that of an individual or of a sovereign.⁸² By contrast, the jurisprudence of “personality,” which dealt with the question of defining the proper subjects of international law was one of the central issues explored by positivist jurists.⁸³ Given that the civilized/non-civilized distinction expelled the non-European world from the realm of law and society, the question arose: what was the status of non-European societies with regard to sovereignty? It was simple enough to assert that the civilized possessed sovereignty while the uncivilized did not, but positivist jurisprudence had to establish plausibly that cultural difference translated into legal difference. Positivists were equipped with a number of analytical tools to arrive at such a conclusion, but, given the positivist preoccupation with consistency and coherence, they had to do so in a manner consistent with the broad complex of ideas and systems of thinking that constituted sovereignty doctrine and positivist jurisprudence.

⁸². The state was not recognized as an independent, clearly defined entity in works of the early naturalists such as Vitoria, for example. It is arguable that the absence of a clear distinction between the municipal and international realms may also be attributed to the overarching character of natural law. See David Kennedy, *Primitive Legal Scholarship*, 27 Harv. Int'l L.J. 1 (1986).

⁸³. Thus the major treatises of the period, such as Hall and Oppenheim, discussed the “law of persons” in either the first or second chapter of their works. Hall begins his work with a chapter titled “Persons in International Law, and Communities Possessing A Character Analogous to Them,” Hall, *supra* note 15, ch. 1, while Oppenheim provides a theory and history of international law in his introductory chapter and titles the next part of his work “The Subjects of the Law of Nations,” Oppenheim, *supra* note 19, Table of Contents.

The practical task of identifying the “sovereign” and defining sovereignty were interrelated tasks that posed a number of complex problems for jurists. The task involved distinguishing sovereigns proper from other entities that also seemed to possess the attributes of sovereignty, such as pirates, non-European states, and nomads.⁸⁴ How could it be claimed within this jurisprudence that the barbarian nations, “a wandering tribe with no fixed territory to call its own,” a “race of savages,” and a “band of pirates”⁸⁵ were not sovereign? This question posed a dilemma to nineteenth-century jurists, whose understanding of positivism was ineluctably affected by Austin: simply, these entities satisfied the essential Austinian criteria of sovereignty. As Lawrence acknowledges, even the wandering tribe might “obey implicitly a chief who took no commands from other rulers”;⁸⁶ pirates, similarly, “might be temporarily under the sway of a chief with unrestricted power.”⁸⁷

For positivists, the general answer was that sovereignty could be most clearly defined as control over territory. Thus Lawrence states:

International Law regards states as political units possessed of proprietary rights over definite portions of the earth’s surface. So entirely is its conception of a state bound up with the notion of territorial possession that it would be impossible for a nomadic tribe, even if highly organised and civilized, to come under its provisions.⁸⁸

Whatever the extent to which an entity may have satisfied the other criteria of statehood, a failure to occupy territory would preclude that entity from being treated as sovereign. The primacy of territory is again emphasized by Lawrence when, after considering two possible bases for the exercise of jurisdiction by a state, he decides finally that jurisdiction over territory takes precedence over jurisdiction over citizens. Thus Lawrence argues, “Modern International law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental.”⁸⁹

Territorial control is thus fundamental to sovereignty, whatever the exceptions established to this rule—in the form of the principle, for example, that foreign sovereigns and diplomats are not completely subjected to a state’s jurisdiction although they may be present within the territory of that state.⁹⁰ Accordingly, wandering tribes could not be sovereign because they failed the territorial re-

⁸⁴. For an examination of the political dimensions of state building, see *The Formation of National States in Western Europe* (Charles Tilly ed. 1975). The challenge that pirates posed to the nation-state and its response is examined in Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State Building and Extraterritorial Violence in Early Modern Europe* (1994).

⁸⁵. Lawrence, *supra* note 17, at 58.

⁸⁶. *Id.*

⁸⁷. *Id.*

⁸⁸. *Id.* at 136.

⁸⁹. Lawrence, *supra* note 17, at 190. The theme is reiterated throughout the work. “The rules of modern International Law are so permeated from end to end with the idea of territorial sovereignty that they would be entirely inapplicable to any body politic that was not permanently settled upon a portion of the earth’s surface which in its collective capacity it owned.” *Id.* at 59.

⁹⁰. *See id.* at 221.

quirement; they were not in sole occupation of a particular area of land. But the problem then confronting the jurists was that many of the uncivilized Asian and African states easily met both the Austinian definition of sovereignty and the requirement of control over territory. The historical reality, as Alexandrowicz points out regarding the Indies, for example, was that “[a]ll the major communities in India as well as elsewhere in the East Indies were politically organized; they were governed by their Sovereigns, they had their legal systems and lived according to centuries-old cultural traditions.”⁹¹ In Africa, as scholars such as Elias have argued, the kingdoms of Benin, Ethiopia, and Mali, for instance, were sophisticated and powerful political entities that were accorded the respect due to sovereigns by the European states with which they established diplomatic relations.⁹²

Positivist jurists could hardly disregard these facts, especially given that European powers had entered into treaties with such communities. The works of eighteenth-century jurists, for instance, gave accounts of diplomatic usages in countries such as Persia, Siam, Turkey, and China, analyzed the negotiations that led to the making of various treaties, and included these treaties within larger collections of international treaties.⁹³ Confronted with this dilemma, positivists resorted once more to the concept of society. The broad response was that Asian states, for example, could be formally “sovereign”; but unless they satisfied the criteria of membership in civilized international society, they lacked the comprehensive range of powers enjoyed by the European sovereigns who constituted international society.⁹⁴

Therefore, the distinction between the civilized and uncivilized, crucial to the intellectual and political validity of positivist jurisprudence, was to be made, not in the realm of sovereignty, but of society. Society, and the constellation of ideas associated with it, promised to enable the jurist to link a legal status to a cultural distinction. Thus positivists argued that sovereignty and society posed two different tests, and the decisive issue was whether or not a particular entity—even a sovereign—was a full member of international society. Lawrence makes this point when considering the legal status of a wandering tribe. “[Y]et none of these communities would be subject to International Law, because they would want various characteristics, which, though not essential to sovereignty, are essential to the membership of the family of nations.”⁹⁵

The tribes remain outside the realm of international law, not so much because

⁹¹. Alexandrowicz, *East Indies*, *supra* note 8, at 14.

⁹². See Elias, *supra* note 8, at 6–15. For a detailed study of the early history of treaty making between African and European states, see Alexandrowicz, *Treaty Making*, *supra* note 8.

⁹³. See Alexandrowicz, *supra* note 30; see also Jeremy Thomas, *History and International Law in Asia: A Time for Review?*, in *Essays in Honour of Wang Tieya* 813 (Ronald St. John Macdonald ed. 1994).

⁹⁴. On the problems of categorizing these entities, see Oppenheim: “No other explanation of these and similar facts [the fact that these non-entities engaged in sovereign behavior] can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law.” Oppenheim, *supra* note 19, at 110. See *id.* at 154–56.

⁹⁵. Lawrence, *supra* note 17, at 58.

they lack sovereignty, but because they are wanting in the other characteristics essential for membership in international society. It follows, despite positivist preoccupations with sovereignty doctrine, that “society” and the “family of nations” are the essential foundations of positivist jurisprudence and of the vision of sovereignty that it supports. In the final analysis, non-European states are lacking in sovereignty because they are excluded from the family of nations. The novel maneuver of focusing on society enabled positivist jurists to overcome the historical fact that, by and large, non-European states were previously regarded as sovereign, that they enjoyed all the rights accompanying this status, and that their behavior constituted a form of practice and precedent that gave rise to rules and doctrines of international law.

The concept of society enabled positivists to develop a number of strategies for explaining further why the non-European world was excluded from international law. One such strategy consisted of asserting that no law existed in certain non-European, barbaric regions. According to this argument, the distinction between the civilized and uncivilized was too obvious to require elaboration. Thus Lawrence, for example, stated, “It would, for instance, be absurd to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission.”⁹⁶ Such powerful evocations of the backward and barbaric confirmed the incongruity of any correspondence between Europe and these societies. Law did no more than maintain an essential and self-evident distinction.

And yet, a closer examination of primitive societies suggested disconcerting parallels. Westlake described the inquiries of the “historical school” into societies “remote from our own.”

We learn from them how the different peoples whom we study usually conducted themselves with regard to family, property, or any other matter which in our actual England is regulated by law; by what beliefs and motives, and by what commands or compulsion if any, their conduct was kept to its usual lines. And by accumulating a number of such investigations we learn how what we now know as the law of a country has arisen. But the analytical school are certainly right in maintaining that, if we give the name of law to anything which we so discover in a remote state of society before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense.⁹⁷

The passage reflects many of the techniques of positivism analyzed earlier. The “analytical school” establishes a definition, adheres to it, and applies it rigorously and unyieldingly. Any conflict between the realities disclosed by the historical researchers and the definition must be resolved in favor of the defini-

⁹⁶. *Id.* For an insightful study of this rhetoric, see Riles, *supra* note 8. Riles points out in her important study, “Lawrence’s polemic participated on a number of levels in the creation of an essentialized and coherent European community defined in dichotomous opposition to non-European ‘savages.’” *Id.* at 736. As Riles further elaborates, “This essentialized European identity depended, however, upon an opposition of Europe to non-Europe that articulated in symbolic terms inequalities of power between Europeans and their colonial subjects.” *Id.* at 737.

⁹⁷. Westlake, *supra* note 16, at viii.

tion, in order to maintain its “consistent or therefore, useful sense.” Language, it would seem, cannot yield to acknowledged empirical reality where this could lead to destabilizing the concepts and categories on which the system is based. In the final analysis, it would seem, the matter is decided by the simple assertion that whatever the commonality between European and non-European societies, European societies are civilized and sovereign, while non-European societies are not. Thus Westlake, even while acknowledging the fact that “different peoples” could possess a system that disconcertingly parallels that of England, quickly proceeded to affirm that “our actual England is regulated by law.”⁹⁸

Law, accordingly, is the preserve of England. While other remote societies may appear to have their own laws, any tendency to affirm this similarity must be immediately repulsed as it could result in the collapse of the language of sovereignty and, therefore, of international law itself. Simply and summarily, within nineteenth-century jurisprudence, law cannot be defined in such a way as to encompass the practices that historical research demonstrates as serving the same function as “law” in Western society.

Thus the methodology of the analytical school was important, not merely in terms of the broad theoretical debate it was engaged in with the historical school, but because it was through the suppression of implications arising from the historical school that the analytical school could make the distinction between the civilized and non-civilized. This demarcation was central to positivist attempts to preserve the coherence of their jurisprudence in the face of the problems posed by the non-European world.

A second strategy used to distinguish the civilized from the uncivilized consisted of asserting the fact that while certain societies may have had their own systems of law these were of such an alien character that no proper legal relations could develop between European and non-European states. Positivist jurists such as Westlake made further distinctions between the Asian states, for example, which were characterized as being in certain respects civilized but “different,”⁹⁹ and the uncivilized tribes, who were more severely denounced as completely backward.¹⁰⁰

In this way, positivists formulated different classifications for the non-Europeans, and distinctions were made for certain purposes between the societies of Asia, Africa, and the Pacific.¹⁰¹ Basically, however, these classifications were irrelevant in terms of the broad issue of the central distinction between the civilized and uncivilized. All non-European societies, regardless of whether they were regarded as completely primitive or relatively advanced, were outside the sphere

⁹⁸. *Id.* The word “actual” is used in a curious fashion, almost as though to add reassurance. It seems to be suppressing the suggestion, which Westlake himself provokes, that there could be some other England which compares with the savage societies which Westlake is intent on separating from England.

⁹⁹. Westlake, *supra* note 16, at 102. For Westlake, government is the test of civilization; Asian states satisfy this test as they comprise of populations “leading complex lives of their own” with their own systems of family relations, criminal law, and administration. *Id.* at 141.

¹⁰⁰. *See id.* at 143–55.

¹⁰¹. *See* discussion *infra* notes 148–155 and accompanying text.

of law, and European society provided the model that all societies had to follow if they were to progress.

The positivist attempt to distinguish between the civilized and uncivilized was fraught with unresolved complications. Westlake's analytic approach sought to extinguish any suggestion of correspondence between advanced European and primitive non-European peoples; but seen from a broader perspective, there was a complete irony in this insistence that only one form of law could accurately be given the term law. After all, it was precisely by relativizing and contesting Austin's rigid definition of law, a strategy used by members of both the analytical and historical schools, that international law could claim to be law at all.¹⁰² If states could be regarded as governed by "law," they were governed by law in the same way that the primitive societies described by Maine were governed by law, notwithstanding the lack of a determinate sovereign who issued laws enforced by controls.¹⁰³ Seen from this perspective, there is an identity between primitive societies and international law; it is by asserting the validity of primitive societies governed by custom, the principal source of international law, that international law is established as a scientific discipline. Having been so established, however, international law then emphatically disassociates itself from the primitive by becoming the authoritative, master discipline that identifies, places, expels, and civilizes the primitive. The implications of the disconcerting identity between the international and the primitive are suppressed. For if the uncivilized non-European societies were to be expelled from the field of international society because they were barbaric and primitive, it followed that international law occupied a similar status with respect to domestic law, law properly so called. If this was so, then international law was an inferior discipline just as non-European peoples were inferior peoples. It followed, furthermore, that international law, rather than possessing any integrity and coherence of its own, bore only a faint and subordinate relationship with domestic law and could only hope to evolve by imperfectly mimicking the definitive institutions and practices of domestic law. Conformity with the master model of Europe, after all, was the path to progress prescribed by positivist international lawyers for the non-European peo-

¹⁰². The analytic approach relativized Austin by arguing that his definition was only one possible definition of law. This is the approach taken by Westlake, *supra* note 16, at viii–ix. Walker went further and argued that Austin's definition was philologically inaccurate. See Walker, *supra* note 42, at 14–17. The historical approach suggested that Austin's definition of law applied only to modern European society. Others such as Bryce went further and argued that Austin's definition did not apply accurately to *any* societies. See Wilfrid E. Rumble, 'Introduction' to John Austin, *The Province of Jurisprudence Determined*, vii, xxiii. (1995). In essence, both the analytic and historical schools, in attempting to rescue the discipline of international law, were attacking Austin for privileging one rather specific meaning of the word "law."

¹⁰³. Walker, in his attempt to refute Austin, could, with little modification, be describing the international system when pointing to Maine's research:

But in such a state of society as that described by Maine, there is rule, and rule effectively enforced, but it is not command set by a determinate author to a human being formerly [sic] obliged to obey; there, while we may identify no determinate legislator, so neither may we point out any one person, or body of persons, *less than the whole*, as at once representing the unity of the race, and admittedly and habitually supreme within.

Walker, *supra* note 42, at 12.

ples. These implications are evaded by the positivist jurists, desperately intent only on establishing their discipline and demonstrating its usefulness.

Even at the theoretical, jurisprudential level, alien societies were a primary threat to the integrity of the overall structure. Consequently, the international law of the period can be read, not simply as the confident expansion of intellectual imperialism, but a far more anxiety-driven process of naming the unfamiliar, asserting its alien nature, and attempting to reduce and subordinate it.

Within the positivist universe, therefore, the non-European world is excluded from the realms of sovereignty, society, and law. Each of these concepts, which acted as founding concepts to the framework of the positivist system, was precisely defined, correspondingly, in ways that maintained and policed the boundary between the civilized and uncivilized. The whole edifice of positivist jurisprudence is based on these initial exclusions and discriminations. Furthermore, it is clear that, notwithstanding positivist assertions of the primacy of sovereignty, the concept of society is at least equally central to the whole system.

Quite apart from the fact that the concept of society was crucial to any refutation of Austin's criticisms, it was only by recourse to this concept that jurists could divide the civilized from the uncivilized and thereby demarcate in legal terms the exclusive sphere occupied by European states. This distinction having been established, it was possible for jurists to draw upon disciplines such as anthropology to elaborate on the characteristics of the uncivilized. Finally, the constitution of sovereignty doctrine itself is based on this fundamental distinction because positivist definitions of sovereignty rely on the premise that civilized states are sovereign and uncivilized states are not. Afflicted by all the insecurities generated by Austin, positivist jurists nevertheless attempted to present international law as a coherent and autonomous scientific discipline that could play an important role in the management of international relations. For an international law anxious to establish itself and make good on its claims to be both scientific and practical, colonialism could be seen as an ideal subject. This was not merely because "colonial problems" had become a central preoccupation of European powers to whom the acquisition of colonies was fundamental to their prestige and whose consequent competition for colonies threatened to lead to the first great European war since the defeat of Napoleon, but also because the colonial problem appeared, at least initially, to be free of many of the central complications raised by Austin. Both the analytical and historical schools pointed to the deficiencies of Austinian thinking, but the real power of his critique of international law emerged whenever a dispute developed between two sovereign states. How was such a dispute to be resolved in the absence of an overarching sovereign to articulate the appropriate law, adjudicate the dispute, and enforce the verdict? The absence of any such system was made explicit by the efforts during the late nineteenth and early twentieth centuries to institute a system of international arbitration and to codify international law—efforts that could be seen as attempts to address exactly these problems.¹⁰⁴ By contrast, the colonial encounter did not directly pose such problems: it was an encounter, not between two sovereign states, but between a sovereign European state and an amorphous

¹⁰⁴. On these efforts and the importance attached to them, see Oppenheim, *supra* note 34; Koskenniemi, Apology, *supra* note 5, at 123–29.

uncivilized entity. And enforcement posed no real difficulties because of massively superior European military strength. Having stripped the non-European world of sovereignty, the positivists in effect constructed the colonial encounter as an arena in which the sovereign made, interpreted, and enforced the law. In this way, the colonial arena promised international jurists a chance to develop a jurisprudence that demonstrated the efficacy, coherence, and utility of international law free of the ubiquitous and unanswerable Austinian objections.¹⁰⁵ In short, the colonies offered international law the same opportunity they traditionally extended to the lower classes—and the dissolute members of the aristocracy—of the imperial center: the opportunity to make something of oneself, to prove and rehabilitate oneself.¹⁰⁶

The division between the civilized and the uncivilized was central to this project; however, efforts to effect this crucial distinction were disrupted by the complication that the uncivilized resembled the civilized in important respects, while the discipline of international law itself bore disconcerting connections with the primitive. The primitive was not outside international law awaiting its ordering ministrations, but rather was within the very heart of the discipline. The subsequent efforts of the international jurist to define and manage the primitive served to conceal this fundamental connection.

IV. NATIVE PERSONALITY AND MANAGING THE COLONIAL ENCOUNTER

A. Introduction

Whatever the positivist assertions as to the legal absence of non-European societies during the second half of the nineteenth century, contact between European Empires and the societies of Asia, Africa, and the Pacific was intensifying at precisely the same period. Indeed, the expansion of colonial empires was one of the defining features of the international relations of the period. Jurisprudentially, positivists confronted the task of formulating the doctrines that could legally account for this expansion of Europe. The interaction between European and non-European societies, which had been taking place for more than four centuries, had, by this time, generated a significant and complex body of

¹⁰⁵. As Riles notes, jurists such as Lawrence “diverted attention from the positivist vision of law as *force*, and reorganized international law around the theme of *order* to reassure the reader of viability of the discipline’s project.” (Footnotes omitted, italics in original). Riles, *supra* note 8, at 726. Further, it was particularly in the colonial context that the idiom of order could acquire an especially compelling significance. *See id.* at 727. The discussion below demonstrates, however, the problem of order among sovereign states emerged even in the colonial context, as when two European states claimed title to the same colonial territory.

¹⁰⁶. This is an important theme of much of Victorian literature including Rudyard Kipling’s *Kim*, and Charles Dickens’s *Great Expectations*. As the experiences of Magwitch demonstrate, rehabilitation does not always lead to acceptance.

treaties.¹⁰⁷

Despite this, the positivists purported to expel the non-European world from the realm of legality by insisting on the distinction between civilized and non-civilized states and then proceeded to effect the re-admission of non-European states into “international society” by the use of the modern and distinctive analytic tools of positivism. Basically, just as positivists sought to reconstitute the discipline according to prevailing ideas of modernity and science, so too they endeavored to recast entirely the legal basis of relations between the civilized and uncivilized by framing the project as though the colonial encounter was about to occur, as opposed to having already taken place. This was accomplished by basing the inquiry on the premise that the uncivilized were outside the law; thus the positivist task was to define the terms and methods by which they were to be assimilated into the legal framework. Positivist jurists made little attempt to acknowledge, much less engage with, the naturalist past and the techniques used by the naturalists to account for the preceding centuries of contact between European and non-European peoples. The principal importance of this maneuver was that the re-entry of non-European societies into the sphere of law could now take place on terms that completely subordinated and crippled non-European societies. This was achieved by deploying the new, racialized scientific lexicon of positivism, which, it was asserted, represented a higher and decisive truth. The language of positivism made up only one part of an extremely elaborate vocabulary of conquest that had been developing in many of the disciplines of the late nineteenth century. Anthropology, science, economics, and philology, while purporting in various ways to expand impartial knowledge, in fact participated crucially in the colonial project.¹⁰⁸ International law relied upon, reinforced, and reflected this larger body of thought from which it could borrow when required to further its own project.

This section explores this positivist project by focusing on three closely related and intersecting concerns. First, I examine how the positivist method, with its ambitions to be scientific and coherent, effected the assimilation of the non-European world into international society, and the different doctrines and techniques it developed for this purpose. Second, I focus particularly on the concept of sovereignty and the variations of sovereignty embodied in the doctrines of assimilation and, in particular, the notion of “quasi-sovereignty” that positivists developed in order to remedy problematic aspects of their theory of assimilation. This was only one example of sovereignty doctrine mutating in the confusions arising from the colonial encounter. Third, I examine how positivists characterized the different peoples of Asia, Africa, and the Pacific, and the effects and function of these characterizations within the overall positivist framework. I then seek to place these jurisprudential developments within a broader context, as diplomatic, political, and ideological considerations inevitably affected the

¹⁰⁷. See Alexandrowicz, *East Indies and Treaty Making*, *supra* note 8; Ian Brownlie, *The Expansion of International Society: The Consequences for the Law of Nations*, in *The Expansion of International Society*, *supra* note 21, at 358, 358–61.

¹⁰⁸. This is one of the central themes of Said’s work, *See Said, Orientalism*, *supra* note 10, at 7–8.

development and application of these doctrines. For these purposes, I focus on the Berlin Africa Conference of 1885, which sought to deal with the native problems attendant upon the partitioning of Africa.

B. Doctrines of Assimilation

In somewhat simplistic terms, non-European peoples could be brought within the realm of international law through four basic, and often interrelated, techniques. First, treaty making constituted the basic technique for regulating relations between European and non-European peoples. Treaties provided for a broad set of arrangements ranging from agreements governing trading relations between the two entities, to treaties by which the non-European entity ostensibly ceded complete sovereignty to the European entity. Second, non-European peoples were colonized and thus subjected to the control of European sovereignty. Colonization took place by a number of methods including by a treaty of cession, by annexation, or by conquest. Third, independent non-European states such as Japan and Siam could be accepted into international society by meeting the requirements of the standard of civilization and being officially recognized, by European states, as proper members of the family of nations. Fourth, European states, particularly in the late nineteenth century, often acquired control over Asian and African societies by way of a special type of treaty: protectorate agreements. While these four categories are crudely distinct, they are nevertheless far from mutually exclusive: protectorates were established through treaties, for example, and sometimes became colonies.

1. Treaty Relations Between Europeans and Non-Europeans

a. The Historical Context

The juridical problems that positivists faced in developing a jurisprudence that would account for colonialism were attributable not only to the analytic limitations of positivism but also to the particular character of colonial expansion in the latter part of the nineteenth century. It is hardly controversial that one of the primary driving forces of nineteenth-century colonial expansion was trade. The right to enter other territories to trade and the freedom of commerce asserted so powerfully and inevitably even in Victoria's time, was a principal rule of nineteenth-century legal and diplomatic relations.¹⁰⁹ Historically, much of the early trade had been conducted by trading companies such as the British East India

¹⁰⁹. The reverberations of such policies have powerful legacies reaching into the modern era. Covering Hong Kong's transition in 1997, for example, *The Economist*, first having noted that the Chinese were intent on stopping the British opium trade, writes that

China had a deep suspicion of all outside "barbarians"; it insisted that trade with the outside world be conducted only through Canton (modern day Guangzhou) and only on its own, capricious terms. Britain thought it had a right to trade freely and a God-given right to pummel with canon any nation that thought otherwise.

1898 and All That—A Brief History of Hong Kong, Economist, June 1997, at 22.

Company and the Dutch East India Company.¹¹⁰ The characteristics and functions of such companies had been clearly summarized by M.F. Lindley:

Formed in most cases, at all events from the point of view of the shareholders, for the purpose of earning dividends, these corporations have proved to be the instruments by which enormous areas have been brought under the dominion of the States under whose auspices they were created, and in this way they have been utilized by all the important colonizing Powers. The special field of their operations has been territory which the State creating them was not at the time prepared to administer directly, but which offered good prospects from the point of view of trade or industrial exploitation.¹¹¹

All these factors inevitably affected the international law of the period. Doctrines were developed to give trading companies some measure of legal personality by characterizing them as extensions of the Crown by virtue of royal charter.¹¹² Thus trading companies were capable of asserting sovereign rights over non-European peoples who were deprived of any sort of sovereignty.¹¹³ Company charters granted them not merely the right to trade in particular areas, but also the right to make peace and war with natives and the power to coin money.¹¹⁴ The control of territories by companies that were established for the explicit purpose of making money, meant, inevitably, that the territories were administered simply for profit.¹¹⁵ Unsurprisingly, governance driven by such imperatives resulted in excesses that led to wars between the companies and the African and Asian peoples they purported to govern. As a consequence these companies often embroiled their chartering sovereigns in complex foreign wars.

By the end of the nineteenth century, European states were assuming direct responsibility for colonial territories. Thus, the East India Company was dissolved and the British Crown took direct control over India in 1858.¹¹⁶ The direct involvement of European states in the whole process of governing resulted in a shift in the ideology justifying Empire from the vulgar language of profit to that of order, proper governance, and humanitarianism. This new synthesis was articulated at the Berlin Conference in 1884–85, where humanitarianism

¹¹⁰. See generally D.K. Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (1966).

¹¹¹. Lindley, *supra* note 20, at 91.

¹¹². For a discussion of the powers and status of the British East India Company, see *Nabob of Arcot v. The East India Company*, 3 Bro. C. C. 292; 29 Eng. Rep. 544 (Ch. 1791), *reprinted in* 6 *British International Law Cases* 281 (1967).

¹¹³. Thus, as Lindley notes of the British East India Company, “what was at first a mere trading Corporation came in the course of time to exercise sovereign rights over an immense area which afterwards passed under the direct administration of the British Crown.” Lindley, *supra* note 20, at 94.

¹¹⁴. See *id.*

¹¹⁵. See Lawrence, *supra* note 17, at 174–75. As Fieldhouse points out, these trading companies changed their modes of operation rather significantly over the years. From being intent simply on trading in the 16th and 17th centuries, these companies increasingly engaged in acquiring and governing territories in order to protect their interests in the 18th and 19th centuries. For a discussion of the East India Company and England’s colonization of India, see Fieldhouse, *supra* note 109, at 149–52, 161–73.

¹¹⁶. Pursuant to the Government of India Act of 1858. See Lindley, *supra* note 20.

and profit seeking were presented in proper and judicious balance as the European powers carved up Africa. The Berlin Conference marked a new phase in the colonial enterprise not only because it formulated a new ideological basis for the expansion of European Empires, but because it attempted to establish a firm and clear framework for the management of the colonial scramble that otherwise threatened to exacerbate inter-European rivalries.¹¹⁷

The direct involvement of European states in the scramble for colonies led to a number of complications. Legal niceties were hardly a concern of European states driven by ambitions of imperial expansion. The positivists insisted on the supreme power of the sovereign state; but if everything a state did was “legal,” then law had no place at all in the scheme of international relations. Thus, in order to assert the existence and relevance of the discipline, positivism had to balance its emphasis on sovereign power with the formulation of a clear set of rules that were observed and obeyed by sovereign states. This familiar problem of the relationship between law and politics in positivist international law manifested itself uniquely in the colonial encounter. State behavior was the basis of positivist jurisprudence; but it was difficult to detect any consistent and principled behavior in the flux, confusion, and self-interest of the colonial encounter. Consequently, there was every danger that law would degenerate into expediency.

A further problem was posed by the fact that although positivists asserted that non-European societies were officially excluded from the realm of international law, numerous treaties had been entered into between these supposedly non-existent societies and European states and trading companies in the period from the fifteenth century onwards. Furthermore, these treaties, and the state practices that followed, suggested that both the European and non-European parties understood themselves to be entering into legal relations.¹¹⁸ Moreover, many doctrines of international law, accepted even by the nineteenth-century jurists, had been produced by this intercourse. For example, as Alexandrowicz’s comprehensive account of the relations between the European and East Indian states prior to the nineteenth century points out, “the details of mutually agreed principles of inter-State dealings can be ascertained from the texts of treaties and documents relating to diplomatic negotiations which took place before and after their conclusion.”¹¹⁹

The status of these treaties became problematic as a result of the emergence of positivism. Indeed, several jurists of the eighteenth century had anticipated the problem that now confronted the nineteenth-century positivists. Noting that positive law—the custom and treaty law developing among European states—was becoming increasingly significant, these jurists raised the problem of the

¹¹⁷. The Berlin Conference, however, hardly succeeded in eliminating such rivalries. Britain and France nearly went to war over the “Fashoda incident,” for example. See *generally* David Levering Lewis, *The March to Fashoda: European Colonialism and African Resistance in the Scramble for Africa* (1987).

¹¹⁸. A detailed account of these exchanges and the international law created both by European and non-European states in the course of these exchanges is given by Alexandrowicz, *East Indies*, *supra* note 8.

¹¹⁹. See *id.* at 2.

implications of these developments for the “universal” international law, which applied to all states and regulated centuries of interaction between Europe and Asia.¹²⁰

This history of treaty making posed a challenge to the positivist framework since the fundamental premises of positivism, when extended to their logical conclusion, implicitly suggested that treaties with non-Europeans were impossible. After all, the treaty is a legal instrument; it presupposes, at least, a sense of mutual obligations and an overarching system of law that would both recognize the treaty as a legal instrument and be applied in any dispute as to the meaning of the treaty. The existence of a treaty, in this way, presupposed a legal universe to which both parties adhered.¹²¹ This presupposition, however, contradicted the powerful positivist claim that non-Europeans were uncivilized, that they were lacking in any understanding of law at all, or else, that their understanding of law was so fundamentally different from that of the Europeans that the two parties existed in incommensurable universes.

Despite this, the positivists were compelled by practical realities to apply their science to a legal institution, the treaty, whose existence seemed an aberration within the positivist conceptual universe. Positivists prided themselves on their empiricism—on their focus on state practice as opposed to the subjective metaphysical speculations of the naturalists. The nineteenth-century European states, however, relied very heavily on treaties with non-European societies in expanding their colonial empires, and in so doing, demonstrated a lamentable disregard for the systematically established and elaborated positivist assertion that non-European peoples were outside the scope of law.

For example, European states intent on creating colonies in Africa often claimed to derive their title rights from treaties with African chiefs. Thus positivists had to formulate a way of incorporating the inescapable phenomenon of treaty relations between these entities within their system. Furthermore, it was not merely unrealistic but also dangerous to ignore the many detailed treaties between European and non-European states. Many states had conducted themselves on the basis that these treaties were valid. International stability would have been severely undermined if it suddenly became possible for states to question the arrangements, titles, and interests that had been ostensibly established by these treaties.¹²² It was precisely the fear of disputes over title to colonial territories among European powers that inspired the Conference of Berlin of 1885.¹²³ Con-

¹²⁰. See Alexandrowicz, *supra* note 30. Alexandrowicz’s general argument, presented in this Article and in his book on the Asian-European encounter, is that treaties in the period from the 15th to the 18th centuries were generally more equal than the imposed, unequal treaties of the 19th century.

¹²¹. Further, as Carty notes, “treaty-making capacity was a vital mark of sovereignty and independence.” Carty, *supra* note 5, at 65.

¹²². European and non-European states had entered into a great number of such treaties. See C.H. Alexandrowicz, *The Theory of Recognition in Fieri*, 34 *Brit. Y.B. Int’l L.* 176 (1958); Alexandrowicz, *East Indies*, *supra* note 8.

¹²³. For a discussion of this see Westlake, *supra* note 16, at 137–40. The Berlin Conference, apart from dividing up Africa among the European powers, sought to establish a system by which European powers making claims to African territories had to notify the Conference of their claims; it was then open to other members to

sequently, the non-European world had to be located in the positivist system, not merely for purposes of control and suppression, but to prevent its ambiguous status from undermining European solidarity.

Treaties between European and non-European states thus became the objects of positivist scrutiny. But the methodology used by positivists to examine these treaties had the paradoxical effect of erasing the non-European side of the treaty even when claiming to identify and give effect to the intentions of that party. This was a consequence of the positivist practice of focusing on the words of the treaty to the complete exclusion of the circumstances under which the treaty had been arrived at. In this way, the positivists ignored the massive violence inflicted on non-European peoples and the resistance of these peoples against that violence.

Anti-colonial resistance took a number of complex and singular forms: the rulers of Ethiopia used both diplomatic and military techniques to maintain Ethiopian independence;¹²⁴ the Kings of Thailand played rival European powers against each other;¹²⁵ and Chinese authorities relied on translations of Vattel and Wheaton to try and protect their interests against European states.¹²⁶ Almost invariably, furthermore, African and Asian states resorted to war in an attempt to stem colonial expansion. Defeat was inevitable given the superior military power of the European states, and it was principally by using force or threatening to use force that European states compelled non-European states to enter into “treaties” that basically entitled the European powers to whatever they pleased. Coercion and military superiority combined to create ostensibly legal instruments. Under the positivist system, it was legal to use coercion to compel parties to enter into treaties that were then legally binding.¹²⁷

The resulting “unequal treaties”—unequal not only because they were the product of unequal power, but because they embodied unequal obligations—were humiliating to the non-European states, which sought to terminate such treaties at the earliest opportunity.¹²⁸ Rights to trade were an important part of such treaties. Thus the Treaty of Nanking¹²⁹ required the Emperor of China to cede

make objections. *See id.*

¹²⁴. *See* K.V. Ram, *The Survival of Ethiopian Independence, in* Conquest and Resistance to Colonialism in Africa 51 (Gregory Maddox ed. 1993).

¹²⁵. *See* Gong, *supra* note 5, at 210–11, for an account of King Mongkut’s dealings with the British.

¹²⁶. *See* Wang Tiewa, *International Law in China: Historical and Contemporary Perspectives, in* 221 *Académie du Droit International, Recueil de Cours* [Collected Courses of the Hague Academy of International Law] 195, 232–37 (1990-II).

¹²⁷. *See* Gong, *supra* note 5, at 43.

¹²⁸. On the origins of capitulations, *see id.* at 64–65.

¹²⁹. The Treaty was, in effect, imposed on the Emperor of China after the Chinese defeat in the Opium Wars of 1839–1842. The war broke out as a result of Chinese attempts to halt the trade in opium, which had been a source of immense wealth to European traders in China. *See generally* Jonathan D. Spence, *The Search for Modern China* 147–64 (1990). For details about the legal aspects of trading with China in the era preceding the Opium Wars, *see* Randle Edwards, *The Old Canton System of Foreign Trade, in* Law and Politics in China’s Foreign Trade 360, 362–63 (Victor Li ed., 1977). As the works of Spence and Edwards make clear, the metaphor of barbarity was used by both the Chinese and the Europeans. Many of the legal

Hong Kong to Great Britain,¹³⁰ open five Chinese ports for trade,¹³¹ and establish a “fair and regular” tariff for British goods.¹³² In addition, it required the Emperor to pay approximately \$21 million to the British for various losses suffered by the British government and citizens as a result of the Opium War. As a consequence of these developments, non-European peoples were governed not by general principles of international law, but by the regimes created by these unequal treaties.¹³³

The history of violence and military conquest, which led to the formation of these treaties, plays no part in the positivists’ approach to the treaty.¹³⁴ Moreover, the positivists, on the whole, accepted the treaties as expressing clearly and unproblematically the actual intentions of the non-European party. Thus positivists regarded as perfectly authentic and completely natural treaties such as those in which the Wyanasa Chiefs of Nayasaland apparently stated:

We. . . most earnestly beseech Her Most Gracious Majesty the Queen of Great Britain and Ireland, Empress of India, Defender of the Faith, &c., to take our country, ourselves, and our people to observe the following conditions:

I. That we give over all our country within the above described limits, all sovereign rights, and all and every other claim absolutely, and without any reservation whatever, to Her Most Gracious Majesty. . . and heirs and successors, for all time coming.¹³⁵

Lindley cites this, apparently without any irony, as an example of a treaty of cession. The parties most knowledgeable about treaty making had no illusions about the legal status of these treaties, recognizing them to be simple manifestations of military superiority. Lord Lugard, doyen of colonial administrators,¹³⁶

complications that early European traders confronted in China were attributable to the Chinese view that the traders were barbarians and that no direct communication was to occur between the traders and the Emperor. *See id.* at 364–65.

^{130.} Treaty of Nanking, Treaty of Peace, Friendship, and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China, Aug. 29, 1842, G.B.-Ir.-P.R.C., art. III, 93 Consol. T.S. 467.

^{131.} This allowed British merchants and their families to reside in these cities for purposes of trade. *See id.*, art. II, at 467.

^{132.} *See id.*, art. X, at 468.

^{133.} Tiewa describes the collapse of the traditional Chinese view after the attack of the European powers: “It was not replaced by the modern international order of the system of sovereign States, but by a new order of unequal treaties. In China’s foreign relations, what applied were not principles and rules of international law, but unequal treaties.” Tiewa, *supra* note 125, at 251.

^{134.} Although a treaty obtained by coercion would be invalid under contemporary international law, it is difficult to find an example of an unequal colonial treaty set aside on the basis of it being obtained by force.

^{135.} *Cited in* Lindley, *supra* note 20, at 186.

^{136.} Lugard’s extraordinary life was inextricably interwoven with Empire: born in India in 1858, he was the son of a chaplain of the East India Company; he trained for soldiering at Sandhurst; and was employed for several years in the Imperial British East African Company. In that capacity he “annexed” large parts of Uganda and explored the Niger in an attempt to fend off French competition. His appointment as High Commissioner of Northern Nigeria, led him to write the classic work on colonial administration, *The Dual Mandate*. Recognized internationally as the foremost colonial expert of his time, Lugard served on the Permanent Mandates Commission of the

made short shrift of the hypocrisy surrounding the issue:

The frank assertion of the inexorable law of progress, based on the power to enforce it if need be, was termed “filibustering”. It shocked the moral sense of a civilisation content to accept the naked deception of “treaty-making,” or to shut its eyes and ears and thank God for the results.¹³⁷

Lugard himself thought it far preferable for the European powers to “found their title to intervention on force,” rather than in treaties, “which were either not understood, or which the ruler had no power to make, and which rarely provided an adequate legal sanction for the powers assumed.”¹³⁸

Jurists had some perception of the fraudulence of such treaties; however, they made no contribution to revealing the deceptions of treaty making. Instead, they applied all their considerable scholarship, insight, and learning towards identifying the proper import of such treaties and giving them effect. The acceptance of Lugard’s argument, after all, would simply confirm the absence of any coherent or effective international legal system and the irrelevance of international lawyers to the great project of Empire.

Rather than confront this possibility, positivists turned to the judicial arena. The broad question raised was: if the non-European world did not exist for the purposes of international law until properly incorporated into international society, what was to be made of the many treaties between European and non-European states?¹³⁹ Although evading this larger issue, Westlake confronts a part of the problem when writing of Europeans entering alien territories:

We find that one of their first proceedings is to conclude treaties with such chiefs or other authorities as they can discover: and very properly, for no men are so savage as to be incapable of coming to some understanding with other men, and wherever contact has been established between men, some understanding, however incomplete it may be, is a better basis for their mutual relations than force. But what is the scope which it is reasonably possible to give to treaties in such a case, and what the effect which may be reasonably attributed to them?¹⁴⁰

In attempting to resolve this difficulty, positivists resorted to concepts of recognition and quasi-sovereignty.

b. Doctrines of Quasi-Sovereignty and Recognition

Recognition doctrine was one technique for accounting for the metamorphosis of a non-European society into a legal entity. In broad terms, the doctrine stipulated that a new state came into being when its existence was recognized

League of Nations. See Margery Perham, *Introduction* of Lord Lugard’s *The Dual Mandate* (5th ed. 1965).

¹³⁷. *Id.* at 17.

¹³⁸. *Id.*

¹³⁹. This problem would not arise in the Groatian universe, where these treaties would be interpreted as the understanding between different societies governed by universal natural law. This is the problem posed by authorities on the 19th century such as Gong. “How could treaty relations with these ‘backward,’ non-European countries be made consistent with the fact that such relations might be construed as recognition of legal personality?” Gong, *supra* note 5, at 60.

¹⁴⁰. Westlake, *supra* note 16, at 143–44.

by established states.¹⁴¹ The fact that a non-European society may have constituted a state was not in itself sufficient, because of the civilized/non-civilized distinction, to belong to the realm of international law.¹⁴² In its particular application to uncivilized states, recognition takes place when “a state is brought by increasing civilisation within the realm of law.”¹⁴³ But until this stage was reached, non-Europeans were excluded from the proper application of the doctrine as it operated in the European realm.¹⁴⁴

Westlake and other positivists attempted to resolve the problem of whether or not the native states were part of international law by arguing that such states, although not proper, sovereign members of international society, were nevertheless partial members.¹⁴⁵ Hence, Westlake proposed, “Our international society exercises the right of admitting outside states to parts of its international law without necessarily admitting them to the whole of it.”¹⁴⁶ The non-European states thus existed in a sort of twilight world; lacking personality, they nevertheless were capable of entering into certain treaties and, to that extent, were members of international law.¹⁴⁷

But how was the determination made as to who was to be admitted into international society, to what extent, and for what purposes? The answers to these questions were extremely vital as it was common for European states to challenge the claims made by rival states that they had acquired property rights or even sovereignty over territory by way of treaty with, for example, an African chief. A European state attacking a rival claim to sovereignty over territory would argue, for instance, that the chief who had entered into the treaty had no authority to do so, that he was not properly a chief, or that the land covered by

¹⁴¹. See W.E. Hall, *A Treatise on International Law* 82–83 (2d ed. 1884). See also Oppenheim, *supra* note 19, at 116: “For every State that is not already, but wants to be, a member, recognition is therefore necessary. A State is, and becomes, an International Person through recognition only and exclusively.”

¹⁴². “As the basis of the Law of Nations is the common consent of the civilised States, statehood alone does not include membership in the Family of Nations.” Oppenheim, *supra* note 19, at 116.

¹⁴³. Hall, *supra* note 140, at 83.

¹⁴⁴. As Lorimer asserts, “The right of undeveloped races, like the right of undeveloped individuals, is a right not to recognition as to what they are not, but to guardianship—that is, to guidance—in becoming that which they are capable, in realising their special ideals.” Lorimer, *supra* note 14, at 157. Thus it was only through “guardianship” that the non-Europeans could achieve any status.

¹⁴⁵. As Lorimer put it, “He [the international jurist] is not bound to apply the positive law of nations to savages, or even to barbarians, as such; but he is bound to ascertain the points at which, and the directions in which, barbarians or savages come within the scope of partial recognition.” Lorimer, *supra* note 14, at 102.

¹⁴⁶. Westlake, *supra* note 16, at 82. Westlake presents this flexibility as an advantage offered by the system: “This is an instance of the way in which all human institutions, being free and not mechanical products, shade off from one to another.” *Id.*

¹⁴⁷. Oppenheim also developed a similar doctrine, asserting, in relation to treaties between Christian and non-Christian states, “when they [Christian states] enter into treaty obligations with them, they indirectly declare that they are ready to recognise them for these parts as International Persons and subjects of the Law of Nations.” Oppenheim, *supra* note 19, at 155. See also the opinion of Arbitrator Max Huber in *Island of Palmas Case (U.S. v. Neth.)*, 2 R.I.A.A. 829, 852 (1928).

the treaty was not within the chief's authority to transfer. It was important, then, to devise rules that could resolve all these disputes and would fix and stabilize the personality of non-European entities; failure to achieve this would lead to an exacerbation of inter-European tensions. Moreover, positivists regarded the successful resolution of such problems as a test of the coherence and value of positivist international law. Indeed, it was precisely this accomplishment that distinguished the positivist from his less able naturalist predecessor. Thus Lawrence dismissed the law of the Middle Ages, when the European expansion commenced, claiming "it was powerless to decide what acts were necessary in order to obtain dominion over newly discovered territory, or how great an extent of country could be acquired by one act of discovery or colonisation."¹⁴⁸

The basic method of resolving the problem of personality comprised a complex process of determining the status of the non-European entity through the doctrine of recognition and then examining whether the right the European state claimed with respect to that entity was consistent with its legal status.¹⁴⁹ For example, if the entity was recognized as having a personality that enabled it to alienate its lands, then European states that had entered into a treaty with that entity regarding rights to the land could claim to possess valid title. But the use of recognition for these purposes raised further tensions. On the one hand, recognition was bestowed by a state at its own discretion; on the other, positivists argued that recognition could only take place within certain confines that were juridically established.¹⁵⁰ Positivists such as Westlake argued that the legal capacity of the entity was pre-determined by the degree of civilization it had attained. Thus African tribes, according to Westlake, could not transfer sovereignty because they were incapable of understanding the concept;¹⁵¹ whereas Asian states possessed this capacity, having attained a higher level of civilization.¹⁵² Within this scheme, the jurist's task was to develop a system of classification, of taxonomy, which could properly categorize every entity encountered in the course of colonial expansion. The implication is that the often self-interested recognition bestowed by a European state was invalid if it disregarded the inherent capacities of the entity in question, capacities that were legally and objectively established by the entity's position on the scale of civilization. In short, international law had established general rules defining the

¹⁴⁸. Lawrence, *supra* note 17, at 52. Lawrence characterizes Grotius as being engaged in the task of solving this problem by an application of the Roman law of property. It was from this prism, then, that doctrines of sovereignty were formulated.

¹⁴⁹. It was vital for these purposes that some agreement be established between international lawyers from different backgrounds. Hence Westlake is at pains to point out that his views on some of these issues correspond with those of Portuguese jurists. See Westlake, *supra* note 16, at 146.

¹⁵⁰. This is a familiar problem with respect to recognition doctrine as a whole.

¹⁵¹. Thus, for Westlake, sovereignty was acquired by other procedures, some of which had been formalized at the Berlin Conference. While natives could alienate property, sovereignty was obtained, "not in treaties with natives, but in the nature of the case and compliance with conditions recognized by the civilised world." Westlake, *supra* note 16, at 145. Westlake's argument, however, was completely contrary to actual state practice. See Alexandrowicz, *Treaty Making*, *supra* note 8, at 48–50.

¹⁵². See Oppenheim, *supra* note 19, at 286.

capacities of native peoples, and individual states had to exercise their discretion within the boundaries of such rules.

Each of these elements of the positivist framework, intended to establish objective legal standards whose application could resolve international disputes, faced insuperable problems. The project of classification, for example, faced a formidable challenge. Essentially, positivist jurisprudence sought to combine anthropological insight with taxonomic precision: each entity was to be studied, its degree of civilization ascertained, and its legal status accordingly allocated. This was the system used to account for a proliferation of entities ranging from “Amerindian and African kings and chiefs, Muslim sultans, khans and emirs, Hindu princes, and the empires of China and Japan.”¹⁵³ Given the range of societies and practices with which the system had to deal, however, it is hardly surprising that positivist jurists themselves finally acknowledged the limitations of their own methods. Lawrence asserts, in discussing the question of whether or not an entity should be admitted into international membership, that “a certain degree of civilization is necessary, though it is difficult to define the exact amount.”¹⁵⁴ The willingness of a non-European to be bound by international law would not in itself suffice to ensure membership; but beyond this, Lawrence suggests that “[i]n matters of this kind, no general rule can be laid down.”¹⁵⁵ State practice, likewise, did not reveal a consistent set of principles as to questions of admittance and capacity. Recognition was granted by states, not in accordance with any international principle, but according to the powerful and unpredictable expedience of competition for colonies. Certainly, there were occasions on which unanimity prevailed among European states, as when Turkey was ceremoniously admitted into the circle of European nations.¹⁵⁶ In such a case, the collective act of recognition established the existence of an entity whose capacity was accepted and agreed upon by European states. This, however, was a relatively rare occurrence.

Colonial expansion, by contrast, involved a haphazard and chaotic series of encounters between rival European states, trading companies, and Asian and African societies. European states adopted different views of native personality, depending on their own interests. The problem was that native personality was fluid since it was created through the encounter with a European state that would inevitably “recognize” the capacity of the non-European entity according to its own needs.¹⁵⁷ A European state that had been granted particular treaty rights by an African chief would insist on the validity of the treaty and on the capacity of the chief to enter into such an agreement.¹⁵⁸ Yet, acceptance of this

¹⁵³. Hedley Bull, *The Emergence of a Universal International Society, in The Expansion of International Society*, *supra* note 21, at 117.

¹⁵⁴. Lawrence, *supra* note 17, at 58.

¹⁵⁵. *Id.* at 59.

¹⁵⁶. *See id.* at 84. On this occasion, by the Treaty of Paris of 1856, Turkey was “admitted to participate in the advantages of the public law and system of Europe.”

¹⁵⁷. Oppenheim appears to accept this. *See supra* note 146.

¹⁵⁸. It was a common tactic among states disputing one other’s claims to argue, for example, that the chieftain who entered into a treaty ceding a disputed territory was not the proper chief. *See* S.E. Crowe, *The Berlin West African Conference 1884–1885*,

approach meant that any action undertaken by an individual state created law, which, as Lorimer points out, “deprives international law of permanent basis in nature and fails to bring it within the sphere of jurisprudence.”¹⁵⁹ Acceptance of this solution dispensed with the idea of law and privileged state sovereignty. In the final analysis, international law failed to establish any clear limits to the exercise of state discretion in matters of recognition, as a consequence of which the subjective and self-interested views of states appeared to prevail.¹⁶⁰ In an attempt to establish standards independent of arbitrary state will, Westlake was prepared, ironically,¹⁶¹ to base the capacity of non-European peoples on the degree of understanding of the non-European party entering into a treaty. “We have here a clear apprehension of the principle that an uncivilised tribe can grant by treaty such rights as it understands and exercises, but nothing more.”¹⁶² He states that cession of this sort “may confer a moral title to such property or power as they [the natives] understand while they cede it, but that no form of cession by them can confer title to what they do not understand.”¹⁶³ As a consequence, “it is possible that a right of property may be derived from natives, and this even before European sovereignty has existed over the spot.”¹⁶⁴ If the degree of native understanding was the test, the question then naturally arose: how was a jurist to ascertain what these natives were capable of understanding? Westlake addresses this problem in his examination of two treaties that concerned disputes between Portugal and England. In these disputes, both states claimed rights over the same territory. In order to decide this issue, Westlake is compelled to resort to his conjecture as to native understanding. He dismisses one treaty as “mixed with a farrago which must have been mere jargon to him [the Chief].” As opposed to another where “there is nothing beyond the comprehension of the Makololo chiefs.”¹⁶⁵ Having initially insisted that non-Europeans were absent from the legal universe, Westlake now effectively acknowledges the inadequacies of positivism by resorting to constructing

at 158–59 (Negro Universities Press 1970) (1942).

¹⁵⁹. Lorimer, *supra* note 14, at 104.

¹⁶⁰. As Gong notes, “The subjective nature of the recognition process and the political element within the standard of ‘civilization’ put the European powers in the always powerful and sometimes awkward position of having to be judge in their own cases.” Gong, *supra* note 5, at 61.

¹⁶¹. Ironically because the basic positivist premise is that natives are entirely outside the law.

¹⁶². Westlake, *supra* note 16, at 149.

¹⁶³. *Id.* at 145.

¹⁶⁴. *Id.* See also *Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 593 (1823) *quoted in* Westlake, *supra* note 16, at 148: “The grant derives its efficacy from their [the Amerindians’] will, and if they choose to resume it and make a different disposition of the land, the Courts of the United States cannot interpose for the protection of the title.” The suggestion of this quotation from Chief Justice Marshall’s opinion in *Johnson v. McIntosh* is that land rights of the natives were recognized in international law (thus enabling the natives to alienate their lands) and that these rights continued even when the natives were incorporated into the sovereignty of the colonial state. Hence Marshall’s statement that the Indians could go so far as to modify the terms on which the land may have been “granted.”

¹⁶⁵. Westlake, *supra* note 16, at 153.

the Makololo chiefs and divining their consciousness in order to give his scheme *some* semblance of coherence.

It is almost superfluous to note that while European powers claimed to derive rights from treaties entered into with non-European states, they refused to accept the obligations arising from them. Thus Hall, noting the tendency on “the part of such [non-European] states to expect that European countries shall behave in conformity with the standard which they themselves have set up,” concludes that treaties only create obligations of “honour” on the part of the European states.¹⁶⁶ Similarly, Oppenheim argues that European states interacted with non-European states on the basis of “discretion, and not International Law.”¹⁶⁷

Positivism claimed to provide, through a precise examination of state behavior and the employment of a comprehensive and clearly defined system of classification, a definitive answer to any legal problem with which it was confronted. Once the actualities of applying positivism to resolving problems of native title are examined, however, it becomes evident that such claims were hardly well-founded. Ultimately, the matter is resolved not in accordance with these detailed and elaborate principles, but rather on an almost completely ad hoc basis, by a process that is reduced to attempting to reconstruct that to which Makololo chiefs imagine themselves to be agreeing. The randomness of this process is acknowledged by the jurists themselves. Lawrence, for instance, acknowledges that “[e]ach case must be judged on its own merits by the powers who deal with it.”¹⁶⁸ Jurists simply could not account for the ambiguous position occupied by the non-European world, which is simultaneously capable of entering into treaty relations, yet lacking in any cognizable international personality. Positivists grandiosely claimed that while their system was based on empirical science, it nevertheless remained autonomous from the messy world of politics, society, and history that it imperiously and decisively ordered. The complex realities of late nineteenth-century politics overwhelmed the positivist system. Its failure to coherently place and incorporate the non-European entity into its overall scheme completely invalidated its much vaunted claims of being comprehensive, systematic, and consistent. The ambivalent status of the non-European entity, outside the scope of the law and yet within it, lacking in international personality and yet necessarily possessing it, was never satisfactorily defined or resolved. As Oppenheim acknowledges, “No other explanation of these and similar facts [the fact that these non-sovereign entities engaged in sovereign behaviour] can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International

¹⁶⁶. W.E. Hall, *A Treatise on International Law* 43–44 (3d ed.), *quoted in* Gong, *supra* note 5, at 61. See also Crawford’s summary of statehood doctrine in the 19th century in Crawford, *supra* note 5, at 12–15.

¹⁶⁷. Oppenheim, *supra* note 19, at 34–35. “The moral rights of all outside the international society against the several members of that society remain intact, though they have not and scarcely could have been converted into legal rights. . . .” Westlake, *supra* note 16, at 140.

¹⁶⁸. Lawrence, *supra* note 17, at 85.

Law.”¹⁶⁹

2. Colonization

The problem of the legal personality of non-European peoples could be most simply resolved by the actual act of colonization, which effectively extinguished this personality. Once colonization took place, the colonizing power assumed sovereignty over the non-European territory, and any European state carrying on business with that territory would deal with the colonial power. In this way, legal relations would once again take place between two European powers. The tension that existed between these European states (for example, over access to markets or resources of a colony) was in many respects less jurisprudentially complicated than relations between European and non-European entities were. Nevertheless, questions of native personality played an important role in determining whether colonization had properly taken place in the first instance. The jurisprudence concerning the issue of how sovereignty was acquired over non-European peoples was controversial and unsettled because, once again, states took very different views depending on their own interests.¹⁷⁰ Broadly, however, discovery,¹⁷¹ occupation, conquest,¹⁷² and cession¹⁷³ were some of the doctrines historically devised to deal with this issue. The conceptual framework offered by private law, particularly property law, played an influential role in the jurisprudence regarding the acquisition of territory.¹⁷⁴ In order to prevent a state from claiming that it had acquired valid title over an entire territory simply by landing there, positivist analysis focused on questions such as what acts were sufficient to show that the European state had acquired control over the territory or that occupation had been “effective.”

Conquest generally involved militarily defeating an opponent and thus acquiring sovereignty over the defeated party’s territory.¹⁷⁵ Conquest was one of the

¹⁶⁹. Oppenheim, *supra* note 19, at 110.

¹⁷⁰. *See id.* at 283.

¹⁷¹. The basic idea underlying the method of discovery to acquire property rights was that the mere “discovery” of a territory sufficed to provide title. Discovery was used as a basis for title in the 15th and 16th centuries, but was generally discredited by international lawyers as a valid basis for establishing title because it was so prone to abuse. *See* Lindley, *supra* note 20, at 128–38.

¹⁷². *See* Hall, *supra* note 140, at 522–29. “Conquest consists in the appropriation of the property in, and of the sovereignty over, a part or the whole of the territory of a state, and when definitively accomplished vests the whole rights of property and sovereignty over such territory in the conquering state.” *Id.* at 522.

¹⁷³. In 1912, Oppenheim listed five modes of acquiring territory: cession, occupation, accretion, subjugation, and prescription. *See* Oppenheim, *supra* note 19, at 284.

¹⁷⁴. *See generally* Carty, *supra* note 5, for a study of the complex ways in which these analogies were made. Although territory was spoken of as property, this did not mean that, at the end of the 19th century, the modes of acquiring territory were treated as identical to the modes of acquiring private property; however, it is notable that the international law of Grotius’s time had apparently relied on Roman law concepts of private property in describing how states acquired property, and this schematization had a continuing influence. *See* Oppenheim, *supra* note 19, at 283.

¹⁷⁵. For a comprehensive and detailed study of conquest, see Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and*

most ancient ways of acquiring title; within the nineteenth-century framework, it was a completely legal and valid way of expanding territory. Recognition of such a right of conquest is completely contrary to the very concept of law as it legitimizes outcomes dictated by power rather than legal principle. Nevertheless, conquest received legal sanction. Given the military weakness of the non-European states and the absence of any legal limitations on a state's ability to commence a war, it was inevitable that European colonial empires expanded by the conquest of large parts of Asia and Africa.¹⁷⁶ As Korman notes, furthermore, European states quite openly relied on the doctrine of conquest as a basis for their title.¹⁷⁷

Furthermore, the emphasis on the concept of property and the positivist view that uncivilized peoples were not legal entities contributed towards doctrines such as "occupation" erasing the existence of many non-European peoples.

Only such territory can be the object of occupation as is no State's land, whether entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a State. Even civilised individuals may live and have private property on a territory without any union by them into a State proper which exercises sovereignty over such territory. And natives may live on a territory under a tribal organisation which need not be considered a State proper.¹⁷⁸

This meant that the territory of "tribal" peoples could be appropriated simply through occupation by the European state on the basis that tribal organization did not correspond with a "State." Thus, British title to the Australian continent was based on occupation of uninhabited territory, *terra nullius*; it was irrelevant that Aboriginal peoples had occupied the continent for more than forty thousand years and had developed sophisticated forms of political and social organization in this time.¹⁷⁹

Each of these doctrines relied upon different notions of native personality, as the particular means of asserting title depended on the positivist assessment of the degree of civilization of the peoples occupying the land. Using this scale, the positivists asserted, for example, that in the case of merely tribal peoples occupation itself would suffice. Still, if the natives belonged to what positivists regarded as an uncivilized, but organized, polity, European powers would have

Practice (1996).

¹⁷⁶. For an outline of conquest, see Oppenheim, *supra* note 19, at 302–07. Conquest seems to have been officially outlawed in contemporary international law as a means of acquiring title to territory, even though certain events suggest that it remains a part of international law. The Indonesian assertions of sovereignty over East Timor, which have been, implicitly, if not explicitly, recognized by countries such as Australia, can be principally explained in terms of conquest. See Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90 (June 30).

¹⁷⁷. See Korman, *supra* note 174, at 66.

¹⁷⁸. Oppenheim, *supra* note 19, at 292.

¹⁷⁹. See Lindley, *supra* note 20, at 40–41. British courts which made such rulings essentially relied on reports of the Aborigines which asserted that "so entirely destitute are they even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded." *Id.* at 41, quoting 7 Parl. Papers No. 425, at 82 (1837).

to assert title through some other means such as conquest or cession.¹⁸⁰ The issue of cession raised the problems discussed earlier as to treaty relations between European and non-European peoples. The legitimacy of conquest as a mode of acquiring control, together with the positivist argument that resort to force was a valid expression of sovereign will, meant that few restrictions were imposed on imperial expansion. This, coupled with the fact that municipal courts of the colonized countries were precluded from inquiring into sovereign behavior, effectively meant that the attempts made by colonized peoples to question the legality of actions taken by the colonizing state or other entities vested with sovereignty by the colonizing state were bound to fail.¹⁸¹

3. Complying with the Standard of Civilization

States such as Japan and Siam succeeded in retaining their nominal independence. For such states, acceptance into the Family of Nations could only occur if they met the “standard of civilization,” which amounted, essentially, to idealized European standards in both their external and, more significantly, internal relations.

These standards presupposed and legitimized colonial intrusion in that a non-European state was deemed to be civilized if it could provide an individual, a European foreigner, with the same treatment that the individual would expect to receive in Europe.¹⁸² The development of this framework appears to correspond with the changing nature of European penetration of the non-European world and the legal regimes that had been devised to promote this. As discussed earlier, the first phase of contact took place through trading companies, which confined their activities principally to trade. As they gradually adopted a more intrusive role in the governance of the non-European state in order to further their trading interests, more demands were made on non-European states, which were compelled under threat of military action to make increasing concessions to the interests of the traders. Apart from demonstrating some of the characteristics of an unequal treaty, the Treaty of Nanking suggests how different European practices and policies were gradually introduced into non-European societies and then expanded. Once it had been established by way of treaty that a European had a right to reside and trade in a particular state, it was not altogether surprising that international jurists would use this as a measure of whether a country was civilized or not. Westlake presents the basic test:

¹⁸⁰. For discussion of the various ways in which title could be obtained over territories occupied by primitive peoples, see Westlake, *supra* note 16, at 155–66. British acquisition of title over India presented a different set of problems by virtue of the existence of a complex political system there. *See id.* at 191.

¹⁸¹. This is illustrated by a series of cases regarding the validity of concessions obtained by colonial powers and affiliated companies, with respect to colonial territories. These took place in India, where it was once declared by the municipal courts that even the actions of the East India Company were to be regarded as the acts of a sovereign and therefore immune from scrutiny. As a consequence, colonized peoples could not bring any claims in the international arena. *See* 2 Y.B. Int’l L. Comm’n 117–18, UN Doc.A/CN.4/Ser.A./1963/ Add.1.

¹⁸². *See* Westlake, *supra* note 16, at 102–03, 141–42.

“When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes. . . .”¹⁸³

Westlake argued that the “Asian Empires” were capable of meeting this standard, provided that Europeans were subject to the jurisdiction of a European consul rather than subject to the local laws; but even so, this meant only that European international law had merely to “take account” of such Asian societies rather than accept them as members of the Family of Nations.¹⁸⁴ For the European states, the local systems of justice were completely inadequate, and there was no question of submitting one of their citizens to these systems. Thus, non-European states were forced to sign treaties of capitulation that gave European powers extra-territorial jurisdiction over the activities of their own citizens in these non-European states.¹⁸⁵ This derogation from the sovereignty of the non-European state was naturally regarded as a massive humiliation by that state, which sought to terminate all capitulations at the earliest opportunity.¹⁸⁶ Capitulations were an aspect of the unequal treaty regime imposed on these states and usually comprised just one part of these treaties, which also granted rights to trade and to establish residences, for example.¹⁸⁷ Once these treaties allowed for a trading presence, it was almost inevitable that the scope of the rights demanded by the European powers to enable them effectively to carry on their trade expanded.

Both external and internal reform had to be carried out by a state seeking entry into the family of nations. In the external sphere, the state had to be capable of meeting international obligations and maintaining the diplomatic missions and channels necessary to enable and preserve relations with European states. In the internal sphere, the state was required to reform radically its legal and political systems to the extent that they reflected European standards as a whole. Put in another way, this test in effect suggested that the project of meeting the standard of civilization consisted of generalizing the standards embodied in the capitulation system, which was specific to aliens, to the entire country.¹⁸⁸ In

¹⁸³. *Id.* at 141.

¹⁸⁴. *See id.* at 142.

¹⁸⁵. *See* Oppenheim, *supra* note 19, at 395. This jurisdiction was exercised by European consuls in the non-European states; the competence of these consuls comprised “the whole civil and criminal jurisdiction, the power of protection of the privileges, the life, and property of their countrymen.” *Id.* at 497.

¹⁸⁶. *See* Anand, *supra* note 8, at 23–24; Tieya, *supra* note 125, at 195. Alexandrowicz argues that originally capitulations were voluntarily undertaken by Asian states who were sympathetic to the problems faced by traders in a foreign culture and who sought to facilitate trade by means of the capitulation, which, in the early stage of the colonial encounter, took place on equal terms. Capitulations at that stage did not signify inequality or inferiority; that occurred by the 19th century. *See* Alexandrowicz, *East Indies*, *supra* note 8, at 97.

¹⁸⁷. *See* Gong, *supra* note 5, at 211, *citing* Treaty of Friendship and Commerce between Her Majesty and the Kings of Siam, Apr. 18, 1855 (the Bowring Treaty).

¹⁸⁸. Thus it was only after Japan had extensively revised its civil and criminal codes that it was admitted to the Family of Nations. *See* Gong, *supra* note 5, at 29.

the domestic sphere, then, the non-European state was required to guarantee basic rights relating to dignity, property, and freedom of travel, commerce, and religion, and it had to possess a court system that comprised codes, published laws, and legal guarantees.¹⁸⁹ All these rules compelling domestic reform essentially required profound transformations of non-European societies in ways that negated the principle of territorial sovereignty. Oppenheim states the principle in its fullest form:

In consequence of its internal independence and territorial supremacy, a State can adopt any Constitution it likes, arrange its administration in a way it thinks fit, make use of legislature as it pleases, organise its forces on land and sea, build and pull down fortresses, adopt any commercial policy it likes and so on.¹⁹⁰

While positivist jurisprudence insisted that states were formally equal and that states possessed extensive powers over their own territory, a different set of principles applied in the case of non-European states, which significantly compromised their internal sovereignty and their cultural distinctiveness in order to be accepted as legal subjects of the system. It was not open for non-European states to exercise the far ranging freedoms over their internal affairs suggested by Oppenheim, principally because it was only if the non-European states had adopted Western forms of political organization that they were accepted into the system. Essentially the actions that non-European states had to take to enter into the system negated the rights that they were supposed to enjoy formally upon admittance.

4. Protectorates

Toward the latter part of the nineteenth century, protectorates were a rather common technique by which European states exercised extensive control over non-European states, while not officially assuming sovereignty over those states.¹⁹¹ Although used to regulate relations within Europe itself, the protectorate was a device modified by European states and used in unique ways in furthering their colonial empires. The protectorate was ostensibly a means of protecting vulnerable states from “great power politics” by entrusting those same great powers to look after the interests of these vulnerable states.¹⁹² Thus the “protectorate” was essentially a treaty by which uncivilized states placed themselves under the “protection” of European states. Under this regime, a European state would acquire complete control over the external affairs of the non-European state, which was prohibited from communicating with any other European state without the permission of its protector.¹⁹³ In theory, the non-European states

¹⁸⁹. See *id.* at 14–15. Gong provides a clear and useful summary taken from various texts, of what the standard of civilization required.

¹⁹⁰. Oppenheim, *supra* note 19, at 178.

¹⁹¹. On protectorates in general, see Lindley, *supra* note 20, at 181–206; Oppenheim, *supra* note 19, at 296–98.

¹⁹². See Alexandrowicz, Treaty Making, *supra* note 8, at 62.

¹⁹³. See *id.* at 62–83. Alexandrowicz defines a protectorate as “a split of sovereignty and its purpose is to vest in the Protector rights of external sovereignty while leaving

retained their sovereignty over internal affairs. Indeed, a number of disputes heard by the British courts established and affirmed this proposition.¹⁹⁴ Nevertheless, the technical distinction between internal and external sovereignty was porous. As Westlake remarks, “[T]he institution of protectorates over uncivilised nations has given greater freedom to the initial steps towards their acquisition.”¹⁹⁵ This was legally justified by protectorate provisions, which enabled the protecting power to assume control over internal affairs because this was explicitly provided for in the agreement,¹⁹⁶ or else because the native ruler was incapable, for example, of maintaining “good government” within the protectorate.¹⁹⁷ The artificiality of the supposed distinction between external and internal sovereignty is suggested by the fact that even questions of succession, which were the very core of native sovereignty, often had to be answered by the protecting power.¹⁹⁸ As Maine points out, regimes such as the protectorate were a complete aberration of Austin’s idea of sovereignty:

It is necessary to the Austinian theory that the all-powerful portion of the community which make laws should not be divisible, that it should not share its power with anybody else, and Austin himself speaks with some contempt of the semi-sovereign or demi-sovereign states which are recognised by the classical writers on International Law. But this indivisibility of Sovereignty, though it belongs to Austin’s system, does not belong to International Law. The powers of sovereigns are a bundle or collection of powers and they may be separated one from another.¹⁹⁹

Significantly, then, the protectorate mechanism enabled European states to exercise control over a state with respect to both its internal and external af-

rights of internal sovereignty in the protected entity. In this way the Protector shelters another entity against the external hazards of power politics.” *Id.* at 62. *See also* Crawford, *supra* note 5, at 187–88.

¹⁹⁴. *See, e.g.*, Duff Development Co. v. Kelantan Govt. 470 A.C. 797 (1924). *See* Lindley, *supra* note 20, at 194–200 for discussion of the status of Malay and Indian protectorates.

¹⁹⁵. Westlake, *supra* note 16, at 184. Lindley goes further in saying, “The more modern protectorates [i.e., protectorates established with respect to non-European states]. . . have been usually intended or destined to result in the incorporation of the protected region into the dominions of the protecting Power, or, at all events, in an increasing control by that Power over the internal affairs of the protected country.” Lindley, *supra* note 20, at 182. Later Lindley states, “In both India and Africa, the tendency has been for the protecting Power to increase its control over internal affairs. In India this has been effected mainly by emphasizing and regularizing the duties which the native princes owe to the paramount Power; in Africa by more direct action in the various branches of administrative government.” *Id.* at 200–01. *See also* Island of Palmas Case, *supra* note 146.

¹⁹⁶. *See* Lindley, *supra* note 20, at 184 (discussing the Warsangali treaty between Warsangali chiefs, near the Somali coast, and Britain). The Warsangali agreed to act upon the advice of British Officers “in matters relating to the administration of justice, the development of the resources of the country, the interests of commerce, or in any other matter in relation to peace, order, and good government, and the general progress of civilization.” *Id.*

¹⁹⁷. *See id.* at 196.

¹⁹⁸. *Id.* at 196–98.

¹⁹⁹. Henry Sumner Maine, *International Law* 58 (1888).

fairs, even while asserting that sovereignty was properly located in the native ruler. As Lindley notes, “By such an arrangement, one State could acquire complete control over another, so far as third nations were concerned, without necessarily assuming the burden of its administration, and it was this feature of the protectorate which favoured its extensive adoption by European Powers in the spread of their dominion.”²⁰⁰

The protectorate was a wonderfully flexible legal instrument because it could be used for a number of different purposes. It could, as Lindley suggests, be used to exclude competing European powers. Equally, it could be used to acquire control over the interior realm of the native state when that was considered desirable. The existence of a protectorate enabled European states to regulate the degree of sovereignty a local ruler had. Thus in terms of some issues, the local ruler could be characterized as having the capacity to transfer property to the Protecting power. For example, where the Protecting power wished to assert its own power, it could declare that the matter in question was within the its sphere of authority.²⁰¹ In analyzing British practice as a protecting state with respect to Indian princely kingdoms, it is asserted that

[t]here *is* paramount power in the British Crown, of which the extent is wisely left undefined. There *is* a subordination in the native states, which is understood but not explained. The paramount power intervenes only on grounds of general policy, where interests of the Indian people or the safety of the British power are at stake.²⁰²

What is notable is that, at a time when sovereignty was generally regarded as fixed, stable, and monolithic,²⁰³ colonial jurists self-consciously grasped the usefulness of keeping sovereignty undefined in order that it could be extended or withdrawn according to the requirements of British interests. It is also notable in this passage that Britain had by now assumed responsibility for the well being of the natives and used this as a further basis for intervention. In the final analysis, the distinction between protectorates and colonies was gradually eroded, and the protectorate became a vehicle by which the European power controlled both the internal and external relations of the native state.²⁰⁴ As in the case of Vitorian jurisprudence, intervention was endorsed by a number of techniques, such as the powerful invocation of disorder and lawlessness within the non-European territory, which necessitated the imposition of an order that

²⁰⁰. Lindley, *supra* note 20, at 182.

²⁰¹. For the complications that could arise regarding which rights attributable to sovereignty were being exercised, see *The King v. Crewe*, 2 Eng. Rep. 576 (2 K.B. 1910).

²⁰². Westlake, *supra* note 16, at 206 (*citing* William Lee-Warner, *The Protected Princes of India* 37–40 (1894)).

²⁰³. For an analysis of this image of 19th-century sovereignty, see Kennedy, *supra* note 5, at 119: “By century’s end, international law would countenance but one form of political authority, absolute within its territory and equal in its relations with other sovereigns.”

²⁰⁴. Lindley asserts that the protectorate was intended to lead to “an increasing control by that [protecting] Power over the internal affairs of the protected country. The sovereignty is to be acquired piecemeal, the external sovereignty first.” Lindley, *supra* note 20, at 182.

could only take place through conquest posited as unwillingly undertaken.²⁰⁵ The protectorate, then, demonstrated yet another variation on sovereignty as it developed in the colonial encounter. The use of the protectorate as a flexible instrument of control corresponded with a growing appreciation for the uses of the “informal Empire” and the realization that an important distinction could be made between economic and political control.²⁰⁶ While it was desirable to exploit the raw materials of Asian and African countries and develop new markets in these countries, these goals could be achieved without assuming political control over the territory or incurring the costs and problems of managing a colony. Seen from this perspective, the ideal situation enabled Britain to exercise economic control over a non-European state that was nominally “sovereign.” The protectorate arrangement, as a legal instrument, was ideally suited for the implementation of such a policy.²⁰⁷

C. The Berlin Conference on West Africa of 1884–85

1. Introduction

Given the conceptual inadequacies of the positivist framework for dealing with the colonial encounter, it was hardly surprising that international law contributed little towards the effective management of the colonial scramble. This scramble generated such grave tensions that the European powers held the Berlin Conference of 1884–85 in an attempt to resolve matters. Here diplomacy and traditional balance of power politics combined with international law, as the imperial powers of Europe attempted to create a legal and political framework that would ensure that colonial expansion in the Congo Basin took place in an orderly way that minimized tensions among the three most powerful European states at the time: England, France, and Germany. This Part of the Article focuses on the legal attempts to define and domesticate the native and place him securely within the authoritative framework of positivist jurisprudence, and on the related theme of the complex ways in which law and politics intermingled in the grand project of colonial management.

African peoples played no part at all in these deliberations,²⁰⁸ which determined in important ways the future of the continent and continue to have a profound influence on the politics of contemporary Africa.²⁰⁹ This exclusion was reiterated and intensified in a more complex way by the positivist argument that African tribes were too primitive to understand the concept of sovereignty and, hence, were unable to cede it by treaty. Consequently, any claims to sovereignty based

²⁰⁵. See Anghie, *Vitoria*, *supra* note 9, at 326–27.

²⁰⁶. See John Gallagher and Ronald Robinson, *The Imperialism of Free Trade*, 6 *Econ. Hist. Rev.* 1 (1953). For a discussion of the role of informal empire in the larger context of empire, see Michael W. Doyle, *Empires* (1986).

²⁰⁷. In the final analysis, however, the British, for example, found it necessary to assume political control over most of the territories which they initially treated as protectorates. It was only in this way that they could create the political conditions and stability that enabled economic expansion.

²⁰⁸. See Elias, *supra* note 8, at 18–20, 33.

²⁰⁹. See generally Mutua, *supra* note 8.

on such treaties were invalid.²¹⁰ This proposition may have been advanced not only for theoretical consistency, but also to preclude European adventurers from abusing the treaty mechanism as a means to acquire sovereignty. Nevertheless, its effect was to transform Africa into a conceptual *terra nullius*; as such, only dealings between European states with respect to those territories could have decisive legal effect. The Berlin Conference was a unique event because it was the first occasion on which European states²¹¹ sought to address the “colonial problem.” Although primarily concerned with the division of Africa, the deliberations of the Conference illuminated many aspects of the broader question of colonialism as a whole. The management of the division of Africa by systematizing the colonial scramble and the articulation of a new ideology of colonialism were two of the major projects of the Conference.

2. Partitioning and Managing Africa

Trade was the central theme of the Conference. Issues concerning free trade in the Congo basin²¹² and free navigation of the Congo and Niger rivers were intensely discussed.²¹³ The implicit failure of international law to devise a coherent framework for regulating the European-African encounter became evident in their deliberations. As the previous discussion on treaties suggests, the modes of acquiring trading rights and control over non-European territory were easily open to abuse as European trading companies or adventurers such as Henry Morton Stanley²¹⁴ could enter into “treaties,” which they claimed provided them with rights, if not actual sovereignty, to vast areas of land. Thus the Berlin Conference, in addition to focusing on trade issues, sought to create a unified system by which claims could be asserted and recognized.

The underlying and crucial issue in this debate was the legal personality of

²¹⁰. See Oppenheim, *supra* note 19, at 285–86 for the general proposition that cessions of territory by native tribes to states fall outside the Law of Nations. For the application of the doctrine to Africa specifically, see Westlake, *supra* note 16, at 149–55.

²¹¹. France and Germany first developed the idea of holding the Conference. Invitations were issued in three stages: first to Great Britain, Belgium, the Netherlands, Portugal, Spain, and the United States; later, to Austria, Russia, Italy, Denmark, Sweden, and Norway; and finally to Turkey. See Crowe, *supra* note 157, at 220. Elias asserts that China was a party to the Treaty, see Elias, *supra* note 8, at 20, but no Chinese representative appears on the list of Signatories appearing in the preamble to the original Treaty. See General Act of the Berlin Conference on West Africa, Feb. 26 1885, *translated in* Official Documents, 1909 Am. J. Int’l L. 7 (Vol. 3, Supp.) [hereinafter General Act].

²¹². See Crowe, *supra* note 157, at 105–18.

²¹³. See General Act, *supra* note 210, art. 1.

²¹⁴. Stanley, acting on behalf of the International Association of the Congo headed by King Leopold II, King of the Belgians, made hundreds of treaties with native “sovereigns” in the region and thus gained control over large portions of the Congo basin that eventually formed the Congo Free State. Leopold was the personal sovereign over the State whose existence was recognized by the powers at the Berlin Conference. See Lindley, *supra* note 20, at 112; Crowe, *supra* note 157, at 158–60.

African tribes. Despite the objections of jurists such as Westlake,²¹⁵ treaties with African tribes were the basis on which claims were made to African territory. This raised the familiar, and by now apparently insurmountable, problems of deciding the capacity of the African entity and the status of that entity within the overall political structure of the tribe.

The American representative to the Berlin Conference, Mr. Kasson, made an alternative proposal arguing that

[m]odern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary territory. In conformity with this principle my government would gladly adhere to a more extended rule, to be based on a principle which should aim at the voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the aggression.²¹⁶

Kasson's proposal was greeted cautiously; the conference "hesitated to express an opinion" on such a delicate matter,²¹⁷ and scholarly opinion was divided as to whether Kasson's proposal nevertheless reflected the practice of states.²¹⁸ On the one hand, Kasson's proposal would have severely and unacceptably curtailed colonial powers if the principle had indeed been implemented so as to require scrupulous evidence of proper consent.²¹⁹ On the other hand, absent such an inquiry into the validity of the ostensible consent, it simply offered a justification for entering into more treaties with African states, claiming that such treaties conformed with the scheme Kasson outlined.

Several jurists such as Westlake pointed out that Kasson's scheme was impractical and dangerous. Its proper implementation raised questions to which there were no clear answers.

Is any territorial cession permitted by the ideas of the tribe? What is the authority—chief, elders, body of fighting men—if there is one, which those ideas point out as empowered to make the cession? With what formalities do they require it to be made, if they allow it to be made at all?²²⁰

There is more than a suggestion in Westlake that the individuals characterized as African chiefs in these treaties exploited all of these confusions for their own purposes.²²¹

Overall, no clear procedure for acquiring valid title was laid down by the Conference. This same vagueness afflicted its attempt to clarify the issue of "effective occupation." The Conference basically stipulated that any party taking

²¹⁵. Westlake argued that African tribes were too simple to understand the concept of sovereignty and hence were incapable of transferring it by treaty. *See* Westlake, *supra* note 16, at 144–46.

²¹⁶. Westlake, *supra* note 16, at 138. For an illuminating discussion of this passage, see Crawford, *supra* note 5, at 178–79. For Kasson's contribution to the Conference, see Crowe, *supra* note 157, at 97–98.

²¹⁷. Westlake, *supra* note 16, at 138.

²¹⁸. *See* Crawford, *supra* note 5, at 179. Incidentally, Mr. Kasson's proposal was never officially accepted. *See id.*

²¹⁹. *See* Westlake, *supra* note 16, at 139.

²²⁰. *Id.* at 139–40.

²²¹. *See id.*

possession of a tract of land in Africa was required to notify all other members of this possession²²² and, further, was required to exercise its authority in its possessions so as to protect existing rights within the territory.²²³ This was intended to prevent countries from making claims to territory based only on the most tenuous connections with that territory and to ensure that control was accompanied by international responsibility. The Conference was only partially successful in achieving these ambitions because Britain, which had the largest interests in Africa, opposed all efforts to impose greater responsibility on the colonizing powers.²²⁴ These attempts to formulate rules for effective occupation acknowledged the lack of any precise, accepted, and workable principles regulating the colonial encounter. The best that could be achieved was to proceduralize the matter²²⁵ by requiring states acquiring territorial interests to notify other signatories of their claims, which would enable these states to lodge any objections.²²⁶ No clarity existed as to how or in which forum such claims were to be resolved.

This unsatisfactory resolution represented a fundamental irony for positivist jurisprudence. At various levels of their jurisprudence, positivists had sought to erase the problematic native from their scheme; the native was expelled from the family of nations and excised from history by positivist disregard for the four preceding centuries of diplomatic relations and was thereby excluded from the process of treaty making. Native resistance was silenced by the positivist practice of reading a treaty without regard to the violence and coercion that led to its formation. Despite all attempts to exclude Africans from the Conference, however, the identity of the African native became the central preoccupation of its deliberations over the question of systematizing territory. And despite positivist attempts to assume complete control over the identity of the native, the native remained unknowable in a way that threatened the stability and unity of Europe. Conventional histories of the Conference make the powerful point that Africans were excluded from its deliberations. The story of the Conference may also be written, however, from another perspective that focuses on the complex way in which the identity of the African was an enduring problem that haunted the proceedings of the Conference.²²⁷

The existence of unassimilability, the problems of native identity, and their effect in bringing to crisis the colonial will to power may well be worth examining and

²²². See General Act, *supra* note 210, ch. 6, art. 34. For discussion as to the problem of effective occupation, see Crowe, *supra* note 157, at 176–91.

²²³. See General Act, *supra* note 210, art. 35.

²²⁴. See Crowe, *supra* note 157, at 176–91. In particular, Britain sought to restrict the application of these principles to the coastal states in Africa and further prevented these principles from applying to protectorates.

²²⁵. This could be read as an example of a tendency that was noted by Koskenniemi: “The problem of order becomes a procedural problem. If only advanced mechanisms for sovereign cooperation and settlement are developed, material disagreements can be prevented from threatening the system.” Koskenniemi, *Apology*, *supra* note 5, at 123.

²²⁶. The term used in the Act is “reclamations” rather than protest. General Act, *supra* note 210, art. 34.

²²⁷. See Westlake, *supra* note 16, at 139–40.

celebrating. Still, such a celebration must be tempered with the knowledge that whatever the disruptions inflicted on the logic of colonial narratives, these did little to ameliorate the real and violent consequences that followed for African societies.

Although Kasson's approach was criticized, subsequent practice suggests that *any* remotely legal explanation for the partition of Africa was inevitably based on his proposal.²²⁸ Seen from the perspective that accepted the possibility of treaties between Africans and Europeans, consent as ostensibly granted by Africans became a complete reversal of what it was supposed to mean. Consent, rather than an expression of the free will of the relevant African party, was instead created in accordance with the exigencies of the situation. Consent was the basis of positivist jurisprudence, and the science of jurisprudence precisely determined whether such consent had led to the formation of certain rules that would then be binding on the state that had given consent. A rich and complex set of ideas—which are still an integral aspect of contemporary international legal jurisprudence—developed out of this set of considerations. Still, with regard to native consent, a completely different set of issues arose. Here, the jurist created consent and the writer created agency, as African chiefs, Indian princes, and Chinese emperors were attributed with powers to consent to various measures that benefited the European states. They were excluded from personality; when granted personality, this was in order to enable the formulation of a consistent jurisprudential system or to transfer the entitlement that the Europeans sought. Having articulated a legal framework for acquiring sovereignty over African territory, which was radically disconnected from the actual practice on which they purported to base their system,²²⁹ positivists, in a now familiar reversal, discarded several important elements of their jurisprudence. Whereas previously they insisted that treaties could not be the basis for acquiring sovereignty over African territory, they now applied their science to the interpretation and application of treaties.

3. Justifying Colonialism: Trade, Humanitarianism, and the Civilizing Mission²³⁰

The Berlin Conference was perhaps the first occasion on which Europe went some way towards articulating a philosophy of colonialism that was appropriate for the late nineteenth century. This was a time when the colonial project went through a new phase because of the direct involvement of states in the furtherance of colonialism and because of the systematic economic exploitation of the colonies, which had led not only to intense inter-state rivalries, but also to the

²²⁸. See Crawford, *supra* note 5, at 178–79 and sources cited therein, which include Lugard.

²²⁹. See Crawford, *supra* note 5 at 178–79, on this issue.

²³⁰. “The conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much. What redeems it is the idea only. An idea at the back of it. . . .” Joseph Conrad, *Heart of Darkness* 21 (Ross C. Murfin ed., Bedford Books 1996) (1902).

increasing importance of the colonies for the European economy.²³¹ The idea of the civilizing mission—of extending the Empire for the higher purpose of educating and rescuing the barbarian—had a very ancient lineage.²³² All imperial powers used versions of the civilizing mission. While this was always an important aspect of European attitudes towards imperial expansion in the preceding centuries,²³³ it was in the nineteenth century that states took a particular and renewed interest in articulating the goals of their colonial project, which was now carried out principally by the state itself, as opposed to trading companies. Consequently, new challenges were posed to the way in which imperial states conceived of themselves and their colonies when the United Kingdom dissolved the East India Company and assumed direct responsibility for its Indian subjects.²³⁴

The humanitarian treatment of inferior and subject peoples was a further issue addressed by the Conference. Over the previous two centuries, international law had gradually abolished the slave trade. The Conference, while reiterating the necessity to stamp out the trade, went further. In his opening speech at the Conference, Prince Bismarck noted that “all the Governments invited share the wish to bring the natives of Africa within that pale of civilization by opening up the interior of the continent to commerce.”²³⁵ The British representative made similar remarks, warning of the dangers of completely unregulated trade and arguing for that type of trade that would “confer the advantages of civilization on the natives.”²³⁶ The Conference concluded that it had properly embodied these concerns in Article 6 of the Conference, which read, in part:

All Powers exercising rights of sovereignty or an influence in the Said territories [the conventional basin of the Congo] engage themselves to watch over the conservation of the indigenous populations, and the amelioration of their moral and material conditions, and to strive for the suppression of slavery and especially the negro slave trade.²³⁷

These vaguely expressed concerns were only sporadically implemented;²³⁸ indeed, the most notable achievement of the Conference was the creation of

²³¹. There is a vast amount of literature regarding the economics of imperialism, ranging from the early work of J.A. Hobson to that of contemporary dependency theorists. For an overview, see, for example, Samir Amin, *Imperialism and Unequal Development* (1977); Michael Barratt Brown, *The Economics of Imperialism* (1974); Walter Rodney, *How Europe Underdeveloped Africa* (1972).

²³². For a study of how the modern European Empires modeled themselves after the Roman Empire and the Roman idea of what may be termed the civilizing mission, see Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c.1500–c.1800* (1995). In particular, for his discussion of Cicero’s version of the civilizing mission, see *id.* at 22–23.

²³³. See, for example, the work of Vitoria in the 16th century.

²³⁴. This led Queen Victoria to declare that the Crown was as responsible toward its native Indian subjects as it was to all its other subjects. See Quincy Wright, *Mandates Under the League of Nations* 11 n.18 (1930).

²³⁵. Lindley, *supra* note 20, at 332.

²³⁶. *Id.*

²³⁷. General Act, *supra* note 210, art. 6.

²³⁸. Crowe, for example, asserts quite forcefully that humanitarian issues played only a small part in the Conference. See Crowe, *supra* note 157, at 3, 103–04.

the Congo Free State, which was subsequently recognized as belonging to the personal sovereignty of King Leopold II of Belgium and soon became the setting of mass atrocities.²³⁹ Nevertheless, the humanitarian rhetoric of the Conference was extremely important because it refined the justification for the colonial project. Trade was not what it had been earlier, a means of simply maximizing profit and increasing national power. Rather, trade was an indispensable part of the civilizing mission itself; the expansion of commerce was the means by which the backward natives could be civilized. “Moral and material well-being” were the twin pillars of the program. This gave the whole rhetoric of trade a new and important impetus. Implicit within it was a new world view; it was not simply the case that independent communities would trade with each other. Now, because trade was the mechanism for advancement and progress, it was essential that trade be extended as far as possible into the interior of all these societies.

D. Recognition and the Reconstruction of Positivism

I have stressed and reiterated the importance of the concept of society because its significance for the whole edifice of positivist jurisprudence has not been properly appreciated. Although a fundamental part of the nineteenth-century positivist vocabulary, “society” has ceased to be a legal concept of any importance in contemporary discussions of international law. This is because recognition doctrine serves to obscure the role and function of “society” by presenting it as a creation of sovereignty. This maneuver is important for the purpose of this Article, since it obscures an understanding of society’s operational role as a mechanism by which cultural assessments could be transformed into a legal status. Furthermore, presenting society as a creation of sovereignty suggests another way in which international law suppresses the colonial past at the doctrinal level. Recognition doctrine was fundamental not only to the task of assimilating the non-European world, but also to the very structure of the positivist legal system. Lorimer points to this in arguing that “recognition, in its various phases, constitutes the major premise of the positive law of nations when stated as a logical system.”²⁴⁰ The link between positivism and recognition may be traced both historically²⁴¹ and logically. In logical terms, Lorimer’s assertion appears correct, in that the positivist emphasis on the sovereign as the fundamental basis of international law suggests that only the phenomena recognized by the sovereign become part of the legal universe.

Recognition doctrine is implicitly based on the assumption that a properly constituted sovereign exists. Only those principles created and accepted by

²³⁹. See Lindley, *supra* note 20, at 112–13.

²⁴⁰. Lorimer, *supra* note 14, at 103. Indeed, Lorimer commences his work by stating that the Law of Nations is divided into three leading doctrines: (1) recognition; (2) normal relations that result from the doctrine of recognition; and (3) abnormal relations that result from the doctrine of recognition. See *id.* at 3–4.

²⁴¹. For an account of the beginnings of the doctrine of recognition in the 18th and early 19th centuries and how it corresponded with the emergence of positivism, see Alexandrowicz, *supra* note 121.

sovereigns constitute law, and only those entities granted legal personality by the sovereign exist within the legal universe. Once established, the sovereign can reconstitute the legal universe. This view of recognition doctrine, however, conceals the complex process by which the sovereign is constituted in the first place.

The origins of sovereignty have always posed a major problem for the discipline, as suggested, for example, by contemporary debates about the right of self-determination. Within the framework of the colonial encounter, however, it is possible to trace how a self-conscious effort was made to constitute sovereignty in ways that were explicitly racialized. Austin argued that law was the command of the sovereign.²⁴² Positivists also focused on sovereignty, but, for them, the idea that sovereignty was the exclusive preserve of Europe was enabled by an elaboration of the concept of “society.” Law only properly prevailed among the members of society, so for the positivists, the concept of law was intimately linked with the concept of society, rather than that of sovereignty as outlined by Austin.²⁴³ The concept of society was crucial to the positivist scheme because it enabled a distinction to be made between different types of states. The effect of the distinction was to exclude non-European states from the family of nations and, hence, from the realm of sovereignty itself.²⁴⁴ Seen in this way, the scope of “sovereignty” principally depended on the development of the “society doctrine.” Reliance on the concept of society to establish sovereignty casts doubt on the claim that sovereignty is the core principle of international law and that everything within the international legal system derives from sovereignty.

The sovereign European state was established through reliance on the concept of society. Once constituted, however, the relationship is reversed and the sovereign asserts its supremacy by presenting itself as the means by which society comes into being and operates. Through recognition doctrine, sovereignty doctrine is reconstructed and presents itself as self-contained, coherent, comprehensive, and all-encompassing. A structure of power and decision-making is implicit in recognition doctrine because the power to “recognize” new states is vested in the states that are already “sovereign.” The doctrine is premised on the existence of a sovereign state, whose will establishes law and whose actions may be subject to lawyers’ inquiry.

Once the existence of the state is presumed, positivist jurisprudence is completely consistent. Once a particular group of states wins the title of “sovereign,”

²⁴². See discussion *supra* notes 36–57 and accompanying text.

²⁴³. See Hall, *supra* note 140, at 40.

It is scarcely necessary to point out that as international law is a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised, such states only can be presumed to be subject to it as are inheritors of that civilisation. They have lived, and are living, under law, and a positive act of withdrawal would be required to free them from its restraints.

Id.

²⁴⁴. Crawford summarizes the situation in the 19th century as “[s]tates as such were not therefore necessarily members of the Society of Nations. Recognition, express or implied, solely created their membership and bound them to obey international law.” Crawford, *supra* note 5, at 13.

an authoritative interpretive framework, employing clearly established categories of “backward” and “advanced,” is established and used to determine the status of other, excluded states. Simple acceptance of this framework precludes inquiries into how this distinction was made and why one set of states becomes sovereign while the other does not, even though anthropological and historical research subversively suggests various disconcerting parallels between these apparently disparate societies.

My argument is that recognition doctrine was not merely, or even primarily, concerned with ascertaining or establishing the legal status of the entity under scrutiny; rather, it was about affirming the power of the European states to claim sovereignty, to reinforce their authority to make such determinations, and, consequently, to make sovereignty a possession that they could then proceed to dispense, deny, create, or grant partially. The history of sovereignty doctrine in the nineteenth century, then, is a history of the processes by which European states, by developing a complex vocabulary of cultural and racial discriminations, set about establishing and presiding over a system of authority by which they could determine who was and was not sovereign. Recognition does not so much resolve the problem of determining the status of unknown entities as obscure the history of the process by which this decision-making framework came into being.

Sovereignty is explicitly identified with particular cultural characteristics and a particular cultural process: that of Europe. The history of sovereignty, then, is equated with the creation of European civilization, and at the same time this becomes the conventional history of how international law became universal.

V. RECONCEPTUALIZING SOVEREIGNTY

A. Colonialism and the Racialization of Sovereignty

An examination of the foundations of positivist views of sovereignty and their complex relationship with colonialism suggests new ways of approaching traditional understandings of sovereignty doctrine and the character of sovereignty as it was inherited by the non-European world.

In attempting to formulate a new, scientific international law, the jurists of the nineteenth century articulated a formalist model of sovereignty: an absolute set of powers bound by no higher authority and properly detached from all the imprecise claims of morality and justice. This model of sovereignty has been the subject of considerable and important critique. The fundamental problem with this model, which was evident from the time it was first articulated, was how order could be created among sovereign states in the absence of an overarching sovereign to articulate and enforce the relevant law authoritatively. The conundrum of this image of sovereignty has been, in one way or another, the central preoccupation of the discipline. This is suggested not merely by scholarly works, but by the manner in which the discipline is introduced in standard textbooks

such as Henkin's *International Law*.²⁴⁵ Important theoretical works by scholars such as Franck, Carty, Kennedy, and Koskenniemi elaborate in various ways on problems arising from this framework.²⁴⁶

A major concern of this Article is to identify what this model of sovereignty excludes. Although this framework plays a significant role in international legal thinking, the relationship between sovereignty and the non-European world cannot be properly understood within it. The interaction between European and non-European societies in the colonial encounter was an interaction not between equal sovereign states, but rather between sovereign European states and non-European states denied sovereignty. The conventional way to account for this relationship is by recourse to recognition doctrine²⁴⁷ and to the "Expansion of International Society," an ambiguous, euphemistic, and somewhat misleading term that refers not to an open process by which the autonomy and integrity of non-European states were accepted, but to the colonial process by which Asian and African societies were made to comply with European standards as the price of membership into the family of nations.

The paradigm of "order among sovereign states" excludes from critical inquiry the processes that I have attempted to trace here: (1) the process by which non-European states were deemed lacking in sovereignty and thus excluded from the family of nations and of law; and (2) the racialization of the vocabulary of the period, not only in the explicit distinctions between civilized and uncivilized, advanced and barbaric, but also in the integration of these distinctions into the very foundations of the discipline, namely the ostensibly neutral concepts of "law," "society," and "sovereignty." The "order" paradigm fails to account for the role of race and culture, not only in the application of these concepts, but also in their very formation. I argue, by contrast, that sovereignty can only be understood in terms of its complex relationship with colonialism and the racial and cultural distinctions it generated and reinforced. At the simplest level, the connection between sovereignty and culture was embodied by the fundamental positivist proposition that only European states could be sovereign. This complete identification of Europe with sovereignty was maintained, reiterated, and reinforced at a number of different levels. Not only was the non-European excluded from the realm of sovereignty, but European culture and society were naturalized. Hence Lawrence argued that European states had belonged to the family of nations "since time immemorial."²⁴⁸ Lawrence continues, "[M]any of them existed before the great majority of [modern international law's] rules

²⁴⁵. See HENKIN ET AL., *supra* note 4.

²⁴⁶. See THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); CARTY, *supra* note 5, at 4; Kennedy, *supra* note 5, at 4; KOSKENNIEMI, *APOLOGY*, *supra* note 5, at 4. The innovative contributions of these scholars concern the analysis of the ingenious (Kennedy) but ultimately unconvincing and indeterminate (Koskenniemi) ways in which this problem is resolved. Carty focuses on the failure of international law to meet the essential requirements of the positivist notion of a legal system.

²⁴⁷. See discussion *supra* notes 239–243 and accompanying text for the way in which recognition doctrine restores the integrity of the positivist framework.

²⁴⁸. LAWRENCE, *supra* note 17, at 84.

came into being. There was no need for them to be received formally among its subjects. Anything like a ceremony of initiation would have been wholly inapplicable to their case.”²⁴⁹

The naturalist notion of a mythic state of nature is replaced by a positivist notion of a mythic age when European states constituted a self-evident family of nations. Lawrence emphatically argues that the origins of European supremacy are beyond history and inquiry and incapable of identification. The appeal to “time immemorial” precludes inquiry into how European states were deemed sovereign in the first place.²⁵⁰ Under this scheme, history is disregarded, and all of the interactions between European and non-European societies in the previous four centuries, which suggested the existence of a family of nations that included non-European societies, are largely dismissed.

In effect, Europe was the subject of sovereignty and the rest of the world was the object of European sovereignty. Acceptance of these premises—the primacy of sovereignty and the identification of Europe as exclusively sovereign—creates a conceptual framework that dictates that the only possible history of the non-European world is the history of its absorption into the European world in order to move towards acquiring sovereignty. Two different dimensions of sovereignty can be seen when studied from this point of view: since European sovereignty is presumed, the European issue is how conflicts between sovereign states may be resolved in the absence of an overarching sovereign; the problem for the non-European world, by contrast, is how to acquire sovereignty. This argument creates, in effect, something like a linear, evolutionary scheme in which the non-European world is the past and the European world the future. Thus, while the non-European world may illuminate aspects of the past of the European world that may otherwise remain hidden, the complex work of the future lies in the elaboration of established sovereignty, an elaboration that takes the form of the conceptual problems generated by the interaction of sovereign European states. Sovereignty manifested itself quite differently in the non-European world than in the European world. First, since the non-European world was not “sovereign,” virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples. European states could engage in massive violence, invariably justified as necessary to pacify the natives and followed by the project of reshaping those societies in accordance with their particular vision of the world. Sovereignty was therefore aligned with existing European ideas of social order, political organization, progress, and development. This points to a second and implicit difference between sovereignty in Europe and sovereignty in the non-European world. In Europe, nineteenth-century positivism created a situation in which sovereignty was supreme and a sovereign’s actions within its own territory were beyond scrutiny. In contrast, lacking sovereignty, non-European states exercised no rights recognizable by international law over their own territory. Any legal restrictions on the actions of European states towards non-European states resulted from contentions among European states regard-

²⁴⁹. *Id.*

²⁵⁰. Writers such as Westlake were insistent that the origins of sovereignty could not be subjected to inquiry. See WESTLAKE, *supra* note 16, at 134–36.

ing the same territory, not from the rights of the non-European states. This is evident in the partition of Africa, which was determined in accordance with the needs of the major European states.

The intent to erase any independent identity or sovereignty in the non-European world pervades positivism at virtually every level of its jurisprudence: in the distinction between civilized and non-civilized states; in the doctrine of *terra nullius*; in the attempt to suppress the long history of treaty practice between European and non-European peoples; and inevitably, as Westlake points out, in the very process of acquiring sovereignty.

The form which has been given to the question, namely what facts are necessary and sufficient in order that an uncivilised region may be internationally appropriated in sovereignty to a particular state? implies that it is only the recognition of such sovereignty by the members of the international society which concerns us, that of uncivilised natives international law takes no account.²⁵¹

As a consequence of the positivist conception of sovereignty, the character of sovereignty in the non-European world was profoundly different from its character in the European world. Sovereignty represents at the most basic level an assertion of power and authority, a means by which a people may preserve and assert their distinctive culture. For the non-European world, however, sovereignty was the complete negation of independent power, authority, and authenticity. This was not only because European sovereignty was used as a mechanism of suppression and management but also because acquiring sovereignty was equated with adopting European civilization. In effect, for the non-European society, personhood as recognized internationally was achieved precisely when the society ceased to have an independent existence, when it was absorbed into European colonial empires or when it profoundly altered its own cultural practices and political organizations. This paradox and irony is nicely if unselfconsciously suggested by Oppenheim's discussion of the transfer of sovereignty by cession. "[C]ession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family."²⁵² The sovereignty acquired by the non-European state, then, was only tenuously connected with its own identity. This artificially created sovereignty reflected the interests and world view of Europe, and it emerged and is inextricably linked with the exploitation and domination of non-European peoples.²⁵³

Sovereignty for the non-European world consisted of alienation and subordination rather than empowerment. This point emerges powerfully from a study of positivist approaches to treaty-making which clearly demonstrate that the only occasion on which native "sovereignty" or "personality" was bestowed or recognized was in a context where that personality enabled the native to transfer title

²⁵¹. WESTLAKE, *supra* note 16, at 136.

²⁵². OPPENHEIM, *supra* note 19, at 286.

²⁵³. For a powerful argument as to the continuing effects of this artificiality on African states, see Mutua, *supra* note 8. The problem remains as to whether it is possible or desirable to return to some "natural" identity.

of territory or to grant rights to sovereignty itself. The basic point is that the development of the idea of sovereignty in relation to the non-European world occurs in terms of its ability to alienate its lands and rights.²⁵⁴ This is a radical contrast with the elaboration of sovereignty in the European world where the question is: are there any limits at all on state sovereignty? Sovereignty in the European and non-European worlds are characterized, then, in two conceptual frameworks that are inverses of each other and, in important ways, are mutually exclusive.

The peculiar character of sovereignty in the non-European context is further evident in protectorate arrangements. At first glance, it may appear that such arrangements recognized and gave effect to native sovereignty. It is clear, however, that native sovereignty was accommodated largely to the extent that this was compatible with the interests of colonial powers. When vital issues were at stake, European states simply assumed sovereignty over that issue. Simply put, granting sovereignty to the natives was precisely the means by which protecting states extended their authority and control over the natives. Similar arguments may be made with regard to consent; consent was the very bedrock of the positivist system, and the whole science of positivism was dedicated to identifying whether in fact a state had consented to be bound by a particular principle. In the case of the non-European world, Kasson's apparently well-meaning attempt to make native consent an integral part of the scheme facilitated the construction of the pretence that natives had in fact consented to their own dispossession.²⁵⁵ In reality, native consent was not so much an expression of an independent will as a construct dictated by the colonial scramble. Rather than providing the stable foundation of the international legal system, in the non-European context, native consent was a variable entity that could be manipulated to give the system an appearance of coherence.

These inversions of sovereignty were a manifestation of a more profound change in the jurists' understanding of sovereignty resulting from the colonial encounter. Since European sovereignty was placed beyond scrutiny and inquiry, it was principally through the operations of sovereignty in the non-European world that European states acquired a new, self-conscious understanding of the origins of sovereignty and its potential operations. Some sense of this was conveyed by Westlake in his discussion of the acquisition of territorial sovereignty, "[T]he title to territorial sovereignty in old countries not being capable of discussion

²⁵⁴. This same maneuver is evident even in naturalist works. For example, Vitoria's apparently novel argument that the Indians of the New World are human beings and thus possess personality results in the Indians being bound by a universal "natural law" that in effect reflects European standards and values. See Anghie, *Vitoria, supra* note 9.

²⁵⁵. It is difficult to know what to make of Kasson's position. On the one hand, it could suggest the importance of proper treaty making based on genuine consent, on the other, as the representative of the United States, Kasson knew of the types of treaties that had been entered into, and they were absurdly one-sided. One can only assume that Kasson's view of the world was such that he thought it only natural that African tribes would wish to surrender their sovereignty to the "International Association of the Congo," King Leopold's vehicle of conquest.

apart from the several dealings, as cession or conquest, which transfer it, we must turn to new [i.e., non-European] countries.”²⁵⁶

As in evolutionary theory, it was by examining the primitive that the modern acquires a better, clearer sense of itself. The history of the origins of sovereignty could now be written through an examination of its operations in the non-European world. And with the peculiar thrill that accompanies the magnification and universalization of the self, the history that emerged from this inquiry confirmed that the history of sovereignty was the coming into being and expansion of European civilization and, moreover, that progress suggested an inevitable evolution towards that highest point.

Furthermore, Westlake suggests that the colonies played an important role in the discipline of international law, not simply because they offered an arena in which sovereignty could exercise itself in ways that were denied to it in Europe, but also because it was through an examination of the acquisition of sovereignty—whether through protectorates, annexation, or meeting the standard of civilization—that jurists could self-consciously grasp sovereignty as a *mechanism*, the characteristics of which could be both theoretically understood and practically developed precisely through its operation in the “new countries” of the non-European world. Sovereignty, in the case of non-European societies, did not arise “naturally”; rather, it had to be bestowed. Law was the creation of “positive institutions,” and international law is a “highly artificial system,” argues Hall.²⁵⁷ The nineteenth century was the age of science, during which industry was applied for the betterment and progress of human society. We see here the suggestion that international law is not merely a science but a technology.²⁵⁸ As a technology, it could help realize the Victorian ideals of progress, optimism, and liberalism,²⁵⁹ which, when applied specifically to the non-European world, meant the civilizing of the benighted native peoples.

In summary, there are two distinctive models of sovereignty that developed in the nineteenth century: one, the standard model, which focuses on the problem of order among sovereign states, cannot satisfactorily account for the process by which European sovereignty became “universalized”; the other, which I have attempted to develop here, focuses on the problem of cultural difference. This Article has attempted to elaborate the uniqueness of the second model, and I argue that it is a fundamental mistake to see the second model as subsumed in some way by the first. These two models cannot be seen in isolation; rather, they are inextricably interrelated because they emerged at the same period out of the same philosophical matrix of positivism. Any attempt to outline a comprehensive theory of sovereignty surely must take this interdependence into account and resist the prevailing tendency to assimilate the unique history of

²⁵⁶. WESTLAKE, *supra* note 16, at 134.

²⁵⁷. HALL, *supra* note 140, at 40.

²⁵⁸. But it is a technology of legal norms; the major advance with pragmatism is the understanding that the technology could be elaborated by using legal norms to create institutions that had a far greater range and flexibility.

²⁵⁹. For a searching study of the “Victorian tradition,” see Koskenniemi, *Lauterpacht*, *supra* note 5.

the non-European world into the conventional model.

B. The Legacy of the Nineteenth Century

The jurisprudence of the nineteenth century has had profound and enduring consequences for the non-European world. Basically, it presented non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves. The implications of this situation are powerfully summarized by Fanon:

Man is human only to the extent to which he tries to impose his existence on another man in order to be recognized by him. As long as he has not been effectively recognized by the other, that other will remain the theme of his actions. It is on that other being, on recognition by that other being, that his own human worth and reality depend. It is in that other being in whom the meaning of his life is condensed.²⁶⁰

Consequently, for the non-European world, the achievement of sovereignty was a profoundly ambiguous development, as it involved alienation rather than empowerment, and presupposed the submission to alien standards rather than the affirmation of authentic identity.

Furthermore, as R.P. Anand has argued, “having lost their international personality, the Asian states could not play any active role in the development of international law during the most creative period of its history.”²⁶¹ Anand refers to many rules of international law, such as the rules of state responsibility, which were explicitly devised to facilitate the economic exploitation of non-European territories.

The question of the enduring effects on non-European societies of the history of exclusion is related to the issue of the legacy of the nineteenth century for the discipline as a whole. Lawrence’s definition of international law reflects both the view prevalent at the time and the fundamental nexus between race and law: “International law may be defined as the rules which determine the conduct of the general body of civilized states in their dealings with one another.”²⁶² A century later, international law is defined as “the law of the international community of states” by Henkin and his colleagues in their major textbook on the subject.²⁶³ The notion of community is retained, but no distinctions are made between civilized and non-civilized states. The international community of the late twentieth century appears open, cosmopolitan, accommodating, and neutral; sovereignty today is a set of powers and competencies that can be enjoyed by all states regardless of their particular cultural identities.

Profound changes in international law have occurred in the intervening years, and the nineteenth century is something of an embarrassment to the discipline for a number of reasons. Its monolithic view of sovereignty, its formalism, and

²⁶⁰. FRANTZ FANON, *BLACK SKIN, WHITE MASKS* 216–17 (Charles Lam Markham trans., Grove Press 1967) (1952).

²⁶¹. ANAND, *supra* note 8, at 20.

²⁶². LAWRENCE, *supra* note 17, at 1.

²⁶³. *See* HENKIN ET AL., *supra* note 4, at xvii.

its rigidity, were important causes of the First World War in the view of a number of distinguished inter-war jurists such as Lauterpacht and Alvarez, who set about the task of constructing a New International Law.²⁶⁴ Its complete complicity with the colonial project has led to its denunciation as an international law of imperialism. Subsequent generations of international lawyers have strenuously attempted to distance the discipline from that period in much the same way that positivists distanced themselves from naturalists. And, as with that previous attempt at distancing, the results are ambiguous.

My argument has been that the modern discipline operates very much within the framework it has inherited from the nineteenth century. The problem of how to establish order in the absence of an overarching sovereign is a problem that arises with the articulation of the positivist framework. Since its articulation, it has been and continues to be a problem that has preoccupied both mainstream and critical theorizing about the discipline. In making this point I am not in any way seeking to diminish the extraordinary or defining importance of this body of work. Rather, I am arguing that an exclusive focus on this framework cannot provide an understanding of the history of the relationship between international law and the non-European world. The non-European world, relegated to the geographical periphery, is also relegated to the margins of theory. The specific historical experience of European states is generalized and universalized by its metamorphosis into the defining theoretical preoccupation of the discipline.²⁶⁵ Nor does it appear sufficient to me to claim that the racism of the nineteenth century has been transcended by the achievement of sovereign statehood by the non-European world. It is true that international law is now more open and cosmopolitan; moreover, international law has promoted the process of decolonization by formulating doctrines of self-determination where once it formulated doctrines of annexation and *terra nullius*. Still, this movement towards the decolonization of international law was by no means universally acclaimed. In the 1960s, when it was clear that the emergence of developing nations would change radically the character of the international system, a number of eminent international lawyers voiced concern about the dilution effect of these new states on an international law that was, in the final analysis, European.²⁶⁶

The question that remained was the possibility and effectiveness of reversing the consequences of colonialism. The optimistic international lawyers of the 1960s, even those notable scholars from developing nations, who were the most

²⁶⁴. See Kennedy, *supra* note 5, at 102.

²⁶⁵. Underlying the conventional approach to the universalization of international law is the tendency to simply treat it as an accomplished historical reality of no larger theoretical significance. Thus there appears to be in operation a further dichotomy whereby Europe constitutes the “theory,” and what occurs in the non-European world is simply secondary.

²⁶⁶. See ANAND, *supra* note 8, at 6–9. The scholars discussed include J.H.W. Verzijl, Josef Kunz, and Julius Stone. The implicit view was that international law should continue to be European despite the repressive effects of such a policy. On the other hand, a number of Western-based lawyers, such as Richard Falk, were consistently and forcefully sympathetic to the cause of decolonization. See Richard Falk, *The New States and International Legal Order*, 118 *Recueil de Cours* 1 (1966-II).

trenchant critics of the Eurocentric character of international law, were hopeful that the acquisition of sovereignty by developing nations and participation in international legal forums would result in the creation of a truly universal, just, and equal international system.²⁶⁷ Thus Guha-Roy, while pointing to the obvious inequities of the doctrines of state responsibility, argued that developing nations were intent, not on repudiating the whole of international law, but on repudiating those rules that facilitated colonialism. The civilized/non-civilized distinction featured in the doctrines and treaties of the nineteenth century was generally expunged from the vocabulary of international law.²⁶⁸ It is clear that scholars from developing nations never achieved the significant reforms that they desired. For instance, the drive by developing countries to create a “New International Economic Order” ended, on the whole, in failure.

The alternative position is that the nineteenth century remains an integral part of contemporary international law. On a material level, the systems of economic and political inequality created by colonialism under the auspices of nineteenth-century international law continue to operate despite the ostensible change of legal regime.²⁶⁹ It is doubtful whether a discipline whose fundamental concepts, “sovereignty” and “law,” had been so explicitly and clearly formulated in ways that embodied distinctions and discriminations that furthered colonialism could be readily reformed by the simple expedient of excising or reformulating the offending terminology.²⁷⁰ Thus, the International Court of Justice may theoretically draw upon “the general principles of law recognized by civilized nations,” where “civilized” must now be understood to mean all nations. But an examination of the recent jurisprudence of the Court suggests that little effort has been made to draw upon the legal traditions and systems of non-Western peoples in the administration of international justice.²⁷¹ International law remains emphatically European in this respect, regardless of its supposed

²⁶⁷. I rely here on the distinction developed by James Gathii between weak and strong forms of anti-colonial scholarship. Gathii elaborates:

The *weak* form of anti-colonial scholarship is basically integrationist: meaning that it is largely complimentary of the liberatory claims of principles such as self-determination as uncompromising tenets of world peace and indicators of the rejection of the colonial experience and specifically as an expression of the value these principles uphold against the unacceptable repression of non-European humanity under colonialism, slavery, and other forms of discrimination and repression of the non-European personality.

Gathii, *supra* note 8, at 189.

²⁶⁸. Some vestiges are still evident, as in art. 38(1)(c) of the Statute of the International Court of Justice.

²⁶⁹. See Gathii, *supra* note 8.

²⁷⁰. I have tried to argue this point at greater length in the context of an actual international dispute in which the use of the supposedly empowering language of “self-determination” and “permanent sovereignty over natural resources” limit the character of the claims that can be made. See Anghie, *Nauru*, *supra* note 9. Critical race theory provides a perceptive and powerful analysis of the continuation of racist and discriminatory practices through the application of a legal vocabulary that has been ostensibly sanitized. See Crenshaw, *supra* note 10; Williams, *supra* note 10.

²⁷¹. Certain notable exceptions to this are evident. Judge Weeramantry’s decisions, in particular, have made far-reaching attempts to incorporate non-European legal traditions into the jurisprudence of the Court.

receptivity to other legal thinking.

The legacies of the nineteenth century appear in even more fundamental ways: despite recognizing that the treaties were unequal and often extracted by force, these treaties continue to be legally binding. The doctrine of *terra nullius* is now understood to have been used over the centuries to dispossess and destroy indigenous peoples throughout the non-European world. Nevertheless, these doctrines are not so much confronted as evaded through reinterpretation of the relevant facts. For example, the argument is made that more recent anthropological evidence suggests the Aboriginal peoples of Australia had a form of “political organization,” as a consequence of which the *terra nullius* doctrine could not be said to apply to Australia. While the operation of the doctrine is thus denied, the doctrine itself is rarely dismissed as outmoded because of the racist ways in which it has been almost invariably deployed.²⁷² Similarly, in the Western Sahara Case, the International Court of Justice asserted that the Western Sahara could not have been *terra nullius* because the people who lived there did in fact have a form of political organization.²⁷³ Thus, the doctrines consolidated by nineteenth-century jurists continue, in important ways, to establish the framework within which indigenous peoples struggle to assert their rights. Jurists and courts attempting to reverse the effects of these laws are often compelled to do so within these established frameworks.

The question is not so much whether the nineteenth century has been transcended but how its continuing effects within the contemporary legal system may be obscured. Any tendency to treat the nineteenth century as being only of historical interest must be treated cautiously. As I have attempted to argue, there appears to be an inherent reflex within international law to conceal the colonial past on which its entire structure is based. The same reflex may be seen at the doctrinal level, for example, in the way that the construction of “law” depends on a notion of “society.” Once that construction has served its purpose, it is inverted by way of a reconstructed jurisprudence in which “society” has been successfully constituted as a function of law. On a larger scale, as discussed earlier, positivists vehemently set out to detach themselves from their naturalist past. The process of distancing and suppressing the past is a common feature of the discipline, and a ritual enacted whenever it attempts to renew and revive itself. The nineteenth century exists within the discipline in a way suggested by Freud, who asserted in *Civilization and Its Discontents*:

But have we a right to assume the survival of something that was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere.

²⁷². See, e.g., Anthony Mason, *The Rights of Indigenous Peoples in Lands Once Part of the Old Dominions of the Crown*, 46 Int'l & Comp. L.Q. 812 (1997); Gerry Simpson, Mabo, *International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence*, 19 Melb. U. L. Rev. 195, 196 (1993); Nehal Bhuta, Mabo, Wik and the Art of Paradigm Management, 22 Melb. U. L. Rev. 24, 36 (1998). As Bhuta and Simpson point out, even when jurists reject *terra nullius* as a proper basis for obtaining title, they have great difficulties in articulating a legally coherent alternative account of how sovereignty was acquired.

²⁷³. Western Sahara (Advisory Opinion) 1975 I.C.J. 12, 39 (Oct. 16).

In the animal kingdom we hold to the view that the most highly developed species we have proceeded from the lowest; and yet we find all the simple forms still in existence today.²⁷⁴

Positivism and the nineteenth century are an integral part of the contemporary discipline. Simplifying considerably, the nineteenth century could be said to embody a particular set of attitudes and methods: it posits an essentialist dichotomy between the non-European and the European; it characterizes relations between these entities to be inherently antagonistic; it establishes a hierarchy between these entities, suggesting that one is advanced, just, and authoritative while the other is backward and barbaric; it asserts that the only history that may be written of the backward is in terms of its progress towards the advanced; it silences the backward and denies it any subjectivity or autonomy; it assumes and promotes the centrality of the civilized and legitimizes the conquest and dispossession of the backward; and it contemplates no other approaches to solve the problems of society than those that the civilized have formulated. Many of these elements are evident in the work of prominent international relations scholars, from Samuel Huntington's influential argument regarding "The Clash of Civilizations,"²⁷⁵ to Francis Fukuyama's assertions as to "The End of History."²⁷⁶ There is a danger that the suggestive work being done on the liberal peace, which relies on the distinction between liberal and non-liberal states, could embody and reproduce some of the elements and attitudes of the nineteenth century.²⁷⁷

Equally important, it must be noted that nineteenth-century attitudes are by no means peculiar to relations between European and non-European peoples. Many of the Asian and African societies colonized in the nineteenth century had previously been involved in imperial projects themselves. Further, it appears to be an enduring and unfortunate truth that non-European states that have been the victims of colonialism often have no inhibition from themselves becoming colonial oppressors.

VI. CONCLUSION

The interpretation of nineteenth-century international law, as developed in this Article, is based on a departure from two of the basic premises of the period's

²⁷⁴. Sigmund Freud, *Civilization and Its Discontents* 15 (James Strachey ed. & trans. 1961) (1930).

²⁷⁵. Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (1996).

²⁷⁶. Francis Fukuyama, *The End of History and the Last Man* (1992).

²⁷⁷. Notwithstanding the respect they accorded one another, liberal states have historically engaged in colonial wars and justified them as advancing the liberal values embodied in the civilizing mission. This phenomenon of "liberal imperialism" was recognized by Michael W. Doyle in a seminal article on the subject of liberal peace. See Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 *Phil. & Pub. Aff.* 323, 331 (1983). On the implications of the enormous body on the liberal peace on international law, see Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *Eur. J. Int'l L.* 503 (1995).

conventional understandings. First, I have argued that the colonial encounter, far from being peripheral to the making of international law, has been central to the formation of the discipline. By this I mean not merely the specific doctrines of the discipline, but its informing philosophy: positivism. Second, I have departed from the dominant theoretical paradigm of the discipline, which focuses on the problem of order among sovereign states in an attempt to reflect the realities of the colonial encounter. By adopting the model of cultural difference, it becomes possible to examine the complex relationship between culture and sovereignty and, specifically, the manner in which sovereignty became identified with the cultural practices of Europe. I have argued that a failure to appreciate this relationship results in a rather limited understanding of sovereignty and its operations, as well as a deficient grasp of the processes and mechanisms that resulted in the universalization of international law.

This alternative framework may clear the way for a new and different interpretation of the period and a subtler understanding of its enduring effects, not merely on non-European societies, but also on the discipline itself. This in turn may assist in the important and as yet unaddressed task of writing alternative histories of the discipline. These histories might focus, for example, on the resistances of the non-European peoples and the strategies they used to combat colonialism. Despite its pretences to coherence and comprehensiveness, positivist jurisprudence was riddled with contradictions and uncertainties and, I argue, never succeeded in properly defining and placing native personality. It is in the contradictions of conventional jurisprudence that alternative histories responsive to the non-European voices excluded from traditional histories may be written.

The alternative framework developed here calls also for a deeper examination of the question of how sovereignty could be used by the non-European world to advance its own interests. As a number of eminent scholars have argued, positivism and nineteenth-century international law crippled the non-European world. For these scholars, the problem arises because of the selective and discriminatory application of the neutral concept of sovereignty. According to this view, the problem is not embodied in the concept of sovereignty itself, but rather in the fact that non-European people are denied sovereignty. My argument is, by contrast, that the concepts themselves are far from neutral, that they are racialized and contain within them the discrimination that non-European people have attempted to contest. An appreciation of the way in which the very vocabulary of international law was racialized from its inception raises important questions about the ways in which sovereignty operates.

Furthermore, this Article is an attempt to make the experience and the specificity of the colonial encounter a subject of theoretical scrutiny as opposed to historical interest. It is unclear to me how a comprehensive understanding of the discipline could be achieved otherwise, given that the encounter was, as I have attempted to demonstrate, central to the formation of the discipline.

More generally, the nineteenth century offers us an example of a much broader theme: the importance of the existence of the “other” for the progress and development of the discipline itself. Seen from this perspective, the nineteenth

century is both distinctive and conventional. Its method, focus, and techniques are in many ways unique. But in another respect, the nineteenth century is simply one example of the nexus between international law and the civilizing mission. The same mission was implemented by the vocabulary of naturalism in sixteenth-century international law. Furthermore, the succeeding paradigm of pragmatism, which developed in the inter-war period, was similarly preoccupied with furthering the civilizing mission even as it condemned nineteenth-century positivism for being formalist and colonial. Thus, the only thing unique about the nineteenth century is that it explicitly adopted the civilizing mission and reflected these goals in its very vocabulary. The more alarming and likely possibility is that the civilizing mission is inherent in one form or another in the principal concepts and categories that govern our existence: ideas of modernity, progress, development, emancipation, and rights. The enormous task of identifying these biases and ridding the discipline of them continues, as does the related task of constructing an international law that fulfils its promise of advancing the cause of justice.

I have argued that because sovereignty was shaped by the colonial encounter, its exercise often reproduced the inequalities inherent in that encounter. But the broader point is that sovereignty is a flexible instrument that readily lends itself to the powerful imperatives of the civilizing mission, in part because through that mission, sovereignty extends and expands its reach and scope. For this reason, the essential structure of the civilizing mission may be reconstructed in the contemporary vocabulary of human rights, governance, and economic liberalization. In this larger sense, then, the jurisprudence of the nineteenth century is both a distinctive and yet entirely familiar part of international law.