BOUNDARIES
OF THE
INTERNATIONAL

Law and Empire

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If by despot we mean an absolute master, who disposes of the goods, the honor, and the life of his subjects, using and abusing an authority without limits and without control, I see no such despots anywhere in Asia. . . . I see only a certain number of places where nothing is respected, where accommodation is unknown and where force reigns without obstacle; these are the places where the weakness and the improvidence of the Asiatics allowed foreigners from distant countries to establish themselves, with the sole desire of amassing wealth in the shortest possible time, and then returning to their country to enjoy it; people without pity for men of another race, without any sentiment of sympathy for natives whose language they do not understand and with whom they share no tastes, habits, beliefs, prejudices . . . the foreigners of whom I speak are the Europeans.

A singular race is this European race. The opinions with which it is armed, the reasonings upon which it rests, would astonish an impartial judge, if such a one could be at present found on earth. Drunk with their recent progress and especially their superiority in the arts of war, they look with a superb disdain upon the other families of the human species; it seems that everyone is born to admire and to serve them. . . . They walk the globe, showing themselves to the humiliated nations as the type of beauty in their figures, the epitome of reason in their ideas, the perfection of understanding in their imaginations. What resembles them is lovely, what is useful to them is good, and what strays from their taste or their interest is senseless, ridiculous, or condemnable. That is their only measure. They judge all things by that rule. In their own quarrels they are agreed upon certain principles by which to assassinate one another with method and regularity. But the law of nations is superfluous in dealing with Malays, Americans, or Tungus.

Jean-Pierre Abel-Rémusat, 1829
Introduction: Empire and International Law

In 1829, Jean-Pierre Abel-Rémusat (1788–1832), who held the first chair in Sinology at the Collège de France, reflected on the ideological complex that his fellow Europeans had developed to justify their commercial and imperial depredations of societies throughout the extra-European world. They read their military supremacy as evidence of their moral superiority; they looked with contempt on societies of which they lacked the most basic understanding; and with a stunning parochialism, they not only saw their own standards of beauty, right, and reason as paramount, but also expected others to embrace those supposed standards despite the Europeans’ consistently abhorrent conduct. Central to this ideology was a story about law: about the supposed absence of law in the despotic empires of Asia, where tyrants dominated their enslaved subjects without any legal or moral restraints, and about the unique virtues of the European law of nations, which had tempered war with consensual rules among free and equal states and whose benefits would one day be conferred on others when they achieved “civilization.” Abel-Rémusat was one participant in a minority discourse criticizing this legal ideology. As a student of the history of human culture, he particularly lamented the loss of civilizational diversity—the unique “genius” and the “spontaneous progress” of each civilization—that he feared was disappearing as there came to be “nothing left on earth but Europeans.” He also eloquently condemned, and others in this vein of analysis would stress, the injustices that Europeans were perpetrating in the name of law and civilization.

This book is a study of the ideological and political work that discourses of the law of nations and international law performed during the eighteenth
and nineteenth centuries with respect to relations between the imperial powers of Western Europe and states and societies outside Europe. These discourses emerged alongside the expansion and consolidation of Western Europe’s global empires, although the connections between empire and international law went unacknowledged for much of the twentieth century. International law, together with structures of international governance, is in important respects a product of the history of European imperial expansion. International law also aspires to universal legitimacy. These features are in certain obvious ways in deep tension with one another. How can a set of institutions and discourses developed at least in part to sustain and justify the domination by a handful of Western European states over much of the rest of the globe hope to win the allegiance of those whose societies historically suffered under those institutions? Moreover, international law’s universalism itself is more deeply bound up with its imperial features than such an observation about the tensions between universalism and domination would suggest.

The law of nations was, until the mid-nineteenth century, an almost exclusively European discourse in the sense that the texts that circulated were produced, with limited exceptions, by Europeans and addressed to other Europeans, although their theoretical questions and conceptual categories reflected the extent and significance of European states’ and other agents' relations and activities outside Europe. Indeed, Europeans throughout the modern period conceptualized international law through close reference to the non-European world. As a study of law of nations discourse and its imperial entanglements, this book focuses primarily on authors of the two major imperial powers of the period, Britain and France, where, until the consolidation of international law as an academic discipline in the second half of the nineteenth century, the law of nations was a language and framework for political argument used broadly in public debates and works of political thought. Disputes about the scope of the law of nations and the nature of legal and diplomatic relations were not highly specialized, as they would become in the nineteenth century, but were conducted through diplomatic and travel writings, and in works of political thought, with a wide circulation. The law of nations furnished a language for thinking about the relationship between historically particular practices and universal moral principles, and was thus one of many registers in which European reflection on the place of Europe in the world took place in the eighteenth century.

The implication of international law in the West’s domination over other societies is an important part of a larger story of the imperial career of European universalisms. As recent studies of the mutually constitutive relationship of liberalism and empire have shown, imperial tendencies have been as internal to liberal universalism as anti-imperial, or emancipatory, or egalitarian ones, despite liberalism’s ostensible commitments to the moral equality of all human beings and to the values of freedom and self-government. Liberalism has often had a parochializing effect on the European imagination, thanks in large part to a linear view of progress that figured European civilization, and European commercial society, as the vanguard or the telos of world history, as at once unique and a model for the rest of the world. Even as it came to understand itself in global terms, Europe “diminished its own ethical possibilities.” Paradoxically, scientific and scholarly attention to global phenomena in the nineteenth century was in part driven by, and can be said to have contributed to, European parochialism, as Europe came into an understanding of itself as an entity with global reach and global significance, both because of its outsized power and because of the apparent singularity of European progress in human history. This process is particularly striking in the field of international law, which became an increasingly disciplinary, and self-consciously European, endeavor over the course of the nineteenth century, alongside the development of that parochial moral universalism.

The law of nations proved a powerful political discourse in the context of European commercial and imperial expansion, in at least three respects. It supplied justifications for the actions of imperial states and their agents: from the conquest of territory, to the seizure of other powers’ ships, to the imposition of unequal or discriminatory trade regimes. It also furnished resources for the criticism of abuses of power by imperial states; it had, as international law still does, both “imperial” and “counter-imperial,” critical, or emancipatory, dimensions. Third, law of nations discourse could obscure the imperial nature of European states: for instance, by conceptualizing the states of the international legal community as territorially compact peoples rather than the sprawling and stratified global empires that the most powerful of them were. As accounts of the law of nations came to be structured by an idea of nations as moral communities equal in status with, and independent of, one another, they had the effect of denying theoretical space for the consideration of European imperial actions. Often they simultaneously delegitimized non-European states as atavistically imperial
in a modern world of equal nations. Such occlusions characterized dominant narratives of international law well into the twentieth century and arguably continue to shape not only mainstream international law but also much of the discipline of international relations and to shore up the major institutions of international governance. As James Tully has argued, "the world legal and political order is best characterized as an imperial order of some kind," yet "our dominant languages of disclosure and research conceal and overlook the imperialism of the present." This book traces some of the languages of disclosure and political argument in the eighteenth and nineteenth centuries that contributed to the current conjuncture Tully so powerfully articulates.

The complexity of global political interactions means that all figurations of and narratives about those interactions necessarily abstract and simplify, drawing attention to certain features or patterns or continuities, and rendering others obscure. Legal discourse has long been central to the project of describing, conceptualizing, and envisioning what has come to be called the international, and since the early modern period that legal discourse has relied on historical narratives, whether more or less explicitly, for its work of conceptualization. For early modern thinkers such as Grotius and Gentili, a grasp of the principles of international law was inextricable from a sense of its history, especially its Roman history. From the time that the first histories of the law of nations were written, in the late eighteenth and early nineteenth centuries by figures such as D. H. L. von Oppensted (1785), Robert Ward (1799), and Henry Wheaton (1841), historiography has been used to stage disputes and stake claims over the normative foundations of legal principles, to justify novel practices as conventional, and to demarcate the boundaries of the international legal community. Accordingly, this book examines how authors deploying the language of the law of nations and international law conceived of the international both spatially and temporally. What did it encompass? What were its contours and limits? How did it come into being and develop over time? What were its possible futures? I should note that this book is a study of reflections by eighteenth- and nineteenth-century legal and political thinkers on these questions of scope, rather than an attempt to chart something like the scope of international law in practice over its history.

Tensions between a consciousness of particularity and an aspiration to universality have been a persistent feature of European conceptualizations of the law of nations. The history of law of nations debates underscores the enduring challenge of thinking about the particular and the universal together, and of accommodating perceived differences within a normative edifice. Legal discourse itself presses toward uniform application, so that exceptions or variations must be explained and justified. Thus, Francisco de Vitoria (ca. 1483–1546) began his De Indis by canvassing the possible reasons that the Amerindians conquered by Spain might not have had "true dominion," for if they had, if "innocent individuals [had been] pillaged of their possessions and dominions, there are grounds for doubting the justice of what has been done." Many of the key terms in international law have had a double-edged quality: while such concepts as equality and reciprocity are apparently inclusive, they have been used as discriminatory standards. Legal discourse could be used to impose particular practices or standards on others in the name of their universally obligatory nature, and to characterize and judge societies as worthy (or not) of reciprocal treatment, or as having standing to make certain kinds of claims.

The question of the relationship between particular norms and practices and universal principles permeates the history of law of nations theorizing most obviously and enduringly through the question of the relationship between the law of nations and the law of nature, between positive law and natural law. There are good reasons, as Jeremy Waldron has urged, to think of natural law and the law of nations as inextricable, and further, to approach natural law by way of positive law. Waldron locates such an approach in the work of Alberico Gentili (1552–1608), who wrote, quoting Cicero, that "The agreement of all nations about a matter must be regarded as a law of nature." We should not, Waldron argues, attempt to hive off our reasoning about the normative standards that guide our judgments of positive laws from the content of those laws themselves, as a common view holds in the name of preserving moral clarity as well as clarity about what the law is. Rather, we should engage in a kind of "back-and-forth" reasoning that balances a sense of actual practices and positive laws with our judgment of the moral quality of those practices and laws, and that allows us to consider a principle's viability for governing social life, whether it makes reasonable demands on people and can be stable over time. "Natural law," as Waldron puts the point, is best understood not as something like pure moral philosophy, but rather "as something discernable most reliably from a careful, critical, and morally well-informed study of universal or consensual human practices." Such an approach to the law of nations represents a form of reflection that draws on actual practice to help establish
our normative standards, while at the same time always preserving an overtly critical and evaluative orientation toward practice.17

Waldron's reflections about how best to think about the relationship between the law of nations and the law of nature shed light on the pitfalls, the limitations, and occasionally the promise of other ways in which European legal thinkers have navigated the encounter between particular and universal, practice and norm. In what follows, I highlight a set of connected arguments that is this book's major object of normative critique. This set of arguments, which can be summarized as the view that the law of nations is Europe's distinctively successful solution to universal problems of order, entails a particular combination of particularism and universalism that, I will argue, was especially pernicious as a source of justifications for and obfuscations of European imperial domination. This was a parochial universalism that saw its own local principles as universally obligating, and put itself in a position to judge others, not just as enemies, but as "outlaws," thereby making itself both a party to conflict and the judge.

Thanks to qualities or developments unique to Europe, the argument has gone, Europeans alone managed to develop a body of legal doctrine that ought to be authoritative for the entire globe, and that they were therefore justified in imposing on others. The dominant register in which this view was expressed shifted from the religious to the civilizational, but these shared a basic narrative structure: Europe was, for the moment, uniquely in possession of universal moral and political truths. The discourses also coexisted and mingled; medieval canon law documents deploy tropes of civilizing as well as converting infidel barbarians or wild men, and international lawyers continued to insist into the late nineteenth century on the distinctively Christian character of international law.16 Proponents of this view have suggested a variety of decisive European features, including respect for the individual as a unique legacy of Christianity; a distinctive appreciation for the rule of law as a legacy of Rome; and a varied geography that led to a plurality of states that existed in close proximity to one another and were forced by their relative equality to accommodate themselves to one another, as opposed to the steppe of Asia that encouraged vast and despotic empires.19 Rousseau encapsulated the view in his "Abstract of Monsieur the Abbé de Saint-Pierre's Plan for Perpetual Peace," which argues that Europe shared a common culture of "maxims and opinions" based on Roman law. The position of mountains and rivers "seem to have settled the number and extent of these Nations; and one can say that the political order of this Part of the world is, in certain regards, Nature's work." Finally, the "multitude and smallness of the States" bound by commerce and intellectual culture meant that Europe produced "not merely an ideal collection of Peoples who have nothing in common but a name like Asia or Africa, but a real society which has its Religion, its morals, its customs and even its laws."20 The blinkered Eurocentrism of such projects was noted by some Enlightenment commentators. Voltaire cheekily parochialized Rousseau's abstract with his mock commentary by the emperor of China, which criticized such peace plans not just for their futility and utopianism but relatedly for their failure to recognize non-European states as members of the international community, for their presumptuousness in placing Europe figuratively at the center of the world, and for their complicity, whether witting or unwitting, with those profiting from unjust global commercial enterprises.21

The universalist claim that European international law should be binding on all states and that China, or the Ottoman Empire, was a lawless exception worked in tandem with the particularist claim that international law was law of Christendom alone and that there was no community of law at all between European states and others. In both cases, the effect was to entrench asymmetries of power in legal form and to render difference from the West (that is, Western Europe and its white settler colonies) as moral and legal inferiority. As Teemu Ruskola has recounted, when Caleb Cushing, the first U.S. ambassador to China, arrived in 1844 to negotiate a commercial treaty for his country in the wake of the first Opium War between China and Britain, Cushing's ships were asked not to fire a twenty-one-gun salute, as China did not observe such a custom and it might frighten the inhabitants. Cushing was also denied an imperial audience and instead was required by Chinese officials to negotiate with the imperial envoy, commissioner Qiyiing, at the temple of Wanghia near Macao. Cushing was outraged about both incidents, insisting that it was his "duty, in the outset, not to omit any of the tokens of respect customary among Western nations" and predicting trouble for China if it persisted in refusing "the exchange of the ordinary courtesies of national intercourse."22 Cushing's self-righteous response neatly encapsulatd what was becoming the standard Western approach to relations with non-European states, in its appeal to supposed principle, to the ideal of mutual respect among states, and to Western customs as normative for the entire world, and its use of all these to place China in a subordinate legal position. Cushing managed to claim
both universality and particularity for the European (Christian, Western) law of nations. When China declined to follow a Western practice, even one as purely ceremonial as the gun salute, it was failing to uphold a standard it ought to recognize. And yet Western states could not be expected to extend forms of legal recognition standard among themselves to China and other non-Western states.

In addition to charting iterations of that parochial universalism in eighteenth- and nineteenth-century international legal discourse, this book also examines alternative efforts to navigate the tensions between international law's universal aspirations and its particular European features. One alternative understanding has stressed that even if Europe constituted a distinct political-social community that had emerged over time as the result of particularly dense interactions and shared history, this community had to be understood in the context of its global connections, and, moreover, Europeans ought to regard their relations with states and societies everywhere as bound and constrained by law. Although they might encounter differences in both domestic and intercommunal legal doctrines, Europeans, in their dealings with other societies, ought to look for shared legal principles. Furthermore, they ought to respect their own legal commitments in dealing with extra-European societies, and to seek mutual intelligibility, even when they could not impose their own standards on others. This approach to the tension between the particular and the universal could lead to a posture of interpretive generosity with respect to others’ legal principles. Though never a dominant strain of political-legal thought, it had distinguished exponents in the eighteenth century and weaker echoes in the nineteenth, and one of the aims of this book is to recapture it.

The injustices that Europeans perpetrated in and on other societies with the help of the law of nations as a tool and justificatory discourse have sometimes been characterized as due to the exclusion of those other societies from the international legal community. But critiques that focus on exclusion are limited. As Richard Tuck has argued, Asian states that had been excluded from treaty relations with Europeans by the Christian ban on treaties with infidels had good reasons to regret their later inclusion within European treaty practices—and the wars and military alliances these governed—as inclusion became more standard in the seventeenth century. Tuck sees Grotius’s criticism of a ban on treaties with infidels as a feature of his imperializing bent, and he argues that it may have been because the ban was more respected in Spanish and Portuguese discourse that those empires lagged behind the Dutch and later the English in imperial expansion into Asia. Treaties and legal recognition were instrumental in the expansion of the British Empire in North America and the Pacific. Nineteenth-century Europeans likewise recognized the sovereignty of African rulers and concluded treaties with them precisely to facilitate their dispossession and subjugation. An apparent recognition of the validity of non-European laws also served as the basis of one important justification of slavery before the nineteenth century. The celebrated barrister John Dunning, representing the slaveholder in *Somerset v. Stewart* in 1772 (the case that established that English common law did not support slavery), argued that the purchase of slaves in Africa rested on a recognition of the right of African societies to make laws imposing slavery as a punishment for offenses against society. He offered that it would be an unjustifiable chauvinism not to recognize the legality of such enslavements:

We are apt (and great authorities support this way of speaking) to call those nations universally, whose internal policy we are ignorant of, barbarians; (thus the Greeks, particularly, stiled many nations, whose customs, generally considered, were far more justifiable and commendable than their own;) unfortunately, from calling them barbarians, we are apt to think them so, and draw conclusions accordingly.... There are of these people, men who have a sense of the right and value of freedom; but who imagine that offences against a society are punishable justly by the severe law of servitude.... The law of the land of that country disposed of [James Somerset] as property, with all the consequences of transmission and alienation.

Arnulf Becker Lorca has charted the disillusionment that semi-peripheral international lawyers felt in the early twentieth century as they saw that the bid for inclusion in the international community of states pursued by a previous generation of non-European lawyers had repeatedly failed to curb European states’ use of international law to bolster and justify their disproportionate power. Today, onerous sovereign debt obligations, or odious debt, persists as another form of injustice enabled by legal “inclusion” on unequal terms. Inclusion on unequal terms arguably cannot properly be called inclusion at all. But perhaps instead it is misleading or unhelpful to think of exclusion as the primary problem, since the critical lens of exclusion tends to suggest that inclusion is an adequate solution. It may be more
productive to see the problem as one of domination, which more clearly enables us to see how the emancipatory and dominating sides of international law are intertwined.

The “European State System” and the Law of Nations

A conception of the international came into focus in Europe in the seventeenth and eighteenth centuries, and relations among European states had priority within this conception. It was during this period that historians and political writers came to understand Europe as a system, a “state system,” worthy of analysis in its own right, rather than simply the product of actions by states and statesmen, and whose coming into being was one of the great achievements of modern European civilization. Other parts of the world were said to be unable to match this achievement, as they were characterized by, perhaps doomed to, great and oppressive empires. And yet, as Andrew Fitzmaurice has noted, “the creation of states and empires was, from one perspective, a connected, or even a single, process.” The relationship of this state system to the “international,” to the law of nations, and to humanity as a whole was complex and ambiguous, but by the turn of the nineteenth century the European state system and its public law were coming to be seen as standing in for the international as a whole, representing a proto-international community or the germ of a global community. The law of nations was one of the most important discourses in which Europeans articulated Europe’s claim to be the unique bearer of universal values.

The project of creating an international order has long been commingled with that of European consolidation and informed by European exceptionalism, from Christendom’s global project of conversion in medieval and early modern Church doctrine, through eighteenth-century projects for perpetual peace, to contemporary theorizations of the European Union as a democratic model for a postsovereign world. Europeans, as Martti Koskenniemi has noted, have never “thought of Europe in merely local terms, but generalized it into a representative of the universal.” The Abbé de Saint-Pierre reported in 1713 that he had initially conceived his project for perpetual peace as encompassing “all the Kingdoms of the World” but had concluded that “even though in following Ages most of the Sovereigns of Asia and Africa might desire to be receiv’d into the Union, yet this Pros-pect would seem so remote and so full of Difficulties, that it would cast an Air of Impossibility upon the whole Project.” He anticipated that a Christian European union “would soon become the Arbiter of the Sovereigns” of “the Indies,” who would place their faith in it when they recognized that its only interest was in mutually beneficial commerce and not in conquest. The complacency of this expectation seems particularly glaring in light of the global facets of the treaty negotiations in which he was participating as a French secretary at Utrecht when the work was published, including the British acquisition of the asiento or permission to supply slaves to Spanish colonies, which ended the Dutch monopoly on the trade, and the recognition of various powers’ sovereignty over new territories in the Americas. Immanuel Kant’s federation of republics is described in universal language but is often read as a project of European federation. Projects for European union have in this way long seen it as having a vocation both as a political archetype for the rest of the world and as an authoritative arbiter of the political legitimacy of extra-European states; a model for the future and a judge for the present.

To be sure, certain political developments largely internal to Europe and Christianity partly shaped the development of European understandings of the international and ideas of universal validity. As Richard Devetak has argued, Renaissance statesmen and the humanist historians who served them “helped give shape to a conception of the international as a world of states,” in the course of a battle against the political theology of the Church as having supreme universal authority. Andrew Fitzmaurice has argued that the universalist gestures of the European law of nations took shape in the context of the religious warfare unleashed by the Reformation: “These rules applied between European states, but their principles necessarily had to have some claim to universality or they risked falling back into the communal ideas that had fed more than a century of war.” Edward Kenne has argued that the shift from naturalism to positivism, which involved an insistence that the law of nations was particular to Europe, was due as much to a counterrevolutionary context within Europe as to reflections on European states’ relations with other parts of the world. Yet for too long the dominant narrative of international politics was one of a system that emerged within Europe—Europe understood in isolation from the rest of the world—that then expanded in the nineteenth and twentieth to encompass the globe. The profound, and constant, role of extra-European developments in the evolution of the law of nations was long ignored.
Since the nineteenth century, such an account of the history and sources of international law has been the dominant one. That narrative said that international law had its origins within Europe, between sovereign European states that viewed each other as free and equal. It saw a pivotal moment in the Westphalia treaties, which, it said, set out above all to protect states’ independence from intervention by outsiders. And, it concluded, this essentially European system gradually came to incorporate other states as they reached the appropriate “standard of civilization,” or, as more recent language would have it, as they entered the state system or decolonized and became independent.

The Victorian historical narrative persisted well into the twentieth century. Both dismissive and defensive in the face of the challenges to international law raised by lawyers and leaders from decolonizing states, the Dutch jurist Jan Verzijl insisted in 1955 that the body of international law was exclusively the product of “the European mind” — it had been generated by a combination of European theoretical activity and European state practice, and it had integrity and coherence. With the kind of reflexive positivism that characterized Victorian international legal thought, as I discuss in Chapter 6, Verzijl offered a peremptory prediction that “it would seem very unlikely that any revolutionary ideas will appear as a result of the entrance of these new members which will have power to challenge or supersede the general principles and customary rules of law which have shown their vitality by standing the test of time and circumstance.” Verzijl, that is, posited a continuity of the tradition of international law that he attributed to the essential conceptual and normative soundness of the legal totality, rather than to its imposition by and collaboration with force. He argued not simply that non-Europeans had adopted international law without materially altering it, but that they could not help but adopt without altering it, because they had no useful alternative legal traditions on which to draw. He depicted non-European resistance and critique as if these were driven by a kind of impotent resentment: something “we in the West can only regard with a certain amount of amusement because it offers curious evidence of the lasting dependence of non-Western nations in the conduct of their international affairs upon fundamental concepts of the Western world from which their political leaders nevertheless so ardently crave to liberate their States.” Rather than recognizing international law as a space of contestation in the past and present, he presented it as an organic whole, “which originated in the West, but which has been adopted by the East,” and he saw in this narrative of European past and global future “one of the outstanding proofs of the ultimate unity of the human race.”

Although it departs significantly in tone from Verzijl’s smug Eurocentrism, Adam Watson’s Evolution of International Society (1992) represents a late twentieth-century articulation of the conventional narrative that recapitulates some of the narrative’s key themes and performs some of the same ideological work. Watson’s book was one of several prominent products of the British Committee on the Theory of International Politics led by Herbert Butterfield, Martin Wight, and Hedley Bull (the nucleus of the “English school” of international relations). Its framing narrative, that the contemporary international system is the result of the global expansion of an originally European system of equal and independent states, takes up the basic nineteenth-century narrative. This approach downplays the fact that the so-called European system of independent states was dependent on—indeed, constituted by—the global relations of politics, economy, and war in which those states were embedded, and it downplays the ongoing asymmetries of power and legal status after decolonization, because it sees the relevant story as the rise of a global society out of a European one, rather than as one of transformations of legal form within a global system characterized by domination and asymmetry.

Thus, while acknowledging the fact of European empires, Watson tells a narrative sanitized of European domination in several ways: he writes (in a Vattelian vein that I explore in Chapter 3) of the European state system of free and equal members as if this system existed independent of global imperial structures; he conceives of European relations with the Ottoman Empire and Asian states as “a compromise or hybrid”; and he summarizes decolonization as the acceptance by Europeans of all other independent states on equal terms: “When Europeans took it for granted that all other independent states should be admitted to their international society on the same terms as themselves, the European society can be said to have given way to a global one.” Such a gloss disregards the fact that Europeans fought during much of the twentieth century to constrict the legal rights and standing of non-European states, beginning with League of Nations members Liberia and Ethiopia in the 1920s and 1930s, by forcing constraints on sovereignty on decolonizing states, and by imposing onerous and often destructive loan conditions on Third World states through international institutions such as the International Monetary Fund and the World Bank, so that the admission on equal terms never
in fact occurred. If it was “taken for granted,” this was arguably only in a more perverse sense than Watson intended, namely, that the very insistence that postcolonial states were incorporated as equal members itself served to obscure their ongoing legal subordination. Watson concludes that “since both the letter and the spirit of the European society of states were essentially non-imperial, and fluctuated within the independences / hegemony half of the spectrum, the nineteenth-century European dominance over the rest of the world proved to be less durable than it once seemed.” The choices Watson makes to render global interactions analytically tractable—that is, his framing historical narrative and spatial conceptualization of the global order as the expansion outward of the community of equal nation-states from Europe to the world—make it hard to see some of the major phenomena of modern world history. An alternative framing would highlight the evolution of a capitalist world system in which European metropoles and extra-European states and societies, whether formally colonized or not, developed interdependently through a profoundly asymmetrical process, with international law playing an important role in justifying and stabilizing inequalities of wealth and military power.

The conventional narrative, that is, disregarded the constitution of modern Europe by an imperial global order and discounted the role of domination in the history of international law by narrating that history as a product of egalitarian relations among nation-states. It largely ignored the global contexts and sources for international law—the profound preoccupation with imperial concerns by thinkers deemed foundational, such as Vitoria and Grotius; the influence of Roman legal concepts developed during the expansion of the Roman Empire; and the inter-imperial rivalries that contributed to so many of the decisive wars, treaties, and theories.

According to the standard account, international law emerged within Europe as a response to the problems of disorder and violence among states that understood themselves as equal in standing, even if not in size, wealth, or power. It then gradually expanded during the nineteenth and twentieth centuries to encompass ever more states as they achieved a “standard of civilization” or achieved independence under decolonization. To summarize, the conventional narrative is problematic in at least two respects. First, it depicts modern international law as developed exclusively within Europe and then exported to the rest of the world, rather than as partly forged in the course of European imperial expansion and through European interactions with extra-European states and societies. And second, it suggests that the (European) building blocks of modern international law were truly universalist, that they did not privilege Europeans or Christians but were (uniquely in the world) universal in scope. Critical histories have been challenging both pillars of the narrative.

In response to the standard narrative, Jörg Fisch has insisted that “the political aim of the European expansion, from the fifteenth to the twentieth centuries, was never to extend the international society of Europe... The aim was not coordination but subordination.” He concludes that the “real universalization” of the system came not through the extension of European power but in its contraction with decolonization, “and this only because it contained a principle which allowed [there to be built] an international society of sovereign equals.” Fisch is interested in law as a political tool rather than as an ideological structure, or rather he emphasizes the former at the expense of the latter. While his argument makes for a vitally important correction to the conventional narrative, Fisch treats Europeans as purely driven by a material impulse to dominate others for European advantage, and he treats the ideas of international law as free-floating normative principles (equality and reciprocity) that belong to everyone and were embraced by decolonizing nations because they were more attractive than the alternative of destroying the system. But the compelling principles of mutual respect, political autonomy, and humanitarian concern cannot, I would argue, be divorced from a history in which such principles were deployed to advance and justify imperial domination; to do so would be to risk failing to respond in a sufficiently critical spirit to the ideological work such ideas may continue to do to shore up or occlude global asymmetries of power, a subject I take up briefly in the Epilogue.

The Historical Narrative of the Book

This book is intended as a contribution to a growing body of literature that can be called the critical history of international law. It is a striking feature of the recent historical turn in international law that it has been deeply shaped by a postcolonial sensibility, so that the revitalization of historical interest in a field that had long lacked it has also entailed a radical challenge to international law’s identity as an emancipatory project with an essentially European genealogy. The book that did more than any other to spark this process was Martti Koskenniemi’s *Gentle Civilizer of Nations*
Bounded by the turn of the nineteenth century was the transformative moment in the history of international law. Alexandrowicz's work had both historiographic and normative aims. He meant to set the historical record straight, from what he saw as its long Victorian detour, to show that international law both in theory and in practice had been far more inclusive than it was to become in the nineteenth century. And he sought to recover that greater inclusiveness as a means of combating "European egocentricity" in international law, with all its pernicious effects in the postcolonial period. Alexandrowicz argued that for much of the sixteenth through the eighteenth centuries, Asian states or rulers were routinely respected as fully sovereign; treaties with them were equal and binding, and these treaties were regarded by European lawyers and scholars as evidence of their participation in the law of nations. For instance, the Maratha state, a formidable military power in northwest India, was, he held, "clearly considered a legal entity in the... law of nations and there is no doubt as to its membership in the Family of Nations and its capacity of dealing with other members on a footing of equality and of concluding treaties in the meaning of international law." Alexandrowicz argued that this naturalist universalism was displaced by positivism beginning in the late eighteenth century. He saw authors such as Ompsted and J. J. von Moser as intermediate figures, with Ompsted seeking to defend the law of nature in a kind of rearguard action against the encroaching positivist ideology, and Moser a representative of the latter whose work nonetheless shows that the "concept of universalism was... capable of holding a qualified position of its own in spite of adverse doctrinal developments."

As compelling and as dauntingly erudite as Alexandrowicz's argument is, it seems flawed in several respects. First, his distinction between natural law universalism and positivism is overdrawn, for theories of the law of nations have always contained elements of both: earlier so-called natural law theories relied on the practice of nations for the content of that law. Natural law remained pervasive in the nineteenth century, and even the self-declared positivists of the period who claimed to eschew natural law held on to claims of prospective universal validity for their "positive" law of nations. Second, he overstated the consensus in seventeenth- and eighteenth-century Europe that Asian states were fellow members of an international legal community, for there was much greater doubt and disagreement on this question than his claims about natural law universalism suggest. In what follows I am deeply indebted to Alexandrowicz's pioneering work even as I seek to challenge aspects of his account.
Before giving an overview of the argument of the book, I will summarize a few features of the earlier history of the law of nations. In Roman law, the *ius gentium* referred to the law common to all peoples; it supplied the basis for legal decisions involving non-Romans living under Roman government, in contrast to civil law, which applied exclusively to Roman citizens. There is, then, a long history to the imbrication of empire and the "law of nations," since the Roman *ius gentium* developed within the Roman Empire precisely as a way of adjudicating relations between Romans and conquered peoples who were not Roman citizens. The *ius gentium* was considered to be based on natural reason and so to be largely in accordance with natural law, with certain key exceptions such as slavery, which was forbidden by natural law but permitted by most societies and so by the *ius gentium*. The development out of the Roman conception of *ius gentium* of an idea of a law governing relations among peoples is complex and contested: as Henry Maine was to note, "the confusion between *ius gentium* or law common to all nations, and international law, is entirely modern," because the Romans used the term "*ius fetiale*" to refer to intercommunal law governing such things as the rights of ambassadors and the proper means of declaring war. The alternative phrase "*ius inter gentes*" is found in Vitoria and Suarez. Jeremy Bentham sought to overcome the ambiguity of *droit des gens or ius gentium* with one of his few successful neologisms, the phrase "international law" (as a translation of *droit entre les gens*), which he saw as more apt because it explicitly indexed laws between states or nations.  

Although it was only in the nineteenth century that treatises on the law of nations began to include, regularly and systematically, treatments of the recognition of states and explicit inquiries into the scope of the international community, the question of the participation of non-European states in the law of nations was, in more oblique forms, a persistent one in law of nations discourse. First, a key argument for the claim that the law of nations tracked natural law was that it was agreed upon by all—or rather, according to the usual qualification, all "civilized"—nations. The law of nations was what all civilized nations, understood as a legitimate proxy for all nations, had agreed to, either explicitly or in practice. Grotius’s formulation characteristically elided the universal judgment of mankind and that of a more particular set of nations: we can "with very great Probability," he wrote, "conclude that to be by the Law of Nature, which is generally believed to be so by all, or at least, the most civilized, Nations. For, an univer-
non-Christian powers from the most important form of interstate relations. Despite profound disagreements among medieval and early modern thinkers about Christianity's implications for law and temporal power, and about the degree to which Christendom could or should be internally united, there remained a widely shared commitment to a deep division in legal status between Christendom and its enemies.\textsuperscript{59}

That gulf in legal status remained plausible, if increasingly contested, into the early eighteenth century. Gottfried Wilhelm Leibniz, for instance, combined a project of "universal jurisprudence" accessible to all minds with one of unifying the \textit{republica christiana} against "the plague of Mohammedanism."\textsuperscript{60} Documents related to negotiations for the Treaty of Utrecht (1713) continued to refer to the \textit{republica christiana}, even as this language was giving way to the language of European community.\textsuperscript{61} Yet when the East India Company sought to defend its trade monopoly in the famous 1685 case \textit{East India Company v. Sandys} on the grounds that only an explicit royal charter could override the religious prohibition on commercial or military alliances with infidels, a lawyer for the independent English merchants fighting the monopoly rejected "this notion of Christians not to have commerce with infidels" as "a conceit absurd, monkish, fantastical and fanatical."\textsuperscript{62} In 1758, Vattel thought that he hardly needed to address the topic at all: a treatment of treaties with infidels, he wrote, "would be superfluous in our age. The law of nature alone regulates the treaties of nations: the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of men, and not under the character of Christians, or of Muslims."\textsuperscript{63}

We might see the eighteenth century, then, as a period of particular fluidity in conceptions of the law of nations, when the older notion of a unified \textit{Christianitas} or \textit{republica christiana} predicated on hostility to infidels was losing its hold, and the divide between civilized and barbarous was not yet as deeply entrenched as it would become in the nineteenth century. At the same time, the law of nations was coming to be identified with what legal and political thinkers began to call the \textit{droit publice de l'Europe (ius publicum Europaeum)}. As the premise of an irreducible legal gulf between Christians and infidels was being rejected, new ways of framing the question of legal relations with non-Europeans arose. Participants in these debates were not always primarily legal thinkers but also diplomats, such as the British emissaries Paul Rycaut and James Porter, Orientalist scholars such as Abraham Anquetil-Duperron, political thinkers and legislators such as Montesquieu and Edmund Burke, and historians such as Robert Plumer Ward. This breadth of participation in questioning the scope of the European legal order marks one difference with the more professionalized late nineteenth century.

What did Europeans think were the sources of the law of nations in this period between the waning of the Christian legal community and the rise of a so-called positivism based exclusively on European practice? How could one determine its content? Why, and for whom, was it authoritative, given that there was no world state? Was it indeed universal? The major sources for the law of nations, according to writers of late eighteenth-century legal textbooks, were the great legal treatises (by Grotius, Wolff, Pufendorf, Burlamaqui, Vattel) that had introduced Roman law in place of theology and canon law as a primary source of legal principles.\textsuperscript{64} Other key sources were treaty collections and diplomatic memoirs and correspondence, which were thought to provide essential contextual information about the meaning and purposes of the treaties. Treaty collecting was a growth industry in this period, particularly after the heroic compilation published by Jean Dumont in the 1720s. The fact that European states signed treaties with so many non-Christian powers in the course of their global expansion does not show, \textit{pace} Alexandrowicz, that they saw these treaties as foundational to the law of nations in the way that treaties within Europe were thought to be. This is not because European states scrupulously abided by their treaties with each other and violated those with powers beyond Europe. But treaties with the Turks and other Asian and North African powers were often treated differently from those within Europe; some collections that were seen as the basis of the law of nations did not include treaties with non-European states, noting that they were restricting themselves to Europe. Treaties of the East India trading companies with Asian powers were usually collected separately. Some of the most influential collections, such as Dumont's, did include treaties with non-Christian powers, especially the Ottoman Empire and the Barbary States. Indeed, Dumont, in justifying the usefulness of his collection, used as his example a hypothetical English ambassador to the king of Morocco, who would want to know the full history of Morocco's treaty relations with France in order to "procure for his Master all the same honors, that this African Monarch renders to the King of France." But even though Dumont's title was \textit{The Universal Diplomatic Corpus of the Law of Nations}, his subtitle indicated that he was including only European treaties.\textsuperscript{65} It is this
sort of equivocation, in which “universal” and “European” operate as synonyms, that suggests that we cannot assume that language of “universal” and “mankind” in legal treatises such as Vattel’s were intended to apply globally.

As I explore in Chapter 2, the Ottoman Empire consistently represented the most prominent fraught case, because its diplomatic and commercial ties with Christian Europe were so dense compared with those of any other Muslim or extra-European state. Despite the empire’s considerable European territory and its long-standing participation in European war, commerce, and diplomacy, authors noted that even if it was technically part of Europe, it was not a full participant in the European legal community. G. F. von Martens, for instance, writing in the 1780s, preferred the term “European law of nations” to “law of civilized nations,” but he added that “European” was not quite right either, because “although, in Europe the Turks have, in many respects, rejected the positive law of nations of which I here treat; and though, out of Europe, the United States of America have uniformly adopted it. It is to be understood à potiori, and it appears preferable to that of, law of civilized nations, which is too vague.”66 The treaty collections often included caveats about the differences between Ottoman or North African treaties and standard European ones, stating that such treaties were restricted to a few key issues, or that the procedure for enforcing them was distinct. A British collection of maritime treaties published in 1779, for instance, noted that because the Ottomans were “unacquainted with the Treaties made by us with other Nations in Europe,” the usual assumptions and procedures could not be followed.67

Similarly, diplomatic memoirs regularly insisted that “the Turks” were not fully acquainted with the European law of nations, or that they refused to recognize it, and so were not properly part of the emerging interstate legal system. The English emissary Paul Rycaut argued in 1666 that “though the Turks make these outward demonstrations of all due reverence and religious care to preserve the persons of Ambassadours sacred and free from violence,” it was clear from their treatment of ambassadors during wars that “they have no esteem of the Law of Nations,” and it was a principle with them to violate their treaties with unbelievers whenever doing so would contribute to the expansion of their empire or the propagation of their faith.68 The English diplomat Sir James Porter likewise wrote a century later that “the Turks have properly no idea of the law of nations.”69 Both Rycaut and Porter were considered sympathetic observers of the Ottomans, and Porter insisted that the regime was lawful and not an oriental despotism. But he held nonetheless that the law of nations did not apply in Turkey. Clearly, many Europeans in the seventeenth and eighteenth centuries, despite the fact that their states and trading companies were signing treaties with Asian and Muslim powers, believed these treaties existed in a different legal space from that of the European treaties and common practices that they saw as the basis for a systematic law of nations.

At the same time, the great treatises of the law of nations in this period tended to be written in resolutely universalist language. Christian Wolff described his conception of the civitas maxima as encompassing “all nations,” and he held that because states are equal, none has the right to impose its own interpretation of natural law on another, so that while all nations have duties of mutual assistance to one another, states cannot compel “barbarous nations” to accept their assistance. His Sinophilism, with its suggestion that “pagans and atheists could be just as moral in their daily lives as practicing Christians,” led to his expulsion from his post at the University of Halle. (Characteristically, the Victorian Sir Travers Twiss would take Wolff’s civitas maxima to refer narrowly, though “somewhat indistinctly,” to “an ‘Inner Circle’ of the more civilized nations.”70) Vattel, likewise, wrote of “the bonds of that universal society which nature has established among” all nations. He looked forward to the time when the principles of the law of nations would be adopted as state practice, and “the world would have the appearance of a large republic; men would live everywhere like brothers, and each individual be a citizen of the universe.”71 At the same time, given the emphatic universalism of Wolff and Vattel’s language, there is remarkably little in their treatises to suggest that they seriously considered the place of treaty relations or legal practices beyond Europe as germane to the emerging doctrine of the law of nations. Like Wolff’s, Vattel’s language tends to be highly abstract, and his examples are drawn primarily from dealings among Europeans.72 Beyond his claim that difference of religion has no bearing on legal obligations, Vattel wrote relatively little about how the law of nations might bind Europeans in their dealings with powers outside Europe. The ambiguity of Vattel’s universalism made for diverse ramifications of his theory: he could be cited on behalf of an expansive law of nations that obligated Europeans in their interactions in Asia and the Americas just as within Europe, but he can also be seen as giving voice to invidious distinctions between law-abiding Europeans and Muslims who, though formally included within the law of
nations, he often depicted as knowingly violating its provisions. Perhaps still more important for the longer-term consequences of his thought, however, was Vattel’s conceptualization of the international sphere as a space inhabited by free and equal states conceived as national communities, a depiction that for Vattel represented both a normative ambition and a rough description of the world around him, although it profoundly misrepresented the character of the major European powers of his day. I explore these features of Vattel’s thought in Chapter 3.

In Chapter 4, I argue that the late eighteenth century saw an unusual, perhaps unmatched, flourishing of critical approaches to the question of the scope of the European law of nations and the nature of legal relations between European and non-European states, and that these approaches emerged on the back of Vattel. The period stands out in the history of the law of nations as one of striking openness on the part of Europeans to the possibility of shared legal frameworks and mutual obligations between Christians and non-Christians, Europeans and non-Europeans. Some analysts feared that nations outside Europe would find themselves in a legal vacuum. They saw the law of nations as a discursive resource against injustice and exploitation by Europeans. They cautioned against the moral errors and political costs of a restricted understanding of the legal community. Legal and political thinkers exemplary of these critical approaches—Edmund Burke, the French Orientalist Abraham Hyacinthe Anquetil-Duperron, and the celebrated admiralty court judge William Scott, Lord Stowell—articulated a more inclusive and pluralistic understanding of the global legal order than the view that came to prevail. None was an opponent of imperial rule as such; indeed, it was precisely through imperial structures that they understood the law of nations as often operating. But they envisaged a global legal order, or network of orders, as a constraint on the exercise and abuse of European states’ power. They wrote during the decades framed by the Seven Years’ War and the Napoleonic Wars, a period when European states were constructing imperial constitutions of global reach, and when states as well as other actors such as trading companies and pirates competed to defend their power and interests in the terms of newly extensive legal regimes. It should again be stressed that the thinkers considered here were Europeans speaking to European audiences, often with limited knowledge of the extra-European societies, languages, and legal traditions they discussed. They drew on the ambiguous status of the law of nations as putatively universal despite its heavily European history. But they did so with the aim of chastening European power through legal limits and obligations, including constraints that Europeans should recognize as binding themselves even when they could not presume to use them to bind others.

Chapter 5 takes up later and rather different ramifications of Vattel’s thought in the first half of the nineteenth century, exploring the reception of Vattel’s thought in Britain, whose expanding empire, unchallenged as a global hegemon after the Napoleonic Wars, was a uniquely significant site for the production of international law, as Lauren Benton and Lisa Ford have shown.22 Whereas the law of nations had been understood since the sixteenth century to be intimately (if complexly) connected to a universal law of nature, by the turn of the nineteenth century, self-described positivists were declaring a break from their predecessors’ naturalism and universalism. The European law of nations, it was now said, was a historically particular phenomenon that had arisen in the context of dense interactions among states and their subjects; other areas of the world might have their own laws of nations, but Europeans should not consider their own legal principles binding on them in their interactions with societies in other parts of the world. In this chapter I explore these transformations in international law by tracing the question of the scope of the law of nations, and the linked question of the status of Vattel as an authority on the law of nations, from the period of the French revolutionary wars through the first Opium War. Vattel’s Droit des gens was arguably the most globally significant work of European political thought through the 1830s, and in the changing reception of Vattel we can track the ragged transition from the intellectual world of the eighteenth-century law of nations to that of the professional international lawyers of the later nineteenth century.

From the mid-nineteenth century, as Chapter 6 argues, legal and political thinkers increasingly argued that although international law was exclusively European in origin, their law was destined, thanks to Europe’s superior civilizational status, to be authoritative for all, and Europeans had the right to dictate the terms of legal interaction to backward, barbarous, or savage peoples. The tension between the European and the universal in international law, that is, came to be resolved through a view of global legality as a European order writ large. When in 1874 the Institut de droit international tasked one of its committees to examine whether so-called oriental nations were full participants in what was called “the general community of international law,” it was taken for granted that international
law was European in origin but prospectively authoritative for everyone, and that as non-Europeans reached the standard of civilization they would be admitted to the international community. The nineteenth-century position has tended to go by the name of "positivism," among both its proponents and later historians, and to be contrasted with an earlier natural law universalism. Some claimed that unlike natural lawyers, they were not engaged in a normative project at all. They were simply interested in recording and codifying actual state practice. As Travers Twiss put it, he made "no pretension to discuss any theories of International Ethics, as furnishing rules, by which the intercourse of independent States ought to be guided. He has been content to examine into the existing usages of State-Life, and to illustrate the modifications and improvements which they have undergone from time to time, whereby they have been adjusted to the growing wants of a progressive civilisation." But as the passage indicates, their theories belied their self-description in at least two ways. They were not just recording state practices but selecting the practices they considered worthy as sources of international law, and doing so on the basis of a set of poorly defended cultural and normative assumptions. Moreover, they did have universalist aspirations: they saw the European order they were codifying as the basis for a future international order that would gradually be extended to or imposed on the rest of the world, in large part through colonial conquest. I argue that nineteenth-century international lawyers placed questions of membership in international society at the heart of their theories of international law. The many late nineteenth-century efforts toward codification of international legal standards intensified the era's exclusionary tendencies by encouraging jurists to specify what might otherwise have remained vague and more implicit prejudices. The debate over the boundaries of international law ranged beyond professional lawyers and involved political thinkers such as J. S. Mill, legislators, colonial administrators, and journalists. Dissident voices in this broader public debate insisted European states had extensive legal obligations abroad. Such authors, including the moral philosopher Francis Newman, and the diplomat and Muslim convert Henry E. J. Stanley, claimed that while the increasing legal exclusions of non-Europeans neatly served an exploitative imperialist agenda, they also provoked hostility and resistance and so proved not only unjust but also foolish and impolitic.

Achieving the equality and consistency to which international law and much international political theory aspire remains tremendously difficult in the face of a global political and economic order marked by gross, and increasing, inequalities. Such tensions between global inequality and aspirations toward universality are ones we inherit from centuries of European expansion and from the political and legal thought that emerged alongside that expansion. It is my hope that an investigation of the shifting boundaries of the international, and their justifications, may help to illuminate continuing uses of ideas of international law and human rights to obscure dynamics of domination by the Global North over the Global South. There may be no untainted well from which we can draw, but recovering the perspective of ecumenical strands of the distinctive and unusual period of the late eighteenth century, as well as their occasional heirs in the nineteenth, may provide resources for the critical scrutiny of such dynamics. The history of international law has until the last two decades been a relatively minor enterprise within international law, and largely the province of international lawyers only, but it has become one of the most vibrant areas of legal scholarship and only recently has begun to be mined by political theorists and historians. This book aims to contribute both to the history of political thought and to our thinking about the lines of political, economic, and legal hierarchy and exclusion that have long marked and continue to span the globe.
Notes


4. As Christopher Tomlins has written of the colonial encounter in early America, legalities are “social products” that “supply the conceptual frames that we use to interpret practices and invent legalities for, and of, others.” Tomlins, “Introduction: The Many Legalities of Colonization: A Manifesto of Destiny


17. Relatedly, Koskenniemi has argued that naturalism and positivism should be seen as complementary rather than as oppositional, and that eighteenth-century German lawyers all “oscillated uncertainly between the relative emphasis” they laid on each. Martti Koskenniemi, “Into Positivism: Georg Friedrich von Martens (1756–1832) and Modern International Law,” Constellations 15, no. 2 (2008): 189–207, at 192.

18. Robert Phillimore wrote that although international law is binding among “heathen” states, “unquestionably, however, the obligations of International Law attach with greater precision, distinctness, and accuracy to Christian States in their commerce with each other.” Commentaries upon International Law, 4 vols., 2nd ed. (London: Butterworth, 1871–1874), 124.

19. For a recent argument for the first feature, see Larry Siedentop, Inventing the Individual: The Origins of Western Liberalism (London: Allen Lane, 2014).


24. Richard Tuck, "Alliances with Infidels in the European Imperial Expansion," in *Empire and Modern Political Thought*, ed. Sankar Muthu (Cambridge: Cambridge University Press, 2012), 61–83. Peter Borschberg makes a similar suggestion by showing how the Dutch secured their monopoly over East Asian trade not on the basis of first occupation, as the Portuguese had done, but rather precisely on the basis of treaties with local powers, treaties that Grotius argued the Dutch had a right to compel the Asians to honor. Borschberg is perhaps too magnanimous when he writes that "as a result of his efforts to safeguard the independence of Asian rulers from encroachments by Spain and Portugal, Grotius (perhaps quite inadvertently) lent his support to preparing the legal and commercial ground for almost three and a half centuries of Dutch colonial rule in Southeast Asia." Borschberg, "Hugo Grotius, East India Trade and the King of Johor," *Journal of Southeast Asian Studies* 30 (1999): 225–248, at 248.


34. Devetak, "Historiographical Foundations," 65; Andrew Fitzmaurice, Sovereignty, Property, and Empire 1500–2000 (Cambridge: Cambridge University Press, 2014), 10; Keene, Beyond the Anarchical Society; Grotius, Colonialism and Order in World Politics (Cambridge: Cambridge University Press, 2002).

35. E.g., John Westlake, Chapters on the Principles of International Law (Cambridge: Cambridge University Press, 1894): "The society of states, having European civilisation, or the international society, is the most comprehensive form of society among men... States are its immediate, men its ultimate members" (78); Lassa Oppenheim, International Law (London: Longmans, 1912 [1905]), 3–11; Wilhelm Grewe, The Epochs of International Law [Epochen der Völkerrechtsgeschichte], trans. Michael Byers (New York: de Gruyter, 2000 [1984]).


44. Anghie, Imperialism, Sovereignty, 193; Yasutaka Onuma, "When was the Law of International Society Born? An Inquiry of the History of International


48. Koskenniemi has made the provocative argument that the doctrinal international law that developed beginning with the “men of 1873” was in important ways quite disconnected from the law of nations theories of the previous century. Martti Koskenniemi, “International Law and raison d’État: Re-thinking the Prehistory of International Law,” in Kingsbury and Straumann, *Roman Foundations*, 297–339, at 297. But nineteenth-century writers consistently cited Grotius, Pufendorf, Wolff, Vattel, and the broader *ius gentium* tradition as their intellectual forebears.


50. Koskenniemi has gone so far as to say that “almost every jurist writing in the last half of the 19th century, and certainly most members of the Institut [de droit international], were overt or covert natural lawyers.” Martti Koskenniemi, “Race, Hierarchy and International Law: Lorimer’s Legal Science,” *European Journal of International Law* 21 (2010): 415–429, at 416.


and Richard Whatmore (Indianapolis, IN: Liberty Fund, 2008), citing book, chapter, and section number.


62. Cobbett’s Complete Collection of State Trials and Proceedings for High Treason and Other Crimes, vol. 10 (London: Hansard, 181), 392. The lawyer appealed to the authority of Grotius and argued that “the Indians have a right to trade here, and we there, and this is a right natural and human, which the Christian faith does not alter.”


67. See A Complete Collection of All the Marine Treaties Subsisting between Great-Britain and France, Spain, Portugal, Austria, Russia, &c.: Commencing in the Year 1546, and Including the Definitive Treaty of 1755 (London: J. Millan, 1779), lv.


72. In addition to Wolff and Vattel, see, e.g., Richard Zouch[es], *Jus et judicium fecealis, sive, juris inter gentes* [An exposition of feacial law and procedure, or of law between nations, and questions concerning the same], trans. J. L. Briely, vol. 2 (Washington, DC: Carnegie Institution, 1911), pt. 1, §1: "That which natural reason has established among all men is respected by all alike, and is called the Law of Nations, as being a law which all nations recognize"; it includes both "the common element in the law which the peoples of single nations use among themselves" and the law observed between nations, or "jus inter gentes." See also J. G. Heineccius, *A Methodical System of Universal Law; or, The Laws of Nature and Nations*, trans. George Turnbull, ed. Thomas Ahnert and Peter Schröder (Indianapolis, IN: Liberty Fund, 2008 [1741]), which asserts a universal law of nations based on the law of nature but says almost nothing about contemporary non-European nations, aside from a brief mention of systems of barter among "barbarous countries" in "Asia, Africa, and America" (bk. 1, ch. 13, §337).


**Two**

Oriental Despotism and the Ottoman Empire


The Rise of Positivism?

The turn of the nineteenth century is widely seen in histories of international law as a watershed moment, when naturalism gave way to positivism: when theories of the law of nations as based on the law of nature were rejected in favor of the view that the only relevant source for international law was state practice. Many nineteenth-century writers on the law of nations took such a view of the moment, as have subsequent historians from divergent perspectives, from Alexakrowicz in the 1950s and 1960s to Stephen Neff in 2014. The decades around the turn of the nineteenth century clearly represent a key turning point in a number of respects, including the gradual adoption of the very term “international,” coined by Bentham in the 1780s. Martti Koskenniemi has gone so far as to argue that there is no continuity between eighteenth-century law of nations discourse and the discipline of international law that emerged in the nineteenth century. Despite the general sense that the period represents a key transitional moment, the first half of the century has been relatively neglected in recent historiography, which has focused on the professionalization of international law in the latter part of the century. Moreover, too great an emphasis on the transformation of international law from naturalism to positivism obscures other developments that are closely linked with but conceptually distinct from that shift and from one another, namely, the rise of historicism and the entrenchment of Eurocentrism in accounts of the law of nations.

In this chapter I explore these transformations in international law by tracing the question of the scope of the law of nations, and the linked question of the status of Vattel as an authority on the law of nations, from the period of the French revolutionary wars through the first Opium War of 1839–1842. Vattel’s *Droit des gens* was arguably the most globally significant work of European political thought through the 1830s, and in the changing reception of Vattel we can track the ragged transition from the intellectual world of the eighteenth-century law of nations to that of the professional international lawyers of the later nineteenth century. I begin with a brief consideration of the influential treaty collector and professor of the law of nature and nations G. F. von Martens, whose efforts to demarcate a distinctly European positive law of nations were shadowed by the recognition that a substantial body of positive law in the form of treaties linked European states with counterparts in Asia and North Africa, and could be differentiated from the “European” law he claimed to elucidate only through vague claims about a shared European culture. Distinctively European practices were likewise at issue in the historicist turn in English-language writings on the law of nations signaled by Robert Ward’s *1795 Enquiry into the Foundation and History of the Law of Nations* and James Mackintosh’s *1795 Discourse on the Law of Nations*. What we might see as the incipient historicism of Vattel’s approach—which relied heavily on historical examples but drew on them as disarticulated precedents or instances of given principles rather than seeing the development of the law of nations as a historical phenomenon—gave way, with these works, to a new evolutionary account of the law of nations. Vattel’s text continued to serve as the primary authority for legal principles, particularly in Britain, where it was made newly relevant for the dilemmas thrown up by imperial expansion thanks to a new edition published by Joseph Chitty in 1834 that supplemented Vattel’s original text with principles and precedents from British admiralty law and imperial experience. Yet, as I will argue, a universalist reading of Vattel as applying to states outside Europe proved so problematic for the dominant prowar position in the British debates leading to the first Opium War that this moment marked the end of his position as the primary authority. The text that most immediately superseded it, *Elements of International Law* by the American Henry Wheaton, first published in 1836, was insistent, and increasingly so in later editions, that the law of nations applied exclusively to European states until others were explicitly admitted to the international community. When public figures from states outside Europe, such as the Algerian Hamdan Khodja and the Chinese official Lin Zexu, drew on translations of relevant passages from Vattel to justify their positions in conflicts with European imperial states in the 1830s, they were appealing to a text whose authority
in Europe was being supplanted at that very moment, arguably in part precisely because its universal scope made it so apt for their critical purposes.\(^7\)

Vattel's *Droit des gens* quickly became the authoritative source of legal principles for interstate relations throughout Europe, in the newly independent United States, and in Spanish America and the many new republics that declared independence there in the 1820s and 1830s; he was the "current oracle of writers and politicians," as Anquetil-Duperron put it in 1798.\(^8\)

At the same time, his name was becoming a byword for useless and even dangerous pieties about law. Kant's famous description in *Toward Perpetual Peace* of Grotius, Pufendorf, and Vattel as "sorry comforters," writers whose precepts are trotted out in justification of offensive wars but have never been known to restrain state violence, was preceded by similar dismissals by Voltaire and others.\(^9\) Bentham similarly derided Vattel as "old-womanish and tautological": "[His propositions] come to this: Law is nature—nature is law. He builds upon a cloud." At the same time, he saw Vattel as the authority to be displaced, writing, "Vattels [sic] the most accredited work on this subject—it's [sic] inadequacy to this purpose."\(^10\)

A satirical verse similarly mocking the futility of the naturalist tradition, first published in the ultra-Tory weekly *The Anti-Jacobin* in 1798, proved irresistible to later British commentators, and can be found echoing across the nineteenth century, quoted by figures from Palmerston to Thomas De Quincey and many others.\(^11\) While contributions to the newspaper, founded by the young M. P. George Canning and edited by the satirist William Gifford, were anonymous and often multiauthored, many of its most celebrated verses were by Canning, whose own copy attributed this poem to himself, Gifford, and John Hookham Frere. The original verse ridiculed the French revolutionary government's consul to Algiers, who, it said, was threatened with execution by the day after he tried to foment revolution among the "Moorish" by translating Paine's *Rights of Man* into "language Mauritanic." The verse initially placed the action in Tunis, then self-mockingly calling attention to such ignorance about, and indifference to, extra-European societies. It also sardonically equated the French revolutionary regime and North Africans as "Pagans" (*Every friend of Humanity will join with us, in expressing a candid and benevolent hope, that this business may not tend to kindle the flames of War between these two Unchristian Powers") and expressed the "wish that the head of [the consul] should be reserved for his own Guillotine." In response to the day's threat of decapitation,

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The Consul quoted Wicquefort, And Pufendorf and Grotius; And proved from Vattel, Exceedingly well, Such a deed would be quite atrocious.\(^12\)

Some uses of this verse, which became a ubiquitous shorthand, a kind of Victorian meme, indicate later nineteenth-century legal writers' understanding of themselves as positivists who restricted themselves to reporting state practice, in contrast to an earlier, overly ambitious prescriptive natural law tradition.\(^13\) As *Chambers's Encyclopaedia* summarized what had become the conventional wisdom by 1870, "Like all his predecessors in the same field, V([attel]]) based his whole system on an imaginary law of nature, and it would be easy to enumerate a large number of false conclusions to which he came in the absence of light thrown on the law of nations by practice, and by the principle of utility in our time, so generally adopted as the test of international morality."

That relatively few later nineteenth-century international lawyers who considered themselves defenders of naturalism could look to Vattel as a precursor, the passing of whose authority marked a great intellectual loss. One such jurist, James Lorimer, wrote, "As Vattel (1714—67) was the last of the philosophical, Moser (1701—86) appears to have been the first of the empirical jurists." He lamented that Vattel failed to save "the science from the rising tide of empiricism," concluding, "It is only when the necessary law is lost sight of in its concrete manifestations, that empiricism, utilitarianism, and the like, degenerate into mere objectless groping amongst lifeless facts and life-destroying fictions." And yet, as we will see in Chapter 6, self-understood naturalists of the later nineteenth century shared with their positivist colleagues a conviction that the law of nations was an exclusively European possession.\(^14\)

The rise of positivism, historicism, and Eurocentrism beginning around the turn of the nineteenth century were linked phenomena, and an increasingly stark positivism tracked a progressively obdurate Eurocentrism. The early historicist and positivist G. F. von Martens, who, like Vattel, acknowledged a natural basis for the law of nations even as he quickly dispensed with it for practical purposes, was also more equivocal about the distinctiveness of Europe and recognized the awkwardness of the line he was trying to draw. The later outright rejection of naturalism, in contrast, was accompanied by an uncompromising Eurocentrism, as Chapter 6 will discuss. But
these three tendencies could also pull in contrary directions. Ward, a thoroughgoing historicist interested in the evolution of distinct law of nations communities, had none of the scientific aspirations of the positivist turn, and his insistence that Europeans had no right to impose their own parochial moral schema on others contrasts with the views of most of the historicist and positivist thinkers who followed. Bentham was profoundly idiosyncratic, but his thought also exercised an influence on the positivist turn, particularly by way of his disciple John Austin. Bentham's obsession with reformist codification contrasts with the direction taken by mainstream international law positivists after the mid-century, as they gave up on utopian schemes of legal reform and stressed their own deference to state practice. Although Bentham was an unspiring critic of natural law thinking, his expansive notion of the international community, his overtures to non-European collaborators, and his critique of European imperial conduct contrasted sharply with the later positivists' European triumphalism. This chapter, then, stresses the ways in which positivist, historicist, and Eurocentric strands of international legal thought could diverge even as a consensus came to be built by mid-century that international law was a body of positive law historically European and presumptively authoritative for the world, given the superiority of European civilization.

**Martens's Positive Law of Nations**

The Göttingen law professor G. F. von Martens took it to be his task to "prov[e] the existence of the positive law of nations" and to establish its content, in his *Précis du droit des gens de l'Europe* and by way of his influential collections of treaties. For Martens, the law of nature was inadequate as a source of rules for the "frequent commerce" that characterized European interactions: it was too rigorous and abstract, and its insistence on the equality of rights was unrealistic. He celebrated Vattel as one of a handful of modern authors who had paid attention to the positive law of nations, as opposed to the universal. Martens opened his account of states' rights and duties with a perfectly conventional reference to natural law as the universal and necessary law that governs all nations, "even against their will," and he argued, again in a familiar vein, that because the law of nature was too indeterminate to provide sufficient guidance for states in frequent interaction, they were obliged to generate more specific rules, through conventions and custom. As Koskenniemi has argued with Martens in mind, "Far from [their] being opposed to each other," the relationship between naturalism and positivism "is better seen as that between framework and routine. If natural law provides an overall image of the world, positivism labours with its details." Martens's positivism thus did not entail a rejection of natural law, although his treatment of the natural foundations of the law of nations was perfunctory, and he saw the "science" of the positive law of nations as having been properly launched only when it was "separat[ed] entirely from the universal law of nations," something Vattel had not done.

What is more striking about Martens's account than its departure from naturalism, and what distinguishes it more markedly from Vattel's, is his insistence on restricting the scope of the law of nations to Europe. The authors Martens cited as contributing to the positive "science," above all, Johan Jacob Moser, addressed a specifically European law of nations. He recognized the awkwardness of the category, noting that "I thought it necessary to confine my title to the *nations of Europe*: although, in Europe, the Turks have, in many respects, rejected the positive law of nations of which I here treat; and though, out of Europe, the United States of America have uniformly adopted it. It is to be understood *à potiori*, and it appears preferable to that of, law of *civilized nations*, which is too vague." He also noted that the "connection between the Ottoman Empire and the Christian states of Europe is much less general, and more feeble in many respects, than that which subsists between the greatest part of the Christian states." And yet Martens routinely included the Ottoman state among the European powers when enumerating them, and discussed its practices as he did those of other (European) states. And although in the *Précis* he restricted the positive law of nations to the "society of European nations," his treaty collections included treaties with powers beyond Europe. Given such ambiguities about the scope of the law of nations, Martens did not simply assume that it applied only to Europe but rather felt it necessary to argue for the existence of a European society of states with its own law of nations. He acknowledged that "all the nations of Europe" had never agreed by treaty upon a common positive law of nations and possibly never would. The European society was like a people before they form themselves into a republic, but while he predicted that they would "never" take that final step, still, the connections among Christian European states were close and robust in a way that their connections with others were not. Given the absence of any
record of uniquely European positive law, and an extensive body of treaties reaching outside Europe, Martens leaned on a notion of European culture to substantiate his account of a "positive" European law of nations. He cited tacit consent, shared history and custom, and patterns of treaty making to assert that the European powers could be seen to have accepted a shared set of rights and obligations that constituted the positive law of nations. Thus, from the start, positivism was, as it were, not strictly positivist—it did not restrict itself to the existing record of written agreements and state practice—but introduced principles of selection according to which some treaties and some diplomatic practices, namely, those between European and extra-European states, were not relevant sources of the law of nations.

The Advent of Historicism: Ward, Mackintosh, Wheaton

Roughly simultaneously with the beginning of explicit calls for a science of the positive law of nations such as we find in Martens was the flourishing of a new genre, the history of the law of nations. Robert Ward's *Enquiry into the Foundation and History of the Law of Nations in Europe from the time of the Greeks and Romans to the Age of Grotius* (1795) is significant as the first history of the subject written in English, with only a few recent predecessors in German, most notably D. H. L. von Ompteda's *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (1785). Ward himself was conscious of the novelty of his project, writing that while the historical facts he adduced were familiar—for the "same collection of facts" had been used to tell a variety of histories, "of man . . . of the progress of society . . . the effects of climate . . . laws in general"—they had "never yet" been used to narrate "a History of the Law of Nations." Ward's pluralism and his consciousness of the provincialism of European law sharply distinguish his historical narrative from the developmental historicism based on an account of progressive civilization that, as we will see, characterized James Mackintosh's work, and that would come to dominate nineteenth-century international law. Ward insisted on the validity of a plurality of legal systems around the globe, though his pluralism was compromised by his belief in the unique truth of Christianity, which he saw as the basis of the European law of nations. (Ward's pluralism may, however, bear comparison to J. G. Herder's, which also was grounded in Christian belief and a faith in providence: such thinkers can accept a diversity of moral beliefs among cultures as an aspect of a benevolent divine plan.)

Although a young and untested lawyer when he wrote the *Enquiry*, Ward had a cosmopolitan upbringing. He was born in 1765 in London to an English merchant based in Gibraltar and his wife, a native of Spain from a Genoese Jewish family, and he lived in Spain for his first eight years. After studying at Oxford and then enrolling at Lincoln's Inn, he left for France for his health around 1788 and remained there until the beginning of the Revolution. His nineteenth-century biographer, quoting Ward, recounts his arrest at the hands of the revolutionary regime when he was apparently mistaken for another Ward and "ordered without trial to Paris, to be guillotined," only to be released when the "real traitor" was found. But he was "banished from the republic merely for my name's sake," returning to London by the last packet boat allowed to sail for England in 1790. In 1794, passing by a London watchmaker's shop with a revolutionary placard in the window, Ward entered the shop and engaged the watchmaker in argument against the "horrors" of revolution; the man, ultimately convinced, revealed to Ward a revolutionary plot and persuaded Ward to accompany him to the authorities, who took them directly to Prime Minister William Pitt. Pitt took an interest in the young lawyer and ultimately recommended him for a pocket borough seat in the House of Commons, which he took up in 1802. Pitt's circle included the attorney general Lord Eldon and his brother William Scott, whom we encountered in Chapter 4, who apparently suggested that Ward write a history of the law of nations. Perhaps not surprisingly, the history that Ward told would have certain clear affinities with Scott's judicial opinions, above all in the position that Europeans had no right to assume that the finer points of their international jurisprudence obliged states that had not consented to such principles or participated in their formulation.

The only extensive critical study of Ward's thought gives prominence to his counterrevolutionary views, describing him as a spokesman for an "Ultra-Tory orientation" and as a representative of modern conservative ideology at its inception. Some critiques of the French Revolution, as we have seen already in the *Anti-Jacobin* verse and in Martens, took the form of skepticism about the Revolution's universalist aspirations or pretensions, whether these were seen as impotent or alternatively as a screen for old-fashioned power politics. When Pitt asked why he had entered the watchmaker's shop, Ward is said to have responded, "I, sir . . . am not long returned
from France, and have there seen in practice what sounds so fine in theory.” His biographer later surmised that his “late residence in France, in which he was so near being the victim of a harsh, if not a wrong, construction of international law,” may have sharpened his interest in that law.27 But while Ward was indeed a critic of the French Revolution when he wrote the Enquiry, and while he criticized what he saw as the misguided universalism of natural-law accounts of the law of nations, the arguments he developed in the Enquiry cannot, I would argue, be reduced to or particularly well explained by either the idea of an incipient conservative ideology or his opposition to the French Revolution. His few asides critical of the Revolution are moderate, and Ward did not portray revolutionary France as a mortal threat to civilization or the European order; he blamed French aggression as much on geopolitical as ideological motivations—namely, the desire to extend French territory to the Rhine.28 He was committed to the legitimacy of plural moral judgments. Such a commitment to moral pluralism is certainly compatible with strands of conservatism and defenses of traditional social orders, and Ward’s thought did develop in a conservative direction in later years. Still, his pluralism as expressed in the Enquiry is neither distinctly conservative nor particularly counterrevolutionary. And given Ward’s departure from Burke’s universalist account of the law of nations, he cannot, I would argue, be marshaled into a “Burkean” counterrevolutionary tradition.

Ward’s central argument in the Enquiry was that the law of nations had to be understood historically, because normative diversity was so profound both within and among communities, and normative commitments so thoroughly shaped by custom and education, that no principles could be said to oblige human beings universally. For “those who take their ideas of universal morality, solely from their own,” he wrote acerbically, such a historical investigation might seem unnecessary.29 Those of a more self-critical and less presumptuous frame of mind had to acknowledge that humanity’s grasp of the universal principles of natural law could only come about through education and habit, and therefore that diverse understandings of those principles were intrinsic to the human condition.30

The implication of this pluralism for legal obligations among states was that “we expected too much when we contended for the universality of the duties laid down in the Codes of the Law of Nations.” He proposed instead that laws that oblige nations in their interactions must arise among “different divisions or sets of nations” connected by “particular religions, moral systems, and local institutions.” This was a theory that had to be “proved from history, if proved at all.” He wrote that he had decided to test his theory from the history of Europe, “as that in which we are most interested”; not, at least here, because it was normatively superior to others. Ward would go on to argue for the truth of Christian principles as well as for the superiority of many principles of European law of nations over those of various predictable others such as “Turks” and “Tartars,” though he criticized both Europe’s principle of balance of power and its obsession with commerce as being of mixed value. The distinctively European institution of the balance of power led European states to “join cheerfully in the most dreadful conflicts to which the lot of Humanity is liable,” though precisely this tendency to war had also necessitated Europe’s relative “polish and mildness.”31

Ward wrote of being struck by the conflict between the universal language of the law of nature and the historical fact that what was called “the system of the Law of Nations was neither more nor less than a particular, detailed, and ramified system of morals”; in other words, that “what is commonly called the Law of Nations, falls very far short of universality.” He argued that general terms such as “the Law of Nations, or the whole World,” should not be taken “in the extensive sense which is implied by those terms,” but rather should be understood to mean “nothing more, than the law of the European Nations, or the European World.” Importantly, the particularism of the European law of nations meant, for Ward, that even as Europeans should understand themselves to be morally bound by its precepts, they had no “right to act toward all other people as if they had broken a law, to which they had never submitted, which they had never understood, or of which they had probably never heard.” If others followed precepts that threatened European “happiness and just rights,” they might be treated as enemies, but never as if they were “punishable for breaches of those laws.” Europeans were not justified in appealing to their own legal principles as if they were universally obligatory.32

Ward affiliated himself with Vattel, and he can be seen as a dualist in the tradition of Vattel in the sense that he accepted reason and natural law as the distant bases for the law of nations, but found them inadequate for the purposes of establishing external legal duties.33 At the same time, his pluralism constitutes a substantial departure from the presumed universality of Vattel’s law of nations. Ward’s far greater stress on cultural and normative diversity evidently owes a great deal to the example of Montesquieu,
who had likewise argued that different peoples have different laws of nations. He quoted Montesquieu as holding that the law of nations depends on the principle that different nations ought to do as much good in peace and as little harm in war as possible. While such a principle might be fine as a starting point, Ward wrote, when we require a more “detailed scheme of duties, it is obvious that much more is necessary to render it definite,” and the fundamental question then becomes “who is to judge?” It is here, in his insistence on the question of judgment, and on the inappropriateness of any peoples’ presumption to judge on behalf of others, that the distinctiveness of his argument in relation to both Vattel and later civilizational theories lies. Vattel, for his part, seems to have been indifferent to the question of diversity of judgment. The universality of his law of nations is taken for granted; he begins mostly with European principles and practices, looks for confirmation in the practices of others, and maintains that all are obligated by the same principles in their interactions. This universality could provide a useful basis for criticism of European violence and abuse of power outside Europe, as we have seen with Burke. But it could also serve as a means by which to foist parochial normative judgments on others; it is this latter facet of Vattel’s thought and the tradition for which Ward thought he stood that Ward’s stress on normative diversity and judgment enabled him to criticize. He criticized the use of “civilization” as a criterion used by Europeans to coerce others to conform to parochial European precepts: “It is fair to suppose that uncivilized, as well as civilized nations believe the religious notions which inspire them, to be the dictates of their nature; although civilized reason should demonstrate, ever so much to its own satisfaction, that uncivilized minds are wrong in their ideas, yet unless the latter agree that they are wrong, nothing satisfactory can be determined.” Not only did those who understood themselves as civilized have no legal grounds for requiring the “uncivilized” to abide by their rules, but there was great diversity of moral and legal principles among so-called civilized nations and even among different sects of the same religion.34

Ward recognized a history of interaction among disparate societies alongside their normative differences, and he saw treaties as a means of drawing together societies that otherwise fell into different communities or “classes” of the law of nations. The “horrid enmity” between Christian and Muslim nations was generated on both sides by prejudice due to unfamiliarity, as well as by more active ideological manipulation within Europe, where the popes had sought to gain power over certain monarchs by castigating their alliances with the Ottoman Empire. He saw the “desolating wars of the Crusades” as an illegitimate Christian assault on territory “fairly possessed according to the maxims of the world,” as indicated by long-standing Christian acceptance of “Infidel” possession.35 He critically canvassed the history of the European prohibition on alliances with “infidels,” showing it to be ill founded from the outset and always constricted by a more flexible practice of treaty and alliance across religious divisions, as well as obviously obsolete by Ward’s own time.36 “Treaties once begun,” the two sides developed regular principles of interaction and came to consider each other “legitimate States,” an example of “the manner in which Convention came to change and to amend the errors of the Law of Nations.” He claimed that just as the Russians and Poles used to stand “upon the verge” of the European legal community, so now did the Ottoman Empire, whose first permanent ambassador to Britain, as we saw in Chapter 2, was fascinating London society at just the moment of Ward’s writing.37

Finally, Ward singled out for criticism the presumption of Vattel’s claim that nations have a duty to cultivate commerce: he objected that if commerce’s utility is the source of the obligation, “its universality must entirely depend upon this, that all mankind consider commerce in the same light with Vattel, which is known not to be the case.” Ward’s pluralism led him, that is, to reject the imposition by philosophical fiat of a particular European law of nations and the values in which it was embedded onto peoples that had not consented to them. At the same time, he was interested in the historical processes by which nations of different international legal communities could come to share principles and respect one another’s legal standing. Although Ward’s book was well received, and he had a modest political career and some popularity in later years as a novelist, the Enquiry, with its distinctively pluralist historicism, was not influential.38 Its significance lies instead, I would suggest, in its suggestive articulation of a path not taken: a pluralism critically oriented against European pretensions to impose their own principles on others and to constitute themselves arbiters of acceptable international conduct for the whole world.

A nearly contemporary work, James Mackintosh’s brief Discourse on the Study of the Law of Nature and Nations, published in 1799 in the course of his own counterrevolutionary turn, was more representative of the developments that were to take place in early nineteenth-century thought about the law of nations. Mackintosh is best remembered for his eloquent
expression of his early support for the French Revolution in his *Vindiciae Gallicae: A Defense of the French Revolution and Its English Admires of 1791* (a moderate, liberal response to Burke's *Reflections* admired by those uncomfortable with the democratic radicalism of Paine's *Rights of Man*), and his subsequent repudiation of that support and newfound admiration for Burke by 1796. His published *Discourse* was essentially the text of the first of a series of lectures he delivered at Lincoln's Inn in early 1799 that were intended as a public declaration of his change of view: while the published work treats what he calls "that part of morality, which regulates the intercourse of states," the course of lectures, the rest of which remained unpublished, ranged more broadly across jurisprudence. He served as judge in the British court at Bombay, and also as a judge on the new vice-admiralty court there, adjudicating prize cases such as those that William Scott decided at the admiralty court in London; taught law at the East India Company's college at Haileybury (what appears to have been a light task he took on for the salary, while he continued to write); and served in the House of Commons from 1815 until his death in 1832, as a major Whig and defender of reform causes including the abolition of slavery, the abolition of capital punishment, Catholic emancipation, and parliamentary reform. He also supported Latin American independence. Mackintosh's significance for our story lies in his turn to historicism in the service of an argument for the European law of nations as having uniquely universal significance. While Mackintosh's *Discourse* bears some resemblance to Ward's argument in its turn to history and its interest in the "positive" facet of the law of nations, alongside a basic commitment to the law of nature as the ultimate foundation of the law of nations, its preoccupations differ in crucial ways.

Mackintosh's historicism was progressive, and his preference for Christianity was based not simply on religious principle but on an elision of "Christendom" with civilization. He utterly lacked Ward's skepticism toward self-serving appeals to the idea of civilization. For Ward, the history of any collection of polities would provide evidence for its positive law of nations; he presented his choice of Europe as due to local partiality rather than to its universal significance. Mackintosh, in contrast, found the positivist refinement of the law of nations a distinctively European achievement: what "we now call the law of nations has, in many of its parts, acquired among our European nations much of the precision and certainty of positive law." Mackintosh presented the law of nations in a "gradation" running from the most basic, "necessary, to any tolerable intercourse between nations," "some traces" of which can be "discovered even among the most barbarous tribes"; to a second class of principles more advantageous and more advanced, which might be found among "the Asiatic empires" and "the ancient republics"; to the most advanced "law of nations, as it is now acknowledged in Christendom." Mackintosh's essay, although it was reprinted as a preface in a number of later French and Spanish editions of Vattel's *Droit des gens*, was remarkably dismissive of him as a legal authority, and his criticisms of Vattel's legal thought seem to be tied, in a way that is not true for Ward, to a rejection of Vattel's republican politics. To his original description of Vattel as "ingenious, clear, elegant, and useful," Mackintosh added a footnote the following year, noting, "I was unwilling to have expressed more strongly or confidently my disapprobation of some parts of Vattel.... His politics are fundamentally erroneous; his declamations are often insipid and impertinent; and he has fallen into great mistakes in important practical discussions of public law" and "adopted some doubtful and dangerous principles."

Mackintosh's judgment of Vattel was cited approvingly by the American legal writer and diplomat Henry Wheaton, who first undertook a history of international law—using the new Benthamite term—in a speech in 1820, "History of the Science of Public or International Law." Wheaton drew on this account in his *Elements of International Law*, the book that by the 1840s would replace Vattel as the standard reference work. His later invocation of another judgment by Mackintosh—"Vattel, a diffuse, unscientific, but clear and liberal writer, whose work still maintains its place as the most convenient abridgment of a part of knowledge which calls for the skill of a new builder"—seems to herald the advent of his own treatise. Wheaton's *Elements*, first published in 1836 and then in numerous subsequent editions in English, French, and Spanish, shared Mackintosh's progressive account of the law of nations as an element of the moral and cultural progress represented by post-Reformation Europe.

So entirely distinguished is the international law of Christendom, from that which prevails among the other classes of nations which people the globe, or between those other nations and Christendom itself, that it may with truth be asserted, that there is no law of nations universally binding upon the whole human race; or, to speak more properly, no other than that of reciprocity—of amicable or vindictive retaliation, as the particular
case may require the application of either. There is no universal and immutable law of nations, which all mankind, in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, recognise in theory or in practice, profess to obey, or in fact obey.

Wheaton held that the “science of international jurisprudence” was, like the sciences of morality and government, “entirely of modern structure.” the product of a now racialized European civilization that shared “Teutonic origin and ancestry” and Christianity along with the legacies of Roman law, feudalism, and chivalry. He distinguished “civilized nations” of Western Europe from the “Eastern Empire, [where] the Mohammedan conquerors remained separate from the vanquished race,” relying solely on the “Koran [as] their all-sufficient institute of ethical and political science.”

Wheaton took for granted the utter separation of European developments from those of the rest of the globe in a way that Martens had not done, for all his sense of the distinctiveness of the European law of nations. Later, in a section of his History of the Law of Nations (1845) titled “Relations of the Ottoman Empire with the other European States,” Wheaton suggested not simply that the European law of nations was the product of a discrete European history, but indeed that it was precisely in distinction from the Muslim world that this law of nations was formed and identified.

Wheaton also remained preoccupied by the idea of the Ottomans’ racial and religious aloofness. In describing the heterogeneity of the Ottoman Empire in the History, Wheaton quoted a passage from Burke’s “Speech on Conciliation with America” that stressed differences in the structures of government in various parts of the Ottoman Empire. But where Burke was making a point about the role of sheer distance in weakening government over extended territories, and likening the Ottoman, Spanish, and British Empires as all subject to this universal experience (“In large bodies, the circulation of power must be less vigorous at the extremities. Nature has said it”), Wheaton misleadingly cut Burke’s reference to distance and used the passage to suggest that the Ottoman Empire was, by implicit contrast with European states, not “completely blended into one nation” but rather riven by “indelible distinctions of race and religion,” and for that reason, among others, alien to the European community of nation-states.

In his 1820 history, Wheaton similarly cited a passage from William Scott but interpreted it in a way that departed from Scott’s own meaning and supported a more triumphalist reading of European civilization. Scott had written, as we saw in Chapter 4, that a “great part of the law of nations stands upon the usage and practice of nations. It is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent.” Recall that Scott was arguing that Europeans were obliged to suspend some of the details of their interstate legal principles when dealing with North African states that had not consented to them. On Wheaton’s gloss, Scott’s passage supported the view that “the customs which regulate the intercourse between barbarous communities, are much wider deviations from that law which is written on the hearts of men, (as we civilized nations read its precepts,) than the voluntary or conventional law of civilized nations has shown even in the most unfortunate periods of European history.” Wheaton had asserted, in something of the spirit of Scott and Ward, that European precepts were not binding on those to whom they were entirely foreign:

The public law of Europe is no more obligatory upon the Asiatic and African nations, than the municipal code of any one state of the world is applicable to another; and it would be as absurd to apply it to them, as it was to punish a Hindu bramin for violating a law enacted on this side of the Cape of Good Hope, by a foreign legislature, and in an unknown language.

He did not inquire, however, as Burke and Scott had done, into Europeans’ own obligations to abide by the law of nations in their conduct beyond Europe, and the suggestion of his generally enthusiastic account of European commerce and colonization was that little criticism on this score was necessary. As with Mackintosh, the implication of Wheaton’s progressive history, with Europe playing a privileged role as the sole source of the science of international jurisprudence, was that the law of nations was historically unique to Europe but had a claim in the future to general authority on the grounds of its basis in superior civilization.

The Rise of Positivism?

European Imperial Expansion and Vattel’s Global Reception

Meanwhile, Vattel was briefly given renewed life as an important authority for an increasingly hegemonic Britain in Joseph Chitty’s English edition of 1834, which Chitty greatly expanded with commentary referring to British
colonial law and citations from admiralty, prize, and other courts, adapting Vattel for an imperial state. Vattel was routinely cited in support of Britain’s right to settle New Zealand in mid-nineteenth-century debates, as when Lord John Russell argued in the House, “You must say that New Zealand shall be treated as inhabited by a civilized people...[or] you must apply the principle of Vattel, who alleged that savages could only hold the land they occupied, and beyond that they should have no favour whatever.” Chitty’s heavily amended text is typical of nineteenth-century editions of Vattel published in Europe and Latin America, such as Andrés Bello’s Principios de Derecho de Gentes (Santiago de Chile, 1832), and the Portuguese philosopher and diplomat Silvéstre Pinheiro Ferreira’s Droit des gens, revue et corrigée avec quelques remarques de l’éditeur (Paris, 1838), whose title, like that of the 1863 French edition by Paul Pradier-Fodéré (in which Vattel’s text was “augmented” with a new translation of Mackintosh’s Discourse and “complétée par l’exposition des doctrines des publicists contemporains mise au courant des progrès du droit public moderne”), announces the editor’s extensive interventions. Like Chitty, Pinheiro Ferreira and Pradier-Fodéré larded their editions with extensive commentary, drawing heavily on Martens, Johann Ludwig Klüber, and Wheaton to bring Vattel “up to date.” Pradier-Fodéré’s revision included a lengthy discussion of the membership of the international community (in comments on book 1, chapter 1 that dwarf the original text), a rebuttal of Vattel’s defense of China’s right to restrict commerce, and a celebration of the expansion of the French Empire: “In less than fifty years, France has recovered the rank that the carelessness of governments or the misfortune of the times had taken from her.” In these editions, Vattel’s text sometimes seems to serve as little more than scaffolding for nineteenth-century commentary that departs considerably from his arguments.

Chitty’s edition was well timed to contribute to British debates leading up to the first Opium War, in which Vattel’s text was a ubiquitous point of reference, “constantly quoted by advocates of war,” as one of their critics noted, and invoked likewise on the antiwar side. The key questions around which Vattel was invoked were whether China was justified in prohibiting the opium trade; whether China had violated the law of nations in confiscating and destroying millions of pounds of opium in 1839, and in detaining the British merchants of Canton in order to force British traders to hand over the opium on their ships off the Canton coast; and whether Britain was justified in demanding compensation for the destroyed opium and, ultimately, in going to war to exact repayment and to force China to permit the opium trade. For those who supported the use of military force to compel China to allow the opium trade, Vattel’s arguments about commerce were inconvenient because Vattel so categorically supported every state’s right to regulate commerce in whatever way it deemed to be in the best interests of its people. Some prowar authors quoted Vattel, straining his meaning to claim that nations are obliged to engage in commerce and to suggest that China’s conduct had implied a tacit agreement to “carry on trade with us on equitable principles.” But others, recognizing that Vattel contravened their position, bit the bullet and argued for excluding China from the community protected by the law of nations:

It is laid down by all writers on public law, that it depends wholly on the will of a nation to carry on commerce with another, or not to carry it on, and to regulate the manner in which it shall be carried on (Vattel, book i.5 [i.e., chapter] 8). But we incline to think that this rule must be interpreted as applying only to such commercial states as recognize the general principles of public or international law. If a state possessed of a rich and extensive territory, and abounding with products suited for the use and accommodation of the people of other countries, insulates itself by its institutions, and adopts a system of policy that is plainly inconsistent with the interests of every other nation, it appears to us that such nation may be justly compelled to adopt a course of policy more consistent with the general well-being of mankind.

Indeed, the pressure brought to bear on the prowar position by a universalist application of Vattel’s principles might be seen as a contributing factor in the movement toward the exclusion of China from the “family of nations,” as well as in the displacement of a universalist Vattel as an authority.

Such a development can be seen in not only the British but also the American response to the war. Former president John Quincy Adams, in the course of his forceful defense of the war (which was unusual at that moment in relation to American public sentiment generally in favor of the Chinese position), felt the need to reckon with Vattel’s unqualified defense of a nation’s right to order its commercial policy as it sees fit. Adams, by then a congressman, argued first that an unrestricted such right contradicted Vattel’s own principle that nations have a general moral duty to engage in commerce, and second that in any case, the Chinese followed a “churlish and
unsocial system" that contravened the principle of equality among nations that was the cornerstone of the European law of nations. Giving a thumbnail sketch of the history of the law of nations, Adams proposed that there is a Law of Nations between Christian communities, which prevails between the Europeans and their descendants throughout the globe. This is the Law recognized by the Constitution and Laws of the United States, as obligatory upon them in their intercourse with the European States and Colonies. But we have a separate and different Law of Nations for the regulation of our intercourse with the Indian tribes of our own Continent; another Law of Nations between us, and the woolly headed natives of Africa; another with the Barbary Powers and the Sultan of the Ottoman Empire; a Law of Nations with the Inhabitants of the Isles of the Sea wherever human industry and enterprise have explored the Geography of the Globe; and lastly a Law of Nations with the flowery Land, the celestial Empire, the Manchou Tartar Dynasty of Despotism, where the Patriarchal system of Sir Robert Filmer, flourishes in all its glory.29

Adams rejected as a “fallacy” what is arguably the structuring principle of Vattel’s dualist system, that while nations have a duty in conscience to contribute to the happiness and perfection of others, a nation’s first duty is to itself, and it is the exclusive judge of that interest. The Chinese Repository, an American missionary publication in Canton, reprinted the lecture because it showed “in a lucid manner one of the strongest reasons why the Chinese government has not the right to shut themselves out from the rest of mankind, founded on deductions drawn from the rights of men as members of one great social system.”60 This claim, issued alongside Adams’s extravagant proliferation of “separate and different” laws of nations governing relations among Europeans and their descendants, versus between Europeans and other societies, illustrates the typical dual movement by which Westerners simultaneously declared that they adhered to universal laws—so the Chinese were violating general principles in supposedly contravening them—and also that the European law of nations was historically particular and so did not pertain to relations with extra-European states.61

For their part, antiwar texts appealed to Vattel in their rejection of attempts to exclude China from the law of nations. One such pamphlet asked, “Now what says Vattel[,] a high law authority, constantly quoted by the advocates of war?,” responding with Vattel’s principle that foreigners are obligated to obey local laws.

And yet in direct contravention of this equitable rule, which regulates our own government in regard to foreigners, and is submitted to by the subjects of England in every other part of the world; and to support the monstrous proposition,—that the Chinese are without the common rights of other nations,—is a criminal withheld from justice, momentous interests involved in inextricable embarrassment, and hundreds of lives have already been sacrificed.62

The Chinese authorities likewise had recourse to Vattel to defend their actions. When Commissioner Lin Zexu arrived in Canton in March 1839 to enact the emperor’s anti-opium policy, he employed a number of agents and translators to gather and translate information about the foreign traders there; one of his early requests was for the translation of several passages from Vattel in relation to commercial prohibitions, the right of a state to confiscate contraband, and the right to wage war.63 Lin obtained translations from the American medical missionary Peter Parker, who recorded the request in his medical report, as well as from his senior interpreter, who had been educated in English and who may have been the one to alert Lin to Vattel’s text. As Parker wrote, “His first applications, during the month of July, were not for medical relief, but for translation of some quotations from Vattel’s Law of Nations . . . sent through the senior hong-merchant; they related to war, and its accompanying hostile measures, as blockades, embargoes, &c.”64 The opium contraband that Lin proclaimed later that year was entirely in keeping with Vattel’s principle that states have perfect liberty to set and change at will their commercial policy. Lydia Liu argues that “Lin’s use of international law in these transactions was strategic,” on the grounds that he had selectively translated passages “strictly confined to the issues of how nations go to war and impose embargoes, blockades, and other hostile measures,” rather than taking the text as a whole.65 But this is to mark too stark a boundary between opportunism and a willingness to engage sources the British themselves considered authoritative, on a subject on which Lin considered himself in the right and on which Vattel unambiguously supported his position.

Lin gave the two sets of translated passages to a fellow official, Wei Yuan, in Beijing, who included them in a compilation of texts about the conditions and views of foreigners, the Hāiguó Túzhi, or The Illustrated History
of the Maritime Countries. The compilation, including the Vattel passages, was printed and circulated to officials across China in 1844 and expanded to two further editions over the next decade (1847 and 1852), and it played an important role in development of Chinese foreign relations over the subsequent decades, as Qing officials responded to the increasingly aggressive European and American commercial and quasi-imperial expansion across maritime Asia.66 But, in a development indicating Vattel’s waning authority in the West in subsequent decades, when the American missionary W. A. P. Martin set out to translate a text of international law into Chinese in the early 1860s, he decided against Vattel and in favor of Wheaton’s Elements of International Law.67 The Opium War thus arguably marks an important turning point, when the implications of Vattelian universalism sat so uncomfortably with a dominant political position in a European imperial state that Vattel had to be argued away or dismissed.

Like Lin Zexu, the Algerian businessman and scholar Hamdan ben Othman Khodja (ca. 1773–1842) found it useful in the early 1830s to obtain translations of some key passages in Vattel in order to challenge abuses of power by a European imperial power. After the French conquest of the city of Algiers in 1830, Hamdan Khodja had a complex series of encounters with French officials in Algeria before choosing to depart for Paris in the spring of 1833. He sent his son, Hadj Hassan, to negotiate with General Bournonville the capitulation of Algiers, a treaty whose immediate violation by the French was to become one of Hamdan Khodja’s most insistent grievances.68 He also served, under some duress, as an intermediary between the French and one of their most formidable opponents, Ahmed Bey, the Ottoman governor of the eastern province of Constantine.69 Giving up any hope of influencing the intransigent colonial officials, he arrived in Paris in the spring of 1833, at the height of French parliamentary and public debates over the “Algerian question,” and in a series of letters and memoranda, and a book titled Le Miroir, appealed directly to the metropolitan authorities and French public opinion. He seems to have produced Miroir in collaboration with a fellow Maghrébi liberal, Hassuna D’Ghisie of Tripoli, through whom Hamdan Khodja had met Berthem in the early 1820s, and possibly also with the assistance of French critics of the conquest.70 In Miroir he argued for an independent Algeria that would take its place in a nineteenth-century Europe of emerging nationalities and engage with European states as a diplomatic equal. He recalled the struggle of the 1820s for an independent Greece, the French participation in the liberation of Catholic Belgium from domination by Holland, and the widespread interest in the “Poles and the reestablishment of their nationality.” He repeated such analogies in a letter of October 1833 to the French commission of inquiry into the conquest (la Commission d’Afrique):

I congratulate myself on my honorable step when I recall that the Greeks owe their independence to the French, that the Belgians owe them their liberty, and that proud and unfortunate peoples have always found in the French the warmest sympathy. No, the Algerians do not deserve to be thrown out of society; they are part of the human family. Blood flows in their veins, Gentlemen, with the same heat as in your own.71

The “question d’Alger” had generally been taken in French debates, even by the “anti-colonistes,” to be the question of what colonial policy would best serve France’s interests; Hamdan Khodja reframed it as one that “has to do with the vitality of an entire nation, composed of ten million individuals.” While granting that the country had been placed, in the deferential language of his appeal to the king, under “Your Majesty’s guardianship [patronage],” he proposed that the king “emancipate the Algerians [and] restore harmony between the two peoples,” for “Algerians, too, have rights that should permit them to enjoy liberty and all the advantages that European nations enjoy.”72 Where French ethnographies tended to insist that the regency’s inhabitants were not a single people but an assortment of disparate and hostile populations, Miroir describes Algerians as “un peuple,” “une nation,” “mes concitoyens,” “mes compatriotes.”73

Hamdan Khodja submitted a memorandum to the French commission of inquiry into the conquest of Algiers in 1833, arguing that continuing the war of conquest would be a strategic disaster for France, as well as unjust, dishonorable, and a violation of France’s liberal principles. He concluded with a protest against the French violation of fundamental principles of the “laws of war and peace” in the course of the conquest. Rather than treating the Algerians as the fellow members of human society and the commercial partners they were, the French had “fixé[d] [s’attacher]” on differences of religion and custom and considered themselves free to violate the “customs of all civilized countries” in Algeria. He cited two passages from Vattel, the first arguing that “justice” is “indispensably binding on nations” even more stringently than on individuals, and the second that not only are agreements made during the course of war inviolably binding, but it is particularly “unjust and scandalous” as well as
imprudent for conquerors to violate capitulation agreements with those that surrender to them.

Finding myself one day with a general [Clauzel], this illustrious personage declared to me that the French were not at all obliged to observe the rules of the capitulation, which was nothing but a ruse of war. This is the source of all our troubles, since the French soldiers, those who hold power, think themselves free to do anything and have acted thus as long as they have been in my country.

Even so I am astonished that the heads of the French army are oblivious to [ignorant] the existence of the laws of war and peace that govern the civilized world. . . . As for me, I do not read French, but I certainly know the faithful translation into Arabic that the Sherif Hassuna Dughiz has made of the treatise on the law of nations by Vattel, and I think I may cite here the provisions contained in Book 2 chapter 5, para 63 and book 3 chapter 16 para 263, which I will not report here.

Can these principles be denied? Are Africans excluded from human society [la société humaine]? Would liberty properly understood approve the morals of this illustrious general? No. In any other common [vulgaire] man, one could excuse this manner of reasoning, but in a leader representing the French nation, such language is unpardonable.74

Hamdan Khodja saw three possible measures in the interests of France: either to clear the countryside by repelling the population into the desert, "if the law of nations approves such a measure, and if it is compatible with the liberal principles that characterize the French nation," or—in true accordance with the law of nations—to select a Muslim prince known to France in whom to confide the fate of the people, "to govern them with the aid of liberal principles, compatible with the laws and mores of these peoples." Even better, as he concluded Miroir,

Evacuate the country and renounce all idea of conquest in establishing a free and independent indigenous government, as was done in Egypt, which has the same religion and follows the same customs, and conclude with this government treaties favorable to both peoples. France would undoubtedly find far greater advantage this way than if Algiers remained her colony. . . . This liberal emancipation, all the more because the Algerians do not profess the same religion as the Europeans, would further add to the celebrity of our century.75

Such a course would entail a "conquest of men's hearts," the only form of conquest appropriate to an age of "enlightenment, civilization, and justice," and the only prudent as well as lawful measure. The French conquest, far from securing Algeria's wealth for France, as the French had assumed, was destroying the orderly countryside and long-standing commercial ties that had made Algeria the "granary of Europe," and inciting the population to fanaticism. General Clauzel, or his allies, found it necessary to publish an extensive "refutation" of Miroir that sought to discredit Hamdan Khodja personally in classically Orientalist terms as wily, duplicitous, and motivated by a religious "fanaticism," and also to undermine his case for an Algerian nation-state. As a "maure," or member of the Turkish-allied elite, the refutation argued, Hamdan Khodja was illegitimate as a spokesman for the whole population, and his very idea of an "Algerian" people was incoherent.76

In elaborating his idealized portrait of French and European liberal civilization and legal principles, Hamdan Khodja did not simply present the French with their own ostensible standards as a critique of their colonial depredations. He also performed the sort of act of interpretive generosity that he asked of his French readers vis-à-vis Islam. He suggested that both Islam and European civilization had been betrayed by their agents. Ottoman and other Muslim rulers had abused their power, and it was this, rather than anything inherent in Islamic legal principles, that had given some substance to the European stereotype of the Oriental despot.77 But European "civilization" had been equally ill served by its self-professed representatives. Having demonstrated the extent to which officials in Algeria had violated French ideals, Hamdan Khodja nevertheless declared himself an ally of those ideals. He implicitly asked his French readers to respond with similar imagination and sympathy to what he acknowledged was an idealized portrait of Islam.78

Bentham's Failed Alternative

Hamdan Khodja's proposal that the French work with a native ruler to install constitutional government in Algeria recalls his friend Hassuna D'Ghies's collaboration with Bentham on a project of constitutional reform for his native Tripoli. D'Ghies, whom Bentham referred to as "my disciple and an adopted son of mine," had lived in France and England beginning in 1815 and introduced Hamdan Khodja to Bentham in 1822. Bentham
hoped to work with Hamdan Khodja to promote political reform in Algeria, and he encouraged him to send reports from Algiers that Bentham would try to place in the British press. Only one report seems to have resulted, which Bentham summarized as follows: “The Algerines are tyrannized over by about 10,000 Turks. The object is, by flattering the Dey, to engage him to listen to European advice, and seek European assistance for delivering his country from that tyranny, and concur in establishing a better form of government.” The summary may well represent Bentham’s (or D’Ghies’s) aspirations rather than Hamdan Khodja’s, though the latter did lament in Miroir that the French had all but dashed his hopes that their expedition might represent a liberation from Ottoman misrule. Together with D’Ghies, Bentham devoted substantial time and energy to the project of drafting legal codes for a constitutional regime that he hoped might replace the pashalik that ruled the regency of Tripoli, a former dependency of the Ottoman Empire. The respect with which Bentham approached the prospect of the indigenous crafting of a constitutional, representative government in a non-European and Muslim society is unusual, and his writings and letters surrounding this episode are striking for their detailed consideration of the questions Bentham believed might be involved in attempting such a project in a Muslim country. Bentham’s writings on North Africa from the 1820s show that positivism did not necessarily entail an understanding of the international community as restricted to Christian Europe, as he suggested that the countries of North Africa should be integrated into the European system. In a draft letter to Mohammed Ali, Bentham urged the Egyptian ruler to declare independence from the Ottoman Empire: “Declare yourself independent,” he wrote, “there are no foreign powers with whom you could not right away make whatever treaties you liked. . . . You would then take your place among the Sovereigns of Europe. And why not? Look at them in population and in revenue—if you find some that are your superiors—you find more that are your inferiors.” Bentham’s awareness of the widespread hostility to reform among the ruling classes of Europe contributed to what seems to be his almost gleeful sense of the political possibility latent in the peripheries.

This sense of possibility reflects the ambitious and idiosyncratic vision that Bentham had offered in his radical critique of international law’s entanglements with European imperial domination in the 1780s, when he coined the term “international” and began to write, at first in French, the texts that would later be stitched together by his nineteenth-century editors into the essay known as “A Plan for an Universal and Perpetual Peace.” Writing in the wake of the Seven Years’ War and the American Revolutionary War, Bentham argued that the most fundamental precondition for global peace was that all states must emancipate their colonies. These writings from the 1780s show the extent to which (in contrast to Vattel) Bentham conceived of the international realm as a space of empires—and saw imperial ambitions and imperial violence as the greatest threats to international peace. Bentham had been no great friend of the cause of the American revolutionaries, whose natural rights arguments he rejected as empty posturing, just as he would later criticize the imprescriptible natural rights of the French Revolution as “nonsense upon stilts,” and “bawling on paper.” So although in that conflict he had supported Britain’s imperial claims, largely because he thought natural rights arguments were so flimsy, Bentham was already coming to see the conflicts driven by imperial ambitions as the greatest threat to international peace.

Bentham’s writings of the 1780s depict the international politics of his era as dominated by the effects of colonial expansion. Colonization was, in Bentham’s words, the “race of vulgar ambition” and a “war against mankind.” Above all, he saw colonies as the chief cause of war in the modern world. He cited as recent examples the war against Spain in the 1740s (the War of Jenkins’ Ear), and the Seven Years’ War, whose violence, he said, stretched from “North America to the East Indies,” and which, in the needless destruction it caused Britain, demonstrated “the extreme folly, the madness of war.” Bentham saw a global system dominated by empires as structurally doomed to incessant violence. Colonies provoked wars not only by multiplying the possible sources of conflict but also because in their newness, and distance from Europe, they were fraught with uncertainty, which Bentham saw as a key source of instability and aggression. His project for the codification of international law was driven by the aim of quelling conflict by reducing uncertainty. A code would do so, he thought, in part by minimizing the many offenses against international peace that were committed by sovereigns unsure of, or in good-faith disagreement about, what constituted their obligations toward one another. But the greater danger to peaceful commerce and cooperation was empire. Bentham’s attention to the imperial nature of the world’s major powers allowed him to see, and to make explicit, what remains possibly implicit, but certainly obscure in Vattel: that a legal system premised on the reciprocity and equality
of independent states must require first of all that they give up their empires and become, in fact, the territorially compact political communities that Vattel had hypothesized.95

Nearly fifty years later, when, at the age of eighty, Bentham returned to the subject to sketch a plan of "International Law," he took the radically different position that the first rule of international peace was that states should stay out of each other's colonies. In the notes on international law that he sent to the barrister and former colonial judge Jabez Henry in 1827, in the hope that Henry would develop them into a treatise or code, Bentham accepted a number of the essential features of Vattel's picture of the international realm: states must recognize each other as equals; each pledges to respect the regime, religion, and customs of all the others; and each is oriented not only toward keeping peace with the others, but also toward "mutual good will" and "mutual good offices." This is all quite faithful to Vattel's account, perhaps more than Bentham would have acknowledged. But now Bentham limited the community of states under international law to "all civilized nations[,] which at present is as much as to say, all nations professing the Christian Religion."96 This was a radical departure from both Vattel's and his own earlier presumptive universalism as well as his overtures of the early 1820s to Muslim North Africa.

Bentham was now also far more modest in his aspirations for the international legal code than he had been in the material that became the essays on perpetual peace. Above all, he gave up the hope of taming imperial ambitions. In describing the "Utility of a body of International law," he first noted the "Good which it is not capable of effecting—preventing a Sovereign who has purposes for conquest from endeavouring to carry them into effect." Rather, the code's main function would be to reduce uncertainty about states' respective rights and duties, so that inflated ideas of "rights violated" might be kept from "stirring up angry passions and anti-social affections." Along with this greater modesty went a complete abdication of Bentham's original prescription for international peace, the emancipation of all colonies. Instead, the principle of universal equality now required (just as Chitty did) that states not interfere in one another's colonies, or as Bentham put it, "Fundamental principles to be agreed upon by all the States: (1) universal equality. No State to pretend to any authority over any other State (a) on sea, (b) on land in the territory of a barbarous nation not being a member of the Congress. (c) All States to be upon a par in Congress, whatsoever the form of government."97

Bentham, then, made an about-face on international law and empire. He gave up on the key prescription for global peace that he had made as a young man, he accepted the restriction of the international legal community to Christian Europe, and he accepted that the system's major powers would be vast global empires with utter legal impunity—at least with respect to international law—in their conduct in their colonies. For help in turning this sketch into a code of international law, he turned to a man whose reputation was built on his work as a colonial official. Bentham's motivations can be obscure, and it is hard to account for what may have happened within his own mind from the 1780s to the 1820s to bring about this change. It may have had partly to do with the shift of the center of gravity of imperial domains from the settler colonies of the Americas—which had mostly established their independence by the late 1820s—to India and other nonwhite populations. But it is worth stressing that in the earlier period, Bentham had insisted on the emancipation of all colonies, India specifically included, and not just colonies whose loudest voices were white settlers.

Whatever his own reasons, there is no question that the change in Bentham's thinking tracks a more general development in European thinking in this period, one that we also see in the shift from Vattel's original text to the Chitty edition of the 1830s. We begin with a universal vision of an international community that is not limited to Europe, one made up of states understood as moral communities protected by political autonomy to work out their collective life. We end with a vision of an international community of equal states limited for the time being to Europe; states understood in a dual way as legal equals vis-à-vis each other but also as global empires controlling vast territories and populations as they see fit. Both Lin Zexu and Hamdan Khodja drew on Vattel to argue that European states had the same stringent legal duties to their states that they had within Europe, at the very moment that the principle of the universal application of the law of nations was coming to be seen as obsolete in Europe, and Vattel as an outdated authority in relation to newer sources that recognized the uniquely European character of the law of nations. International law speaks, in the later model, only to the interactions between European states; it is not well equipped to analyze those states as empires, to hold them to legal account, or to recognize the global order as one that is structured hierarchically. Henry Wheaton's Elements of International Law quickly replaced Vattel as the standard reference work. As we have seen, Wheaton
was a thinker in whom the strands of historicism, positivism, and Eurocentrism worked in tandem. In an 1845 author’s preface to *Elements*, Wheaton wrote, “If the international intercourse of Europe, and the nations of European descent, has been since marked by superior humanity, justice, and liberality, in comparison with the usage of the other branches of the human family, this glorious superiority must be mainly attributed to those private teachers of justice” beginning with Grotius, who articulated its principles. Among the key features of Wheaton’s text that made it more in tune with its times than the outdated Vattel—especially for Martin’s purposes of bringing Western international law to China—was Wheaton’s insistence that the law of nations was not universal. This was an argument that he made ever more insistently in the editions of his text published after the first Opium War, in which he argued that international law “has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.” His revisions to later editions also newly stressed, however, that the European order would and should expand to encompass the extra-European world.

The more recent intercourse between the Christian nations of Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognized by, and reciprocally extended to, Turkey, Persia, Egypt, and the States of Barbary. The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its ineretate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.

As international law came in the latter half of the nineteenth century to be increasingly a self-conscious discipline, its major practitioners came to argue that international law had to be understood as a historically particular system that had arisen under the distinctive circumstances of early modern Europe and was constantly adjusting to the “growing wants of a progressive civilization.” They were, consequently, preoccupied in a way that earlier theorists of the law of nations such as Wicquefort, Wolff, and Vattel had not been with delimiting the scope of the international community, expounding the criteria for admission into that community, managing its gradual expansion to encompass some excluded states, and specifying the legal status of various societies they deemed inadmissible. Anxious to establish the scientific credentials of their discipline, most shared with figures in other emerging social or human sciences of the period a conviction that the intellectual advances made over their eighteenth-century predecessors lay precisely in their historical approach to their subject. International law could be scientific and progressive only by being historical. The resulting constellation of beliefs—in the historical particularity of the European law of nations, the normative validity of the European legal system for the future of the world as a whole, and the possibility of rendering international law scientific—distinguished nineteenth-century international legal thought from its eighteenth-century sources and left a marked legacy for international law in the twentieth century.


FIVE  The Rise of Positivism?


4. Edward Keene uses quantitative data treaty making to suggest that the “crucial period during the first half of the nineteenth century” was significant a moment of transformation in attitudes about interstate relations as the latter half of the nineteenth century. Edward Keene, “The Treaty-Making Revolution of the Nineteenth Century,” International History Review 34 (2012): 496.

5. Alexandrowicz’s interest in the shift from naturalism to positivism lay primarily in the shift from universalism to Eurocentrism, and this chapter follows his lead in this respect.


7. Vattel’s text was also translated into Turkish in 1837, two years before the Tānzimat reforms began: Hürev Mehmed Paşa, the official who ordered the manuscript translation of books 3 and 4, had fought against the French in Egypt and later served as governor there. A decade later, the first work of international law published in Turkish, by the Viennese official Baron Ottokar


13. The Saturday Review’s 1883 (4 August) review of John Hosack’s On the Rise and Growth of the Law of Nations as Established by General Usage and by Treaties noted that the author “warns us indeed in his preface that it is not his object to compete with those eminent writers who have sought ‘to lay down certain rules for the guidance of independent States as well in peace as in war.’ He does not, it would seem, aspire to be cited by future consuls on future historic occasions, as when ‘The Consul quoted Wicquefort’… His aim is simply to describe what have been the actual practice and usages of nations in their transactions with each other.”


15. Martens’s Latin text was published 1785 and the French in 1789, from which this English translation by Cobbett was published in 1795. G. F. von Martens, *A compendium of the law of nations, founded on the treaties and customs of the modern nations of Europe*, trans. William Cobbett (London: Cobbett and Morgan, 1802 [1788]); I quote this 1802 translation unless otherwise noted. Martens taught at the University of Göttingen beginning in 1783 and later held several posts in Hanover and briefly in Napoleon Bonaparte’s Kingdom of Westphalia.

16. Neff sees Martens as working “strongly in the spirit of Vattel,” though he characterizes him as holding that there was not, and could not be, any such thing as a universal law of nations.” Neff, *Justice among Nations*, 199. Béla Kapossy likewise sees Vattel and Martens as sharing “a strong common ground,” along with earlier figures in the German academic tradition such as Gottfried Achenwall and Johann Stephan Pütter, because, it seems, he treats Vattel as discussing a European political system rather than a universal law. Béla Kapossy, “Introduction: Rival Histories of Emer de Vattel’s Law of Nations,” *Grotiana* 31 (2010): 5–21, at 15.


20. Martens, *Compendium*, 5, 27. He lists Turkey among the European powers at 33, 38, 42; he notes its practice sometimes as reflective of (120), sometimes as a departure from (332, 349) standard European practice. Keene has noted that patterns of treaty making between the Ottoman Empire and European states seem to have been unaffected by the 1856 Treaty of Paris that was often described by nineteenth-century observers as marking Turkey’s entrance into the family of nations. Keene, “Treaty-Making Revolution,” 475–500.

21. The English *Compendium* in a sense brought this tension between Martens’s theory and his treaty collections into a single volume, by appending a list of “the principal treaties” from 1731 to 1802 that, like Martens’s *Recueil des traités*, included many treaties with extra-European powers—a 1731 treaty between the States-General of Holland and the Kingdom of Algiers; a 1732 treaty be-

tween the Russian and Persian Empires; a 1737 treaty of commerce, and a 1739 defensive alliance, between the Swedish Crown and the Ottoman Porte.

22. He wrote of “the resemblance in manners and religion, the intercourse of commerce, the frequency of treaties of all sorts, and the ties of blood between sovereigns,” though as we have seen, he recognized the regularity of treaties with states outside Europe. Martens, *Compendium*, 3, 27.

23. On Ompfeda as an important German predecessor, see Alexandrowicz, “Doctrinal Aspects of the Universality of the Law of Nations,” *British Year Book of International Law* 37 (1966): 506–515; reprinted in Alexandrowicz, *The Law of Nations in Global History*, ed. David Armitage and Jennifer Pitts (Oxford: Oxford University Press, 2017), 168–179. Alexandrowicz notes that the key late eighteenth-century German authors who addressed questions of the scope of the law of nations, Ompfeda, Just, and Martens, had connections to the British sovereign by way of Hanover, which may account for their greater attention to the kinds of extra-European interactions that British and French authors addressed more often than their continental counterparts.


28. E.g., Ward, *Enquiry*, 178. One of Ward’s most emphatic criticisms reads, “The miserable departure of the French from that humanity which has constituted the distinguishing honour of modern warfare, however executed by all good men, is considered by themselves an elevation of their character” (1753); in the preface written just before publication, he adds, “The conduct of this nation is now somewhat mended, and the points most complained of were the effects of the influence of a merciless tyrant, or of dark minded ruffians who have already, most of them, met their reward” (1:lvii–lviii) (emphasis in original).


30. "Burlamaqui contends, that variations, when they are cruel, are mere barbarous customs, from which all just and well-regulated Nations ought to abstain. But surely, when the very question is concerning the universality of a custom, and other customs are proved to exist; to get rid of them in this way, is a mere petitio principii; not to mention that the Nations thus adopting other Laws, have an equal right with any other to call themselves (according
to their own ideas at least,) just and well-regulated” (Ward, Enquiry, 1:153) (emphasis in original).

31. See, e.g., Ward, Enquiry, 1:145–146 (here Ward is remarkably uncritical of his European sources).


33. Ward, Enquiry, 1:35. Ward generally praised Vattel, though he questioned some of his judgments and noted that “if we differ [from Vattel] at all, it will only be in endeavours to give something more definite and binding even than this assemblage of the laws of Nature and the laws of Man, as the real foundation of the Law of Nations.” Ward, Enquiry, 1:27 (emphasis in original).

34. Ward, Enquiry, 1:36 (emphasis in original), 1:102 (emphasis in original), 1:144.


36. For instance, Edward Coke’s version of the prohibition, he argued, was based on biblical passages that should have been irrelevant to the modern European law of nations. Ward, Enquiry, 1:26.


38. Ward, Enquiry, 1:36. Note George Canning’s quip that Ward’s “law books were as interesting as novels and his novels as dull as law books.” Quoted by Clive Towse, “Ward, Robert Plumer (1765–1846),” in Oxford Dictionary of National Biography (Oxford: Oxford University Press, 2004), Joseph Chitty, in his list of works of jurisprudence that should be counted (alongside state practice) among the sources of “the positive Law of Nations generally and permanently binding upon all independent states,” cites Ward’s book a few times, calling it a work “of great ability, but not yet acknowledged to be such a high general authority” as the earlier classics including Vattel. Emer de Vattel, The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, ed. Joseph Chitty (London: S. Sweet, 1834), lv (note).


41. James Mackintosh, “Speech on Presenting a Petition from the Merchants of London for the Recognition of the Spanish-American States” (15 June 1824), in The Miscellaneous Works of the Right Honourable Sir James Mackintosh, vol. 3 (London: Longman, 1846), 457–482, calling for recognition of independent Latin American states for the sake of British commerce. Mackintosh further argued that formal recognition of a former colony as an independent state can be granted only by the imperial power renouncing its authority; in relation to Spanish America, Great Britain could only grant “virtual” recognition, acknowledging the fact of their independence by sending and receiving diplomatic agents. But he proposed that to impose a demand on the new states that they earn recognition by demonstrating good government was to unfairly impose a condition that was never required among European states (441, 466).

42. Mackintosh, Discourse (1799), 5, 60–61. Editions of Vattel that began with Mackintosh’s Discourse as a preface include French editions of 1830 and 1863, a Belgian edition of 1839, and a Spanish edition of 1836.


46. Wheaton, Anniversary Discourse, 17–18. He added, manifestly falsely, given the extensive classical scholarship in the medieval Islamic world, that the Muslim world “caused no inspiration from the finished productions of classical genius.”

47. “The European law of nations is mainly founded upon that community of origin, manners, institutions, and religion which distinguished the Christian nations from those of the Mahomedan world.” Henry Wheaton, History of the Law of Nations and America; From the Earliest Times to the Treaty of Washington, 1842 (New York: Gould, Banks and Co., 1845), 555.


49. Wheaton, Anniversary Discourse, 22, 19 (emphasis in original).

50. Vattel, The Law of Nations, ed. Chitty. In a significant departure from Vattel, Chitty, citing Ward’s Enquiry, asserted that when there was doubt about a legal principle, “Christianity . . . should be equally appealed to and observed by all as an unfailling rule of construction” (liv–lv).

51. In the last of three House of Commons debates of 17 June, 7 July, and 23 July 1845. Hansard, 3rd ser., vol. 82, cols. 970–1025. See also Mark Hickford, “Decidedly the Most Interesting Savages on the Globe: An Approach to the


53. Paul Pradier-Fodéré, ed., Le droit des gens . . . par Vattel, vol. 1 (Paris: Gil-laumin, 1863), 498. Referring to the Treaty of Tianjin, he wrote, “The conquest by modern civilization of these two countries, so full of mystery, is one of the titles to glory of the year 1858 . . . in establishing new commercial relations everywhere, in bringing European mores to every shore, the European powers are propagating civilization in the most remote countries” (375–376).


55. E.g., James Matheson, The Present Position and Prospects of the British Trade with China: Together with an Outline of Some Leading Occurrences in Its Past History (London: Smith, Elder, 1836), 33–35. See also Lydia Liu, “Legislating the Universal,” in Tokens of Exchange: The Problem of Translation in Global Circulation (Durham, NC: Duke University Press, 1999), 127–164. See also Samuel Warren, The Opium Question (London: James Ridgway, 1840), citing Vattel on the duty of nations to fulfill their engagements and arguing, notwithstanding Vattel’s explicit principle that nations may choose not to participate in commerce and may change their commercial policy at any time without injuring their trading partners, that “the Chinese may possibly have been entitled originally to refuse any intercourse with us, either social or commercial; but they have long resigned such rights. They have invited our commercial intercourse. . . . They have led us to invest in it our capital to an enormous extent, and to erect a machinery for carrying on such commerce, which they cannot now shatter to pieces at their will” (101–103).


57. Teemu Ruskola discusses American public opinion in favor of the Chinese position and identifies the Treaty of Wanghia of 1844 as a turning point in American conceptions of Chinese legal standing. Teemu Ruskola, Legal


61. Citing Vattel on the “necessary” law of nations as the law of nature applied to inter-state relations, Adams made a distinctly unVattelian move with the qualification that the necessary law “can be enforced only between Nations who recognize that the State of Nature is a State of Peace” and that “Mahometan Nations” rejected that claim in principle.” J. Q. Adams on the Opium War,” 306.


67. Martin explained in the book’s English preface, “My mind at first inclined to Vattel; but on reflection, it appeared to me, that the work of that excellent and
lucid writer might as a practical guide be somewhat out of date.” Quoted by Hsü, China’s Entrance, 127.


70. Although the title page of the work notes that it was “translated from the Arabic by H. D. Oriental,” no original Arabic text of Miroir has been found. Abdeljelil Temimi surmises that others, whether Ottoman dragomans (translators) in Paris or Frenchmen, may have assisted Hassuna D’Ghies with the translation, but he has not recovered the identities of any other collaborators. See Temimi, “À propos du Miroir,” 109–171 (and on possible collaborators, 116–120); Temimi, Le beylik, 101–126.

71. Hamdan Khodja, Miroir, 37–38. He charged that the French had supported the Greeks and Poles with funds seized from his “miserable country, although Algerians are also men” (p. 10). Letter quoted in Georges Yver, “Si Hamdan ben Othman Khodja,” Revue Africaine 57 (Algiers, 1913): 112.

72. Hamdan Khodja, Miroir, 52; Hamdan Khodja, “Réclamations,” pièce 10, Miroir (1833), 426. Miroir’s call for Algerian national independence would not have sat well with the Ottoman authorities, and in his appeals to Ottoman correspondents, Hamdan Khodja emphasized the importance of saving Algeria from the rule of nonbelievers rather than its national independence. See, e.g., his August 1833 letter to the Sultan translated in Temimi, Recherches, 144–149.

73. On the meaning of the term “nation” in French discourse, see Hagen Schulze, States, Nations and Nationalism (Oxford: Blackwell, 1996); William F. Sewell, “The French Revolution and the Emergence of the Nation Form,” in Revolutionary Currents: Nation Building in the Transatlantic


75. Hamdan Khodja, Miroir (1833), 324.

76. “Mémoire,” 36; Hamdan Khodja, Miroir (1833), 322; “Réfutation de l’ouvrage,” in Hamdan Khodja, Miroir, 266. Le Miroir “always collectively represents the interests of the Moors and those of the Arabs, in thus employing the general denomination of Algerians, Hamdan purports to express the wishes and grievances of the whole population, whereas in reality nineteen-twentieths of the population have nothing in common with the Moors, not even religion, and their interests are entirely distinct”; “Réfutation,” 294.

77. He argued that Islamic jurisprudence recognizes that laws cannot determine their own application in particular circumstances, and that this inevitable indeterminacy had been abused by particular sovereigns. Hamdan Khodja, Miroir, 112–113.

78. In a gesture of identification with his audience, Hamdan Khodja noted that when Algiers conquered Tunis in 1754, the Tunisians resented the Algerians just as the latter now did the French; the majority of honorable Algerians, he argued, disapproved of what had been done but felt powerless to stop it, and he imagined the same was true of many of his French readers. Hamdan Khodja, Miroir, 142.


80. Hamdan Khodja, Miroir, 262.


82. Correspondence of Jeremy Bentham, 12:471–472; (emphasis in original).

83. Bentham’s sense of the possibilities for innovation generated outside Europe stands in contrast to the more common European use of colonies as laboratories for governing and disciplinary techniques that were then imported back into the metropole. See, e.g., Timothy Mitchell, Rule of Experts;


He described inhabitants of colonies such as Guernsey, Jamaica, Canada, and Bengal as "deprived of liberty in an international sense" because "the native ... is subject to the controlling agency of such distant government." Bentham Papers, UCL, box 100, f. 168.


89. Wheaton, Elements of International Law, 6th ed. (Boston: Little Brown, 1855), cxci.

90. Wheaton, Elements, 21.


92. See, e.g., T. E. Holland’s claim that jurisprudence is "not a science of legal relations à priori, as they might have been, or should have been, but is abstracted à posteriori from such relations as have been clothed with a legal character in actual systems, that: is to say from law which has actually been imposed, or positive law. It follows that Jurisprudence is a progressive science." T. E. Holland, The Elements of Jurisprudence (Oxford: Clarendon Press, 1880), 8. John Burrow attributed the influence of evolutionary social theory in Victorian Britain precisely to the "tension between English positivistic attitudes to science on the one hand and, on the other, a more profound reading of history, coming to a large extent from German romanticism, which made the older form of positivist social theory, philosophic radicalism, seem inadequate." John Burrow, Evolution and Society: A Study in Victorian Social Theory (Cambridge: Cambridge University Press, 1966), xv.

SIX Historicism in Victorian International Law

1. Travers Twiss, "Introduction to the Second Edition," in The Law of Nations Considered as Independent Political Communities (Oxford: Clarendon Press, 1884 [first published 1861–1863]), xvii. A revised second edition was published in 1875 with a different "second edition" preface and introduction; the historical narrative discussed here, in what Twiss calls the "introduction to the second edition," is in fact new to the 1884 edition, as is its preface. Twiss, who in 1849 had been appointed to the new chair in international law at King’s College, London, and later held the Regius Professorship of Civil Law at Oxford, had in 1872 resigned all his offices in the wake of a scandal involving his wife. For discussion of the possible implications of his personal life for his career, particularly his willingness to serve the deeply problematic cause of the Belgian king Leopold’s conquests in the Lower Congo valley, see Andrew Fitzmaurice, "The Resilience of Natural Law in the Writings of Sir Travers Twiss," in British International Thought from Hobbes to Namier, ed. Ian Hall and Lisa Hill (New York: Palgrave Macmillan, 2009), 137–160.

2. Twiss, Law of Nations (1884), xxvii. Twiss’s reading of Wolff is novel; note, for instance, Wheaton’s criticism, which takes for granted the universality of the civitas maxima, that Wolff "takes no pains to prove the existence of any such social union or universal republic of nations, or to show when and how all the human race became members of this union or citizens of this republic." Henry Wheaton, Elements of International Law, 6th ed. (Boston: Little Brown, 1855), 11. See the introduction in Wolff, Jus gentium metodo scientifica pertractatum, ed. Joseph Drake (Oxford: Clarendon Press, 1934), xlv. Wolff does distinguish between "civilized" and "barbarous" nations and argues that all nations ought to be cultured and civilized (Jus gentium, §§52–57). But his civitas maxima is explicitly a society "among all nations," without which "the universal obligation of all toward all would be terminated; which assuredly is absurd" (57).

3. "The term ‘Christian States’ has been used here for the sake of convenience, as distinguishing the States of Europe which took part in or acceded to the Principal Act of the Congress of Vienna, from the Ottoman Porte, which was not a party to that Act." Twiss, Law of Nations (1884), xxxi. I discuss his anxieties further below, when addressing Twiss’s report for the Institut de droit international’s commission on the applicability of the law of nations to "Oriental" nations.

4. Twiss, Law of Nations (1884), xxxvii. Twiss refers here to his contemporary, the Russian legal theorist Frederic de Martens (not the G. F. von Martens discussed in Chapter 9). On Bluntschli’s emphatically hierarchical conception