International Law, the Civilizing Mission and the Ambivalence of Development in Africa: Conceptual Underpinnings

Amin G. Forji*

Introduction

International law, past and present has had to constantly wrestle with striking a balancing act between legality and imperialism. Following the Agrarian and Industrial revolutions, European\(^1\) economies increasingly witnessed profound boosts in productivity and net output beginning from the 17th century. By the start of the 19th century when explorations and discoveries were the currency of the day, European powers increasingly saw the acquisition of Africa as crucial to satisfy its economic imperatives namely: reinforcing home industries and instituting a market for finished products. While professing liberal moralism, European encroachment into Africa became suddenly exemplified with a turn from informal to formal empire.\(^2\) As Europeans penetrated deep into Africa, there also arose a need to develop a body of rules to govern their relations. The eventual encounter with African indigenous peoples\(^3\) sparked many complications for international lawyers at the level of international relations. How was international

---

* Doctoral Candidate in International Law, Department of Public Law, University of Helsinki. Author can be contacted at: amin.forji@helsinki.fi or amingeorges@yahoo.co.uk

\(^1\) The term “Europe” in this work except where specified otherwise will be limited to the great European powers that colonized Africa. While I do recognize that colonialism and imperialism are not always one and the same, in this work I would nevertheless exceptionally used them interchangeably. Imperialism for the purpose of this work denotes to the domination and imposition of one’s own legal and economic systems on other polities. See E. Jouannet, Universalism and Imperialism: The True-False Paradox of International Law?, 18 The European Journal of International Law, (2007), 382.


\(^3\) I will also used such terms as “native”, “other”, “primitive”, “uncivilized”, “backward”, “savage”, “Indigenous”, “barbarian”, etc (without necessarily having them in quotes) mainly to highlight their historical usage.
law going to qualify the colonization of the African continent by European invaders? Where was the moral boundary of subjugation in relation to international law? What standard was this moral boundary going to be based on?

With the inauguration of *Revue de Droit International et de législation Compare* in 1868 as the first ever professional International Law journal, the discipline instantly assumed a new professional self-awareness especially in advocating for liberal reforms. The Belgian jurist, Gustave Rolin-Jaquemyns in its inaugural manifesto propounded *l'esprit d'internationalité*, which recognized common universal principles and the superior unity of the great human society. This invocation paved the way for internationalist thinking and doctrine, which as I will illustrate later cemented the groundwork for European colonization, based on the idea of a duty to civilize and enlighten the “dark” continent of Africa.

This work will examine the historical analysis of the relationship between the European encounter with Africa and the civilizing mission narrative, with highlights on the logic of economic development as the driving force of the project. In fact, international law has not just been at the epicenter but deeply intertwined with the development project. With the 19th century as my starting point, I will draw on the legal mindset of the era (positivism) as well as contemporary scholarships to illustrate the constant contradictory tendencies of promise (economic development) and peril (exploitation) by international law and how the framing of development initiatives for Africa by the discipline has come with a lot of baggage. What has been the impact of positivism on Africa with respect to economic development? The invocation of development whether implicitly or expressly has often been all encompassing. My contention is that international law and economic development must be seen in their true character—not only are they related, they are inseparable and function within common parameters.

International law is without doubt a product of European genius. It has functioned as an indispensible tool to spread European values to the rest of the world while at the same time affirming a universal tone. However, as some scholars have rightly observed, international law is not an abstract entity nor does it function in a vacuum. It has its roots in

---


[JAIL, Volume 6, Number 1, 2013]
1. Background: Encounter, Development Metaphor and the Framing of the “Other”

Understanding the history of the colonial encounter between Europe and Africa is crucial in grasping why the logic of development whether

human nature itself. Thus what is “international” is often the voice of a particular speaking as universal. The voice of the civilized has the trend of serving as a universal standard. Nineteenth century legal doctrine placed much emphasis on economic development framed in terms of material and moral progress for the “backward” “uncivilized” non-Europeans, which was then used as the basis to legitimize European colonization in Africa and elsewhere around the globe.

For the sake of specificity, I would mostly restrict my arguments to the operation of the mission on the African continent (Sub-Saharan Africa). Some of the questions which I would attempt to address include how international law defined Africa in the 19th century and how that vocabulary is relevant today. What is the connection between international law and colonization, especially what are the legal results of using the standard of civilization as the trendsetter of international law and consequently development? Moreover, in what ways did (has) this vocabulary as a “standard” buttressed the subordination and exploitation of Africa by the West and international institutions in the name of development? While there has recently been some excellent scholarship on the colonial history of international law, most of it has centered on the cultural differentiation arguments vindicating the civilizing mission. This work will try to examine the economic component of the project with special focus on the operation of the development narrative in Africa.

---

expressly or impliedly was at the epicenter of the civilizing mission. Colonialism has in fact been qualified as Europe’s first gift of science to the rest of the world. In the 19th century, Africa without doubt presented itself as a perfect laboratory for such an experiment. European intellectuals were quick to adopt an unqualified premise that Africa had no history of its own, and even if there was any, it was either redundant, of little relevance to the modern world or nothing to take home—a strong supposition that nothing happened there in its “prehistory.”

Beside oral testimonies, historical accounts of life in Africa before the arrival of the Europeans were at best scanty. It is alleged that historians were arguably not greatly interested. Those who expressed concern more often than not perpetuated the sense that the history of Africa was the history of white activity there. African customs and traditions were nothing more than a mere curiosity. It is the European actions that were of importance and relevance.

Tales of explorers striding the dangerous jungles and deserts of Africa aroused enormous interests in the European metropolitan reading public. As the interests over these men and their activities augmented, a corpus of both real and fictional heroes – missionaries, explorers, traders, early officials, lawyers, etc – quickly began to emerge. This includes the likes of James Bruce, Mungo Park, David Livingstone and Henry Stanley. They reflected the best of Europe; exemplars of brave men to emulate; exemplars of goodness and a clear manifestation of what greatness could achieve. Their findings and reports about the African landscapes and natives were crucial in establishing a determinate perception of non Europeans in general and Africans in particular. These reports not only largely corroborated existing myths but told of a state of emergency – a human race in urgent need of human and economic development. They told of a dark continent inhabited by tribal people or natives, whose lifestyles and

---

10 Singh, supra, note 8, 56.
13 Prior, ibid., 12.
14 Prior, ibid., 1.
customs were savage, barbaric, blood-thirsty, uncivilized, a throwback and thus potentially dangerous. The continent was also said to be devoid of law in general and international law in particular. This was in direct contradistinction with the glorification of European activities that were sarcastically construed as unyieldingly positive and “unremittingly good” despite considerable evidence to the contrary that the era was not exactly an age of reason.

By declaring that Africa had no history prior to direct contact with Europe, the advocates of this construction were in retrospect laying a crucial caveat thus: Africans having made no history of their own, clearly had no development of their own. “Therefore, they were not properly human, and could not be left to themselves, but must be led towards civilization by other peoples. That is, by the peoples of Europe…” The above depiction no doubt carries a crucial significance. Not only does it postulate a rejection of African political, economic and cultural institutions but most importantly a strong indication of “moral” pro-activism – a “humanitarian” objective to rescue primitive peoples of Africa, and lead them towards modernity hence development. There was therefore a justified sense of imperial mission or “civilizing mission” as the colonizers themselves preferred to term it. Put differently, there was a felt responsibility, duty of care or philanthropic moral conscientiousness to give something (civilization)—call it development to the lost peoples of Africa; which in itself presupposed that there was no existing institution better placed to alter Africa for the better than European powers.

International law in the 19th century in essence defined Africa as economically backward by contrasting it with modernity that incarnated modernity and progress. The dynamic of differentiation emphasizing the different developmental levels between Europe and Africa was articulated around various cultural, socio-political and economic constructions. Unlike the primitive Africans, Europeans were profoundly schooled in arts and science, and this clearly manifested in their drive for progress. The agrarian and industrial revolutions which were vivid testimonies of progress clearly elevated European societies

---

15 Levitt, supra, note 11, 1; Prior, ibid., 2-3.
above all others in the mastery of the material world.\textsuperscript{19} I would examine the varying logics prophesying the economic backwardness of Africa in various sections of this work.

A sharp cultural distinction drawn between the civilized Europeans and primitive or savage Africans was crucial in underlining the economic imperativeness of the civilizing mission. It was a monologue which projected “the other” as anything but alien. The encounter with Africa was an encounter with a primitivism given that Africa had been left behind in a throwback stage of human development. It was an encounter between a sovereign who could do as it pleased and a backward polity that was lacking in sovereignty, hence also lacking in rights by analogy. The continent had little or no semblance with a civilized identity whether in geopolitical, socio-economic or environmental outlooks.\textsuperscript{20} Not only were the inhabitants of the “dark” continent depicted as primitive, their entire land needed thorough economic development to make it more habitable for humankind. Unlike temperate Europe or the western world that was free from diseases, fertile and productive, the African tropics were grossly dangerous—its nature widely infested by pests and disease, coupled with the barbaric activities of African natives.\textsuperscript{21}

The Law of Nations being an expression of European consciousness could not be logically applied to non-European or non-Christian nations. Henry Wheaton was clear and unambiguous about this in 1836, when he observed that there is no universal Law of Nations “which all mankind of all nations, ancient and modern, savage and civilized, Christian and pagan, have recognized or in practice…”\textsuperscript{22} While the international law of civilized Christian nations of Europe and America, is one thing, he contended, “that which governs the intercourse of the Mohamedan nations of the East with each other, and with Christians, is another and a


very different thing.” Christianity as well as other highlights of cultural differentiation (wide development gap) propelled Europeans to see themselves as categorically superior to the “others.” Driven by such a mindset, the belief of superiority inevitably became a prejudice, standing in the way of clearly understanding the “others,” thus preventing the Europeans from engaging them as equals. As Tzvetan Todorov—the Franco-Bulgarian philosopher bluntly framed it, Europeans could not adequately understand the “others” because they tended to see more of their own identity each time they evoked the standard of civilization. Robert Phillimore stated in his 1879 thesis that international comity, like international law:

“can only exist in the lowest degree amongst independent states; in its next degree amongst independent civilized states, and in its highest degree amongst independent Christian states.”

Colonialism thus came with a completely new set of challenges, especially with regard to framing and regulating relations with the non-European peoples, already qualified as uncivilized. International lawyers were quick to find solutions to the looming questions. A group of liberal thinkers led by Gustave Rolin-Jaequemyns (1885-1902), Tobias Michael Carel Asser (1838-1913) and John Westlake (1828-1913) in 1868, published the first international law journal - *Revue de Droit International et de Législation Comparée*, as a professional forum for liberal legislative reform in Europe. In response to the inhumane conduct of the Franco-Prussian war of 1870-71, these thinkers began working on a charter with Jean Gaspar Bluntschli (1808-1881) and eight other men for what in 1873 became the *Institut de droit international* in Ghent, becoming the first

---

professional association of international lawyers. Its primary goal was to function as “the scientific organ for the common legal consciousness of the civilized world.” 28 The innovation here was the conception of international law as an expression of popular consciousness, and its eventual extension beyond Europe - in contradistinction to earlier attempts to restrict the realm of international law to Europe and the Christian world.29

True to their progressive mindset, 19th century international lawyers certified two separate regimes: one, governing relations amongst European sovereigns (or members of the family of nations) under formal equality, and the other, governing relations between European sovereigns with uncivilized non-Europeans under inequality, granting privileges to the former.30 This doctrine used in erecting these boundaries was dubbed the “standard of civilization,” and was interpreted to legally determine those that belonged to the family of nations from those that did not.31 Any nation that failed to meet it was by definition uncivilized.32 A non-civilized polity could be admitted into the sovereign family of nations only if other sovereign nations had effectively and clearly recognized it as meeting the civilization standard (the doctrine of recognition) — a clear indicator that the international community was to be strictly restricted to civilized nations who in fact had all achieved a particular level of economic development. Nevertheless, many questions remained unanswered. For instance, who or what decides what “civilization” meant? What were the legal results of using the standard of civilization as the trendsetter of international law and consequently development? Moreover, in what ways did (has) this vocabulary as a “standard” buttressed the exploitation of the colonies by the colonizers in the name of development?33

28 Koskenniemi, supra, note 4, 42; M. Koskenniemi, International Law in Europe: Between Tradition and Renewal, 16 European Journal of International Law, (2005), 113-124, 120. Article 1 of the Institute’s statute conceives the association as the “Juridical conscience of the civilized world.”
29 Koskenniemi, supra, note 4, 49; Gozzi, supra, note 26, 354.
31 Gong, supra, note 9, 3.
32 Ibid., 3-5.
33 Moses, supra, note 8, 3; Singh, supra, note 8, 73, 74, & 77.
2. **Advanced versus Backward, Standard of civilization and the Progress Metaphor**

During the second half of the 19th century when European powers annexed and formulated policies for Africa, jurists and theologians far from being observers were both actors and defenders of the subject matter. Just like European public lawyers of the preceding centuries (Francisco de Vitoria (1492-1546), Hugo Grotius (1583-1645), Samuel von Pufendorf (1632-1694), Emmerich Von Vattel (1714-1767), Bartolomé de las Casas (1484-1566), et al) who all advanced juridical justifications for the annexation of The Americas, 19th century international lawyers especially through the *Institut de Droit International* also afforded the legal basis for colonization by attaching endless focus on the cultural differences between Europeans and the “other”—framed as a distinction between civilization and barbarism. Their pronouncements were particularly relevant in explaining imperial actions and events, thereby legitimating the nature and function of moral humanitarianism behind the civilizing mission discourse. In an earlier pronouncement, an influential theologian, the Reverend Frederick Farrar famously asserted that lowly peoples had “not added one iota to the knowledge, the arts, the sciences, the manufactures, [and] the morals of the world.”

While Africans were commonly described as primitive and backward, Europeans on the other hand were seen to be scientific, innovative, civilized, etc—attributes which by implication certified that they were advanced beings, hence superior to their colonized subjects. European civilization was essentially characterized by two broad attributes to wit: individualism and rationality—the two moved hand-in-hand. While individualism enabled material progress, rationality on the other hand was the underpinning for scientific progress. The elevation of the Europeans naturally presupposed the denigrating and dehumanizing of the “other.” They were habitually defined by negatives—their economy was trapped at primitive levels of productivity, they lacked individuality, rationality, innovation and the

---


power of reasoning, which were all tools for progress. In fact, they were deficient in all positive virtues of social and political order. The civilizing mission being a moral crusade naturally necessitates a protagonist who is more superior and advanced in reasoning, thinking and material understanding of the world.37

The 19th century was heavily punctuated by “Aryan” pride, depicting the grandeur of European civilization. This was the case for example with the ideological movement which emerged around 1870 in England and USA known as Social Darwinism, claiming a mastery in the understanding of primitive societies. Led by Herbert Spencer (1820-1903), Thomas Henry Huxley (1825-1895) and Francis Galton (1822-1911), the school fostered the concept of “survival of the fittest” as a solution to primitive societies; which essentially implied that the Caucasian race was superior to all others both biologically and in terms of human development, and were thus destined to rule over inferior peoples who might be impervious to progress.38 Such writings provided an influential ideological backbone for international lawyers to postulate a wide gap between the material development of Europeans and the colonized territories which was both empirically verifiable and physically obvious.

With the development gap having been drawn, European intervention in Africa was given a legal meaning, justified as vital to foster economic prosperity and growth, framed in terms of moral humanitarianism—a mandate for the advanced to rule the backward peoples and assist them to advance. It was an articulation of universalism premised on the narrative of progress.39 Humanity was thus progressing or bound to progress as a result of the civilizing mission. The fundamental distinction between the civilized and the primitive or the advanced and the backward was thus an enabler for the colonizers to articulate various areas of human endeavour that the non-

37 Alam, ibid., 2-3.
39 J. Pitts, “Boundaries of Victorian International Law,” in D. Bell (Ed.), Victorian Visions of Global Order, (2007), 70. The French statesman, Jules Ferry echoed similar sentiments in 1884 during a speech at the French Chamber of Deputies, maintaining that superior races had both a right over inferior races and a duty to civilize them.
European societies in general and Africa in particular lacked behind as well as propound a way out of their backwardness and economic stagnation.

The idea of an international society or l’esprit d’internationalité which recognized the existence of common principles and the “superior unity of the great human society”40 became the basis for rallying behind the colonial conquest. The logic of progress and the promise of transforming backward peoples and societies towards modernity made international law particularly appealing and attractive. The British philosopher, John Stuart Mill was one of the first scholars to postulate a nexus between civilization and progress, stating that the 19th century was “pre-eminently the era of civilization...whether we consider what has already been achieved, or the rapid advances making towards still greater achievements.” This assertion fits neatly with another made by Georg Schwarzenberger, the British International Lawyer who in 1955 stated that the nexus between [progress] civilization and international law is a basic question of international law.41

By presenting themselves as the juridical conscience of the civilized world, international lawyers at the Institut de Droit International ultimately assumed the role of an absent international legislature that incarnated humanity’s conscience. As representatives of European sensibilities, they assumed a mandate to define international legal thought based on a shared legal consciousness (esprit d’internationalité), while envisaging Europe’s contribution to the backward world in political, economic and social contexts.42 L’esprit d’internationalité was by all intent and purposes a humanistic construct founded on aggressive altruism—a challenge to take up the so-called “White Man’s Burden” based on the theory of tutelage over backward peoples. For international lawyers such as August Von Blumerincq and Rolin-Jaquemyns, colonization was essentially a fulfillment of historical inevitability.43 Rolin-Jaquemyns in particular accentuated the existence of what he termed “[a] law of progress”—the obligation for mankind to incessantly follow the path of improvement and development such that each phase

40 Koskenniemi, supra, note 4, 13.
43 Azikiwe, supra, note 2, 290-291; Koskenniemi, supra, note 4, 105.
of history must always be superior to the preceding phases. By the same token, there was an obligation on the part of civilized states and the advanced to impose the benefits of civilization on the backward peoples.

Having settled down on the sharp cultural difference between the civilized Europeans and the uncivilized “others”, international lawyers proceeded to use it as a barometer for drawing the boundaries of the community of states by devising a standard which was later termed the “standard of civilization in international law.” This classical standard in essence was:

“a legal mechanism designed to set the benchmark for the ascent of non-European states to the ranks of the civilized ‘Family of Nations’ and with it, their full recognition under international law.”

This differentiation was critical because it effectively prevented “natives” from eventually invoking any sovereign authority over European incursions. Instead, they were bound to recognize Europe’s jus gentium to encroach upon their territory and develop it.

The encounter between Europe and Africa produced a hierarchical structure between cultures, with international law emerging as the arbiter to mediate the gap by employing the standard of civilization. The


45 B. Bowden, “Globalisation and the Shifting ‘Standard of Civilization’ in International Society,” Refereed paper presented to the Jubilee Conference of the Australasian Political Studies Association, Australian National University, October 2002, 2. Georg Schwarzenberger summarized the standard thus: “The test whether a State was civilised and, thus, entitled to full recognition as an international personality was, as a rule, merely whether its government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners.” [Emphasis added] Schwarzenberger, supra, note 41, 220. See generally, Bowden, Bowden, supra, note 45; as to what constituted the Family of Nations, Hedley Bull propounded that a community (society) of states exists where a group of nations “conscious of common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.” H. Bull, The Anarchical Society: A Study of Order in World Politics, Macmillan, London 1995, 13; cf: Bowden, supra, note 45, 3.
standard was not only a trendsetter for progress but moreover a vector of inclusion or exclusion into the community of nations. It was the bar; for backward cultures or primitive societies could only progress by imitating and becoming more like civilized societies. African societies at the eve of colonial annexation were not just projected as lacking the political institutions and organization necessary for a functional state but moreover as deficient on every conceivable attributes of civilization. Anghie has stated that the most unique thing about the 19th century is that it explicitly adopted the civilizing mission and reflected its goals in its very vocabulary. This view has been concurred by Koskenniemi who has vividly elaborated on some of the key thoughts and themes of 19th century international law practice, to wit: the tension between sovereignty and individualism, economic growth on state power, secularism and most importantly, the belief in progress as a criterion for acceding into the community of states. Articulated along the contours of modernity, advancement, development, emancipation and rights, the civilizing mission essentially boiled down to two broad ideas of progress namely: the view of history as progress and progress as a criterion to belong to the community of nations.

To borrow the wordings of a 1950 European film, Africans were “just backward children” in the eyes of the Europeans. By diligently working towards development, Africa was expected to eventually join the community of nations at such a time that it had sized up with the standard of civilization. Africans like other non-Europeans could only accede to the family of nations by accepting Europe as their master—“but to accept a master was proof that one was not equal.” The boundaries of the community of nations were delimited by different levels of development with western civilization being the barometer. The standard of civilization was a two-edged sword. While professing to lay out a platform for the eventual accession of non-Europeans into the community of nations, the standard crucially functioned to ostracize them at the same time. First it highlighted the differences between the two cultures and then proceeded to devise techniques based on the

---

46 Anghie, supra, note 20, 114; Koskenniemi, supra, note 2, 2.
47 Anghie, ibid., 114; Koskenniemi, ibid., 2.
49 Koskenniemi, supra, note 4, 136.
50 Gong, supra, note 9, 44.
different levels of development to bridge the gap. The differentiation was then used to legally justify countless theories and imperial policies. It was not until two decades after the World War II that most formerly colonized territories were considered to have attained sufficient development levels to join the family of nations.

The overriding consensus amongst 19th century international legal scholars was that it was the duty of the civilized to bring progress and order to the savages beyond Europe, with the standard of civilization seen as the international legal principle necessary to regulate relations between the advanced and the backward peoples. The standard provided a structuring formula for accommodating the “other” into the society of states. The German philosopher, Christian Wolff conceived the civilizing mission as an opportunity to export the benefits of European civilization to non-Europeans—a duty to Europeans to work towards perfection not only of themselves, but moreover the perfection of the backward as well.51

Non-European societies had to become civilized in order to join the society of states. This involved the “other” completely dismantling its customary laws and socio-economic attitudes and then recreating itself in the image of Europe—that is, advocating for mimicry. The colonizers obviously wanted the colonized to become recognizable, almost the same like themselves but not quite. They wanted the colonized to reform but remain different so that the role of the colonizer could be clearly exposed. In other words, they wanted Africa to be altered in the image of progress but to remain different even in its completion stage.52

The civilizing mission was essentially European particularism assuming the guise of universalism, or as Koskenniemi has summed it up—it was an exclusion-inclusion discourse:

“exclusion in terms of a cultural argument about the otherness of the non-European that made it impossible to extend European rights to the native, inclusion in terms of the native’s similarity with the European, the native’s otherness having been erased by a universal

humanitarianism under which international lawyers sought to replace native institutions by European sovereignty.”

3. Sovereignty and Civilization

3.1 After Westphalia: Sovereignty in the 19th Century

Although international lawyers at the Institut de Droit International gave the green lights and badly needed legitimation for colonial injustice, some recent scholarship has tended to insinuate that the complicity was not so intentional. Their overriding goal, these arguments hold, was the exportation of droit publique de l’Europe and the expansion of European civilization into the dark corners of the globe. That is to say their attitudes and pronouncements were grounded more on conscience rather than on conspiracy. This postulation has provoked varying debates both in support and against the submission. As Koskenniemi has remarked, some international lawyers – the likes of Gaston Jèze and Charles Saloman – saw outright hypocrisy where international lawyers of the Institut professed a civilizing mission. Not only was the fervent belief in European superiority shared by all the men of 1873, it was ultimately reflected in their eventual recommendations for the expansion of European sovereignty into Africa and other non-European societies. It is also obvious that their voices tended to follow that of their metropole’s wide ambition in Africa and elsewhere. They were unapologetically supportive of their home country’s conscience juridique.

As afore-noted, 19th century international lawyers postulated a hefty gap in terms of cultural differences, understandably between the civilized or advanced Europeans and the uncivilized or backward others. Next, they devised a series of techniques aimed at bridging this gap, framed in terms of a mission to civilize the uncivilized, liberate them out of their backward state and lead them towards progress.

53 Koskenniemi, supra, note 4, 130.
54 For example, Koskenniemi, ibid., 107-110. This is not to suggest that Koskenniemi necessarily shares the beliefs of the men of 1873. In fact, he has not shied away from lamenting that the history of international law has been marred by “stupidity, unwarranted ambition, careerism and much hypocrisy.” He continues: “But there has also been some political wisdom, and a little courage, times when faith was lost, but also stubborn refusal to admit defeat...” Ibid., 503.
55 Koskenniemi, supra, note 4, 106-107, 116-118, 166; See also, D. Cannadine, Ornamentalism: How the British saw Their Empire, Penguin, London 2002, 139-140.
(development). My contention in this section is that beyond the progress rhetoric, the elaboration of such a sharp cultural distinction was crucial first in legally excluding Africans and other non-Europeans from the realm of sovereignty, as well as giving the concept (sovereignty) an expanded meaning.

There is an underlying consensus that international law is universal. As a multilateral institution, the discipline encompasses a set of doctrines that apply to all states, irrespective of geographical location, specific cultures, religion and/or political organizations. According to Anghie, Fidler and Lindley, the universality of international law is a relatively recent development. The entire mission civilizatrice was fundamentally anchored on a Universalist rhetoric. Nineteenth century jurists and publicists perceived the forcible acquisition of territories in Africa in terms of “Enlightenment Universalism”—that is, an engagement to uplift the inferior peoples of the Dark Continent towards progress.

By Enlightenment Universalism, they were asserting a catalogue of universal values incumbent on humankind—the enjoyment of which was dependent on the levels of civilization. Jurists and publicists of the century importantly contended that the emancipation campaign was going to liberate natives from oppression from their tribal leaders, eradicate slavery, backwardness and disease. The significance of such images as “backward,” “Dark Continent,” “inferior,” “uncivilized,” “disease,” etc cannot be over-emphasized. Once the image of the “other” was validated as backward and wanting, the need for Europeans to civilize and lead them towards progress (development) became all the more transparent with the universalist rhetoric seducing support for the mission as a force for good. International law specifically strengthened the moral argument that the civilizing mission was doing a generous service by putting Africa on a platform of progress. Order, peace and development were the projected goals of the mission. The General Act of the Berlin Conference, 1884 valorized the main objectives of the

civilizing mission as “instructing the natives and bringing home to them the blessings of civilization.”

It is only through colonization in the 19th century that the discipline and its sources became a universal system. As Anghie and others have asserted, international law did not precede the encounter between Europe and Africa. It was rather a product of it. Thus, colonization according to this analysis is central, not peripheral to international law. The assumption that it is only international law that shaped life in the colonies while not incorrect is at best incomplete. The conditions in the colonies were crucial in enabling the discipline assume its global juridical character. International law in general encompasses many colonial themes of the nineteenth century, most notable amongst which is sovereignty as understood since the century and the insistence on civilization as a trendsetter for belonging in the family of nations. Most importantly, all sources of international law contained in article 38 (1) of the ICJ statute are fully connected to the standard of civilization. Article 38 (1) (c) specifically pinpoints “general principles of law recognized by civilized nations” as a source of international law. The unity exhibited by European powers towards one another in Africa was testimony to how far civilization had transformed Europeans and enabled them to completely detach their identity from savagery and backwardness which every man was in bondage to in the throwback age.

The conception of international law as a law of progress naturally inspired the vision to impose civilization on non-Europeans, hence the exportation of droit publique de l’Europe to colonized territories and the universalizing of the discipline. By identifying themselves as the rightful barons to codify the morality of states, European international lawyers were able to determine what eventually constituted objects of universality. It is only through colonization that many of the normative doctrines of the discipline were forged out as an attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.

---

60 See generally, Article 38 (1), Statute of the International Court of Justice (ICJ) of June 26, 1945.
The Peace of Westphalia (1648) which ended the thirty years war in Europe is commonly regarded as signaling the origin of the sovereignty doctrine. The thirty years war was characterized by the struggle for self-determination in identity and government against the hegemonic power of the Holy Roman Empire, with the Westphalian peace – actually two separate treaties, Münster and Osnabrück – resolving the conflict by validating the state system and affirming the full juridical autonomy of every state in managing its own affairs. All states were deemed to enjoy sovereign equality – that is, all sovereign states were conceived as juridical equals to one another – according to a newly formulated caveat that international relations should be driven by balance of power considerations instead of ideals of Christendom.\(^{62}\) Ever since, international lawyers have habitually adhered to the rigid concept of sovereignty: most of them finding it difficult to see past Westphalian sovereignty—even as the concept has evolved over the last two centuries. Conceiving the doctrine as monolithic and absolute in application, scholars generally pay only scanty attention to historical events beyond Westphalia. In fact, Westphalian sovereignty remains synonymous amongst many scholars even for our current system of sovereign states.\(^{63}\)

The sovereignty doctrine has nevertheless come under intense scrutiny from recent scholarships—the likes of Anthony Anghie, Stephen Krasner, Peter Fitzpatrick and Robert Williams Jr. who have fiercely challenged the rigid Westphalian construction as overrated. While not denying that the history of sovereignty is largely one of Westphalian geographical extension, these authors have postulated that sovereignty is nevertheless not solely a Westphalian derivative as it has over time been severely influenced in fundamental ways by European colonial encounters. They have looked beyond Wesphalia, arguing that it is the aggressive expansion of \textit{droit publique de l’Europe} through colonization that provided the basis for the modern conception of the


[JAIL, Volume 6, Number 1, 2013]
Boutros Boutros-Ghali, the former UN Secretary General while echoing the same sentiment and affirming that sovereignty has in fact never been as vibrant as legal scholars seem to suggest, characteristically stated thus:

“It is undeniable that the centuries-old doctrine of absolute and exclusive sovereignty no longer stands, and was in fact never so absolute as it was conceived to be in theory.”

The bottom-line of this critical scholarship is to the effect that Westphalian peace did not just lay down a universal doctrine of state sovereignty but most importantly granted European powers with the monopoly of legal personality. For example, the juridical regulation of war and warfare, the development of law of the sea were not primarily aimed at establishing peace or laissez-faire for all in continental waters, but rather at fortifying European powers or sovereign states with legitimate reasons to wage war and to parade the high seas for colonial expansion and trade.

It is also very telling that 19th century international lawyers were deeply concerned with the legal basis for colonization and the eventual status of colonized subjects. As Anghie has convincingly argued, the civilizing mission, which carefully rested on the ‘dynamic of difference’, was at the forefront of the development of the sovereignty principle in the 19th century. Sovereignty has always rested with the civilized and developed to the exclusion of the uncivilized and backward. Moreover:

“the structure of sovereignty, the identity of sovereignty, no less than the identity of an individual or a people, is formed by its history, its origins in and engagement with the colonial encounter.”

---


67 Anghie, supra, note 20, 4, 56-66, & 312.
As colonization loomed in the 19th century, international lawyers were quick to realize that the non-European world would pose enormous an enormous challenge to the international system, given that they were not at its origin. International law was specific to the community of civilized states from where it originally emanated. How would non-Europeans be governed, and on what basis would their lands be occupied? What is the relationship between civilization and sovereignty? Why could moral principles within international law not be extended to indigenous African peoples? In response to these concerns, they revitalized the classical Westphalian concept of sovereignty which prescribed that states could only be bound by rules to which they have consented. All sovereign countries by virtue of the Westphalian standard enjoyed absolute power over their national territories. Backward non-Europeans - the likes of Africans typically lacked this sovereignty - were excluded from the civilized international society or family of nations and most importantly could thus not decide on their own fate. It was recurrently argued that they lacked reason and self-control and were in some other ways not yet fully human. The only sovereignty at stake even on non-European soils was solely between European (sovereign) rivals.

The development of international law in the 19th century was essentially along the pattern of sovereignty. Using the dynamic of difference, international law established a group that was entitled to benefit from sovereignty (the civilized and developed) and certain others that were to be excluded from its sphere (the uncivilized and backward). It further empowered sovereign powers to dominate and exercise unlimited authority over the excluded groups. Crucial to the morality of the annexation of Africa is the European understanding of the rights of non-European peoples against the civilized peoples of Europe with respect to sovereignty over territory. Plainly put, did Europeans have any rights to occupy and exercise sovereignty over lands inhabited by Africans? To address these concerns, international lawyers adopted the position that common universal principles were going to guide European expansionism, mutual relationships and development in the colonies.


K. Pomeranz, Empire & Civilizing Missions, Past & Present, 134 Daedalus, (2005), 36; Anghie, ibid., 740.

Keal, supra, note 48, 191.

[JAIL, Volume 6, Number 1, 2013]
3.2 The Interplay of Free Trade and Private property

Sovereignty whether in Westphalian or colonial contexts as a general rule always came with the privileges of statehood. A sovereign polity upon joining the family of nations was ultimately bound by certain rights and obligations. For example, it was treated as the equal of all others (sovereign equality), was recognized by all other members of the family of nations (doctrine of recognition), was entitled to non-intervention, and was allowed to fully govern its own affairs. A sovereign polity was also bound with the obligations of guaranteeing basic rights—of life, property, travel, commerce—to both its own peoples and foreigners; it had to have an organized government and capacity for self-defense; had to adhere to international law: in a nutshell, it had to conform to the norms and practices of the civilized international society.71

The invasion of the backward by the advanced was not seen by international lawyers as amounting to trespass; instead it was a humanitarian fulfillment based on economic necessity. This holds well with the cliché that man by nature is a gregarious being—that is, he is migratory. He moves from place to place. While the raison-d’être for such movements by the civilized is presumed to be for the purpose of discovery or economic development; by the primitive it is usually for nomadic reasons as he supposedly just roams to anywhere that nature is kinder to him.72 Such a mindset inspired international lawyers to formulate a doctrine of universal ownership for the civilized or the so-called terra nullius rule. The narrative is not a straightforward-jacket-rule though. When is a territory open for acquisition or barred from annexation? Does the occupation of a land impliedly confer sovereignty on its occupants? Conversely, are original inhabitants precluded from claims to sovereignty once annexed?

In addressing the above questions, I intend to shed some light into the cloud surrounding the ambivalence of the sovereignty logic that 19th century international lawyers legitimated for the backward peoples. A terra nullius land has been defined as:

“a tract of territory…not subject to any sovereignty—either because it has never been so subject to, or, having once been in that condition, has been abandoned—[with the consequence that] the sovereignty over it is opened to

71 Philpott, supra, note 64, 583-584.
72 Azikiwe, supra, note 2, 289.
acquisition by a process analogous to that by which property can be acquired in an ownerless thing.”

Going by the above definition, a terra nullius land corresponded to lands inhabited by the uncivilized—yet to be transformed through economic activities or development. Thus, all territories that were not in the possession of members of the family of nations were by implication terra nullius or territorium nullius. Given that the earth was for occupation and to be used in a civilized way, it follows that all terra nullius lands were subject to universal ownership—that is, the right to develop world resources, the right to exploit the weaker races and the right to civilize backward peoples. Natives presumably wasted the land with their rudimentary cultivation practices and philosophy of communal ownership. The civilizing mission enabled Europeans to regulate land tenure according to property rights as was the practice in Europe. International law had to as a matter of necessity mandated all terra nullius lands to civilized societies legalizing their actions each time these lands were annexed. The English jurist Travers Twiss, a fervent proponent of the terra nullius rule, affirmed in 1884 that the civilized could legitimately acquire “unoccupied” territories through discovery followed by occupation.

How did Africa fit into the terra nullius discourse? Better still, how did international lawyers frame the position of “natives” on the lands that were naturally theirs? The legal minds essentially introduced two economic institutions that would eventually shape the economic future of Africa for centuries to wit: trade and private property. Both rights went hand-in-hand and were initially enforced through capitulations—that is, a barrage of unequal ambiguous treaties between European invaders and African tribal chiefs, some of which were signed at gunpoint. While the European sovereigns gained ultimate titles to the lands, natives were relegated to no more than a right of practical use.

---

73 Lindley, supra, note 56, 10.
75 T. Twiss, The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Times of Peace, Clarendon Press, Oxford 1884, 160. According to Twiss, “A nation, which by any just means enlarges its dominions by the incorporation of new provinces with the free will of their inhabitants, or by the occupation of vacant territory to which no nation can lay claim, is pursuing the legitimate object of its being, the common welfare of its members.” Twiss, ibid., 147. cf, Sylvest, supra, note 34, 409.
over restricted patches of land. The treaties were an implied guarantee to the natives that the sovereign would develop and protect their borders. The British politician Joseph Chamberlain in 1888 justified the *terra nullius* rule by providing that “the tribes and Chiefs that exercise dominion in them cannot possibly occupy the land or develop its capacity.”

The idea of treaties between Europeans and natives without doubt represents a fundamental paradox. Were the colonizers having it both ways—eating their cake and having it back at one and the same time? To be specific, how could entities which as the colonizers claimed, lacked sovereignty and were too primitive to understand the concept or its importance turn around and cede their lands and rights through treaties? Answers to these concerns certainly rested in various juridical postulations, all framed around the economic ideas of trade and private property. Varying juridical postulations insinuated that although African tribes clearly lacked civilized thinking hence sovereignty and could thus not cede away what they did not have, they nevertheless understood and had ownership (property) rights over their lands. The right of ownership could be conveyed by the natives only to the discovering sovereign. Every claim of discovery or occupation was thus traditionally fortified by treaties with tribal chiefs. While the European discovers could always exercise unlimited dominion over the land, “native [could] never be accorded more than the right to its occupancy.”

To that effect, King Leopold II of Belgium, for example, acting through the Comité d’Etudes du Haut Congo (the Comité), which was later also renamed as the International Congo Association (ICA) with Henry Standley as its pioneer manager, signed a barrage of various concession treaties with native Chiefs, thus effectively making him the grand emperor of tropical central Africa. He nationalized nine-tenths of the land and restricted natives only to areas in which they had their huts—where they allowed to use the land for domestic cultivation.

---

77 cf, Sylvest, *supra*, note 34, 409.
78 Anghie, *supra*, note 20, 145.
In general, the treaties with tribal rulers were crucial in giving a juridical colour to European imperial acquisitions. This stems from the fact that all western nations recognized these treaties as binding—they complied with general principles of law recognized by civilized nations. The development of the lands said to be the primary objective of these treaties, the downside is that it highlighted the natives’ backwardness thus effectively undercutting or preventing him from joining the civilized society of nations. In order for the sovereign’s discovery of land to amount to a claim of sovereignty, the right of occupancy of natives had to be materially transferred through a concession treaty. While assuming the character of a consensual agreement, the real intent was first and foremost to lawfully keep the natives in subjugation and moreover, to wade-off all potential European rivalries. For instance, in 1888, the British entered a concession treaty with Chiefs Lobengula and Matabele, whereupon they purportedly leased away the “complete and exclusive charge over all metals and minerals” along the coast. Like several other cooked treaties, this was later interpreted to mean all of the land. A year later, in 1889, Lobengula wrote to Queen Victoria complaining of duress by white invaders in the following words: “The white people are troubling me much about gold. If the Queen hears that I have given away the whole country, it is not so.”

The General Act of the Berlin Conference, 1884 importantly embodied the sentiment of free trade and private property, emphasizing that every African colonial power must accord special protection to foreigners and the property of all European “Christian missionaries, scientists and explorers.” As Gerrit Gong did point out, international lawyers considered the protection of western rights and property as the minimum requirement for civilization. Whenever any polity was unwilling or unable to meet this standard because of the imperfections of its civilization or other deficiencies, international lawyers contended that civilized states could freely annex it as a moral duty in order to safeguard the rights and property of all Europeans. But what is perhaps even more puzzling is the eventual fate of the colonized subjects. Westlake responded by propounding that international law naturally leaves the treatment of natives to the conscience of the civilized state to

---

81 See Azikiwe, supra, note 2, 300-301.
82 The General Act of the Berlin Conference 1884-1885, of February 26 1885. See Chapter I, Article VI and Chapter VI, Article XXXV.
83 Gong, supra, note 9, 64.
which sovereignty is awarded. The Swiss jurist, Johann Kaspar Bluntschli concurred noting that “international law depends on humanity’s consciousness for its rights.”

The insistence on trade and private property was clearly illustrative of the fact that the European mission in Africa was first and foremost economic in nature. With the introduction of modern commerce, commercial and economic relations between Europe and Africa was harmonized based on western standards with the test for acceptance into the community of nations dependent on whether a political entity was able and willing to adequately protect the life, liberty and property of foreigners. In addition to this requirement, the right to property also importantly required some minimum degree of social organization.

Westlake, for example, emphasized on the existence of a “government” as a deciding factor for any immunity to terra nullius acquisition by Europeans. A government going by his definition existed as from such a time when it could adequately grant protection to Europeans, such that they could conveniently carry on the complex life to which they have become accustomed in their home countries. Members of the family of nations neatly corresponded to this definition because they, as a matter of practice, concluded treaties that protected foreigners, private property and regulated trade. Adam Smith laid out three basic conditions necessary for economic growth and progress to wit: peace, easy taxes and a tolerable administration of justice. Governments were necessary to guarantee law and order; markets did the rest through the invisible hand—that is, the free interplay of demand and supply. Given that African primitive societies were neither capable of functioning as a veritable government nor able to protect persons and private property, European intervention became all the more indispensable in order to enlighten them on ways of civilization.

While highlighting civilization as the foundation of any state, the German jurist, Lassa Oppenheim cited four elements as basic for every sovereign to wit: country or nation, people, government and sovereign

84 Westlake, supra, note 79, 143.
85 cf: Jouannet, supra, note 44, 12.
86 Schwarzenberger, supra, note 41, 220.
87 Westlake, supra, note 79, 141-142.
89 Alam, ibid., 5.
government.\textsuperscript{90} If Africans were still living on subsistence or in the state of nature, then it goes without saying that their land was by definition \textit{terra nullius}.

The fundamental polemic with colonial sovereignty is not just the imperialism of Europeans over the Africans (or non-Europeans in general) but more critically, the ease with which international law sided with the civilizing mission, effectively insinuating a new meaning to sovereignty as the exclusive privilege for the developed to lord over the backward. The purport of the colonial construct, it will appear though, was arguably not so much to disqualify the Africans from the realm of sovereignty but rather to manage it on their behalf (tutelage) – purportedly bringing Africans under the protection of European sovereigns whose gift of civilized justice was in turn going to liberate them from the tyranny of tribal chiefs and general backward condition. It was alleged that colonial administration was going to bring the best results to the natives in terms of economic development. The Scottish jurist James Lorimer, for example, contended that colonization acted to improve the economic conditions of all who were subjected to it.\textsuperscript{91} Put differently, the colonial discourse of sovereignty perpetuated an insinuation that sovereignty as a concept was at odds with backwardness, and thus for it to be extended to the African continent, its constituents necessarily had to earn it by attaining a particular level of development.

How did international law balance the European claims of “right” of conquest against the ownership rights of African natives based on sovereignty over territory? In the preceding sections, I have discussed

\textsuperscript{90} L. Oppenheim, \textit{International Law, A Treatise}, Longmans, London 1937, 112. In his book, \textit{A Treatise on International Law}, the English Jurist, William Edward Hall, echoed a similar sentiment as Oppenheim on the issue of trade and private property, noting that sovereign states were self-sufficient entities that adequately protected the rights and property of foreigners, and European civilization enabled “the existence in almost all states of a municipal law, consonant with European ideas...[which guaranteed foreigners access to] criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the state.” W.E. Hall, \textit{A Treatise on International Law}, Clarendon Press, Oxford 1924, 58-59 (\textit{Emphasis added}).

\textsuperscript{91} P. Muldoon, \textit{The Sovereign Exceptions: Colonization and the Foundation of Society}, \textit{17 Social and Legal Studies} (2008), 60, 68, & 70; J. Lorimer, \textit{The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities}, Blackwood & Sons, Edinburgh 1883, 228. Lorimer remarking on the French brutal war in Algeria interestingly apportioned the blame to victims (Algerians) for failing to French people and property: “...Had Algeria come to respect the rights of life and property, its history would not permanently deprived it of the right of recognition...” See Lorimer, \textit{ibid.}, 161.
how the standard of civilization was projected as a barometer for human progress and consequently a ground for admission into the family of nations. The definition of a civilized society was premised on the insistence of a political organization as a deciding factor. Lindley has qualified a political organisation thus:

“[If a] numerous society is permanently united by the habitual conformity of the bulk of its members to recognized standards in their relations *inter se*; if laws set or imposed by the general opinion of the community are habitually observed or their breach punished, eventhough no one person, or no determinate body of persons short of the whole community, is charged with their enforcement, such a society should, it would seem be regarded as a political one.”92

Crucial to the construction of this argument is the portrayal of Africa’s lack of recognized political institutions as a ground to be denied basic rights in international law. Jurists contended that there were no effective or recognizable legal or political institutions on the African continent prior to the arrival of the Europeans. Given that rules of international law are in place only to protect its members, entities that felt outside the family of nations were essentially precluded from enjoying the legal protections afforded by the discipline. The sharp cultural distinction between the advanced and the backward did not make much sense except when matched by the different levels of economic development and the evidence of political organization.

Nineteenth century juridical discourse over sovereignty presents a particular paradox, notably, the evolution from the struggle over national territorial sovereignty as a legal right (as evidenced by the peace of Westphalia) to the legal and political basis for excluding the “other” from exercising sovereignty over their national territories (as evidenced by the colonization of Africa). In other words, while Westphalian sovereignty was confined to territorial sovereignty, colonial sovereignty on the other hand conferred the civilized with a right of conquest of the backward peoples. To talk like Carl Smith, the sovereign suddenly became “he who decides the exception.”93 Was this an administration of justice or a corruption of the law? Jurists were

92  Lindley, *supra*, note 56, 22.
apparently uniform in favour of the former. In the case of African colonisation, the exception was apparently more important than the rule. It is not a particularly strange thing with international law for the exception eventually becoming the rule, especially when it is backed by a moral caveat or arguments for national security. Such is the case with the doctrine of necessity, the right of preemptive strike, humanitarian intervention and the right of self-defense.

The acquisition of African lands was in fact projected as a mere act of economic necessity that was going to enable the natives to benefit from the amenities of western civilization, thus radically transforming their backward conditions. The tribal leaders were despotic, superstitious, and failed to protect persons and private property. The society as a whole was said to have no real history except for nomadic activities and despotic tribal institutions. The British colonial administrator, Lord Frederick Lugard, in *The Dual Mandate in British Tropical Africa*, justified economic imperialism by propounding that since the industrial world is dependent on raw materials civilized humanity was in retrospect endowed with a universal right of discovery to develop every undeveloped resource wherever they happened to be. In other words, if the natives had no intellectual ability to care for their resources, it follows that it was then incumbent on civilized humanity to care for it.94

If the pathway of the deer, as funnily remarked by Azikiwe, is the only realistic way to realize constructive progress, that deer must logically surrender its path.95 By intruding thus on native lands, European powers were in effect asserting a *de facto* sovereignty over them. By overthrowing African despotic rulers and destroying the poor yielding system of cultivation, the colonial powers were effectively honouring a conscience call to share the fruits of civilization with the world’s backward peoples.96 Capitulations laid the general groundwork for conducting business in Africa, with the standard of civilization providing the legal basis on which Europe and Africa could conduct economic, social and political relations. One legal importance of treaties with tribal leaders is the apparent insinuation that the natives were in effect inviting the Europeans to civilize their territories. The standard of civilization then justified an extraterritorial jurisdiction since Africans themselves going by the treaties were confirming their condition as

95  *Idem*.
uncivilized and economically backward. Accordingly, J. de Hornung, asserted that:

“les civilisés doivent donner l’exemple d’une justice supérieure … les nations civilisées doivent aider les ‘races inférieures’ à entrer dans le système politique des Etats.”

The Covenant of the League of Nations in its article 22 famously codified the right of colonization.98

The moral crusade to develop and transform the natives was indispensable for any hope of them eventually joining the civilized society of states. They could only attain such progress through the intervention of Europe and submission to civilization standards, especially with respect to protecting persons and private property.

It has been observed that at least three kinds of relations could have possibly developed in the aftermath of European contact with the “other.” The first impulse may have been to leave the natives to their own fate. Secondly, the natives could have been ethnically cleansed so as to purify the world from primitiveness and backwardness. Lastly, the advanced peoples of Europe with their mastery of the material world could help improve their precarious condition by leading them towards progress in every aspect, including facilitating unrestricted trade with civilized sovereigns.99 The first and second possibilities were inconceivable as Europeans could not in their good civilized conscience allow African natives to their own destructive fate; they could not allow them to continue destroying their lands and vegetation unknowingly; or to continue neglecting their natural resources that forever went un-expropriated and untapped. As for the third option, not only was it the best, it was the only remedy to natives’ backwardness—it enabled Europeans to guide the natives towards improved labour and better management of natural resources, hence, towards advancement and economic prosperity.100

97  J. de Hornung, Civilisés et barbares, 17 Revue de droit international et de législation comparée, (1904), 552; that is, “those who are civilized must act in line with superior justice…civilized nations must help the inferior races return to the political system of states.”

98  Article 22 of the Covenant of the League of Nations, of 28 June 1919.

99  Alam, supra, note 36, 2-4.

100  Idem.
4. The Shift from Natural Law to Positivism

The 19th century has cemented its place in history as the century of European colonization. Although many contemporary legal commentators have with good reason been fiercely alarmed by the aggressive expeditions into the African hinterlands and elsewhere around the globe, events of the era were all but a déjà-vu in action as well as legal pandering. The Americas had fallen under their control since 1492 when Christopher Columbus together with other European explorers stormed the continent. Mainland Asia and the Oceanic were the next targets, respectively in the 16th and 17th centuries.

Up until the nineteenth century, jurists variously conceived the Law of Nations (Jus Gentium) as natural law or emanating from natural law; with the central argument being that reason contained rules of justice that governed relations between nations. Since all human activity according to natural law was bound by an overarching morality, sovereign states were in retrospect also bound by principles of natural law. Two early works of Francisco de Vitoria in the 16th century to wit: De Indis noviter inventis (On the Newly Discovered Indies) and De Jure Bellis Hispanorum in Barbaros (Concerning the Law in Spain's Barbarian Wars) specifically dealt with the legal problems arising out of the European conquest vis-à-vis the indigenous peoples. While highlighting the theme of reason, de Vitoria justified the violence on non-Europeans by providing that all men and entities, including Popes and Kings were subject to the higher moral authority of God.

Natural law was closely bound to Divine law given that the content of natural law was purely based on reason. Jurists and theologians professed the authority of Europeans to bring the wealth and riches of foreign lands “within the ambit of Christian rulers and to authorize conversion to Christianity—by force if necessary—according to the medieval doctrine of ‘just war.’” The Indian natives were deemed as

102 Anghie, supra, note 25, 10-11.
104 Evans, supra, note 80, 13.
105 Ibid., 12.
possessing reason just like everyone else, including the Europeans. The French philosopher, Charles-Louis Montesquieu in his political treatise, *Esprit des Lois* distinguished between “laws in general” which were applicable to all human beings as they were based on human reason and “Laws in Particular” that were restricted to the will of each government.\footnote{Koskenniemi, *supra*, note 4, 100.}

The natural law content of international law was indeed universal in outlook—the reason why it could be extended to non-Europeans. What made the law of nations universal in the first place was the claim that it was grounded on natural law whose scope cut across all cultural differences and beliefs. The German jurist Samuel Pufendorf, for instance, remarked that natural law was the foundation of international law and extended to all religious confessions.\footnote{G. Gozzi, *The Particularistic Universalism of International Law in the Nineteenth Century*, 52 *Harvard International Law Journal* (2010), 75.} Although various authors deferred as to the extent, there was however a consensus that natural law from its very onset was a force for rights to all—Europeans and non-Europeans alike. Varying opinion by European international lawyers however insinuated that the Indian indigenes failed to exercise reason; instead they chose to live in savage backward conditions which were at variance with *jus gentium*—thus necessitating the intervention of Europeans to enlighten them.\footnote{Wolfe, *supra*, note 76, 135.} Tacitly, they had themselves to blame for any violence inflicted on them by Europeans if they failed to exercise reason by embracing the invaders—who were architects of development. Going by this narrow paradoxical line of reasoning, common sense should have dictated to the Indians that they would fare better under modernity rather than savagery.

To make sure that European acquisitions in The Americas were in accordance with the Law of Nations, imperial powers largely abided to the *Requerimiento*, which was a declaration of sovereignty and war. Written by Juan López de Palacios Rubios—a professor of law at Salamanca who doubled as Council of Castile jurist in 1510, the *Requerimiento* provided the theoretical basis and doctrinal foundation of Spanish acquisitions in The Americas.\footnote{See L. Pereña, *La idea de justicia en la conquista de América*, Mapfre, Madrid 1992, 37.} As a prerequisite, the reading of the *Requerimiento* was to be duly witnessed by a notary; informing indigenous peoples what would happen to them if they failed to submit voluntarily to European authority. A typical *requerimiento* read thus:

\footnote{See L. Pereña, *La idea de justicia en la conquista de América*, Mapfre, Madrid 1992, 37.}
“We shall forcibly enter your country and shall make war against you in all ways and manners that we can ... we shall take your wives and your children, and shall make slaves of them... and we shall take away your goods and do all the harm and danger that we can...and we protest that all the deaths and losses which shall accrue from this are your fault, and not of their Highnesses, or ours, nor of the gentlemen who come with us.”

International law as natural law clearly had many voices, religion simply just one of them. In other words, it was very elastic in scope. The convergence of Christianity and European natural law already in the 16th and 17th centuries was evidently a tool to exclude the other. Since the Law of Nations as natural law relied largely on natural law, its content was accordingly imbued in moral principles. As a result, the underlining content of the discipline was gradually compromised and corrupted by the colonial experience. It left everyone uneasy—the Europeans as well as the non-Europeans, albeit for different reasons.

The Universalist basis of natural law which made international law applicable to everyone—civilized as well as the primitive was evidently as pretentious as it was misleading. While the reasoning clearly implied that universal humanity had to acknowledge the “freedom of Indians alongside the rights of Europeans (as with all peoples) to trade and travel, and to preach the Christian faith, within their lands,” Europeans evidently had no intention to validate such rights. The law of nations may have been projected as universal in scope, yet it was unmistakably marketed as something uniquely European.

Due to its uniquely European content, it is only through imposition that *jus gentium* could be extended to non-Europeans. Some jurists—the likes of Bluntschli and Lorimer even invoked the universality of natural law

---

110 Extract from 'The Requirement' (1513) in M. Lunenfeld, *Discovery, Invasion, Encounter: Sources and Interpretations* (1492), Heath and Co., Lexington DC 1991, 190. cf: Evans, *supra*, note 80, 12-13. Another scholar, Christopher Weeramantry has illustrated at length how the Law of Nations in the 16th and 17th centuries was largely Christian in character. According to him, “When international law commenced its modern career in the 16th and 17th centuries, it was cast largely in the Graeco-Judeo-Christian mould. Since then it has moved towards greater universalization. Many more universal perspectives drawn from all the world’s cultural traditions can and must be fed into it as it develops to suit the needs of the 21st century.” C. Weeramantry, *Universalising International Law*, Martinus Nijhoff Publishers, Leiden 2004, 2-3.

111 Weeramantry, *ibid.*, 4. 368.

112 Evans, *supra*, note 80, 13.
International Law and the Civilizing Mission in Africa

law to justify the inferiority of non-Europeans vis-à-vis western civilization. Lorimer, for instance, while dividing humanity into savages, civilized and barbarians asserted that the backward condition of the Indians was in itself testimony of their inferiority. The Indians on their part as expected were frustrated at the violence and abuses constantly inflicted on them and their lands, all in the name of progress. While they were bound to comply to all the violence inflicted on them by the European colonialists; natural law in retrospect did not grant them any right of self defense which by common sense would have translated into a just war. Indigenous peoples were rendered “susceptible to physical force if they presumed to contest Europe’s self-evident claims on the ground.” If they dared retaliate, they were going to have themselves to blame, for international law saw them as unlawful combatants.

The climate at the dawn of the 19th century was therefore ripe for a new vision or direction. Europe launched its next colonial assault – the African continent being one of the main targets – under a new “promising” philosophy known as positivism: a belief in sovereign states as guarantor of rights rather than the belief in a Christian God. This positivist framework which was championed by liberal philosophers ensured that the “Law of Nations claimed no higher authority than that which nations agreed between themselves.” The move from naturalism to positivism came with a crucial significance, namely: the need to ensure certainty in the law as opposed to the uncertainty that characterized natural law—plainly put, the need to assert absolute sovereignty in international relations. By so doing, 19th century positivists effectively changed the content of international law to fit the unique interests of their sovereign states.

---


114 Evans, *supra*, note 80, 4. Anghie has cleverly noted that “[p]ower rarely presents itself simply as brute force, as shock and awe. Rather, it presents its violence in terms of an overarching narrative, and there are few more compelling stories that power can relate about itself when expanding than the great imperial narrative in which ‘we’ are civilized, peace-loving, democratic, humanitarian, virtuous, benevolent and ‘they’ are uncivilized, violent, irrational, backward, dangerous, oppressed, and must therefore be sanctioned, rescued and transformed by a violence that is simultaneously, defensive, overwhelming, humanitarian and benevolent. The furtherance of justice, the promotion of humanitarianism; these are the great goals that imperialism has traditionally set itself.” (Anghie, *supra*, note 20, 317).

115 Evans, *ibid.*, 14.

116 Gozzi, *supra*, note 107, 74.
The move to positivism was however not a total divorce from naturalism. Instead, it emerged by first combining both natural and positive law. For example, the 19th century formulation of sovereignty was very extensive in scope, with *jus publicum Europaeum*—a positive law, recognizing the right of a sovereign state to wage war, while at the same time granting immunity to state conduct. Sovereign states could thus act even with a *justa causa*. Unlike naturalist international law that applied to all irrespective of cultural differences or religious confessions, positivist international law on the other hand created a sharp distinction between the civilized and the uncivilized, and excluded the latter from the society of nations. While highlighting a sharp caveat, namely that western states were sovereign and non-European non-sovereign, positivist jurisprudence thus did not just legitimize the civilizing mission but also reversed the relationship between the colonial and colonized. It is the triumphant suppression of the non-European societies. Under naturalism, everybody—sovereigns and non-sovereigns alike were bound by natural law. Under positive law, the sovereign beside administering and enforcing the law could go even further to create other laws and manipulate existing codes. Under positivist international law, the only means for the uncivilized to join the family of nations was to size up with the standard of civilization.

**Conclusion**

Nineteenth century international lawyers conceived European colonial activities in Africa and other non-European societies during the era in legal terms, professing that it was a humanitarian moral activism primarily intended to redeem these societies from their pathetic backward and primitive conditions into modernity thus guaranteeing them economic development. The immediate result of this was the endless process of framing a sharp difference between the backward “other” and the advanced Europeans, with the latter accorded an infinite mandate to civilize the former. My underlining contention is that the logic of cultural difference was cruelly construed. The positivist logic of excluding the uncivilized from the society of states coupled with the outright refusal to share any static rights, if anything is testimony of the

---

117 Gozzi, *supra*, note 107, 75.

[JAIL, Volume 6, Number 1, 2013]
fact that the European civilizing mission in Africa was without doubt a self-serving project. It was as hypocritical as it was misleading. Despite annexing the entire African continent, European international lawyers throughout the colonial period routinely framed the colonial encounter as something about to occur as opposed to something that was already taking place.\textsuperscript{119}

Without the standard of civilization framed in terms of the different levels of development, it would have been virtually impossible to legally justify that natives needed to be colonized. If sovereignty was used only in reference to supreme authority and sovereign rights could be applied solely to the benefit of civilized European nations, then I find it curious and disturbing to think that the promise of economic development as articulated in the civilizing mission was not a moral pathway to progress but rather a strategy, a propaganda or a window-dressing to consolidate the hegemonic economic and political interests of Europeans, exploit the natives as well as subject them to the violence of colonization. By assigning nothing else except endless obligations to natives, international law almost blurred its own promises of acting to transform Africa from a backward to a modern society. But even violence is normally a two-edged sword. It may ultimately destroy him who wields it. Colonization cultivated an awakened mind in the Africans. Slowly but surely, they acquired limited education, formed nationalist movements and advocated for self-determination which paid-off though mainly through bloodshed, exactly a century after they were first placed under colonial captivity.

\textsuperscript{119} Anghie, \textit{supra}, note 20, 65-66.