

## The Invention of a Tradition: Westlake, The Berlin Conference and the Historicisation of International Law

In his article “History of an Illusion”, David Kennedy argues that much of what international lawyers in the 20<sup>th</sup> Century took to be the predominant features of 19<sup>th</sup> Century international law – its philosophical preoccupations with positivism and natural law and its formalist commitment to sovereignty – were little more than fantasies projected back to undergird a modern pragmatic, or progressivist, sensibility constructed to arrive in the form of a “synthesis” from that carefully designed past. The “modernism, pragmatism and progressivism of today’s international law” he was to argue “is more rhetorical effect and polemical claim than historical achievement, and more part of the internal dynamic of the field’s development than an artefact of a distant era”.<sup>1</sup> Just as the Austinian problematic (how to conceive of a law ordering the activities of “sovereign” states) seemed to be a fixation more for 20<sup>th</sup> Century international lawyers than their 19<sup>th</sup> Century predecessors, so also the mystification of sovereignty was one “read back” by those seeking to undergird new institutional initiatives both within and outside the League of Nations. For Kennedy, the 19<sup>th</sup> Century history of international law was to be read in a different register, one that situated the sensibilities of the 19<sup>th</sup> Century profession in the same “modernist” frame of the later revisionists – it was equally “flexible and innovative in its reasoning”, similarly “deferential to state power” and just as “cosmopolitan”.<sup>2</sup>

In one direction Kennedy’s attention is focused here upon the essentially ideological character of traditional international legal historiography, and his attack upon it may be associated, above all else, with an attempt to displace the naturalising postulates that appears to underpin contemporary “pragmatic” thought (characterised by its “centrism”, “flexibility” and its resort to “balancing principles” such as “reasonable accommodation, reci-

1 D. KENNEDY, *International Law and the Nineteenth Century: History of an Illusion*, in: *Quinnipiac Law Review* 17 (1997–1998) 99–136, 104.

2 KENNEDY (n. 1) 134.

procuity and fairness”).<sup>3</sup> That the mode for doing so seems to resolve itself in the articulation of an alternative, more “accurate”, narrative of 19<sup>th</sup> Century legal history that displaces the possibility of its subsequent supersession in the manner described, in some ways detracts from the force of a more general possible insight: that international legal historiography is always, and routinely, polemical in the sense that the kind of neutrality that might otherwise be sought in describing the “true” history of international law “in its own terms”, or for its “own ends”, is one entirely dependent upon a prior resolution of matters that are fundamentally unstable (such as over the conditions for legal agency or the identification of relevant sources). At some point, reflection has to turn towards the conditions of production – the insights, interests or theoretical frames which the author brings to bear upon the material that comes to hand – and which, as Croce famously noted, is to make all historical judgments essentially “contemporary” in character.<sup>4</sup> Kennedy’s critique might thus be thought to have been misdirected: seeking to try to respond at the level of historical truth to a question which might better have been addressed in terms of its meaning.

Nevertheless, the concern of this paper is not so much with an evaluation of the kinds of claims Kennedy makes about 19<sup>th</sup> Century international legal history, nor indeed with the specific problematic with which he leaves us. Rather it is to reflect upon the very genesis of the kind of historical reflection that Kennedy takes as the point of his critique. It is perhaps decisively ironic, in that sense, that one of the outstanding features of 19<sup>th</sup> Century international legal thought was the emergence of a consciousness of its own historical character. This is not to say, of course, that prior to this time, international lawyers were unaware of historical precedents or of the contribution made by earlier scholars, whether humanist or scholastic.<sup>5</sup> Rather it is to reflect upon the fact that it was only from the time of Ompeda<sup>6</sup> and de Martens,<sup>7</sup> in the late 18<sup>th</sup> Century that international lawyers begin to envisage

3 KENNEDY (n. 1) 135–136.

4 See B. CROCE, *History as the Story of Liberty* (1941) 19.

5 It is possible, of course, to trace earlier instances of this process of historicisation, particularly in Pufendorf’s account of the development of natural sociability. For a discussion see I. HONT, *The Language of Sociability and Commerce: Samuel Pufendorf and the Theoretical Foundations of the “Four Stages” Theory*, in: A. PAGDEN (ed.), *The Languages of Political Theory in Early Modern Europe* (1987) 253.

6 D. H. L. v. OMPEDA, *Literatur des gesammten, sowohl natürlichen als positiven Völkerrechts* (1785).

7 G. F. DE MARTENS, *Recueil des Traités* (1791–1801). One may also note that the lack of attention to historical study prior to this time was not confined to

their projects in distinctively historical terms. Here, for the first time, one was to find accounts of the history of international law as a discipline, and from this point onwards the now, almost compulsory, “historical introduction” in textbooks were to start to make their appearance.

The emergence of this historical consciousness, of course, neatly aligns with the rise, on the one hand, of a rigorous, source-based, methodology that characterised the newly emergent professional historiography,<sup>8</sup> and on the other, of a “historicist”<sup>9</sup> frame of reference (in which all knowledge was understood to be capable of being ordered within a meta-narrative of social progress or evolution)<sup>10</sup>. The point of importance, however, is that what was bequeathed by the 19<sup>th</sup> Century is something that had, perhaps, less to do with the theoretical debates between positivism and natural law, or as to the structural character of sovereignty and consent, than with the idea that the essential character of international law was to be understood in historical terms. This idea, of course, has some bearing upon debates as to the “sources” of international law (insofar as it invites critical reflection upon claims to trans-historical truth),<sup>11</sup> as it does upon how one might reflect upon notions of sovereignty or statehood, but it is to suggest that rather than being formative, such debates are actually symptomatic – produced, as a logical outcome of a process of placing international legal knowledge within a specifically historical frame.

In one sense, of course, to speak about international legal knowledge being historicised is counter-intuitive. The very process of legal argument, after all, will be one that involves the marshalling of relevant historical sources and their rhetorical deployment in reference to contemporary conditions. All law

international law. In 1888 MAITLAND, the Downing Professor on the Laws of England was to deliver his inaugural address under the title “Why the History of English Law is not Written”, in: *Collected Papers* (1911), i, 480.

8 See L. VON RANKE, *Theory and Practice of History* (ed. Igers 2010).

9 In Meinecke’s terms, historicism arose primarily out of various critiques of enlightenment thought in which Vico, Herder and Goethe are at the forefront. See F. MEINECKE, *Historicism: The Rise of a New Historical Outlook* (trans. Anderson and Schmidt 1972). For a virulent criticism of the idea of historicism see K.R. POPPER, *The Poverty of Historicism* (1957).

10 One of the most expressive examples of the frame of reference this invoked is to be found in Gibbon’s adage that we may “acquiesce in the pleasing conclusion that every age of the world has increased and still increases, the real wealth, the happiness, the knowledge, and perhaps the virtue, of the human race”. E. GIBBON, *The Decline and Fall of the Roman Empire* (1794, ed. Bury) Vol. 4, Ch. xxviii, 169.

11 See e.g. WARD, *An Enquiry into the Foundation and History of the Law of Nations in Europe* (1795) I, iv–xviii.

seems to be about history at one level or another and perhaps has always been. Yet it is equally evident that the intellectual frame of rule-finding or policy-prescription also not infrequently involves an effacement of the historical character of the materials in question and the displacement of “unnecessary” contextual factors of cause and explanation that might otherwise be of interest. After all, one need not know much more about the case of the *Caroline*, in order to rely upon it, than that it involved a discussion of the conditions for the exercise of self-defence. In fact, one may go further than this and suggest that the process of historicising an event – to make explicit the particularity of the context and explore the specificities of motive or cause – is to make it all the less relevant as a generalisable experience from which contemporary legal rules might be deduced. The significance of the Nuremberg and Tokyo tribunals, for example, has always been clouded by the apparent inability to entirely displace the contextual conditions (victors justice) that appeared to shape their work. But if the historicisation of legal materials operates, at one level, as a kind of normative block, at another level entirely, it may also be seen to shape or orient legal knowledge in particular ways: contemporary initiatives may acquire a character or trajectory precisely as a consequence of being placed in a certain relationship to experience from the past. The continued significance of the *Naulilaa* arbitration, for example, derives primarily from the sense in which it provides evidence of a form of politico-judicial movement from an age of reprisals to that of collective security. The contextual other-worldliness of the historical event is thus turned from being a facet marking its irrelevance, to a characteristic that endows it with productive effect through the medium of a trans-historic interpretive scheme in which notions of “progress”, “evolution”, “development” or “supersession” come to the fore.<sup>12</sup> It is, furthermore, this latter process that Kennedy identifies to be that of the pragmatic “illusionists” of the 20<sup>th</sup> Century, and which rhetorically orients a good deal of policy-oriented legal reform to this day.

Yet, and this is the key point, once the bridgehead was created – once it came to be understood that international law had “a history” – there was no going back. The “flat earth” cosmopolitanism of the humanists, for whom the poets and orators of Rome had as much to offer as the practice of treaty making, was not there to be reprised in its own terms, but only as a thin lineage of cosmopolitan thought straining against the resistance of what was effectively a materialist critique. All law, all legal relations, had to be under-

<sup>12</sup> See generally, T. SKOUTERIS, *The Notion of Progress in International Law Discourse* (2010).

stood, at some level or other, as the products of human acts and agency even if the object, in some hands, was the identification of trans-historical truths. The subsequent repudiation of 19<sup>th</sup> Century legal thought (whether or not one is to associate it with “positivism” as a method, a philosophy, or indeed a faith), was thus never going to be achieved in anything less than its own terms – its temporal displacement arriving in the form, not of a revived idealism, but of a new kind of “cosmopolitan materialism” whose analytical frame was that of a global sociology within which a functional differentiation between fields of endeavour and levels of agency would be allowed to flourish. It is this broader frame, with its linguistic correlates of, on the one hand, “community” and “universality”, and on the other “fragmentation” and “specialisation”, that provides the shape for international legal thought to this day.

The main focus of this chapter, however, is upon the initial process of historicisation taking place within the 19<sup>th</sup> Century, in which the consciousness of international law as being the active product of social agency was developed. This had, as I hope to show, both social and spatial connotations, the effect of which was not merely to highlight the contingent character of legal activity but was also, and simultaneously, to place at centre-stage, relations with territories in the non-European world. Whereas before, the non-European world could be perceived as an undifferentiated terrain – as the incidental locus of legal thought and action – it became the spatial exemplar of the new temporal ordering of international law. The process by which international law came to be understood as historically located was one that resulted in a divided realm of doctrine and practice in which those parts of the world that partook of that history were divided from those that had yet to participate in it. The re-description of the *ius inter gentes* as the public law of Europe appeared, thus, to be the merest logical expression of this anthropologically-informed historical consciousness. But yet its real meaning was to be divined only at its limits – at the point at which the European encountered the non-European, and when international lawyers were faced with the problem of its transcendence.

The particular medium through which I propose to explore these ideas is by reference to John Westlake’s response to the events surrounding the Berlin West Africa Conference of 1884–5. The reasons for this choice are several. In the first place, the Berlin Conference was clearly a significant moment in late 19<sup>th</sup> Century international legal and diplomatic relations.<sup>13</sup> Whilst historians

13 For general accounts of the Conference see S. CROWE, *The Berlin West African Conference 1884–1885* (1942); R. GAVIN and J. BETLEY, *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885* (1973); S. FÖRSTER, W. MOMMSEN and R. ROBINSON

are characteristically divided in how to read it as an event – whether, for example, it was essentially colonial or anti-colonial in orientation,<sup>14</sup> whether its focus was upon Europe or Egypt rather than Africa,<sup>15</sup> whether it was central to the process of partition or largely superficial<sup>16</sup> – its symbolic place as a marker of the high-point of colonial expansion in the late 19<sup>th</sup> Century is hard to avoid. This was certainly the case for the (albeit comparatively small) community of international lawyers within Europe at the time, whose attention was drawn to events at Berlin and the attempts made there to articulate rules governing the acquisition of territory for purposes of regulating the subsequent Scramble.<sup>17</sup> For them, Berlin posed something of a novel problem. On the one hand it offered the opportunity to reflect upon the intellectual organization of ideas of territorial sovereignty and the content of rules relating to its acquisition. On the other hand, however, it also brought into prominence the pertinence of those rules in relation to non-European

(eds.), *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (1988); S. COOKEY, *Britain and the Congo Question 1885–1913* (1968); R. ROBINSON, J. GALLAGHER and A. DENNY, *Africa and the Victorians: The Official Mind of Imperialism* (2<sup>nd</sup> ed. 1981); R. ANSTEY, *Britain and the Congo in the Nineteenth Century* (1962); A. KEITH, *The Belgian Congo and the Berlin Act* (1919); E. FITZMAURICE, *The Life of Lord Granville* (1905) II; R. S. THOMSON, *Fondation de l'Etat Indépendent du Congo* (1933); P. GIFFORD and W. R. LOUIS (eds.), *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (1971); E. AXELSON, *Portugal and the Scramble for Africa 1875–1891* (1967); J. HARGREAVES, *West Africa Partitioned* (1974–1975) I.

14 For a discussion see R. ROBINSON, *The Conference in Berlin and the Future of Africa, 1884–1885*, in: FÖRSTER et al (n. 13) 1.

15 See ROBINSON et al (n. 13) ???.

16 J. HARGREAVES, *Prelude to the Partition of West Africa* (1963) 337; R. LOUIS, *The Berlin Congo Conference*, in: GIFFORD and LOUIS (n. 13) 167; T. PAKENHAM, *The Scramble for Africa* (1991) 254 (“There were thirty-eight clauses to the General Act, all as hollow as the pillars in the great saloon. In the years ahead people would come to believe that this Act had had a decisive effect. It was Berlin that precipitated the Scramble. It was Berlin that set the rules of the game. It was Berlin that carved up Africa. So the myths would run. It was really the other way round. The Scramble had precipitated Berlin. The race to grab a slice of the African cake had started long before the first day of the conference. And none of the thirty-eight clauses of the General Act had any teeth. It had set no rules for dividing, let alone eating, the cake.”). What Pakenham is prepared to admit for the Conference is what he calls the “spirit of Berlin” (“For the first time great men like Bismarck had linked their names at an international conference to Livingstone’s lofty ideals: to introduce the ‘3 Cs’ – commerce, Christianity, civilisation – into the dark places of Africa.”)

17 General Act of the Berlin Conference, 26<sup>th</sup> Feb. 1885 C 4361 1885.

territory the demarcation of which seemed to fall outside the territorial confines of European civilisation.<sup>18</sup> One of those who was to struggle with the theoretical problems that seemed to arise was Westlake, whose Chapters on the Principles of International Law were organized around this persistent theme. He was, of course, by no means the only person writing on the subject at the time, and in terms of his conclusions he may be said to differ considerably from a number of his peers. But his work, nevertheless, may be regarded as acutely sensitive to the theoretical and methodological challenges that appeared to confront all international lawyers at the time.

#### *The Berlin Conference and its Final Act*

As most conventional accounts point out, the immediate origin of the Berlin Conference was to be found in a series of exchanges between the German Chancellor Bismarck and the French foreign minister Jules Ferry from April to October 1884 over the terms of a possible Franco-German *entente* on matters relating to overseas territories. The genesis of the proposed *entente* was informed, obviously enough, by the Anglo-French rivalry over Egypt (in which the French feared British control of the Suez Canal)<sup>19</sup> and by a series of disputes between Britain and Germany in relation to Cameroon, Angra Pequena, Fiji and New Guinea.<sup>20</sup> But there were at least three further forms of inducement for resort to a multilateral Conference on the subject of West Africa. The first was an appreciation that European consuls and explorers had increasingly resorted to open competition in the search to obtain exclusive treaties of trade and protection with a variety of rulers along “unclaimed” parts of the coast and within the interior of Africa.<sup>21</sup> As was commented in an

18 See e. g., E. ENGELHARDT, *Etude sur la Déclaration de la Conférence de Berlin Relative aux Occupations*, in: *RDILC* 18 (1886) 578.

19 On this theme see ROBINSON et al. (n. 13). For the French, a British stranglehold over the Suez Canal would have undermined their plans for expansion in Indo-China and Madagascar.

20 The Conference also had an obvious role in signifying Germany’s intention to become a colonial power rival to Britain is also of note. ROBINSON (n. 13) 8–9.

21 Although Stanley de Brazza Goldie and Nachtigal had all been actively concluding treaties with native sovereigns, even as late as 1883 there was still resistance to the idea of the outright annexation of African territory. As Assistant Under-Secretary Meade noted: “The view of the Foreign Office ... was that England should annex all unoccupied territory between Lagos and the French settlement of the Gaboon. Now this would be a tremendous undertaking. We could not annex it without making ourselves responsible for peace and order there. This would mean a task as heavy as governing the Gold Coast in a country and climate still severer. We should have to obtain a revenue which

editorial in the Times of 15<sup>th</sup> September 1884 (with the enduring title “The Scramble for Africa”), Protectorates “were being announced with such bewildering rapidity that no map-maker could keep pace”.<sup>22</sup> The concern, in this respect, was the threat of conflict and war. With “Protection” went tariff barriers, monopolies, and other restraints on freedom of commerce<sup>23</sup> such that each instance of a Protectorate being announced was one more threat to be managed. The second, and related, inducement had been the conclusion of an Anglo-Portuguese agreement in 1883 the effect of which would have been to recognize Portuguese sovereignty over the mouth of the Congo River,<sup>24</sup> and which threatened to close off the vast interior of Central Africa to the merchants, traders and factories of other European States. The Portuguese claims, much to the consternation of other European powers, were

could only be obtained by levying customs dues, and I doubt English traders wishing for this.” Minute by Meade, 28 March 1993. CO 806/203. ROBINSON et al (n. 13) 168.

22 The Times, 15<sup>th</sup> Sept. 1884.

23 As Kasson remarked at the Conference itself “[f]rom the moment when possession of a Colony does not take for granted its commercial monopoly, it ceases to have any value for a foreign Government. The revenues which it would bring in to the mother country would never be equal to the expenses which its maintenance would require”. Kasson statement, 10<sup>th</sup> Dec. 1884, Protocols, Annexe No. 13, 164.

24 The Treaty of 1884 provided for British recognition (subject to the conditions of the treaty) of Portuguese claims in the Congo between 8° and 5° 12' South the inland frontier of which would be defined with the least possible delay. Subsequent articles provided that the territory in question “shall be open to all nations and foreigners of all nationality” and that there should be freedom of movement and commerce (article II). Trade and navigation on the Rivers Congo and Zambesi should be free (article III) as should it be on all waterways in the territory concerned. To that end a mixed Commission would be established to draw up regulations for navigation, police and supervision of the Congo (article IV) including the establishment of appropriate “supervisory” charges for goods transhipped across the territory (article V). Roads were to be kept free and open to all travellers (article IV), protection given to missionaries or other ministers of religion (article VII), and respect (such as compatible with Portuguese sovereignty) given to the rights of native inhabitants under Treaties and Engagements with Portugal (article VIII). Tariffs were limited for a period of ten years to a level of those adopted in Mozambique in 1877 (Britain demanding national treatment for its subjects in this respect (article IX) and most favoured nation status more generally (article X). Particular emphasis was given finally to the “extinction of slavery” to which both High Contracting Parties bound themselves, and both agreed to allow the other to exercise powers conferred upon them under the Anglo-Portuguese Slave Trade Treaty of 1842 in Eastern and Southern Africa in cases in which no local authority is present. For the background see R. ANSTEY, *Britain and the Congo in the Nineteenth Century* (1962) 85.



largely based upon the title of discovery, and its alliance with Britain was taken to be a way of foreclosing other nations interests in the putative wealth and riches that existed in the Congo basin. Whilst the British had been forced to concede that this agreement was effectively dead before the Conference began,<sup>25</sup> its failure was nevertheless indicative of the problems of trying to approach the question of territorial delimitation through the medium of bilateral agreements.<sup>26</sup> Thirdly, the publication of a promise made to France by King Leopold, to the effect that the former would have a “right of option” over the territory possessed by the International Association of the Congo were the latter to be wound-up, caused a not inconsiderable degree of consternation, not least as a consequence of enduring doubts as to whether the Association, as an essentially private body, could claim to enjoy sovereignty as a “state”. Its recognition by the United States in April 1884<sup>27</sup> had certainly put the issue on the table, but in some degree the real issue turned upon the question whether the Association could be entrusted with the task of securing freedom of commerce within the Congo basin on behalf of all European States.<sup>28</sup>

In the course of their various exchanges during the summer of 1884, Bismarck and Ferry settled upon a definitive agenda for the Conference, circulated to all participants, which was designed to address three matters:

- “1. Freedom of commerce in the basin and the mouths of the Congo.
2. The application to the Congo and Niger of the principles adopted by the Congress of Vienna with a view to preserve freedom of navigation on certain international rivers, principles applied at a later date to the River Danube.
3. A definition of formalities necessary to be observed so that new occupations on the African coasts shall be deemed effective.”<sup>29</sup>

- 25 ROBINSON (n. 13) p. 3 (“Rejected in Paris and Berlin, intrigued against in Brussels, decried by merchants in Manchester and patriots in Lisbon, and the Anglo-Portuguese Treaty had been sabotaged by mid-June”). See generally ANSTEY (n. 24); FITZMAURICE (n. 13) II 356.
- 26 Nothing in the formalities of the Anglo-Portuguese agreement required its acceptance by other parties, but both Britain and Portugal understood that without such recognition, the agreement would be futile. Granville to Petre, 23<sup>rd</sup> April 1884, C. 4023, No. 40 (GAVIN and BETLEY [n. 13] 21).
- 27 See, State Papers, 30, 3. Further, Bontinck (n. ) 200–201; Wack, ???, 79–80.
- 28 While many States were appreciative of this idea, the British Foreign Office was deeply sceptical. See e.g. Anderson, “Nature of the King of the Belgians”, 2 March 1884, FO 84/1809, 233–235.
- 29 See, Plessen to Granville, 8<sup>th</sup> Oct. 1884, C.4205, No. 10. The German Chancellor originally proposed that a congress should guarantee free trade “in all unoccupied parts of the world not yet legally occupied by a recognized Power”. Courcel to Ferry, 14<sup>th</sup> May 1884, DdF, V, No. 270, 289.

The Conference itself took place in the German Chancellor's palace on Wilhelmstraße from the 15<sup>th</sup> November 1884 to the 26<sup>th</sup> February 1885. It was attended by 14 states including every European power with the exception of Switzerland, and with the presence also of the US<sup>30</sup> and Turkey.<sup>31</sup> There was no official place for the International Association of the Congo, nor for the Sultanate of Zanzibar or any other African sovereign. The work of the Conference was conducted over ten plenary sessions and was divided into two phases, the first of which ran from 15<sup>th</sup> November to 22<sup>nd</sup> December 1884, the second from the 5<sup>th</sup> January until the 26<sup>th</sup> February. Much of its work was also undertaken by specialised Commissions which reported back regularly to the plenary.

The outcome of the Conference was the conclusion of a General Act signed and ratified by all participants with the exception of the USA.<sup>32</sup> It was also signed and ratified by the Congo Free State (the recognition of which had been secured by another set of treaties between the International Association of the Congo and participating States which were appended to the General Act)<sup>33</sup> and by Zanzibar.<sup>34</sup> The overt purpose of the General Act was to secure “the development of trade and civilization in certain regions in Africa” at the same time as obviating “the misunderstanding and disputes which might in future arise from new acts of occupation (‘prises de possession’) on the coast of Africa”.<sup>35</sup> It comprised of 38 articles contained within seven Chapters, four of which contained “Declarations” on various substantive topics, two Acts of Navigation (relating to the Congo and Niger respectively) and a final chapter

- 30 The US reserved the right to decline to accept the conclusions of the Conference. NAW, Dept State Diplomatic Instructions Germany, vol. 17, ff. 414–415; in BONTINCK (n. 27) 225
- 31 France, Belgium, the Netherlands, Germany, Great Britain, Portugal, Spain, the United States, Austria, Russia, Italy, Denmark, Sweden and Norway, Turkey.
- 32 Schmitt comments pithily that the United States “demonstrated a mixture of absence in principle and presence in practice”. C. SCHMITT, *The Nomos of the Earth* (2003) 217.
- 33 Protocol IX, Annex I. E. HERTSLET, *A map of Africa by treaty* (3<sup>rd</sup> ed. 1967), I, 221–226 (Great Britain); 227–228 (Italy); 21–25 (Austria); 230–231 (Netherlands); 240–241 (Spain); 239 (Russia); 242–243 (Sweden and Norway); 205–206 (Denmark); 196–197 (Belgium).
- 34 HERTSLET (n. 33) I, No. 49, 314. The act of adhesion, however, contained a reservation to the effect that “shall not entail or shall not be supposed to signify his acceptance of the principle of free trade”. Once placed under a British Protectorate, however, the reservation was withdrawn by Britain on the 22<sup>nd</sup> June 1892. HERTSLET (n. 33) I, No. 46, 312.
- 35 General Act, preamble. HERTSLET (n. 33) II, No. 128, 468.

which dealt with “General Dispositions” relating to modification, signature and ratification.<sup>36</sup>

Leaving aside the navigation provisions (which were modelled on those for the Danube)<sup>37</sup> the key features of the General Act were fourfold.<sup>38</sup> First it established a regime of free trade in an area that stretched across the centre of Africa encompassing, at its centre, the “hydrographic” basin of the Congo and which was extended, for purposes of the Act, to the Eastern and Western seaboard of the Continent. Any power exercising sovereign rights in relation to such territory would be prohibited from establishing monopolies of any kind<sup>39</sup> and goods were to be free of all import and transit duties<sup>40</sup> and subject only to such taxation as might be levied “as fair compensation for expenditure in the interest of trade”.<sup>41</sup> Secondly, the powers bound themselves to “watch over the preservation of the native tribes and to care for the improvement of the conditions of their moral and material well-being”<sup>42</sup> and

36 Chapter I, Declaration relative to Freedom of Trade in the Basin of the Congo, its Mouths and circumjacent Regions, with other Provisions connected therewith (articles I–VIII); Chapter II, Declaration Relative to the Slave Trade (article IX); Chapter III, Declaration Relative to the Neutrality of the Territories Comprised in the Conventional Basin of the Congo (articles X–XII); Chapter IV, Act of Navigation for the Congo (articles XIII–XXV); Chapter V, Act of Navigation for the Niger (articles XXVI–XXXIII); Declaration Relative to the Essential Conditions to be Observed in Order that new Occupations of the Coasts of the African Continent may be held to be Effective (articles XXXIV–XXXV); Chapter VI, Declaration Relative to the essential Conditions to be observed in order that new Occupations on the Coasts of the African Continent may be held to be effective; Chapter VII, General Dispositions.

37 The regime for the Niger, however, did not envisage the establishment of a river commission. The river commission for the Congo was never established.

38 Described by Schmitt as “a remarkable final document of the continuing belief in civilization, progress, and free trade, and of the fundamental European claim based thereon to the free, i. e., non-state soil of the African continent open for European land-appropriation”. SCHMITT (n. 32) 216.

39 Article V.

40 Article IV (“Merchandise imported into those regions shall remain free from entrance and transit dues.”).

41 Article III.

42 Article VI (“All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes, and to care for the improvement of their moral and material wellbeing, and to help in suppressing slavery, and especially the Slave Trade. They shall, without distinction of creed or nation protect and favour all religious, scientific, or charitable institutions and undertakings created and organized for the above ends, or which aim at instructing the natives and bringing home to them the blessings of civilization.”).

employ all means at their disposal to put an end to the trade in slaves.<sup>43</sup> Thirdly, the powers bound themselves to respect the neutrality of the Congo basin and committed themselves to lend their good offices to enable such territory, in case of war, to be considered as belonging to a non-belligerent state.<sup>44</sup> Finally, and most significantly, the General Act committed any power acquiring coastal territory on the African continent to notify all others of their claim (article 34),<sup>45</sup> and take such steps as necessary to ensure within those territories the protection of vested rights and, where applicable, free trade (article 35).<sup>46</sup>

For all the apparent significance of the General Act in terms of the way in which it purported to set out the conditions for the subsequent partition of Africa, it was also clearly limited in various ways. Crowe, in her later account of the Conference, was in fact summarily dismissive:

“The importance of the conference as a landmark in international law, has in fact been exaggerated, for when its regulations are studied it can be seen that they all failed of their purpose. Free trade was to be established in the basin and mouths of the Congo; there was to be free navigation of the Congo and the Niger. Actually highly monopolistic systems of trade were set up in both those regions. The centre of Africa was to be internationalised. It became Belgian. Lofty ideals and philanthropic intentions were loudly enunciated by delegates of every country ... [and yet] the basin of the Congo ... became subsequently, as everyone knows, the scene of some of the worst brutalities in colonial history ... It was originally stipulated that the conventional Basin of the Congo ... should be neutralised in time of war. Actually it was found necessary to

43 Article IX (“Seeing that trading in slaves is forbidden in conformity with the principles of international law as recognized by the Signatory Powers, and seeing also that the operations which, by sea or land, furnish slaves to trade, ought likewise to be regarded as forbidden, the Powers which do or shall exercise sovereign rights or influence in the territories forming the Conventional basin on the Congo, declare that these territories may not serve as a market or means of transit for the Trade in Slaves, of whatever race they may be. Each of the Powers binds itself to employ all the means at its disposal or putting an end to this trade and for punishing those who engage in it.”).

44 Article

45 Article XXXIV (“Any Powers which henceforth takes possession of a trace of land on the coasts of the African continent outside of its present possessions, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.”).

46 Article XXXV (“The Signatory Powers of the present Act recognize the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and transit under the conditions agreed upon.”).

make neutrality optional. Only the Congo Free State opted for neutrality, and this neutrality was violated by Germany in 1914. Last but not least, and this is the feature of international law most commonly associated with it, the conference made an attempt to regulate future acquisitions of colonial territory on a legal basis. But here again, its resolutions, when closely scrutinised, are found to be as empty as Pandora's box. In the first place the rules laid down concerning effective occupation, applied only to the coasts of West Africa, which had already nearly all been seized, and which were finally partitioned during the next few years; secondly, even within this limited sphere the guarantees given by the powers amounted to little more than a simple promise to notify the acquisition of any given piece of territory, *after* it had been acquired, surely on every ground a most inadequate piece of legislation."<sup>47</sup>

Whether or not Crowe may be thought to overstate, in one direction, what might feasibly be expected of a multilateral agreement and understate, in another, what its legal influence might really have been, it was certainly the case that the formalities of the General Act were not to have a lasting impact. A few formal notifications were made under the terms of article 34 in the following years, but since it only extended to title to the coastal regions of Africa such practice largely petered out in later years. Already by 1890 the terms of the General Act, so far as relating to the question of slavery<sup>48</sup> and the importation of arms and liquor were largely superseded by those in the Brussels General Act,<sup>49</sup> a declaration appended to which also amended the terms of article 4 by permitting the imposition of duties on imports.<sup>50</sup> The terms of the General Act were, for a period, to be routinely invoked in disputes with the Congo Free State over matters of commercial freedom and the treatment of natives, and also by Britain during the period in which she pondered the recognition of the Congolese annexation by Belgium.<sup>51</sup> But in 1919, ratification of the treaty of St Germain the terms of which purported to supersede the Berlin General Act in its entirety – a conclusion which was, albeit somewhat controversially, endorsed by the Permanent Court of International Justice in the *Oscar Chinn case*.<sup>52</sup>

47 CROWE (n. 13) 3–4.

48 See, in particular, article IX.

49 Brussels General Act,

50 Declaration respecting Import Duties, 2<sup>nd</sup> July 1890, HERTSLET (n. 33) II, 517. Under the same authorisation, a separate scheme was established in relation to the Eastern Zone of the Conventional Basin of the Congo by agreement between Britain, Germany and Italy, HERTSLET (n. 33), II, No. 131, 518. This was to survive until 1901.

51 See generally, COOKEY (n. 13). Further, E. NYS, *Le droit international. Les principes, les théories, les faits* (1912).

52 See, M. SORENSEN, The Modification of Collective Treaties without the Consent of all the Contracting Parties, in: *Nord TIR* 9 (1938) 150.

From that stage onwards, it remained a point of reference in Arbitral decisions in the 1920s and 1930s such as in the *Island of Palmas*<sup>53</sup> and *Clipperton Island*<sup>54</sup> cases, but here mainly for purposes of being distinguished: there was no general obligation to notify; the Berlin General Act only applied to Africa. It also, for a brief period of time, remained a resource in the hands of certain German international lawyers, seeking to challenge the terms of the Treaty of Versailles which, they maintained, had wrongfully deprived Germany of its colonies.<sup>55</sup> Nevertheless, by the time Jennings was to write his influential monograph on the *Acquisition of territory in international law* in 1963, its significance had declined to the point at which he felt it necessary only to mention the Berlin General Act in one footnote (n. 2, p. 39) where Lauterpacht is quoted with approval denying its contemporary relevance.

If this is to testify as to the legal insignificance of the General Act, this was not, as I have already suggested, the immediate impression of it for international lawyers at the time. Several key figures, such as Sir Travers Twiss and Emile de Laveleye, had already involved themselves quite extensively in events prior to, and during, the Conference. And subsequent to the Conference itself, a slew of books and articles on the subject of the acquisition of territorial sovereignty, the nature of colonial protectorates, the desirability of international navigation regimes or the neutralisation of territory, were produced.<sup>56</sup> The *Institut de Droit International*, furthermore, was encouraged to attempt to formulate a set of principles that gave expression to the newly emergent consensus that had apparently emerged.<sup>57</sup> It was the cause, in brief, of a significant amount of doctrinal reflection some of which concerned, as we shall see, meditations on the general character of international law.

- 53 See, *Island of Palmas case (Netherlands, USA)*, *RIAA* (1928) II 829, 868.  
 54 *Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island*, Jan. 28, 1931, in: *AJIL* 26 (1932) 390, 394.  
 55 See???,  
 56 See e.g., E. ENGELHARDT, *Conférence de Berlin – Origin des Actes de Navigation du Congo et du Niger*, in: *RDILC* (1886) 96; ENGELHARDT, *Etude sur la Déclaration de la Conférence de Berlin Relative aux Occupations*, in: *RDILC* (1886) 433; F. DE MARTENS, *La Conférence du Congo à Berlin et la politique coloniale des Etats modernes*, in: *RDILC* (1886) 113, 244; J. HORNUNG, *Civilisés et barbares*, in: *RDILC* (1886) 188, 281; J. JOORIS, *De l'occupation des territoires sans maître sure la côte d'Afrique. La Question d'Angra Pequena*, in: *RDILC* (1886) 236  
 57 On the work of the Institut in this respect see M. KOSKENNIEMI, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002) 98–178.

*Chapters and Principles – John Westlake’s Berlin*

John Westlake’s *Chapters on the Principles of International Law*,<sup>58</sup> published some nine years after the Conference is perhaps one of the best examples of this initial species of doctrinal reflection. He was clearly not alone in understanding the Conference and General Act to have had some impact upon, or relevance for, general international law:<sup>59</sup>

Most international lawyers writing upon that subject between 1885 and 1914 would routinely refer to the Berlin General Act as part of a general discourse on territorial sovereignty.<sup>60</sup> Nor, as we shall see, can his *Chapters* be regarded as a definitive statement of the condition of international law at the time: in many respects he sought to position himself outside, or between, what he saw to be the dominant traditions of thought at the time (the analytical school on one side, the historical school on the other). What is of particular interest in his work, however, is the way he attempts to weave together two divergent strands of thought that were in common circulation – one being a consciousness as to the historically-contingent character of European international law; the other a sense as to the universal orientation of the precepts that underpinned that thought and practice (in which the terms “civilisation”, “progress”, and “humanity” were often at the fore). As Westlake was aware, these stood in tension with one another and the occasion of the Berlin Conference – in which the question as to how one might conceptualise legal relations with the non-European world came to the fore – provided the opportunity for bringing them together in some way.

At the outset, there is no doubt that the Berlin Conference was one, if not the main, cause for Westlake writing and publishing his *Chapters*, and the terms of the General Act lie as a background thread throughout. His key concern, as he points out in his preface, was a problem that had been

58 J. WESTLAKE, *Chapters on the Principles of International Law* (1894).

59 WESTLAKE (n. 58) 105. (“The rules which the African Conference of Berlin laid down in Articles 34 and 35 of its General Act, though limited in their expression to the acquisition of territory on the coast of Africa, embody the shape which the law as to the original acquisition of title has taken under the influence of these views. Few doubt that their principles are applicable generally ...”).

60 P. FIORE, *Nouveau droit international public suivant les besoins de la civilisation moderne* (2e éd., trad. par Charles Antoine, 1885); G. JÉZE, *Etude theoretique et pratique sur l’occupation comme mode d’acquérir les territoires en droit international* (1896); A. RIVIER, *Programme d’un cours de droit des gens* (1889); NYS (n. 51) II; C. SALOMON, *De l’occupation des territoires sans maître* (1889).

discussed, but only unsatisfactorily resolved in Berlin: what were the general principles concerning the acquisition of sovereignty over “new” territory? What role was played, in that respect, by the various treaties (principally treaties of Protection) concluded with native authorities? What was one to make of the modes of historic title such as “discovery”? What events at the Conference clearly demonstrated, to Westlake, was the need for some conceptual elaboration of the notion of territorial sovereignty, and he saw himself as having a particular contribution to make in that regard. He was to note, in any case, that “the great human interest of that question [vis, the Berlin Conference] would of itself have been sufficient motive for its introduction into this book, even had it not been required for the scientific purpose mentioned.”<sup>61</sup>

The key problem that Westlake sought to address was what he saw to be the persistence within contemporary legal scholarship of a neo-feudal conflation of idea of territorial sovereignty with that of property.<sup>62</sup> Since, in feudal society, kingdoms and principalities were understood largely as the property of kings or princes, capable of being passed by marriage, bequest or inheritance,<sup>63</sup> it was unsurprising that the Roman Law notions of *imperium* and *dominium* had lacked any effective distinction. In a post-Feudal world, however, these terms were to be differentiated. *Imperium*, as Westlake was to aver, was the Roman law term for sovereignty and expressed “primarily an authority over persons, but extended to the relation which a state bears to its territory”,<sup>64</sup> whereas *dominium* was the term for property, whether that be the property of a private person or of the State itself. The distinction was important insofar as property and sovereignty played “different parts in the system of acts and purposes which makes up civilised life”. In case of the cession of territory, for example, the State receiving the territory would receive sovereignty over the whole, but only those proprietary entitlements to such public property as existed within that territory prior to the act of cession.<sup>65</sup>

Westlake’s point, however, was not merely to rectify the misapplication of Roman speculations about natural modes of acquiring property, but to address a more concrete problem that he saw arising as a consequence of the discussion in Berlin over title to territory in Africa. The key to understanding that problem, however, lies first of all in his account of international

61 WESTLAKE (n. 58) xiv.

62 WESTLAKE (n. 58) 131–132.

63 WESTLAKE (n. 58) 131 (“it belonged to the king to govern his kingdom as it belonged to the lord to govern his manor”).

64 WESTLAKE (n. 58) 133.

65 WESTLAKE (n. 58) 129–130.



law, the main features of which may be gleaned from the first three of his eighteen Principles:<sup>66</sup>

- “1. The society of states, having European civilisation, or the international society, is the most comprehensive form of society among men, but it is among men that it exists. States are its immediate, men its ultimate members. The duties and rights of states are only the duties and rights of the men who compose them.
2. The consent of the international society to the rules prevailing in it is the consent of the men who are the ultimate members of that society. When one of those rules is invoked against a state, it is not necessary to show that the state in question has assented to the rule either diplomatically or by having acted on it though it is a strong argument if you can do so. It is enough to show that the general consensus of opinion within the limits of European civilisation is in favour of the rule.
3. The consent of international society, defined as in the last paragraph, and given to a rule as an enforceable rule of law, is normally binding on the consciences of men in matters arising within the society and transcending the state tie, as state law is normally binding on the conscience within that tie. Such consent therefore normally determines the mutual duties and rights of the states in which men are grouped. This is so because the international society is not a voluntary but a necessary one, and the general consensus of opinion among its members is the only authority that can make rules for it. The men who compose any state derive benefits from that society, and therefore cannot at their pleasure adhere to it in part and not altogether ... The social nature of man lies at the bottom of these reasons.”

For Westlake, thus, international law represented a system of rules that had emerged by “general consensus” within a particular society (civilised European society), the addressees of which were those “men” (sic!) who comprised that society, and who were bound to it by reason of both conscience and necessity. As we shall see below, Westlake’s views in this respect were undoubtedly shaped by the tradition of the German historical school whose emphasis on the grounding of law in culture, language and tradition (as represented in the idea of the *Volksgeist*) had laid down a challenge to the rationalist universalism of Enlightenment thought and its associated advocacy of “natural rights”.<sup>67</sup> The dictates of reason, as Westlake was to note, were always historically contingent, dependent upon both time and place,<sup>68</sup> and

<sup>66</sup> WESTLAKE (n. 58) 78–85.

<sup>67</sup> Westlake distinguishes, here, between the original *jus naturale*, understood as “a body of rules at one time believed to be ascertainable and primary” and its later corruption in which it came to be understood as “a body of rights believed to exist by nature, and to secure which is supposed to be the primary function of law”. WESTLAKE (n. 58) 113.

<sup>68</sup> J. WESTLAKE, *Introductory Lecture on International Law*, 17<sup>th</sup> October 1888, in: J. WESTLAKE, *Collected Papers on International Law* (L. OPPENHEIM ed.

the language of natural rights was therefore ultimately unhelpful since it not only obscured the articulation of decisive rules,<sup>69</sup> but also wrongly conflated the ethical with the juridical.<sup>70</sup> “Ideals are always propagandist” as he was to later note.<sup>71</sup>

Westlake’s emphasis upon the centrality of social consensus, here, was underpinned by an essentially sociological conviction that Europe enjoyed a common civilisation:

“Throughout Europe and America, if we except Turkey, habits occupations and ideas are very similar. Family life, and social life in the narrower sense of that term, are based on monogamous marriage and respect for women. The same arts and sciences are taught and pursued, the same avocations and interests are protected by similar laws, civil and criminal, the administration of which is directed by a similar sense of justice. The same dangers are seen to threaten the fabric of society, similar measures are taken or discussed with the object of eluding them, and the same hopes are entertained that improvement will continue to be realised. The literature which is occupied with the life and destiny of man, which entertains him and expresses his most intimate feelings, is read everywhere from whatever country it emanates. There are differences in detail, but no one who has a liberal education feels himself a stranger in the houses, schools, law courts, theatres, scarcely even in the churches, of another country. Not only is there a great circulation of people regardless of territorial boundaries, but the native subjects of one state travelling or resident in another do not form a class apart; they mix freely with the population, and usually feel themselves safe under the administration of justice.”<sup>72</sup>

1914) 403–404 (in which he expresses profound scepticism as to the existence of general “principles of international legislation”).

69 WESTLAKE (n. 58) 112 (“[S]ince the cases in which the right of self-preservation is alleged are precisely those in which it would clash with the right of independence, which is equally asserted by the advocates of natural rights, it follows that no rules, but confusion, must result from recognition either right as absolute”).

70 WESTLAKE (n. 58) 113. In the main, Westlake was to regard the key to this distinction as being found in the idea of enforceability: “When a claim is urged but is not held to be enforceable, it is commonly called a moral claim as distinguished from a legal one. In order to become a legal claim it must be accompanied by the sentiment that it would be justifiable to enforce it, and that sentiment must be shared by the general mass of some society which is concerned with the matter.” (WESTLAKE [n. 58] 2–3). See also, WESTLAKE, *Introductory Lecture* (n. 68) 402–403 where he stresses the important role of “human authority more or less regular its action” in determining the necessity for enforcement, and indicates that the principles marking the boundary between “the morally right and the enforceable, must bear the same relation to the rules of International Law which what Bentham called the principles of legislation bear to national law”.

71 J. WESTLAKE, *The Transvaal War* (1899), in: *Collected Papers* (n. 68), 419, 424.

72 WESTLAKE (n. 58) 101–102.

Of course, if international law was to be identified with the social and cultural parameters of European society, and was dependent ultimately upon a collective psychological self-consciousness, then relations with the non-European world were immediately rendered problematic. How might one insist upon the adhesion of non-European societies to the rules of international law if, culturally speaking, they shared little in common? How, furthermore, might one view those treaties of cession or protection that had been concluded with native sovereigns in Africa and elsewhere for purposes of establishing title to such territory? For Westlake, it was the second, rather than the first of these questions that required answering. As regards the first, the issue was really just the extent to which European states might wish to admit non-European states (such as Turkey, Persia, China, Japan and Siam) to the benefits of membership in the system – and then the choice remained as to whether they would be admitted to merely “parts of international law” rather than the whole of it.<sup>73</sup> In practice, of course, he concluded that as a consequence of the necessity of imposing regimes of consular jurisdiction, the partial option had often been preferred – even, paradoxically, in case of Turkey despite the fact that she had been admitted into European society as a consequence of the Treaty of Paris of 1856.

It was in relation to the second question – concerning the status of treaties of protection or cession – that his distinction between sovereignty and property again became important. Westlake was to observe, at the outset, that the character of territorial sovereignty as it was known in international law was impossible to deduce from examination of the situation in “old countries” – all one would be faced by, in any particular case, would be a local distribution of territory and property:

“All [such] states ... hold their territory by the same kind of title by which their subjects hold their property in land, that is by a series of human dealings – as cession or conquest in the one case, conveyance *inter vivos* or will in the other – deduced from a root assumed as presenting an irreducible situation of fact.”<sup>74</sup>

In such a context, the idea of sovereignty (as *imperium* rather than *dominium*) remained hidden behind the veil of ownership. One might attempt move back down the chain of ownership, he suggests, to search out the moment of original acquisition (as might be identified in a postulated “state of nature”), but such philosophical or “prehistorical” speculation was really of no relevance. Not only would it be entirely speculative<sup>75</sup> but it faced a logical

73 WESTLAKE (n. 58) 82.

74 WESTLAKE (n. 58) 134.

75 WESTLAKE (n. 58) ???.

impasse: the moment in which sovereignty might be said to have been first formed, was not a moment in which one might describe its character, for it was that which had yet to be produced.<sup>76</sup> The meaning of territorial sovereignty, in short, was something that could only be observed in the contrast between the European world, where it existed as a matter of fact, and the non-European world, in which it had yet to be established.

It was, thus, in the context of the extension of territorial sovereignty over new areas that the character of territorial sovereignty really came to the fore. At the start of his short four-page excursus on the topic, Westlake begins with the following:

“No theorist on law who is pleased to imagine a state of nature independent of human institutions can introduce into his picture a difference between civilised and uncivilised man, because it is just in the presence or absence of certain institutions, or in their greater or less perfection, that that difference consists for the lawyer.”<sup>77</sup>

At first glance Westlake might be mistaken for expressing the intuition that the establishment of ideas of governmentality that necessitate a differentiation between “civilised and uncivilised man” are inconsistent with general principles of natural right. Yet of course he was saying precisely the opposite. What he meant was that the speculative idea of the social contract and of natural right that had underpinned the political discourse of the enlightenment was fundamentally problematic precisely as a consequence of their inability to recognize the concrete realities of a world divided by reference to its degree of civilisation.<sup>78</sup> Apart from signalling his distaste for the doctrines of natural right, and his determination to distance himself from the tradition of Wolff and Vattel,<sup>79</sup> Westlake calls attention here to the central role played by the

76 WESTLAKE (n. 58) 134–135, 136 (“[W]hatever light philology or archaeology may throw on the early history of mankind, an impassable barrier separates their researches, in spite of the great interest that must be felt in them, from the subjects with which international law has to do.”). Jameson adverts to a similar problem that occupies the work of Rousseau, for whom, it is argued, the origin of the society, as for language, is founded in nothing other than the fundamental contradiction of effect preceding cause. F. JAMESON, *Valences of the Dialectic* (2009) 308–314.

77 WESTLAKE (n. 58) 137.

78 Cf. GONG ???.

79 See C. WOLFF, *Jus gentium methodo scientifica pertractatum, in quo jus gentium naturale ab eo, quod voluntarii, pactitii et consuetudinarii est, accurate distinguitur* (1749); E. DE VATTEL, *Le droit des gens ou Principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains* (1758). For Westlake’s account of the two see WESTLAKE (n. 58) 70–77.

idea of civilisation in international law. Civilisation, in this context,<sup>80</sup> was civilisation of an institutional kind rather than that of an individual moral, aesthetic or cultural activity, the key to which was the presence or absence of institutions of law and governance capable of regulating everyday life, and sufficiently well established to ensure that it was “not disturbed by contests between different European powers for supremacy on the same soil”.<sup>81</sup> As an idea, its significance lay in the fact that European states had different relations with non-European peoples depending upon the presence or absence of such institutions: “[w]herever a population furnishes such a government as this, the law of our international society has to take account of it”.<sup>82</sup> Where, by contrast, no such government is evident, “the first necessity is that a government should be furnished” and that it would be the responsibility of European powers to do so. This, furthermore, was an unavoidable necessity given the overt social compulsions which he saw to prevail: “[t]he inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied”.<sup>83</sup> Even if, he was to add, a “fanatical admirer of savage life” were to demand that the whites be kept out, government would still be necessary in order to effectuate that result. One way or another, colonial rule seemed inevitable.

Although it provided a vital clue to his position, this still left open the conditions under which European States might establish their sovereignty over such “uncivilised” regions. And it was at this point, that Westlake turned to events at the Berlin Conference. At the time at which the delegates were agreeing the final text of articles 34 and 35 of the General Act – which, as we have seen, provided that any power acquiring coastal territory on the African continent had to notify all others of their claim (article 34), and take such steps as necessary to ensure within those territories the protection of vested rights and, where applicable, free trade (article 35) – the American delegate Kasson, introduced the apparently radical idea that since “Modern international law” was leading to the recognition “of the right of native tribes to dispose freely of themselves and of their hereditary territory”, the principle should be “extended” to require the “voluntary consent of the natives whose country is taken possession of, in all cases where they had not provoked the

80 One may contrast his ideas here, with his much broader description of what constituted European civilisation noted above (supra, text accompanying n. ???). For a similar distinction see J. MILL, *Dissertations and Discussions: Political, Philosophical and Historical* (1859) I, 160–205.

81 WESTLAKE (n. 58) 141–143.

82 WESTLAKE (n. 58) 142.

83 WESTLAKE (n. 58) 142–143.

aggression”.<sup>84</sup> Although reported in the Protocol annexed to the General Act, this was not a point subject to elaborate discussion albeit the case that it seemed to indicate the position that would be adopted by the US when it came to deciding whether or not to recognize the claims made under article 34.

In some respects, Kasson’s intervention seemed to come out of thin air – in what respect had modern international law led to the recognition of the right of native tribes to dispose freely of themselves? What evidence was there for this nascent notion of “self-determination”? What, furthermore, did Kasson really intend by his intervention? There seemed to be at least two plausible sources for this reflection. The first was the emergent practice within Europe that, as had been noted by those such as Woolsey, had led states to seek the consent of inhabitants of ceded territory.<sup>85</sup> Thus in 1860 the Neapolitan provinces of Sicily, the Marches and Umbria were annexed to the kingdom of Italy through direct and universal suffrage, and the Treaty of Turin uniting Savoy and Nice to France enjoined the parties concerned to determine the will of the inhabitants. The principle of popular consent prior to changes in sovereignty could presumably be also extended to territorial acquisition in the non-European world. The second, and more immediate, ground for Kasson’s interjection, however, related to the agreements that had been concluded with native sovereigns in Africa through which the latter either explicitly “ceded” their sovereignty to the European power concerned, or extended certain concessions of exclusivity. Of particular significance, here, was the ongoing debate at Berlin over the recognition of Leopold’s International Association of the Congo. By the beginning of 1884, the International Association had already established a number of centres of trade and commerce in the Congo and had concluded a range of treaties with local sovereigns in favour of what it referred to as “Free States”.<sup>86</sup> As the Association was to put it:

84 Protocol of 31<sup>st</sup> January 1885. Parliamentary Paper, c. 4361, 209; GAVIN and BETLEY (n. 13) 240. Kasson added that this should constitute “the minimum of the conditions which must necessarily be fulfilled in order that the recognition of an occupation may be demanded”, and that “it should be well understood that it is reserved for the respective signatory powers to determine all the other conditions from the point of view of right as well as of fact which must be fulfilled before an occupation can be recognised as valid.”

85 T. WOOLSEY, *International Law* (5<sup>th</sup> ed., 1878) 65–66.

86 Stanley was to later make clear that he had concluded over 450 treaties with native sovereigns. See H. STANLEY, *The Congo and the Founding of its Free State: A Story of Work and Exploration* (1885) II, 379. (“The Association were in possession of treaties made with over 450 independent African chiefs, whose rights would be conceded by all to have been indisputable, since they held their lands by undisturbed occupation, by long ages of succession, by real divine right. Of their own free will, without coercion, but for substantial considera-

“by treaties with the legitimate Sovereigns in the basins of the Congo and the Niadi Kwilu and in adjacent territories upon the Atlantic there has been ceded to it territory for the use and benefit of Free States established and being established under the care and supervision of the said Association in the said basins and adjacent territories to which cession of the said Free States of right succeed.”<sup>87</sup>

The real problem for the Association, of course, was that it looked very much more like a private enterprise with a few trading stations than a state as such, and the earlier recognition of its “flag” by the US<sup>88</sup> had not entirely persuaded other, more sceptical, powers.<sup>89</sup> Kasson’s intervention, in that context, seemed designed to cut through the remaining doubts by privileging the centrality of native consent and thus providing an effective basis for the recognition of the authority of the International Association.<sup>90</sup>

Whether or not as a conscious attempt to reflect the British government’s evident anxiety over the status accorded to the International Association, Westlake’s response to Kasson’s intervention was to regard it as fundamentally misconceived. As much as a state might legitimately concern itself with abuse meted out by another power to an uncivilised population, it would simply be going too far to suggest that their free consent was a necessary prerequisite for the establishment over them of a government possessing international validity. It might, as had been recognized at the Conference, be “a good ground of objection on the part of any power that pleased to take up the cause”,<sup>91</sup> but to make it a condition precedent for the acquisition of

tions, reserving only a few easy conditions, they had transferred their rights of sovereignty and of ownership to the Association.”)

87 In a letter of 12<sup>th</sup> December 1883 to Sanford (who was coordinating the lobby for US recognition of the Association), Jules Devaux, writing on behalf of King Leopold, described the situation as follows:

“The stations and territories have a local government, their chiefs are chiefs of districts. They have made an agreement with the native kings to form a Union on certain conditions which have been settled ... What we ask for is not the recognition of the governments of the stations and territories but that in consequence of an exchange of declarations their flag should be treated as ‘pavillon ami’. What exists on the Congo i.e. the settlements, the forces, the administrations, the agreements with the native chiefs is quite sufficient to authorize and justify the recognition.”

State Papers, 25, 191; BONTINCK (n. 27) 181–182.

88 State Papers, 1883–1884, lxxv, 377; WESTLAKE (n. 58) 201.

89 Granville to Malet, 24<sup>th</sup> November 1884, FO 403/47, No. 147 (No. 98 Africa).

90 For the view that Kasson was largely acting as an advocate for the Association see THOMSON (n. 13) 221–223.

91 WESTLAKE (n. 58) 139. See comments of Busch, Protocol 8, Jan 31<sup>st</sup> 1885 (GAVIN and BETLEY [n. 13] 239, 240).

sovereignty *per se*, would have been to defeat the object of the Conference which was to prevent collisions between its members and regulate their position on the African coast. Who, after all, was to say whether the tribe had consented? Would they even understand what it meant to cede territory? And if they did, what formalities would need to be observed? Much better, Westlake observed, that such people be deemed to fall under the benign authority of a European State. Becoming the subjects of the power possessing international title to the country in which they live “natives have on their governors more than the common claim of the governed, they have the claim of the ignorant and helpless on the enlightened and strong; and that claim is the more likely to receive justice, the freer is the position of the governors from insecurity and vexation”.<sup>92</sup>

Westlake’s absolute denial of legal agency to the “natives” was to inform his stance on a series of cognate issues. Treaties with “uncivilised tribes” could not, on their own, be treated as adequate to establish title over territory. Since natives “in rudimentary condition” take no rights under international law, no cession of sovereignty was possible. “A stream” as he was to put it “cannot rise higher than its source”.<sup>93</sup> Such agreements might, at best, provide evidence of fact that the natives in question have been treated with “humanity and consideration”, or provide a basis for the respect of “moral title to such property or power as they understand”.<sup>94</sup> Similarly, treaties of protection in uncivilised regions were unlike those in Europe<sup>95</sup> and formed, ultimately, merely a kind of inchoate title (rather like discovery) that was preliminary to plenary title established through effective occupation.<sup>96</sup>

If by stressing the centrality of effective occupation, Westlake might have been expressing an opinion widely-shared, his views on treaties of protection were altogether more controversial. At the Conference itself, a heated debate had broken out over the extent to which the obligations contained in article 35 of the General Act, should apply “colonial protectorates”.<sup>97</sup> The original text proposed for article 35 by the German government had provided that the Powers concerned acknowledge the obligation to “establish and to maintain in the territories or places occupied or taken under their protection a jurisdiction sufficient to secure the maintenance of peace, respect for rights acquired, and, where necessary, respect for the conditions under which liberty

92 WESTLAKE (n. 58) 140.

93 WESTLAKE (n. 58) 144.

94 WESTLAKE (n. 58) 145.

95 The examples from Europe included the Ionian Islands and San Marino.

96 WESTLAKE (n. 58) 177–187.

97 WESTLAKE (n. 58) 178–179.



of commerce and of transit shall have been guaranteed”.<sup>98</sup> The British delegates, however, conscious that this might have profound implications for their administration of overseas territory in which much looser arrangements were in place, maintained that a clear distinction had to be drawn between annexations and protectorates.<sup>99</sup> Whereas annexation implied “the direct assumption of territorial sovereignty”, protectorates, by contrast, maintained “recognition of the right of the aborigines, or other actual inhabitants, to their own country, with no further assumption of territorial rights than is necessary to maintain the paramount authority and discharge the duties of the protecting Power”.<sup>100</sup>

To a large extent, this was a peculiarly British problem in the sense that it proceeded from a concern that the Foreign Jurisdiction Act of 1843 did not, in fact, provide a sufficient basis for the exercise of jurisdiction over foreigners in protected territory.<sup>101</sup> Whilst Westlake ultimately disagreed with the latter contention, he was at one with the position of the British government in relation to the question of colonial protectorates. These were marked, in his view, by three particular characteristics: first the rights enjoyed in protectorates fell short of those associated with the enjoyment of territorial sovereignty; secondly, they were exclusionary in the sense that they limited the ability of other states from exercising authority within that territory; and finally they enjoyed the character of a “guardianship” in the sense that the protecting state “represents and protects the district and its population, native or civilised, in everything which relates to other powers”.<sup>102</sup> Whilst it is possible to discern very clearly, here, the origins of the idea of tutelage that eventually underpinned the Mandate system in the League of Nations, what is more remarkable is the inventive flexibility of Westlake’s analysis – guardianship being adduced as a novel intermediate category (in which the question of sovereignty remains entirely indeterminate) the overt purpose of which being to explain and justify the apparent variability of British practice.

98 Annex to Protocol No. 7, GAVIN and BETLEY (n. 13) 239.

99 Granville to Malet, 14<sup>th</sup> Jan, 1885, FO 403/49, No. 92 (GAVIN and BETLEY [n. 13] 103, 104).

100 FO 84/1819. See generally, CROWE (n. 13) 185–191.

101 Selbourne to Pauncefote, 23<sup>rd</sup> Jan. 1885, FO 403/49, No. 183 (GAVIN and BETLEY [n. 13] 108, 109).

102 WESTLAKE (n. 58) 179.

### *Doctrinal Dissensus*

As his position in respect of Protectorates suggests, whilst Westlake's general discussion of such issues may be regarded as broadly typical of that encountered in late 19<sup>th</sup> Century literature on international law, it is by no means expressive of a uniformity of view. On this matter, he was clearly advocating a position preferred by the British government. In many other matters, however, he worked in a field of his own – positioned, as he saw it, some way between the idealism of the continent and the analytical formalism of the Anglo-American tradition.<sup>103</sup> He shared with Twiss and Hall, a peculiarly British approach to inchoate title, but yet distanced himself from Twiss's "continental" fixation with the "natural rights" of sovereignty,<sup>104</sup> and from Hall's analytical conception of statehood.<sup>105</sup> His account did not begin and end with a definition of sovereignty (which, indeed, played very small part in his account)<sup>106</sup>, nor was the State and its "abstract rights" the starting point of his analysis.<sup>107</sup> In similar vein, Westlake's denial of native sovereignty was not a uniform position adopted by international lawyers at the time – many were willing to accept that "uncivilised" communities in Africa and elsewhere enjoyed rights of sovereignty.<sup>108</sup>

The range of views in play were, in fact, made all too evident in the subsequent discussions within the *Institut de Droit International* which, in 1885, commissioned a report from Martitz to enable them to consider the outcome of the Berlin Conference. Martitz's "Projet de déclaration" summarised, in its first article, what he saw to be the overall sense of the General Act: all territory not under the sovereignty or protection of States forming part of the international legal community, and whether or not inhabited, constituted

103 WESTLAKE, ???.

104 See T. TWISS, *The Law of Nations Considered as Independent Communities* (2<sup>nd</sup> ed. 1884).

105 See W. HALL, *A Treatise on International Law* (4<sup>th</sup> ed. 1895).

106 His discussion of "sovereignty" largely accords it a descriptive role. See e.g. his famous formula on p. 87 ("Independence like every negative, does not admit of degrees ... Sovereignty is partible. A group of men is fully sovereign when it has no constitutional relations making it in any degree dependent on any other group: if it has such relations, so much of sovereignty as they leave it is kind or degree of semi-sovereignty, though the constitution may not call it by that name.").

107 WESTLAKE, Introductory Lecture (n. 68) 412. Westlake's later two-volume treatise entitled *International Law*, was to assume a very much more traditional format, but even here he was to resist the temptation to proceed from a discussion of states to a description of their "rights".

108 See e.g., SALOMON (n. 60); HORNUNG (n. 56).

“*territorium nullius*”.<sup>109</sup> The point was not that the territory was to be treated as unoccupied (i. e. as *res nullius*), but simply as a non-sovereign domain whose possession by European powers was ultimately to be treated as original not derivative. Although one might have surmised, in light of articles 34 and 35 of the General Act, that such a proposition was largely uncontroversial, the article was unanimously rejected albeit on a number of different grounds. Some, like Engelhardt, regarded the opposition between sovereignty and *terra nullius* as far too categorical: not all territory outside the family of nations could be regarded as unoccupied in that sense. If anything, the basic rule of practice seemed to be that occupation, as Kasson had intimated, was to be based upon consent.<sup>110</sup> Others, like Hornung, were more explicit in their anti-colonial sentiments – rejecting the notion of *terra nullius*, albeit in terms that still spoke of the possibility for the appropriate “tutelage” of the uncivilised natives. That the *Institut* was ultimately unable to agree upon any particular formulation was not merely to highlight the lack of consensus on such basic issues amongst international lawyers at that time, but also the apparent level of indeterminacy that appeared to lie behind the concrete terms of the General Act itself.

One of the most curious features of this discussion at the *Institut*, is that it was conducted in a language that was almost entirely absent from the Conference itself. Although at various stages in proceedings, participants had referred, in passing, to “unoccupied territory”,<sup>111</sup> or the “prise de possession” of territory, for the most part, no mention was made of the phrase “*terra nullius*” nor was there any real speculation on the subject of native sovereignty.<sup>112</sup> The real question for the delegates was *how* colonization might take place and *how* one might demonstrate adequate proof of possession – whether through occupation pure and simple, or by some other means<sup>113</sup> – rather than whether there existed a “right to colonize” or appropriate territory merely by occupation, or whether certain communities on the continent could be regarded as “sovereign”. It was certainly evident that absent a supposition that Africa was indeed *territorium nullius*, as Martitz was to put it, not much sense could be made of articles 34 and

109 F. DE MARTITZ, Occupation des territoires, in: *RDILC* (1887).

110 *Annuaire*, 10<sup>th</sup>, 181–182.

111 See e. g. Granville to Plessen, 8<sup>th</sup> Oct 1884.

112 See J. FISCH, Africa as terra nullius: The Berlin Conference and International Law, in: FÖRSTER et al. (n. 13) 347, 355.

113 See e. g., A. W. HEFFTER, *Le droit international public de l'Europe* (1866), par. 70, 141; C. SALOMON (n. 60), par. 80, 206.

35,<sup>114</sup> but that is merely to bring to the fore the role played by Westlake and others subsequent to the Conference in rationalising the outcome by giving expression to what they saw to be the unarticulated premises that appeared to be embedded within it.<sup>115</sup> That model of engagement was, ultimately, to highlight the superficiality of the doctrinal disputes: what was not in question was the fact that Africa was being partitioned and that the task for all was one of attempting to square off, in one way or another, that irreducible reality with what was otherwise known about international law. That for Salomon it might have represented a hesitant step towards the recognition of native sovereignty, or for Westlake an affirmation as to its irrelevance, was perhaps of little consequence.

Whilst they might have differed considerably in terms of the methodological or analytical techniques employed, therefore, it is nevertheless plausible to suggest that much of the work of international lawyers at this time was broadly homologous. What they seemed to share, above all else, was a basic consciousness as to the existence of a distinction between the European and non-European worlds that was such as to allow the latter to become the object of colonial expansion. As Koskenniemi summarises:

“The colonial discourse of late nineteenth-century international law was able to accommodate positions as apparently wide apart as Westlake’s and Hornung’s to create a solid defence of the extension of European influence. It was a discourse of exclusion-inclusion; 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.”<sup>116</sup>

The key, in that sense, was not to be found in the existence or otherwise of agreement over the concept of *terra nullius*, or indeed over the necessity for native consent, but rather in the adoption of a generic standpoint which both relied upon, and produced, a particular knowledge of the non-European world, placing it as an terrain of action, in a penumbral zone on the outer edges of the family of nations. Even if, thus, the language was occasionally that one? of humanity, self-government, or emancipation, it nevertheless

114 FISCH (n. 112) 354–357.

115 This is particularly true of the doctrine of the “colonial protectorate” which merely emerged in scholarship in the following 15 years. FISCH (n. 112) 366–369.

116 KOSKENNIEMI (n. 57) 130.

seemed to function as a “servile *ancilla regnorum*”<sup>117</sup> obedient to the overriding imperatives of global commercial expansion and colonial rule.

### *History and Society*

The main perceived cause for this loss of critical faculty on the part of 19<sup>th</sup> Century international legal scholars has largely been attributed to the emergence of “positivist” thought – and Westlake himself is frequently taken to be a clear exponent of that jurisprudential tradition.<sup>118</sup> It is not entirely clear, however, that Westlake fully merits such a description.<sup>119</sup> He would certainly speak of “positive law”, as did many others, but there is no obvious evidence that he regarded use of this phrase as summarising his theoretical approach to international law in any direct sense. If, furthermore, it is taken to mean a theoretical tradition that emphasised the fundamental centrality of “sovereignty”, or of the “state”, Westlake was certainly not an adherent.<sup>120</sup> What is evident, nevertheless, is that Westlake’s attention was drawn to a form of “scientific method” that broadly accorded with the general tenets of Comtean positivism<sup>121</sup> – namely a post-metaphysical commitment to experiential, “scientific” knowledge, whose primary model was taken to be that of the causal rules of the natural sciences.<sup>122</sup> In Westlake’s case, this involved the

117 H. LAUTERPACHT, *Westlake and Present Day International Law*, in: *Economica* 15 (1925) 307.

118 See e.g., A. ANGHIE, *Imperialism, Sovereignty and the Making of International Law* (2005) 45–48.

119 See esp. LAUTERPACHT (n. 117).

120 It is certainly the case that Westlake distinguished his position from that of John Austin’s “analytical positivism”. See e.g., WESTLAKE, *Introductory Lecture* (n. 68) 396–402. Lauterpacht, whilst maintaining that Westlake retained certain features of positivist thought, noted with approval, that Westlake nevertheless tempered this with a certain idealism: “International law based on consent, the rules of which are interpreted, modified, and applied by recourse to reason, to the sense of right, and to private law applicable in a given case; international law, the commands of which are directed not to impersonal states, but to men and women charged with international responsibilities; international law built not upon the deification of the state, but upon the law’s function to regulate the mutual conduct of self-governing entities called states and marching towards the ‘federation of the world’ – these are the principles of the teaching of John Westlake.” LAUTERPACHT (n. 117) 324–325.

121 A. COMTE, *A General View of Positivism* (trans. J. Bridges 1865).

122 Although WESTLAKE (n. 58) identifies a sharp differentiation between “jural laws and the laws of nature” (pp. 4–6), he nevertheless commits himself to an understanding of “jural law” as “the subject of a natural science” (p. 14) which, whilst distinct from the abstract sciences of geometry or mathematics,

identification of a limited set of general principles that he purported to deduce from the array of social practices and institutions that characterised the raw material of international law.<sup>123</sup> His “inductive” disposition,<sup>124</sup> here, not only necessitated an emphasis being placed upon what he saw to be observable social facts (laws, institutions, modes of government)<sup>125</sup> but also to the maintenance of an unavoidable distinction between law and morality (the former which lay in the register of fact, the latter in that of faith).

Nevertheless, Westlake’s position on all these points was an attenuated one. What states did, or how they behaved, was certainly of considerable importance, but any such practice necessarily had to be brought within some kind of analytical frame the existence of which, in some ways, preceded the practice itself: “some clue” as he was to put it, must be given “before that labyrinth is entered”.<sup>126</sup> His principles, thus, were necessarily partially descriptive, partially evaluative: not everything could be made to “fit” the scheme of analysis. He was very clear, for example, about the relative permissibility of different kinds of treaties with native sovereigns (which depended upon how plausible it was that the natives understood that to which they purported to agree),<sup>127</sup> he was also distinctly sceptical of certain kinds of claims made by European powers in which they purported to establish their title to territory by way of “discovery” or by means of the “hinterland doctrine”.<sup>128</sup> Work had to be done to make sense of the evidence, and what

nevertheless bears the characteristics of “scientific knowledge”. See also, WESTLAKE, Introductory Lecture (n. 68) 396.

123 In his “Introductory Lecture” of 1888, Westlake was to distinguish between the “descriptive” and the “philosophical” aspects of international law. The former he described in the following terms: “It comprises a knowledge of the actual distribution of the world into states, with their boundaries, the statistics of their material strength and, so far as can be obtained, of their moral strength, and their mutual relations as being either wholly independent or more or less subordinate one to another.” WESTLAKE, Introductory Lecture (n. 68) 392.

124 WESTLAKE, Introductory Lecture (n. 68) 410.

125 These he saw as “generalities” inherent in the “mass of individual facts” knowledge of which were not merely “preliminary”, but integral to the understanding of international law. WESTLAKE, Introductory Lecture (n. 68) 394.

126 WESTLAKE (n. 58) vii. He thus shares with the “analytical school” (by which he means adherent’s to Austin’s theory of law) a concern that “if we give the name of law to anything ... before we have fixed in our minds what we mean by that name, we beg the question, and have no security that our language has any consistent, or therefore useful, sense” (viii).

127 WESTLAKE (n. 58) 152–153.

128 WESTLAKE (n. 58) 155, 168–169.

was never far in the background were claims to right and justice. Whilst law and morality were analytically separate, they were nevertheless connected: both were matters that engaged the conscience, both entailed claims in the language of right or justice, both operated also at the level of public discourse. The distinction between them, in fact, depended upon the extent of their social purchase in the public mind: the content of this public consciousness would be the ground for determining whether particular moral claims might enjoy a right of enforcement and hence the status as “law”.<sup>129</sup> Morality was, ultimately, far from unimportant: not only did it serve as the necessary engine of legal change but also became the temporal marker of social progress.

In the final analysis, Westlake’s conception of law was a social one: conceived as a set of rules generated within a particular political community; the product of collective human action and agency, shaped by language, culture and tradition, not reified as an object whose existence stood outside the social context in which it was generated, nor hypothesised as a consequence of some rationalist reflection upon the character of human nature. It was, in that sense both historical,<sup>130</sup> and innately critical: one whose target was the axioms or *a priori* metaphysics of the secular humanists whose universals (sovereignty, natural rights) were undercut by the knowledge that they were the historical product of a particular social, cultural, and political milieu (for which the shorthand “European society” was summative).<sup>131</sup> Even if reason had a part to play in the development of rules of international law –

129 WESTLAKE (n. 58) 15. In his preface, Westlake makes clear that his audience is not merely students, but the public more generally, and that his role is that of preparing men for the “duties of citizenship” (Ibid, v). In similar vein, he comments in his introductory lecture, that “each one of us” should try always “to bear in mind his own personal responsibility in international affairs”. The strong insistence on the artificiality of the state may thus have an “evil influence” on the public insofar as it weakens “the sense that the action of a state is the action of those within it who help to guide it, whether in a public capacity or even by merely expressing an opinion”. (WESTLAKE, Introductory Lecture [n. 68] 410–411).

130 Westlake spoke of three standpoints by which one might view “the rules of conduct which ... present themselves as matters of claim”, the first of which was as an “existing body of more or less authoritative doctrine”, the second of which being “a body of doctrine manifestly imperfect, giving rise to interesting and difficult questions about the nature of the amendments that may be desirable”, the third being “a body of doctrine having a history, the study of which is at once gratifying to a liberal curiosity, and necessary for understanding the doctrine itself, and for appreciating the possibilities of amending it.” WESTLAKE, Introductory Lecture (n. 68) 395.

131 Thus, in his discussion of Grotius, he was keen to stress that Grotius’ work was the product of his time. WESTLAKE (n. 58) 48–49.

in the sense of being descriptive of the process by which new rules or principles come to be established in social thought and practice – it was only through the medium of “experience” that they would enter the domain of law.<sup>132</sup>

To the extent that he pitched himself against a form of a-historic idealism, Westlake was working in a tradition that extended as far back as Montesquieu,<sup>133</sup> whose emphasis upon the impact of culture, religion, climate and soil upon the generation of particular legal forms had informed the subsequent emergence of the German Historical School<sup>134</sup> and beyond that, the work of many of Westlake’s contemporaries<sup>135</sup> (including his immediate predecessor in the Whewell chair at Cambridge, Sir Henry Maine).<sup>136</sup> Both Niebuhr<sup>137</sup> and von Savigny had, through their studies of Roman law, come to the conclusion that particular legal institutions – of property, marriage, and so forth – were not only embedded in particular social contexts, as Montesquieu had noted,<sup>138</sup> but were to organically evolve with changing conditions of society. As Savigny was to put it:

“In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to the people, like their language, manners and constitution. Nay, these phenomena have no separate existence, they are but the particular faculties and tendencies of an individual people, inseparably united in nature ... That which binds them into one whole is the common conviction of the people, the kindred consciousness of an inward necessity, excluding all notion of an accidental and arbitrary origin.”<sup>139</sup>

And, so far as concerns the evolution of this kindred consciousness:

“For law, as for language, there is no moment of absolute cessation; it is subject to the same movement and development as every other popular tendency; and

132 WESTLAKE, Introductory Lecture (n. 68) ???.

133 CH. DE MONTESQUIEU, *Spirit of the Laws* (1752).

134 See G. HUGO, *Lehrbuch eines civilistischen Cursus* (1832); F.K. VON SAVIGNY, *System des Heutigen Römischen Rechts* (1840). See also J. C. Bluntschli, The Historical School of Law – Thibaut and Savigny, in: *Journal of Jurisprudence* 32 (1888) 57.

135 E.g. J. C. BLUNTSCHLI, *The theory of the State* (1885).

136 H. MAINE, *Ancient Law* (3<sup>rd</sup> ed. 1866). See further C. LANDAUER, Henry Sumner Maine’s Grand Tour: Roman Law in Ancient Law, in: A. LEWIS and M. LOBBAN (eds), *Law and History* (2003) 135.

137 B. NIEBUHR, *Lectures on the History of Rome* (1852 trans. Schmitz).

138 MONTESQUIEU (n. 133) ??? (“Man is born in society ... and there he remains”).

139 F.C. v. SAVIGNY, Of the vocation of our age for legislation and jurisprudence (German 1814, trans. 1831) 24.



this very development remains under the same law of inward necessity, as in its earliest stages. Law grows with the growth, and strengthens with the strength of the people.”<sup>140</sup>

If, for Savigny, the direct consequence of this insight was to contest Thibaut’s proposals for the legal codification of civil law within Germany,<sup>141</sup> its broader implications were clear enough. In the first place, it could always operate as an adjunct to, or refinement of, the conjectural histories of the Scottish Enlightenment:<sup>142</sup> changes in the form of legal ownership mapping themselves sequentially through different modes, or “stages”, of economic and political organization. Marx’s particular debt to Niebuhr and von Savigny in this respect is evident.<sup>143</sup> Secondly, and in a related sense, just as the socially and culturally contingent character of law seemed to necessitate a differentiation in both time and space, so also did it seem that the two forms of differentiation might also be of essentially the same order. As Maine was to explain it, the historical and the comparative methods were, in some respects, co-terminous:

“We take a number of contemporary facts, ideas, and customs, and we infer the past form of those facts, ideas, and customs not only from historical records of that past form, but from examples of it which have not yet died out of the world, and are still to be found within it. [W]hen ... we have learned not to exclude from our view of the earth and man those great and unexplored regions which we vaguely term the East, we find it to be not wholly a conceit or a paradox to say that the distinction between the Present and the Past disappears. Sometimes the Past *is* the Present ...”<sup>144</sup>

The recognition of a temporal disjunction between Europe’s present and its past, in other words, could be founded upon a knowledge of the “non-progressive”, “barbarous” or “primitive” conditions of extra-European society whose evolution, furthermore, was conceptualised as being “naturally” coincident with the historical trajectory of European society (from “status” to “contract” as Maine was to put it).<sup>145</sup>

140 SAVIGNY (n. 139) 27–28.

141 A. THIBAUT, *Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland* (1814) 52–55.

142 See e. g., A. FERGUSON, *An Essay on the History of Civil Society* (1767); H. HOME (Lord Kames), *Sketches of the History of Man* (1778); A. SMITH, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776).

143 See N. LEVINE, The German Historical School of Law and the Origins of Historical Materialism, in: *Journal of the History of Ideas* 48 (1987) 431.

144 H. MAINE, *Village Communities in the East and West* (1889) 6–7.

145 See, J. BURROW, *Evolution and Society: A Study in Victorian Social Theory* (1967) 138–178.

This reliance upon an evolutionary frame of reference (which had clear congeners in both the scientific positivism of Comte<sup>146</sup> and Herbert Spencer's social evolutionism)<sup>147</sup> provided, for Maine, an important means by which he could universalise the particular, and overcome the otherwise rather obvious limits of his comparative philology. It was also, for those such as Westlake, a means by which they might organize and relate two essentially competing (and largely empirical) intuitions: one of which being that international law was necessarily a socially and historically contingent product and largely of European "origin"; the other being that its historic and contemporary field of operation was by no means limited to relations between European powers but encompassed also, treaty-making and other forms of contact with all manner of sovereigns elsewhere in the world. Whilst the historical particularity of Europe, when framed in cultural terms, adverted to the existence of a division between the civilised and uncivilised worlds, this itself provided no means for the bridging of that gap or of explaining how the latter could be brought within the frame of the former.<sup>148</sup> The idea that the uncivilised periphery existed in an analogical relationship with pre-historic forms of European society, and that civilisation (far from being a mere "standard") was an active historical *process*<sup>149</sup> of maturation, allowed the non-European world's spatial "otherness" to be historicised in thoroughly familiar terms. It could thus serve not only as a source of historical insight (informing, for example, Westlake's investigation into principles of territorial sovereignty<sup>150</sup> and his analytical category of "civilisation" itself)<sup>151</sup> but also as a realm of action and intervention in relation to which international lawyers could orient their professional vocation. On this score, Westlake's description of his own general starting point is very revealing. As he was to put it, rather than

"define International Law as the science of the rules prevailing between states, and to treat as subsidiary the questions of how far those rules are applicable to semi-sovereign states or to half-civilized or uncivilized populations",<sup>152</sup>

146 Supra, n. 121.

147 H. SPENCER, *First Principles* (1862).

148 Cf. ANGHIE (n. 118) 4.

149 WESTLAKE, Review of Wheaton's Elements, in: *RDILC* (1969) 657, 658 ("C'est le propre de la force, soit morale, soit physique, que toute science qui s'en occupe ait sa partie dynamique, aussi bien que sa partie statique").

150 See above, ???.

151 See above, ???.

152 WESTLAKE, Introductory Lecture (n. 68) 412.

he sought instead

“to put in the front the idea of action, which carries with it the ideas of duty and responsibility, and to define International Law as dealing with all human action not internal to a political body. From this point of view the subject is seen to have real unity.”<sup>153</sup>

It is thus through the framework of action and responsibility that Westlake understands the language and practice of European international law to be capable of being universalised – just as he perceived his own task to be that of “preparing men for the duties of citizenship”,<sup>154</sup> so also he seemed to believe that those conducting foreign affairs (over whom international lawyers might have influence) were under a duty to prepare the uncivilised world for the demands of modern life. This was not an “extraneous” activity, but one central to his professional vocation as an international lawyer.

Nevertheless, if for Westlake, his professional predecessors fell into error in their failure to understand that knowledge of the world was a product of human action and agency and that a properly scientific method necessitated an orientation to the organized outcomes of thought and consciousness, his own stance was one that veered towards an uncritical materialism. His account, ultimately, was that of an observer of a world of anthropological contrasts in which the cultures, traditions and mores of different societies could be scientifically organized around, or by reference to, characteristic forms of law and governance. The primary phenomenological experience of the social world in other words, came to be apprehended and organized through the medium of his pre-existent structuring categories of social knowledge, yet in a way that neither reflected upon the conditions for the establishment of that frame of reference, nor upon his own performative role within the account.<sup>155</sup> Just as his attention to the cultural particularity of European social and political life seemed to arise from a concern to locate legal thought and practice in the material conditions of the real world, so also did he seem blind to the fact that far from displacing the metaphysical “universals” which he found so evidently problematic, he was reinserting them on different intellectual plane: in one direction in an apparent universal individual psychological will to power or knowledge (in which notions of

153 Ibid.

154 WESTLAKE (n. 58), preface, ???.

155 Cf. A. SCHOPENHAUER, *The World as Will and Representation* (1819) II (describing the “materialist” as the philosophy of the “subject who forgot to take account of himself”).

duty and responsibility come to the fore), in another direction in an overarching, meta-structural, notion of “culture” (which both divides and unites the worlds he describes).<sup>156</sup> Yet, and perhaps this is the most important point, the problem is not so much the re-emergence within his work, of certain universals which we may recognize to be essentialist in character, but the lack of self-consciousness as to their presence. His attentiveness to the conditions of social production underpinning international legal thought – which remains an important theme to this day<sup>157</sup> – was thus not problematic simply because it had the effect of situating Europe at the centre of the universe of international law, but rather because it failed to reflect upon the way in which international law itself operated as a discourse that helped to construct those social conditions upon which it may be said to have depended.

*Conclusion: Consequences of the Historical*

If, as has been suggested here, the main, and most lasting, contribution of 19<sup>th</sup> Century international legal thought was the historicisation of the discipline, it was an innovation with certain obvious consequences. In one direction it pushed attention towards the social conditions underpinning its production – towards, in other words, the temporal and spatial locale in which the language and practice of international law was understood to have been generated. As Wheaton was to observe the *jus gentium*, was “a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions”.<sup>158</sup> Even if thus, Montesquieu’s Iroquois might be said to recognize international law, it was certainly not of the same order. In another direction, the historicisation of law oriented legal thought away from the kind of abstract rationalisation, or hypothetical excursus that had been associated with the tradition of natural rights, and towards various empirical, or experiential, forms of knowledge: whether that be in terms of the external manifestation of state “practice” and consent, or in the more elusive “inner” psychology of the juridical consciousness.

On both counts the 1884/5 Berlin Conference was to represent both a challenge and source of insight. In a very practical sense, it required international lawyers to find ways of overcoming the obvious tension that existed

156 On both these scores, Westlake exhibits a debt to Dilthey. See W. DILTHEY, *Introduction to the Human Sciences* (trans. Betanzos, 1988).

157 See M. KOSKENNIEMI, *International Law in Europe: Between Tradition and Renewal*, in: *EJIL* 16 (2005) 113.

158 WHEATON, *Elements* (1836) 44–45.

between the self-evident social origins of international law and its field of operation – in what way could the knowledge of the European origins of international law, be squared with the need to regulate the burgeoning relations with native communities in Africa and elsewhere? In another sense, however, it was also to present an opportunity: the very uncivil character of African societies seemed to provide vital evidence for the construction of knowledge of, and about, the emergence and character of European civilisation. If, following Mill, one could define civilization as the qualities put on by society as it throws off savage life,<sup>159</sup> then attentiveness to the conditions of savage life could only be revealing. One could construct, in the contrast, both in a sense of present and past, both an account of what had been achieved and what left behind. If, furthermore, the conditions of uncivilised life opened the door on European history, so also did they illuminate the terms under which European international law might be rendered universal.

For all the critical insights that ensued from this historicised conception of international law, it was one always vulnerable to its own supersession. In one direction, the conceptual mooring of the content of law in time and place was to demand the development of ever sophisticated doctrinal techniques to govern its applicability in new social settings – latent notions of *rebus sic stantibus*, inter-temporality, and *desuetude* were thus all given particular form and shape in the late 19<sup>th</sup> and early 20<sup>th</sup> Centuries. In another direction, just as 19<sup>th</sup> Century international lawyers were concerned with creating their own disciplinary past for purposes of orienting their engagement with the questions of the day, so they were to become subject to precisely the same fate. Indeed, their position was ever more precarious precisely because of their commitment to contextualise their own discourse. So, when in the following century, scholars of later generations were to return to the subject of Berlin, they were to recognise in the likes of Westlake, Bluntschli and Wheaton, nothing other than they were apparent apologists for colonialist enterprise, misled by the tenets of a redundant creed (positivism), and located in an era of international law which had been effectively overtaken by subsequent events.<sup>160</sup>

However trenchant the subsequent critiques, however, many have arisen in a form that would have been regarded, by those such as Westlake, as entirely

159 MILL (n. 80) 161.

160 See e.g., R. ANAND, *New States and International Law* (1972); *Asian States and the Development of Universal International Law* (1972); C. ALEXANDROWICZ, *The Afro-Asian World and the Law of Nations (Historical Aspects)*, in: *Recueil des Cours* (1968) 1; *European-African Confrontation: A Study in Treaty Making* (1973) 6, 21.

recognizable. When, for example, Umozurike was to argue that a principle of historical dialectics was in play underpinning the process of decolonisation and securing, for all people, human rights and self-determination,<sup>161</sup> Westlake may well not have disagreed had he been alive to witness the turn of events. In a similar sense, Bedjaoui's critique of colonialist international law in the late 19<sup>th</sup> Century<sup>162</sup> would, no doubt, simply have affirmed the already solid belief that international law, at any given moment, was not merely responsive to the social conditions of the day but subject, above that, to a meta-historical principle of social progress. For all, furthermore, the concern to express the obsolescence of 19<sup>th</sup> Century international law through the medium of a critique of naïve positivism,<sup>163</sup> it is clear that this is to miss the target in at least two ways. In one direction, it is not at all clear that international lawyers such as Westlake were "positivist" in the sense that it came to be understood in the early 20<sup>th</sup> Century. Their world was far more dependent upon the contingent truths of an elitist juridical sociology, than upon any formal deductive logic. In another direction, it is clear that many 19<sup>th</sup> Century international lawyers were equally adept at historicising methodological commitments as much as the substance of law: understanding that what passed for law at any given moment was, in part, dependent upon particular historical social formations. That, after all, was the gist of Comte's positivism even if he fetishised what he saw to be the era of empiric rationality.

Even if many of the theoretical and methodological commitments of 19<sup>th</sup> Century international lawyers' understanding of the discipline remained in place, one thing that subsequently became visible was the apparently ideo-

161 U. UMOZURIKE, *International Law and Colonialism in Africa* (1979) 143. ("Colonialism was once tolerated by international law, which, like everything else, is subject to the principle of dialectics. Viewed in historical perspective, the law has been evolving towards perfection. The concrete situation at any particular time generates a law that takes care of the situation. That law is the thesis which, lacking perfection, produces its anti-thesis. This represents the new concrete situation for which the law becomes outmoded and unsuitable. There is a conflict between the two, and this may be violent ... but it may also be peaceful. A new law then emerges in response to the new situation. This becomes the new thesis and the dialectic progression continues towards a perfect law that not only provides for, but secures, the human rights and self-determination of all peoples. This progression is evident from slavery to colonialism and then neo-colonialism. The opposition of certain Western States to anticolonialism is a temporary setback that cannot prevent the march towards a perfect law.")

162 M. BEDJAOU, title?.

163 See ALEXANDROWICZ (n. 160).

logical character of the history upon which they had relied. Some, like Bedjaoui, were content to remain with the story of a European international law, in the understanding that it had been fundamentally changed as a consequence of the admission of new states into the legal order. Others, by contrast, were to seek to isolate the 19<sup>th</sup> Century (or more narrowly the views of certain 19<sup>th</sup> Century international lawyers) as having departed from a longer-standing, more universal tradition. However viewed, what was apparent was that the articulation of international legal history was no neutral endeavour, but one filled with meaning and potential. It immediately opened up various different routes to an engagement with questions of self-determination<sup>164</sup> and to an understanding of the meaning and significance of decolonisation.<sup>165</sup> It was also a means by which, alternatively, optimism and despair as to the conditions of the contemporary world might be expressed.<sup>166</sup> In the process, however, there is the danger that it might ultimately take on the appearance of an ideological gloss, no longer capable of expressing anything meaningful about the past, no longer speaking to concrete social relations other than in a metaphorical way. The challenge, in that sense, is to understand the conditions of production of the contemporary histories of international law.

Matthew Craven

164 See K. KNOP, *Diversity and Self-Determination in International Law* (2002).

165 See M. CRAVEN, *The Decolonization of International Law* (2007).

166 See M. KOSKENNIEMI, Why History of International Law Today, in: *Rechtsgeschichte* 4 (2004) 61.