1 Francisco de Vitoria and the colonial origins of international law

> Sir, As I know you will be pleased at the great victory with which Our Lord has crowned my voyage, I write this to you, from which you will learn how in thirty-three days, I passed from the Canary Islands to the Indies with the fleet which the most illustrious king and queen, our sovereigns, gave to me. And there I found many islands filled with people innumerable, and of them all I have taken possession for their highnesses, by proclamation made and with royal standard unfurled and no opposition was offered to me.[1]

Introduction

While Hugo Grotius is generally regarded as the principal forerunner of modern international law, historians of the discipline trace its primitive origins[2] to the works of Francisco de Vitoria, a sixteenth-century Spanish theologian and jurist.[3] Consequently, it is entirely appropriate that the Carnegie endowment commenced its renowned series of *Classics of International Law* with Vitoria's two famous lectures, *De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*.[4] Traditional approaches to

[1] Christopher Columbus, 'Letter of Columbus on the First Voyage', in Cecil Jane (ed. and trans.), *The Four Voyages of Columbus* (New York: Dover, 1988), I, p. 1.

[2] David Kennedy, 'Primitive Legal Scholarship', (1986) 27(1) *Harvard International Law Journal* 1–98.

[3] For accounts of Vitoria's place in the discipline of international law, and his relationship to Grotius, see James Brown Scott, *The Spanish Origin of International Law* (Oxford: Clarendon Press, 1934); Arthur Nussbaum, *A Concise History of the Law of Nations* (rev. edn., New York: Macmillan, 1954).

[4] The titles of the two lectures may be translated as 'On the Indians Lately Discovered' and 'On the Law of War Made by the Spaniards on the Barbarians'. The two lectures are collected together in one volume, Franciscus de Victoria, *De Indis et de Ivre Belli Relectiones* (Ernest Nys ed., John Pawley Bate trans., Washington, DC: Carnegie Institution of Washington, 1917), p. 116. This is the first work in the series *The Classics of*

Vitoria's work and his place within the discipline pointed, among other things, to Grotius' indebtedness to the teachings of Vitoria,[5] to Vitoria's identification of certain fundamental theoretical issues confronting the discipline and to the enduring significance of Vitoria's thinking on the law of war and on the rights of dependent peoples.[6]

Vitoria's two lectures, as their titles suggest, are essentially concerned with relations between the Spanish and the Indians. Colonialism is the central theme of these two works designated as the founding texts of international law. It is hardly possible to ignore the fact that Vitoria is preoccupied with a colonial relationship.[7] While traditional approaches to Vitoria duly acknowledge this fact, they fail to appreciate the extent to which Vitoria's jurisprudence is constructed around his attempts to resolve the unique legal problems arising from the discovery of the Indians. Instead, these traditional approaches essentially characterize Vitoria as extending and applying existing juridical doctrines developed in Europe to determine the legal status of the Indians. Thus, for example, Kooijmans argues that

> the dealings of the Spaniards with the Indians were subject to the rules that apply to intercourse between states. Vitoria introduced an essentially new element in relentlessly drawing the consequences from the theories which until then had remained outside the European horizon . . . [T]he rules that apply to European inter-state intercourse also apply to the intercourse with the American-Indian political communities, because there is no intrinsic difference. The small Indian states are legal persons, they enjoy the same rights as European states.[8]

International Law published by the Carnegie Institution of Washington. 'Victoria' is more commonly referred to in the literature as 'Vitoria' and I have accordingly adopted the latter version.

[5] Scott, *The Spanish Origin*, pp. 3–4.

[6] For examples of his influence on the rights of dependent peoples, see Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930); and Christopher G. Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (New York: Oxford University Press, 1992), p. 78.

[7] For a brilliant analysis of Vitoria's justification of colonial relations, see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourse of Conquest* (New York: Oxford University Press, 1990).

[8] (Pieter Hendrik Kooijmans, *The Doctrine of the Legal Equality of States: An Inquiry into the Foundations of International Law*, Leyden, A. W. Sijthoff, 1964, p. 57). Kooijmans does make it clear, however, that for Vitoria, the Indians would acquire the rights of states once 'these communities correspond to the requirements laid down by him for the state'. *Ibid*.

My argument, in contrast, is that while Vitoria's jurisprudence relies in many respects on existing doctrines, he reconceptualizes these doctrines, or else invents new ones, in order to deal with the novel problem of the Indians. The essential point is that international law, such as it existed in Vitoria's time, did not *precede* and thereby effortlessly resolve the problem of Spanish–Indian relations; rather, international law was created out of the unique issues generated by the encounter between the Spanish and the Indians. It is in this context that the question arises: what is the relationship between the origins of international law and the colonial encounter in these, the first teachings on international law? Further, what does an examination of these origins suggest about the relationship between colonialism and international law as a whole, the relationship that is a central concern of this book?

The classical problem confronting the discipline of international law is the problem of how order is created among sovereign states. The identification of this problem as the defining dilemma of the discipline has encouraged scholars seeking to clarify Vitoria's place within the discipline to explore his work in terms of his understanding and treatment of this problem.[9] My argument is that Vitoria does not interpret the problem of Spanish–Indian relations as a problem of creating order among sovereign states. Vitoria's analysis does not proceed on the basis that both the Indians and Spaniards are sovereign, that sovereigns possess certain powers and that the interaction between the two parties is therefore regulated by the rules managing and limiting the exercise of such powers which he, the jurist, identifies, examines and applies. Rather, Vitoria's work addresses a prior set of questions. Who is sovereign? What are the powers of a sovereign? Are the Indians sovereign? What are the rights and duties of the Indians and the Spaniards? How are the respective rights and duties of the Spanish and the Indians to be decided?

In dealing with these issues, Vitoria focuses on the social and cultural practices of the two parties, the Spanish and the Indians. He assesses and formulates the rights and duties of the Indians, for example, by examining their rituals, customs and ways of life. The problem confronting

[9] For example, see Kooijmans, *The Doctrine of the Legal Equality.* Kennedy discusses this point at some length. As he notes: 'Most historians who treat primitive texts do so in a way which both presupposes and proves the continuity of the discipline of international law – reaffirming in the process that the project for international law scholars is and always was to construct a social order among autonomous sovereigns.' Kennedy, 'Primitive Legal Scholarship', 11.

Vitoria, then, was not the problem of order among sovereign states, but the problem of creating a system of law to account for relations between societies which he understood to belong to two very different cultural orders, each with its own ideas of propriety and governance.

This problem is suggested in Columbus' account of his 'taking possession' of the New World: what meaning could his legal ceremonies have for the people who were ostensibly to be bound by them; whose presence is acknowledged, if only through their silence, who offered no opposition to Columbus? In any event, what can hardly be disputed is the central significance of law to the whole colonial enterprise. Columbus' first sentence succinctly sketches the background to his voyage, due prominence being given to God and his sovereigns; his second sentence begins by relating his discovery of various undefined islands and peoples which are no sooner described than taken possession of by means of a legal ceremony that may or may not take cognizance of those peoples. Would it have legally mattered if the people had offered opposition? Or was the ceremony complete in itself, opposition indicating only the hostility of the natives? The passage raises several enduring issues concerning the connection between law and imperialism.[10]

Sovereignty doctrine – by which I broadly refer to the complex of rules deciding what entities are sovereign, and the powers and limits of sovereignty – was not already formulated and then simply applied by Vitoria to resolve the problem of creating order between different societies. Rather, for Vitoria, sovereignty doctrine emerges through his attempts to address the problem of cultural difference.

I explore the relationship between colonialism and international law, cultural difference and sovereignty doctrine, by focusing on four broad issues. First, I focus on Vitoria's repudiation of traditional techniques of accounting for relations between the Spanish and the Indians. Having dismissed the old medieval jurisprudence based on the notion that the Pope exercised universal authority, Vitoria clears the way for his own version of secular international law. Secondly, I focus on the techniques by which Vitoria creates a universally binding system of law by evoking a notion of natural law; this system resolves Vitoria's problem of creating a common framework binding both Spanish and Indian alike. Thirdly, I consider the rules and norms prescribed by this system, and the effect

[10] See Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (Chicago: University of Chicago Press, 1991), p. 54; for the more elaborate protocol of conquest later developed by Spain, see Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (New York, Cambridge University Press, 1995), p. 69.

of their application to Spanish–Indian relations. Finally, I examine the question of enforcement and the sanctions applied once the norms prescribed by natural law have been violated. In examining each of these areas, I attempt to delineate how Vitoria's understanding of cultural difference and the identity of the Indian shapes his jurisprudence, and how in turn this jurisprudence determines the Indians' legal status.

Vitoria and the problem of universal law

The issue of accounting for Spanish title over the Indies was conventionally decided by applying the jurisprudence developed by the Church to deal with the Saracens to the Indies. Within this framework, the Indians could be characterized as Saracens, as heathens, and their rights and duties determined accordingly. Vitoria criticises this traditional framework, which had emerged out of the several centuries of interaction and confrontation between the Christian and heathen worlds, and replaces it with his own. The traditional framework relied basically on two premises. First, it was asserted that human relations were governed by divine law. As Vitoria's jurisprudence suggests, the medieval Western world relied on three different types of law; divine law, human law and natural law.[11] Of these, divine law was asserted to be primary by many scholars and theologians of the fifteenth century. Secondly, it was argued that the Pope exercised universal jurisdiction by virtue of his divine mission to spread Christianity. Consequently, sovereigns, the rulers of Europe, relied upon the Pope's authority to legitimize their invasions of heathen territory; in expanding the Christian world by military conquest, these rulers were making real the jurisdiction which the Pope possessed in theory.[12] Pope Alexander VI's Papal Bull, which divided the world into Spanish and Portuguese spheres, exemplified the application of this set of doctrines: the rule of the sovereign was legitimate only if sanctioned by religious authority.[13]

Vitoria vehemently denies each of these assertions, and in the course of refuting the conventional basis for Spanish title creates a new system of international law which essentially displaces divine law and its administrator, the Pope, and replaces it with natural law administered

[11] Alfred P. Rubin, 'International Law in the Age of Columbus' (1992) XXXIX *Netherlands International Law Review* 5–35 at 11–14.

[12] See Rubin, 'International Law' and Anthony Pagden, *Lords of All The World, Ideologies of Empire in Spain, Britain and France c. 1500–c.1800* (New Haven: Yale University Press, 1995).

[13] Pagden, *Lords of All The World*, p. 32.

by a secular sovereign. Thus, the emergence of a secular natural law – the natural law which was proclaimed to be the basis of the new international law – is coeval with his resolution of the problem of the legal status of the Indian, for it is this problem which initiates Vitoria's inquiry.

Vitoria commences his construction of a new jurisprudence by posing the question of whether 'the aborigines in question were true owners in both private and public law before the arrival of the Spaniards'.[14] Could the Indians, the unbelievers, own property? Rather than adopt the traditional approach of dismissing the Indians as lacking in rights merely because of their status as unbelievers, Vitoria reformulates the relationship between divine, natural and human law. Having examined numerous theological authorities and incidents in the Bible, he concludes that whatever the punishments awaiting them in their after-life, unbelievers such as the Indians were not deprived of their property in the mundane realm merely by virtue of that status. Vitoria concludes:

> Unbelief does not destroy either natural law or human law; but ownership and dominion are based either on natural law or human law; therefore they are not destroyed by want of faith.[15]

Crucially, then, Vitoria places questions of ownership and property in the sphere of natural or human law, rather than divine law. As a consequence of the inapplicability of divine law to questions of ownership, the Indians cannot be deprived of their lands merely by virtue of their status as unbelievers or heretics.[16] Vitoria's argument that vital issues of property and title are decided by secular systems of law – whether natural or human – inevitably diminishes the power of the Pope, for these secular systems of law are administered by the sovereign rather than the Pope.

Vitoria further undermines the position of the Church by refuting another justification for Spanish conquest of the Indies: the argument that 'the Emperor is lord of the whole world and therefore of these barbarians also'.[17] Vitoria's emphasis here shifts to the Christian emperors of Europe whose authority was related in various complex ways to

[14] Vitoria, *De Indis*, p. 120. [15] *Ibid.*, p. 123.

[16] 'From all this the conclusion follows that the barbarians in question cannot be barred from being true owners, alike in public and private law, by reason of the sin of unbelief or any other mortal sin, nor does such sin entitle Christians to seize their goods and land.' Vitoria, *De Indis*, p. 125, note x.

[17] Vitoria, *De Indis*, p. 130.

the authority of the Church.[18] Vitoria denies that the sovereign, the Emperor, could have acquired universal temporal authority through the universal spiritual authority of Christ and the Pope. He questions whether divine law could provide the basis for temporal authority, methodically denies a number of assertions of Papal authority and concludes that 'The Pope is not civil or temporal lord of the whole world in the proper sense of the words "lordship" and "civil power"'[19] and goes even further to assert that even in the spiritual realm, the Pope lacks jurisdiction over the unbelievers.[20] The Pope's authority is partial, limited to the spiritual dimension of the Christian world.

Vitoria's rejection of the argument that the Pope exercised universal authority which empowered sovereigns to pursue military action against heathens and infidels such as the Indians results in a novel problem:

> Now, in point of human law, it is manifest that the Emperor is not lord of the world, because either this would be by the sole authority of some law, and there is none such; or if there were, it would be void of effect, inasmuch as law presupposes jurisdiction. If, then, the Emperor had no jurisdiction over the world before the law, the law could not bind someone who was not previously subject to it.[21]

The Spanish and the Indians are not bound by a universal, overarching system; instead, they belong to two different orders, and Vitoria interprets the gap between them in terms of the juridical problem of jurisdiction. The resolution of this problem is crucial both for Vitoria's new jurisprudence and his construction of a common legal framework which would enable him to resolve the problem of the Indians' status. The two techniques by which Vitoria addresses the issue of jurisdiction comprise essentially two related parts: first, his complex characterization of the personality of the Indians and, second, his elaboration of a novel system of universal natural law.

Vitoria first focuses on the issue of Indian personality. As his own work suggests, the writers of the period appear to have characterized the Indians as being, among other things, slaves, sinners, heathens, barbarians, minors, lunatics and animals. Vitoria repudiated these claims, humanely asserting instead that

[18] Vitoria was writing during the reign of Charles V of Spain, who was designated the Holy Roman Emperor. This was a time of massive Spanish imperial expansion. See Pagden, *Lords of All the World*, p. 32.

[19] Vitoria, *De Indis*, p. 153. [20] *Ibid.*, p. 136. [21] *Ibid.*, p. 134.

the true state of the case is that they are not of unsound mind, but have, according to their kind, the use of reason. This is clear, because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason.[22]

It is precisely because of his insistence that the Indians are human beings that Vitoria is lauded as a protector of native peoples against colonial exploitation. For Vitoria, then, the Indians established their own versions of many of the institutions found in Vitoria's world, in Europe itself.[23] They are governed by a political system which has its own coherence, and possess the reason necessary, not only to create institutions, but to determine moral questions which are 'self-evident' to others.

Vitoria's characterization of the Indians as human and possessing reason is crucial to his resolution of the problem of jurisdiction. He argues that 'What natural reason has established among all nations is called *jus gentium*'.[24] The universal system of divine law administered by the Pope is replaced by the universal natural law system of *jus gentium* whose rules may be ascertained by the use of reason. As a result, it is precisely *because* the Indians possess reason that they are bound by *jus gentium.* Vitoria hardly mentions the concept of *jus gentium* in his earlier discussion. Nevertheless, the problem of jurisdiction is resolved by his simple enunciation of this concept which he elaborates primarily by demonstrating how it creates doctrines which govern Spanish–Indian relations. Natural law administered by sovereigns rather than divine law articulated by the Pope becomes the source of international law governing Spanish–Indian relations.

The character of this natural law is illuminated in Vitoria's argument that the Spanish have a right under *jus gentium* to travel and sojourn in the land of the Indians; and that providing the Spanish do not harm the Indians, 'the natives may not prevent them'. Vitoria argues that:

it was permissible from the beginning of the world (when everything was in common) for any one to set forth and travel wheresoever he would. Now this was not to be taken away by the division of property, for it was never the intention of peoples to destroy by that division the reciprocity and common user which prevailed among men, and indeed, in the days of Noah, it would have been inhuman to do so.[25]

[22] *Ibid.*, p. 127. [23] Pagden, *Lords of All the World*.
[24] Vitoria, *De Indis*, p. 151. [25] *Ibid.*, p. 151.

The natural law which solves the problem of jurisdiction is based on something akin to a secular state of nature existing at 'the beginning of the world'. As this passage suggests, *jus gentium*, naturalizes and legitimates a system of commerce and Spanish penetration. Spanish forms of economic and political life are all-encompassing because ostensibly supported by doctrines prescribed by Vitoria's system of universal law. The gap between the two cultures now ceases to exist in that a common framework by which both Spanish and Indian behaviour may be assessed is established. Equally importantly, an idealised version of the particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law.

The Indians seem to participate in this system as equals. The Spanish trade with the Indians 'by importing thither wares which the natives lack and by exporting thence either gold or silver or other wares of which the natives have abundance'.[26] The exchange seems to occur between equals entering knowledgeably into these transactions, each meeting the other's material lack and possessing, implicitly, the autonomy to decide what is of value to them. The Indian who enters the universal realm of commerce has all the acumen and independence of market man, as opposed to the timid, ignorant child-like creatures Vitoria presents earlier. The fairness of the system and the equal status of the Indians are further suggested by Vitoria's argument that the Indians are subject to the same limitations imposed on Christian nations themselves: 'it is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians'.[27] Reciprocity, it seems, would permit the Indians to trade in Spain.

While appearing to promote notions of equality and reciprocity between the Indians and the Spanish, Vitoria's scheme must be understood in the context of the realities of the Spanish presence in the Indies. Seen in this way, Vitoria's scheme finally endorses and legitimizes endless Spanish incursions into Indian society. Vitoria's apparently innocuous enunciation of a right to 'travel' and 'sojourn' extends finally to the creation of a comprehensive, indeed inescapable system of norms which are inevitably violated by the Indians. For example, Vitoria asserts that 'to keep certain people out of the city or province as being enemies, or to expel them when already there, are acts of war'.[28] Thus any Indian attempt to resist Spanish penetration would amount to

[26] *Ibid.*, p. 152. [27] *Ibid.*, p. 153. [28] *Ibid.*, p. 151.

an act of war, which would justify Spanish retaliation. Each encounter between the Spanish and the Indians therefore entitles the Spanish to 'defend' themselves against Indian aggression and, in so doing, continuously expand Spanish territory, as discussed below.

Vitoria further endorses the imposition of Spanish rule on the Indians by another argument, which relies explicitly on the *cultural differences* between the Spanish and the Indians. In establishing his system of *jus gentium*, Vitoria characterizes the Indians as having the same ontological character as the Spanish. This is a crucial prerequisite for his elaboration of a system of norms which he presents as neutral, and founded upon qualities possessed by all people. According to Vitoria, Indian personality has two characteristics. First, the Indians belong to the universal realm like the Spanish and all other human beings because, Vitoria asserts, they have the facility of reason and hence a means of ascertaining *jus gentium* which is universally binding. Secondly, however, the Indian is very different from the Spaniard because the Indian's specific social and cultural practices are at variance from the practices required by the universal norms – which in effect are Spanish practices – and which are applicable to both Indian and Spaniard. Thus the Indian is schizophrenic, both alike and unlike the Spaniard. The gap between the Indian and the Spaniard – a gap that Vitoria describes primarily in cultural terms by detailed references to the different social practices of the Spanish and the Indians – is now internalized; the ideal, universal Indian possesses the capacity of reason and therefore the potential to achieve perfection. This potential can only be realized, however, by the adoption or the imposition of the universally applicable practices of the Spanish. The discrepancy between the ontologically 'universal' Indian and the socially, historically, 'particular' Indian must be remedied by the imposition of sanctions which effect the necessary transformation. Indian will regarding the desirability of such a transformation is irrelevant: the universal norms Vitoria enunciates regulate behaviour, not merely between the Spanish and the Indians, but among the Indians themselves; thus the Spanish acquire an extraordinarily powerful right of intervention and may act on behalf of the people seen as victims of Indian rituals: 'it is immaterial that all the Indians assent to rules and sacrifices of this kind and do not wish the Spaniards to champion them.'[29] Thus Spanish identity or, more broadly, an idealised Western

[29] Vitoria, *De Indis*, p. 159. Indeed, for Vitoria, it would suffice for these purposes if the Spaniards were obstructed in their attempts to convert the Indians. This affected the

identity, is projected as universal in two different but connected dimensions of Vitoria's system; Spanish identity is both externalized, in that it acts as the basis for the norms of *jus gentium*, and internalized in that it represents the authentic identity of the Indian.

War, sovereignty and the transformation of the Indian

War, the central theme of Vitoria's second lecture, is vitally important to an understanding of his jurisprudence – first because the transformation of the Indian is to be achieved by the waging of war and secondly because Vitoria's concept of sovereignty is developed primarily in terms of the sovereign's right to wage war.

War is the means by which Indians and their territory are converted into Spaniards and Spanish territory, the agency by which the Indians thus achieve their full human potential. Vitoria, I have argued, displaces the realm of divine law and thereby diminishes the power of the Pope. Nevertheless, once Vitoria outlines and consolidates the authority of a secular *jus gentium*, which is administered by the sovereign, he reintroduces Christian norms within this secular system; proselytising is authorised now, not by divine law, but the law of nations, and may be likened now to the secular activities of travelling and trading. Vitoria elegantly presents the crucial transition:

> ambassadors are by the law of nations inviolable and the Spaniards are the ambassadors of the Christian peoples. Therefore, the native Indians are bound to give them, at least, a friendly hearing and not to repel them.[30]

Thus all the Christian practices which Vitoria dismissed earlier as being religiously based, as limited in their scope to the Christian world and therefore inapplicable to the Indians, are now reintroduced into his system as universal rules. This astonishing metamorphosis of rules, condemned by Vitoria himself as particular and relevant only to Christian peoples, into universal rules endorsed by *jus gentium* is achieved simply by recharacterizing these rules as originating in the realm of the universal *jus gentium.* Now, Indian resistance to conversion is a cause for war, not because it violates divine law, but the *jus gentium* administered by the sovereign.

'welfare of the Indians themselves', in which event the Spanish might intervene 'in favor of those who are oppressed and suffer wrong' (*ibid.*, p. 157).

[30] *Ibid.*, p. 156.

Vitoria elaborates on the many situations in which war is now justified:

> If after the Spaniards have used all diligence, both in deed and in word, to show that nothing will come from them to interfere with the peace and well-being of the aborigines, the latter nevertheless persist in their hostility and do their best to destroy the Spaniards, they can make war on the Indians, no longer as on innocent folk, but as against forsworn enemies and may enforce against them all the rights of war, despoiling them of their goods, reducing them to captivity, deposing their former lords and setting up new ones, yet withal with observance of proportion as regards the nature of the circumstances and of the wrongs done to them.[31]

Given that any Indian resistance to Spanish presence is a violation of the law of nations, which would justify sanctions, Spanish war against the Indians is inevitable and endless. The Indian is ascribed with membership within an overarching system of *jus gentium*, with intention and volition; as a consequence of this, violence originates within Vitoria's system through the Indians' deviance.

Vitoria's exploration of the law of war raises many of the traditional questions which still occupy international lawyers: Who may wage war?, When can war be waged?, What limits must be observed in the waging of war?, What constitutes a just war?, and so forth. Furthermore, war is a special phenomenon, because it is the ultimate prerogative of the sovereign. Vitoria's most sustained and explicit exploration of sovereignty doctrine thus occurs in the context of his examination of the law of war.

Vitoria understands sovereignty, in part, as a *relationship* – the sovereign has a duty towards his people and the state and has certain prerogatives – the right to wage war and to acquire title being among the most prominent. The sovereign, the prince, is the instrumentality of the state, posited almost as the metaphysical embodiment of the people.[32]

[31] *Ibid.*, p. 155.

[32] The prince is the entity in whom all power is vested:

> for the prince only holds his position by the election of the State. Therefore he is its representative and wields its authority; aye, and where there are already lawful princes in a State, all authority is in their hands and without them nothing of a public nature can be done either in war or in peace.
>
> (Vitoria, *De Indis*, p. 169)

Vitoria later concludes: 'Such a state, then, or the prince thereof, has authority to declare war and no one else.' *Ibid.*, p. 169.

The prince expands the state, as the successful waging of war brings people outside the state within its scope.[33]

While Vitoria thus defined the powers of the sovereign, he had greater difficulty in identifying the sovereign himself. 'Now the whole difficulty is in the questions: What is a State and who can properly be called a sovereign prince?'[34] Sovereigns cannot be defined independently of states. The state, claims Vitoria, 'is properly called a perfect community'.[35] But then 'the essence of the difficulty is in saying what a perfect community is'.[36] Vitoria's answer is tautologous: 'By way of solution be it noted that a thing is called perfect when it is completed whole, for that is imperfect in which there is something wanting, and, on the other hand, that is perfect from which nothing is wanting.'[37] Neither does it help to define the sovereign as the ultimate authority within the community, for even this proposition is subject to complex qualifications; the complicated hierarchies of the time defy Vitoria and he acknowledges that a doubt may well arise whether, when a number of states of this kind or a number of princes have one common lord or prince they can make war of themselves without the authorization of their superior lord.[38] Amid this confusion, Vitoria finally resorts to empiricism, citing as examples of sovereignty the kingdoms of Castile and Aragon, communities, which have their own laws and councils.

The foregoing suggests that the power of the state has not been consolidated in any significant way. Authority is too dispersed and hierarchies, while established theoretically, are too confusing and uncertain for Vitoria to use them convincingly as a means of structuring sovereignty doctrine. Vitoria's discussion of sovereignty is at its most detailed, however, in his analysis of the laws of war, as a consequence of the fact that it is the sovereign who declares war and exercises all the rights of war. Just war doctrine is a crucial aspect of the whole complex of issues relating to the law of war. Even if the sovereign authority can be properly identified, does the sovereign's subjective belief in the justice of the war ensure that the war is indeed 'just'?[39]

[33] 'It is, therefore, certain that princes can punish enemies who have done a wrong to their State and that after a war has been duly and justly undertaken the enemy are just as much within the jurisdiction of the prince who undertakes it as if he were their proper judge.' Vitoria, *De Indis*, p. 172.

[34] Vitoria, *De Indis*, p. 169. [35] *Ibid.*, p. 169. [36] *Ibid.*, p. 169.

[37] *Ibid.*, p. 169. [38] *Ibid.*, p. 169. [39] Vitoria, *De Indis*, p. 173.

Vitoria rejects the argument that subjective belief in the 'justness' of a war would suffice to render it truly just because 'were it otherwise, even Turks and Saracens might wage just wars against Christians, for they think they are thus rendering God service'.[40] Instead of examining the issues of subjective belief and just war doctrine and then deciding whether or not they applied to the Saracens, Vitoria arrives at his conclusion by first establishing the proposition, the fundamental premise of his argument, that *the Saracens are inherently incapable of waging a just war.* The initial exclusion of the Saracens – and, in this case, by extension, the Indians – then, is fundamental to Vitoria's argument. In essence, only the Christians may engage in a just war; and, given Vitoria's argument that the power to wage war is the prerogative of sovereigns, it follows that the Saracens can never be truly sovereign, that they are at best, partially sovereign because denied the ability to engage in war.

Earlier, in his first lecture, Vitoria had argued that the Indians too possess their own form of rulership, that they 'have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws and workshops'.[41] Such a passage may suggest that Indian communities are governed by sovereigns; but Vitoria's insistence, in his analysis on just war, that only Christian subjectivity is recognized by the laws of war, ensures that the Indians are excluded from the realm of sovereignty and exist only as the objects against which Christian sovereignty may exercise its power to wage war.

The task of identifying sovereign authority and defining the powers wielded by such an authority, in the complex political systems of Renaissance Europe, proved extraordinarily difficult, and the techniques and conceptual distinctions used by Vitoria for this purpose were problematic and ambiguous. The distinction between the Indians and the Spanish, however, was emphatic and well developed. Indeed, in the final analysis, the most unequivocal proposition Vitoria advances as to the character of the sovereign is that the sovereign, the entity empowered to wage a just war, cannot, by definition, be an Indian.

Since the Indians are by definition incapable of waging a just war, they exist within the Vitorian framework only as violators of the law. The normal principles of just war, which would prohibit the enslaving of women and children, do not apply in the case of the pagan Indians:

[40] *Ibid.*, p. 173. [41] *Ibid.*, p. 127.

And so when the war is at that pass that the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, then it is also justifiable to carry all enemy-subjects off into captivity, whether they be guilty or guiltless. And inasmuch as war with pagans is of this type, seeing that it is perpetual and that they can never make amends for the wrongs and damages they have wrought, it is indubitably lawful to carry off both the children and women of the Saracens into captivity and slavery.[42]

Once fault is established, as the above passage suggests, the war waged against the Indian is, in Vitoria's phraseology, 'perpetual'. Similarly, in his discussion of whether it is lawful and expedient to kill all the guilty, Vitoria suggests that this may be necessary because of the unique case of the unredeemable Indian:

and this is especially the case against the unbeliever, from whom it is useless ever to hope for a just peace on any terms. And as the only remedy is to destroy all of them who can bear arms against us, provided they have already been in fault.[43]

A certain respect is extended to sovereignty in the case of wars between European powers as the 'overthrow of the enemy's sovereignty and the deposition of lawful and natural princes' are 'utterly savage and inhumane measures'.[44] In the case of the Indians, however, such a deposition of sovereigns is not merely permitted but necessary in order to save the Indians from themselves. These conclusions stand in curious juxtaposition to other parts of Vitoria's work, where he emphasizes the humanity of the Indians. Simply, war waged against the Indians acquires a meta-legal status.[45] Many of the legal doctrines of consent, limits and proportion that Vitoria outlines earlier, cease to apply to the Indian once the all-encompassing and inescapable obligations of *jus gentium* are breached.

In summary, then, there are two essential ways in which sovereignty relates to the Indian: in the first place, the Indian is excluded from the sphere of sovereignty; in the second place, it is the Indian who acts as the object against which the powers of sovereignty may be exercised in

[42] *Ibid*., p. 181. It is notable that Vitoria refused to characterize the Indians as slaves in his first lectures. Now, however, with respect to war and the new scheme of natural law he outlines, he achieves much the same result: the enslavement of the whole Indian population, including women and children.

[43] Vitoria, *De Indis*, p. 183. [44] *Ibid*., p. 186.

[45] Onuma Yasuaki, *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford, Clarendon Press, 1993), pp. 383–384.

the most extreme ways. Perhaps even more profoundly, it is through its application to the Indian that new aspects, powers and techniques of sovereignty can be discovered, as few limits are imposed on sovereignty when it is applied to the Indian. The most characteristic and unique powers of the sovereign, the powers to wage war and acquire title over territory and over alien peoples are defined in their fullest form by their application to the non-sovereign Indian.

Conclusion

Vitoria is an extremely complex figure. A brave champion of the rights of the Indians in his time,[46] his work could also be read as a particularly insidious justification of their conquest precisely because it is presented in the language of liberality and even equality. Vitoria continuously alludes to the theme of the novelty of the discovery of the Indians: thus his work addresses the controversy generated by 'the aborigines of the New World, commonly called the Indians, who came forty years ago into the power of the Spaniards, not having been previously known to our world'.[47] Later he argues 'at the time of the Spaniards' first voyages to America they took with them no right to occupy the lands of the indigenous population'. In these different ways, Vitoria seizes upon the discovery of the Indians to claim that traditional understandings of law were inadequate to deal with such a novel situation; in so doing, Vitoria clears the way for his own elaboration of a new, secular, international law.

My argument, then, is that Vitoria is concerned not so much with the problem of order among sovereign states but the problem of order among societies belonging to two different cultural systems. Vitoria resolves this problem by focusing on the cultural practices of each society and assessing them in terms of the universal law of *jus gentium.* Once this framework is established, he demonstrates that the Indians are in violation of universal natural law.

The problem of cultural difference plays a crucial role in structuring Vitoria's work – his notions of personality, *jus gentium* and, indeed, sovereignty itself. Vitoria's jurisprudence can be seen to consist of three primary elements connected with this problem. First, a difference is

[46] Georg Cavallar, *The Rights of Strangers: Theories of International Hospitality, the Global Community and Political Justice Since Vitoria* (Aldershot: Ashgate, 2002), pp. 75–121.
[47] Vitoria, *De Indis*, p. 116.

postulated between the Indians and the Spanish, a difference which is rendered primarily in terms of the different social practices and customs of each society. Secondly, Vitoria formulates a means of bridging this difference, through his system of *jus gentium* and his characterization of the Indian as possessing universal reason and therefore capable of comprehending and being bound by the universal law of *jus gentium*. Thirdly, the Indian – possessing universal reason and yet backward, barbaric, uncivilized – is subject to sanctions because of his failure to comply with universal standards. It is precisely whatever denotes the Indian to be different – his customs, practices, rituals – which justify the disciplinary measures of war, which is directed towards effacing Indian identity and replacing it with the universal identity of the Spanish. These sanctions are administered by the sovereign Spanish to the non-sovereign Indians.

Cultural difference is also crucial to Vitoria's version of sovereignty doctrine. Vitoria's attempts to outline a coherent vision of sovereignty doctrine in the shifting political conditions of Renaissance Europe encountered a number of difficulties which he tried to resolve by proposing various distinctions – between, for example, the public and the private, the municipal and international spheres. Each of these attempts fails,[48] however, and ultimately, the one distinction which Vitoria insists upon and which he elaborates in considerable detail is the distinction between the sovereign Spanish and the non-sovereign Indians. Vitoria bases his conclusions that the Indians are not sovereign on the simple assertion that they are pagans. In so doing he resorts to exactly the same crude reasoning which he had previously refuted when denying the validity of the Church's claim that the Indians lack rights under divine law because they are heathens. Despite this apparent contradiction, Vitoria's overall scheme is nevertheless consistent: the Indians who inevitably and invariably violate *jus gentium* are denied the status of the all-powerful sovereign who administers this law.

Clearly, then, Vitoria's work suggests that the conventional view that sovereignty doctrine was developed in the West and then transferred to the non-European world is, in important respects, misleading. Sovereignty doctrine acquired its character through the colonial encounter. This is the darker history of sovereignty which cannot be

[48] In the final analysis, as Kennedy argues, Vitoria 'does not locate the sovereign between a distinct municipal and international legal order, nor does he distinguish internal and external or private and public sovereign identities'. Kennedy, 'Primitive Legal Scholarship', 35.

explored or understood by any account of sovereignty doctrine assuming the existence of sovereign states.

My argument, then, is that Vitoria is indeed a seminal figure in the history of international law on account of his intimation of certain fundamental problems of the discipline and his attempt to resolve them. The problem Vitoria identifies and explores is the problem of legally accounting for relations between two radically different societies. In addressing this issue, Vitoria develops a number of concepts and relationships – regarding divine and natural law, sovereignty and culture, particularism and universalism – which are then constituted into a jurisprudence which executes a formidable series of manoeuvres by which an idealised form of particular Spanish practices become universally binding, Indians are excluded from the realm of sovereignty, and Indian resistance to Spanish incursions becomes aggression which justifies the waging of a limitless war by a sovereign Spain against non-sovereign Indians. The colonial encounter is central to the formulation of Vitoria's jurisprudence whose significance extends to our own times.

The classic question of how order is created among sovereign states and the framework of inquiry it suggests lends itself to a peculiarly imperialist version of the discipline as it prevents any searching examination of the history of the colonial world which was explicitly excluded from the realm of sovereignty. The interactions Vitoria examines occur not between sovereign states, but between the sovereign Spanish and non-sovereign Indians. The crucial issue, then, is how it was decided that the Indians were not sovereign in the first place.

Once the initial determination had been made and accepted that the colonial world was not sovereign, the discipline could then create for itself, and present as inevitable and natural, the grand redeeming project of bringing the marginalized into the realm of sovereignty, civilizing the uncivilized, and developing the juridical techniques and institutions necessary for this great mission. Within this framework, the history of the colonial world would comprise simply the history of the civilizing mission.

Vitoria's account of the inaugural colonial encounter suggests that an alternative history of the colonial world may be written by adopting a different framework and posing a different set of questions. How was it determined that the colonial world was non-sovereign in the first place? How were the ideas of universality and particularity used for this purpose? How did a limited set of ideas which originated in Europe present themselves as universally applicable? How, armed with these

concepts, did European empires proceed to conquer and dominate non-European territories? How does resistance to colonialism – for a close reading of Vitoria does suggest, however subtly, the powerful presence of Indian resistance – become a further justification for imperialism? Furthermore, if sovereignty is so intimately connected with the problem of cultural difference, and if it is shaped in such a manner as to authorize certain cultures while suppressing others, vital questions must arise as to whether and how sovereignty may be utilised by these suppressed cultures for their own purposes.

In raising these issues, we may better understand the difficulties colonized peoples have encountered in entering the realm of sovereignty, the compromises they have made for the purposes of doing so and the limitations from which they suffer in attempting to pursue their interests and aspirations through a 'universal' language of international law which, arguably, was devised specifically to ensure their disempowerment and disenfranchisement. In examining these issues it may finally become possible to write a different history of the relationship between colonialism and international law and, thereby, of international law itself.

2 Finding the peripheries: colonialism in nineteenth-century international law

By the simple exercise of our will we can exert a power for good practically unbounded.[1]

Introduction

International law is universal. It is a body of law which applies to all states regardless of their specific and distinctive cultures, belief systems and political organizations. It is a common set of doctrines which all states, whether from Europe or Latin America, Africa or Asia use to regulate relations with each other. The association between international law and universality is so ingrained that pointing to this connection appears tautologous; it is today hard to conceive of an international law which is not universal. 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 which took place towards the end of the 'long nineteenth century'.[2] The conquest of non-European peoples for economic and political advantage was the most prominent feature of this period termed, by one eminent historian, the 'Age of Empire'. By

[1] Joseph Conrad, 'Heart of Darkness', in Morton Dauwen Zabel (ed.), *The Portable Conrad* (rev. edn., New York: Penguin Books, 1976), p. 561.

[2] Historians of the period tend to see the nineteenth century as extending up to 1914; it is the commencement of the First World War that marks the end of the century. See Eric Hobsbawm, *The Age of Empire, 1875–1914* (New York: Pantheon Books, 1987).

1914, after numerous colonial wars, virtually all the territories of Asia, Africa and the Pacific were controlled by the major European states and this resulted in the assimilation of all these non-European peoples into a system of law which 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. The sovereign is the foundation of positivist jurisprudence, and nineteenth-century jurists sought to reconstruct the entire system of international law as a creation of sovereign will. Positivism was the new analytic apparatus used by the jurists of the time to account for the events which resulted in this dramatic development, the universalization of international law and the formulation of a body of principles which was understood to apply globally as a result of the annexation of 'unoccupied' territories such as the continent of Australia, the conquest of large parts of Asia and the partitioning of Africa.

This chapter focuses on the relationship between positivism and colonialism. My interest lies in examining the way in which positivism managed the colonial confrontation: what were the techniques, the doctrines, the legal methodologies developed to account for the expansion of European Empires and the various peoples and societies they dispossessed? In studying this relationship I seek not only to outline an architecture of the legal framework, but 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. This task requires an understanding of two bodies of scholarship, that relating to positivism and that relating to the application of positivism to the colonial encounter.

Positivist jurisprudence is based on the notion of the primacy of the state; and, despite subsequent attempts to reformulate the foundations of international law, the basic 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 which has governed the major theoretical inquiries into the discipline. That problem is: how can legal order be created among sovereign states? As I have previously suggested, the attempts to resolve this problem, and the critiques of these attempts, have, on the whole, constituted the central theoretical debate of the discipline over

the twentieth century.[3] Indeed, it was in the nineteenth century that this problem took on the particularly challenging form that has marked the discipline ever since, this as a consequence of the emergence of positivism, and John Austin's famous criticism, explored in more detail below, of international law as failing to meet the requirements of international law properly so called. Colonialism features only very incidentally within this scheme. This appears inevitable, as the colonial confrontation was not a confrontation between two sovereign states, but between a sovereign European state and a non-European state which, 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. However, it poses no theoretical difficulties; hence, the colonial world is relegated to both the geographical and theoretical peripheries of the discipline. This is the history I am examining; not with a view to furthering it but in an attempt to question its assumptions and its exclusions, and to point to the 'ambivalences, contradictions, the use of force, and the tragedies and ironies that attend it'.[4]

Certainly, colonies were often exasperatingly troublesome, in terms of both their governance and international jurisprudence; but for the international lawyers, colonial problems constituted a separate and distinct set of issues which were principally of a political character – how

[3] I am indebted to a number of important recent works which examine the importance of the nineteenth century to international law, as seen within this framework. These include Anthony Carty, *The Decay of International Law?: A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester: Manchester University Press, 1986); David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', (1997) 17 *Quinnipiac Law Review* 99; Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Co., 1989); Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law', (1997) 2 *European Journal of International Law* 215. I am also indebted to major works which deal with the entry of colonial states into the international system: James Crawford, *The Creation of States in International Law* (New York: Oxford University Press, 1979); Gerrit Gong, *The Standard of 'Civilization' in International Society* (New York: Oxford University Press, 1984).

[4] Dipesh Chakrabarty, 'Postcoloniality and the Artifice of History: Who Speaks for "Indian" Pasts?', (1992) 37 *Representations* 1, extracted in Bill Aschcroft, Gareth Griffiths and Helen Tiffin (eds.), *The Post-Colonial Studies Reader* (London: Routledge, 1995), p. 386.

should the people be governed, what role should international law play in decolonization – issues which did not generally impinge in any significant way on the core theoretical concerns of the discipline.

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 for the purpose of effecting the emergence of colonial territories into sovereign states, these challenges were perceived as threatening to disrupt a stable and established system of international law which was essentially and ineluctably European and which was now faced with the problem 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 world which was suddenly discovered to be multicultural.[5]

Scholars focusing on the colonial world naturally adopted a very different approach to the issue. The principal concern of these scholars was to show how positivist international law disenfranchised and subordinated non-European peoples. The naturalist international law which had applied in the sixteenth and seventeenth centuries asserted that a universal international law deriving from human reason applied to all peoples, whether 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 which comprised the civilized 'family of nations'.

[5] For an examination of this period see, for example, Adda B. Bozeman, *The Future of Law in a Multicultural World* (Princeton: Princeton University Press, 1971); Réné-Jean Dupuy (ed.), *The Future of International Law in a Multicultural World: Workshop, The Hague, 17–19 November 1983* (London: Martinus Nijhoff, 1984). The axiomatically European character of international law has been often proclaimed. In his monumental work on the history of the discipline, Verzijl, for example, 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 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*, 10 vols., Leyden: A. W. Sijthoff, 1968, I, pp. 435–436)

It is not entirely surprising, then, that colonialism features only very incidentally even in much more recent works; see, for example, Jens Bartelson, *A Genealogy of Sovereignty* (New York: Cambridge University Press, 1995).

The important work of these scholars focused, then, on the complicity between positivism and colonialism.[6] 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 recognised that special doctrines and norms had to be devised for the purpose of defining, identifying and placing the uncivilized, and this was what the jurists of the period proceeded to do when listing among the modes of acquiring territory, 'conquest' and 'cession by treaty'. While analysing and critiquing these doctrines and their effects, however, distinguished scholars such as Alexandrowicz tend implicitly to treat the colonial encounter as marginal to the discipline by studying it in terms of the effects of positivism on the colonial state.

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 which 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 not on the problem of how order is created among sovereign states, but on an alternative problem,

[6] The most notable scholar of 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* (Oxford: Clarendon Press, 1967) and *The European–African Confrontation: A Study in Treaty Making* (Leiden: A. W. Sijthoff, 1973). Many Third World scholars have examined the effect of the nineteenth century in their broader treatment of the relationship between colonialism and international law, e.g., R. P. Anand, *New States and International Law* (New Delhi: Vikas Publishing House, 1972), Taslim O. Elias, *Africa and the Development of International Law* (Leiden: A. W. Sijthoff, 1972) and Mohammed Bedjaoui, *Towards a New International Economic Order* (New York: Holmes & Meier, 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 which deal with the issue of the significance of nineteenth-century colonialism to international law include Georges Abi-Saab, 'International Law and the International Community: The Long Road to Universality', in Ronald St John Macdonald (ed.), *Essays in Honor of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994), p. 31; Annelise Riles, 'Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture', (1993) 106 *Harvard Law Review* 723; Siba N'zatioula Grovogui, *Sovereigns, Quasi Sovereigns and Africans: Race and Self-Determination in International Law* (Minneapolis, MN: University of Minnesota Press, 1996); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2002).

that of how order is created among entities characterized as belonging to entirely different cultural systems, the framework I sketched in chapter 1. I suggest, then, that the manoeuvres 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 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?

My broader and further goal is to contest the received and traditional understandings of positivism and of sovereignty doctrine which treat each of these ideas 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 disempowering effect that an already established positivism had on non-European peoples. Similarly, sovereignty doctrine is understood as a stable and comprehensive set of ideas which 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 is no insignificant thing. My interest lies, however, not only in the important point that positivism legitimized conquest and dispossession, but in the reverse relationship, in identifying how positivism itself, sovereignty itself, were 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 was not an example of the application of sovereignty; rather, sovereignty was constituted through colonialism.[7]

In attempting to sketch this alternative history, I depart from the tendency, 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 colonialism is hard to overlook. Positivists developed an elaborate vocabulary for denigrating non-European people, 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.[8] 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 native; my argument, further is that colonial problems posed a significant and, in the end, insuperable set of challenges to positivism and its pretensions to develop a set of doctrines which could coherently account for native personality, a task which was crucial to the positivist self-image. The brutal realities of conquest and dispossession can hardly be ameliorated by the assertion that the legal framework which legitimized 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, 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.[9] This in turn is part of a larger project which has been the preoccupation of many jurists of the non-European

[7] This is to follow, with a little adaptation, Edward Said's concern to 'regard imperial concerns as constitutively significant to the culture of the modern West'. See Edward Said, *Culture and Imperialism* (New York: Knopf, 1993), p. 66.

[8] This corresponds exactly with Said's notion of Orientalism: 'Orientalism can be discussed and analysed 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.' Edward Said, *Orientalism* (New York: Pantheon Books, 1978), p. 3.

[9] The broad attempt, then, is to begin in some way the problematic task, which Dipesh Chakrabarty has formulated, of 'provincializing Europe'. 'Who Speaks for "Indian" Pasts?', p. 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

world: to understand the relationship between international law and colonialism in order to better formulate the potential of the discipline to transform the enduring inequities and imbalances which resulted from the colonial confrontation.

This inquiry is conducted through an analysis of the works of prominent jurists of the nineteenth century;[10] these include James Lorimer,[11] W. E. Hall,[12] John Westlake,[13] Thomas Lawrence,[14] and Henry Wheaton.[15] I have also considered the works of later jurists such as Lassa Oppenheim[16] and M. F. Lindley,[17] who wrote in the 1920s, but whose work adopts and elaborates the nineteenth-century framework.[18]

notes, 'The project of provincializing "Europe" refers to a history which does not yet exist'. *Ibid*., p. 385.

[10] For a searching exploration of how European international lawyers as a community responded to issues of colonialism, see Koskenniemi, *The Gentle Civilizer of Nations*.

[11] James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edinburgh: Blackwood & Sons, 1883).

[12] W. E. Hall, *A Treatise on International Law* (2nd edn., Oxford: Clarendon Press, 1884), the first edition of which was published in 1880 and which was revised on numerous occasions, was the major English treatise on the subject prior to the appearance of Oppenheim's *International Law in 1905*.

[13] Westlake was Whewell Professor of International Law in the University of Cambridge in 1894, at the time of the publication of his work, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894). It is notable that, for a work which purports to be general in scope, three of the eleven chapters deal quite explicitly with issues regarding the status and treatment of colonies and natives.

[14] Thomas Lawrence, *The Principles of International Law* (Boston: D.C. Heath, 1895).

[15] Henry Wheaton, *Elements of International Law* (Boston: Little, Brown & Co., 1866). Wheaton's work, which passed through several editions, was widely respected and used at this time.

[16] The first edition of Lassa Oppenheim's magisterial *International Law* was published in 1905. The work could be regarded as a superb embodiment of positivist jurisprudence. The analysis of this chapter is based on *International Law: A Treatise* (2nd edn., London: Longmans, Green & Co., 1912). This is perhaps the last great international law text of the long nineteenth century. Subsequent editions have been edited by a series of extremely eminent 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.

[17] 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* (New York: Negro Universities Press, 1969).

[18] For comprehensive accounts of the broader political contexts in which these judicial developments occurred, see Gong, *The Standard of 'Civilization'*; Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (New York: Oxford University Press, 1984); Adam Watson, *The Evolution of International Society: A Comparative Approach* (London: Routledge, 1992). For other useful but shorter works dealing with the same themes, see David Strang, 'Contested Sovereignty: The Social Construction of Colonial Imperialism', in Thomas J. Biersteker and Cynthia Weber (eds.), *State Sovereignty as Social Construct* (Cambridge: Cambridge University Press, 1996), pp. 22–50.

The second section of this chapter focuses on the basic elements of positivism, the analytical tools, methods and ambitions of positivist jurists, this 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 the importance that these jurists placed on establishing the intellectual coherence and rigour of their discipline and, thereby, the significance of positivist attempts to coherently account for the colonial confrontation. The third section of this chapter explores the first step in the dynamic of difference, the process by which a gap is postulated between European and non-European peoples; it examines how cultural distinctions became the basis for establishing a legal status, and how sovereignty doctrine is constituted by the elaboration of these distinctions in such a way as to exclude non-European peoples from the realm of sovereignty.

The next section examines the process by which the gap is bridged and the non-European world is brought into the realm of international law. It focuses, first, on the techniques of assimilation and secondly, on the Berlin Africa Conference of 1885 which provides an example of the broader diplomatic and political contexts in which these doctrines were applied. The final section offers a reinterpretation of the significance of the nineteenth century to the discipline in the context of the previous analysis.[19]

Elements of positivist jurisprudence

Introduction

Positivists such as Westlake, Lawrence and Oppenheim, using a familiar technique, begin their works by providing a brief history of international law up to the time of their writing, this in order to better demonstrate how they differed from naturalists. These jurists distanced themselves from the inadequacies of naturalism by elaborating a positivism which, they asserted, was scientific, precise, comprehensive and capable of

[19] The language of the period is replete with racial aspersions to the 'uncivilized', 'natives', 'backward' and so forth, but I have refrained from placing these terms in quotations as I hope it is understood that the appearance of these terms in this work does not reflect my acceptance of them.

providing clear and coherent answers to any legal dispute it had to resolve. To these positivists, law was an abstract set of principles which was in important respects autonomous.

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 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. International lawyers thus attempted to develop a jurisprudence which could address these objections. Finally, positivists sought to present their discipline as 'scientific' in character. Each of these factors was an important aspect of the positivist self-image, and played an important role in the development of positivist jurisprudence. Not only did positivism establish the legal framework that dealt with international disputes but, more broadly, it established the vocabulary, the set of constraints and considerations, which both shaped and were shaped by sovereignty doctrine.

Positivism and the shift from natural law

Positivist jurists generally commenced their campaign of articulating their new, distinctive versions of international law by employing the very traditional technique of sketching the histories of their discipline up to their own time, this as a means of distinguishing themselves from their naturalist predecessors. As discussed previously, even early jurists such as Francisco de Vitoria made a distinction between 'natural law' and 'human law'. In broad terms, natural law consisted of a set of transcendental principles which could be identified through the use of reason. Human law, on the other hand, as the term suggests, was created by secular political authorities, and positivism was an extended elaboration of this framework. Natural law was strongly identified with principles of justice, with 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.[20]

The techniques of naturalist jurists are illustrated by jurists such as Grotius who argued that reason revealed a set of rules which governed relations between nations. Nineteenth-century writers such as Wheaton understood Grotius's science[21] to have been,

> First, to lay down those rules of justice which would be binding on men living in a social state, independently on any positive laws of human institution; or, as is commonly expressed, living together in a state of nature; and,
> 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.[22]

Naturalists did not completely ignore the importance of man-made laws, 'the positive laws of human institution' which were manifested in forms such as state practice, the customs observed among nations and the treaties into which they entered. Essentially, however, custom was still approached through the naturalist framework which examined and assessed the validity of state behaviour with reference to the transcendental principles originating from the 'state of nature', the model society whose laws could be identified and elaborated by reason and which, ideally, governed state behaviour. A gradual shift in this approach is evident from the mid-seventeenth century onwards. Vattel, whose major work, *The Law of Nations*,[23] 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 which raised doubts as to whether international law could ever bind the sovereign.[24] Jurists in the late eighteenth century and early nineteenth century combined positivism and naturalism in various

[20] However, as Richard Tuck has shown, naturalist techniques could be used to provide the sovereign with extensive powers. See Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order From Grotius to Kant* (New York: Oxford University Press, 1999).

[21] The discussion here of naturalist jurisprudence is based on nineteenth-century understandings of this jurisprudence, rather than on my own analysis of the original works of jurists such as Grotius.

[22] Wheaton, *Elements of International Law*, chapter 1.1.

[23] Emer de Vattel, *The Law of Nations or Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (Charles G. Fenwick trans., Washington, DC: Carnegie Institution of Washington, 1916).

[24] See Koskenniemi, *From Apology*, pp. 85–98; Carty, *The Decay of International Law*, pp. 71–74; for a short and general treatment of Vattel, see Arthur Nussbaum, *A Concise History of the Law of Nations* (rev. edn., New York: Macmillan, 1954), pp. 156–158.

ways, arguing, for example, that while a certain universal natural law applied to all nations without distinction between civilized and non-civilized, a considerable body of positive law specific to Europe was also emerging.

Positivist law consisted of those rules which had been agreed upon by sovereign states, either explicitly or implicitly, as regulating relations between them.[25] 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.[26] 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, derived from the law of nature,[27] was that of securing and furthering liberty.[28] 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'.[29]

For positivists, the sovereign state was the foundation of the entire 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 be bound only to that which it had agreed. 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 behaviour of states and the institutions and laws which they 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.

[25] *See* C. H. Alexandrowicz, 'Doctrinal Aspects of the Universality of the Law of Nations', (1961) 37 *British Yearbook of International Law* 506–515 at 506.

[26] See *ibid*.

[27] Lorimer insisted on 'the exceptional dependence of the law of nations on the law of nature'. Lorimer, *The Institutes of the Law of Nations*, p. 23.

[28] See *ibid*., pp. 19–27.

[29] Lassa Oppenheim, 'The Science of International Law: Its Task and Method', (1908) 2 *The American Journal of International Law* pp. 313, 328.

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.[30]

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 impliedly – to a set of customary laws. Thus, for positivists, treaties and the developing body of custom was the best guide to the proper rules of international behaviour.

In focusing on the sovereign as the exclusive and ultimate source of law, positivist international jurists were following a long tradition which 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, who asserted famously that 'Laws properly so called are a species of commands. But, being a command, every law properly so called flows from a determinate source.'[31] 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 behaviour and, like Austin, insisted on the distinction between law and morality or justice.[32] 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 person in a state of subjection to its author'.[33]

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, however, intent on

[30] Westlake, *Chapters on the Principles of International Law*, p. 63.
[31] John Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954), p. 133.
[32] While Austin critiqued international law, in other respects, of course, Austin and positivist international law were in close agreement.
[33] Austin, *The Province of Jurisprudence*, pp. 133, 201.

defining law in such a manner as to establish a sound basis for a science of jurisprudence, and rescuing it from the muddy speculations of naturalists, threatened such pretensions by his categorical assertion 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 by his contemporaries. Westlake,[34] Lawrence,[35] Oppenheim[36] and Walker,[37] for example, commence their works with attempts to refute or qualify 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,[38] often in 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 his 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.'[39] 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.[40] 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 recognised and administered by municipal courts.[41]

[34] See generally Westlake, *Chapters on the Principles of International Law*, preface and chapter 1.
[35] See generally Lawrence, *The Principles of International Law*, chapters 1, 2.
[36] See generally Oppenheim, *International Law*, p. 5.
[37] Thomas Alfred Walker, *A History of the Law of Nations: From the Earliest Times to the Peace of Westphalia* (Cambridge: Cambridge University Press, 1899).
[38] 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 jurists, see Westlake, *Chapters on the Principles of International Law*, pp. vii–ix.
[39] Lawrence, *The Principles of International Law*, p. 25.
[40] See Oppenheim, *International Law*, p. 5.
[41] See *ibid*.

The reality and efficacy of customary law was further illustrated by the historical work of writers such as Sir Henry Maine. Maine adopted a distinctive approach to the relationships between law and society.[42] He had been a consistent critic of Austin and his fellow positivist Jeremy Bentham, and his works such as *Ancient Law* suggested powerfully that Austin's view of law was very limited and that societies had generally been governed by conceptions of law which differed markedly from those defined by Austin.[43] International jurists such as Walker[44] and Lawrence[45] seized upon Maine's researches, the 'hard facts of History'[46] to point to the inadequacy of Austin's definition. International jurists, furthermore, had a particular interest in stressing the importance of customary law, 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 disapprobation falling on those who transgress it.[47]

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 very 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 behaviour of states, as exemplified by the operation of customary international law.

[42] Carl Landauer, 'From Status to Treaty: Henry Sumner Maine's International Law', (2002) XV(2) *Canadian Journal of Law and Jurisprudence* 219–254.
[43] Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1st American edn., New York: C. Scribner, 1864), p. 6.
[44] Walker, *A History of the Law of Nations*, pp. 8–19.
[45] For a discussion of Lawrence's use of Maine, see Riles, 'Aspiration and Control', 723.
[46] Walker, *A History of the Law of Nations*, p. 8.
[47] Austin, *The Province of Jurisprudence*, p. 31.

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, the central concept used elsewhere by Lawrence and by virtually all international lawyers of this period in their efforts to credibly suggest the existence of rules which are observed even in the absence of a supreme authority. 'International law', proclaims Westlake, 'is the body of rules prevailing between states'.[48] 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.[49]

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 which are regularly observed and which are enforced by sanctions. Consequently, society constituted law and law constituted society. It is through a complicated inter-play between law and society that the result is circularly achieved, that international order is maintained and international law created:

> 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 recognize that there is a society of states, we recognize that there is international law.[50]

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.[51]

Westlake unsurprisingly deviates here from the Austinian approach of looking to the source of these laws in order to locate the single

[48] Westlake, *Chapters on the Principles of International Law*, p. 1.
[49] *Ibid*., p. 2. [50] *Ibid*., p. 3. [51] *Ibid*., p. 2.

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 a 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'[52] becomes 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'.[53]

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, then, provides the matrix of ideas, the analytical resources which, 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 accepted into society and which agree upon principles regulating their behaviour 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.

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 ideas[54] on natural selection, but the massive success of the industrial revolution which had been made possible by scientific discoveries.[55] While jurists understood

[52] The terms 'family of nations' or 'community of nations' are used quite interchangeably by positivist jurists.

[53] Oppenheim, *International Law*, p. 8. For Oppenheim's general discussion on 'community', see *ibid*., pp. 8–9. 'Innumerable are the interests which knit all the individualised civilized States together and which create constant intercourse between these States as well as between their subjects.' *Ibid*., p. 10. (The creation of unity among European states.)

[54] On the importance of Darwin for validating the new 'scientific method', see J. M. Roberts, *A History of Europe* (Oxford: Helicon, 1996), pp. 342–344.

[55] On the place of science in society at the end of the nineteenth century, see generally Hobsbawm, *The Age of Empire*, chapters 10–11.

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 disciplines in ways which appeared compatible with the scientific framework in an attempt to elevate not only their discipline, but their profession.[56] The human sciences, of which 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',[57] and international lawyers of the period invariably refer to the 'science' of international law.[58] The positivist self-image of being engaged in a scientific inquiry – and all that suggested in terms of rigour, 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 behaviour in the midst of the general flux and confusion of international relations. Thus Lawrence writes of the great international lawyers of the nineteenth century as producing 'order from chaos, and made International Law into a science, instead of a shapeless mass of undigested and sometimes inconsistent rules'.[59]

The term 'science' was used in very 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

> regards 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.[60]

[56] This issue is explored by David Sugarman, '"A Hatred of Disorder": Legal Science, Liberalism and Imperialism', in Peter Fitzpatrick (ed.), *Dangerous Supplements* (Durham, NC: Duke University Press, 1991), p. 47. As Koskenniemi notes: 'By [the] 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, *From Apology*, p. 98 (footnotes omitted).

[57] Westlake, *Chapters on the Principles of International Law*, p. vi.

[58] 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, *The Science of International Law*.

[59] Lawrence, *The Principles of International Law*, p. 94.

[60] *Ibid*., p. 1.

Order could be established through classification, of both the legal phenomena of state behaviour and of the rules of international law itself. Law is concerned, according to Westlake, with the 'classification of institutions or facts';[61] furthermore, it is 'with law as an institution or fact that the legal student has to deal.[62] 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 endeavour 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 they engaged in. 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 which classified and processed the raw material of practice and reconstituted it into a coherent and complete legal framework.

The origins and character of the ordering mechanism which performed these vital tasks, however, assumed a transcendental quality which seemed beyond history and beyond inquiry. Indeed, to adopt any approach which 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

[61] Westlake, *Chapters on the Principles of International Law*, p. 12. 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 highest fulfilment.
>
> (Morton J. Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy*, New York: Oxford University Press, 1992, p. 17)

[62] Westlake, *Chapters on the Principles of International Law*, p. 12.

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. 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.[63]

This scientific methodology favoured, 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 which could be won only by ensuring the autonomy of law, and establishing and maintaining the taxonomies and principles which 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' which he condemns would advocate.[64] Thus, within the

[63] Cited in Sugarman, '"A Hatred of Disorder"', p. 51.

[64] It must be noted that other nineteenth-century writers such as Lawrence espoused the historical approach. See Lawrence, *The Principles of International Law*, p. 16, where he raises the issue of whether the inquiry into international law should be based on an *a priori* or 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'. *Ibid*. 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 work *Ancient Law* (1864).

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 which 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, on the juridical character of state behaviour – with the idea of 'society' which was indispensable to any claim that international law possessed any sort of status as law, and which was the basis of the defence 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 something like 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 were the subject of positivist scrutiny. For positivists, 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, encompass, this sociological aspect upon which it was so curiously and ambivalently dependent for its functioning?

The tensions and ambivalences 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 rigour.

Defining and excluding the uncivilized

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.[65] 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 which 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'.[66] 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.[67] No distinction is made between the civilized and the uncivilized.

Within Wheaton's scheme, 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 civilized*' (emphasis in the original).[68]

Despite this trend towards excluding the uncivilized states, non-European states were recognised 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 that:

[65] 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, *Elements of International Law*, p. 10 (footnote omitted).

[66] Wheaton, *Elements of International Law*, p. 10.

[67] *Ibid*.

[68] Wheaton, *Elements of International Law*, p. 10. 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 neighbours: 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.' *Ibid*.

> 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.[69]

The passage is notable for its gesture towards including Africa within the law of nations and suggesting that European states, indeed America itself, had to respect the law of nations as practised within Africa – although, ironically, it is African law which ostensibly supports slavery.

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 which counts as law is that which is practised only among the 'civilized countries'. By 1866, Wheaton by contrast 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.[70]

As I have argued, naturalists such as Vitoria recognised the existence of important cultural differences between, for example, the Spanish and the Indians of the Americas. 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 by the explicit imposition of European international law over the uncivilized non-Europeans. It is 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 the former were deprived of 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.[71]

Thus the state of nature that naturalists used as a basis for the formulation of rules of international law was unsatisfactory, not only

[69] *The Antelope*, 23 U.S. (10 Wheaton) 5 at 66 (1825).
[70] Wheaton, *Elements of International Law*, p. 15.
[71] Gong, *The Standard of 'Civilization'*, pp. 53–57.

because it was subjective, imprecise and based on transcendental principles rather than the realities of state behaviour, 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 civilized and uncivilized 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.[72]

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 it lacks this central distinction. Quite apart from the notorious failure of naturalism to focus exclusively on state will, then, it was rejected by the positivists for this second reason. Positivist jurisprudence was so insistent on this distinction that any system of law which 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 which 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 it could be deployed by justifying his claim that 'the occupation by uncivilized 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 civilized occupant'.[73] 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 to participate as full members with all the attendant rights and powers.

[72] Westlake, *Chapters on the Principles of International Law*, p. 137. [73] *Ibid*.

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 at 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 which had to be bridged by positivist international law.

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 as that jurisprudence outlined a system of law which applied to all human activity, whether of an individual or a sovereign. 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.[74] Given that the civilized–non-civilized distinction expelled the non-European world from the realm of law and society, the question arose: could non-European societies be regarded as sovereign? It was simple enough to assert that the civilized possessed sovereignty while the uncivilized did not. But positivist jurisprudence had to plausibly establish that cultural difference translated into legal difference. Positivists were equipped with a number of analytical tools to

[74] 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'. See generally Hall, *A Treatise on International Law*, chapter 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, *International Law*, Table of contents.

arrive at such a conclusion but, given the positivist preoccupation with consistency and coherence, it had to do so in a manner consistent with the broad complex of ideas and systems of thinking which constituted sovereignty doctrine and positivist jurisprudence.

The task of identifying the 'sovereign' and defining 'sovereignty' were inter-related tasks which posed a number of complex problems for jurists. The task involved distinguishing sovereigns proper from other entities – such as pirates, non-European states and nomads – which also seemed to possess the attributes of sovereignty. 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'[75] 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';[76] pirates, similarly, 'might be temporarily under the sway of a chief with unrestricted power'.[77]

The general answer was that sovereignty implied control over territory. For positivists, 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.[78]

Whatever the extent to which an entity may have satisfied the other criteria of statehood, then, a failure to occupy territory would preclude that entity from being treated as sovereign. The primacy of territory is again emphasized by Lawrence when considering two possible bases for the exercise of jurisdiction by a state, and deciding finally that jurisdiction over territory takes precedence over jurisdiction over citizens. Thus Lawrence argues that 'Modern International law, being permeated throughout by the doctrine of territorial sovereignty, has adopted the latter principle as fundamental.'[79]

Territorial control is thus fundamental to sovereignty, whatever the exceptions established to this rule – in the form of the principle, for

[75] Lawrence, *The Principles of International Law*, p. 58. [76] *Ibid*. [77] *Ibid*.
[78] *Ibid*., p. 136. [79] Lawrence, *The Principles of International Law*, p. 190.

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.[80] Thus wandering tribes could not be sovereign because they failed the territorial requirement; 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 Asiatic and African states easily met both the Austinian definition of sovereignty and the requirement of control over territory; they thus posed a great problem to positivist attempts to distinguish civilized and uncivilized societies. Further, the historical reality, as Alexandrowicz points out regarding the Indies, for example, was that:

> All the major communities in India as well as elsewhere in the East Indies were politically organised; they were governed by their Sovereigns, they had their legal systems and lived according to centuries-old cultural traditions.[81]

In Africa, as scholars such as Elias have argued, the kingdoms of Benin, Ethiopia and Mali, for instance, were sophisticated and powerful political entities which were accorded the respect due to sovereigns by the European states with which they established diplomatic relations.[82]

Positivist jurists could hardly disregard these facts, given especially 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, analysed the negotiations which led to the making of various treaties, and included these treaties within larger collections of international treaties.[83] Confronted with this dilemma, positivists resorted once more to the concept of society. The broad response was that Asiatic 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.[84]

[80] *Ibid*., p. 221. [81] Alexandrowicz, *An Introduction*, p. 14.

[82] See Elias, *Africa*, pp. 6–15. For a detailed study of the early history of treaty making between African and European states, see Alexandrowicz, *The European–African Confrontation*.

[83] See Alexandrowicz, 'Doctrinal Aspects'; see also Jeremy Thomas, 'History and International Law in Asia: A Time for Review?', in Ronald St John Macdonald (ed.), *Essays in Honor of Wang Tieya* (Dordrecht: Martinus Nijhoff, 1994).

[84] 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 behaviour] can be given except that these not-full Sovereign States are in some way or

The creation and maintenance of the division between the civilized and uncivilized was crucial to the intellectual and political validity of positivist jurisprudence. The distinction between the civilized and uncivilized was to be made, then, 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:

> yet 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.[85]

The tribes remain outside the realm of international law, not so much because they lack sovereignty, but because they are wanting in the other characteristics essential to membership of international society. It follows then, despite positivist preoccupations with sovereignty doctrine, that 'society' and the 'family of nations', is the essential foundation of positivist jurisprudence and of the vision of sovereignty it supports. In the final analysis, non-European states are lacking in sovereignty because they are excluded from the family of nations. The novel manoeuvre of focusing on society enabled positivist jurists to overcome the historical fact that non-European states had previously been regarded as sovereign, that, by and large, they enjoyed all the rights accompanying this status, and that their behaviour 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 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, states '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

another International Persons and subjects of International Law.' Oppenheim, *International Law*, p. 110. See *ibid*., pp. 154–156.

[85] Lawrence, *The Principles of International Law*, p. 58.

forest to receive a permanent diplomatic mission'.[86] Such powerful evocations of the backward and barbaric confirmed the incongruity and unthinkability of any correspondence between Europe and these societies. Law did no more than maintain an essential and self-evident distinction.

And yet, closer examination of primitive societies suggested disconcerting parallels. Westlake describes 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 and therefore useful sense.[87]

The passage reflects many of the techniques of positivism analysed 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 favour of the definition, in order to maintain its 'consistent and 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 commonalities 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' can possess a system which

[86] *Ibid*. For an insightful study of this rhetoric, see Riles, 'Aspiration and Control', 723. As Riles points out in her important study, 'Lawrence's polemic participated on a number of levels in the creation of an essentialised and coherent European community defined in dichotomous opposition to non-European "savages".' *Ibid*., 736. As Riles further elaborates: 'This essentialised 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.' Riles, 'Aspiration and Control', 737.

[87] Westlake, *Chapters on the Principles of International Law*, p. viii.

disconcertingly parallels that of England, quickly proceeds to affirm that 'our actual England is regulated by law'.[88]

Law, then, is the preserve of England; and 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 then, within nineteenth-century jurisprudence, law cannot be defined in such a way as to encompass the practices which historical research demonstrates as serving the same function as 'law' in Western society.

The methodology of the analytical school was thus 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 which 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 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, then, made further distinctions between the Asiatic states, for example, which were characterized as being in certain respects civilized but 'different'[89] and the 'tribal peoples' who were more severely denounced as completely backward.[90]

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.[91] Basically, however, these classifications were irrelevant in terms of the broad issue of the central

[88] The word 'actual' is used in a curious fashion, almost as though to add reassurance, to suppress 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.

[89] Westlake, *Chapters on the Principles of International Law*, p. 102. For Westlake, government is the test of civilization; Asiatic states satisfy this test as they comprise populations 'leading complex lives of their own' with their own systems of family relations, criminal law and administration. *Ibid*., pp. 141–142.

[90] See Westlake, *Chapters on the Principles of International Law*, pp. 142–155.

[91] See discussion on pp. 84–86.

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

The positivist attempt to distinguish between the civilized and uncivilized was fraught with unresolvable 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.[92] 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 issues laws enforced by controls.[93] Seen from this perspective, there is an identity between primitive societies and international law; and 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 from the primitive by becoming the authoritative, master discipline which identifies, places and expels the primitive. The implications of the disconcerting identity between the international and the primitive is not explored. 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

[92] The analytic approach relativised Austin by arguing that his definition was only one definition of law. This is the approach taken by Westlake, *Chapters on the Principles of International Law*, pp. viii–ix. Walker went further and argued that Austin's definition was philologically inaccurate. See Walker, *A History of the Law of Nations*, pp. 14–17. The historical approach suggested that Austin's definition of law appplied 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', in John Austin, *The Province of Jurisprudence Determined* (Wilfrid E. Rumble, ed., New York: Cambridge University Press, 1995), p. xxii. In essence, both the analytic and historical schools, in attempting to rescue the discipline of international law, were attacking Austin for privileging one very specific meaning of the word 'law'.

[93] For a discussion of Maine's work in this context, see Walker, *A History of the Law of Nations*, p. 12.

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; correspondingly, rather than possessing any integrity and coherence of its own, international law bore only a faint and subordinate relationship with domestic law, and could hope to evolve only 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 peoples. These implications are not addressed by the positivist jurists intent both on establishing their discipline and demonstrating its usefulness.

Even at the theoretical, jurisprudential level, then, alien societies are 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 as 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, then, the non-European world is excluded from the realms of sovereignty, society, law; each of these concepts which acted as founding concepts to the framework of the positivist system was precisely defined, correspondingly, in ways which maintain and police the boundary between the civilized and uncivilized. The whole edifice of positivist jurisprudence is based on this initial exclusion, this determination that certain societies are beyond the pale of civilization. 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 criticism, 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 was based on this fundamental distinction because positivist definitions of sovereignty relies on the premise that civilized states were sovereign and uncivilized states were not.

Afflicted by all the insecurities generated by Austin, positivist jurists nevertheless attempted to present international law as a coherent and autonomous scientific discipline which could play an important role

in the management of international relations. For an international law anxious to establish itself and make good 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 had become fundamental to their prestige, and whose consequent competition for colonies threatened to lead to the first great European war since the defeat of Napoleon. It was 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 made at the end of the nineteenth and early twentieth centuries to institute a system of international arbitration and to codify international law, which could be seen as attempts to address exactly these problems.[94] 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 uncivilized entity; and enforcement posed no real difficulties because of massively superior European military strength. Having stripped the non-European world of sovereignty, then, 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 which demonstrated the efficacy, coherence and utility of international law free of the ubiquitous and unanswerable Austinian objections.[95] 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 centre:

[94] On these efforts and the importance attached to them, see Oppenheim, 'The Science of International Law', 313; Koskenniemi, *From Apology*, pp. 123–129.

[95] As Riles notes jurists such as Lawrence 'diverted attention from the positivist vision of law as *force*, and reorganised international law around the theme of *order* to reassure the reader of viability of the discipline's project'. Riles, 'Aspiration and Control', 726 (footnotes omitted, italics in original). Further, it was particularly in the colonial context that the idiom of order could acquire an especially compelling significance. *Ibid*., p. 727.

the opportunity to make something of yourself, to prove and rehabilitate yourself.

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 very important respects, while the discipline of international law itself bore disconcerting connections with the primitive. The primitive was not so much outside international law awaiting its ordering ministrations, but within the very heart of the discipline, and the subsequent efforts of the international jurist to define and manage the primitive served to conceal this fundamental connection.

Native personality and managing the colonial encounter

Introduction

Whatever the positivist assertions as to the legal absence of non-European societies, however, contact between European Empires and the societies of Asia, Africa and the Pacific was intensifying at precisely this period, the latter half of the nineteenth century. The expansion of colonial Empires was one of the defining features of the international relations of the period. Jurisprudentially, the task confronting the positivists was that of formulating the doctrines which could legally account for this expansion of Europe. The interaction between European and non-European societies, which had by this time been taking place for more than four centuries, had generated a significant and complex body of treaties.[96]

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 proceeding 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, then, just as positivists sought to reconstitute the discipline according to prevailing ideas of modernity and science, so too they endeavoured to recast entirely the legal basis of relations between the civilized and uncivilized by framing the project as though the colonial encounter

[96] See Alexandrowicz, *An Introduction* and *The European–African Confrontation*; Ian Brownlie, 'The Expansion of International Society: The Consequences for the Law of Nations', in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (New York: Oxford University Press, 1984), pp. 357–369 at pp. 358–361.

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, and the positivist task was to define the terms and methods by which they were to be assimilated into the framework of law. 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 manoeuvre was that the re-entry of non-European societies into the sphere of law could now take place on terms which completely subordinated and disempowered those societies. This was achieved by deploying the new, racialised scientific lexicon of positivism which, it was asserted, represented a higher and decisive truth. The language of positivism was only one part of a far larger and massively 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, participated crucially in the colonial project.[97] 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 that are 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. Thirdly, 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. Finally, I seek to place these jurisprudential developments within a broader context, as diplomatic, political and ideological considerations inevitably

[97] This is one of the central themes of Said's work. See Said, *Orientalism*, pp. 12–13.

affected the development and application of these doctrines. For these purposes, I focus on the Berlin Africa Conference of 1884–5, which sought to deal with the problems attendant upon the partitioning of Africa.

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 could provide 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. Secondly, 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. Thirdly, independent non-European states such as Japan and Siam (as it then was) could be accepted into international society by meeting the requirements of the standard of civilization of, and being officially recognised by, European states, as proper members of the family of nations. Fourthly, European states, particularly in the latter part of the nineteenth century, often acquired control over Asian and African societies by 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 protectorates sometimes became colonies.

Treaty relations between Europeans and non-Europeans

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 to the particular character of the colonial expansion as it occurred 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, the freedom of commerce asserted so powerfully and inevitably even in Vitoria's time, was a principal rule of nineteenth-century legal and diplomatic relations. Historically, much of

the early trade had been conducted by trading companies such as the British East India Company and the Dutch East India Company.[98] 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 utilised by all the important colonizing Powers. The special field of their operation 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.[99]

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.[100] Trading companies were thus capable of asserting sovereign rights over non-European peoples who were deprived of any sort of sovereignty by this same law.[101] Company charters allowed them not merely to trade in particular areas, but to make peace and war with natives, and the power to coin money.[102] The control of territories by companies established for the explicit purpose of making money meant, inevitably, that the territories were administered simply for profit.[103] Unsurprisingly, governance driven by such imperatives resulted in excesses which led to wars between the companies and the African and Asian peoples they purported to govern, as a consequence

[98] See generally D. K. Fieldhouse, *The Colonial Empires: A Comparative Survey from the Eighteenth Century* (London: Weidenfeld & Nicolson, 1966).

[99] Lindley, *The Acquisition and Government*, p. 91.

[100] 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 (1791), reprinted in (1967) 6 *British International Law Cases* 281.

[101] 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, *The Acquisition and Government*, p. 94.

[102] *Ibid*.

[103] See Lawrence, *The Principles of International Law*, pp. 174–175. As Fieldhouse points out, these trading companies changed their modes of operation very significantly over the years. From being intent simply on trading in the sixteenth and seventeenth centuries, these companies increasingly engaged in acquiring and governing territories in order to protect their interest in the eighteenth and nineteenth centuries. See Fieldhouse on the East India Company and England's colonization of India. Fieldhouse, *The Colonial Empires*, pp. 149–152, 161–173.

of which these companies often embroiled their chartering sovereigns in complex foreign wars.

By the end of the nineteenth century, European states were directly assuming responsibility for colonial territories. Direct rule by the European sovereign itself often followed. Thus, The East Indian Company was dissolved and the British Crown took direct control over India in 1858.[104] The direct involvement of European states in the whole process of governing resulted in a shift from the vulgar language of profit to that of order, proper governance and humanitarianism. This new synthesis was articulated at the Berlin Conference in 1884–5, where humanitarianism 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 which otherwise threatened to exacerbate inter-European rivalries.[105]

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 powerfully intent on 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 which 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 behaviour was the basis of positivist jurisprudence; but it was difficult to detect any consistent and principled behaviour 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

[104] Pursuant to the Government of India Act of 1858. Lindley, *The Acquisition and Government*, p. 95.

[105] The Berlin Conference, however, hardly succeeded in eliminating such rivalries. Britain and France nearly went to war over the 1898 'Fashoda incident', for example. See generally David Levering Lewis, *The Race to Fashoda: European Colonialism and African Resistance in the Scramble for Africa* (New York: Weidenfeld & Nicolson, 1987).

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 practice which followed, suggested that both the European and non-European parties understood themselves to be entering into legal relations. Many doctrines of international law, accepted even by the nineteenth-century jurists, had been produced by this intercourse. As Alexandrowicz's comprehensive account of the relations between the European and East Indian states prior to the nineteenth century points out, for example

> 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.[106]

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 which 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 implications of these developments for the 'universal' international law which applied to all states and which regulated centuries of interaction between Europe and Asia.[107]

This history of treaty making posed a challenge to the positivist framework as 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 which would both recognize the treaty as a legal instrument and would be resorted to in the event of disputes as to the meaning of the treaty. The existence of a treaty, in this way, presupposed a legal universe to which both parties adhered.[108] 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,

[106] Alexandrowicz, *An Introduction*, p. 2.

[107] See Alexandrowicz, 'Doctrinal Aspects'. 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 fifteenth to the eighteenth centuries were generally more equal than the imposed, unequal treaties of the nineteenth century.

[108] Further, as Carty notes, 'treaty making capacity was a vital mark of sovereignty and independence'. Carty, *The Decay of International Law*, p. 65.

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 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, demonstrating a lamentable disregard for the positivist assertion so systematically established and elaborated, that non-European peoples were outside the scope of law, relied very heavily on treaties with non-European societies in expanding their empires.

For example, European states intent on creating empires in Africa claimed very often to derive their title from treaties with African chiefs. Positivists had thus 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 which had been ostensibly established by these treaties.[109] It was precisely the fear of disputes over title to colonial territories among European powers that inspired the Conference of Berlin of 1884–5.[110] Consequently, 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

[109] European and non-European states had entered into many such treaties. See C. H. Alexandrowicz, 'The Theory of Recognition *in Fieri*', (1958) 34 *British Yearbook of International Law* 176–198.

[110] For a discussion of this, see Westlake, *Chapters on the Principles of International Law*, pp. 137–140. 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 make objections. *Ibid*.

positivist practice of focusing on the words of the treaty, to the complete exclusion of the circumstances in which the treaty had been arrived at. In this way, the positivist ignored the massive violence inflicted on non-European peoples, and the resistance of these peoples to 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;[111] the Kings of Thailand played off rival European powers one against another;[112] the Chinese authorities relied on translations of Vattel and Wheaton to try and protect their interests against European states.[113] Almost invariably, however, 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' which basically entitled the European powers to do 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 which were then legally binding.[114]

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.[115] Rights to trade were an important part of such treaties. Thus the Treaty of Nanking[116] required the Emperor of China, among other things, to

[111] See K. V. Ram, 'The Survival of Ethiopian Independence', in Gregory Maddux (ed.), *Conquest and Resistance to Colonialism in Africa* (New York: Garland, 1993).

[112] See Gong, *The Standard of 'Civilization'*, pp. 210–211, for an account of King Mongkut's dealings with the British.

[113] See Wang Tieya, 'International Law in China: Historical and Contemporary Perspectives', (1990-II) 221 *Académie du Droit International, Recueil De Cours* 195, 232–237.

[114] See Gong, *The Standard of 'Civilization'*, p. 43.

[115] On the origins of capitulations, see Gong, *The Standard of 'Civilization'*, pp. 64–65.

[116] The Treaty was in effect imposed on the Emperor of China after the Chinese defeat in the Opium Wars of 1839–42. The war broke out as a result of Chinese attempts to stamp out 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* (New York: Norton, 1991), pp. 147–164. For details about legal aspects of trading with China in the era preceding the opium wars, see Randle Edwards, 'The Old Canton System of Foreign Trade', in Victor H. Li (ed.), *Law and Politics in China's Foreign Trade* (Seattle: University of Washington Press, 1977), p. 362. As the works of Spence and Edwards make clear, the metaphor of barbarity was used by both sides of the

cede Hong Kong to Great Britain,[117] to open five Chinese ports for trade[118] and to establish a 'fair and regular' tariff for British goods[119] – in addition to which the Emperor was required to pay some 21 million dollars to the British for various losses suffered by the British government and citizens as a result of the Opium War which had occurred because the Chinese Emperor sought to prevent British traders from selling opium in China. As a consequence of these developments, non-European peoples were governed not by general principles of international law, but the regimes created by these unequal treaties.[120]

The history of violence and military conquest which led to the formation of these treaties plays no part in the positivist's approach to the treaty.[121] 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 Nyasaland 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.[122]

interaction. Many of the legal 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 Edwards, 'The Old Canton System', pp. 364–365.

[117] Treaty of Nanking, Treaty of Peace, Friendship, and Commerce Between Her Majesty the Queen of Great Britain and Ireland and the Emperor of China, 29 August 1842, G.B.-Ir.-P.R.C., art. III, 93 Consol. T.S. 467.

[118] This allowed British merchants and their families to reside in these cities for purposes of trade. See Article II of the Treaty of Nanking.

[119] See Article X of the Treaty of Nanking.

[120] Wang Tieya 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 foreign States, but a new order of unequal treaties. In China's foreign relations, what applied were not principles and rules of international law, but unequal treaties.' Tieya, 'International Law in China', p. 251.

[121] Although a treaty obtained by coercion would be invalid under contemporary international law, it is difficult to find an example of any of the unequal colonial treaties being set aside on the basis that it was obtained by force.

[122] Cited in Lindley, *The Acquisition and Government*, p. 186.

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,[123] who had actually been involved in the whole treaty making process, 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 ears and thank God for the results.[124]

Lugard himself thought it far more 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'.[125]

Jurists had some perception of the fraudulence of such treaties; however, they made no contribution to revealing the deceptions of treaty making, instead treating them with the utmost seriousness, and as valid legal instruments; 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 the positivist turned to the judicial arena: the broad question here 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

[123] Lugard's extraordinary life was inextricably interwoven with Empire; born in India in 1858, the year after the Mutiny, 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 to the experiences which resulted in his classic work on colonial administration, *The Dual Mandate*. Recognised internationally as the foremost colonial expert of his time, he served on the Permanent Mandates Commission of the League of Nations; he died in 1945. See Margery Perham, 'Introduction', in Lord Frederick Lugard, *The Dual Mandate in British Tropical Africa* (5th edn., London: Frank Cass, 1965).

[124] *Ibid*., p. 17. [125] *Ibid*.

many treaties between European and non-European states, supposedly non-existent entities?[126] 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 whatever 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 effect which may be reasonably attributed to them?[127]

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

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 recognised by established states.[128] 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.[129] In its particular application to uncivilized states, recognition takes place when 'a state is brought by increasing civilisation within the realm of law'.[130] But until this stage was reached, non-Europeans were excluded from the proper application of the doctrine as it operated in the European realm.[131]

Westlake and other positivists attempted to resolve the problem of whether or not the native states were part of international law by

[126] This problem would not have arisen, in the natural law universe, where these treaties would have been interpreted as the understanding between different societies governed by universal natural law. This is the problem posed by authorities on the nineteenth 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 of as recognition of legal personality? (Gong, *Standard of 'Civilization'*, p. 60)

[127] Westlake, *Chapters on the Principles of International Law*, p. 144.

[128] See Hall, *A Treatise on International Law*, pp. 82–83. See also Oppenheim, *International Law*, p. 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.'

[129] 'As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not include membership in the family of nations.' Oppenheim, *International Law*, p. 116.

[130] Hall, *A Treatise on International Law*, p. 83.

[131] As Lorimer asserts:

arguing that such states, although not proper, sovereign members of international society, were nevertheless partial members[132]: hence, Westlake proposed that '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'.[133] The non-European states thus existed in a sort of twilight world; lacking personality, they were nevertheless capable of entering into certain treaties and were to that extent members of international law.[134]

But how was the determination made as to who had been 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 that the chief who had entered into the treaty had no authority to do so, that he was not properly a chief, that the land covered by the treaty was not within the chief's authority to transfer and so forth. It was important, then, to devise rules that could resolve all these disputes and that would fix and stabilise 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 which distinguished the positivist from his less able naturalist predecessor. Thus Lawrence dismissed the law of the Middle Ages, when the European expansion

> 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 to which they are capable, in realising their special ideals. (Lorimer, *The Institutes of the Law of Nations*, p. 157)

Thus it was only through 'guardianship' that the non-Europeans could achieve any status.

[132] 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, *The Institutes of the Law of Nations*, p. 102.

[133] Westlake, *Chapters on the Principles of International Law*, p. 82. Westlake presents this flexibility as an advantage offered by the system: 'This is an instance of the way in which all institutions, being free and not mechanical products, shade off from one to another.' *Ibid*.

[134] Oppenheim, too, developed a similar doctrine; see Oppenheim, *International Law*, p. 155. See also the opinion of arbitrator Max Huber in the Island of Palmas Case (*U.S.* v. *Netherlands*), 2 R.I.A.A. 829, 852 (1928).

commenced, as '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'.[135]

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.[136] For example, if the entity was recognised as having a personality which enabled it to alienate its lands, then European states which 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 according to its own discretion; on the other, positivists argued that recognition could take place only within certain confines which were juridically established.[137] 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;[138] whereas Asian states possessed this capacity, being of a higher level of civilization.[139] Within this scheme, the jurist's task was to develop a system of classification, of taxonomy, which could properly categorise every entity encountered in the course of colonial expansion. The implication is that the individual, and often self-interested, recognition bestowed by a European state could not operate in such a way as to change the inherent

[135] Lawrence, *The Principles of International Law*, p. 52. Lawrence then 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.

[136] 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, *Chapters on the Principles of International Law*, p. 146.

[137] This is a familiar problem with respect to recognition doctrine as a whole.

[138] Thus for Westlake, sovereignty was acquired by other procedures some of which had been formalised 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 civilized world'. Westlake, *Chapters on the Principles of International Law*, p. 145. Westlake's argument was completely contrary to actual state practice; see Alexandrowicz, *The European–African Confrontation*, pp. 48–50.

[139] Oppenheim, *International Law*, p. 286.

capacities of the entity in question, capacities which were objectively established by the entity's position on the scale of civilization. In short, international law had established rules defining the 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 allocated accordingly. 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'.[140] Given the range of societies and practices it had to deal with, 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, although it is difficult to define the exact amount'.[141] 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 'In matters of this kind, no general rule can be laid down'.[142]

Nor did state practice 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 expediencies 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.[143] In such a case, the collective act of recognition established the existence of an entity whose capacity was

[140] Hedley Bull, 'The Emergence of a Universal International Society', in Hedley Bull and Adam Watson (eds.), *The Expansion of International Society* (New York: Oxford University Press, 1984), pp. 117–141 at p. 117.

[141] Lawrence, *The Principles of International Law*, p. 58. [142] *Ibid*., p. 59.

[143] Lawrence, *The Principles of International Law*, p. 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'.

accepted and agreed upon by European states. This, however, was a relatively rare occurrence. Colonial expansion was achieved by 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, as it was created through the encounter with a European state which would inevitably 'recognise' the capacity of the non-European entity according to its own needs.[144] A European state which 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.[145] But acceptance of this approach meant that whatever an individual state did created law: this, as Lorimer points out 'deprives international law of permanent basis in nature and fails to bring it within the sphere of jurisprudence'.[146] The cost of accepting this solution was to dispense with the idea of law altogether at the expense of sovereignty. Recognition doctrine was based on the premise that each state could make its own decision; having gone this far, international law failed to establish any boundaries to this discretion, as a consequence of which the subjective and self-interested views of the state appeared to prevail.[147]

In an attempt to establish standards independent of arbitrary state will, Westlake was prepared, ironically,[148] 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 uncivilized tribe can grant by treaty such rights as it understand and exercises, but nothing more.'[149] He continues that

[144] Oppenheim seems to accept this when noting 'when they [Christian states] enter into treaty obligations with them [non-Christian states], they indirectly declare that they are ready to recognize them for these parts as International Persons and the subjects of the Law of Nations', Oppenheim, *International Law*, p. 155.

[145] It was a common tactic among states disputing each other's claims to argue, for example, that the chieftain who entered into a treaty ceding the disputed territory was not the proper chief. See generally S. E. Crowe, *The Berlin West African Conference 1884–1885* (Westport, CN: Negro Universities Press, 1970), pp. 158–159.

[146] Lorimer, *The Institutes of the Law of Nations*, p. 104.

[147] 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, *Standard of 'Civilization'*, p. 61.

[148] Ironic because of the basic positivist premise that natives are entirely outside the law.

[149] Westlake, *Chapters on the Principles of International Law*, p. 149.

cession of this sort 'may confer a moral title to such property or power as they understand while they cede it, but that no form of cession by them can confer title to what they do not understand'.[150] 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'.[151]

If 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 which were the subject of disputes between Portugal and England, each claiming rights over the same territory. Westlake is finally compelled to resort to his conjecture as to native understanding in order to decide this issue. 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'.[152] Having initially asserted that non-Europeans were absent from the legal universe, Westlake now resorts to constructing the Makololo chiefs and divining their consciousness in order to give his scheme some semblance of coherence. Fundamentally, then, the positivist attempt to obliterate the non-European from their scheme having failed, it then resorted to acknowledging the presence of the non-European and accounting for it in a manner consistent with positivist notions of international law, objectivity and precision. Even this more compromised endeavour, however, was far from successful; no clear, objective standards were established for deciding whether a particular African chief could cede only property rather than sovereignty.

It is almost superfluous to note that while European powers claimed to derive rights from treaties they 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 standards which they themselves have set up', concludes that treaties create only obligations of 'honour' on the part of the European states.[153]

[150] *Ibid*., p. 145.

[151] *Ibid*. In asserting this proposition, Westlake also cited Chief Justice Marshall's views in *Johnson* v. *McIntosh* 121 U.S. 18 Wheat. 1543 (1823), in Westlake, *International Law*, p. 148.

[152] *Ibid*., p. 153.

[153] See W. E. Hall, *A Treatise on International Law*, cited in Gong, *Standard of 'Civilization'*, p. 61. See also Crawford's summary of statehood doctrine in the nineteenth century in Crawford, *The Creation of States*, pp. 12–15.

Oppenheim, similarly, argued that European states interacted with non-European states on the basis of 'discretion, and not International Law'.[154]

Positivism claimed to provide, through a precise examination of state behaviour, and the employment of a comprehensive and carefully articulated system of classification, a precise answer to any legal problem with which it was confronted. Once the actualities of the application of positivism to resolving problems of native title are examined, however, it becomes evident that such claims were hardly well founded. The matter is resolved not in accordance with these detailed and elaborate principles, but on an almost completely ad hoc basis, by a process which is finally reduced to attempting to reconstruct what Makololo chiefs imagine themselves to be agreeing to. The randomness of this process is acknowledged by the jurists themselves. Thus Lawrence acknowledges that 'Each case must be judged on its own merits by the powers who deal with it'.[155] All this is quite apart from the fact that jurists simply could not account for the ambiguous position occupied by the non-European world, simultaneously capable of entering into treaty relations, and 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 and the ambiguous character of the native overwhelmed the positivist system; its failure to coherently place and incorporate the non-European entity into its overall scheme, negated its much-vaunted claims of being comprehensive, systematic and consistent. The ambivalent status of the non-European entity, outside the scope of law and yet within it, lacking in international personality and yet necessarily possessing it if any sense was to be made of the many treaties which European states relied on, 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

[154] Oppenheim, *International Law*, pp. 34–35. See also Westlake: 'The moral rights of all outside the international society against the several members of that society remain intact, though they have not and can scarcely could have been converted into legal rights.' Westlake, *Chapters on the Principles of International Law*, p. 140.

[155] Lawrence, *The Principles of International Law*, p. 85.

Sovereign States are in some way or another International Persons and subjects of International Law.[156]

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 having business with respect to the territory would deal with the colonial power; in this way, legal relations would take place, once more, between two European powers. Whatever the continuing frictions and tensions between these powers – as to access to the markets and resources of the colony, for example – they were in many respects less jurisprudentially complicated than relations between European and non-European entities.

Once again, however, 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 on this matter depending on their own interests.[157] Broadly, however, discovery,[158] occupation, conquest,[159] and cession[160] were some of the doctrines historically devised to deal with this issue. The conceptual framework offered by private law, and in particular property law, played an influential role in the jurisprudence regarding the acquisition of territory.[161] Positivist analysis focused on questions such as what acts

[156] Oppenheim, *International Law*, p. 110.

[157] See *ibid*., p. 283.

[158] The basic idea underlying discovery was that the mere 'discovery' of a territory sufficed to provide title; discovery was used as a basis for title in the fifteenth and sixteenth centuries, but was generally discredited by international lawyers as a valid basis for establishing title because it was so prone to abuse. See Lindley, *The Acquisition and Government*, pp. 128–138.

[159] See Hall, *A Treatise on International Law*, pp. 522–529, '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.'

[160] In 1912, an authority such as Oppenheim listed five modes of acquiring territory: cession, occupation, accretion, subjugation and prescription. See Oppenheim, *International Law*, p. 284.

[161] See generally Carty, *The Decay of International Law*, for a study of the complex ways in which these analogies were made.

were sufficient to show that the European state had acquired control over the territory, or that occupation had been 'effective' in order to prevent a state from claiming that it had acquired valid title over an entire territory simply by landing there.

Conquest generally involved militarily defeating an opponent and thus acquiring sovereignty over the defeated party's territory.[162] Conquest was one of the most ancient ways of acquiring title and, 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 Empires would expand by the conquest of large parts of Asia and Africa.[163] Furthermore, as Korman notes, European states quite openly relied on the doctrine of conquest as a basis for their title.[164]

The emphasis on the concept of property, and the positivist view that uncivilized peoples were not legal entities, also 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 civilized 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 organization which need not be considered a State proper.[165]

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,

[162] 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 Practice* (New York: Oxford University Press, 1996).

[163] For an outline of conquest see Oppenheim, *International Law*, pp. 302–307. Conquest seems to have been officially outlawed in contemporary international law as a means of acquiring title to territory.

[164] See Korman, *The Right of Conquest*, p. 66.

[165] Oppenheim, *International Law*, p. 292.

territorium nullius; it was irrelevant that Aboriginal peoples had occupied the continent for many thousands of years.[166]

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. If the natives belonged to what positivists regarded as an uncivilized and yet organised polity, however, European powers would have to assert title through some other means such as conquest or cession.[167] 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.

Complying with the standard of civilization

Certain states, such as Japan and Siam, succeeded in retaining their nominal independence. For such states, acceptance into the family of nations could occur only 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 pre-supposed 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.[168] The development of this framework appears to correspond with the changing nature of European penetration of the non-European world and the legal regimes which had been devised to accommodate 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,

[166] See Lindley, *The Acquisition and Government*, pp. 40–41.

[167] For discussion of the various ways in which title could be obtained over territories occupied by primitive peoples, see Westlake, *Chapters on the Principles of International Law*, pp. 155–166. British acquisition of title over India presented a different set of problems by virtue of the existence of what was posited as a complex political system there. See *ibid*., p. 191.

[168] See Westlake, *Chapters on the Principles of International Law*, pp. 102–103, 141–142.

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 (1842) 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 Europeans 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:

> 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.[169]

Westlake argued that the 'Asiatic Empires' were capable of meeting this standard, provided that the 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 to merely 'take account' of such Asiatic societies rather than accept them as members of the family of nations.[170] 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. Non-European states were thus forced to sign treaties of capitulation which gave European powers extra-territorial jurisdiction over the activities of their own citizens in these non-European states.[171] 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.[172] Capitulations were a part of the unequal treaty regime imposed on these states and generally comprised one part of a treaty which usually granted rights to trade and rights to establish residences,

[169] *Ibid*., p. 141. [170] See *ibid*., p. 142.

[171] See Oppenheim, *International Law*, p. 395; this jurisdiction was exercised by European consuls in the non-European states; these 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'. *Ibid*., p. 497.

[172] See Anand, *New States*, pp. 21–23; Tieya, 'International Law in China', p. 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 nineteenth century. See Alexandrowicz, *An Introduction*, p. 97.

for example.[173] 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 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.[174] In the domestic sphere, then, the non-European state was required to guarantee basic rights – relating to dignity, property, freedom of travel, commerce and religion, and it had to possess a court system which comprised codes, published laws and legal guarantees.[175] 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.[176]

While positivist jurisprudence insisted that states were formally equal and that they 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

[173] See Gong, *Standard of 'Civilization'*, p. 211, citing the Treaty of Friendship and Commerce Between Her Majesty and the Kings of Siam, 18 April 1855 (the Bowring Treaty).

[174] 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, *Standard of 'Civilization'*, p. 29.

[175] See *ibid*., pp. 14–15. Gong provides a clear and useful summary, taken from various texts, of what the standard of civilization required.

[176] Oppenheim, *International* Law, p. 178.

because it was only if the non-European states had adopted Western forms of political organization that they were accepted into the system. Basically, then, the actions non-European states had to take to enter into the system negated the rights which they were supposed formally to enjoy upon admittance.

Protectorates

Towards the latter part of the nineteenth century, protectorates were a common technique by which European states exercised extensive control over non-European states while not officially assuming sovereignty over those states.[177] Although used to regulate relations within Europe itself, the protectorate device was modified by European states and used in unique ways to further their colonial empires. The protectorate was ostensibly a means of protecting vulnerable states from 'great power politics' by entrusting those very same great powers with the task of looking after the interests of these vulnerable states.[178] Thus the 'protectorate' was essentially a treaty by which uncivilized states placed themselves under the 'protection' of European states. Under this regime, the European state would acquire complete control over the external affairs of the non-European state, and this meant that the non-European state could not communicate with any other European state without the permission of its 'protector'.[179] In theory, then, the non-European states retained their sovereignty over internal affairs. Indeed, a number of disputes heard by the British courts, for example, established and affirmed this proposition.[180]

The distinction between internal and external sovereignty, that protectorates technically established was, however, porous. As Westlake remarks, for example, 'the institution of protectorates over uncivilized nations has given greater freedom to the initial steps towards their

[177] On protectorates in general, see Lindley, *The Acquisition and Government*, pp. 180–206; Oppenheim, *International Law*, pp. 296–298.

[178] See Alexandrowicz, *The European–African Confrontation*, p. 62.

[179] See *ibid*., pp. 62–83. Alexandrowicz defines a protectorate in the following terms:

> The Protectorate means a split of sovereignty and its purpose is to vest in the Protector rights of external sovereignty while leaving rights of internal sovereignty in the protected entity. In this way the Protector shelters another entity against the external hazards of power politics.
>
> (Alexandrowicz, *The European–African Confrontation*, p. 62)

See also Crawford, *The Creation of States*, pp. 187–188.

[180] For example, *Duff Development Co.* v. *Kelentan Govt*. [1924] A.C. 797. See Lindley, *The Acquisition and Government*, pp. 194–200 for a discussion of the status of Malay and Indian protectorates.

acquisition'.[181] 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,[182] or else because the native ruler was incapable, for example, of maintaining 'good government' within the protectorate.[183] 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, were often to be approved of by the protecting power.[184] As Maine points out, regimes such as the protectorate were a complete aberration from 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 of 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.[185]

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

[181] Westlake, *Chapters on the Principles of International Law*, p. 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, *The Acquisition and Government*, p. 182.

[182] See *ibid*., p. 184, discussing the Warsangali Treaty between chiefs of the Warsangali – near the Somali coast – and Britain, whereby 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'.

[183] See Lindley, *The Acquisition and Government*, p. 196.

[184] See *ibid*., p. 200.

[185] Henry Sumner Maine, *International Law: A Series of Lectures Delivered Before the University of Cambridge, 1887* (London: John Murray, 1888), p. 58.

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.[186]

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 of a local ruler, depending on the circumstances. Thus in terms of some issues, the local ruler could be characterized as having capacity to transfer property to the protecting power, for example. In other cases, where the protecting power wished to assert its own power, it could declare that the matter in question was within the protecting power's sphere of authority.[187] In analysing British practice as a protecting state with respect to Indian princely kingdoms, it is asserted that

> There *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.[188]

What is notable is that, at a time when sovereignty was generally regarded as fixed, stable and monolithic,[189] 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, too, as a basis for intervention. In the final analysis, then, the distinction between protectorates and colonies was gradually eroded; the protectorate was a vehicle by which the European power controlled both the internal and external relations of the native

[186] *Ibid*., p. 182.

[187] For the complications which could arise in the context of which rights attributable to sovereignty were being exercised, see *R.* v. *Crewe*, 2 Eng. Rep. 576 (K.B. 1910).

[188] Westlake, *Chapters on the Principles of International Law*, p. 207 (1894), citing William Lee-Warner, *The Protected Princes of India* (London: Macmillan & Co., 1894), pp. 37–40.

[189] For an analysis of this image of nineteenth-century sovereignty see Kennedy, 'International Law', p. 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.'

state.[190] As in the case of Vitorian jurisprudence, intervention was endorsed by a number of techniques, by the powerful invocation of disorder and lawlessness which necessitated the imposition of order which could take place only through conquest posited as unwillingly undertaken. 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 of the uses of 'informal Empire' and the realization that an important distinction could be made between economic and political control.[191] While it was desirable to exploit the raw materials of Asian and African countries and develop new markets there, this was achieved, where possible, without assuming political control over the territory and with it all the costs and problems of managing a colony. Seen from this perspective, the ideal situation was one in which economic control could be exercised over a non-European state which was nominally, at least, 'sovereign'. As a legal instrument, the protectorate arrangement was ideally suited for the implementation of such a policy.[192]

The Berlin Conference of 1884–1885

Introduction

Given the conceptual inadequacies of the positivist framework for dealing with the colonial encounter, the positivist validation of the use of force, and the intense competition among European states for colonies, it was hardly surprising that international law contributed very little towards the effective management of the colonial scramble. The tensions arising from the scramble were such that the European powers held the Berlin Conference of 1884–5 to try and resolve matters. Here, diplomacy and the traditional balance of power politics combined with

[190] 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, *The Acquisition and Government*, p. 182.

[191] See John Gallagher and Ronald Robinson, 'The Imperialism of Free Trade' (1953) 6 *The Economic History Review* 1–15. For a discussion of the role of informal empire in the broad context of the imperial project see Michael W. Doyle, *Empires* (Ithaca, NY: Cornell University Press, 1986).

[192] 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 which enabled economic expansion.

international law, as the imperial powers of Europe attempted to create a legal and political framework, to ensure that colonial expansion in the Congo Basin took place in an orderly way which minimised tensions among the three most powerful European states at the time, England, France and Germany. This part of the chapter focuses on the legal attempts to define and domesticate the native and place him securely within the authoritative framework of positivist jurisprudence, together with the related theme of the complex ways in which law and politics intersected in the grand project of colonial management.

African peoples played no part at all in these deliberations. As U. O. Umozurike points out, 'The most irrelevant factor in deciding the fate of the continent was the Africans themselves who were neither consulted nor apprised of the conference',[193] a conference which determined in important ways the future of the continent and which continues to have a profound influence on the politics of contemporary Africa.[194] 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 to cede it by treaty: as a consequence, any claims to sovereignty based on such treaties were invalid.[195] This proposition may have been advanced not only for reasons of theoretical consistency, but in order to preclude the rampant abuse by European adventurers of the treaty mechanism by which they claimed 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.[196] The Berlin Conference[197] was a unique event, furthermore, as it was the first occasion on which European states[198] sought as a body to address the

[193] U. O. Umozurike, *International Law and Colonialism in Africa* (Enugu, Nigeria: Nwamife Publishers, 1979), p. 26. See also Elias, *Africa*, pp. 18–34.

[194] See Makau wa Mutua, 'Why Redraw the Map of Africa?: A Moral and Legal Inquiry', (1995) 16 *Michigan Journal of International Law* 1113–1176.

[195] See Oppenheim, *International Law*, pp. 285–286 for the general proposition that cessions of territory by native tribes made to States fall outside the Law of Nations; for the application of the doctrine to Africa specifically, see Westlake, *Chapters on the Principles of International Law*, pp. 149–155.

[196] See Westlake, *Chapters on the Principles of International Law*, p. 154.

[197] See Crowe, *The Berlin West African Conference*, pp. 158–159; Mutua, 'Why Redraw the Map', pp. 1126–1134.

[198] The instrument which emerged from the Conference was the General Act of the Conference of Berlin Concerning the Congo, Signed at Berlin, 26, 1885, Official Documents, *American Journal of International Law* 7. France and Germany first developed the idea of holding the Conference; invitations were issued in three stages,

'colonial problem'. Although concerned with the division of Africa, the conference's deliberations 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 conference's major projects.

Partitioning and managing Africa

Trade was the central preoccupation of the conference, which focused on issues of free trade in the Congo basin,[199] and free navigation of the Congo and Niger Rivers.[200] In discussing these issues, the implicit failure of international law to devise a coherent framework for regulating the European–African encounter became evident. 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 even adventurers such as Henry Morton Stanley[201] could enter into 'treaties' which, they claimed, provided them with rights, if not actual sovereignty, over vast areas of land. The Berlin Conference, in addition to focusing on trade issues, thus sought to create a unified system by which claims could be asserted and recognised.

The underlying and crucial issue in this debate was the issue of the legal personality of African tribes. Despite the objections of jurists such as Westlake,[202] treaties with African tribes were the basis on which claims were made to African territory. This raised the familiar and by now apparently insurmountable problem of deciding the capacity of the African entity and the status of that entity within the overall political structure of the tribe.

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, *The Berlin West African Conference*, pp. 220–221.

199 See *ibid*., pp. 105–118.

200 See Article 3 of the General Act.

201 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 which 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, *The Acquisition and Government*, p. 112; Crowe, *The Berlin West African Conference*, pp. 158–160.

202 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, *Chapters on the Principles of International Law*, pp. 144–146.

An alternative proposal was made by the American representative to the Berlin Conference, Mr Kasson, who argued that:

> Modern 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 title. 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.[203]

Kasson's proposal was greeted cautiously, and the conference 'hesitated to express an opinion' on such a delicate matter;[204] scholarly opinion was divided as to whether Kasson's proposal, even though not officially accepted, nevertheless reflected the practice of states.[205] On the one hand, Kasson's proposal would have severely and unacceptably curtailed colonial powers if indeed the principle had been implemented in such a way as to require scrupulous evidence of proper consent.[206] On the other hand, absent such an inquiry into the validity of the ostensible consent, the proposal simply offered a justification for entering into more treaties with African states, claiming that such treaties conformed with the scheme outlined by Kasson.

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?[207]

There is more than a suggestion in Westlake, furthermore, that the individuals characterized as 'African chiefs' in these treaties exploited all these confusions for their own purposes.[208]

Overall, therefore, no clear procedure for acquiring valid title was laid down by the conference. This same vagueness afflicted the conference's attempt to clarify the issue of 'effective occupation'. The conference

[203] Cited in Westlake, *Chapters on the Principles of International Law*, p. 138. On Kasson's contribution to the Conference see Crowe, *The Berlin West African Conference*, pp. 97–98.
[204] See Westlake, *Chapters on the Principles of International Law*, p. 138.
[205] See Crawford, *The Creation of States*, p. 179.
[206] See Westlake, *Chapters on the Principles of International Law*, p. 139.
[207] *Ibid*., pp. 139–140.
[208] See Westlake, *Chapters on the Principles of International Law*, pp. 139–140.

basically stipulated that any party taking possession of a tract of land in Africa was required to notify all other members of this possession[209] and, further, was required to exercise its authority in its possessions in such a way as to protect existing rights within the territory.[210] 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, as Britain, which had the largest interests in Africa, opposed all efforts to impose greater responsibility on the colonizing powers.[211] 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 proceduralise the matter by requiring states acquiring territorial interests to notify other signatories of their claims, to enable these states to lodge any objections.[212] No clarity existed as to how such claims were to be resolved, or in what forum.

This unsatisfactory resolution represented a fundamental irony for positivist jurisprudence. Positivists had sought at numerous levels of their jurisprudence to erase the problematic native from their scheme; the native was expelled from the realm of the family of nations and excised from history by positivist disregard for the four preceding centuries of diplomatic relations, and excluded from the process of treaty making. Native resistance and opposition were silenced by the positivist practice of reading a treaty with no regard to the violence and coercion which led to its formation. Despite all such attempts to exclude the African 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 which 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

[209] See Chapter VI, Article 34 of the General Act. For discussion as to the problem of effective occupation see Crowe, *The Berlin West African Conference*, pp. 176–191.

[210] Article 35 of the General Act.

[211] See Crowe, *The Berlin West African Conference*, pp. 176–191. 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.

[212] The term used in the Act is 'reclamations' rather than protest. Article 34 of the General Act.

the conference may also be written, however, from another perspective which focuses on the complex way in which the identity of the African was an enduring and irresolvable problem that haunted the conference's proceedings.

The existence of unassimilability, and the problems of native identity and their effect in bringing to crisis the colonial will to power, may well be worth identifying and celebrating; but 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 which followed for African societies.

Although Kasson's approach was attacked and criticized, subsequent practice suggests that to that extent that *any* remotely legal explanation could be given to the partition of Africa, it was based on his proposal.[213] Seen in this perspective, which 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 will of the relevant party, was instead created in accordance with the exigencies of the situation. What resulted, in effect, was a system of treaty making in which ideas of 'consent' acquired a peculiar and completely distorted form. Consent, of course, was the basis of positivist jurisprudence, and the science of jurisprudence, authorities such as Oppenheim argued, consisted precisely in determining whether such consent had led to the formation of certain rules, which would then be binding on the state which had so consented. 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. However, with regard to native consent, a very different set of issues arose. Here, consent was created by the jurist; agency was created by the writer, as African chiefs, Indian princes and Chinese Emperors, were ascribed powers to consent to various measures which benefited the European powers. They were excluded from personality; when granted personality, this was in order to enable the formulation of a consistent jurisprudential system or else to transfer the entitlement which the Europeans sought. Having articulated a legal framework for acquiring sovereignty over African territory which was radically disconnected from the actual practice[214] on which they purported to base their system, positivists,

[213] See Crawford, *The Creation of States*, pp. 178–179 and sources cited therein, which include Lugard.

[214] See Crawford, *The Creation of States*.

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.

Justifying colonialism: trade, humanitarianism and the civilizing mission[215]

The Berlin Conference was perhaps the first occasion on which Europe as a body went some way towards articulating a philosophy of colonialism which was appropriate for the late nineteenth century, a time in which the colonial project entered 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 led not only to intense inter-state rivalries but the increasing importance of the colonies for the metropolitan economy. The idea of the civilizing mission, of extending Empire for the higher purpose of educating and rescuing the barbarian, had a very ancient lineage.[216] Versions of the civilizing mission were used by all the actors who participated in imperial expansion. New challenges were posed to the way in which imperial states conceived of themselves and their colonies once, for example, the United Kingdom dissolved the East India Company and assumed direct responsibility towards its Indian subjects.[217]

The humanitarian treatment of inferior and subject peoples was thus one of the issues addressed by the conference. Over the previous century or so, the slave trade had been gradually abolished by international law. The conference, however, while reiterating the necessity to stamp out

[215] '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 at it too much. What redeems it is the idea only. An idea at the back of it.' Joseph Conrad, *Heart of Darkness* (Edinburgh: W. Blackwood & Sons, 1902).

[216] See Pagden's study of how the modern European Empires modelled themselves on the Roman Empire, and the Roman idea of what may be termed the 'civilizing mission'. Anthony Pagden, *Lords of All the World: Ideologies of Empire in Spain, Britain and France c. 1500–c.1800* (New Haven: Yale University Press, 1995). See especially his discussion of Cicero's version of the 'civilizing mission', *ibid*., pp. 22–23.

[217] This led Queen Victoria to declare that the Crown was as responsible towards its native Indian subjects as it was to all its other subjects. See Quincy Wright, *Mandates Under the League of Nations* (Chicago: University of Chicago Press, 1930), p. 11, n. 18.

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 the pale of civilization by opening up the interior of the continent to commerce'.[218] The British representative made similar remarks, warning of the dangers of completely unregulated trade and arguing for that type of trade which would 'confer the advantages of civilization on the natives'.[219] The conference concluded that it had properly embodied these concerns in Article 6, which read in part:

> All the Powers exercising sovereign rights or influence in the aforesaid territories [the conventional Basin of the Congo] bind themselves to watch over the preservation of the native tribes, and to care for the improvement of the conditions of their moral and material well-being, and to help in suppressing slavery and especially the Slave Trade.[220]

These vaguely expressed concerns were only sporadically implemented;[221] indeed, the most notable achievement of the conference was the creation of the Congo Free State, which was subsequently recognised as belonging to the personal sovereignty of King Leopold II of the Belgians and which was the scene of mass atrocities.[222] 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 programme. 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.

[218] Quoted in Lindley, *The Acquisition and Government*, p. 332.
[219] *Ibid*. [220] Article 6 of the General Act.
[221] Crowe, for example, asserts quite forcefully that humanitarian issues played only a very small role in the Conference. See Crowe, *The Berlin West African Conference*, pp. 3, 103–04.
[222] See Lindley, *The Acquisition and Government*, pp. 112–113. Adam Hochschild, *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* (Boston: Houghton, Mifflin, 1999).

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 adequately 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. In terms of my overall argument, this manoeuvre is crucial for the purposes of obscuring the understanding of society's operational role as a mechanism by which cultural assessments can 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 to the very structure of the positivist legal system. Lorimer points to this in arguing that 'Recognition, in its various phases, constitutes the premise of the positive law of nations when stated as a logical system'.[223] The link between positivism and recognition may be traced both historically[224] and logically. In logical terms, Lorimer's assertion appears correct, in that the positivist emphasis on the sovereign as being the fundamental basis of international law suggests that it is only the phenomena which the sovereign recognize that become part of the legal universe. Recognition doctrine is implicitly based on the assumption of the existence of a properly constituted sovereign. Only those principles which are created and accepted by sovereigns constitute law, only those entities which are granted legal personality by the sovereign exists within the legal universe. Once established, the sovereign becomes the prism, the gaze, which reconstitutes the legal universe. What this view of recognition doctrine conceals, however, is the complex process by which the sovereign is constituted in the first place.

[223] Lorimer, *The Institutes of the Law of Nations*, p. 3. Indeed, Lorimer commences his work by stating that the Law of Nations is divided into three leading doctrines: (1) The doctrine of recognition; (2) The doctrine of normal relations that result from the doctrine of recognition; (3) The doctrine of the abnormal relations that result from the doctrine of recognition. *Ibid*.

[224] For an account of the beginnings of the doctrine of recognition in the eighteenth and early nineteenth centuries and how this corresponded with the emergence of positivism, see Alexandrowicz, 'The Theory of Recognition', p. 176.

The origins of sovereignty have always constituted a major problem for the discipline, as suggested by contemporary debates about the right of self-determination, for example. Within the framework of the colonial encounter, however, it is possible to trace how a very self-conscious effort was made to constitute sovereignty in ways that were explicitly racialised. Austin argued that law was the command of the sovereign. Positivists focused on sovereignty, but at least with respect to the European–non-European distinction, the powerful and defining idea that sovereignty was the exclusive preserve of Europe was enabled by an elaboration of the concept of 'society'. Law properly prevailed only among the members of society. Consequently, for the positivists, the concept of law was intimately connected with the concept of society, rather than that of sovereignty as outlined by Austin.[225] The concept of society is crucial to the positivist scheme because it enables a distinction to be made between different types of states; the effect of the distinction is to exclude non-European states from the family of nations and hence from the realm of sovereignty itself.[226] Seen in this way, the constitution of sovereignty depended on the elaborations which 'society doctrine' alone could develop. This reliance on the concept of society to establish sovereignty seems somewhat at odds with the claim that sovereignty is the core and essential principle of international law, and that everything within the system derives from sovereignty.

The sovereign European state was established through reliance on the concept of society. Once constituted, however, the sovereign asserts supremacy by presenting itself as the means by which society operates and comes into being. It is through recognition doctrine that 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 the doctrine because the power to 'recognise' new

[225] See Hall, *A Treatise on International Law*, p. 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 recognized by countries differently civilized, such states can only be presumed to be subject to it as 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.'

[226] Crawford summarizes the situation in the nineteenth century as: 'States 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, *The Creation of States*, p. 13.

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 may be presumed, positivist jurisprudence acquires some semblance of consistency. Once a particular group of states wins the title of 'sovereign', 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 an inquiry 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, about 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 partially grant. 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 discrimination, set about establishing and presiding over a system of authority by which they could develop the powers to determine who is and is 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 comes into being.

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

Reconceptualizing sovereignty

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.