

Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation

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Governing interstate relations across the globe, contemporary international law is universal. But this is a relatively recent phenomenon: until the nineteenth century, the laws regulating interactions between sovereign polities were circumscribed to discrete regions of the world. How did international law become universal? This article critiques the assumption, held by most scholars, that this process was one of European expansion, arguing instead that international law universalized when jurists from semi-peripheral polities, such as Japan, the Ottoman Empire, and Latin American states, appropriated European international legal thought. Classical international law only recognized equality between states belonging to the “family of civilized nations,” while sovereign autonomy and equality was denied beyond the West. Faced with pressures to sign unequal treaties, elites in the semi-periphery realized the stakes of learning the international legal discourse. This article traces the work of non-Western jurists who studied international law in Europe, internalized the categories of classical international law, and ultimately used them in order to change, in the direction of equality, the rules of international law applicable vis-à-vis their polities. Their reinterpretation of the central elements of classical international law—positivism, absolute sovereignty and the standard of civilization—progressively achieved the inclusion of non-Western states within the regime of autonomy and equality. Thus, the doctrinal appropriation of semi-peripheral jurists transformed international law. It also formed a distinctive semi-peripheral legal consciousness defined by a “particularistic universalism.”

INTRODUCTION

The idea that there is or should be law in the international world has inspired a multiplicity of intellectual, professional, and institutional projects. At the most basic level, this idea implies that there should be one international law: a single set of legal rules, principles, and institutions governing interstate behavior on a global scale. International law, however, became a global legal order only during the course of the nineteenth century. Before that, according to the prevalent view, international law’s range of

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validity was circumscribed to the interaction between European sovereigns; international law—both as an idea and as a concrete legal order—was born and developed in seventeenth-century Europe. In consequence, most international lawyers understand that the process through which international law became global involved the expansion of European international law.¹ Although their explorations arrive at the same result, there is considerable divergence in the description of the events leading to the emergence of a universal international law.

For some, international law expanded when non-European states were admitted as new members of the international community. For others, it expanded when international legal rules, doctrines or ideas were imposed outside Europe to enable and justify formal or informal colonialism.² Followers of the first interpretation assume that international law is a legal order that governs relations between states, an order including rules and doctrines to attribute international legal personality. International law thus achieves universality when a significant number of new states acquire membership in the international community; such membership was determined by the standard of civilization in the nineteenth century and is now determined by the doctrine of recognition.³ Followers of the second interpretation assume that international law manages cultural differences between Western and non-Western polities. Thus, when the non-European world was colo-

1. Wilhelm Grewe continues to be the most influential exponent of the idea of expansion of European international law in the nineteenth century. See Wilhelm Grewe, *Vom europäischen zum universellen Völkerrecht*, 42 ZaöRV (1982); see also WILHELM GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Wilhelm Grewe & Michael Walter trans., de Gruyter 2000) [hereinafter GREWE, EPOCHS]. See generally *id.* at 445–82. More specifically see *id.* at 462–63 for a description of the process of expansion and a typical list of new states. This perspective, which is not without criticism (see *infra* text accompanying note 7) is widely reproduced not only in international law textbooks written by Western authors, but also in the scholarship of non-Western international lawyers. In the former, for example: “The old Christian States of Western Europe constituted the original international community within which international law grew up But gradually the international community expanded by the inclusion of Christian states outside Europe (such as various former colonies of European states in America as they became independent) . . . and, during the latest, by inclusion of non-Christian states. Particularly significant was the express acknowledgement of Turkey’s membership of the international community.” ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM’S INTERNATIONAL LAW 87 (9th ed. 1996). For a more recent example: “[T]he prevailing view in the study of international law is that it emerged in Europe in the period after the Peace of Westphalia (1648)” PETER MALANCZUK, AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 9 (7th ed. 1997). In scholarship by non-Western international lawyers, consider, for example: “Modern international law has its origin in western civilization. It has, however, been expanding to the whole world.” Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, in 221 (1990-II) RECUEIL DES COURS 195, 204 (Hague Academy 1991). Assuming the Western nature of international law, the non-Western international lawyer tends to focus his effort into transforming contemporary international law into a more multicultural legal order. E.g., Yasuaki Onuma, *When Was the Law of International Society Born?*, 2 (1) J. HIST. INT’L L. 1, 1–66 (2000).

2. See Ian Brownlie, *The Expansion of International Society: The Consequences of the Law of Nations*, in *THE EXPANSION OF INTERNATIONAL SOCIETY* 358 (Hedley Bull & Adam Watson eds., 1984); see also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law*, 40 HARV. INT’L L.J. 1 (1999). See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW* (2005).

3. On recognition as a legal doctrine rather than as a decision based on national interest, see HERSH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 1–6 (1947).

nized or subjected to informal imperialism, international law expanded but did not become universal. Although international law recognized the sovereignty of Western states, it denied legal personality to non-Western polities, legalizing the acquisition of overseas territories, on the basis of discovery and occupation, or through treaties in which the polities ceded sovereignty or jurisdiction to Western powers.

The discrepancy between these two interpretations is not trivial. It illustrates two sharply different realities at the root of the international legal order that have developed up until today. More importantly, these two accounts are contradictory; each one portrays the expansion of international law as the geographical extension of an international legal regime of a diametrically dissimilar character: a legal order valid between sovereign equals or a set of legal relations sanctioning inequality. This article explores the history of international law in the nineteenth century as containing both regimes of equality and inequality, both conferring and denying sovereignty.

A. From Geographical Expansion to a Universal International Law

When we assume that international law has a European origin and look back at the progressive inclusion of non-Western states, we think that European international law expanded. However, delving into the discrepancy between the ideas of expansion through admission and expansion through imposition, that is, acknowledging the coexistence of the regimes of equality and inequality, offers a glimpse into a very different story. This is the story about how international law became universal.

Nineteenth-century international law achieved global geographical scope by including two separate regimes: one governing relations between Western sovereigns under formal equality, and the other governing relations between Western and non-Western polities under inequality, granting special privileges to the former. International law changed radically when the doctrines erecting the boundaries between these two regimes, the doctrine of recognition and the standard of civilization, were reinterpreted so that a number of non-Western sovereigns were admitted into the international community and thus became governed by the regime recognizing formal equality.

Changes in the rules used to attribute international legal personality, however, resulted in a transformation deeper than the geographical expansion of international law's range of validity. In the nineteenth century, international law became universal. The transformation of the doctrinal structure of international law was not a Western concession (that is, expansion through inclusion), but the reinterpretation of rules by non-Western states, supporting their admission into the international community. This reinterpretation was possible because a generation of semi-peripheral international lawyers had appropriated Western international legal thought. After becom-

ing versed in Western legal discourse, these semi-peripheral lawyers used it to engage in disciplinary debates, arguing for rules and doctrines that served the interests of their states. These particular uses of international law and engagements with the classical legal tradition produced a distinctive, semi-peripheral legal consciousness. I will examine and interpret this semi-peripheral version of classical international legal thought as a form of a particularistic universalism.

Consideration of semi-peripheral international lawyers' engagement with Western international legal thought invites us to rethink the meaning of universality as a term describing the transformations that the international legal order underwent during the nineteenth century. The term universality, I would suggest, reflects not only changes in international law's doctrinal outlook—reducing the scope of the doctrines that limited inclusion of non-European sovereigns—but also points at the global professionalization of international lawyers, articulating a transnational legal discourse. Furthermore, it describes a profound transformation in the nature and function of the international legal order itself: although international law continued enabling Western powers' global, political, and economic intervention, it also began regulating and to some extent limiting the power of Western states, governing the interactions between independent political organizations on a global scale.

European international law expanded along with the global, economic, and military expansion of the West. Semi-peripheral jurists internalized European legal thought in order to change rules. In changing the rules, however, they also transformed international law. This article argues that international law became universal only when non-Western jurists internalized European legal thought, transforming nineteenth-century international law along the abovementioned doctrinal, professional, and normative dimensions.

The central contention of this article, that international law became universal through semi-peripheral appropriation, will be supported by showing a correlation between changes in legal thought and changes in international rules and doctrines. I will suggest a correlation between semi-peripheral elites' engagement with international law—by becoming international lawyers, publishing, participating in conferences, etc.—and the inclusion of semi-peripheral states in the international community, within the regime where states are considered formally equal.⁴ To understand the plea of semi-peripheral states to be governed under international law's regime of equality, we should grasp the nature and development of the diverse legal rules and principles governing the interaction between Western and non-Western sovereigns at the beginning of the nineteenth century, especially the ones

4. In some cases this correlation was strong: in 1894 Japan renegotiated the unequal treaties it had concluded with Western states, signing the first treaty under conditions of equality with Great Britain.

establishing unequal treatment. I will explain the diversity of these rules by examining the international legal regimes governing ideal typical interactions between Western and non-Western states.

B. *Unequal Regimes in Nineteenth-Century International Law*

Even though international law attained global geographical reach in the nineteenth century, a stable treaty-making pattern and a rather dense legal regime had already conjoined some European and non-European powers for centuries.⁵ Although several of these regimes were old and well-entrenched, Western international lawyers of the first half of the nineteenth century ignored these legal connections and developed the idea of an exclusively “European law of people” by marking out the conceptual and doctrinal apparatus developed by an array of European thinkers and schools of thought.⁶ Western international lawyers and diplomats, representing their merchants’ interests or their states’ expansionist policies, deployed the idea of an exclusively European international law in order to justify the exclusion of non-European entities from the privileges of an international legal order based on sovereign equality.⁷ They thus gave legal support to formal colonialism or unequal treatment, respectively: for example, they redefined over-

5. On the historical development of these legal regimes between some European and non-European Powers, see, for example, CHARLES HENRY ALEXANDROWICZ, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS IN THE EAST INDIES (16TH, 17TH AND 18TH CENTURIES)* 101-110, 158-177 (1967) (showing a thick net of treaty-based relations between European sovereigns and sovereigns in the East Indies); Roberto Ago, *Pluralism and the Origins of the International Community*, 3 *ITALIAN Y.B. OF INT’L L.* 3, 13, 21-26 (1977) (arguing that at the beginning of the ninth century, an international community of coexisting sovereigns developed in the Euro-Mediterranean area, which after two centuries included interactions governed by treaties between sovereigns belonging to the Roman Christian, Byzantine and Islamic worlds); Paul Guggenheim, *Das Jus publicum europaeum und Europa*, 3 *JAHRBUCH DES ÖFFENTLICHES RECHTS DER GEGENWART* 1, 2 (1954).

6. This redefinition of international law as European public law was in part created by the academic study of the history of international law. These were basically studies on the history of European ideas; in Wolfgang Preiser’s words: “[W]hat these comprehensive works offer is largely international legal theory, i.e., the repetition and explanations of schools of thought in international law” in contradistinction to “a history of the law of nations as such, i.e., a history of law as had developed and had been applied in practice to govern the peaceful and hostile relations between States and State-like entities.” Wolfgang Preiser, *History of the Law of Nations*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 126 (Rudolf Bernhardt ed., 1992). This type of criticism is not new. See, e.g., Arnold McNair, *Aspects of State Sovereignty*, 26 *BRIT. Y.B. INT’L L.* 6, 6 n.1 (1949) (noting that “most history of international law is either a history of its literature, or a history of international relations It is difficult to find much history of the content, that is, the actual rules of law as applied in practice.”).

7. Some authors contend that the nineteenth century witnessed the reduction of international law’s scope of validity instead of its expansion. See ALEXANDROWICZ, *supra* note 5, at 9-10, 235-237 (sustaining the idea that the nineteenth century doctrinal shift from naturalism to positivism transformed a universal law of peoples into a regional European international law). Juan Antonio Carrillo Salcedo, *Aspectos Doctrinales del Problema de la Universalidad del Derecho de Gentes*, 17 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL* 1, 5-10 (1964) (suggesting that the re-conceptualization of international law as a social phenomenon, that is, law as an expression of the juridical consciousness of a homogenous international community of civilized states resulted in the reduction of international law’s geographical range). Grewe has disputed the idea that international law reduced its scope of validity, arguing that until the nineteenth century international law was a legal order between the Christian nations of Europe. See GREWE, *EPOCHS*, *supra* note 1, at 451-452, 456, 469-470 (indicating that a universal definition of the

seas territories as *terra nullius*—that is, territories that are not subjected to the authority of any sovereign and thus can be acquired through occupation—or exempted their nationals from local law through consular jurisdiction.

On many occasions, European states conquered new territories and incorporated them as colonies. In this case, international law's geographical sphere of validity enlarged only to the extent that it developed rules to justify conquest overseas, regulating controversies between European states with conflicting claims over the same territory. But in terms of the interactions between the metropole and its colonies, international law did not expand because the legal regulation between the two was integrated into the metropole's colonial administrative law. As a result, the use of international legal arguments to resist expansion was limited to pushing forward a right to self-determination, and the materialization of a genuinely universal international law largely had to wait until twentieth-century decolonization.

At other times Western expansion was informal; that is, Western states opened new areas of the world to international trade without integrating them into their own dominions. In this case, Western and non-Western states signed treaties establishing formal international legal relations that occasionally sanctioned formal equality, but mostly instituted unequal treatment. Most of these treaties were signed under duress, following military defeat or the exercise of armed or diplomatic coercion. Nonetheless, semi-peripheral lawyers saw the formalization of their dealings with Western states as an opportunity to bring to bear the notion of international law as law between sovereign equals, and thereby challenge the rules that were unfavorable to them.

The fact that Europe extended its power and influence under different forms (colonial and informal), and therefore elicited different strategies of resistance (ideological, involving the use of armed force, or legal), suggests that the term "European expansion" is inaccurate if it is employed to describe a single process through which international law achieved global validity. The claim that international law became universal after semi-peripheral appropriation and use of European international legal thinking, which I advance in this article, therefore involves a redefinition of the historical context in which the use of international law was possible. Looking at both the regimes of equality and inequality, I argue that international law was relevant in governing both intra-Western interstate relations and relations between Western sovereigns and semi-peripheral polities.

I investigate three different ideal types describing interactions between Western and non-Western states in which the latter did not fall under direct colonial rule, either because they were too powerful, too large, or not geo-

legal community was in practice limited to the Christian-European world, thus legalizing the acquisition of overseas territory and the imposition of unequal treatment).

litically important enough, or because of other historical contingencies.⁸ Consequently, in each of these cases there was greater room for strategic use of international law by non-European actors.⁹ The first ideal type describes formally equal interactions between Western sovereigns and non-European states; the second, unequal interactions in both political and legal terms; and the third, interactions involving non-European states that participated politically in the European Concert, but whose international personality and enjoyment of formal equality was contested.

Appropriating international law was a strategy available for states in these three ideal types. Semi-peripheral lawyers supported changes in the rules sanctioned in these regimes by reinterpreting central concepts and doctrines of the European international law tradition. The appropriation of this intellectual tradition to overcome the doctrinal barriers European lawyers had developed to bar equal treatment was not simply academic; it was also a political and legislative project.

C. *Semi-Peripheral Jurists*

It was neither in the interest of European powers and the United States, nor in the sight of most Western international lawyers, to expand beyond the West the scope of European international law, understood as a law sanctioning sovereign equality among peoples sharing a common juridical consciousness.¹⁰ It was rather in the antipodes where the project of invoking and

8. See David Strang, *Contested Sovereignty: The Social Construction of Colonial Imperialism*, in STATE SOVEREIGNTY AS SOCIAL CONSTRUCT 22–49 (Thomas J. Biersteker & Cynthia Weber eds., 1996) (offering an explanation based not only on Western power, but also on an institutional analysis of the state system and the language of sovereignty and recognition, to explain why some non-Western states were able to avoid formal colonization in the nineteenth century). Strang identifies three situations in which non-Western polities successfully constructed their claim to sovereignty, thus achieving recognition by Western states. First, sometimes the non-Western state was able to both defend its territory militarily and frame that use of force within the Western rules of war so that it would not jeopardize its civilized status, thus decreasing the chances of other Western states intervening (e.g., Japan, Ethiopia). Second, sometimes there was direct competition between two or more Western states with interests in the same territory, which impeded formal colonialism and supported the maintenance of the non-Western state's sovereignty (e.g., the Ottoman Empire, China, Persia). Finally, Strang identifies a form of "defensive Westernization," primarily in the case of Japan and to a lesser extent in Siam, in which "explicit imitation of Western political and administrative institutions led to the abrogation of the restrictive treaties imposed by the West." *Id.* at 40. In this study of the work of non-European jurists I show that imitation meant not only mimicry, but also appropriation of the legal ideas that were transforming international law.

9. I use ideal types, in the conventional Weberian sense, as heuristic devices to draw historical comparisons between different non-Western political entities that established international legal relationships with European powers. The construction of ideal types does not entail the analysis of all the cases fitting under them. I have therefore excluded or given marginal treatment to the appropriation of classical international law in places like Ethiopia, Persia or Poland.

10. Jörg Fisch argues that expansion came along only after the progressive weakening of European states' power in the international world. See Jörg Fisch, *Power or Weakness? On the Causes of the Worldwide Expansion of European Law*, 6 J. HIST. INT'L L. 21–26 (2004). The argument is sustained by a wide-ranging historical study. See JÖRG FISCH, *DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT: DIE AUSEINANDERSETZUNGEN UM DEN STATUS DER ÜBERSEEISCHEN GEBIETE VOM 15 JAHRHUNDERT BIS ZUR GEGENWART* (1984) [hereinafter FISCH, *DIE EUROPÄISCHE EXPANSION*].

internalizing the European concept of international law led to its globalization. A generation of non-Western international lawyers studied European international law with not only the purpose of learning how to play by the new rules of international law that Western powers sought to impose on them, but also with the aim of changing the content of those rules.¹¹ I will explore the work, life, and professional trajectory of this generation of semi-peripheral lawyers who visited or moved to Europe during the second half of the nineteenth century. Consider the following sample of lawyers from various semi-peripheral nations: Carlos Calvo (Argentinean, 1822–1906); Etienne Carathéodory (Turkish national, ethnic Greek, 1836–1907); Fedor Fedorovich Martens (Russian national, ethnic Estonian/Baltic German, 1845–1909); Nicolas Saripolos (Greek, 1817–1880); Tsurutaro Senga (Japanese, 1857–1929).¹²

These lawyers were as prolific as they were strategic. At home, they published hornbooks and general studies intended to teach international law in their own languages and to demonstrate the assimilation of European international law. However, they also wrote specific monographs in French, English, or German, which were published in Europe and intended for Western audiences. These works engaged with Western authors and their ideas, thereby appropriating the conceptual and doctrinal machinery that European thinkers had developed both to distinguish an exclusively European law of nations and to demarcate within its boundaries the range of validity of law between sovereign equals. Throughout their writings, semi-peripheral internationalists pursued a distinctively non-European interpretation of the classical European law of nations, in which they re-signified and redeployed its fundamental elements—positivism, the standard of civilization, and absolute sovereignty—to advocate for a change in extant rules of

11. In consequence, I supplement the interpretation put forward by Fisch arguing that diminishing power does not completely explain the expansion of European international law. The decisive appropriation of international law by semi-peripheral lawyers also contributed to the expansion. Although one can identify a general trend in international power relations explaining European economic and military expansion and the use of international legal arguments by non-European states to resist, there was considerable diversity in the strategies and outcomes of semi-peripheral international lawyers' appropriations of international law. Sometimes they challenged the content of the rules by invoking underlying principles; at other times they contested the fact that the rules applicable within the West did not apply to them, achieving results ranging from partial success (formal recognition as a sovereign equal) to partial failure (renegotiation of treaties under unequal treatment).

12. In light of the professional relevance attained by these lawyers, it seems contradictory to qualify them as semi-peripheral. I have dealt previously with the problem of interpreting the work, professional trajectory, and contributions of semi-peripheral lawyers situated at the intellectual and political centers of the world. See Arnulf Becker Lorca, *Alejandro Alvarez Situated: Subaltern Modernities and Modernisms that Subvert*, 19:4 LEIDEN J. INT'L L. 879, 927, 929 (2006). Another problem, which is also related to the geopolitical location of this group of lawyers, is the absence of a single and common term to describe them. Although not entirely satisfactory, I will use as interchangeable terms: semi-peripheral (as a strictly descriptive category), non-European (acknowledging the problems of defining Europe and the fact that the United States was a central actor in the expansion of international law), and non-Western (although most international lawyers, especially Latin Americans, were Western-educated modernizers).

international law and to justify the extension of the privileges of formal equality to their own states in their interactions with Western powers.

This group of semi-peripheral international lawyers converged in Europe not simply as a result of individual efforts, but also as a consequence of wider political patterns within the nineteenth-century world system. Notwithstanding differences in nationality, culture, or religion, the similarity of these lawyers' paths responded to a common historical imperative defined by the economic and military expansion of Europe and the resistance opposed by non-European peoples. At least since the fifteenth century, Europe had expanded overseas by opening trading posts or incorporating new territories as colonies. By the nineteenth century, imperialistic expansion integrated vast areas of the globe into a world economy centered in Europe.¹³ Resistance to European expansion adopted various forms, including not only popular revolt and organized military campaigns, but also modernization projects pursued by reformist national movements.

While the role international law played in the European expansion was not homogenous, the strategies lawyers used to articulate resistance through international legal arguments were similar. Section two of this article examines the similarity of lawyers' strategies by showing the appropriation of the basic elements of classical international law by a number of jurists from the semi-periphery. Section three explores the diversity of legal regimes in the three abovementioned ideal types and argues that the functional equivalences between them explain a common pattern of appropriation in the semi-periphery. Finally, section four suggests that this common pattern of appropriation produced a semi-peripheral legal consciousness, which I describe as being both universal and particularistic. This section examines the distinctive articulations of the idea of a universal international law in each ideal type. I conclude by drawing some lessons out of this story, calling for a more pluralistic international legal ethos that is more attentive to local non-Western distinctiveness, and encouraging semi-peripheral jurists to know their own past and to learn from the strategies adopted by their predecessors.

I. THE SEMI-PERIPHERAL APPROPRIATION OF CLASSICAL INTERNATIONAL LAW

A. *Profession Beyond the West*

The global expansion of the great European powers and the United States was economic, political, and military. Legal relations also developed when Western expansion into overseas territories was accompanied by the estab-

13. On the continuities and changes between the earlier period of European colonial empires and nineteenth century imperialism, see H.L. WESSELING, *THE EUROPEAN COLONIAL EMPIRES 1815–1919* (Diane Webb trans., 2004).

lishment of diplomatic relations and international agreements. However, the international legal regimes that governed relations between Western and non-Western states during the nineteenth century do not explain why Japanese, Latin American, Turkish, or Russian lawyers engaged with the European international legal tradition.¹⁴ Neither doctrines nor legal concepts travel by themselves. Non-European elites had to convince themselves that mastering European international legal thinking was included in the project of national modernization, in which the recognition of international legal personality became a proxy for civilization. Additionally, they had to persuade traditionalist opponents at home of the usefulness of international law (for example, to tame Western incursions). Treatises had to be translated and legal doctrines had to be taught by trained scholars. Thinking and acting like an international lawyer requires instruction and practice. When national elites in Turkey, China, or Latin America decided to use international law and engage with the European tradition of international legal thinking, aiming to improve their bargaining position vis-à-vis Western powers, they had to import legal knowledge. Consequently, some of their lawyers and diplomats had to become European-fashioned international lawyers.¹⁵

By the nineteenth century it had become increasingly common for non-European intellectual elites to migrate to Europe in the search for high culture, knowledge, and gains in their individual social capital. International lawyers rapidly followed suit.¹⁶ After completing legal education in their home countries, lawyers from different regions of the world moved to Europe's intellectual and political centers. Some served in diplomatic missions

14. I would like to stress that this study has adopted a narrow and particular definition of international law and is therefore circumscribed to three ideal types of interactions between Western and non-Western sovereigns. The reasons to focus only on certain actors and contexts are consequently historical rather than normative. Nor is this study inspired by political correctness and the ensuing effort to find "forgotten voices" in the history of international law. Elites from regions of the world that were under colonial rule or beyond reach of European and American commercial and geopolitical interests during the nineteenth century either had no need or only limited possibilities to make use of international law and thus did not belong to this group of semi-peripheral international lawyers. It was not until the decolonization struggles of the 20th century that elites from Africa, the Pacific, and Central Asia appropriated, used, and influenced the international legal tradition. For example, in nineteenth-century Africa only Ethiopia could make use of international law to support the claim to sovereignty based on their Christian affiliation. On the other hand, as Henry Richardson has shown, other Africans or African Americans had to invoke legal claims "outside law" to confront slavery. HENRY J. RICHARDSON III, *THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW* 441–446 (2008).

15. To acquire knowledge about international law, non-European governments sponsored the translation of foreign textbooks or directly hired foreign international lawyers. For example, in 1874, French international lawyer Pradier-Fodéré was hired by the Peruvian government to teach international law and serve as a legal advisor. Gustave Rolin-Jacquemyns, renowned Belgian lawyer and cofounder of the Institut de Droit International, after accepting a personal invitation by the king of Siam, served as a counsellor to the crown between 1892 and 1902. See WALTER TIPS, *GUSTAVE ROLIN-JAEQUEMYS AND THE MAKING OF MODERN SIAM: THE DIARIES AND LETTERS OF KING CHULALONGKORN'S GENERAL ADVISER* (1996). Western international lawyers were also hired in Asia. See *infra* text accompanying note 173.

16. See Victor Karady, *La migration internationale d'étudiants en Europe, 1890–1940*, 145 *ACTES DE LA RECHERCHE EN SCIENCES SOCIALES* 22, 47 (2002).

accredited in Europe; others accepted European governmental positions with the explicit purpose of learning European international law. Others, supported by their family fortunes or independently financed, moved to Europe to pursue advanced legal studies and remained there while working for their home countries.¹⁷ Most of them combined more than one occupation, serving as legal advisers or diplomatic agents while in Europe and taking on academic and political positions once back in their home countries.¹⁸

By the end of the nineteenth century, there was a significant community of international lawyers from semi-peripheral countries who had pursued doctoral studies in law or informal studies under the guidance of prestigious international law professors in Europe. This trend increased throughout the first decades of the twentieth century. This migration of lawyers and law students during the second half of the nineteenth century was part of a broader phenomenon in which non-European elites, intellectuals, diplomats, and international lawyers converged in Europe, which contributed to making Paris, Berlin, London, Brussels, and The Hague global centers of international culture and politics.

During the nineteenth century, the international world transformed rapidly and dramatically. International law adapted and changed in response to the new global economic order that emerged from European and U.S. expansion, becoming very different from the law governing intra-European relations and from treaties regulating the interaction between Western and non-Western sovereigns. In the context of shifting definitions, central concepts, doctrines, and rules, international law was embodied not only in treaties but also in treatises, where semi-peripheral jurists sought to change the rules contained in the treaties that governed the relationship between their polities and the international world. These writings should therefore be considered as legislative acts in nineteenth-century international law.

I explore and draw comparisons between the work and professional trajectories of a number of international lawyers from the semi-periphery and suggest that the migration of non-European legal intellectuals to Europe, their appropriation of European international legal thinking, and the general cir-

17. For example, according to Miyasaki, during the mid-nineteenth century, Japanese nationals Shin-ichiro Tsuda and Shusuke Nishi were sent to Leiden University and Takeaki Enomoto to Holland, while Chinese Ma Chien-Chung studied international law at the University of Paris. Shigeki Miyasaki, *History of the Law of Nations Regional Development: Far East*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 802, 806 (Rudolf Bernhardt ed., 1992). Also, Japanese lawyers Tsurutaro Senga and Shingo Nakamura studied during the end of the nineteenth century at the University of Berlin. See Fuji Ito, *One Hundred Years of International Law Studies in Japan*, 13 *THE JAPANESE ANN. INT'L L.* 19, 28 (1969). Japanese Sakutaro Tachi studied in France, Germany, and England between 1900 and 1904. See II *ANNUAIRE DE L'INSTITUTE DE DROIT INTERNATIONAL* 517 (1950). Russian Andre Mandelstam took courses with Renault in Paris from 1897–1898. See *id.* at 483.

18. Onuma has argued that one of the reasons nations entering the “Eurocentric international society” as “later-comers” shared similar characteristics is the small size of their elites, so that a single individual had to play double or triple roles. See Yasuaki Onuma, *Japanese International Law in the Prewar Period: Perspectives on the Teaching and Research of International Law in Prewar Japan*, 29 *JAPANESE ANN. INT'L L.* 42 (1986).

cultation of international legal ideas and doctrines transformed international law into a global legal discourse. It also led to the emergence of a common professional style or legal consciousness among semi-peripheral international law practitioners.

This shared disciplinary consciousness was shaped by the tactical assimilation of extant international law through the selection of some of its features: positivism (over naturalism as international law's normative source), doctrines that substantiated an absolute notion of sovereign autonomy and equality (over doctrines that made sovereignty permeable), and the internalization of the standard of civilization as the attribute granting international legal subjectivity (over, for example, the use of the maxim *ubi societas ibi ius*). These broad conceptual commitments are undoubtedly the same elements defining the European synthesis out of which nineteenth-century classical international law came into being.¹⁹ Non-Western international lawyers mimicked their Western colleagues, but they assimilated international law in their pursuit of objectives that differed from the ones usually at the center of European international law. Consequently, classical international law itself acquired atypical attributes. That is, pulling international legal resources to sustain the recognition of legal personality of non-European states made international law different from the law safeguarding the European balance of power in the case of bigger powers, or securing legal equality in the case of small European states, whose legal personality was not contested.

I now describe how the general characteristics of classical international law—that is, positivism, an absolute concept of sovereignty, and the standard of civilization—were appropriated by semi-peripheral authors and channeled to produce a similar but different international law that responded to their distinctive interests. In the subsequent section, I map the diversity of modes in which classical international law was imported and assimilated as a result of local differences in the historical contexts of each of the three aforesaid ideal types.

B. Positivism

Explanations of the predominance that legal positivism attained in nineteenth-century international law commonly point at the general influence

19. Kennedy, however, suggests that the idea of the nineteenth century as characterized by the triumph of positivism and the centrality of sovereignty was itself a result of the critique of sovereignty and positivism advanced by modernist international lawyers during the first half of the twentieth century. Kennedy's study sheds light on the reasons why contemporary liberal internationalists see sovereignty and positivism as backward elements of the legal tradition that should be overcome and thus why the nineteenth century history of international law has remained mostly unexplored. See David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 *NORDIC J. INT'L L.* 385, 386–87, 412–413 *passim* (1996). In this study, I suspend the preconceptions about the nineteenth century identified by Kennedy and examine the rationale behind non-Western jurists' support of a legal theory and disciplinary sensibility that would seem problematic to contemporary observers.

this trend exerted in the fields of jurisprudence and philosophy.²⁰ Alternatively, positivism is thought to have developed in the nineteenth century as the conceptual framework in consonance either with a period characterized by relative peace and material progress or with an age defined by imperialism and the concomitant need to offer legal justification to colonialism.²¹ Either way, positivism gave conceptual coherence to a new reality: international law as rules, emanating from states, and governing interstate relations.²²

If the nineteenth century consequently marked the resolution in favor of positivism of the prolonged dispute with naturalist theories of international law, it should not be surprising that international lawyers from the semi-periphery followed the positivist trend.²³ Semi-peripheral jurists' positivism might be characterized as the default position into which non-Western legal experts subsided in the course of their appropriation of international law, precisely at the time when the positivist school became dominant.²⁴

Semi-peripheral international lawyers' positivism, however, could be more accurately described as an answer to the new international legal doctrines the positivist framework had systematized. To be precise, semi-pe-

20. According to Kunz, "it is against the long predominance of the 'classic' natural law and its extravagances that, at the beginning of the nineteenth century, positivism came as a reaction in Europe." Josef Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 947, 952 (1961). See also Stephen Hall, *The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism*, 12 EUR. J. INT'L L. 269 (2001).

21. Kunz, for instance, revising the history of the debate between naturalism and positivism, argues that positivism provides a better theoretical framework during periods of peace, because of its emphasis on interpretation and codification of existing law, as opposed to periods of change and wars, when problems of law-making and the politics of law make positivism too rigid. See Kunz, *supra* note 20, at 953–54. In contrast, Anghie has revealed the historical and conceptual interconnections between positivism and colonialism. See Anghie, *supra* note 2.

22. See, e.g., Benedict Kingsbury, *The International Legal Order*, in OXFORD HANDBOOK OF LEGAL STUDIES (Peter Cane & Mark Tushnet, eds., 2003). Kingsbury argues that since the late nineteenth century, the international lawyer, combining the roles of both scholar and practitioner, has followed a dispute settlement focus combined with a practice-oriented positivist jurisprudence, a model that emphasized the materials generated by recognized sources of law. According to Kunz, positivism "stood for the predominance of the state, for the dualistic construction, for the will of the state as the only basis of international law, for the unquestionable right of every sovereign state to go to war, against third-party judgment, against progressive development of international organizations, and so on." See Kunz, *supra* note 20, at 957.

23. See, e.g., "In the science of international law, the nineteenth century was the great era of positivism. This means, first of all, that the conception of the law of nature and the kindred one of just war were to all intents and purposes abandoned." ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 232 (1954).

24. Jacobini, for example, studies Latin American international lawyers in terms of their disposition toward positivism as the dominant trend of the epoch. See H. B. JACOBINI, *A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN WORKS OF LATIN AMERICAN WRITERS* (1954). Renowned non-European international lawyers like Russian Fedorovich Martens became central figures in the shift toward positivism. See NUSSBAUM, *supra* note 23, at 179–85; see also FEDOR FEDOROVICH MARTENS, *VÖLKERRECHT: DAS INTERNATIONALE RECHT DER CIVILISIRTEN NATIONEN* (Carl Bergbohm trans., 1886). Baltic German/Estonian international lawyer Carl Bergbohm's work *Staatsverträge und Gesetze als Quellen des Völkerrechts* became a classic in the positivist tradition. See CARL BERGBOHM, *STAATSVERTRÄGE UND GESETZE ALS QUELLEN DES VÖLKERRECHTS* (1877).

ripheral international lawyers' positivism countered the legal doctrines that European and U.S. international lawyers had developed to provide their states with greater scope for legal interventions in non-European states, changing the international legal regimes that regulated interactions with non-Western states. Non-European international lawyers were therefore positivists not because of an unabashed position in the debate on the nature and normative foundations of international law, but rather because of pragmatic and strategic reasons.

On the one hand, non-Western lawyers confronted a pragmatic rather than theoretical problem when striving to make sense of the rules of the regimes governing the interaction between Western and non-Western powers.²⁵ The professional sensibilities of practicing semi-peripheral international lawyers generally coincided with the positivist perspective, given their proximity to concrete state behavior and the imperative to work with the sources of international law directly emanating from that practice. For example, limiting the grounds for a *de jure* justification of inequality between Western and non-Western nations was a central practical problem faced by non-Western international lawyers. Discussing the capitulation treaties that Japan had signed with various Western powers, Japanese lawyer Tsurutaro Senga maintained that the basis for Western states' exercise of consular jurisdiction was laid down exclusively by the treaties signed by Japan, and that its application was consequently entirely determined by their provisions. All matters not covered by the capitulations, Senga adamantly affirmed, should be resolved by rules of international or municipal law, that is, neither by the theory of extraterritoriality professed by some European publicists, nor by analogy to the institution of consular jurisdiction as forced on Turkey or on other Asian or African states.²⁶

On the other hand, positivism might be described in hindsight as strategically chosen by semi-peripheral international lawyers to give priority to the sources of law that unequivocally expressed the will of their sovereign, as well as to the theory of international law that circumscribed its scope within the realm of inter-state relations, rather than making inroads into the domestic realm. Positivism was indeed the theoretical approach more amicable to Senga's efforts to reduce the latitude to interpret unequal treaties beyond

25. Akashi has argued that Japanese international lawyers' practice-oriented attitude toward the idea and concept of international law responded to the daring situation faced by Japan once opened by Western powers. Japanese jurists were indifferent to the long-lasting European debate between positivism and naturalism: "it is highly probable that the question whether it [international law] was natural or positive should have been a peripheral issue." See Kinji Akashi, *Japanese "Acceptance" of the European Law of Nations: A Brief History of International Law in Japan*, in EAST ASIAN AND EUROPEAN PERSPECTIVES ON INTERNATIONAL LAW 19 (Michael Stolleis & Masaharu Yanagihara eds., 2004).

26. TSURUTARO SENGA, *GESTALTUNG UND KRITIK DER HEUTIGEN KONSULARGERICHTBARKEIT IN JAPAN* 10 (1897). The absence of solidarity between jurists from different non-European states is typical of the legal consciousness of this first generation of semi-peripheral international lawyers, which I characterize as a form of particularistic universalism. See *infra* section IV.

Japan's sovereign will and as such opposed the use of natural law doctrines to limit the sovereign autonomy of non-Western states.²⁷

While not entirely dominant, the natural law remnants that carried on to the mid-nineteenth century were particularly detrimental to the interests of non-European nations. Scottish jurist James Lorimer, for example, followed the basic tenets of naturalist doctrine when positing that positive law is declaratory of the law of nature. The law of nations, in turn, is discovered through inferences from the basic facts of nature, which according to Lorimer are essentially power relations. Elevating the fact of power and the inequality between states to an alleged "de facto principle," Lorimer rules out the possibility of formal legal equality among states that are unequal in fact, a difference that confers to European states unilateral rights to expansion and conquest.²⁸

Non-European international lawyers therefore welcomed positivism's break with the naturalist tradition, for positivism confined law to the rules emanating from sovereign will while displacing detrimental rules deduced from general naturalist principles. Moreover, this break was crucial to overcoming international law's Christian theological underpinnings and therefore useful to substantiating the inclusion of non-Christian political entities as international legal subjects on a morally-neutral basis. For example, only the first attempts to assimilate international law at the beginning of the nineteenth century in China and Japan depended on drawing parallels between international law as natural law and Confucianism. As soon as professional international lawyers took over the legal aspects of the interaction with Western powers, latter generations of Chinese or Japanese intellectuals opted for positivism.²⁹

The continuing purchase of naturalist doctrines constituted a threat to the independence of non-European states even after Western governments had recognized their legal personality. Under natural law's argumentative plasticity, the just war theory could justify Western military intervention in China, Turkey, or Latin America. Semi-peripheral jurists thus realized the

27. In the nineteenth century, equality was denied not only on the basis of the standard of civilization, but also on the basis of natural law principles. See, e.g., JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES*, (1883). Therefore, for instance, Fedor Fedorovich Martens insisted that international law is composed of juridical rules and not moral or religious laws. FEDOR FEDOROVICH MARTENS, *TRAITÉ DE DROIT INTERNATIONAL* 24 (A. Leo trans., 1883).

28. On the "de facto principle" see JAMES LORIMER, *THE INSTITUTES OF LAW: A TREATISE OF THE PRINCIPLES OF JURISPRUDENCE AS DETERMINED BY NATURE* (1880); in relation to international law, see *id.* at 260–61. On the application of the theory of 'de facto principle' to the doctrine of recognition, see *id.* at 104.

29. Hirohiko Otsuka, *Japan's Early Encounter with the Concept of the "Law of Nations,"* 13 *JAPANESE ANN. INT'L L.* 35 (1969) (arguing that it was a strategy to breach the linguistic and cultural gaps). *But see* Akashi, *supra* note 25, at 19. In the Latin American context, Andres Bello follows a naturalist approach. See ANDRES BELLO, *PRINCIPIOS DE DERECHO DE GENTES* (1832). Calvo, on the other hand, articulates the turn to positivism. See CARLOS CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE: PRÉCÉDÉ D'UN EXPOSÉ HISTORIQUE DES PROGRÈS DE LA SCIENCE DU DROIT DES GENS, TOME PREMIER* 154 (1896).

need to develop a comprehensive critique of natural law on “scientific” grounds. Argentinean international lawyer Carlos Calvo, for example, did not simply join the positivist trend, but also described the distinction between natural law and positive law and the corresponding differentiation between customary law and conventional law as outdated.

Declaring that the distinction between naturalism and positivism had lost purchase in modern discussions and affirming that it was only proper to “ancient publicists,” Calvo shifted the attention toward elucidating the principles of justice on the basis of which international law is founded and that ought to precede inter-state relations. After reviewing the positions of a long list of authorities, Calvo summarizes his opinion:

[W]e recognize that the general idea of justice can transform the relations of states for the better and in their common benefit; however, in the course of our work we will stick with preference to the principles defined in treaties, to the rules naturally and logically deduced from particular conventions, or from the diverse cases resolved in practice, in short to the established jurisprudence.³⁰

Calvo only enters the discussion about justice to distance himself from the debate on the naturalist/positivist theories of international law. But he also eschews a thorough discussion of the principles of justice, centering the analysis exclusively on the positive sources of law. In this manner and in similar fashion to Senga, Calvo gave theoretical leverage to a practice-oriented form of positivism. For instance, in “the language of facts” Calvo reveals the practical character of his definition of the sources of international law, limiting it to valid treaties rather than emphasizing their moral or rational foundation.³¹

I have so far shown that semi-peripheral jurists were positivists in the sense of engaging with the central ideas of the positivist school of thought. Semi-peripherals supported positivism because the doctrines and legal arguments associated with the positivist school were seen as more beneficial to their interests than the doctrines and arguments linked to the naturalist school. However, there is another way to understand the positivist outlook of nineteenth-century international law. In addition to a school of thought based on a shared legal theory, positivism can also be grasped from the perspective of the modes of legal reasoning it foregrounds. In this sense, positivism is identified with the abuse of deductive reasoning, that is, positivism is seen as legal formalism.³² Semi-peripheral lawyers were formalists when

30. See CALVO *supra* note 29, at 154. For a similar opinion, see MARTENS, *supra* note 24, at 24.

31. See *id.*, at 159–60 (affirming that treaties are the main source of international law).

32. See Kennedy, *supra* note 19, at 385–420. I am using the notion of ‘abuse of deduction’ in Duncan Kennedy’s phenomenological sense, that is, the difference between what is experienced as deduction and as abuse of deduction, depend on the ‘blocking level,’ on the level of abstraction in which a proposition is

supporting a variety of legal propositions or doctrines—from non-intervention, to the illegality of the use of force to recover public debt, to the abrogation of consular jurisdiction—by way of presenting them as deductions from the principle of sovereignty. In particular, I examine elsewhere in greater detail semi-peripheral jurists' appeal to sovereignty to defend the equality and autonomy of their states.³³ For example, Greek international lawyer and scholar Michel Stavro Kebedgy (1865–1947) relied on this mode of reasoning when writing on the principle of sovereign autonomy and equality:

Sovereignty is the fundamental attribute that the juridical conscience of peoples and the science of international law recognize to the distinct moral persons that form the Society of Nations and that we call states. It has as a necessary corollary the *juridical equality* of all states and their mutual *independence*. Sovereign states, by their very definition, hardly recognize any person above them. It evidently follows that they all are on the same ground *equal* and *independent*. That is true whatever may be the geographical extent, material power, or the constitutional form of each state³⁴

I explore elsewhere these and other examples of formalist legal reasoning by semi-peripheral authors. These writers, however, did not identify as formalists. For obvious reasons, they characterized their approach as positivist.³⁵ Instead of expressing their conceptual views on the nature of law, semi-peripheral authors invoked positivism in their legal arguments, envisioning not a natural-law-oriented opponent, but the conservative European classical international lawyer. Also a positivist, this classical lawyer recognized special rights to the great European powers and thus would favor an international legal order based on inequality. In contrast to the Western lawyers' politically-infused opinions, which supported the great powers' privileged position, the semi-peripheral scholar invoked positivism as a way to emphasize the objective, dispassionate and scientific character of his argument. Georgios Streit (1868–1948), for example, adopted this position in his 1898 inaugural lecture to the international law chair at the University of Athens. In the lecture, published in the *Revue de Droit International et de Législation*

experienced as permitting deduction. The blocking level varies over time according to usage rather than logical accuracy. See DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* xviii (1975).

33. See ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1850-1950* (Cambridge Univ. Press, forthcoming 2011).

34. Michel Kebedgy, *Principes du droit des gens*, 19 ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT 84, 84 (F. Fleiner et al. eds., 1900) (trans. by author).

35. Formalism, as a sign of dogmatism or excessive idealism, has long been used to discredit the views of adversaries. However, formalism, as both designating a critique of the mode of legal reasoning characterized by the abuse of deduction and calling for a renewal of thinking in the direction of contextualist or outcome-oriented modes of legal thinking, emerged only during the first decades of the twentieth century, during the transition from classical to modern international legal thought. See *supra* note 33.

Comparée, Streit begins by announcing the continuation of the tradition instituted by his predecessor, who based his entire analysis on two principles: "he has conceived and taught international law as positive law; he has clearly separated the science of that law from politics."³⁶ Accordingly, Streit could not only characterize his study on the position of great powers under international law as scientific, but also defend the juridical equality of all states.

Semi-peripheral jurists were positivists in the sense that they subscribed to a legal theory and a mode of legal reasoning. Affiliation to the theoretic stance or school of thought, however, did not animate their positivism; rather, it was their will to assimilate international law into practical knowledge. To meet Austin's challenge against the conceptualization of international law as law, semi-peripheral authors did not pursue a scientific approach in the manner that European, and in particular British, positivist international lawyers did.³⁷ Positivism instead proved useful to non-Western states by defining their revocation of certain international legal rules, such as widespread international legal customs, principles, and doctrines legitimizing unequal treatment of non-European states, as expressions of their sovereign will. Therefore, rather than subscribing to positivism per se, semi-peripheral international lawyers used the positivist claim to scientific knowledge as support for their practical reconstructions of international legal doctrines, among them the reinterpretation of the meaning of absolute sovereignty and the standard of civilization.

C. *Absolute Sovereignty*

Semi-peripheral internationalists endorsed an absolute notion of sovereignty that emphasized both the rights to autonomy and equality. First, they stressed the domestic autonomy of a polity to constitute itself, rather than its factual independence vis-à-vis other sovereigns.³⁸ Second, unlike their Western counterparts, semi-peripheral publicists understood absolute sovereignty to include the rights of states as well as their obligations vis-à-vis other sovereigns. Emphasizing this dyad, these internationalists affirmed the formal equality between sovereign states and derived from it a series of principles that safeguarded the political independence and preserved the ter-

36. Georgios Streit, *Les Grandes Puissances dans le Droit International*, 2 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE [R. DE D. INT. ET DE L. COMP.] 5, 5 (1900) (trans. by author).

37. See generally Michael Lobban, *English Approaches to International Law in the Nineteenth Century*, in TIME, HISTORY AND INTERNATIONAL LAW 65, 66 (Matthew Craven et al. eds., 2007).

38. Calvo's treatise, for example, reviews Vattel's definition of sovereignty as the capacity of the nation to govern itself, regardless of form, as long as it remains independent from any foreign people. Calvo then contrasts this definition with his own: "the essential character of a state's sovereignty does not rest on being more or less dependant from another state, rather it rests on the power that it has to give itself a constitution, establish its laws, establish its government, without any intervention of a foreign nation." CALVO, *supra* note 29 at 171.

ritorial integrity of their nations.³⁹ More importantly, however, non-Western lawyers ventured to delineate the doctrinal contours of sovereignty by narrowing the range of potential exceptions to the rule, including the most imperious ones of intervention and consular jurisdiction.

Aiming at delimiting intervention as an exception to sovereign autonomy, Carlos Calvo, for example, devotes several pages to international law authorities that both justified the right of intervention and that supported the principle of non-intervention. He lists a number of conflicting views, sufficient enough to conclude that: "there are almost as many different opinions as there are authors."⁴⁰ Though asseverating the dissatisfaction that comes from theoretically defining the right of intervention, Calvo instead focuses on interventions in the historical record from ancient times to the nineteenth century. This turn to history then allows him to highlight a distinction between interventions within European states and interventions by Europeans within the internal affairs of American states. As regards to the former, Calvo argues that in modern times, especially since the independence of Greece, intervention has followed high principles of international politics, such as the equilibrium among nations and the protection of moral or religious values.⁴¹ The legitimacy or illegitimacy of intervention, according to Calvo, is therefore not intrinsic but subordinate to the situation of the country involved and the international impact that it produces. In the European cases, having followed "sound reason and equity," interventions have been "favorable to the development of civilization."⁴² In contrast, on the basis of an examination of the French (1838–1840) and Anglo-French (1843–1850) interventions in Rio de la Plata, as well as the Anglo-French-Spanish intervention in Mexico (1861–1868), Calvo strongly affirms:

[R]egardless of the point of view adopted, it is impossible to discover a single serious and legitimate reason that could justify up to a certain point the European interferences in the domestic affairs of the Americas.⁴³

Interventions, Calvo laments, have been either politically motivated or, in the case of demands for pecuniary compensation, justified under the pretense of protection of private interests, with no inquiry whatsoever as to their authenticity. Regarding politically-motivated interventions, if American as well as European states are independent nations and thus owe each other

39. *Id.* at 264. Absolute sovereignty necessarily implies complete independence. Hence for states, as moral persons, it implies a primary right, that of pursuing freely the achievement of their own destinies, and a no less pressing obligation of recognizing and respecting the sovereign rights and the absolute independence of other states.

40. *Id.* at 278.

41. *Id.* at 322–24.

42. Apart from the British and Russian interventions in the independence of Greece, Calvo also mentions the French intervention in Italy as a contributing factor to the latter's unification. *Id.* at 323.

43. *Id.* at 348.

reciprocity in their treatment, Calvo concludes that the assertion of a right of Europeans to interfere in the domestic affairs of the New World would in turn give way to an equivalent right by the states of the Americas to intervene in Europe. That situation would render impossible the preservation of amicable and peaceful relations between habitants of both continents. Considering economically-motivated interventions, Calvo points out that the recovery of debts or pursuance of other type of private claim has never justified the use of armed force by one European state against another, and concludes that no reason exists to change that rule in relation to the states of the New World.⁴⁴

But if intervention becomes a legal principle equal to the non-intervention principle of the law of peoples, the question Calvo asks is which of them then becomes the rule and which the exception. Historically, Calvo maintains, non-intervention has in general prevailed in the political relations between states. Thus, he concludes by affirming that the absolute principle of non-intervention is a corollary to the principle of nationality, admitting exceptions only when a state freely appeals to another state for assistance in defending or recovering its autonomy when threatened by a foreign power.⁴⁵

On the other hand, consular jurisdiction posed challenges similar to intervention, in the sense that delimiting the scope of this exception to sovereign autonomy elicited analogous responses. Tsurutaro Senga addresses the issue. Whereas it is undeniable that all limitations to the fundamental rights of the sovereign state are exceptional, German-speaking Senga reminds his European readers, the attempt to justify consular jurisdiction by appealing to its normal character in Asia and Africa in contrast to its nonexistence in Europe is untenable.⁴⁶ In this manner, Senga unpacks the contention that European international law's validity outside Europe depended on the extent to which the social and consequently legal relations between the European and non-European states were immediate enough. For instance, German publicist Holtzendorff classified legal duties among states into four groups, according to which consular jurisdiction was justified in Turkish lands, Africa, and Asia on grounds of the weak European relationship with these nations.⁴⁷ Senga opposed this interpretation by distinguishing two issues that he interpreted as separate: the possibility of identifying regional group-

44. If both intervention and non-intervention are general principles of the law of peoples, then the task becomes to identify the rule, which is non-intervention. *Id.* at 348–51.

45. Note how Calvo takes on the principle of nationality at the center of reconstruction of Europe to give it a twist. *Id.* at 351–55.

46. Senga, *supra* note 26, at 134.

47. These four groups included: relations between European states, between European and American states, between Christian-European states and Turkish lands, and between European and Asian and African states. *See generally* FRANZ VON HOLTZENDORFF, HANDBUCH DES VÖLKERRECHTS: AUF GRUNDLAGE EUROPÄISCHER STAATSPRAXIS (Franz von Holtzendorff, ed., 4th ed. 1889) (1885). *Cf.* JOHN WESTLAKE, CHAPTERS ON PRINCIPLES OF INTERNATIONAL LAW (Cambridge University Press 1894); LORIMER, *supra* note 27.

ings around a similar class of legal bonds, on the one hand, and the limitation of sovereign autonomy, on the other. If regular and actually shared particularities exist in the international legal relations within a group of states, Senga reasons, the differentiation in the conventional rights held by them must conform to the distinctive economic or social relations of their respective continents. Senga asserts that these variations of the rights applicable to legal interactions, however, remain within the realm of each group of states. Thus, distinctions between regional groups do not justify restricting the absolute rights belonging to each sovereign as an international legal subject. Namely, it does not make it lawful for European states to discriminate against Asian states, as is the case in the inequitable treaties establishing consular jurisdiction.⁴⁸

Consular jurisdiction in Japan, Senga concludes, is in contradiction with the principle of sovereign autonomy.⁴⁹ Highlighting the contradiction was not enough to assure the success of the legal argumentation in Japan's favor, however, for Senga had to also show that Japan was actually sovereign. Japanese publicists, in consequence, had to confront the standard of civilization, that is, the yardstick used by Western international lawyers to justify or deny the recognition of international legal personality.

D. *The Standard of Civilization*

The doctrine of the standard of civilization has a particular genealogy. As the law of peoples, emerging in the fifteenth century under a natural law conception, it shifted progressively to become a formalized legal order underpinned by positivist legal thought. In response, Western legal scholars developed the doctrine of the standard of civilization to delimit international law's scope and validity.⁵⁰ Moreover, nineteenth-century positivist international law of civilized nations did not include any formal procedure to determine the "civilized" status, leaving the admission of new members to the determination of international legal scholars.⁵¹

However, the standard of civilization did not emerge simply as a consequence of a shift in scientific debates. Positivism and the distinction between civilized and uncivilized peoples served the interest of Western imperialism and colonialism.⁵² There is, however, another story running

48. Senga, *supra* note 26, at 134–35.

49. Specifically, consular jurisdiction violates the state's constitutional sovereignty (Staatsrechtliche Souveränität), the sovereignty of the head of state (Fürstensouveränität), and international legal sovereignty. *Id.* at 107–09, 123.

50. For studies exploring the construction of the standard by Western international lawyers, see generally GERRIT GONG, *THE STANDARD OF "CIVILIZATION" IN INTERNATIONAL SOCIETY* (Clarendon Press 1984). See also Anghie, *supra* note 2.

51. Georg Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, 33 AM. J. INT'L L. 56, 64 (1939) [hereinafter Schwarzenberger, *Rule of Law*].

52. See generally Georg Schwarzenberger, *The Standard of Civilization in International Law*, in CURRENT LEGAL PROBLEMS 220 (George Keeton & Georg Schwarzenberger eds., 1955) [hereinafter

parallel to the imposition of European international law. At the same time Western international lawyers developed the standard and Western states used it to legitimize their overseas expansion, semi-peripheral intellectuals internalized the standard of civilization, developing legal arguments to justify the recognition of their countries as sovereign states. They internalized it by demonstrating the civilized status of their respective nations. Alternatively and less frequently, lawyers challenged the standard as not scientifically sound and therefore legally useless to recognize or deny international legal subjectivity.

Not only did non-European jurists accept the civilization standard as a prerequisite to sovereignty and hence to membership in the “family of nations,” they also consented to the position that adoption of political institutions, particularly in regards to the law of Western states, was the most visible indicator of a country having satisfied the standard. Accordingly, since non-European states adopted the Western standard of civilization, one might think that semi-peripheral lawyers passively imported Western legal thought, and that European international law was hence globalized. However, this appropriation was strategic; although not without problems, it served the interest of semi-peripheral states by allowing their jurists greater room for agency.⁵³ First, as argued above, in comparison to natural law doctrines, such as just war theory, the standard of civilization limited the realm of discretion left to Western states in their interaction with the extra-European world. With the standard, the link between Christianity and international law softened, and a non-Western sovereign’s international legal personality came to depend on whether it was capable of assuming binding international commitments and protecting the life and property of Western foreigners.⁵⁴ Second, lawyers from nations trying to achieve or secure recognition of their international personality did not simply submit to European determinations of who had met the standard of civilization. On the contrary, they were actively engaged in both European diplomatic circles and the international law professional scene arguing for the recognition of their civilized status.⁵⁵

Schwarzenberger, *Standard*]; Schwarzenberger, *Rule of Law*, *supra* note 51; GONG, *supra* note 50; Anghie, *supra* note 2.

53. It is important to note that surveying the ways in which semi-peripheral jurists internalized the standard of civilization in the context of the modernization and Westernization of their countries does not entail a positive, either political or normative, assessment of the consequences that this strategy imposed on their respective peoples. In fact, this type of critique should be levelled against both semi-peripheral as well as Western international lawyers.

54. See Schwarzenberger, *Rule of Law*, *supra* note 51, at 62–66; Schwarzenberger, *Standard*, *supra* note 52, at 220.

55. Calvo was a founding member of both the Institut de Droit International, established in 1873 in Ghent, and the Association for the Reform and Codification of the Law of Nations (later renamed the International Law Association), established in Brussels in 1873. Manuel Peralta, *Carlos Calvo*, 21 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 486, 488 (1906); 1 TRANS. INT'L L. ASS'N 1 (1873–74).

Writing on the legal aspects of the interaction between their own state and Western states, semi-peripheral international lawyers strove to demonstrate not only their understanding of international law, but also the allegiance of their governments to international legal precepts. As such, they hoped to prove that their governments behaved as civilized and thus sovereign states. Non-European publicists saw their publications in Europe—books and articles in prestigious European law journals, mainly in French, the dominant language of the period, but also in English, German, and Dutch—as underscoring the inclusion of their states in the society of civilized nations.

Following conventional wisdom, semi-peripheral international lawyers included both domestic and international facets in their efforts to substantiate their respective states' compliance with the standard of civilization.⁵⁶ The enactment of laws and introduction of legal institutions guaranteeing basic rights to nationals and foreign citizens alike were a central demonstration of their progression and modernization. In other words, while the idea of civilization was utilized by Western publicists to justify colonialism over “noncivilized peoples” and special rights on “quasi-sovereign” nations, such as consular jurisdiction, lawyers from countries in the latter situation, exercising only limited or formal sovereignty, appropriated the standard to overcome its legal consequences and to assert full sovereign autonomy.⁵⁷

First, semi-peripheral jurists internalized the domestic facet of the standard by enacting Western law as a would-be expression and proof of sovereignty.⁵⁸ For example, Kentaro Kaneko (1853–1942), a renowned Japanese jurist and diplomat, writes in the *Revue de Droit International et de Législation Comparée* that “for certain countries that have already entered the concert of universal civilization since some years, the question to be examined is if the modifications in the organization of the courts have taken place in order that their jurisdiction can be applied without hindrance to subjects of Christian powers.”⁵⁹ Kaneko answers in the affirmative: “Such is notably the case of the Japanese Empire, whose laws and institutions are at present at the level of the ones of the states of Europe and America.”⁶⁰ Kaneko goes on to sug-

56. Gong's study offers a useful enumeration of the requirements included in the standard: 1) guarantee of basic rights of foreign nationals, life, property, freedom of travel, commerce, religion; 2) organized political bureaucracy; 3) adhesion to generally accepted international law; 4) fulfilment of international obligations and diplomatic relations; 5) conforming to the accepted norms and practices of the “civilized” international society, including prohibition of polygamy and slavery. See GONG, *supra* note 50.

57. That is, non-European political elites not only imported and enacted Western law and institutions, but also invoked these transplants as justifications for holding Western residents accountable under the law governing the territory, rather than the foreigner's national law applied by the consul.

58. See WESTLAKE, *supra* note 47.

59. Kentaro Kaneko, *Les Institutions Judiciaires du Japon*, 25 R. DE D. INT. ET DE L. COMP. 338, 338–39 (1893) (trans. by author). In 1874 Kaneko earned a law degree at Harvard Law where he was a tutee of Oliver Wendell Holmes, Jr.

60. *Id.* at 338. Kaneko enumerates the new laws and institutions that modernized the Japanese legal system (among others): a new constitutional regime (Kaneko himself had participated in the drafting of the constitution of 1889), the law establishing the organization of the judiciary and a series of new codes

gest that the introduction of Western law in Japan positioned its judicial institutions on equal footing with the ones of the peoples of Europe and America.

Kaneko's argument is subtle, for he implies that a Western legal system is not a sufficient sign to assert a country's status of civilization, but rather a justification for shifting the basis on which jurisdiction is exercised from the nationality principle to the territorial principle. Moreover, to grasp the full extent of the successful reception of Western law and institutions in Japan, Kaneko argues, one must understand Japan's extensive history, which he sets out to introduce to Western readers.⁶¹ Giving an interpretative twist—typical of non-European thinkers—to the idea of Western law as a European site-specific historical phenomenon and therefore to the ineluctable requirement of its importation, Kaneko presents a story in which the long history that preceded the imperial restoration of 1867 ripened Japanese legal institutions for modernization and successful assimilation of Western law.⁶² Nineteenth-century codification, Kaneko points out, was not the first time that compilations of laws had been enacted in Japan.⁶³ Furthermore, since the reorganization of the judiciary undertaken by the Japanese Empire in the year 660 A.D., Japanese courts evolved in a fashion similar to European courts.⁶⁴ Accordingly, Kaneko defends the historical legacy enjoyed by Japanese courts, their modernization, and the professional expertise of its judges, all of which made it quite difficult to compare the legal education or experience of Japanese judges with the competences of foreign consuls, who were simply elected by foreign merchants.⁶⁵ With a functioning Western legal system, Japanese lawyers could plead in favor of Japan's meeting the standard of civilization and consequently for the recognition of its sovereignty. They could then launch a critique of the legality of the unequal treaties, particularly with respect to consular jurisdiction.

In similar fashion, Latin American lawyers internalized the standard by asserting that, although sharing with the West the same cultural roots, civilization in Latin America had a history of its own. Carlos Calvo complained resentfully about Europeans' ignorance of the civilization of the "peoples of

of criminal procedure and civil procedure, a civil code, and commercial code. Kaneko concludes: "l'ensemble constitue un moment législatif qui a frappé l'attention du monde scientifique." [together they constitute a legislative monument that has called the attention of the scientific community.] *Id.*

61. Kaneko reviews four periods of Japanese institutional history: primitive, ancient, middle ages, and modern. *Id.* at 342–44.

62. This mode of internalizing the standard of civilization is not uncommon. Other jurists have also identified the standard with European civilization while claiming non-Western roots that confirm the respective state's meeting of the standard. Takahashi illustrates this method: "It must be confessed that this generosity [of applying the standard] is chiefly owed to European civilization, which was introduced thirty years ago, but in general it may be said that if the graft was from Europe, the stock was an ancient one, deeply rooted in Japan from the earliest times." Takahashi, *infra* note 182, at 4.

63. Kaneko, *supra* note 59, at 341.

64. *Id.* at 356.

65. *Id.* at 353.

the Latin race” in the Americas.⁶⁶ In order to correct European neglect, Calvo published a monumental compilation of historical and statistical data about Latin America.⁶⁷ Calvo’s revision of a vast record of laws and political institutions since colonial times onwards, on the one hand, and the cultural and political progress made by Latin American republics since independence from monarchic Spain and Portugal, on the other, allowed him to base the claim to sovereignty and civilization on solid foundations.

Second, as soon as semi-peripheral international lawyers contended to have fulfilled the domestic prerequisites to count their legal systems and therefore their nations within the civilized world, they also had to supplement their assertions by demonstrating that the international facet of the standard was also met.⁶⁸ Thus, they sought to demonstrate compliance with international law and civilized behavior at the international level.

Japanese jurists, for instance, directed attention to Japan’s record of compliance with the general principles of international law and with the rules and obligations contained in a series of universal treaties signed by all “civilized nations” during the nineteenth century.⁶⁹ Compliance was not enough, however, for Japanese internationalists also had to show that Japan behaved

66. “L’Amérique latine a été découverte, conquise et peuplée par l’Europe, et cependant elle n’en est pas connue comme elle devrait l’être” [Latin America has been discovered, conquered and populated by Europe, however, she is not known as it should be.] *RECUEIL COMPLET DES TRAITÉS*, *infra* note 67, at i. Furthermore, Calvo contests that Latin America is either frequently confused with other uncivilized regions of the world or still mistakenly identified with the period of colonial domination, disregarding the incessant progress Latin America has made since independence. To him, America was seen as conserving “son état primitif et sauvage: ses habitants civilisés et intelligents sont considérés comme des Indiens ou des nègres d’Afrique, allant tout nus ou couverts des plumes” [its primitive and savage state: its civilized and intelligent habitants are considered as the Indians or the blacks from Africa, going all naked or covered with feathers.] *Id.* at ii.

67. CARLOS CALVO, *RECUEIL COMPLET DES TRAITÉS, CONVENTIONS ET AUTRES ACTES DIPLOMATIQUES DE TOUS LES ÉTATS DE L’AMÉRIQUE LATINE COMPRIS ENTRE LE GOLFE DU MEXIQUE ET LE CAP DE HORN, DEPUIS L’ANNÉE 1493 JUSQU’À NOS JOURS*, (Paris, Librairie de A. Durand, 1862) [hereinafter *RECUEIL COMPLET DES TRAITÉS*]. Dedicated to Napoleon III as an expression of gratitude of the peoples of the Latin race and published in Paris, Buenos Aires, and Madrid, both in Spanish and French, and in eleven volumes between 1862 and 1868, this work collects legal documents and various figures on geography, populations, and commerce, from discovery to mid-nineteenth century. See also CARLOS CALVO, *ANNALES HISTORIQUES DE LA RÉVOLUTION DE L’AMÉRIQUE LATINE: ACCOMPAGNÉES DE DOCUMENTS À L’APPUI DE L’ANNÉE 1808 JUSQU’À LA RECONNAISSANCE PAR LES ÉTATS EUROPÉENS DE L’INDÉPENDANCE DE CE VASTE CONTINENT* (Paris, Librairie de A. Durand, vols. 1–5, 1864–1867).

68. Nagao Ariga, for instance, linked the political and social reforms implemented by Japan with the declaration of the Empire to carry on hostilities against China respecting the law of nations. NAGAO ARIGA, *LA GUERRE SINO-JAPONAISE AU POINT DE VUE DU DROIT INTERNATIONAL* 4 (A. Pedone ed., 1896).

69. In particular, Japan signed the treaties that laid the foundations of the laws in war. For example, in 1886, Japan acceded to the 1864 (First) Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and in 1887 acceded to The Paris Declaration of 1856 on maritime law in time of war. See Douglas Howland, *Japan’s Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894-1895)*, 9 J. HIST. INT’L L. 179, 183–84, 188 (2007) (arguing that Japanese adherence to basic international agreements was used to show its civilized status and thus to revise unequal treaties).

like a civilized state in its international dealings.⁷⁰ In this regard, the standard was internalized in a manner similar to the nineteenth-century European practice, namely by recognizing a barbarian other in relation to whom a civilized status could be discerned. Sakuyé Takahashi (1867–1920) exemplifies this attitude when distinguishing between Chinese “barbarian” behavior and Japanese “law-abiding spirit” during the Sino-Japanese war of 1894–1895.⁷¹ Similarly, Nagao Ariga (1869–1921) affirms Japan’s civilized behavior by pointing out that while the laws of war were based on reciprocity, Japan raised herself above the minimum legal duty, staying firm in her “gracious commitment” to comply with international law, notwithstanding recurring violations of the laws of war by the Chinese.⁷²

Latin Americans also constructed the civilization process in the region in contradistinction to other nations.⁷³ In this case, however, the civilized/barbarian dichotomy was projected less into countries of other regions and focused instead on the indigenous peoples of the Americas, in respect to which Latin American elites had claimed an exclusive right of guidance to civilization.⁷⁴ Similarly, in the Ottoman as well as the Russian Empire, the internalization of the standard of civilization was redeployed domestically to justify the policy of modernization and Westernization and to attach the label “barbarian” to the groups opposing reform.⁷⁵ For example, Etienne Carathéodory, an ethnically Greek international lawyer at the service of the Ottoman rulers, is recalled to have championed for the internalization of the civilized/barbarian dichotomy in order to move Turkey toward the West, expressing that “Turkey will be rescued, if she ceases to be pan-Islamic and becomes truly European.”⁷⁶

It is interesting to note that the Japanese framed their own ancient history and culture as the fundamental source for the modernization and the progression that occurred in the latter part of the nineteenth century.⁷⁷ Latin

70. See Onuma, *infra* note 176, at 34 (arguing that “scrupulous compliance” with the “law of war was thought to contribute to the recognition of Japan as a ‘civilized nation’ . . . prerequisite to abolishing extraterritoriality and restoring tariff autonomy”). See also Howland *supra* note 69, at 193–98 (showing how Japanese jurists presented Japan’s conduct, in the war against China, as civilized).

71. TAKAHASHI, *CASES*, *infra* note 184, at 3. “So barbarous was the conduct of the Chinese authorities that if reprisal were the prevailing principle of International Law, Japan need have stopped at nothing in revenging herself. But Japan refrained from revenge, for it was her intention, in spite of the nature of her opponent, to set an example of generosity by carrying on hostilities in an enlightened fashion.” *Id.*

72. ARIGA, *supra* note 68.

73. See, e.g., CALVO, *supra* note 29, at 155 (affirming that from a positivist perspective of international law, international law is limited only to the states of Europe and the Americas).

74. See Liliana Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law*, 18–32, 93 (Sept. 2002) (unpublished S.J.D. dissertation, Harvard University) (on file with Harvard Law School Library).

75. See *infra* text accompanying note 222 (discussing the internalization of the standard by Martens).

76. M. Streit, *Notices Necrologiques, Étienne Carathéodory*, 22 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 342, 345 (1908) (trans. by author).

77. Japan can be proud to have taken such a noble and dignified resolution at the occasion of an event determinant of its destiny. However, my intention here is not to incite universal admiration, either from the public nor historians; I simply want to draw general attention on this point as a legal question. The

American lawyers have, at times, also made rhetorical use of the pre-Columbian, Inca, and Aztec Empires' civilization to distinguish the region from others populated by "uncivilized tribes"—regions that, in that period, were falling under the occupation of European states. This rhetorical move continued to be an internalization of the standard through its embrace of an idealized past, rather than a challenge to the idea of a Western standard of civilization on the basis of which to measure non-Western social organizations.⁷⁸

Nineteenth-century semi-peripheral international lawyers rarely critiqued the standard of civilization.⁷⁹ Only at the end of the century did the standard start to be challenged. Tsurutaro Senga criticized the predominant view that limited the full enjoyment of the fundamental rights of sovereignty to states meeting a standard of civilization. Considered from an ethnographic standpoint, the standard was "unscientific and deceitful" since—according to Senga—it assumes the existence of various stages of civilization.⁸⁰ It is quite remarkable that following this comment, Senga's sharpest criticism comes in the form of a dense footnote two and half pages long:

It is to be regretted that modern international law authors use in their works such an unscientific expression as "civilization" (resp. "culture"). The definition of civilization evidently lies beyond [the competence of] jurisprudence. But which science has defined this expression? None!⁸¹

Following a rhetorical strategy familiar to non-Western intellectuals, namely pointing at inconsistent perspectives, this footnote recounts an extensive list of European thinkers who have used the expression "civilization"

Chinese, from the point of view of the laws of war, can be compared to the Turks, Arabs, and rough countries. The Japanese Empire, in its war against such a nation, wanted nevertheless to follow the laws that would apply to France, England, or Germany. ARIGA, *supra* note 68, at 9.

78. Evoking Latin America's pre-Columbian civilizations was rhetorical not only because by the time of independence only tenuous ties existed between the elites and the indigenous peoples, but also because the Creole elites were committed to positivism and modernization. See AMANCIO ALCORTA, *DROIT INTERNATIONAL PUBLIQUE* 202–13 (1887); see also Amancio Alcorta, *El Derecho Internacional en las Antiguas Civilizaciones Americanas*, in *NUEVA REVISTA DE BUENOS AIRES* 82 (Vicente G. Quesada ed., 1881).

79. I am not unaware of the resistance against the standard of civilization and against international law in general by non-European statesmen invoking alternative normative systems. As Gong puts it, the encounter between Western and non-Western peoples brought about a clash over different standards of civilization. GONG, *supra* note 50. See also RICHARDSON, *supra* note 14, at 3–34 (discussing Africans' and African Americans' demands "outside law" to contest slavery). However, it is important to remember that this study primarily focuses on the appropriation and use of the international legal discourse by semi-peripheral publicists. I thus trace a trajectory starting from a loyal learning process of existing international law around the middle of the century, which shifted toward the deployment of given legal rules and arguments to support the interests of non-Western states, and then by the end of the century developed into an internal critique of the standard of civilization. An external critique of international law based on alternative non-European normative systems reappeared since semi-peripheral international lawyers of the first half of the century called upon their own Latin American, Islamic, African, or Third World traditions to support the critique.

80. SENG, *supra* note 26, at 135.

81. *Id.*

in a variety of ways. On the basis of this appraisal, Senga concludes by affirming:

[E]ach one arbitrarily bestows to the expression "civilization" a subjective sense after their own Weltanschauung, so that each religious denomination or philosophical school cherishes a peculiar conception of civilization. When European international law scholars speak about "civilization" or "civilized states", they do so likewise from the subjective standpoint of their own Weltanschauung.⁸²

Senga then identifies subjective considerations and logical inconsistencies in the use of the notion of civilization by prestigious international lawyers like Martens and von Holtzendorff, which is probably why he kept his critique within a lengthy footnote. Senga finds the standard of civilization not only scientifically useless, but also ideologically charged, since it disguises the subjective preferences of the lawyer who invokes it. In Senga's view, it is thus untenable to use the idea of civilization to limit the sovereign rights of states and the geographical range in which international legal relations are governed under equality.

A critique of the standard of civilization was exceptional among semi-peripheral internationalists. Otherwise, Senga shared with them the same professional sensibility. He expressed this sensibility through his commitment to scientific legal analysis, articulation of a legal position or interpretation that reflected the interests of its own local polity and the consolidation of its modernizing nation-building project, and readiness to engage with the international legal doctrines produced at the political and intellectual centers of the profession.

Regardless of Senga's classical semi-peripheral sensibility, by challenging the use of the standard of civilization, Tsurutaro Senga set himself apart from most semi-peripheral international lawyers who instead internalized the standard. This challenge is also exceptionally powerful because it is articulated from within the premises of the European intellectual and legal discourse, inaugurating a mode of critique adopted by semi-peripheral internationalists ever since. It is extremely important to uncover this unique critique of the standard of civilization, for it amounts to a patent demonstration of the purposive and strategic appropriation of international law by non-European practitioners facing the challenges of nineteenth-century Western imperialism. Resistance, therefore, is not exclusive patrimony of third worldist international lawyers who were active during the 1960s decolonization. Defying the Eurocentric assumptions of international legal scholarship is not an exclusivity of contemporary international lawyers acquainted with postcolonial literature. Widespread interpretations of nine-

82. *Id.* at 136.

teenth-century history of international law prove inadequate as well. An account in which international law appears as an intra-European affair is not complete if the debate between European and non-European international lawyers—over consular jurisdiction or intervention, for instance—as well as the use of their arguments in international disputes are ignored.⁸³ Interpretations that underscore the mutually constitutive relationship between international law and formal/informal colonialism, however, are problematic if they assume Western publicists' hegemony in the configuration of the discourse of international law, erasing the role of non-Europeans in the mutual constitution of the discourse itself.⁸⁴

II. THE IMPOSITION AND NEGOTIATION OF RULES: HYBRIDITY AND FUNCTIONAL EQUIVALENCES BETWEEN INTERNATIONAL LEGAL REGIMES

A. *Three Types of International Regimes*

Non-European jurists located in different parts of the world appropriated classical international law in a similar fashion, not simply because they faced similar challenges to the autonomy of their polities and similar strategic choices to use international law in their diplomatic negotiations with Western powers. Semi-peripheral lawyers also had to deal with nearly identical or functionally analogous rules of international law, so in similar fashion they internalized, adapted, and used the arguments advanced by Western international lawyers. Semi-peripheral lawyers and diplomats who started negotiating treaties rapidly became occupied with the interpretation of the treaties' underlying legal doctrines, concepts, and principles. Soon thereafter, as they became involved in the reformulation of these legal doctrines, concepts, and principles, they engaged with, appropriated, and transformed the intellectual tradition of international legal thinking in Europe, making it universal.

This section examines the different international regimes valid in the semi-peripheral world as well as the functional equivalences between them. I distinguish between three ideal typical interactions between Western and non-Western sovereigns.

The first ideal type describes formally equal interactions between Western sovereigns and non-European states whose international personality was

83. Most studies share this type of Eurocentrism. For example, in Grewe's long history of international law there is nothing to say about consular jurisdiction, nor is there much about non-European lawyers' attempts to reduce the scope of intervention. See GREWE, *EPOCHS*, *supra* note 1. Grewe's work is not exceptional since most histories of international law do not fare any better. See, e.g., ANTONIO TRUYOL SERRA, *HISTOIRE DU DROIT INTERNATIONAL PUBLIC* 132 (1995); NUSSBAUM, *supra* note 23.

84. Some TWAIL (third world approaches to international law) scholarship, I would argue, also falls under this type of Eurocentrism, since it fails to recognize, and therefore study, the counter-hegemonic use of international law by non-Western jurists.

recognized. It includes international relations between newly independent states and European states. That is, polities that due to a mix of domestic factors and political contingency between big powers, achieved independence during the nineteenth century (Latin America and Greece, for example).

The second ideal type is based on relationships between Western sovereigns and non-European states treated unequally both in political and legal terms. It encompasses relations between non-Western powers strong enough to oppose some resistance to their incorporation into the world capitalist system's commercial flows, so that they did not become colonies (China, Japan, Siam, and others), and Western powers (mainly European and the United States) who forcefully "opened" the former.

The third ideal type represents interactions between Western sovereign states and non-Western states that even though participating politically in the European concert, their international personality was questioned and thus did not fully enjoy legal equality. It considers the transformations that longstanding political and commercial relations between Europe and some of its powerful neighbors, that is, the Russian and Ottoman Empires, experienced during the nineteenth century, so that the latter had to "apply" for reentry into the "family of civilized nations."

With the help of this typology, I explore the local or regional specificity of a global trend. Nineteenth-century European colonialism and imperialism, as well as the various forms in which non-Western nations handled and resisted foreign expansion, defined the common historical context that led to the construction of a global international order. The appropriation of international law was a strategy available for states in these three ideal types, but the particularities of each historical context shaped the success, failure, and modes in which international legal thinking was internalized and legal arguments used. Particularly important are the international legal regimes governing the relationship between Western and non-Western states that were in place up until the middle of the nineteenth century. Semi-peripheral lawyers supported changes in the rules sanctioned in these regimes by reinterpreting central concepts and doctrines of the European international law tradition such as the doctrine of recognition. The appropriation of this intellectual tradition to overcome the doctrinal barriers European lawyers had developed to bar equal treatment was consequently not only an academic but also a political and legislative project.

International legal relations between European and non-European polities were not new in the nineteenth century. However, as the world was drawn together into one global market, the number of treaties signed during the nineteenth century between European and non-European sovereigns increased exponentially. As a result, by the end of the century, a dense network of treaties developed between European sovereigns and sovereigns situated around the globe, including in Asia, Africa, Eastern Europe, Latin

America, and the Pacific Islands. The nature of the legal interactions instituted by these treaties varied: some treaties established equal relations between sovereigns, while others established unequal treatment between states. Still others instituted the end of international legal relations by sanctioning the cession of sovereignty and the colonial annexation of non-European territories.⁸⁵

Although European and non-European states signed general bilateral treaties, which enacted rules covering a broad range of issues including the regulation of traditional diplomatic relations, international trade, and the rights of foreign residents, no single treaty governed all interactions between the states. Instead, these relations were governed by a series of rules emanating from a series of treaties agreed over time, customary rules, or rules stated in the decisions of local authorities or tribunals. When international relations between a European and a non-European state became relatively stable and wide-ranging in scope, the series of international law rules governing their interaction, though emanating from different sources, instituted a consistent international regime.

Nineteenth-century international legal regimes were not only bilateral; on many occasions, a type of regional legal regime developed between a number of European and non-European states. As a result of the inclusion of the most favored nation clause in each treaty concluded between a non-European state and a Western state, the specific bilateral treaty with the deepest concessions and thus the most favorable treatment had legal effects on other states, not just the signing parties. This particular treaty then represented the international legal regime governing the interaction between the non-European party and all other Western states with which that party had established legal relations.

At other times, when a particular bilateral treaty became the blueprint for subsequent negotiations and drafting of treaties, the rules of the treaty had an impact beyond the original parties. This was not an infrequent occurrence since in the foreign offices of the nineteenth century, only a few lawyers had participated in multiple negotiations and gave legal advice on new issues. For example, as shown below, the convention signed in 1535 between the Ottoman Sultan Suleyman and King Francis I of France served as a first model that was followed by later treaties between the Ottoman rulers and other Western states.⁸⁶ Moreover, the capitulations Western states signed

85. See FISCH, *DIE EUROPÄISCHE EXPANSION*, *supra* note 10 (a study of these treaties); Anghie, *supra* note 2, at 54–57 (a study of protectorates).

86. Philip Brown, for example, maintains that the treaty of 1535 “may be considered as the real commencement of the regime of the Capitulations Certainly all subsequent treaties were closely modeled on this treaty; and other nations have claimed as favorable treatment as therein accorded to France. In fact, it is stated in the body of this compact that the King of France reserved the right on behalf of the Pope, the King of England, and the King of Scotland, to adhere to the treaty should they so desire.” PHILIP MARSHALL BROWN, *FOREIGNERS IN TURKEY; THEIR JURIDICAL STATUS* 33–34 (1914) (internal footnote omitted). Other lawyers and historians have also recognized the role of the treaty of

with the Ottoman Empire after the “Near Eastern Crisis” of 1838–1840 became blueprints for the negotiation of international agreements with those non-Western polities that, while not subjected to colonial domination, were open to global trade. This model was consolidated and replicated in later treaties with Japan, Siam, and China.⁸⁷

Consequently, to explore the legal relations governing the interaction between European and non-European states, I will now examine the legal regimes in each of the three abovementioned ideal types of international relations. Specifically, I will look at the international legal regimes in force in the Ottoman Empire, China, and Latin America.

B. *The Ottoman Capitulations*

Conventionally, international lawyers think that during the nineteenth century, international law began to regulate the relations between the Ottoman Empire and Western states following the imposition of capitulations, and that the treaty of Paris, signed in 1854, sanctioned Turkey’s admission into the international community. The history of capitulations, however, reaches far back into the sixteenth century when Western governments and Russia established regular diplomatic representations in the Ottoman court, and when treaties were subsequently concluded that created a *protégé* system for foreigners residing in the territories under Ottoman rule as well as for certain non-Muslim Ottomans.⁸⁸ However, well before the rise of the Ottomans, local authorities within the Byzantine Empire granted certain privileges to foreign merchants, including jurisdictional exemptions.⁸⁹ These grants were not only a matter of customary practice, but also privileges embodied in innumerable legal agreements concluded between sovereigns whose merchants participated in the commercial network connecting the Mediterranean basin.⁹⁰ Therefore, by the beginning of the nineteenth cen-

1535 as a model for subsequent capitulations. See Lucius Ellsworth Thayer, *The Capitulations of the Ottoman Empire and the Question of Their Abrogation as It Affects the United States*, 17 AM. J. INT’L L. 207, 211 (1923); Thomas Naff, *The Ottoman Empire and the European States System*, in THE EXPANSION OF INTERNATIONAL SOCIETY (Hedley Bull & Adam Watson eds., 1984); GABRIEL BIE RAVNDAL, THE ORIGIN OF THE CAPITULATIONS AND OF THE CONSULAR INSTITUTION (1921).

87. British diplomat John Bowring, for example, participated in the negotiation of various treaties with the Ottomans, China, and Siam. See Richard Horowitz, *International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century*, 15 J. WORLD HIST. 445 (2004).

88. See Salahi R. Sonyel, *The Protégé System in the Ottoman Empire*, 2 J. ISLAMIC STUD. 56, 56–66 (1991).

89. See Alexander H. de Groot, *The Historical Development of the Capitulatory Regime in the Ottoman Middle East from the Fifteenth to the Nineteenth Centuries*, 83 ORIENTE MODERNO 575 (2003).

90. See Roberto Ago, *supra* note 5. This interpretation is not novel. Travers Twiss, for example, argued in his late nineteenth-century treatise that after the dismemberment of the Western Roman Empire, and in the absence of a common law or religion, merchants abroad were governed by their own personal laws. The Latin Kings of Jerusalem, for example, had since the eleventh century concluded with Genoa, Venetia, and Pisa treaties conferring extraterritorial privileges. Also, the Byzantine Empire had entered into agreements with the Genoese and Venetians granting privileges to their merchants, including their Muslim subjects. Moreover, these agreements were confirmed by the Ottomans after conquering Constantinople. TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES (1884).

ture, the extraterritorial regimes that the capitulations established were not only of common usage, but also were well entrenched in the intellectual tradition of the laws of nations.⁹¹

By the mid-nineteenth century, however, capitulations had acquired an exceptional character, both conceptually and in terms of their impact. Conceptually, the jurisdictional concessions contained in capitulations became an exception when the international order progressively moved toward the principle of territorial sovereignty, which coalesced once the European political order abandoned the personal link between sovereign and subject as a basis for political organization.⁹² At the same time, the impact of capitulations depended on shifts in the equation of force between the states exercising extraterritorial prerogatives and the states subjected to extraterritoriality. Prior to the nineteenth century, the exercise of extraterritorial jurisdiction was widespread and in the case of Turkish capitulations, some agreements were in fact reached in the Ottoman Empire's own interest, and on occasions following the defeat of European powers.⁹³ In contrast, at the beginning of the nineteenth century, during the rise of European colonial expansion in general and the weakening of Ottoman rule in particular, the concession of privileges deeply eroded the power of local authorities.⁹⁴

In brief, unlike international law scholarship, the specialized literature on Turkish capitulations provides a longer time span in which to contextualize capitulations. This literature suggests that the ordinary interpretation followed by international lawyers about the imposition of European interna-

91. Late nineteenth-century treatises included considerable sections on capitulations and consular jurisdiction. For examples from the British, French, and German traditions, see respectively TWISS, *supra* note 90; HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 1259–67 (1898); JOHANN LUDWIG KLÜBER & CARL EDUARD MARSTADT, *EUROPÄISCHES VÖLKERRECHT* 30–36 (1851). The treatment given to the matter in these textbooks shows that capitulations were not regarded as exceptional or as necessarily in conflict with the main principles of international law. Instead they were a matter of international law's global expansion.

92. See TWISS, *supra* note 90, at 444 (“Treaties of this character [recognizing extraterritoriality] are not of novel device, as their origin may be traced back to a period, when race or nationality rather than territory was the basis of a community of law.”). This can be compared with treatises as late as Vattel's or Wheaton's, defining sovereignty as people and government with less importance given to territory. In this sense, the extraterritorial regime instituted by the capitulations constituted a remnant of “legal conceptions of the later Roman [Empire].” Edwin Pears, *Turkish Capitulations and the Status of British and Other Foreign Subjects Residing in Turkey*, 21 L.Q.R. 408 (1905).

93. See MAURITS H. VAN DEN BOOGERT, *THE CAPITULATIONS AND THE OTTOMAN LEGAL SYSTEM: QADIS, CONSULS, AND BERATHS IN THE 18TH CENTURY* (2005). Boogert argues that, at the beginning, the Ottoman Sultan unilaterally issued capitulations granting trade privileges to the sovereign countries that had sent envoys. The main purpose of capitulations was to stimulate trade with the West and regulate the presence of foreign merchants.

94. See Roderic H. Davison, *Ottoman Diplomacy and its Legacy*, in *IMPERIAL LEGACY: THE OTTOMAN IMPRINT ON THE BALKANS AND THE MIDDLE EAST* (L. Carl Brown ed., 1996). Davison argues that in the nineteenth century the Sublime Porte, as a weaker party, sought refuge in international law in front of Western powers. For example, since the treaty of Paris signed in 1856 established a territorial settlement that was relatively favorable to Turkey, Ottoman diplomats supported the observance of international law and the principle of *pact sunt servanda*.

tional law during the nineteenth century should be qualified. “Imposition” is a term that might accurately describe the shifts in power conferring to Western powers greater leverage to determine the terms and impact of the covenants signed with the Ottoman rulers and with other non-Western governments during the nineteenth century. It is not entirely correct, however, to use “imposition” to describe the long term evolution of the rules applicable to the relations between the West and the non-Western world because the term implies that the expansion of international law exclusively flowed from the former to the latter.

The Ottoman Empire routinely entered into peace agreements—*abdnames*—with Christian states.⁹⁵ Firstly, and at the peak of Ottoman power, these pacts included unilateral and non-reciprocal concessions that the Sultan granted to the foreign state, thus reserving for himself the right to abrogate the covenant at will if, for example, the condition of maintaining peaceful relations was breached.⁹⁶ Consequently, as İnalçık has shown, the Sultan conceded privileges in exchange for reciprocal advantages, under which non-Muslim Ottoman subjects engaged in commercial operations in Europe, for example.⁹⁷ On some occasions, and in particular when the power of the Ottoman Empire declined, these accords were also signed in the form of bilateral agreements or peace-settlements conferring reciprocal rights to both signatories.⁹⁸ At the same time, the *abdname* document itself, as a type of *berat*, namely a decree or edict issued by the Sultan, contained the trade privileges granted to individual foreign merchants first and then to states.⁹⁹ In Western languages, bilateral peace agreements and unilateral concessions as well as the document issued came to be known as capitulations, having

95. “*Abd-nāme*” was one of the official terms used by Ottomans for “treaty.” See J.M. Landau, *Mu’abada*, in *ENCYCLOPAEDIA OF ISLAM* (P. Bearman Heinrichs et al. eds., 2d ed. 2008). Specifically, according to İnalçık, ‘*abd-nāme* was the document subscribed to confirm the covenant (*‘abd*) guaranteeing protection (*amān*) to an enemy (*Ḥarbī*). Halil İnalçık, *İmīyāzāt*, in *ENCYCLOPAEDIA OF ISLAM* (P. Bearman et al eds., 2d ed. 2008). However, according to Feroz Ahmad, Ottomans used also the term “*imtiyazat*,” which means “privilege” or “concession for foreigners,” to refer to the capitulations. Feroz Ahmad, *Ottoman Perceptions of the Capitulations 1800–1914*, 11 *J. ISLAMIC STUD.* 1 (2000).

96. These documents were also called “*‘abd-nāme*.” See Landau, *supra* note 95; Thayer, *supra* note 86, at 224.

97. İnalçık, *supra* note 95.

98. Scholars of the nineteenth and early twentieth centuries heatedly discussed the unilateral or bilateral character of *‘abd-nāmes*, as Turkey could only legally abrogate capitulations if they were conceptualized as unilateral concessions. Panaite has noted how the distinction was inconsistently drawn by using modern juridical criteria on documents of the fifteenth to the seventeenth centuries. Panaite also shows that on several occasions the Ottoman terminology, phrasing the agreements as unilateral concessions, contradicted the Latin, Italian, or French translations depicting capitulations as bilateral treaties. VIOREL PANAITÉ, *THE OTTOMAN LAW OF WAR AND PEACE: THE OTTOMAN EMPIRE AND TRIBUTE PAYERS* 239–42 (2000) [hereinafter PANAITÉ, *OTTOMAN LAW*]. See also Viorel Panaite, *Notes on the Islamic-Ottoman law of peace*, 41 *REVUE DES ÉTUDES SUD-EST EUROPÉENNES* 191 (2003).

99. In Panaite’s terminology these are Imperial charters (*abdnames-i bmyñ*). Viorel Panaite, *Overview of the Empire in a Time of Change*, H-NET BOOK REVIEW, Mar. 2003, <http://www.h-net.org/reviews/showrev.php?id=7325> (reviewing DONALD QUATAERT, *THE OTTOMAN EMPIRE, 1700–1922* (2000)).

originally no association with the idea of surrender or imposition, but making reference to the agreement's division in chapters.¹⁰⁰

The term "capitulation" was first used to describe a treaty concluded with France in 1535, the first covenant in which the Ottoman Emperor addressed a European sovereign as *padishah*, that is, emperor, and thereby treated him as a sovereign equal.¹⁰¹ The concessions granted in 1535 (renewed in 1673) were confirmed, extended, and systematized into a complete list of privileges by a 1740 treaty. This regime evolved through usage and interpretation, subsequent treaties with other Western powers, and the widespread inclusion of the most favored nation clause extending the privileges to other nations. This general corpus of rules governed the relationship between the Ottoman Empire and Western powers and Russia, and determined the legal status of foreigners within the Ottoman Empire and of certain Ottoman subjects.¹⁰²

Salahi Sonyel has shown how the original practice of protecting foreign nationals expanded to include the non-Muslim subjects of the Ottoman Empire, becoming a significant threat to the existence of the Empire. Along with the privileges conferred to Western merchants under capitulations, some treaties also claimed religious protection for non-Muslim Ottomans.¹⁰³ Moreover, when Ottoman authorities granted to accredited ambassadors a number of *berats* (patents or warrants), that is, jurisdictional exemptions and tax and commercial privileges to individuals serving in the foreign legations as *dragoman* (interpreters), commercial agents, or employees, European and Russian ambassadors, in turn, either sold these patents to affluent Ottoman Greeks, Armenians, and Jews, or widely conferred nationality to them. In this manner foreign ambassadors immensely expanded their protective role over Ottoman subjects.¹⁰⁴

100. Late nineteenth-century international lawyers were well aware of this. See, e.g., G. PÉLISSÉ DU RAUSAS, *LE RÉGIME DES CAPITULATIONS DANS L'EMPIRE OTTOMAN* 1 n. 1 (1902); TWISS, *supra* note 90, at 463 (arguing that the use of the term "capitulation" referred to discrete portions of treaties). See generally PANAITE, *OTTOMAN LAW*, *supra* note 98, at 240 (comparing the use of terminology in Turk and Western languages in various treaties concluded between Western sovereigns and the Ottoman rulers).

101. Once the struggle for the Holy Roman Emperors between Charles I of Spain and Francis I of France was resolved in favor of the former with his coronation as Charles V in 1521 and the latter's capture in 1525, the French resumed negotiations with Suleyman to forge an alliance against the Habsburgs. Although the military agreements came to nothing after peace between Charles and Francis was imposed, the relation of friendship and cooperation between France and the Ottomans continued. See Naff, *supra* note 86, at 146–47.

102. Other Western nations that pushed Turkey to include in their capitulations most favored nation treatment in order to enjoy the privileges granted in the French Capitulations of 1535 and 1740 included: England (1579), Holland (1579), Austria (1615), Russia (1711), Sweden (1737), Denmark (1756), Prussia (1761), Spain (1782), Sardinia (1825), United States (1830), Greece (1854), and Brazil (1858). BROWN, *supra* note 86, at 40–43.

103. According to Sonyel, by the eighteenth century, the French had claimed protection over Catholics, the British and Prussians over small Protestant communities and occasionally over Jews, and the Russians over Greeks and Armenians. Salahi R. Sonyel, *The Protégé System in the Ottoman Empire*, 2 J. ISLAMIC STUD. 56, 58–59 (1991).

104. Sonyel claims that by 1860 in Istanbul alone, around 50,000 Ottoman subjects enjoyed foreign national status. *Id.* at 58, 64.

As a result, no single set of legal texts codified the scope and nature of privileges. Instead, their scope and nature depended on the invocation of rules, customs, and precedents in particular diplomatic or consular negotiations. Furthermore, a significant gap separated the formal privileges conceded in the capitulations from their implementation. Maurits van den Boogert, in his study on the practice of the capitulatory regime in the eighteenth-century Ottoman legal system, describes this gap and argues that capitulations offered a general framework requiring negotiations between Ottoman authorities and Western representatives each time a controversy ensued.¹⁰⁵

No single capitulation treaty contained a complete list of the privileges instituted by the international legal regime valid in the Ottoman Empire. Thus, authors have looked at the historical development of this international regime and distinguished between personal, economic, and juridical privileges.¹⁰⁶ Under the first type, capitulations granted foreigners permission to visit and reside in Ottoman territories, and included freedom of movement, worship, commerce, and the exercise of professions. Capitulations also granted foreigners the privilege to hold private religious services, to send and receive letters unopened by Turkish authorities, and to have an inviolable domicile.¹⁰⁷ In addition to the general freedom of commerce, foreigners enjoyed economic privileges, such as exemptions from direct taxation, from internal taxes on foreign goods and on goods in transit, and from the regulation of import and export duties, maximums being fixed by the capitulatory powers.¹⁰⁸ Foreign powers also controlled the Turkish financial system through the “*Dette Publique Ottomane*” institution created 1881 to protect the interests of the foreign creditors by allowing them to supervise the collection of revenues and other fiscal matters of the Empire.¹⁰⁹ Finally, jurisdictional privileges were extremely complex and subject to many changes throughout time.¹¹⁰ In general, consuls had absolute jurisdiction to resolve civil and criminal cases involving foreigners of the same nationality, and special mixed tribunals were established for cases involving foreigners of different nationalities.¹¹¹ Civil cases between foreigners and natives fell under the jurisdiction of local tribunals typically as long as a *dragoman* was

105. See generally VAN DEN BOOGERT, *supra* note 93.

106. See, e.g., YILMAZ ALTUĞ, TURKEY AND SOME PROBLEMS OF INTERNATIONAL LAW 22–31 (1958) (adding administrative privileges such as post offices operated by capitulatory powers, the establishment of schools, hospitals and monasteries); NASIM SUSA, THE CAPITULATORY REGIME OF TURKEY, ITS HISTORY, ORIGIN, AND NATURE 70–88 (1933).

107. Thayer, *supra* note 86, at 215, 217; SUSA, *supra* note 106, at 70–72.

108. SUSA, *supra* note 106, at 72–75.

109. *Id.* at 75–77.

110. See generally VAN DEN BOOGERT, *supra* note 93, at 159–79, 207–24 (showing that consular jurisdiction involved adjudicating disputes not only over private claims, but also over conflicts of law in inheritance, or bankruptcy).

111. Thayer, *supra* note 86, at 216.

present, while criminal cases originally followed the same rule, but were later passed to the exclusive jurisdiction of the consul.¹¹²

Turkish capitulations were first and foremost international treaties, and as such they regulated traditional interstate matters, from the conduct of ordinary diplomatic relations to the implementation of the European concert's political settlements.¹¹³ Capitulations redrew boundary lines, guaranteed the right of navigation in rivers (for example, the Danube), or neutralized maritime spaces (for example, the Black Sea). As peace agreements, capitulations declared the end of hostilities, established demilitarized zones, and determined war compensations. In addition to typical interstate matters, Turkish capitulations also contained a number of rules securing the integration of local markets into the international economy and the concession of privileges to foreigners and to some Ottoman nationals. Such rules were central to the constitution of a legal regime of vast scope and impact and led to the radical transformation and Europeanization of Turkish legal and institutional order.¹¹⁴

C. *The Chinese "Treaty Port System"*

The international law rules enacted in the Turkish capitulations were similar to the rules sanctioned in the unequal treaties concluded in Eurasia.¹¹⁵ In 1842, following China's defeat in the Opium War of 1839, Britain and China signed the Treaty of Nanking.¹¹⁶ Other Western powers rapidly followed suit, forming the first set of agreements that instituted a comprehensive legal regime between China and the West. Since the legal regime opened a series of Chinese ports to foreign trade, it was also known as the "treaty port system." The Tientsin Treaty of 1858, signed under new threats of war after the Arrow incident, revised and extended the previously granted privileges.¹¹⁷ It increased the number of "treaty ports." It also included a series of personal privileges enjoyed by foreigners, including "the right of residence, of buying or renting houses, of leasing land therein, and

112. *Id.* at 217.

113. The Paris Treaty of 1856 included Turkey in the European concert of nations. General Treaty for the Re-Establishment of Peace between Austria, France, Great Britain, Prussia, Sardinia, and Turkey, and Russia, Mar. 30, 1856, 114 CONSOL. T.S. 409.

114. See Esin Öricü, *The Impact of European Law on the Ottoman Empire and Turkey*, in EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH AND 20TH-CENTURY AFRICA AND ASIA 39 (Wolfgang J. Mommsen & Jaap de Moor eds., 1991).

115. This similarity was well known to international lawyers of the first half of the twentieth century and to contemporary historians. See, e.g., Horowitz, *supra* note 87, at 460–61. Among lawyers, see, e.g., TSENG YU-HAO, THE TERMINATION OF UNEQUAL TREATIES IN INTERNATIONAL LAW: STUDIES IN COMPARATIVE JURISPRUDENCE AND CONVENTIONAL LAW OF NATIONS 12 (1933); Francis Bowes Sayre, *The Passing of Extraterritoriality in Siam*, 22 AM. J. INT'L L. 70, 70 (1928).

116. Two annexes and a supplementary treaty concluded in 1843 complemented the Treaty of Nanking. For an analysis of their rules, see DONG WANG, CHINA'S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY 11–16 (2005).

117. This regime was further expanded after the Boxer rebellion and reached its peak influence in the 1920s and 1930s. GONG, *supra* note 50, at 140.

of building churches, hospitals, and cemeteries.”¹¹⁸ Judicial privileges included the typical extension of foreign consuls’ jurisdiction to adjudicate on controversies arising between British subjects, and in relation to crimes committed by British subjects in Chinese territory.¹¹⁹ Economic privileges, such as the tariffs fixed in the Treaty of Nanking, were confirmed. However, special norms were incorporated to address particular complaints that British merchants made about the operation of the treaty port institution as well as particular rules relative to the context and resolution of the Arrow incident.¹²⁰

The treaty port system, like capitulations, instituted a complex legal regime consisting of a succession of agreements and supplementary conventions. This regime was also transformed by subsequent interpretation and usage as well as in its interaction with domestic politics, legal culture, and institutions. As in the capitulatory regime, the impact of the treaty port system depended less on the formal privileges that the agreements contemplated than on the practical compromises that Chinese and Western officials reached. In Fairbank’s words, the treaty system became a “joint Sino-foreign arrangement, a compromise or hybrid device, to which both parties had to contribute and which neither could control alone.”¹²¹ The Chinese treaty port system, therefore, was not simply a product of unequal treaties imposed by the West. From a global perspective, on the one hand, the regime that emerged in China had historical links with the Ottoman capitulatory regime, since Turkish capitulations provided models for governing the interstate relationship with non-European countries. It was also significant that British envoys, for example, who had diplomatic experience in the Ottoman Empire were subsequently appointed to special missions in Asia. From a Chinese viewpoint, on the other hand, capitulations were a compromise between their own tributary system and Westerners’ international law. Again in the words of Fairbank, “the treaty system in its early decades from the 1840s to the 1880s was not merely a Western device for bringing China into the Western world; it may equally well be viewed as a Ch’ing device for accommodating the West and giving it a place within the Chinese

118. Treaty of Peace, Friendship and Commerce between China and Great Britain, art. XI, June 26, 1858, 119 CONSOL. T.S. 167 [hereinafter Treaty of Tientsin].

119. See Treaty of Tientsin, *supra* note 118, arts. XV and XVI.

120. To prevent local officials from imposing taxes beyond the treaty ports officials when they collected inland transit duties, Article XXVIII granted foreign merchants the right to pay a single charge and obtain a transit pass exempting them from further taxation. It also allowed Chinese authorities appointed to oversee the collection of duties to declare the tax rates. See Treaty of Tientsin, *supra* note 118, art. XXVIII. See generally JOHN CARTER VINCENT, *THE EXTRATERRITORIAL SYSTEM IN CHINA: FINAL PHASE* (1970).

121. JOHN KING FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842–1854* 371 (Stan. Univ. Press 1969).

world.”¹²² Moreover, as in Turkey, extraterritorial institutional arrangements were not alien to Chinese legal culture.¹²³

Similar to Turkish capitulations, the treaty port system also fulfilled traditional international functions. By displacing the existing tributary systems in China or Japan, the treaty port system laid out the basic legal rules governing inter-state relations on the basis of diplomatic representation under horizontal equality. In the Treaty of Tientsin, for instance, signatories agreed to appoint ambassadors and other diplomatic agents to the Court of Peking “in accordance with the universal practice of great and friendly nations.”¹²⁴ However, unequal treaties also contained the rules that made it possible to incorporate China into the global markets. In addition to the mentioned privileges, the treaty port system contained rules for Western organizations to operate and manage radio, telegraph, mining, railway, and industrial establishments.¹²⁵ Furthermore, in 1854, a foreign-manned and administered institution, the Foreign Inspectorate of Customs in Shanghai, was established, and had an impact in the control of revenues and the financial market, in the same way the Turkish Debt Administration did in the Ottoman Empire.

However, in terms of the progressive weakening of Chinese power and because of the fact that it lasted until 1949, the treaty port system arguably had a greater impact than the Turkish capitulations. Along with the concession of the typical personal, economic, and juridical privileges, unequal treaties also granted compulsory and perpetual leases to establish various Western facilities, including the stationing of police, naval, and military forces, along the coast and the Yangtze River, thereby sanctioning the operation of gunboat diplomacy.

D. General Treaties of Peace, Commerce, and Navigation in Latin America

The international legal regimes in force in Turkey or China were certainly different than the regimes that developed in nineteenth-century Latin America. Unlike Turkish capitulations and the Chinese treaty port system, the agreements signed between Western and Latin American states established formal equal treatment. European powers and the United States rec-

122. John K. Fairbank, *The Early Treaty System in the Chinese World Order*, in *THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS* 257, 258 (John King Fairbank ed., 1968).

123. See Pär Cassel, *Excavating Extraterritoriality: The “Judicial Sub-Prefect” as a Prototype for the Mixed Court in Shanghai*, 24 *LATE IMPERIAL CHINA* 156, 156–57 (2003). Studying the Mixed Court in Shanghai, Cassel argues that there was continuity between the traditional Qing legal system and the treaty port system's extraterritorial aspects. He argues the norms that regulated extraterritoriality were borrowed and adapted from Qing legal concepts that granted certain legal privileges to Manchus.

124. Treaty of Tientsin, *supra* note 118, art. II. According to Article II, diplomatic agents, their family and establishment could take permanent residence in the capital. *Id.* art. II. It also imposed rules of protocol that would reflect the recognition of equal standing: “[the ambassador] shall not be called upon to perform any ceremony derogatory to him as representing the Sovereign of an independent nation on a footing of equality with that of China.” *Id.* art. III.

125. TSENG, *supra* note 115, at 16.

ognized the newly independent governments of Latin America as full and sovereign members of the international community much earlier than they recognized Turkey and China. In spite of this difference, the historical contexts and international legal regimes in force in Turkey, China, and Latin America have significant parallels. These parallels explain a shared imperative among semi-peripheral lawyers in these three locations to internalize and use European international legal arguments to manage and improve the interaction of their states with the Western powers that dominated global politics and the emerging world economy.

First, capitulations, unequal treaties, and the treaties negotiated under sovereign equality had a significant number of similar rules. For example, there were rules that opened the local markets to foreign trade, granted foreigners the right to travel, reside, and conduct commerce, imposed limits on import duties, determined the conditions for coastal shipping, and established most favored nation treatment. These privileges were generally conferred under reciprocity in the case of Latin America and unilaterally in the case of China and Turkey.

Second, some rules of international law from the capitulations and the treaty port system were formally different but functionally similar to rules in force in the international legal regimes governing the interaction between Western and Latin American states. For example, most international agreements concluded with Latin American governments did not grant jurisdictional powers to foreign consuls. Although consular jurisdiction, the most controversial aspect of unequal treaties, was absent from the international legal regimes in Latin America, extant classical international law doctrines granted broad diplomatic protection, giving foreign diplomatic representatives vast room for action. Thus, after the conclusion of general treaties and the establishment of diplomatic relations, European governments and the United States aggressively used diplomatic protection, not only representing their citizens' claims against Latin American governments—imposing, for instance, the settlement of disputes by mixed commissions—but also threatening or using force to secure the payment of compensation to injured foreigners and to collect public debt.

Third, while the doctrine of the standard of civilization mediated and limited the admission of Turkey and China into the international community and justified unequal treatment, it was the doctrine of recognition that performed an equivalent function in Latin America. Western states did not use the standard of civilization to refuse or qualify a Latin American state's admission into the international community or to deny reciprocity in the privileges and general norms of international conduct established in subsequent treaties. However, as I show below, Latin American publicists' strategies to achieve recognition were analogous to Chinese and Turkish lawyers' efforts to internalize the standard of civilization. The discussions regarding the scope and meaning of the standard of civilization determined the nature

of the rules enforced by the Turkish capitulations or the Chinese treaty port system. Similarly, the negotiation between Western states and the new Latin American sovereigns concerning the recognition of the latter's international personality created controversy about the type of economic and personal privileges that foreign residents would receive and the conditions under which they would be conferred: unilaterally, under reciprocity, or with preferential treatment for the newly independent nations.

International rivalries, national self-interest, and political contingency played out in the negotiation of general treaties of peace, commerce, and navigation between Western and Latin American governments, and explained the various classes of legal relations sanctioned by them. Most international agreements established commercial and maritime reciprocity, which was arguably more beneficial to the merchants and economic interests of the United States, Britain, and other European states than to the new states of Latin America. As a result, the Western states probably extracted them from the Latin American states in exchange for recognition, as a sacrifice to gain access to foreign markets or to obtain foreign loans, or under the local elite's own commitment to the freedom of commerce.¹²⁶ It was therefore unusual that Britain received from Brazil, and to a lesser extent from Colombia and Rio de la Plata, non-reciprocal preferential treatment as well as economic and judicial privileges. Conversely, but also exceptionally, Mexico obtained from Britain preferential treatment in the form of reduced duties as well as a broad definition of Mexican commercial ships that favored the development of coastal shipping. This range of international law rules can be illustrated in a brief review of the treaties signed between the governments of Spanish America and Brazil, and the most powerful states involved in the region's independence, Britain and the United States.

As soon as the United States recognized Latin American states in 1822 and articulated the Monroe Doctrine the year after, it started to negotiate agreements to promote its commercial interests in the region.¹²⁷ The United States granted recognition not only to support the emerging republics and to oppose the reestablishment of monarchies in the continent, but also to obtain access to the new markets to the south, making sure that the old colonial monopolies were definitely broken. However, the United States was unwilling to enter into a continental multilateral agreement, as proposed in 1826 by Bolivar at the Congress of Panama. When Britain obtained preferential treatment from Latin American governments at the Congress of Panama, the United States initiated a diplomatic offensive to conclude bilateral agreements with the governments of Spanish America and Brazil.¹²⁸

126. See D.A.G. Waddell, *International Politics and Latin American Independence*, in *THE INDEPENDENCE OF LATIN AMERICA* 195 (Leslie Bethel ed., 1987).

127. See ARTHUR PRESTON WHITAKER, *THE UNITED STATES AND THE INDEPENDENCE OF LATIN AMERICA, 1800-1830*, 546-63 (1962).

128. For example, in the twenty years following recognition of Spanish American governments in 1822 (1824 in the case of Brazil) the United States concluded treaties with: Colombia, October 3, 1824;

In the context of Anglo-American commercial rivalry over Latin American markets, the United States sought to obtain strict reciprocal treatment in its relationships with Latin American states. Without much success at the beginning, the United States concluded its first treaty in 1824 with Colombia.¹²⁹ But the treaty of “Peace, Amity, Commerce and Navigation between the Central American Federation and the United States,” signed in 1825, became the model for later treaties, since it contained a complete catalogue of rules governing political and commercial relations, including full reciprocal treatment.¹³⁰

In contrast, Britain’s recognition and negotiation of general treaties with Latin American states followed a slow and intricate course. Internal politics, namely, the King’s support of the principle of legitimacy, as well as international politics—primarily the need to protect the relationship with Spain in their alliance against France—explains Britain’s cautious policy vis-à-vis Spanish American governments. Consequently, Britain signed its treaties with the Spanish American republics much later than the conventions concluded with Brazil.

The first treaty signed between Brazil and Britain in 1827 granted non-reciprocal extraterritorial privileges in favor of Britain. Because the treaty includes consular jurisdiction, it is remarkably analogous to the unequal treaties concluded in Turkey, Siam, Persia, and China. But for the same reason, this treaty was an exception in Latin America, an exception explained by the traditional alliance between Britain and Portugal and the Brazilian Emperor’s willingness to reciprocate for the assistance provided during the move of the Portuguese court to Brazil in the wake of Napoleon’s occupation of the Iberian Peninsula.

74 CONSOL. T.S. 455; Colombia, March 16, 1825, 75 CONSOL. T.S. 161; Central American Federation, December 5, 1825, *id.* at 433; Mexico, January 12, 1828, 78 CONSOL. T.S. 35; Brazil, December 12, 1828, *id.* at 249; Brazil, June 15, 1829, 79 CONSOL. T.S. 453; Colombia, November 25, 1829, 80 CONSOL. T.S. 225; Mexico, April 5, 1831, 81 CONSOL. T.S. 381; Chile, May 16, 1832, 82 CONSOL. T.S. 413; Mexico, April 3, 1835, 85 CONSOL. T.S. 101; Venezuela, January 30, 1836, 86 CONSOL. T.S. 1; MEXICO, APRIL 20, 1836, *id.* at 103; Peru-Bolivian Confederation, November 30, 1836, *id.* at 257; Mexico, April 11, 1839, 88 CONSOL. T.S. 397; Ecuador, June 13, 1839, 89 CONSOL. T.S. 63; Chile, July 7, 1840, 90 CONSOL. T.S. 263; Peru, March 17, 1841, 91 CONSOL. T.S. 301.

129. Until 1825, negotiations or ratification of treaties had generally failed, sometimes because of domestic instability (as in the case of Chile and Peru) and other times because of British influence (in the case of Mexico). See WHITAKER, *supra* note 127, at 586–87. The treaty with Colombia of 1824 included a most favored nation clause, which put an end to the preferential treatment afforded to Britain. See *id.* at 588.

130. General Convention of Peace, Amity, Commerce, and Navigation between the Central American Federation of the Centre of America, Dec. 5, 1825, 8 U.S.T. 1867. The treaty contained a most favored nation clause. *Id.* art. II. It placed commerce and navigation on the basis of perfect equality and reciprocity, granting mutually the right to “frequent all the coasts and countries of the other and reside and trade there, enjoying the rights and privileges that native citizens enjoy.” *Id.* art. III. The treaty also established religious liberty, conferred reciprocity on import and exports duties, granted their respective citizens the power to dispose of personal goods according to law and gave special protection to the persons and property of the citizens of each other, according to law and access to justice. *Id.*

In contrast, it was equally exceptional for Britain to grant preferential treatment to a Latin American state. For example, the treaty signed in 1826 with Mexico established reciprocal freedom of commerce and allowed citizens of each state to freely “come, remain and reside in the respective territories.”¹³¹ The treaty also conferred national treatment on import duties and on any other charges imposed on vessels entering their respective ports, and provided a narrow definition of British and Mexican vessels.¹³² Two additional articles to the treaty somewhat mitigated the narrow definition of Mexican vessels, since Britain granted Mexico preferential treatment for a ten-year period, in which national treatment was limited and a wider definition of Mexican vessels was in force.¹³³

However, most treaties signed between Britain and Spanish American states instituted strict reciprocity.¹³⁴ These agreements were concluded in the form of general treaties of amity, commerce, and navigation. In general, as was the case for covenants reached with the United States, these treaties opened up trade, limited tax on exports and imports, secured the protection of the property held by foreigners, as well as their lives and private liberties, and guaranteed most favored nation status. Although these treaties established reciprocal conditions, formally equal treatment did not mean substantive equality in the interactions between Britain and Latin American states. Equal treatment meant asymmetrical relations, not only because England’s greater economic development reinforced a world division of labor that was detrimental to Latin American interests, but also because foreign proprietors secured the protection of their own interests through the exercise of diplomatic intervention, which could escalate to the imposition of coercive measures and demonstrations of force.

131. The Treaty of Amity, Commerce and Navigation between Great Britain and Mexico, art. II, Dec. 26, 1826, 77 CONSOL. T.S. 39.

132. *Id.* arts. V, VI, VII.

133. According to Rodríguez, British diplomats agreed to grant preferential conditions because of Mexico’s uncompromising position during negotiations. The post-independence excitement of Mexican politicians led them to refuse “to grant special privileges to any nation, even Great Britain. The new republic would assume her place as an equal among the great powers of the earth.” JAIME E. RODRÍGUEZ O., *THE EMERGENCE OF SPANISH AMERICA: VICENTE ROCAFUERTE AND SPANISH AMERICANISM, 1808–1832* 91 (1975).

134. A brief review of one of these treaties illustrates the typical norms governing the relationships between Latin American states and Britain. For instance, the Treaty of Amity, Commerce and Navigation between Great Britain and Rio de la Plata, signed in Buenos Aires on February 2, 1825, established in Article 2 “reciprocal freedom of commerce,” according to which the citizens of each party “have liberty freely and securely to come, with their Ships and Cargoes, to all such Places, Ports, and Rivers . . . to enter into the same, and to remain and reside in any part of the said Territories . . . to hire and occupy houses and warehouses, enjoy the most complete protection and security for their Commerce; subject always to the Laws and Statutes of the two countries respectively”; Article 3 extends to British overseas territories the freedoms granted to citizens of Rio de la Plata; Article 4 establishes reciprocal most favored nation treatment on import and export duties as well as on import and export prohibitions; Article 10 appoints consuls for the protection of trade. Treaty of Amity, Commerce and Navigation between Great Britain and Rio de la Plata, Gr. Brit.-U.S. Provinces of Rio de la Plata, Feb. 2, 1825, 3 H.C.T. 44.

D. *The Turkish, Chinese, and Latin American International Law Regimes Compared*

We are unfortunately too familiar with complaints of the delay and inefficiency of the courts in the South American republics. We must, however, continue to repose confidence in their independence and integrity, or we must take the broad ground that these states are like those of oriental semi-civilized countries.¹³⁵

This quotation shows that nineteenth-century diplomats were well aware of the existence of parallel international regimes. Unlike their colleagues in the past, contemporary international lawyers have only occasionally studied the Turkish capitulations, the Chinese treaty port system, and the general treaties of amity and commerce concluded in Latin America— international regimes that strike most of them as historical remnants of a bygone era.¹³⁶ The relative absence of research on these international legal regimes explains most authors' tendencies to overemphasize the role of Western imposition of international law as the main cause explaining the global expansion and consequent transformation of European international law into a universal legal order. The history of international law in Turkey, China, and Latin America calls this interpretation into question.

First, these non-European histories show that semi-peripheral lawyers did not merely implement Western powers' dicta, but that they had some leverage to negotiate the content of the international agreements they signed. In the midst of adverse power relations, semi-peripheral lawyers and diplomats relentlessly negotiated with Western states to advance their own foreign policy objectives.¹³⁷ Though these treaties were not simply imposed by Western states, it was still the case that most rules of international law served Western interests. Occasionally, non-European states extracted

135. Note from Mr. Seward, Sec. of State, to Mr. Burton, min. to Colombia (Apr. 27, 1866), in 6 A DIGEST OF INTERNATIONAL LAW 660 (John Bassett Moore ed., 1906).

136. Note that the previous discussion of these three international legal regimes has mostly relied on the research carried out either by diplomatic and legal historians, or by international lawyers of the late nineteenth and early twentieth centuries. The main histories of international law give only cursory treatment to unequal treaties. See generally NUSSBAUM, *supra* note 23; KARL-HEINZ ZIEGLER, *VÖLKERRECHTSGESCHICHTE: EIN STUDIENBUCH* 2 (2d ed., 2007); GREWE, *EPOCHS*, *supra* note 1. By the same token, none of the major encyclopedias of international law has an entry on unequal treaties. See, e.g., Rudolf Bernhardt, *German Nationality*, in 8 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 258–60 (1992). Mathew Craven's work stands as a lonely exception. See Mathew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, in INTERROGATING THE TREATY: ESSAYS IN THE CONTEMPORARY LAW OF TREATIES, 43 (Matthew Craven & Malgosia Fitzmaurice eds., 2005). The omission of unequal treaties in contemporary studies of the history of international law reflects the exceptional character that these treaties had conceptually and in terms of their impact. The absence also expresses a general indifference regarding the history of the rules of international law. McNair's 1949 criticism of most history of international law as "either a history of its literature, or a history of international relations" is still accurate: "It is difficult to find much history of the content, that is, the actual rules of law applied in practice." Arnold McNair, *Aspects of State Sovereignty*, 26 BRIT. Y.B. INT'L L. 6, 6 n.1 (1949).

137. See, e.g., MICHAEL R. AUSLIN, *NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY* 4 (2004).

favorable terms from Western states, as in the British-Mexican treaty of 1826. Yet a majority of treaties enforced either rules instituting unequal treatment—most importantly consular jurisdiction—or rules under conditions of formal equality that arguably benefited the more powerful states rather than weaker ones.

These treaties, however, were negotiated and signed by semi-peripheral authorities who had in sight the broader international political situation. Consenting to rules that were unfavorable in the short-term would nonetheless be acceptable to pursue long-term goals, such as achieving recognition, gaining access to foreign markets, and obtaining loans or military supplies.¹³⁸ Moreover, when Western states signed treaties, they limited, at least formally, their autonomy vis-à-vis non-Western states. Furthermore, Western powers had to push for diplomatic negotiations to revise existing treaties, rather than resorting to threat or actual use of force.

Second, even when international power relations were such that Western states could impose their own terms, the scope and impact of the rules enacted in treaties concluded with non-European governments depended on domestic institutions and informal practices. The above-mentioned studies uncovering the mediating role that domestic authorities had in Turkey, China, and Latin America illustrate how the rights enjoyed by foreigners were not fully determined by the formal rules contained in the treaties concluded with foreign powers. The actual scope of the rights enjoyed by foreigners depended both on their ability to put forward their contentions to the representatives of their home governments and on the resolution of the conflicting claims advanced by consular authorities (under extraterritorial jurisdiction or diplomatic protection) and local political actors.¹³⁹

Third, the history of nineteenth-century international legal regimes in Turkey, China, and Latin America demonstrate that central rules of international law, both in respect to their content and nature and regarding their conceptual outlook, were much more hybrid than one would have expected given the stereotypical view of this period, as characterized by the imposition of international law (an order with an exclusively European origin). Rules and institutions sanctioned by these treaties had roots in the legal history and cultures of both parties. Extraterritoriality, for instance, was not alien to Turkey or China. In fact, extraterritorial jurisdiction as sanctioned

138. For example, Bethell writes, “[c]ommercial treaties were imposed on Mexico, Colombia, Argentina and other independent Spanish American republics (with little possibility of negotiation) as a precondition for much-sought-after recognition by Britain, the world’s leading power.” Leslie Bethell, *Britain and Latin America in Historical Perspective*, in *BRITAIN AND LATIN AMERICA: A CHANGING RELATIONSHIP* 4 (Victor Bulmer-Thomas ed., 1989).

139. In addition to the literature quoted above, see RICHARD T. CHANG, *THE JUSTICE OF THE WESTERN CONSULAR COURTS IN NINETEENTH-CENTURY JAPAN* 135 (1984), which challenges the interpretation that consular jurisdiction favors the interest of foreigners. On the role of the interaction between foreign citizens and authorities of their respective home governments in shaping the extraterritorial regime in China, see EILEEN P. SCULLY, *BARGAINING WITH THE STATE FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942* 21–23 (2001).

in both the Turkish capitulations and the Chinese treaty port system had been in force prior to the nineteenth century in both the Ottoman and Chinese domestic legal orders, such as in the tributary relations with foreign polities, including at times European sovereigns.

Fourth, these international legal regimes came into force in the context of the economic and political interactions that followed the formation of a world economy. They gave stability and regulated the incorporation of non-European states into the global economic order. As part of a global trend, the series of treaties signed between Western and non-Western states contained either nearly identical rules or functionally analogous rules even though they were concluded in different and distant locations around the world. These treaties secured and governed the opening of the entire territory or some ports of China, Japan, Latin America, and Turkey to international trade, including rules that gave foreign citizens the right to reside and travel, to acquire property, to conclude contracts, and to hire nationals. Some rules with dissimilar content, included in treaties signed with different non-European states, performed analogous functions. Although these treaties considered some non-Western states to be sovereign equals while others treated non-Western states unequally, the operative legal doctrines in both types of treaties—diplomatic protection and consular jurisdiction respectively—similarly enabled and mediated the presence and impact of European merchants and citizens in places as diverse as Argentina, Siam, Japan, and Egypt.

This section provided a historical background on the nature and trajectory of the rules of international law that semi-peripheral states confronted in their interaction with Western states. Examining and comparing a series of international regimes ranging from absolute inequality to formal equality explains why semi-peripheral elites felt the pressure to learn the discourse of international law. Even when international law purely reflected power imbalances, the expression of such unequal treatment in the language of law gave semi-peripherals a starting point for resistance because rules set out in treaties or general principles written down in treatises set a baseline that semi-peripheral jurists could invoke in case of further encroachment by Western powers. This baseline of rules and doctrines could be reinterpreted by semi-peripherals to justify better treatment. From this starting point, semi-peripheral jurists sought to change the rules and doctrines governing their interaction with the West, replacing the regimes instituting unequal treatment with formal equality.

This section also offered a more complete picture of nineteenth-century international law, making apparent two important aspects. First, international law was plural. It consisted of a variety of international regimes with different rules and historical trajectories. At the same time, functional equivalences between different regimes as well as a single conceptual and discursive apparatus supporting the legality of diverse regimes suggest the

existence of one international law, one legal discourse governing the relations between Western and non-Western states and allocating different degrees of equality. Semi-peripheral appropriations of international legal thought in support of a change of rules for semi-peripheral states—in particular, the legal consciousness that developed out of these appropriations—reflected the plural and singular character of international law.

III. THE PARTICULARISTIC UNIVERSALISM OF SEMI-PERIPHERAL INTERNATIONAL LAWYERS

When semi-peripheral international lawyers appropriated classical international law and the European legal tradition, they advanced a series of doctrinal positions, reinterpreting positivism, absolute sovereignty, and the standard of civilization. But this appropriation was not only doctrinal. At the same time, it entailed the construction of a deeper set of assumptions—assumptions about the nature of an international world dominated by Western powers, about the fate of non-Western polities as newcomers, about modernization as an answer to the Western challenge to semi-peripheral independence, and about international law as part of the modernizing and nation-building project. I would suggest understanding these assumptions as well as the mode of thinking about them through the language of international law as a distinctively semi-peripheral legal consciousness.¹⁴⁰

This semi-peripheral form of classical legal consciousness might be described as a particularistic universalism. Semi-peripheral jurists faithfully believed in the universality of international law as neutral and scientific knowledge and as a legal order where instituting sovereign autonomy and equality should attain validity on a global scale. However, semi-peripheral jurists' specific articulation of the universal rendered international law particular. Given their eagerness to be faithful to their own representations of international law's universality, in addition to the fact that international legal doctrine was a channel to support modernization or nation-building projects defined by the specific political predicaments faced in different parts of the globe, semi-peripheral lawyers' international legal thinking acquired a local or regional distinctiveness.

In other words, the distinctive semi-peripheral recombination of the central elements of classical international law—absolute sovereignty, positivism, and standard of civilization—contained a tension between the believed universality and neutrality of a scientific outlook and the centrality given to their respective national standpoints and interests. The former pulled the

140. I borrow the concept of legal consciousness from Duncan Kennedy. "The notion behind the concept of legal consciousness is that people can have in common something more influential than a checklist of facts, techniques and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind." KENNEDY, *supra* note 32, at 5.

semi-peripheral internationalist toward a universalist jurisprudential approach to construe the meaning and definition of international law, and the latter pulled him in the opposite direction toward a particularist perspective from which to evaluate the impact of international legal doctrines and rules.¹⁴¹

The desire to improve the international position of their respective polities by means of international law drove nineteenth-century semi-peripheral lawyers' hurried and faithful acquisition of knowledge about international law. As a result, semi-peripheral publicists adopted central tenets of the international legal tradition at face value, only subsequently adjusting the uses and interpretations thereof to serve particular and local interests. Consequently, their belief in the universality of international law as the law between civilized states, for example, remained intact. This had a great impact on their professional sensibilities. In particular, the strategy of internalizing (rather than rejecting) the standard of civilization by demonstrating the civilized status of their countries in contrast to other non-European nations contributed to the absence of ideological cohesion between international lawyers from different nations and regions of the semi-periphery.¹⁴²

Non-European international lawyers who evaluated the history of their own political, legal, or cultural contexts to demonstrate their participation in the civilized world were less inclined to recognize commonalities with other regions or states of the semi-peripheral world. Thus, the generation of semi-peripheral lawyers who accepted international law under the classical synthesis during the second half of the nineteenth century saw no reason to establish bonds of solidarity with one other, which is one of the features that set them apart from the generation of modern semi-peripheral international lawyers that followed. Assimilating the knowledge and mastering the arguments that would contribute to the task of getting European nations to recognize the legal personality of their states fostered a pragmatic sensibility

141. For example, when Argentinean publicist Almacio Alcorta challenged Calvo for neither giving adequate treatment to Argentinean interests nor recognizing the existence of American principles of international law, Calvo retorted, "[e]stas palabras, por honrosas que sean, envuelven un reproche que no es comprensible de parte de un jurisperito argentino que sigue el movimiento científico del mundo [S]i como argentino acato la ley de mi país, como autor de un libro de doctrina universal he debido colocarme bajo el punto de vista de la ciencia, buscando, si no el modo de uniformar el principio, al menos de conciliar los intereses de todos los pueblos. [These words entail a reproach that is not comprehensible for an Argentinean jurisperito who follows the world's scientific movement As an Argentinean I comply with the law of my country, but as an author of a book of universal jurisprudence, I have had to situate myself under a scientific point of view, seeking, if not a mode to uniform the principles, at least to reconcile the interests of all peoples.]" Carlos Calvo, *Polémica Calvo-Alcorta*, 7 NÚEVA REVISTA DE BUENOS AIRES 629, 632–33 (1883). For a description of the disputes between universalist and particularist international lawyers in the Latin American context, see Arnulf Becker Lorca, *International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination*, 47 HARV. INT'L L.J. 283 (2006).

142. The absence of bonds of solidarity resulted from the structure of the argument adopted by semi-peripheral publicists; that is, unequal treatment applies not to "us" but to other "less civilized nations." As a result, I would argue that Latin Americans set themselves apart from their indigenous peoples; Japanese from the Chinese; Russians from the Ottomans; Ottoman elites from their own Islamists.

that put non-European international lawyers under significant professional pressure. Once this pressure lifted, later generations of lawyers had more latitude to risk departing from the dominant perspective by deploying interpretations of international law that explicitly responded to the particularities of the history, culture, and problems in their specific locations. This partial detachment from European intellectual influence bolstered semi-peripheral international lawyers' confidence and made it possible to bond professionally and politically with international lawyers from other regions. This is the reason that I reserve use of the notion of "vernacular cosmopolitanism" to non-European international lawyers of the first half of the twentieth century and describe semi-peripheral classical international lawyers of the second half of the nineteenth century as "universal particularists."¹⁴³

I have thus far emphasized the global trends that explain the transformations international law underwent during the nineteenth century. I have highlighted the influence that European expansion and the consolidation of global markets had on the international legal regimes regulating interaction between Western and semi-peripheral states across the globe. I have also indicated that both the functional equivalences in the rules enacted by these legal regimes and European international lawyers' development of doctrines sustaining the inclusion of unequal rules in them explain the global character of the appropriation of European international legal thinking in the semi-periphery.

The global character of this trend is not an excuse to forget that the appropriation of international law in places as dissimilar as Japan, Turkey, China, Russia, and Mexico served a plurality of interests and agendas. That is, the specific characteristics of each context where this global trend was articulated explain the particularist aspect of the semi-peripheral legal consciousness. International lawyers supported the modernization and Westernization of their polities, but the significance, impact, and politics of these processes varied dramatically. To understand these differences, I now turn to a comparative study of the historical contexts in which European international legal thought was appropriated and in which international law became universal. I will look at the three ideal types of interaction between Western and non-Western states, exploring the historical context of each. Considering them in the chronological order of the central events in each ideal type, I will examine: first, the inclusion of newly independent sovereigns under formally equal international relations between Western and non-Western states; second, Western expansion through the forceful opening of weakened empires under legally and politically unequal relations; and third, the effort of non-Western empires to seek readmission to the international community for states treated unequally though formally participating in the European concert of nations.

143. On the early twentieth-century semi-peripheral international lawyers as "vernacular cosmopolitans," see LORCA, *supra* note 33.

A. Inclusion of Newly Independent States through Recognition

Political elites in the semi-periphery, especially in the colonial territories that won the various wars of independence waged during the first half of the nineteenth century, considered the discourse of international law to be a fundamental building block in their nation-building projects. Once military means had secured independence, the authorities of the new states sought recognition of their sovereign autonomy as members of the international community from the main European powers and the United States.¹⁴⁴ The desire for recognition primarily occurred following the partial dismemberment of the Spanish, Portuguese, and Ottoman Empires that created the Latin American republics and Greece.¹⁴⁵

In contrast to Japan, Turkey, and China, where the standard of civilization limited their admission into the international community and justified unequal treatment, in Latin America and Greece the doctrine of recognition performed an equivalent function. Recognition had vital political consequences. Western states did not grant recognition as a gratuitous concession. Instead, Spanish American states and Brazil had to vigorously pursue recognition of their statehood by European governments and the United States. By the 1820s, after declaring independence but during the war against Spanish loyalists, some Spanish American governments had sent special envoys to London and Washington. These envoys fought arduously to establish formal diplomatic relations with European states and then to conclude treaties of friendship, commerce, and navigation.¹⁴⁶

European recognition, in particular by Britain, was crucial to undercut support from the Holy Alliance for a Spanish incursion to regain control of its former colonies. Spanish American states also wanted recognition in order to increase European trade and investment as well as to improve the conditions under which they procured loans and arms from European bankers and merchants. Moreover, Spanish American envoys sought to establish diplomatic relations and sign general treaties not only with Britain and the United States, but also with France and other smaller European states.¹⁴⁷

International politics were evidently at center stage in the diplomatic struggle to obtain recognition and to determine the rules of international

144. See generally JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2d ed., 2006).

145. The wars of independence at the beginning of the nineteenth century put an end to Spanish rule in Latin America and resulted in the creation of a number of new countries. Compared to Spanish America, Brazil followed a different trajectory, when in 1822 and with far less struggle it became a monarchy separate from Portugal. On the other hand, another group of independent countries (Greece, Montenegro, Romania) emerged from the defeat of Ottoman forces in the Greek war of independence and the Russo-Turkish war of 1877–1878. However, I will only explore the use of international legal language to obtain recognition in relation to Latin America.

146. See *supra* note 128; see also, e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Brazil, Dec. 12, 1828, reprinted in 79 CONSOL. T.S. 249.

147. See RODRÍGUEZ, *supra* note 133, *passim*.

law that would regulate the interaction with governments that had been newly admitted to the “family of nations.”¹⁴⁸ Both the victories of the new Latin American republics and Greece in their wars of independence and their post-bellum success depended to a great extent on the self-interest of the great powers and particularly on the ascending role of Britain. For example, to prevent a relapse into colonial rule under the auspices of the Holy Alliance, Canning devised a policy of cooperation with the United States to recognize the Latin American republics under the latter’s hegemony, as expressed in the Monroe Doctrine.¹⁴⁹ Similarly, Britain allying with Russia secured the independence of Greece from the Ottoman Empire.

However, the fight for recognition was also a diplomatic dispute fought on legal grounds.¹⁵⁰ On the one hand, recognition challenged the Vienna Congress’ principle of legitimacy as well as the conventional understanding of the doctrine of recognition itself. On the other hand, Latin American diplomats created a new dimension of controversy while negotiating general treaties of peace, commerce, and navigation by discussing the type of economic and personal privileges that Latin American states would grant to foreign residents and the conditions under which they would confer them (whether unilaterally, under reciprocity, or with preferential treatment for the newly independent nations).

At the same time, publicists from Latin America not only invoked international legal arguments to secure recognition for the international legal personality of their newly independent states and to gain sovereign autonomy from the very same powers that made their independence possible—namely, Britain and the United States—but also reinterpreted and changed existing legal doctrines governing recognition. Argentinean lawyer Carlos Calvo was the more prominent representative who attempted to exploit international law to promote the interests of the Latin American republics.¹⁵¹

Since the Congress of Vienna, the international rules governing recognition had sanctioned the principle of legitimacy. The Spanish Chancellery was perfectly aware of this legal doctrine and used it in the diplomatic protests it presented to the European governments who were negotiating recognition and treaties with Spanish American “rebel” governments, invoking

148. See generally Waddell, *supra* note 126, at 225–26.

149. See John R. Davis, *Britain and the European Balance of Power*, in *A COMPANION TO NINETEENTH CENTURY BRITAIN* 34, 37 (Chris Williams ed., 2006); Waddell, *supra* note 126, at 213–15.

150. This was especially true in the case of Brazil, where “[i]ndependence . . . was won not on the field of battle but by diplomacy.” Alan K. Manchester, *The Recognition of Brazilian Independence*, 31 *HISP. AM. HIST. R.* 80, 80 (1951).

151. This pattern is remarkably similar to the one followed by Greek international lawyers, both regarding their use of the classical synthesis to buttress Greek independence and deal with the Ottoman Empire and their migration to Europe’s intellectual centers. See, e.g., Nicolas Saripolos, *La question gréco-turque, ses commencements, ses progrès, et son état actuel*, 11 *R. DE D. INT. ET DE L. COMP.* 119, 133–35 (1879); Nicolas Saripolos, *La question gréco-turque après l’acte final de la conférence de Berlin*, 13 *R. DE D. INT. ET DE L. COMP.* 231, 239–43 (1881); see also M. Rivier, *Notice nécrologique sur M. Saripolos par M. Rivier*, 10 *ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL* 52, 55–56 (1888).

the illegality of this course of action.¹⁵² In order to push for recognition, the Latin American states challenged the principle of legitimacy. This challenge entailed a change in the international rules toward a conception of sovereignty based on a people's right to self-determination.¹⁵³ Recognition, in the writings of Carlos Calvo, also challenged the traditional interpretation of the doctrine of recognition itself.

Calvo embraced the distinction between internal and external sovereignty that positivist international lawyers had introduced, though he employed the distinction to support a shift toward a declaratory rather than a constitutive conception of recognition. Calvo followed the conventional view in affirming that sovereignty emerges as soon as a society gives itself a government, creating the internal sovereignty of the state. Internal sovereignty exists and is exercised *de plano* from the moment that the state is constituted, and therefore does not require sanction by other states. Calvo also accepted an idea of sovereignty that requires other states to recognize a nation in order for it to be included in the international community, thereby sanctioning its external sovereignty.¹⁵⁴ But Calvo inverted the consequences of this doctrinal distinction—the separation of a colony affects the external sovereignty of the metropole. As long as the struggle for independence continues, uninvolved states have to observe strict neutrality in their relations with the metropole and with the colonies fighting for independence. However, Calvo warned that uninvolved states have the right to grant recognition to colonies when there is a protracted war of independence or when it has become *de facto* impossible for the metropole to regain control over its colonies.¹⁵⁵

I have sketched above Calvo's tactical appropriation of international law. It is also important to emphasize Calvo's professional presence in Europe and the local—Latin American—distinctiveness of his semi-peripheral legal consciousness. Carlos Calvo's career is a paradigmatic example of the professional patterns that nineteenth-century semi-peripheral lawyers followed. After pursuing studies in Buenos Aires and Paris, Calvo began a diplomatic career that put him in contact with the most prestigious intellectual milieus of mid-nineteenth century Europe.¹⁵⁶ Calvo was remarkably successful.¹⁵⁷ Precisely at the time when international law became a professional activity,

152. WILLIAM SPENCE ROBERTSON, *FRANCE AND LATIN-AMERICAN INDEPENDENCE* 560 (1939).

153. Self-determination was not a new concept. Its revival marked a return to the influence that the French Revolution had exerted on pre-restoration international law. See Robert Redslob, *Völkerrechtliche Ideen der französischen Revolution*, in *FESTGABE FÜR OTTO MAYER* 273 (Scientia Verlag Aalen 1974) (1916).

154. CALVO, *supra* note 29, at 235.

155. *Id.* at 241.

156. For an example of one diplomatic mission, in 1860 Calvo represented Paraguay in London with the main task of requesting reparations for the Paraguayan government in the Cansatt case. "Calvo's success with the case opened the doors for him in the salons and intellectual circle of Europe." Obregón, *supra* note 74, at 96.

157. Calvo was a founding member of both the Institut de Droit International and the International Law Association. See *supra* note 55.

Calvo achieved wide impact by publishing treatises both in Spanish and French, some of which had various editions and translations.¹⁵⁸

Calvo's success can be understood in the context of the transformations international law experienced during the course of the nineteenth century. I have argued above that international law both contracted and expanded its range of validity during that period. The geographical scope of international law shrank to govern exclusively the interactions between European, civilized, and sovereign states—becoming the “*Droit publique de l'Europe*.”¹⁵⁹ While international lawyers began to articulate the idea of international law, expressing the juridical consciousness of civilized peoples, they saw themselves as embodying this consciousness in the form of an internationalist spirit and a profession defined by universality and inclusiveness.¹⁶⁰

This double shift—both conceptual and professional—required someone like Calvo. As an Argentinean in Paris, he reminded Europeans of a parallel history of international law in the New World and reinstated the universality that international law had lost after the demise of naturalism.¹⁶¹ A Latin American in Europe patently manifested European international law's universality and Latin America's civilized status as well as guaranteed the scientific impartiality of the international lawyers' doctrinal positions. Calvo himself was aware of the role that his foreignness served:

My venerable colleague Professor Heffter, assured me, during the visit I paid to him in 1878, that the impartiality of my doctrines and the fact that I am a foreigner bestowed my work in the German high courts of justice, with an authority that the works of nationals often lacked.¹⁶²

158. In 1868, Calvo published *DERECHO INTERNACIONAL TEÓRICO Y PRÁCTICO DE EUROPA Y AMÉRICA*, which he published in French as *CARLOS CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, PRÉCÉDÉ D'UN EXPOSÉ HISTORIQUE DES PROGRÈS DE LA SCIENCE DU DROIT DES GENS*. The fourth edition was translated into Chinese and Greek, and an abridged edition was translated to English. In the prologue to the fifth edition, Calvo notes the various translations and editions, commenting, “[i]s it not the best proof of the usefulness of our work?” Obregón, *supra* note 74, at 91 n.178 (quoting *CARLOS CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, PRÉCÉDÉ D'UN EXPOSÉ HISTORIQUE DES PROGRÈS DE LA SCIENCE DU DROIT DES GENS* (5th ed. 1986)).

159. This interpretation has been mainly put forward by Alexandrowicz. See C. H. Alexandrowicz, *Doctrinal Aspects of the Universality of the Law of Nations*, 37 *BRIT. Y.B. INT'L L.* 506, 506–15 (1961). On the distinction between a universal law of nations and a European public law, see Guggenheim, *supra* note 5.

160. For an account of this emerging disciplinary sensibility, see MARTTI KOSKENNIEMI, *GENTLE CIVILIZER OF NATIONS* 11–97 (2001).

161. European international lawyers welcomed Calvo's inclusion of material relating to the Americas. For instance, in his book review of Calvo's *Derecho Internacional Teórico y Práctico de Europa y América*, (1869), Gustave Rolin-Jacquemyns notes, “[m]ais ce qui lui donne en outre une valeur speciale, c'est la part importante, et toute nouvelle, qu'il fait aux précédents historiques américains, dans l'examen des questions qu'il traite. [But what gives him added value, is the important role, altogether new, that he gives to historical American precedent in the examination of his questions.]” Gustave Rolin-Jacquemyns, 1 *R. DE D. INT. ET DE L. COMP.* 294, 294 (1869).

162. Carlos Calvo, *Polémica Calvo-Alcorata*, 7 *NUEVA REVISTA DE BUENOS AIRES* 629, 635 (1883) (Arg.) (trans. by author). The fact that Calvo mentions Heffter is remarkable. Heffter was renowned for maintaining that there was no single external public law (*äußeres Staatsrecht*) because there was no law

Latin Americans' singular history explains not only their elite's heavy reliance on the culture, tradition, and values of "Western civilization" to assert their own thoughts, but also their obsessive preoccupation with the recognition of their participation and contribution to the development of Western culture.¹⁶³

International law was not immune from this general trend and shaped nineteenth-century Latin Americans' efforts to demonstrate the assimilation of the discourse of international law in ways that overemphasized the common religious substratum in order to assert membership in an international community of Christian nations.¹⁶⁴

However, the classical synthesis, as seen in the rules and principles of international law that Latin American appropriations brought about, did not simply reflect the legal order of the "European Concert." On the contrary, Latin Americans pushed to the forefront precepts that responded to the interests of their own countries. In the absence of this class of rules, they resorted to general principles of law to challenge the norms exclusively rooted in European state practice. What came to be known as the "Calvo doctrine," for example, was an effort to argue—on the basis of classical international law's absolute sovereign autonomy and equality—that military as well as diplomatic interventions by European states in the domestic affairs of Latin American nations were unlawful.¹⁶⁵ As shown above, Calvo reinterpreted the nature of the right to intervene as an exception to the principle of sovereign independence. Calvo claimed that the exception was only justified when exercised in Europe, for it followed "a principle favorable to the devel-

extending its scope to all states and peoples of the globe. According to Heffter, law only developed and achieved validity within determined circles. Specifically, a general legal consciousness manifested itself only within Christian Europe and in the states with European heritage. In the European realm, Heffter insisted, this law has acquired the name of European public law. AUGUST HEFFTER & FRIEDRICH GEFFCKEN, *DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART AUF DEN BISHERIGEN GRUNDLAGEN* 1–2 (1882).

163. See LAURENCE WHITEHEAD, *LATIN AMERICA: A NEW INTERPRETATION* 1–18 (2006).

164. For example, when Spain seized the Chincha Islands in Peru, Latin American authorities made diplomatic protests condemning the attack as not in accord with the practice of civilized nations. The Argentinean minister to Peru, D. F. Sarmiento, formulated his diplomatic protest using Christianity as a sign of civilization: "[t]he Republics of South America belong to the community of Christian nations which governs itself by international law; they exist by their own right, which they themselves have conquered, as proved by history, and secured by universal concurrence; whilst the people from whom they have severed themselves can in no manner deny their existence, by urging the absence of Treaties or of explicit acknowledgement, after forty years renunciation of all pretension of dominion, and virtual approval of the Treaties of Ayacucho, which put an end to the war between the metropolis and its former colonies." Letter from Don D.F. Sarmiento to Señor Ribeyro in 32 ACCOUNTS AND PAPERS OF THE HOUSE OF COMMONS 15 (1864).

165. Luis Drago further developed Calvo's doctrine. This doctrinal development came after the blockade of Venezuelan ports by Great Britain, Germany, and Italy to obtain payment of compensation for injuries suffered by their nationals. For a detailed exploration of the Calvo and Drago doctrines, see *supra* text accompanying notes 40–44. The general literature on this case is vast and includes many non-Latin American semi-peripheral lawyers' writing. See, e.g., C.G. Ténékidès, *Considérations sur la Clause Calvo: Essai de justification du système de la nullité intégrale*, 43 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 270–84 (1936).

opment of civilization.”¹⁶⁶ In Latin America, on the contrary, intervention was unlawful since it was based on mere force.¹⁶⁷

B. *Western Expansion through the Forceful Opening of Weakened Empires*

Elites in some empires in Asia felt a similar pressure to appropriate international law when they confronted the reconfiguration of the nineteenth-century world system under European and American hegemony. Although weakened, for different geopolitical reasons these empires did not fall under direct colonial rule by European powers. Yet they were not powerful enough to oppose the forced opening of their territories to Western commerce and influence.¹⁶⁸ By the 1850s, Japan, China, and Siam had signed unequal treaties with European powers and the United States that not only guaranteed freedom of trade and religion, unilateral most-favored treatment, and reduction of tariffs, but also renounced any claim to subject foreign residents to their legal order and judicial system, thereby recognizing the exercise of consular jurisdiction in their territory.¹⁶⁹

Japan, for example, saw its long-sustained policy of seclusion powerfully disrupted in 1853 with the arrival of an American expedition of ironclad steamers under the command of Commodore Matthew Perry, who proceeded to force the opening of Japanese ports to American trade.¹⁷⁰ After the conclusion of the U.S.-Japan Treaty of Friendship of 1854, the Shogunate government felt pressured to rapidly acquire basic knowledge on the “Western law of Nations” in order to handle the new relationship with the United States and European nations.¹⁷¹

Moreover, Japanese elites and government officials were in a different position than their Latin American and Greek counterparts. By the time international law became knowledge essential to the Latin American and Greek nation-formation projects, the elite and educated people of these new republics had strong links of cultural dependency with Europe. They were ready

166. CALVO, *supra* note 29, at 323.

167. *See id.* at 350–51.

168. For example, Auslin has shown a parallel between Japan, Burma, and Siam, in their dealings with Western powers and the efforts to renegotiate unequal treaties. AUSLIN, *supra* note 137, at 22–25.

169. *See generally* AUSLIN, *supra* note 137 (regarding Japan); JOHN KING FAIRBANK, *TRADE AND DIPLOMACY ON THE CHINA COAST: THE OPENING OF THE TREATY PORTS, 1842–1854* (1953); DONG WANG, *CHINA’S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY* (2005) (dealing extensively with China); Craven, *supra* note 136 (considering these treaties in general).

170. Starting in the Sixteenth century, Japan had contact with Portuguese, Spanish, English, and Dutch envoys and merchants. In 1638, however, the regime adopted a policy of seclusion to eliminate the impact of Christian missionaries, as evidenced by the fact that only Dutch and Chinese merchants were exempted from the prohibition and were only allowed to engage in restricted trade. *See* R.P. Anand, *Family of “Civilized” States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, 5 J. HIST. INT’L LAW 1, 8 (2003).

171. *See* AUSLIN, *supra* note 137, *passim*. Thereafter, Japanese officials resisted U.S. pressure to extend the scope of the 1854 treaty by delaying negotiations. The Western intervention in China sent a powerful message which by 1857 caused Japanese elites to change their stance and sign a new treaty. Other Western powers rapidly followed suit. *See* Anand, *supra* note 170, at 12–13.

to tackle the appropriation of European international legal thought because they had already been traveling to Europe for a long time and had also long been immersed in the Western legal tradition. The situation in Japan, or for that matter in China, was quite different not only because there was no significant economic or cultural exchange with Europe before the nineteenth century—Europe was in fact peripheral to the East Asian economic system—but also because the region had under Chinese leadership established a longstanding, stable, and independent political order that governed relations between autonomous political entities via hierarchical relations (namely, under a tributary system).¹⁷²

Consequently, European international law first had to be assimilated through direct importation. Japanese imperial authorities employed European and U.S. lawyers to provide them with legal advice, teach international law to their young elites, and participate in the translation of classic international law textbooks.¹⁷³ China, Korea, and, to a lesser extent, Siam and Persia also acquired and translated U.S. and European international law textbooks and hired foreign experts in international law.¹⁷⁴

The Japanese government later sent some of its officials to Europe where they studied international law and then served as legal advisers in Japan's diplomatic missions or participated in the first international meetings of the 1890s (mainly in the first Hague Conference). In 1862, Japanese Shusuke Nishi was the first student sent to Europe, where he studied Western law under Simmon Vissering at the University of Leiden. Translating and publishing his handwritten notes on international law in 1868, and teaching international law after his return, Nishi became the first Japanese international law scholar.¹⁷⁵

Some scholars have characterized the beginnings of international law in Japan as a period defined by the passive assimilation of Western legal thinking, which reflected the predominant ethos of the “wholesale Westernization” of Japanese society.¹⁷⁶ As with studies on Latin American international

172. On Western Europe as peripheral to China, see generally ANDRE GUNDER FRANK, *REORIENT: GLOBAL ECONOMY IN THE ASIAN AGE* (1998).

173. For example, the Japanese government employed an Italian, Alessandro Paternostro, to write an essay supporting Japan's full admission into the international legal community. See Alessandro Paternostro, *La Revision des Traités avec le Japon au Point de Vue du Droit International*, 23 R. DE D. INT. ET DE L. COMP. 5 (1891). The Japanese government also invited German-Swiss international lawyer Otfried Nippold to teach at the Society of German Sciences in Tokyo between 1889 and 1892. See OTFRIED NIPPOLD, *WANDERUNGEN DURCH JAPAN: BRIEFE UND TAGEBUCHBLÄTTER* (1901). Miyasaki lists a number of Westerners who served as legal advisers to China, Japan, and Korea. Miyasaki, *supra* note 17, at 807.

174. Fuji, *supra* note 17, at 29 (noting the translation and publication of authors such as Hall, Westlake, Von Martens, Lawrence, and von Liszt).

175. Fuji, *supra* note 17, at 19; Miyasaki, *supra* note 17, at 806.

176. Onuma Yasuaki, ‘*Japanese International Law*’ in the Prewar Period: Perspectives on the Teaching and Research of International Law in Prewar Japan, 29 JAPANESE ANN. INT'L L. 23, 23 (1986). Early teaching and research of international law was, in the words of Onuma, “practical, statism-oriented, Eurocentric and passive.” *Id.* at 23. Onuma argues that lawyers from nations that have entered the Eurocentric international society as “late-comers” share a similar pragmatism, passivism, and state-centrism in their

law, studies on Japan assumed that Japanese international lawyers straightforwardly followed Western trends in international legal scholarship.¹⁷⁷ The story of nineteenth-century international law as the progressive defeat of naturalism by positivism is mirrored in the evolution of Japanese international law.

Many scholars think that the first generation of Japanese international lawyers adhered to natural law and made use of the analogy between natural law and Confucianism to render Western international law understandable.¹⁷⁸ However, Japanese publicists imported European international legal thought due to a pragmatic need to achieve recognition from Western powers. They were not particularly inclined to examine international law's conceptual underpinnings. Rather, Japanese internationalists followed the general trend by moving to positivism during the second half of the century, focusing their attention on doctrinal and practical aspects of international law.¹⁷⁹ For example, Kinji Akashi has argued that the distinction between naturalism and positivism was of only marginal importance to Japanese practitioners for whom the description of international law's substantive content was of much greater relevance than the discussion about the theoretical foundations of the international legal order.¹⁸⁰

By the 1890s, after the first generation of Japanese international lawyers had acquainted themselves with international legal discourse and with European intellectual circles, their assimilation of international law became less subservient. Thus, Japanese publicists, who had translated Western international law treatises and written international law treatises in their own lan-

understanding of international law. *Id.* at 42. Along the same line, Yamamoto points out that Japan chose to "accept and comply with the international legal order as it was," even if it had not taken part in its creation. Consequently, Japanese lawyers' approach was "passive and conservative." Yamamoto Soji, *Japanese Approaches and Attitudes Towards International Law*, 34 *JAPANESE ANN. INT'L L.* 115, 118 (1991).

177. See Jacobini, *supra* note 24, at 38–76 (presenting Latin American international law thinking in terms of writers ascribing to naturalism or positivism—the main theoretical currents in Europe—and finding most of them to be eclectic).

178. It is possible to draw this analogy because until the first half of the nineteenth century natural law was not completely out of fashion, particularly in the Western international law literature that was translated to Japanese. See Hirohiko Otsuda, *Japan's Early Encounter With the Concept of the "Law of Nations"*, 13 *JAPANESE ANN. INT'L L.* 35, 45–46 (1969). Amane Nishi (1829–97) and Mamichi Tsuda (1829–1903), the first Japanese citizens who studied international law with Simon Vissering in Leiden between 1863 and 1865, are deemed to have followed the natural law perspective of their master. Once back in Japan, Nishi taught "universal law of nations" at the school of the Shogunate and published in 1868 a translation of his notes of Vissering's lectures, which influenced the first generation of Japanese internationalists. Kinji Akashi suggests that most Japanese scholars have thought that the first generation of international lawyers adhered to natural law because of the influence Nishi's notes had on Japanese internationalists. Kinji Akashi, *Japanese 'Acceptance' of the European Law of Nations: A Brief History of International Law in Japan*, in *EAST ASIAN AND EUROPEAN PERSPECTIVES ON INTERNATIONAL LAW* 1, 3–5 (Michael Stolleis & Masaharu Yanagihara eds., 2004). However, Akashi criticizes this conventional interpretation. See *infra* note 180 and accompanying text.

179. See Yamamoto, *supra* note 175, at 118; see also Fuji, *supra* note 17, at 20–22 (mentioning the influence exerted by the works of positivist authors such as Wheaton, Woolsey, Kent, Halleck, and Bluntschli).

180. Kinji Akashi, *supra* note 178, at 3–6, 18–19.

guages and for local audiences, began to publish monographs in European languages and to participate in the profession's European centers. For instance, Nagao Ariga (1860–1921) studied in Tokyo and Berlin and upon his return to Japan taught international law, served as a legal adviser to the army during the war in China, participated in the First Hague Conference as a technical expert, and published in French on the international legal aspects of the wars against China and Russia.¹⁸¹

In 1897, the Japanese government sent Sakuyé Takahashi (1867–1920) to study international law in Europe. Takahashi provides an extraordinary example of intellectual agency and the willful appropriation of international law. During his European sojourn, he not only published pieces in English, French, and German but also sought the involvement of European publicists in matters crucial to Japan's interests.¹⁸² For instance, Takahashi published a collection of articles in Germany written by renowned European international lawyers on the Sino-Japanese War.¹⁸³ In 1899, the Cambridge University Press published a book by Takahashi.¹⁸⁴ Interestingly, Takahashi managed to get T.E. Holland to write a preface and John Westlake to write an introduction for the book. Until 1899, the various editions of Holland's international law treatise had excluded Japan from the members of the "family of civilized nations."¹⁸⁵ After meeting Takahashi, Holland changed that passage in the 1900 edition to include Japan within the sphere of international law.¹⁸⁶ Conversely, Westlake, one of the international lawyers most apologetic for British imperialism and the deployment of the standard of

181. Nagao Ariga, *De la Protection Accordée aux Chinois Résidant au Japon Pendant la Guerre Sino-Japonaise*, 2 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 577 (1895); *La Capitulation de Port-Arthur*, 5 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 601 (1907).

182. Sakuyé Takahashi, *Le Droit International dans l'Histoire du Japon*, 3 R. DE D. INT. ET DE L. COMP. 188 (1901).

183. Many of the articles by Western authors were written under Takahashi's initiative. See, e.g., AEUSSERUNGEN ÜBER VÖLKERRECHTLICH BEDEUTSAME VORKOMMNISSSE AUS DEM CHINESISCH-JAPANISCHEN SEEKRIEG UND DAS DARAUf BEZÜGLICHE WERK, "CASES ON INTERNATIONAL LAW DURING THE SINO-JAPANESE WAR" (Sakuyé Takahashi ed., 1900). The book included a selection of reviews of Takahashi's work in various European outlets. *Id.*

184. SAKUYEI TAKAHASHI, CASES ON INTERNATIONAL LAW DURING THE CHINO-JAPANESE WAR (Cambridge Univ. Press 1899) [hereinafter TAKAHASHI, CASES]. In 1908, Takahashi also published a study on the Russo-Japanese war, both in London and New York. See SAKUYEI TAKAHASHI, INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS (Banks Law Pub. Co. 1908); SAKUYEI TAKAHASHI, INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS (Stevens & Sons 1908).

185. See THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 295 (2d ed. 1882) ("Within this charmed circle, according to the theory of International law, all States are equal. Without it, no State, be it as powerful and as civilised as China or Japan, can be regarded as a normal international person."); THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 322 (3d ed. 1886).

186. See THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 373 (9th ed. 1900) ("Within this charmed circle, to which Japan has also some time since fully established her claim to be admitted, all States, according to the theory of international law are equal. Outside of it no State, be it as powerful and as civilized as China or Persia, can be regarded as a normal international person.").

civilization against Japan, uneasily came to terms with the very presence of a Japanese scholar—rather than a barbarian—in Cambridge.¹⁸⁷

As in Latin America, Japanese efforts to assimilate international law depended on a broader commitment to a modernizing ideology. This feature distinguishes the appropriation of international law in China during a period when the modernization project had slowed down. In Japan, the role of international law as a modernizing tool and as a marker of civilization became stronger during the Meiji Restoration.¹⁸⁸ Japan heavily relied on international law to pursue its policies, not simply as a consequence of the modernizing trend and the resultant Westernization of its legal institutions, but also because international law was appropriated in ways that made it seem useful for Japan in pursuing its own interests. International law served this purpose both in the context of the wars with China (1894–95) and then with Russia (1904–05) and at the end of the century while challenging the unequal treaties and justifying its own military expansionist and colonial policies. This usefulness might be one of the reasons why, unlike their counterparts in China, Siam, or Persia, whose governments relied more on foreign legal experts, from very early on Japanese lawyers founded professional organizations, taught international law, and participated in international diplomatic events.¹⁸⁹

China, in contrast, had the misfortune of being either too strong to pay any significant attention to Westerners' "laws of nations" before the nineteenth century, or too weak afterwards to appropriate the discourse of international law quickly enough to use it successfully to contain Western intervention. Before the nineteenth century, relations with the West were extremely limited for the Chinese Empire and the use of Western legal language to regulate those interactions was quite innocuous, so that there was never a serious need for China to internalize and assimilate Western international law.¹⁹⁰

187. I explain this interaction with greater detail. See LORCA, *supra* note 33.

188. Fuji, *supra* note 17, at 19; AUSLIN, *supra* note 137, at 146.

189. See AKASHI, *supra* note 178, at 3–6. I would argue that the slowing down or failure of the modernization projects in China and Persia also explains why local lawyers trained in Western international law appeared at the beginning of the twentieth century.

190. International law was invoked by Christian missionaries who entered China during the last part of the sixteenth century and by the Dutch in their contacts with Qing officials in the period between 1662 and 1690. In both cases, Chinese authorities refused attempts to validate the European law of nations and depart from their Sino-centered tributary system. See Zhaojie Li, *International Law in China: Legal Aspect of the Chinese Perspective of World Order* 120–21 (1995) (unpublished S.J.D. Dissertation, Toronto University) (on file with Harvard Law School Library); see also GONG, *supra* note 50, at 132–34. China first entered into a formal agreement with a foreign country on equal terms when China and Russia concluded the Treaty of Nerchinsk in 1869. China agreed, for example, to reciprocate ritual observances to maintain the prestige of each civilization. *Id.* at 134. Chinese authorities appointed two Jesuits as translators and advisors precisely in order to conclude a treaty on the basis of equality and reciprocity. Their role was to ensure that the negotiations were carried out in accordance with the principles of international law. Wang Tieya, *International Law in China: Historical and Contemporary Perspectives*, in 221 RECUEIL DES COURS 195, 227 (1990).

With the start of the nineteenth century, the situation changed dramatically. Immanuel Hsü, in his study on China's entrance into the family of nations, reconsiders the critique that modern Chinese scholars have frequently leveled against the Manchu government for its ignorance of international law in its early negotiations with the West. These scholars think that Chinese authorities were incompetent because they too easily signed away extraterritorial concessions, while being ridiculously obstinate about trivial formalities which were ordinary diplomatic practices among Western states.¹⁹¹ Hsü, however, follows a different path in asking why, after international law was introduced to China, Chinese authorities failed to use international legal arguments to assert China's sovereignty. On the one hand, Hsü stresses that the rules invoked to regulate the interactions between China and the Western powers were not part of general international law in the sense of conforming to the principles of sovereign autonomy and equality, but were contained in a series of unequal bilateral treaties that imposed daunting and exceptional limits on China's sovereignty. The general corpus of international law remained therefore unused within Sino-Western interactions.¹⁹² On the other hand, Hsü, as well as other scholars, recounts a number of events during the nineteenth century in which Chinese authorities applied European international law without much success.¹⁹³ With the exception of an isolated experience of an advantageous use of international legal arguments in the 1860s that yielded a short-lived ascendance of the study of international law, the cumulative disappointments that Chinese au-

191. IMMANUEL HSÜ, CHINA'S ENTRANCE INTO THE FAMILY OF NATIONS: THE DIPLOMATIC PHASE, 1858-1880 121 (1960). Gong has proposed an alternative interpretation explaining Chinese reluctance to give up the *kostow*, namely, the ritual by which foreign powers became a tributary of China. Rather than responding to an unreasonable and rigid formalism, China defended the *kostow* because recognizing foreign sovereigns as equals challenged its existing worldview. GONG, *supra* note 50, at 130-33. By the same token, Liu contests the conventional suggestion that China's downfall is explained by its failure to abandon Sino-centric ways of thinking, especially its unwillingness to join free trade and to give up the tributary protocols and adopt modern European diplomacy. Lydia H. Liu, *Legislating the Universal: The Circulation of International Law in the Nineteenth Century*, in *TOKENS OF EXCHANGE: THE PROBLEM OF TRANSLATION IN GLOBAL CIRCULATIONS* 127, 129-30 (Lydia H. Liu ed., 1999).

192. HSÜ, *supra* note 191, at 121-23.

193. In 1838 the Emperor appointed Lin Tse-hsü to lead the campaign to suppress opium trafficking and consumption in Canton. Since it was mostly English opium that was smuggled from India to China, Lin sought to find a justification to prohibit the opium trade in Western publicists' writings and consequently ordered the translation of a number of texts on the law of peoples. In particular, Lin requested the translation of passages from the English version of Vattel's *LE DROIT DES GENS* on the right to prohibit the entrance of foreign merchandise, to confiscate smuggled goods, and to wage war. In 1839, Lin declared opium to be contraband and wrote a letter to Queen Victoria requesting her to stop the opium trade. Using European international law proved futile when the First Opium War broke out, resulting in the Treaty of Nanking being concluded with Britain in 1842 following China's defeat. In exchange for a withdrawal of troops, Britain forced China not only to accept opium as legitimate merchandise, but also to open five ports to trade and for the residence of British merchants, to abolish the monopolistic trade system, to pay indemnity (compensating the loss of opium and British lives and covering debts owed to British merchants by Chinese merchants), to recognize extraterritoriality, to cede Hong Kong, and to fix tariffs. Britain obtained further concessions in a series of treaties that came to be known as the treaty port system. See Li, *supra* note 190, at 124-33; GONG, *supra* note 50, at 136-46; HSÜ, *supra* note 191, at 138-45; WANG, *supra* note 116, at 11-16.

thorities suffered when applying international law forestalled the development and study of a discipline they considered to be useless.¹⁹⁴

But China was not unique in its experience of only encountering Western international law's regime of inequality. The erosion of the Qing Dynasty's internal rule was a greater obstacle to the appropriation of international legal thought. It made it impossible to undertake a modernizing project that—as in Japan of the Meiji Restoration, Russia of Peter the Great, or Turkey under the influence of the Young Ottomans—would make international legal discourse central to the nation-building process. This explains why purposeful appropriation of international law came only after the Emperor was overthrown. Even after the founding of the Republic of China in 1912, international law was still barely taught.¹⁹⁵ For these reasons, there was considerable international legal activity during the nineteenth century, but no significant efforts by Chinese public servants to appropriate classical international law.

Significant international legal scholarship appeared only in the 1920s when Chinese lawyers who had been studying abroad, first in Japan and then in Europe, returned to China after having completed their legal education. In spite of being part of the first generation of Chinese lawyers who became international legal scholars and practitioners, lawyers like Vi Kyuin Wellington Koo (1888–1985) and Chou Keng-shen (1889–1971) did not share a classical consciousness. On the contrary, these lawyers, who were mainly active between the 1920s and 1940s, were under the influence of the vernacular cosmopolitan consciousness that defined the disciplinary sensibilities of most non-European international lawyers of the beginning of the twentieth century.¹⁹⁶

194. The famous translation of Wheaton's *Elements of International Law* into Chinese in 1864 is commonly seen as a watershed in the introduction of international law. The usefulness of translation was tested the same year when the Prussian minister to China seized Danish ships as a prize of war. Chinese officials successfully argued that the ships were on Chinese territorial waters. Li, *supra* note 190, at 129. Later, China began to teach international law and some diplomats specialized in international law. For example, Ma Jianzhang studied law in France in the 1870s, and an international law association was set up in 1898. Wang, *supra* note 190, at 236–37.

195. Li, *supra* note 190, at 210.

196. Consequently, I examine their work and professional trajectories elsewhere. See LORCA, *supra* note 33. Chiu discusses China's delay in producing modern international lawyers. See Hungdah Chiu, *The Development of Chinese International Law Terms and the Problems of Translation into English*, in CONTEMPORARY CHINESE LAW: RESEARCH PROBLEMS AND PERSPECTIVES 139 (Jerome Cohen ed., 1970); see also Cheng Tiquang, *The People's Republic of China and International Law*, 8 DALHOUSIE L.J. 3, 8 (1984) (for the argument that from the Qing Dynasty to the Kuomintang only a handful of treaties were written and that the few lawyers that studied international law focused mainly on the unequal treaties, "since they followed indiscriminately the theories expounded and rules made by the imperialist powers for the imperialist powers, and given the subservient attitude of the then Chinese government, they could do very little to advance the Chinese cause."). Dong Wang, on the other hand, argues that during the period of the first Republic (1912–1928) foreign relations were for the first time "taken over by a foreign-trained elite." WANG, *supra* note 116, at 35. Unlike Cheng, Wang maintains that both the Kuomintang and the Communist Party condemned the unequal treaties while disputing how they should be abolished. *Id.* at 87.

C. *Inclusion in the "Family of Civilized Nations" through Re-admission*

Faced with European and American ascendance and the nineteenth-century configuration of a world economic system that gravitated toward the West, Russian and Ottoman ruling elites had to modernize their political systems. Unlike in the previous examples, in which classical international law was appropriated to advance, negotiate, and secure inclusion in the emerging international order, the Russian and Ottoman Empires had undergone long-standing commercial, cultural, and political (both military and diplomatic) interaction with the European states since at least the process in which the laws of peoples were constituted in the early Middle Ages.¹⁹⁷

During different historical periods, rules and legal instruments have framed the relationship between the Russians and the Ottomans, as well as their relationship with the European powers.¹⁹⁸ On the one hand, the Russian and Ottoman Empires have constantly been a factor in the European political order, not only during the earlier periods when they exercised their military might over Europe, but also during the course of the nineteenth century, when they were part of the system of power equilibrium and the concert of European states.¹⁹⁹ On the other hand, at some points in this long history, the nature of the inter-sovereign relationship between the European, Russian, and Ottoman powers developed to include the recognition of their co-existence on equal and reciprocal grounds.²⁰⁰

It seems counterintuitive that elites of these two non-European empires felt it in their interest to appropriate nineteenth-century classical international law. One would not expect a need to assert membership in the international community, considering that the Russian and Ottoman Empires had already been bound to Europe for centuries through a series of treaties and the law of nations. However, it is precisely because this premise came under attack during the nineteenth century as a consequence of the move to positivism in European international law, that the previous history of legal engagements between the European, Russian, and Ottoman powers was erased.

I have argued that the shift in the conceptualization of international law, from naturalism to positivism, brought with it the redefinition of the nature of interactions under international legal regulation. According to the natural law paradigm, political communities existed within a normative web simply as a result of their existence; their interactions were thus regulated by the

197. See ERNEST NYS, *LES ORIGINES DU DROIT INTERNATIONAL* (1894) (describing the origins of the law of nations in the early middle ages).

198. Ago, *supra* note 5.

199. For example, Russia participated in the Congress of Vienna, and the Ottoman Empire was included in the treaty of Paris of 1856.

200. See Karl-Heinz Ziegler, *The Peace Treaties of the Ottoman Empire with European Christian Powers*, in *PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY* 338 (Randall Lesaffer ed., 2004) (discussing the Ottoman Empire).

laws of peoples. Positivism, conversely, required that communities attain certain standards of civilization to obtain an international legal personality. Furthermore, the space between international legal subjects was not a *tabula rasa* because positivism also required states to belong to an international community as a way of justifying reciprocal normative commitments and limitations that might not accord with their sovereign will. States thus had to become part of a community based on commercial, cultural, religious, or political ties—the international community being defined as a “family of civilized nations.”²⁰¹ The changes brought about by positivism imposed upon Russian and Ottoman lawyers (particularly for the latter as subjects of a non-Christian power) the burden of showing these communal bonds between their respective states and the international community of civilized states.

Facing uncertainty about their membership in the European “family of civilized nations,” and realizing the perils of a possible exclusion, Russian and Ottoman officials sought to assimilate the new conceptualization of international law with an eye toward securing re-entry.²⁰² These transformations within the domain of legal doctrine worked together with pressure for change arising from political and economic conditions. Nineteenth-century European commercial expansion, economic growth, technical breakthroughs, and military power put both the Russian and Ottoman Empires under serious strain, threatening not only their borders and spheres of influence but also their domestic and long-established social and political forms of organization.

Russian and Ottoman ruling elites pushed forward vast projects of modernization, and both experienced similar opposition from traditionalist segments of the elite. The distinctive outcomes of these two cases, as compared to the ideal types discussed above, resulted from the fact that these Empires were still powerful enough to participate militarily and politically in the European Concert, despite being in a period of decadence, resistance, and reconstruction. It was the responsibility of international lawyers to translate the position of power enjoyed by the Russian and Ottoman Empires into juridical standing, thus ensuring their legal participation in the European Concert.

201. This argument does not assume that positivism fully superceded naturalism. To the contrary, both perspectives coexisted in the work of both early and late nineteenth century European international lawyers. Indeed, a consensus emerged among international lawyers that Western ‘civilized’ states should be governed by positive international law (of a higher normative standard that arguably attracted greater compliance) and non-civilized states should be governed by natural law (namely, moral rules of behavior). See, e.g., LORIMER, *supra* note 27, at 101–03. European authors who had not fully endorsed the turn to positivism and remained attached to naturalism shared these views. See, e.g., MANUEL TORRES CAMPOS, *ELEMENTOS DE DERECHO INTERNACIONAL PÚBLICO* 58–59 (1890).

202. See LORIMER, *supra* note 27, at 102 (maintaining that only moral rules of good conduct but no positive legal obligations applied outside the “family of civilized nations”).

At the same time, however, these doctrinal transformations that led toward the adoption of the standard of civilization as a yardstick for the recognition of statehood presented Russian and Ottoman elites with an opportunity to justify not only the project of modernization and Westernization of their societies and political institutions, but also an expansionist policy. The Russian Empire, in particular, invoked its own civilized status to justify its tutelage over the conquered sovereigns in central Asia.²⁰³

1. *The Ottoman Empire*

There has been much discussion over when the Ottoman Empire entered the European Concert or the “family of civilized nations.” This debate misses the point by evading the issue of the indeterminacy of the doctrine and practice of recognition under nineteenth-century international law. Instead, the debate is based on a literal interpretation of the text of the Treaty of Paris of 1856, the intention of the European and Turkish signatories, or alternatively on a surviving natural law substratum.²⁰⁴

Conversely, if one looks at the international context that the Ottoman rulers found themselves in during the second half of the nineteenth century, one can see the pressure on Turkish elites to appropriate classical international law and its lingering effects during the decline of the Empire.²⁰⁵ Ottoman officials were more starkly involved with international legal issues during the second half of the nineteenth century. Old grievances with Russia, Austria, Britain, and France over the control of the Black Sea and the Straits and the rights to free navigation manifested themselves in interactions ranging from diplomatic negotiations to armed conflict, and finally gave way to various treaties of peace.

Unlike the Russian or Japanese rulers, Ottoman rules did not consistently try to produce lawyers who would specifically master the new positive theory of international law or who would teach and write about international legal issues. Instead, these tasks were partially tackled by diplomats with legal training and a Western outlook, such as Étienne Carathéodory, an eth-

203. In his study on Anglo-Russian relations in Persia, Kazemzadeh recounts how diplomats justified Russia's military expansion in central Asia. In 1864, Prince A. M. Gorchakov, the Chancellor under Nicholas I, sent to Russian representatives abroad a dispatch that “became a landmark in the history of Russian diplomacy.” Kazemzadeh quotes Gorchakov's dispatch: “The position of Russia in Central Asia is that of all civilized States which are brought into contact with half savage, nomad populations, possessing no fixed social organization. In such cases it always happens that the more civilized State is forced, in the interests of the security of its frontier and its commercial relations, to exercise a certain ascendancy over those whom their turbulent and unsettled character make most undesirable neighbours . . .” FIRUZ KAZEMZADEH, *RUSSIA AND BRITAIN IN PERSIA, 1864–1914: A STUDY IN IMPERIALISM* 8 (1968).

204. See, e.g., NUSSBAUM, *supra* note 23, at 190–91; LASSA OPENHEIM, *INTERNATIONAL LAW: A TREATISE* 49 (Hersh Lauterpacht ed., 1955); Tetsuya Toyoda, *L'Aspect Universaliste du Droit International Européen du 19ème Siècle et le Statut Juridique de la Turquie avant 1856*, 8 J. HIST. INT'L L. 1, 19–37 (2006).

205. I have already alluded to the legal rapport linking some European powers, Russia, and Turkey, which allows us to reinterpret the treaty of 1856 as signaling an admission of the political context that affected the doctrinal shift from naturalism to positivism. See J.C. Hurewitz, *Ottoman Diplomacy and the European State System*, 15 MIDDLE E. J. 141 (1961).

nic Greek, and Gabriel Noradounghian, an ethnic Armenian, both of whom had served the Ottoman government in its legal and diplomatic dealings with Western states and Russia. Consequently, both acted in a diplomatic capacity while providing legal advice and writing about international legal matters close to their professional practice. Noradounghian published a collection of treaties and a compilation of other legal documents from the Ottoman Empire's international relations.²⁰⁶ Carathéodory wrote about the legal status of international rivers and freedom of navigation.²⁰⁷ In spite of this, it was not until well past the turn of the century that international law started off as a discipline and that the discourse of international law was imported, yet under a modern cosmopolitan consciousness, following up on the reforms pressed forward by the Young Ottomans first and by the Young Turks thereafter.

Thus, as in China, by the time a Turkish international legal profession emerged in the first decades of the twentieth century, the disciplinary discourse had shifted from classical to modern international law.²⁰⁸

2. *Russia*

It might appear utterly misguided to include the Russian Empire and publicists central to the development of international law such as Martens within the semi-periphery of international law.²⁰⁹ Russia certainly exerted power as a member of the Holy Alliance and its expansionism placed it in overt conflict with Britain over Central Asia and Persia. Friedrich Martens, on the other hand, was a crucial figure in the development of humanitarian international law; a figure still remembered today when lawyers invoke the clause bearing his name, the 'Martens clause.'²¹⁰

However, Russia was not at the forefront of the nineteenth-century expansion of European international law. I suggest that the international legal regimes enlarged alongside the emergence of a modern world economy

206. See, e.g., GABRIEL NORADOUNGHIAN, *RECUEIL D'ACTES INTERNATIONAUX DE L'EMPIRE OTTOMAN* (1897).

207. ÉTIENNE CARATHÉODORY, *DU DROIT INTERNATIONAL CONCERNANT LES GRANDS COURS D'EAU: ÉTUDE THÉORIQUE ET PRATIQUE SUR LA LIBERTÉ DE LA NAVIGATION FLUVIALE* (1861).

208. I examine elsewhere the work and ideas of modernist Turkish international lawyers. See LORCA, *supra* note 33.

209. See generally WILLIAM BUTLER, *RUSSIA AND THE LAW OF NATIONS IN HISTORICAL PERSPECTIVE* (2009) (discussing Russian international law in general).

210. For biographical information about Martens, see generally PUSTOGAROV, *infra* note 219. At the time of his death, Martens had become immensely successful. See, for instance, the obituary written by British jurist Thomas Holland. T. E. Holland, *Frederic de Martens*, 10 *J. SOC'Y COMP. LEGIS.* 10–12 (1909). On the Martens clause, see, for example, Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 *AM. J. INT'L L.* 78, 79 (2000) (pending the codification of the law of war, the Martens clause established a supplementary or residual humanitarian protection based on common usages among civilized nations). The fact that he used the distinction between civilized and uncivilized warfare, and that he induced Russia to commit to the former as a marker of civilization was in itself an expression of Martens' semi-peripheral legal consciousness. See *infra* note 232 and accompanying text.

under the pull of Western European and American economic development (and the exploitation of non-Europeans). Classical legal thought, I argue, became the dominant paradigm because it articulated legal rules and doctrines that facilitated the global expansion of the West. For the polities that were not at the center of the world economic system, appropriating the classical approach to international law was seen as a strategy to improve their standing within the emerging international order as well as to deal with Western encroachments on their territories.²¹¹

To the extent that the world economic system did not consolidate around a division of labor and trade relations that favored Russian interests, nineteenth-century Russia was semi-peripheral. Moreover, although Russia and the West shared a Christian heritage, Russia had followed its own path, marked by the Byzantine tradition and a feudal, sociopolitical organization that led to the formation of a patrimonial Empire. Therefore, as Lauri Mälksoo has suggested, when, in the eighteenth century, Russia broke out of her isolation and entered the European state system, Russian internationalists were intellectually dependent on Europe, thinking about themselves as “translators and transferors of Western European international law scholarship.”²¹²

Consequently, while neither downplaying Russia’s participation in the European Concert nor overlooking the professional recognition achieved by its international lawyers, one might nevertheless interpret Russia’s approach and use of international law through the lens of the more extensive semi-peripheral appropriation of classical legal thought. We might interpret Russia in a semi-peripheral context because Russian elites appropriated European international legal thought. Engaging with and further developing classical legal thinking, Russian elites used international law as a symbol of civilization in at least three different contexts: domestically, to support the modernization project; internationally (vis-à-vis Western powers) to secure sovereign equality in their international relations; and also internationally, to base its expansionist project to the West as well as to central Asia in the unequal privileges classical international law bestowed to civilized states.

Domestically, nineteenth-century Russia had been engaged in a vast project of modernization since the reign of Peter the Great at the beginning of

211. Lauri Mälksoo has argued that in spite of Russian jurists’ efforts to internalize European international law, Western European authors questioned Russia’s standing as a civilized nation. As a consequence, “Russians felt that the Western alliance the country during the Crimean war (1851–1856) or the Balkan wars of the 1870s were not the ‘usual’ clashes between European Great Powers—they were alliances specifically against the influence of Russia and its dangerous ‘otherness.’” Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT’L L. 211, 219 (2008).

212. Mälksoo, *supra* note 211, at 213. Moreover, Mälksoo argues that between Western and Russian international legal scholarship there has been not only a linguistic but also a mental divide. As a result, Russian jurists appear to be under the illusion of Russia’s intellectual self-sufficiency. The flipside effect of the mental and linguistic divide is that Russian scholars emphasized Russia’s contribution to the development of international law. *Id.* at 215.

the eighteenth century. Modernization brought Western sciences to Russia, including law in general and international law in particular.²¹³ Specifically, under the reign of Alexander II (1855–1881), Russia supported the study of international law.²¹⁴ From then on, European international law textbooks were translated, and modern international law was taught in the newly founded universities, mostly by foreign professors.²¹⁵

International law acquired an important place among Russian liberal elites, for it allowed them to openly support the principle of law within an autocratic society.²¹⁶ But as in other parts of the semi-periphery, in which elites were divided between modernizers and traditionalists, Russian elites were divided between Slavophiles and Westernizers.²¹⁷ It was not until the mid-nineteenth century, particularly after the defeat in the Crimean War (1853–1856), that a consensus in favor of Westernization emerged.²¹⁸ Once again, the introduction of the rule of law, individual rights, and Western laws, institutions, and legal thinking in general were crucial not only for the modernization project, but also in supporting Russia's assertion of civilized status.

Internationally, in ways similar to the experiences of other nations seeking entry into the international community, Russia also pointed to its behavior vis-à-vis foreign nations to prove its civilized status. Russia's international lawyers became essential to accomplishing this objective, guiding officials in the direction of civilized behavior, such as waging wars humanely or pushing for breakthroughs in the development or codification of international law, demonstrating more enthusiasm than the Europeans. International lawyers were also crucial in making Russia's civilized behavior known among Europeans through their writings and through their direct involvement with the profession's transnational networks. Friedrich F. Martens was a perfect example of the role that international lawyers acquired both domestically and internationally.²¹⁹

213. TARJA LÄNGSTRÖM, *TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW* 36–37 (2003).

214. See PETER HOLQUIST, *THE RUSSIAN EMPIRE AS A "CIVILIZED NATION": INTERNATIONAL LAW AS PRINCIPLE AND PRACTICE IN IMPERIAL RUSSIA, 1874–1898*, at 7 (Nat'l Council for Eurasian and E. European Research, 2004), available at http://www.ucis.pitt.edu/nceer/2004_818-06g_Holquist.pdf.

215. LÄNGSTRÖM, *supra* note 213, at 41.

216. HOLQUIST, *supra* note 214, at 7.

217. Most Russian international lawyers were on the side of Westernizers, who advocated for Russia to open itself to Western culture and science. Slavophiles opposed Westernization, urging Russia to follow its own path. Eric Myles, "Humanity", "Civilization" and the "International Community" in the Late Imperial Russian Mirror: Three Ideas "Topical for Our Days", 4 J. HIST. INT'L LAW 310, 313–314 (2002). In particular, like Latin American and Ottoman modernizers, Martens deployed the civilized/barbarian distinction in the domestic context. As Mälksoo has noted, "[i]t was Russia herself who had to be gently civilized in the hands of Martens and other Baltic German/Russian international law scholars—Westernizers." Mälksoo, *supra* note 211, at 220.

218. See Myles, *supra* note 217, at 313–314.

219. Friedrich Fromholz Martens was born in 1845 in Pernov (Pärnu/Pernau) a town on the gulf of Riga in the province of Livonia. VLADIMIR PUSTOGAROV, *OUR MARTENS: F.F. MARTENS INTERNATIONAL LAWYER AND ARCHITECT OF PEACE* 7 (William Elliott Butler ed., Kluwer trans., 2000) (1993). Martens was born in extremely modest circumstances, and in spite of having been orphaned at an early age, he

Martens (1845–1909) was the most important Russian classical international lawyer.²²⁰ Martens was extremely successful in his professional attempts to facilitate Russia's admission into the "family of civilized nations" and thus into the domain of international law. Martens achieved remarkable eminence in diplomatic and international law centers, making it somewhat problematic to consider his work within non-European histories of international law. I suggest, however, that interpreting Martens within the semi-peripheral legal consciousness is heuristically interesting. First, it reveals historians' difficulty in recognizing Martens' centrality to the history of international law and the particularities of the Russian context that shaped his contribution. Second, it allows one to see Martens' development of typically semi-peripheral argumentative tactics to ensure inclusion by internalizing the standard of civilization. However, Martens' clear statement of the requirements of international legal personality contributed to the crystallization of the "standard of civilization" and presaged the arguments that subsequent non-European lawyers had to make to achieve inclusion into the international community.²²¹ The work of Martens is therefore worth reviewing.

Martens, in a way that became typical of semi-peripheral lawyers of the classical period, had to connect a series of ideas into an argument for the internalization of international law in Russia, while supporting Russia's inclusion among civilized states and substantiating the recognition of its international legal personality. Under the premise that there is an intrinsic nexus between the domestic order of a nation and its international conduct, Martens' line of reasoning asserted that international law is an expression of

received a good education at a German school in St. Petersburg and, in 1863, the Law Faculty of St. Petersburg University admitted him for study. *Id.* at 7, 14. Upon graduation, the University offered to allow Martens to remain to prepare for a position as a professor. When Martens suggested choosing the chair of criminal law, the Dean replied, "No, remain at the chair of international law. Then we will have our Martens", alluding to the two noted European writers on international law . . . who bore this surname." *Id.* at 18–19. Martens finished his magister, went abroad, attending lectures in Vienna, Heidelberg (by Johann Caspar Bluntschli), and Leipzig, received his doctoral degree in 1873 and became a professor in 1876. *Id.* at 19, 26. Martens went on to become, among others, a member of the *Institut de Droit International*, and Russian delegate to a number of conferences, including the First and Second Hague Conferences. Moreover, Martens wrote some of the most influential treatises of his time. See *supra* note 24.

220. Pustogarov has determined that Martens was of Estonian origin, contradicting some German authors who affirm that he was a Baltic German. PUSTOGAROV, *supra* note 219, at 12–13. Martens only adopted a Russian first name later on, when marrying and converting to the Orthodox faith. Even though he became known as Fedor Fedorovich Martens, according to Pustogarov, he continued calling himself Friedrich von Martens in German and Frederic de Martens in French. *Id.* at 9. The use of Western and Russian versions of his name point to Martens' commitment to both Russia's Westernization and imperial idea. Mälksoo has shown that Martens regarded the principle of nationality as unstable and dangerous, instead he believed that the state must respect the rights of citizens regardless their national origin and the language they spoke. Lauri Mälksoo, *The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855–1985*, 76 BRIT. Y.B. INT'L L. 383, 389 (2005).

221. According to Gong, this standard was consolidated only at the very end of the nineteenth century. See GONG, *supra* note 50, at 24–35.

civilized life.²²² He went on to associate civilization with the social and political conditions of European nations.²²³ Martens argued that because of both Russia's own history as well as the introduction of reforms that led to modernization and Westernization, Russia had social and political institutions akin to those in Europe. Russia, therefore, was part of the "family of civilized nations," and a sovereign under modern international law.

International law, Martens mused, is forged only on the basis of essential and real relations that at any given moment unite nations in the pursuit of a variety of goals. Martens suggested that certain general causes bring nations together through common purpose, whether in the interest of humanity, civilization, or politics. It is among the states that share these collective goals that the international community is constituted.²²⁴ Martens pled for Russia's inclusion in the international community by showing common links established not only because of its modernization efforts but also because of religion. Russia and Europe were bound together by the Christian tradition, which was equivalent, in Martens' eyes, to Western civilization.²²⁵

In a manner familiar to classical publicists, Martens insisted that nations lying outside the community of shared purposes, namely, the non-European entities that are deemed to lack mutual links of solidarity or interest and thus do not invite reciprocal relations, are excluded from positive international law. Contacts between sovereign states and uncivilized and savage

222. I MARTENS, *supra* note 27, at iii. "Les différences géographiques, économiques et celles qui marquent les divers degrés de civilisation des peuples, influent sur leur développement intérieur et sur leur droit. Le droit international ne peut devenir une réalité que chez les peuples arrivés à un degré peu près égal de développement civil et politique, car chez eux seuls la notion du droit est identique." [The geographical and economic differences and the ones that define the diverse degrees of civilization of peoples, have an influence on their domestic development and on their law. International law cannot become a reality except among peoples who have achieved much the same degree of civil and political development, for it is only among them that the notion of law is identical.] *Id.* at 20. Martens later affirms that no civilized state can find all the elements of its life and fulfillment within its territory, which is why contemporary nations have established relations with one another. *Id.* at 28.

223. "Le droit international contemporain est le résultat de la vie civilisée et de la connaissance du droit chez les nations européennes. Ainsi que le démontre l'histoire, les conditions essentielles de l'ordre juridique international . . . se sont rencontrées d'abord en Europe et, jusqu'à présent, elles sont loin d'exister dans tous les États du globe. Il s'en suit que l'action du droit international ne s'étend qu'aux nations qui reconnaissent les principes fondamentaux de la civilisation européenne et qui sont dignes du nom de peuples civilisés." [Contemporary international law is the result of civilized life and of the consciousness about the law among European nations. As history demonstrates, the essential conditions of the international juridical order . . . are first encountered in Europe and, up to the present, they are far from existing among all states of the world. Therefore, the effect of international law is only understood among the nations that have recognized the fundamental principles of European civilization, and that are worthy to be called civilized peoples.] *Id.* at 238.

224. According to Martens, collective goals can be religious, intellectual, economic, and political. *Id.* at 27.

225. "J'ai la ferme conviction que les relations internationales et les principes du droit qui les déterminent, tirent toute leur importance et toute leur force de la communauté des intérêts qui unissent les nations civilisées ou chrétiennes." [I have the firm conviction that international relations and the principles of law that regulate them draw all of their importance and all of their force from the community of interests that unite civilized or Christian nations.] *Id.* at ii–iii.

peoples were for Martens de facto interactions subject to natural law.²²⁶ Martens claimed that “the social and political conditions under which Muslim, heathen or savage peoples live, render impossible the application of international law with these barbarous or half civilized nations.”²²⁷ Russia, in contrast, was civilized, according to Martens.²²⁸ To demonstrate the distinction between Russia and the rest of the non-European world—very much in line with Russia’s expansionist policy in the Balkans and Central Asia—Martens disputed the inclusion of Asian states and Turkey in the international community of civilized peoples.²²⁹ Martens viewed the absence of reciprocity that the capitulations stipulated in the relationship between European powers and Turkey, Persia, Japan, and China as demonstrating their exclusion from the international community. Because these nations did not offer the guarantees necessary for the security of the interests and rights of foreigners, and did not implement essential transformations of the law and political and social regimes, Martens concluded that these nations should not enjoy the rights of civilized nations.²³⁰

As long as the international community was composed only of peoples belonging to the European civilization, new states had to appropriate the fundamental elements of Western culture for the international community to progress.²³¹ Russia was a case in point in Martens’ argument. Although Russia had engaged in commercial relations with England and Holland, signed treaties, and sent and received diplomatic missions from European states since at least the thirteenth century, Russia had not done enough to gain membership into the international community. Martens insisted that until the eighteenth century, Russia’s internal social and political conditions made it impossible for a relationship with Western sovereigns to emerge on the basis of equality and reciprocity.

Martens wanted to persuade his readers (though without much discussion) that since the reign of Peter the Great and the consolidation of modernization during the reign of Catherine II, a change in domestic affairs had brought Russia into the international community of civilized nations. Martens’ brief justification for including Russia within the international community might have made perfect sense to him: Marten’s own professional

226. *Id.* at 239.

227. *Id.* at 238–39.

228. See generally HOLQUIST, *supra* note 214, at 4–6.

229. See FEDOR FEDOROVICH MARTENS, *RUSSIE ET L’ANGLETERRE DANS L’ASIE CENTRALE* (1879); FEDOR FEDOROVICH MARTENS, *DAS CONSULARWESEN UND DIE CONSULARJURISDICTION IM ORIENT* (1874).

230. MARTENS, *supra* note 27, at 240–41. It is quite interesting that Martens indicates that when this moment of a similar degree of “instruction and civilization” is reached, international law will no longer be exclusively established based on Christian principles, and will not only be obligatory for Christian nations. However, Martens warns that at that point, it will be necessary that peoples and societies under the rule of international law ensure “les conditions raisonnables de l’existence humaine” [the reasonable conditions of human existence] in accordance with “la civilisation séculaire des nations européennes” [the secular civilization of the European nations].

231. *Id.* at 270–71.

success and recognition in diplomatic circles confirmed Russia's centrality in the European Concert. Similarly to the Japanese jurists who pointed to Japan's behavior in the central area of warfare as a sign of Japan's civilized status, Martens also viewed Russia's active role in the development of humanitarian international law as a sign of Russia's civilized status.

Martens was the author of the program and a central figure in the First Hague Conference (1899), which marked the beginning of the modern rules of warfare.²³² Tsar Nicholas II's initiative to advance humanitarian law and Martens' role in it might be seen as an illustration of Russia's commitment to Westernization. Contrary to what one might expect, Russia's determination to become a leading force in the advancement of humanitarian law and thus civilization did not contradict but rather endorsed Russia's expansionism, embodying a mission to civilize other nations.²³³ Martens had significant exposure within Europe. He sat on various arbitration tribunals, his treatises were translated and widely read, and he participated in professional debates that reached the public in the form of journalistic pieces, such as a piece on the tension between Russia and England over their influence in Central Asia.²³⁴ Martens' participation in a professional dialogue about increasing the global range of international law shows the process through which international law became universal during the second half of the nineteenth century.

IV. CONCLUSION: RETHINKING THE MEANING OF UNIVERSALITY IN PUBLIC INTERNATIONAL LAW

Conventional international legal scholarship claims that international law is European and that this legal order achieved universality when the international society of European states expanded globally. International lawyers consider to be European both the international legal order that globalized during the nineteenth century and the international legal order that attained universality at the end of the century, not just because its conceptual outlook developed out of the European legal tradition, but also because European states, their lawyers, and their diplomats were the primary historical actors. International law therefore was globalized either when Western states recognized non-European sovereigns as members of the international community, or when Western states used international law to justify formal colonial rule or informal imperialism in Africa, Asia, or Latin America. Either way, this conventional history of international law in the nineteenth century covers only the ideas and doctrines developed by European and

232. See, e.g., Daniel Marc Segesser, "Unlawful Warfare is Uncivilised": *The International Debate on the Punishment of War Crimes, 1872–1918*, 14 *EURO. REV. HIST.* 215 (2007); Myles, *supra* note 217, at 318–19.

233. This is similar to Japanese international lawyers. See ARIGA, *supra* note 68.

234. See e.g., MARTENS, *supra* note 229; PUSTOGAROV, *supra* note 219.

North American international lawyers and the rules of international law devised by European states to govern the foreign relations with other Western states.

The belief in the exclusively European nature of international law limits the scope of analysis and prevents an understanding of the global character of the historical processes through which international law became universal. How did international legal rules, doctrines, and ideas expand their range of validity; why did they gain traction outside Europe; and to what extent did international law change in the process of expansion?

I have strived to answer these questions by writing a global history of the emergence of an international legal order of a universal nature, suggesting that globalization did not follow international law's geographical expansion through inclusion of new states or through Western imposition. This history showed that international law became universal when, in a process that was both global and multidimensional, non-European lawyers appropriated European international legal thought and established, along with Western international lawyers, a global profession that articulated a transnational legal discourse.

I have argued that by the dawn of the nineteenth century, a significant number of international legal regimes had governed, under some degree of formal equality, the interaction between some European and non-European sovereigns. During the nineteenth century, European publicists had shifted their conceptual understanding of international law to positivism. A series of new legal doctrines emerged from this theoretical shift supporting a change toward unequal treatment in the international regimes governing relations with non-Western sovereigns. For example, according to a constitutive (as opposed to a declaratory) doctrine of recognition, international personality—which granted the privilege of equal treatment—depended on a state complying with the “European standard of civilization.” Semi-peripheral international lawyers contested the unfavorable change in the rules of international law by engaging with the doctrines and debates that justified the new rules.

This explanation of the process through which international law became universal, a story emphasizing non-Western appropriations of the European international legal tradition and the constitution of a transnational legal discourse, invites us to rethink the meaning of “universality” as a term describing the transformations that the international legal order underwent during the nineteenth century. International lawyers have typically used the term “universality” to describe the final stage in the progressive expansion of international law's geographical range of validity. This study, however, suggests that during the nineteenth century, international law underwent transformations more significant than a mere geographical expansion. I propose to use the term “universality” with three additional implications: to indicate changes in international law's conceptual outlook, to describe the global

aspects of the professionalization of international law, and to illustrate the transformations in the nature of the international legal discourse itself.

First, regarding the conceptual change, international law's space of validity, which had been theoretically reduced to intra-Western relations after the shift from naturalism to positivism, regained universality when semi-peripheral lawyers re-interpreted the doctrines of recognition and the standard of civilization, such that there were only procedural, rather than substantive limitations, to the inclusion of non-Western states. I have shown that semi-peripheral international lawyers did this by disentangling the association between the ideas of the distinctiveness of European/Western statehood, the standard of civilization, and international legal personality. Their criticisms were therefore not directed at a standard of civilization, but rather at the malleability of this standard and the possibility—at least theoretically—of non-Western sovereigns internalizing it to support their international personality.

Second, semi-peripheral lawyers' appropriation of European international legal thought happened at a time when the practice of international law became specialized and turned into a distinctive profession with a transnational community. During this period, professional activities undertaken by international lawyers became transnationally organized. As legal advisors serving their own foreign offices or foreign governments, international lawyers circulated globally, giving counsel, joining diplomatic negotiations, and becoming members of arbitration tribunals. As producers of ideas, international legal scholars published works that were translated into many languages and discussed around the world. As professionals, the first associations of international lawyers founded inside and outside Europe reflected a global constituency at the same time that the student bodies of European universities, where international law was taught, became increasingly cosmopolitan. The participation of semi-peripheral jurists and diplomats in the transnational professional community that emerged out of these events made it possible for this community to acquire a global character.

By the second half of the nineteenth century, semi-peripheral lawyers had become professional international law experts, negotiating, signing, and invoking treaties, and insisting on compliance with these treaties. They had also discussed and contested established doctrinal positions, challenging extraterritoriality in Japan and China, and, in the case of Latin America, criticizing the doctrines supporting diplomatic intervention. Yet it is not the mere participation of non-Europeans in the creation of international legal norms and concepts that makes the use, internalization, and appropriation of international law interesting, but rather the ways in which these lawyers played with the discourse of international law, at times endorsing it while at other times being surprisingly critical—a strategic stance that I contend

should be recovered by semi-peripheral internationalists today.²³⁵ This strategic stance is one of the central lessons I would draw from this segment of international law's history. In addition to the strategic appropriation and pragmatic use of international law, there are other lessons worth reclaiming. These include the semi-peripheral jurists' determination to acquire power in the discipline through their presence and interventions at the centers of the profession in Europe and through their resolve to acquire intellectual capital through academic degrees and publications.

Third, one might believe that international law became universal only after having been articulated globally (by a transnationally constituted profession) and with some degree of inclusiveness (after semi-peripheral lawyers re-interpreted legal doctrines limiting the scope of the international community). If so, this international law would be qualitatively different from the law that Western powers unilaterally fashioned and imposed, which legitimized Western exercise of jurisdictional powers overseas and resolved disputes between Western states, particularly controversies emerging from conflicting colonial claims over territories overseas. This law became universal, because it not only enabled the Western powers to intervene politically and economically around the world, but also regulated and to some extent limited the mutual interaction between independent political organizations on a global scale.

During the course of the nineteenth century, semi-peripheral appropriations of international legal thought and the global circulation of rules, lawyers, and legal ideas transformed existing international legal regimes into a universal international law. "Universality," as a consequence, describes not only international law's geographic expansion, but also doctrinal changes, the global professionalization of international lawyers, and the transformation of the nature and functions of the international legal discourse. These are the central arguments I have put forward in this article.

International law should be viewed from a global standpoint. Since the nineteenth century, the expansion of world trade relations, ensuing military confrontations, and technical advances in transportation and communication led to an interconnected world. Thus, this period transformed international law into a series of legal regimes shaping and governing a global economic order, and in which European and non-European sovereigns became intertwined to a degree exceeding what would result from a mere increase in the number of legal rules and treaties.

It might seem unclear why, before describing and explaining the process through which international law became universal from a global perspective, I had to explore the distinctive meaning that the use of international law acquired in various semi-peripheral settings, namely, in each of the three ideal-types explored above—inclusion of newly independent Republics, ex-

235. See Davison, *supra* note 94, at 185.

pansion by the forced openings of weakened empires, and empires seeking re-admission. However, it is only by comparing the various international legal regimes and ways of engaging with European international legal thought that one can uncover the global character of these local understandings. Therefore, to explore the transformations that international law experienced during the nineteenth century, I have adopted a perspective that is conscious of the distinctiveness of both local and global phenomena.

This methodological choice carries with it important implications for our understanding of contemporary international law. The international legal profession that emerged during the second half of the nineteenth century appears strikingly more pluralistic and culturally diverse than today's well-established invisible college. If one considers the array of lawyers around the world publishing in the discipline's main journals and contributing to the discipline's central debates in the nineteenth century, international legal thinking and scholarship today seems comparatively parochial.

One might explain the greater diversity of meanings and uses that the nineteenth-century publicists made of international law by the fact that at that time, the world was (according to international law) divided into normatively separate areas—civilized, quasi-civilized, barbarian, and savage.²³⁶ Today, the problematic character of these distinctions has certainly been overcome by their displacement by more politically palatable notions, such as democratic governance, economic development, or respect for human rights.²³⁷ The perceived universality of these categories has contributed to less understanding of the different meanings that these concepts and international law can have in different regions of the world.

Aware of their local particularities that made them “similar but different” from their Western colleagues, semi-peripheral publicists were able to make inroads into the Western legal profession without obliterating their distinctive political interests, historical contexts, and individual experiences.

236. Lorimer famously states that “[a]s a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity. To these, whether arising from peculiarities of race or from various stages of development in the same race, belong, *of right*, at the hands of civilized nations, three stages of recognition—plenary political recognition, partial political recognition, and natural or mere human recognition.” LORIMER, *supra* note 27, at 101. Lorimer places the European states in the first sphere and Turkey and the “historical states of Asia which have not become European dependencies” in the second, with the third sphere “extend[ing] to the residue of mankind.” *Id.* at 101–02.

237. See Anghie, *supra* note 2 (suggesting a deep structure explaining the continuities with their opponents, underdeveloped dictatorships that were violators of fundamental rights). Carl Schmitt provides a conservative critique of liberal universalism. Schmitt bitterly resents the universalization of European international law, for it entailed not only its global expansion, but its radical transformation. In Schmitt's eyes, the *Jus Publicum Europaeum*, based on the concrete normative order of the European community (*Hausgenossenschaft*) of peoples, morphed into the spaceless universalism of a liberal international legal order open to heterogeneous states. CARL SCHMITT, *Die Auflösung der europäischen Ordnung im “International Law”*, in STAAT, GROßRAUM, NOMOS: ARBEITEN AUS DEN JAHREN 1916–1979, at 372–73 (Gunter Maschke ed., 1995); see also CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM: IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950).

The stories I have recounted here show the progressive gains in professional and intellectual confidence that the semi-peripheral lawyers achieved. Having been fairly successful in the appropriation of classical international legal thought, non-European international lawyers were conscious that they had become signs of civilization and of the universalization of international law itself. Non-European international lawyers managed to convince their states to internalize the classical synthesis in order to achieve recognition of their polities' legal personality, to challenge unequal treaties, or to strengthen the protection that the principles of formal equality and absolute sovereignty afforded to semi-peripheral states. Bringing about this change required considerable diplomatic resources to show and sustain the claim of civilization based on Westernization and the modernization of their states' legal and political institutions.

These efforts depended on the competence of international law experts, not only in devising the required legal arguments, but also in putting them into circulation. The central objective of this "first generation" of semi-peripheral international lawyers was to master the knowledge indispensable for internalizing classical international law. They were, as a consequence, fairly faithful to the Western international legal tradition, siding with legal positivism and sovereignty, and accepting the reality of a Western standard of civilization. However, their legacy made it possible for subsequent generations of non-European practitioners from the twentieth century onwards to develop a less universalistic approach to international law. This later approach mostly adopted a sociological and anti-formalist stance that provided legal intellectuals with a conceptual detour with which to bypass the international legal tradition's Eurocentrism, hence permitting particularistic conceptualizations of international law.

The appropriation of classical international law in the nineteenth century paved the way for vernacular cosmopolitan international lawyers to emerge in the first half of the twentieth century. These lawyers, following strategies similar to their forerunners, re-appropriated the emerging legal consciousness, this time within the context of the move to modern international law. In the early twentieth century, semi-peripheral lawyers developed approaches to international law based on a regional or cultural distinctiveness, in the form of a Latin American, Asian, or Islamic international law. Even though semi-peripheral international lawyers pursued a type of distinctiveness that fragmented the international community, their sense of belonging to the international community paradoxically increased, following their unambiguous commitment to cosmopolitanism.

There is one final question looming behind this exploration, in the same manner that it haunts the writing of legal history in general and the recent "turn to history" of international law in particular: why should one undertake a historical study of nineteenth-century international law? More specifi-

cally, why should one engage with non-Eurocentric histories of the origin of modern international law, of the type elaborated in this article?²³⁸

Looking back into the nineteenth century, we can see the global character that modern international law developed from its inception. More importantly, we may therefore also see the extent to which “universal” international law had plural meanings. It was used, for example, not only to justify colonial expansion and to establish a regime of quasi-sovereignty (in the case of polities subjected to unequal treaties), but also to support the claim to sovereignty by non-European states. Legal pluralism of this sort calls for a comparative analysis of traditions of international legal thought as well as of differences in the uses and practices of international law. In particular, the ways in which non-European lawyers negotiated these differences to build an international legal order responsive to their self-interest in a context of highly unequal power relations provide great insight for understanding some aspects of the past and present of international law.

As in the past, international law currently is used to enable, legitimize, and resist Western economic, cultural, and political (diplomatic and military) power.²³⁹ Unlike in the nineteenth century, however, contemporary international lawyers tend to look only within the boundaries of Western international legal thought and practice to find ways to resist the hegemony of international law, eliciting exclusively intra-Western debates.²⁴⁰ In fact, the history that I recount is very much about unsuccessful efforts to use international law to counter Western economic and military power, as well

238. Matthew Craven describes the turn to history and the different ways in which international lawyers have engaged with the history of international law. See Matthew Craven, INTRODUCTION TO TIME, HISTORY AND INTERNATIONAL LAW (Matthew Craven, Malgosia Fitzmaurice, & Maria Vogiatzi eds., 2007). Craven views the growing interest in the historiography of international law, in the aftermath of the end of the Cold War and the new “war on terror,” as an effort to search for answers in the discipline’s past, in the face of the political uncertainties of the present. *Id.* at 3–4.

239. Various parallels could be drawn by looking at the tension between the principle of sovereign equality and actual forms of unequal treatment in contemporary and nineteenth century international law. For example, consular jurisdiction can be functionally compared with free trade agreements or investment treaties that bestow competence on international arbitration bodies to resolve disputes involving foreign actors. The standard of civilization as a doctrinal device to differentiate the legal regime applicable to privileged and subordinate states is paralleled in the nuclear non-proliferation regime. The invocation of anti-formal principles by powerful states and a response based on formal rules by weaker states continues to be a common argumentative pattern.

240. For example, when Armin von Bogdandy and Sergio Dellavalle study the conceptual preconditions of the various positions held by international lawyers, ordering them in two competing paradigms—universalism and particularism—they conceive of their task as providing a critical standpoint from which to assess and understand these positions, but also as supporting “intercultural dialogue on international law.” Armin von Bogdandy & Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, 5 (Inst. for Int’l L. and Just. Working Paper No. 2008), available at <http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf>. The fact that they only consider the ideas put forward by European and American international lawyers is considered unproblematic. Verdirame reviews and discusses the debate dividing American and European approaches to international law. See Guglielmo Verdirame, *The Divided West: International Lawyers in Europe and America*, 18 EUR. J. INT’L L. 553 (2007).

as about the hegemonic impact that appropriating international law had on globalizing the concept of sovereignty and the standard of civilization.²⁴¹

However, it is also true that the nineteenth century, as recounted here, appears full of surprising stories about fairly early and successful appropriations of international legal discourse to counterbalance Western expansion. These stories about disciplinary dialogue cross-cutting the center and semi-periphery bring to the surface an uncannily pluralistic nineteenth-century international law profession. It is inspiring to remember the non-European facets of the history of international law as well as the role of its semi-peripheral international lawyers, for they reveal distinctive ways of understanding and using international law at the fringes of international power and show alternatives to reinventing the discipline in light of the challenges of today.

241. Although throughout this article non-European international lawyers are presented in a sympathetic light, I recognize the costs and shortcomings of this strategy. For instance, the national policies supporting modernization, in line with the internalization of the standard of civilization, were brutal for the peoples who had to be modernized. I also fail to discuss the violence of European expansion. For an impressive account, see MIKE DAVIS, *LATE VICTORIAN HOLOCAUSTS: EL NIÑO FAMINES AND THE MAKING OF THE THIRD WORLD* (2001).