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The Return of the Standard of Civilization

David P. Fidler*

“The nexus between Civilisation and International Law
is a basic question of International Law.”

—Georg Schwarzenberger, 1955¹

I. INTRODUCTION

Those who teach international law are familiar with presenting Article 38(1) of the Statute of the International Court of Justice (“ICJ”)² as the authoritative list of the “sources” of international law. Some teachers might engage students in discourse about the “source” of the sources: is it positivism or natural law? But rarely, I would wager, does a teacher have his or her students think about the following questions: from where did the sources listed in Article 38(1) come, and who bounded the choice to positivism and natural law?

These questions point to the development of international law. The answers to these questions force us to see international law as the living artifact of “Western civilization.” International law grew out of the Westphalian system of sovereign States that emerged in Europe in the 17th century.³ International law has, thus, deep civilizational roots.⁴ As the Westphalian system expanded beyond Europe,⁵ international law followed in its wake. The European great powers and the United

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1. Georg Schwarzenberger, *The Standard of Civilisation in International Law*, *Current Legal Probs* 212, 212 (1955).
2. Statute of the International Court of Justice 59 Stat 1055, Treaty Ser No 993 (1945).
3. Peter Malanczak, *Akehurst's Modern Introduction to International Law* 9, 15–17 (Routledge 7th rev ed 1997) (“The prevailing view in the study of international law is that it emerged in Europe in the period after the Peace of Westphalia (1648).”).
4. The European roots of international law are explored in detail in Wilhem G. Grewe, *The Epochs of International Law* (de Gruyter 2000) (Michael Byers, trans).
5. *Id.* at 458 (“In the nineteenth century the State system extended to cover the entire planet.”).

States succeeded in imposing aspects of Western civilization on the rest of the world. Through this process, international law became a universal system, and the sources of international law likewise were universalized. The expansion of Western civilization, including international law, produced what I call the “Westphalian civilization.”

A remnant of this expansion is found in Article 38(1)(c) of the ICJ Statute, which states that “general principles of law recognized by civilized nations” are a source of international law.⁶ In truth, each source listed in Article 38(1) was connected to what used to be called the “standard of civilization” (“SOC”). During the 20th century, this standard and the phrase “recognized by civilized nations” became embarrassments to the international legal profession.⁷ These terms were unfortunate relics of an arrogant age during which a certain segment of humanity deemed itself the guardian and organizer of the human race. As the SOC seemed to disappear in the last half of the 20th century, international lawyers perhaps believed that they were leaving behind an unsavory part of international law’s history to enter a more enlightened era.

Historical relics sometimes, however, haunt the present. In some cases, such relics reappear to teach us that history changes less than we think. In the post-Cold War era, events have resurrected the SOC. Some scholars have argued that we have reached the “end of history” with regard to the organizing philosophical principles for human civilization.⁸ Others have claimed that what the post-Cold War era is witnessing is not civilizational harmonization but the “clash of civilizations.”⁹ Still others believe that civilizational harmonization is occurring but in ways that are detrimental.¹⁰

Debates about globalization have also raised issues related to the role of civilization in global relations. Many commentators see globalization as a force of homogenization that is causing diverse political, economic, and cultural systems to conform to Western ways.¹¹ The collapse of Soviet communism and the developing world’s “revolt against the West”¹² give globalization a Western flavor. Peoples and

6. Statute of the ICJ Art 38(1)(c) (cited in note 2).

7. Schwarzenberger, *Current Legal Probs* at 215 (cited in note 1) (noting that the international lawyer “may be content, as a number of writers on the general principles of law recognised by civilised nations have been, to refrain from expressing himself on the meaning of this embarrassing adjective”).

8. Most famously, Francis Fukuyama, *The End of History?*, *Natl Interest* 3 (Summer 1989).

9. See, for example, Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon & Schuster 1996).

10. See, for example, Richard Falk, *Predatory Globalization: A Critique* 1 (Polity 1999).

11. See, for example, Simon Murden, *Cultural Conflict in International Relations: The West and Islam*, in John Baylis and Steve Smith, eds, *The Globalization of World Politics: An Introduction to International Relations* 374, 377 (Oxford 1997) (describing the post-Cold War process by which much of the world has been brought in to the Western market capitalist structure).

12. The phrase “revolt against the West” comes from Hedley Bull, *The Revolt Against the West*, in Hedley Bull and Adam Watson, eds, *The Expansion of International Society* 217, 217 (Clarendon 1984).

governments differ in their reactions to the civilizational portents of globalization. For some, globalization promises the dark age of McWorld—a civilization in which the forces of homogenization swallow diversity.¹³ For others, globalization contains opportunities to create a global civilization that will allow humanity to overcome its attachment to tribal politics.¹⁴

Once upon a time, Western nations used international law to impose on non-Western countries policies, institutions, and values embedded in Western civilization. The SOC was the operative international legal principle in this effort at civilizational harmonization, and it helped create a Westphalian civilization. With all the discussion about civilizational harmony and discord in the post-Cold War era, international lawyers should reflect on whether and how international law is being used today in civilizational relations. In this Article, I argue that we are witnessing the return of the SOC in international law. In short, States, international organizations, and nongovernmental organizations are using international law to impose a liberal, globalized civilization on the world. The original emergence of the SOC helped transform the world from a condition of civilizational diversity and separation into a Westphalian civilization characterized by Western norms, rules, institutions, and values. The return of the SOC marks the potential transformation of Westphalian civilization into a liberal, globalized civilization.¹⁵ Whether knowingly or not, international lawyers have become civilizational architects in ways that international lawyers of the late 19th and early 20th centuries would have recognized. The international legal profession's 20th century retreat from SOC has proved short-lived.

My argument proceeds in four parts. First, I look at the old SOC and the role it played in international law in the 19th and early 20th centuries. This embarrassing piece of international legal history has been forgotten or has remained obscure to many students of international law in the second half of the 20th century. The SOC is, however, a critical protagonist in the universal expansion of international law as part of the development of Westphalian civilization.

Second, I explore the evidence that the SOC has returned to shape international law today. The evidence comes in many forms, but my analysis centers on how

13. See, for example, Benjamin R. Barber, *Jihad vs. McWorld* (Ballantine 1995).

14. Positive readings of globalization can be found in Thomas L. Friedman, *The Lexus and the Olive Tree: Understanding Globalization* (Farrar Straus Giroux 1999) and John Micklethwait and Adrian Wooldridge, *A Future Perfect: The Essentials of Globalization* (Crown 2000).

15. This interpretation of the development of intercivilizational relations differs from the one offered by Huntington. He broke relations among civilizations into three periods: (1) sporadic encounters between civilizations separated by time and space (before 1500 AD); (2) the rise and impact of Western civilization (from 1500 AD until the end of World War I); and (3) a multicivilizational system (from the end of World War I to the present). Huntington, *The Clash of Civilizations* at 48–55 (cited in note 9). During these three periods, he argued that “the relations among civilizations have [] moved from a phase dominated by the unidirectional impact of one civilization on all others to one of intense, sustained, and multidirectional interactions among all civilizations.” *Id.* at 53.

international law is used today to regulate the State's relationships with the individual, the market, other States, and the international community. A fair reading of the evidence, I believe, shows that international law is being used to transform Westphalian civilization into a liberal, globalized civilization.

Third, the rise, fall, and rise of the SOC forces us to ask why the standard has played and is now playing such a prominent role in international law. International lawyers can no longer pretend that the SOC is confined to the museum of international law. The Article analyzes whether the structure of the international system produces a theoretical and practical need for international law to incorporate a SOC.

Fourth, I examine the consequences for international relations of the SOC's return. One such consequence is that this return perhaps changes what Stanley Hoffmann called the permanent dialogue between Jean-Jacques Rousseau, as representative of realism, and Immanuel Kant, as representative of liberalism,¹⁶ into a dialogue between Kant and Edmund Burke, as the voice of conservatism. Proposing this new dialogue suggests that the role of the SOC in international law remains subject to debate and controversy.

II. THE OLD STANDARD OF CIVILIZATION: FROM CIVILIZATIONAL DIVERSITY TO WESTPHALIAN CIVILIZATION

The origins of the old SOC can be found in the collision between Western civilization and the non-Western civilizations forced open to European and American commerce and political influence in the 19th century.¹⁷ As the international system expanded to become global in scope in the 19th century, developing means to conduct relations between diverse and formerly relatively separate cultures became critical. While this was not an entirely novel question, as European relations with the Ottoman Empire suggest,¹⁸ the cultural diversity problem deepened in the 19th century as Western powers penetrated more extensively into Asia and Africa. It was apparent that the political, economic, legal, and moral values taken for granted within Western civilization were alien to other civilizations. When such different civilizations entered into intense contact, how would their relations be structured?

The SOC provided the structuring principle for the expansion of Western civilization into the non-Western world. Gerrit Gong argued that the standard

16. Stanley Hoffmann, *Janus and Minerva: Essays in the Theory and Practice of International Politics* 25, 47 (Westview 1987) ("Whoever studies contemporary international relations cannot but hear, behind the clash of interests and ideologies, a kind of permanent dialogue between Rousseau and Kant.").

17. Grewe argued that the concept of "civilization" and "civilized nations" only began to affect thinking on international law in the 19th century as the European great powers, especially Britain, expanded their influence globally. See Grewe, *The Epochs of International Law* at 445-58 (cited in note 4).

18. See Thomas Naff, *The Ottoman Empire and the European States System*, in Bull and Watson, eds, *The Expansion of International Society* at 143 (cited in note 12).

developed to deal with practical and philosophical problems that arose as Western influence expanded globally.¹⁹ The practical problem was how to protect Western citizens' life, liberty, and property in non-Western regions.²⁰ The philosophical problem was how to determine "which countries deserved legal recognition and legal personality in international law."²¹ The SOC solved the practical problem by requiring that non-Western countries treat Western citizens according to Western legal standards, which meant protections for life, dignity, property, and freedom of commerce, travel, and religion.²²

The SOC solved the philosophical problem by requiring that non-Western countries become "civilized" in order to join the international society of States.²³ To be a member of Westphalian civilization, a non-Western country had to become a State that (1) guaranteed basic rights, as understood in the West, for foreign nationals; (2) had an organized political bureaucracy with the capacity to run governmental functions and organize the country for self-defense; (3) had a Western-style domestic system of law, with courts and written codes of law, that administered justice fairly within its territory; (4) had diplomatic resources and institutions to allow the State to engage in international relations; (5) abided by international law; and (6) conformed to the customs, norms, and mores accepted in Western societies.²⁴

The SOC mandated the reordering of non-Western governments, laws, economics, and societies in the image of the West. The reordering occurred in four different relationships, and Table 1 lists these relationships and illustrates how the SOC challenged, penetrated, and changed non-Western cultures.

19. Gerrit W. Gong, *The Standard of 'Civilization' and International Society* 24 (Clarendon 1984).

20. *Id.*

21. *Id.*

22. *Id.* at 14.

23. Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv Intl L J* 1, 4-5 (1999) (noting that 19th century international lawyers posited a gap between civilized and uncivilized nations and devised techniques by which to civilize the uncivilized so that the latter could join the "Family of Nations").

24. Gong, *Standard of 'Civilization'* at 14-15 (cited in note 19).

Table 1: The Impact of the Standard of Civilization

| Relationship | Impact |
|-----------------------------|--|
| Individual↔State | Introduced concepts of State obligations to protect basic individual rights of Western nationals |
| Market↔State | Liberalized commerce, empowering private actors and limiting the government's role in trade and commercial activities |
| State↔State | Imposed the apparatus of inter-State relations on non-Western countries, forced non-Western countries into political and economic intercourse with the West, and required obedience to international law |
| State↔International Society | Forced non-Western countries to adopt the common interests and values characterizing Western civilization |

Western powers advanced their civilization through imperialism and the system of capitulations. Imperialism involved Western States taking over non-Western countries and ruling them directly, and notions of the superiority of Western civilization justified imperial activities.²⁵ The SOC also stood at the center of the system of capitulations, which Western powers used against non-Western countries not incorporated into empires.²⁶ Capitulations were the primary tool used by Western countries to implement the SOC, and they were the catalysts for reforms in non-Western countries that would bring such countries closer to membership in the civilized world.

Through capitulations, Western States gained extraterritorial jurisdiction in the territories of non-Western countries. Capitulations exempted Western nationals from the criminal and civil jurisdiction of a non-Western country.²⁷ Thus, Western merchants, investors, and their dependents had immunity from the laws of the non-

25. B.V.A. Röling, *International Law in an Expanded World* 28 (Djambatan 1960) (noting that "civilization formed the justification for colonial domination, endowed the legal title to the position of hegemony").

26. Grewe, *The Epochs of International Law* at 457 (cited in note 4) ("The principal, practical effect of the linkage of international law to the standards of civilisation was the system of 'capitulations' or, in other words, the 'unequal' treaties by which the civilised nations reserved a special jurisdiction ('consular jurisdiction') over their own nationals, whom they did not wish to have subjected to the legal order and justice system of a half-civilised or uncivilised country.").

27. See Sir Sherston Baker, 1 *Halleck's International Law* 387-88 (Kegan Paul, Trench, Trübner 3d ed 1893) ("It was the object of the . . . treaties to exempt foreigners from the civil and criminal jurisdiction of the local magistrates and tribunals, and make them subject only to the laws and authorities of their own country, thus creating a kind of extra-territoriality for all citizens of the contracting States resident in or visiting any part of the East where the treaties obtained.").

Western nations. Jurisdiction over Western nationals and their property vested in consular officials of the Western State.²⁸ The SOC justified extraterritorial jurisdiction: because the non-Western nation was not civilized, Western nations would not allow their nationals to be subject to uncivilized political and legal systems.²⁹

While the immediate effect of capitulations was to force non-Western governments to protect the rights of Westerners, they had a wider impact on non-Western countries. Capitulations affected how business was conducted in non-Western economies. Domestic markets were opened to foreign competition, and domestic traders were introduced to new ways of conducting commerce. Capitulations represented a crude form of legal harmonization for transnational economic interaction. Commercial relations between Westerners and non-Westerners were harmonized on the basis of Western legal standards.³⁰ Capitulations also created domestic pressure on non-Western governments to reform their commercial laws to allow their businesses to compete with Westerners.³¹ The wider legal and economic harmonization process triggered by capitulations can be seen in Japan's "transition from the 'rule by status' Tokugawa system of law to a Meiji 'rule-by-law' system."³²

The economic and legal harmonization stimulated by capitulations were indicators of the transformation of non-Western countries into Western clones. Capitulations were the epicenter of a radical remaking of the way the world was organized. And international law was a primary instrument in setting up capitulatory regimes and placing the SOC at the center of civilizational interaction. Western powers carved out their extraterritorial rights through treaties and believed that the

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28. For a historical description of the practice of consular officials and courts under the capitulations, see Luke T. Lee, *Consular Law and Practice* 7–17 (Clarendon 2d ed 1991). For analysis of US practice in connection with extraterritorial jurisdiction, see David J. Bederman, *Extraterritorial Domicile and the Constitution*, 28 Va J Intl L 451 (1988).
29. Gong, *The Standard of 'Civilization' and International Society* at 14 (cited in note 19) (noting that "the standard of 'civilization' demanded that foreigners receive treatment consistent 'with the rule of law as understood in Western countries'").
30. A. M. Kotenev, *Shanghai: Its Mixed Court and Council* xi (North China Daily News and Herald 1925) (noting that "Europe and America tried to establish in China the same conditions for their trade as prevailed in their countries"); Skinner Turner, *Extraterritoriality in China*, 10 Brit YB Intl L 56, 63 (1929) (arguing that what a Westerner wanted in non-Western countries was "reasonable certainty as to the laws under which he is to come; some harmony between those laws and those of the western world").
31. Kotenev noted that Chinese businessmen successfully lobbied their government to reform the Chinese legal system so that they could compete with Western traders. Kotenev, *Shanghai: Its Mixed Court and Council* at xi (cited in note 30).
32. Gong, *Standard of 'Civilization'* at 181 (cited in note 19). See also M.T.Z. Tyau, *Extraterritoriality in China and the Question of Its Abolition*, 2 Brit YB Intl L 133, 139–40 (1921–22) (arguing that abolition of extraterritoriality in China was justified in part because of China's progress in legal reform along Western lines).

SOC represented customary international law.³³ What the capitulations reflected on the ground were the general principles of law recognized by civilized nations. Each primary source of international law—treaties, customary international law, and general principles of law—were pillars in the development of Westphalian civilization in the 19th and early 20th centuries. As Schwarzenberger argued in 1955, “the generation of pre-1914 international lawyers was fully justified in regarding international law as a powerful civilising agency.”³⁴

The “generation of pre-1914 international lawyers” were civilizational architects. With the SOC, they built foundations in non-Western countries for a new architecture for intercivilizational relations. The building process was not, however, without impact on the architects. The expansion of Western civilization had an interesting effect on international law’s relationship with notions of civilization. Schwarzenberger argued that, as Western power expanded, “the coalescence of international law and European civilisation began to show visible signs of strain.”³⁵ Schwarzenberger continued: “The price which the European law of nations had to pay for universality was increasing separation from its Christian foundation and dilution of its ethical contents. It underwent a process of formalisation and became a law congenial to the needs of the industrial pioneer and capitalist investor.”³⁶

Western expansion changed the concept of “civilization” from one dominated by “Christianity, chivalry, and trade”³⁷ to one focused on whether a State “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.”³⁸ The SOC can thus be seen as a pragmatic principle of international law that allowed States to trade and interact.³⁹ Whether a country was civilized was more a question of the adoption of Westphalian mechanics than the acceptance of Western culture. The expansion of Western power in the 19th century saw Western civilization expanding in the more limited form of Westphalian civilization.

I coin the term “Westphalian civilization” to denote that what capitulations and the SOC wrought was not the complete adoption of Western civilization by non-Western countries. The SOC brought non-Western States into the Westphalian

33. Gong, *Standard of ‘Civilization’* at 14 (cited in note 19) (quoting Georg Schwarzenberger as claiming that the standard of civilization had “crystallised into a rule of customary international law” from the mid-19th century).

34. Georg Schwarzenberger, *Current Legal Probs* at 222 (cited in note 1).

35. *Id.* at 220.

36. *Id.*

37. *Id.* at 219–20.

38. *Id.* at 220.

39. Röling, *International Law in an Expanded World* at 31 (cited in note 25) (arguing that in the second half of the 19th century, whether a non-Western State was considered within the community of civilized nations was a question “usually determined by the extent to which a country possessed the requirements for proper, commercial traffic”).

system and provided a basis on which Western and non-Western countries could conduct political and economic relations. The interaction was informed by the norms, rules, and institutions of Western civilization; but, as Schwarzenberger observed, the expansion of Western civilization and the Westphalian system produced—through the SOC—a pragmatic, limited strategy designed to bring non-Western countries into profitable contact with the West. Out of this clash of civilizations in the 19th century came Westphalian civilization.

Another way to understand Westphalian civilization is through concepts from international relations theory. The old SOC could be seen as the basis for pluralistic rationalism in international relations. Rationalism holds that States can structure their relations to avoid engaging in a perpetual power struggle, as realism predicts.⁴⁰ Rationalists do not deny that the anarchical nature of inter-State relations creates a difficult milieu for coexistence, but they believe that States can form an international society because they can agree on common interests and values that support more orderly relations.⁴¹

Rationalism exhibits two different strands of thought: pluralism and solidarism.⁴² Pluralism acknowledges that States have different political, economic, and cultural systems but holds that even diverse States can form an international society with moral and legal rules. The morality is, however, a morality of *States* not of domestic political systems or individuals. The diversity among States makes it difficult to project moral principles applicable in some States onto others. The basis of inter-State governance is the practice of States in their systemic interactions rather than a priori principles or natural law. Similarly, rules of international law in a pluralistic international society flow from State behavior not from abstract principles.

Solidarism holds that the society of States rests upon political, economic, and cultural likemindedness within States. International society and international law are weak under pluralism, and only deeper similitude domestically among States provides a foundation for morality and international law in international relations. Domestic homogeneity means that States share important values, principles, and interests and can use this homogeneity as a basis for more effective cooperation. Solidarism creates the conditions necessary to facilitate an important role for ethical and international legal principles for both States and individuals.

While the SOC had impact on non-Western forms of governance, law, and economics, its cultural penetration was more limited because, as Schwarzenberger

40. See Martin Wight, *International Theory: The Three Traditions* 13–15 (Leicester 1991) (Gabriele Wight and Brian Porter, eds) (explaining the basics of the rationalist tradition of international relations theory).

41. Id at 13 (“The Rationalists are those who concentrate on, and believe in the value of, the element of international intercourse in a condition predominantly of international anarchy.”).

42. See David P. Fidler and Jennifer M. Welsh, eds, *Empire and Community: Edmund Burke's Writings and Speeches on International Relations* 52–53 (Westview 1999) (discussing the pluralist and solidarist perspectives within the international society tradition).

noted, the test was “merely whether [a non-Western] 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.”⁴³ The standard did not require that non-Western countries have specific forms of government or treat their own nationals in the same way that Western nationals had to be treated.⁴⁴ The standard did not require non-Western countries to be fully Western; it merely required them to be Westphalian in their ability to interact in the international system and international society.⁴⁵ The concept of Westphalian civilization links the old SOC with pluralistic rationalism rather than solidaristic rationalism.⁴⁶

III. THE NEW STANDARD OF CIVILIZATION: FROM WESTPHALIAN CIVILIZATION TO LIBERAL, GLOBALIZED CIVILIZATION

The international legal profession’s preference to forget the embarrassing SOC runs counter to current discourse that raises the importance of civilizations and their role in world affairs. The international lawyer’s reluctance to approach the SOC is understandable; but, when we analyze what is happening today in international law, it is hard not to see a process that echoes what took place under the old SOC: the values and principles of Western civilization are (1) being held up as the rallying point for global action; and (2) being used as criteria to judge the performance and legitimacy of “backward” countries. As in the past, international law today carries the values of Western civilization forward and provides means for their imposition on other countries and cultures. In the post-Cold War world, the triumph of liberalism within Western civilization has spawned a new SOC. This new standard dominates thinking about the role and substance of international law in Westphalian civilization. The resulting convergence of the new standard of civilization and international law creates

43. Schwarzenberger, *Current Legal Probs* at 220 (cited in note 1).

44. The only movement in this direction, prior to the development of international law on human rights after World War II, was the negotiation of treaties protecting the rights of minority populations after World War I. Georg Schwarzenberger, *The Frontiers of International Law* 73 (Stevens and Sons 1962) (noting that “the minorities treaties of the post-1919 period constituted a valuable complement to the traditional minimum standards of international law in favour of foreign nationals”).

45. Huntington captured the limited impact of the Western civilization on other cultures when he wrote that:

During the nineteenth and twentieth centuries the European international system expanded to encompass virtually all societies in other civilizations. Some European institutions and practices were also exported to these countries. Yet these societies still lack the common culture that underlay European international society. In terms of British international relations theory, the world is thus a well-developed international system but at best only a primitive international society.

Huntington, *The Clash of Civilizations* at 54 (cited in note 9).

46. The ideological conflicts that erupted after World War I within Western civilization after the rise of communism and fascism effectively rendered the old standard of civilization impotent to press beyond the mechanistic Westphalian civilization to a deeper solidarity constructed in the image of the West.

the vision of a liberal, globalized civilization, which is a more radical and far-reaching concept than Westphalian civilization.

Although the old standard of civilization helped build Westphalian civilization, this civilization was mechanical. It did not deeply harmonize government, economics, and law. Much of the 20th century witnessed hot and cold wars fought to determine what philosophy would control Westphalian civilization. Western civilization suffered two World Wars and the Cold War in a struggle of ideologies. Because the West had historically been the hegemon, its prevailing ideology would determine the destiny of the Westphalian civilization. With the end of the Cold War, liberalism emerged victorious.

The liberal victory has been discernable in international law and international relations theory. In international law, liberal dominance appears in the prominence given to free trade, democratic governance, human rights, the rule of law, and good governance. In international relations theory, liberalism has attracted attention. Scholars working with liberalism have divided the world into liberal and nonliberal zones. The liberal zone, according to Benedict Kingsbury, is "constituted by liberal states practising a higher degree of legal civilization, to which other states will be admitted only when they met the requisite standards."⁴⁷ Kingsbury further argues that dividing the planet into zones of liberal and nonliberal States with "the liberal West as the vanguard of a transformed global legal order" contains a "new standard of civilization" promulgated "to promote the advancement of the backward."⁴⁸ As Kingsbury suggests, the new SOC arises in the wake of liberalism's victory, the collapse of alternative ideologies, and the decline in the geopolitical importance of the non-Western developing world. In addition, no non-Western culture is universalizable like liberalism. No other civilization appears to have the potential to be the ghost in the Westphalian machine.

As argued in Part II, the old SOC, doctrinally speaking, was limited. The new standard is more ambitious and intrusive. If the old standard connects with pluralistic rationalism, then the new standard aims for solidaristic rationalism. Under the new SOC, international law is a tool of political, economic, and legal harmonization and homogenization on a scale that dwarfs what was seen in the 19th and early 20th centuries. The civilizational conquest started under the old SOC is now being carried deeper into the hearts of non-Western cultures through international law.

To glimpse this process, return to the four relationships used in Part II to explore the impact of the old SOC on non-Western countries. Table 2 indicates how profoundly liberal-inspired rules of international law penetrate and shape States in today's Westphalian civilization.

47. Benedict Kingsbury, *Sovereignty and Inequality*, in Andrew Hurrell and Ngaire Woods eds, *Inequality, Globalization, and World Politics* 66, 90 (Oxford 1999).

48. Id at 90–91.

Table 2: The New Standard of Civilization in International Law

| Relationship | Impact of International Law |
|-----------------------------|---|
| Individual↔State | <ul style="list-style-type: none">·Comprehensive body of international human rights law on civil and political rights that applies to all individuals regardless of national origin·Empowerment of civil society groups in making and monitoring national and international law |
| Market↔State | <ul style="list-style-type: none">·Liberalization of trade in goods and services under international trade law·Protection of intellectual property rights under international trade law·Liberalization of foreign investment regimes under network of bilateral investment treaties·Use of structural adjustment policies by international financial organizations to promote liberal economic policies·Development of international law on anti-corruption |
| State↔State | <ul style="list-style-type: none">·Development of notions of governmental illegitimacy under international law |
| State↔International Society | <ul style="list-style-type: none">·Common interests and values of international society reflected in international law are predominantly liberal in origin and direction |

Many areas of international law in Table 2 have the potential for more profound impact on domestic governance, economics, and law than the old SOC.⁴⁹ Human rights law extends protections of life, liberty, and property guaranteed to Westerners under capitulations to *all* people. Liberalization of trade and investment requires far-reaching reforms to how many domestic economies and legal systems historically operated. Such liberalization affects all merchants, not just Western ones. Whether a government is democratic is now a pressing issue,⁵⁰ and the test of democratic legitimacy is more far reaching than what the old SOC required. Contemporary

49. See Gregory H. Fox, *Strengthening the State*, 7 Ind J Global Legal Stud 35, 35 (1999) (discussing how contemporary international law “require[s] States to alter law and practice in virtually every area of governance”).

50. See, for example, Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am J Intl L 46 (1992) (arguing that the international community has increasingly come to expect democracy as requisite to a State’s legitimacy); Brad R. Roth, *Governmental Illegitimacy in International Law* (Clarendon 1999); Gregory H. Fox and Brad R. Roth, eds, *Democratic Governance and International Law* (Cambridge 2000).

international law is part of a liberal project of political, economic, and legal homogenization seeking to foster a certain kind of human solidarity within Westphalian civilization.

Capitulations were at the heart of the old SOC; and the new standard has equivalent centers of activity, namely human rights, market liberalization strategies, structural adjustment policies, the emphasis on the "rule of law" and "good governance," and the democratic legitimacy of governments. While the new SOC is more expansive, parallels between the old and the new standards reveal an affinity, which Table 3 outlines.

If the SOC has returned in international law, then the international legal profession should rethink its belief that the West and the profession have abandoned the historically discredited and morally embarrassing SOC. Does the return of the SOC require a re-examination of the historical and theoretical role of the standard in international law? As I argued elsewhere, "[t]he resurrection of the standard at the end of the twentieth century raises the possibility that it serves a deeper structural and normative purpose than simply making the West richer and more powerful."⁵¹

IV. THE ROLE OF THE STANDARD OF CIVILIZATION IN INTERNATIONAL LAW

The easiest way to interpret the role of the SOC in international law is, with the realist, to attribute it to power politics. As the Athenians informed the Melians, "the strong do what they have the power to do and the weak accept what they have to accept."⁵² Or, as Rousseau put it, "everywhere the strong [are] armed against the weak with the formidable power of the law" so that "[j]ustice and truth must be bent to serve the most powerful: that is the rule."⁵³ Factors central to realist analysis of international relations play a significant role in the story of the rise, fall, and rise of the SOC. The SOC has arisen twice in international systems characterized by an imbalance of political, economic, and technological power that benefited one civilization in its relations with others. In the 19th and early 20th centuries, non-Western civilizations could not counterbalance Western States' economic and military power. In the post-Cold War period, Huntington observed that "[t]he West is now at an extraordinary peak of power in relation to other civilizations."⁵⁴ The new

51. David P. Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 *Tex Intl LJ* 387, 409 (2000).

52. Thucydides, *History of the Peloponnesian War* 402 (Penguin 1954) (Rex Warner, trans).

53. Jean-Jacques Rousseau, *The State of War*, in Stanley Hoffmann and David P. Fidler eds, *Rousseau on International Relations* 33, 43 (Clarendon 1991).

54. Samuel P. Huntington, *The Clash of Civilizations?*, 72 *Foreign Aff* 22, 39 (Summer 1993).

Table 3: The Old and the New Standards of Civilization Compared

| Features of the Old Standard of Civilization | Features of the New Standard of Civilization |
|--|---|
| Protection of basic human rights of Western nationals, such as life, liberty, property, freedoms of travel, commerce, and religion | Protection of basic civil and political rights, as enshrined in treaties such as the European Convention of Human Rights and the International Covenant on Civil and Political Rights |
| Opening of domestic markets to foreign traders and merchants | Liberalization of markets for trade in goods, services, and investment capital |
| Organized and effective governmental bureaucracy | "Good governance" and anti-corruption measures |
| Western-style system of domestic law with impartial administration of justice | Emphasis on the "rule of law" within countries, and linking governmental legitimacy to presence of democracy |
| Ability to engage in international relations and abide by international law | Stress on State's ability to participate in the processes of globalization and to follow international legal regimes adopted to deal with globalization issues |
| Conform to Western customs, norms, and mores | Pressure to adopt Western individualism, consumerism, and secularism at the expense of traditional practices |
| Sources of international law central to applying the old standard of civilization to non-Western countries | Sources of international law, and international legal regimes created with them, central to applying the new standard of civilization globally |

SOC, in a realist view, reflects nothing more than the absence of a balance of power in the international system.

A problem with accepting the realist interpretation is that realism has traditionally been interested in States not civilizations. Once civilizations—which transcend State borders and force us to look below and above the level of the State—become the focus, we leave the realist paradigm. If we substitute civilizations for

States in realism, we have the “clash of civilizations” but it is not clear that we learn much from this about how different civilizations interact through the State system.

The SOC grows out of cultural difference, which has not been relevant to realist analysis. The old SOC was a Western response to the cultural conflicts caused by the expansion of Western civilization. The standard is the offspring of cultural dissonance in the international system. The development of international law in Western civilization did not confront this issue, except at the margins, until the 19th century because States in Europe and North America were culturally similar. In 1796, Edmund Burke provided a description of the cultural similitude that European States enjoyed:

The writers on public law have often called this *aggregate* of nations a Commonwealth. They had reason. It is virtually one great state having the same basis of general law; with some diversity of provincial customs and local establishments. The nations of Europe have had the very same christian religion The whole of the polity and oeconomy of every country in Europe has been derived from the same sources. . . . From all those sources arose a system of manners and of education which was nearly similar in all this quarter of the globe; and which softened, blended, and harmonized the colours of the whole. . . . When a man travelled or resided for health, pleasure, business or necessity, from his own country, he never felt himself quite abroad.⁵⁵

Burke’s Commonwealth of Europe represents solidaristic rationalism. To have any kind of *society* among sovereign States, some framework of common interests and values has to develop organically (as happened in Europe) or be created when different cultures interact (as happened with the old SOC). As Gong argued, “[s]ome standard of civilization will remain a feature of any international society wherein cultural diversity and pluralism exists coetaneously with hierarchy and anarchy.”⁵⁶ The SOC in international law seems, therefore, to be a product of (1) the anarchical nature of the international system; and (2) cultural diversity among States and peoples. Who gets to define the SOC is determined by the hierarchy of power in the international system.

International lawyers have long struggled with the problem of cultural diversity, such as in the debate between relativism and universalism in international human rights law. More generally, Kingsbury has argued that “a persistent feature of international law, [is] the problem of reaching normative judgments in a heterogeneous world while simultaneously accommodating deep cultural, social and religious differences.”⁵⁷ The old SOC represents the first systematic effort by States to build a global international society in the midst of cultural dissonance. As a pillar in

55. Edmund Burke, *First Letter on a Regicide Peace* (1796), in Fidler and Welsh, eds, *Empire and Community* at 287, 315–16 (cited in note 2).

56. Gong, *Standard of Civilization* at 248 (cited in note 9).

57. Benedict Kingsbury, *Confronting Difference: The Puzzling Durability of Gentils’s Combination of Pragmatic Pluralism and Normative Judgment*, 92 *Am J Intl L* 713, 713 (1998).

the construction of an international society, international law requires some level of common understanding and acceptance about how inter-State relations are to operate. A basic level of similitude is what Western powers created through the old SOC and is what Westphalian civilization embodies.

Linking the old SOC with pluralistic rationalism clarifies the artificiality of the similitude created by international law in Westphalian civilization. International society grounded in pluralistic rationalism is weak because the common interests and values are limited and vulnerable to the expediency of national interests. A shallow foundation for international law negatively affects its operation. Burke identified this dynamic at the end of the eighteenth century:

In the intercourse between nations, we are apt to rely too much on the instrumental part. We lay too much weight upon the formality of treaties and compacts. We do not act much more wisely when we trust to the interests of men as guarantees of their engagements. The interests frequently tear to pieces the engagements; and the passions trample upon both. Entirely to trust either, is to disregard our own safety, or not to know mankind. Men are not tied to one another by papers and seals. They are led to associate by resemblances, by conformities, by sympathies. It is with nations as with individuals. Nothing is so strong a tie of amity between nation and nation as correspondence in laws, customs, manners, and habits of life. They have more than the force of treaties in themselves. They are obligations written in the heart.⁵⁸

In short, solidaristic rationalism provides a better foundation for international law; but it requires a deeper similitude among States and peoples than what the old SOC achieved. This deeper similitude is what the new SOC advances.

Crudely speaking, the international society that prevailed from the end of World War I to the end of the Cold War never advanced far from pluralistic rationalism. Indeed, the line between pluralistic rationalism and realism over the course of this roughly eighty year period is often difficult to detect. Fascism, communism, and the ideology of decolonization successively took aim at what Western States created and fostered through the SOC. Between the end of the World War I and the end of the Cold War, the blocs of competing States did not agree about how to structure the individual's relationship with the State, the State's powers vis-à-vis the market, the parameters of inter-State relations, and what common interests and values should define international society. During this "eighty years' crisis,"⁵⁹ few obligations were written in the heart of Westphalian civilization to support a robust system of international law.

With the collapse of communism, the withering of developing country unity, and the lack of universalizable alternatives, the hegemonic civilization again appears to be producing a new SOC in the context of the anarchical nature of the international

58. Burke, *First Letter on a Regicide Peace* at 315 (cited in note 42).

59. The phrase "eighty years' crisis" is taken from Tim Dunne, Michael Cox, and Ken Booth, eds, *The Eighty Years' Crisis: International Relations 1919–1999* (Cambridge 1998).

system and cultural diversity among States and peoples. But, as noted earlier, the new SOC pierces State sovereignty and non-Western cultures more deeply than the old standard. While some of this penetrative force comes from new technologies, such as the Internet, the penetration is philosophically motivated. While accelerated by new technology, the new SOC is, to borrow a popular phrase, socially constructed by liberal, globalized States and their nongovernmental allies to achieve deeper human solidarity.

V. CONSEQUENCES OF THE RETURN OF THE STANDARD OF CIVILIZATION

Critics of liberalism and globalization might recoil at my argument that the SOC has returned. There is no shortage of critics of globalization and the development of certain aspects of international law, such as the World Trade Organization. Others might reject the premise of the “return of the standard of civilization” because it ignores aspects of contemporary international law and relations that have no historical antecedents. I do not pretend that the “return of the standard of civilization” explains everything about contemporary world affairs and international law’s role in them. Nor does my thesis mean that I agree with all that is advanced through the new standard of civilization. Those who reject my thesis need, however, to provide an alternative explanation for the liberal hegemony that animates international law today and how this hegemony differs from what occurred in the 19th and early 20th centuries.

The return of the standard of civilization also has certain consequences for international law and relations that are important to highlight.

A. MARGINALIZATION OF REALISM?

While power plays a role in the return of the SOC, this return signals that international relations is more complicated than realism historically has argued. When political, economic, cultural, and legal harmonization and homogenization are leading themes in contemporary world affairs, the States-as-billiard-balls model does not carry the explanatory power that it did in a more pluralistic era.⁶⁰ These observations echo writers who believe globalization marginalizes realism as a theory of international relations. This marginalization reduces the conceptual barrier realism has often been for people wondering about the reality and importance of international law. Although realism can explain the return of the SOC that is consistent with its precepts, we are less likely today to get excited about realism’s arguably outmoded view of the world.⁶¹

60. Timothy Dunne, *Realism* 109, 119 (“It has often been argued that the end of the cold war dealt a fatal blow for Realism.”) in Baylis and Smith, eds, *The Globalization of World Politics* (cited in note 11).

61. Not everyone would agree with this observation. See, for example, *id.* at 121–22 (arguing that “[t]here are good reasons for thinking that the twenty-first century will be a realist century”).

B. MARGINALIZATION OF PLURALISTIC RATIONALISM?

Similarly, the return of the SOC appears to marginalize pluralistic rationalism. As argued earlier, the old SOC created the conditions necessary for rationalism to work in a multicultural world. The new SOC moves beyond what the old standard attempted to harmonize. An international society based on pluralism may be shallow and vulnerable to the forces created in an anarchical system of States.⁶² International law in a pluralistic environment becomes “instrumental,” in Burke’s phrase, and lacks deep commitment from States and their peoples. The new SOC seems geared to produce solidarism within the Westphalian framework. These observations do not mean that the world has become unicultural; rather, my argument is that civilizational pluralism is not what the new SOC seeks to achieve, however politically incorrect that result may be.

C. CONSTRICTION OF CONSTRUCTIVISM?

Social constructivism has caught the attention of many who study world politics.⁶³ Indeed, the slogan of social constructivism—“anarchy is what States make of it”—fits into the rise of the old and new standards of civilization. Both standards are examples of Western powers shaping anarchy in a certain way. The constructivist claim that norms, rules, and institutions not only reflect the preference and power of States but also shape those preferences and exercises of power is the dynamic one can identify in the old and new standards of civilization. At the same time that the SOC seems to reflect a constructivist approach, it perhaps represents a constriction of constructivism. Once States make anarchy in a certain way and sustain that creation for decades, it becomes difficult to reverse course. An alleged virtue of social constructivism is that it liberates thinking from the “iron laws” of realism and allows us to reconceptualize how States shape anarchy and how international law can play a

62. Hedley Bull reached a similar conclusion when he argued:

The future of international society is likely to be determined . . . by the preservation and extension of a cosmopolitan culture, embracing both common ideas and common values, and rooted in societies in general as well as in their elites, that can provide the world international society of today with the kind of underpinning enjoyed by the geographically smaller and culturally more homogeneous international societies of the past.

Hedley Bull, *The Anarchical Society* 305 (Columbia 2d ed 1997). But, Bull warned that “the cosmopolitan culture . . . may need to absorb non-Western elements to a much greater degree if it is to be genuinely universal and provide a foundation for a universal international society.” *Id.* The new SOC is not, however, about absorbing non-Western elements.

63. See, for example, Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 *Intl Org* 391 (1992); Alexander Wendt, *Social Theory & International Politics* (Cambridge 1999). Smith noted that Wendt’s article, *Anarchy is What States Make of It*, “has probably been cited in the professional literature more than any other article in the last decade [the 1990s].” Steve Smith, *New Approaches to International Theory*, in Baylis and Smith, eds, *The Globalization of World Politics* at 165, 183 (cited in note 1).

role in the reshaping process. Social constructivism frees us from what Philip Allott called the "tyranny of the actual."⁶⁴

The old and new standards of civilization suggest, however, that "there is some tyranny in the actual in that the historical progress of the anarchical international system limits the room for alternative human and moral choice on the values to guide international and global society."⁶⁵ The journey from civilizational diversity and separation to Westphalian civilization and now toward liberal, globalized civilization has grooved international relations in ways that cannot be easily deconstructed and re-made into another reality. Most critics of the current liberal hegemony in international law and relations do not advocate the destruction of Westphalian civilization; rather they seek some alternative way to let Western civilization organize world affairs.

D. PERMANENT DIALOGUE BETWEEN KANT AND BURKE?

As noted in the Introduction, Hoffmann summed up international relations theory as a permanent dialogue between Kant (liberalism) and Rousseau (realism).⁶⁶ The return of the SOC might signal a change in the participants in this dialogue. Neither Kant nor Rousseau was interested in cultural diversity. Kant's plan for perpetual peace requires adoption of liberal politics, economics, and law by the rest of the world. Rousseau's structural analysis of international relations leaves no room for culture to influence how a State might behave internationally. Both the old standard and especially the new SOC have Kantian overtones. Who provides an alternative voice to Kant after the return of the standard of civilization?

Rousseau remains a candidate; but, if realism is progressively (if not permanently) being marginalized, Rousseau loses his place. The voice of culture in classical international relations theory is Edmund Burke. For Burke, solidarism rests on cultural, or civilizational, foundations. Europe's shared civilization supported European international society and the development of international law. One can see in the old and new standards of civilization the attempt to build a globally shared culture so that the person who leaves his country to travel anywhere in the world would never feel himself quite abroad.

Burke's hostility, however, toward British imperialism in India represented an equally important aspect of his views on the role of culture in international relations. Burke was not a civilizational chauvinist. He argued that Indian civilization was morally equivalent to European civilization.⁶⁷ If Britain could not engage India in

64. Philip Allott, *The Concept of International Law*, 10 *Eur J Intl L* 31, 49 (1999).

65. Fidler, 35 *Tex Intl L J* at 412 (cited in note 51).

66. Hoffmann, *Janus and Minerva* at 47 (cited in note 16).

67. "I assert that their morality is equal to ours as regards the morality of Governors, fathers, superiors; and I challenge the world to shew, in any modern European book, more true morality and wisdom than is to be

commerce without destroying Indian civilization, then Britain should abandon its activities in India.⁶⁸ At the same time, Burke did not believe that the law of nations governed relations between Britain and India because it was the “public law of Europe”—a culturally bound system of rules.⁶⁹ Between India and Britain there was little correspondence in laws, customs, manners, and habits of life. Without that cultural foundation, the law of nations would be “instrumental” and subject to the whims of nations.

Burke’s defense of Indian civilization in the face of British imperialism and cultural chauvinism might conceptually represent the voice to counterbalance Kant’s in a new dialogue. Kantian liberalism has no tolerance for traditional civilizations, while Burkean conservatism opposes sacrificing the people of other civilizations to the norms, values, and rules that govern the most powerful States in the international system.

Whether Burke’s voice counterbalances that of Kant’s is open to debate. The combination of the old and new standards of civilizations may have taken us beyond a Burkean defense of non-Western civilizations. New technologies further reinforce doubts about the feasibility of reconstructing anarchy in Burkean fashion. Burke himself never provided a detailed answer to how Britain and India could engage in commerce without some cultural harmonization concerning how trade, investment, and the people involved in such activities would be handled. This is the question to which the old SOC and the system of capitulations developed as an answer. The new SOC may represent the “end of history” for Burkean conservatism. If that is correct, the permanent dialogue might be a monologue. It may not, however, be a permanent monologue.

VI. CONCLUSION

My thesis that the SOC has returned in the post-Cold War period recognizes that the old standard vanished from the world scene for roughly eighty years. What awaits the new SOC in the future is impossible to predict. Perhaps Huntington will prove right, and we will see civilizations clashing.⁷⁰ The harsh dynamics of the old SOC may reappear—the core’s exploitation of the periphery leading to a new “revolt

found in the writings of Asiatic men in high trusts, and who have been Counsellors to Princes.” Edmund Burke, *Speech on Opening of Impeachment (1788)*, in Fidler and Welsh, eds, *Empire and Community* at 203, 227 (cited in note 42).

68. “[I]f we are not able to contrive some method of governing India well, which will not of necessity become the means of governing Great Britain ill, a ground is laid for their eternal separation; but none for sacrificing the people of that country to our constitution.” Edmund Burke, *Speech on Fox’s India Bill (1783)*, in Fidler and Welsh, eds, *Empire and Community* 170–171 (cited in note 42).

69. Fidler and Welsh, eds, *Empire and Community* at 44–45 (cited in note 42).

70. See Huntington, *The Clash of Civilizations* (cited in note 9).

against the West” that rejects the new SOC, leaving Westphalian civilization as the global organizing paradigm.⁷¹ Or a revolt may never materialize and inequity and inequality between the West and the rest will be like a chronic disease that festers but does not destroy the organism. Another possibility is that the new standard of civilization, aided by new technologies, solidifies civilizational harmonization on the West’s liberal, globalized terms. More optimistically, the new SOC could produce “new legal orders” that transcend the Westphalian framework of international law.

Great emphasis is placed on how much is new in contemporary international law. The return of the SOC should give international lawyers pause about the novelty of their endeavors. We think ourselves more advanced and enlightened than our international legal predecessors of the pre-1914 era. How ironic and perhaps disturbing it is to realize that we, as civilizational architects, may be putting those men of embarrassing attitudes to shame.

71. Andrew Linklater, *Rationalism* in Scott Burchill and Andrew Linklater, eds, *Theories of International Relations* 93, 106 (St Martin’s 1996) (positing that one outcome of the relations between different cultures and civilizations is that “the sovereign state has been accepted by non-European peoples and there is a basic consensus about the need to uphold basic rules of co-existence though not to promote any particular set of moral standards. Pluralism has been accepted and solidarism resisted.”).

