The Liberal Myth. Foreigners' Property Rights and the Making of Modern World Politics

Thesis submitted in partial fulfilment of the requirements for the degree of Doctor of Philosophy at the Department of Politics and International Relations, University of Oxford

99 975 words

January 2018

Tomas Wallenius
Christ Church

Abstract

The thesis conceptualizes a new approach to the historical study of the global legal order. Instead of following an influential contextual approach focusing on understanding the works of great legal theorists, I analyze the relationship between legal thought and the global legal practices that constituted actually existing patterns of social order. The usual idea of legal practice needs however first be reimagined. A focus on the 'profession of international law' is too narrow. As often the most influential actors in legal practice were not lawyers but for example parliamentarians and diplomats. Second the conventional idea of a legal text needs to be reconceptualised. Drawing on literary theory, I argue that the historical significance of a legal text is constituted not only by the context of its writing but also through its reception and use by later practitioners. Moreover, legal texts are not constant but are often modified, even after the death of the original author, by later editors seeking to make the work useful for contemporary practitioners. This insight highlights a neglected and important alternative dynamic of legal change that first takes place through legal practice and is introduced to doctrine only afterwards. In this practice story, legal change predominantly takes place through practitioners pursuing their interests within broad bounds set by normative expectations rather than with the novel speculations of great thinkers.

I have applied the new method to the case of foreigners' property rights. These rights are crucial as the legal frameworks that have enabled the growth of a global liberal economy through transnational trade and investment. The study of these rights has allowed me to challenge the conventional interpretation that Britain and the United States, as leading liberal democracies drawing on the liberal political thought of Locke, created a liberal international order through multilateral treaty making.

Table of contents

Introduction	4
1. The Case for a History of Global Legal Practices	17
I. France, Old Regimes and the Unmaking of the Droit d'Aubaine	56
2. The Droit D'Aubaine in Legal Doctrine	57
3. The Unmaking of the Droit D'Aubaine in Legal Practice	74
II. Anglo-Americans and the Making of the 'Standard of Civilization'	117
4. The 'Standard of Civilization' in Legal Doctrine	118
5. The Making of the 'Standard of Civilization' in Legal Practice	155
6. The Reception of the 'Standard of Civilization' in Legal Practice	203
Conclusion	232
Bibliography	248

Introduction

Nowadays the importance of the global economy as a dimension of world politics is widely recognized. Increasingly the discipline of International Relations sees the 'long nineteenth century' as the crucial era for the making of a qualitatively different modern international society, a pivotal element of which was a growing and expanding capitalist economy.[1] The importance of stronger private property rights for changing domestic economies has been recognized for a long time. Early modern natural law theorists such as Hugo Grotius or John Locke perceived individual property rights as crucial for a good domestic society.[2] Contemporary scholars have argued that private property constitutes a crucial element of a 'liberal tradition' in political theory that is based on an emphasis on individual rights.[3] Considerable empirical work has also already been done on private property rights in domestic, colonial and extraterritorial contexts.[4]

---

[1] Barry Buzan and George Lawson, *The Global Transformation. History, Modernity and the Making of International Relations* (Cambridge: Cambridge University Press, 2015), 17–45; Justin Rosenberg, *The Empire of Civil Society. A Critique of the Realist Theory of International Relations* (London: Verso, 1994), 138–39, 159–72; Christian Reus-Smit, *The Moral Purpose of the State. Culture, Social Identity, and Institutional Rationality in International Relations* (Princeton, New Jersey: Princeton University Press, 1999), 9, 122–45; G. John Ikenberry, *Liberal Leviathan. The Origins, Crisis, and Transformation of the American World Order* (Princeton, New Jersey: Princeton University Press, 2011), 1–2, 15–17. The 'long nineteenth century' is customary dated between the French Revolution in 1789 and the beginning of the First World War in 1914 following E. J. Hobsbawm, *The Age of Revolution 1789-1848* (London: Weidenfeld & Nicolson, 1962). Though 1789 and Napoleon's final defeat in 1815 present breaks, there were also considerable continuities that stretched from the 'old regime' world to that of restoration Europe.

[2] Hugo Grotius, *De Iure Belli Ac Pacis Libri Tres. In Quibus Ius Naturae & Gentium : Item Iuris Publici Praecipua Explicantur* (Paris: Nicolaus Buon, 1625); Anonymous (John Locke), *Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, And His Followers, Are Detected and Overthrown, The Latter Is an Essay Concerning the True Original, Extent, and End of Civil Government* (London, 1689). On the early modern natural law tradition in general Richard Tuck, *The Rights of War and Peace. Political Thought and the International Order From Grotius to Kant* (Oxford: Oxford University Press, 1999).

[3] Michael W. Doyle, *Ways of War and Peace* (New York: W. W. Norton, 1997), 225; Beate Jahn, *Liberal Internationalism: Theory, History, Practice* (Basingstoke: Palgrave Macmillan, 2013), 70–71; Ikenberry, *Liberal Leviathan*, 62–63. Also Reus-Smit, *Moral Purpose of the State*, 122–27. Within the history of international law,

Despite these insights, surprisingly little has been written on the key focus of this thesis: the legal frameworks that enabled the growth of economic relations between states recognized as full members of international society during the course of the nineteenth century. In order to exist, transnational trade and investment require relatively stable legal frameworks protecting the property rights of merchants and investors from one state conducting business in another one.[5] Thus I ask in this thesis: how, why and by whom foreigners' property rights became increasingly protected in international society. To answer this question, this thesis provides an analytical narrative of the evolution of key dimensions of foreigners' property rights during the course of a very long nineteenth century stretching from 1763 to 1914.[6]

---

for an argument about liberalism constituting the ideology of international legal doctrine, Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument.*, reissue with new epilogue (Cambridge: Cambridge University Press, 2005), 70, 74, and in general chapter 2. Also Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law*, trans. Sutcliffe, Christopher (Cambridge: Cambridge University Press, 2012), 4. For a cogent critique of the usual idea of a liberal tradition, Duncan Bell, "What Is Liberalism?," *Political Theory* 42, no. 6 (2014): 682–715. To an extent also, Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), 13–20.

[4] For private property rights in a domestic context Kurt Burch, *"Property" and the Making of the International System* (Boulder, Colorado: Lynne Rienner, 1998); Benno Teschke, *The Myth of 1648. Class, Geopolitics, and the Making of Modern International Relations* (London: Verso, 2003). In a colonial context Edward Keene, *Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002). The focus of these works is 'domestic' in the sense that they analyze the evolution of the private property rights of Western states' nationals within these states' metropolitan or colonial territory.

During the long nineteenth century treaties establishing extraterritorial jurisdiction were almost exclusively imposed by Western states on non-Western states whose status as members of international society was ambiguous. These treaties established that the Western state's domestic legal system had jurisdiction over disputes involving its nationals in the non-Western state. For extraterritoriality and private property rights in an extraterritorial context Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984); Turan Kayaoglu, *Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China* (Cambridge: Cambridge University Press, 2010); Maia Pal, "The Politics of Extraterritoriality. A Historical Sociology of Public International Law" (PhD dissertation, University of Sussex, 2012).

These domestic and extraterritorial foci are largely shared by China Mieville, *Between Equal Rights. A Marxist Theory of International Law* (London: Pluto, 2006).

[5] For partial exceptions: Charles Lipson, *Standing Guard. Protecting Foreign Capital in the Nineteenth and Twentieth Centuries* (Berkeley, California: University of California Press, 1985), 12–19, 37–64; Kate Miles, *The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital* (Cambridge: Cambridge University Press, 2013), 47–70; Keene, *Beyond the Anarchical Society*, 103–5.

Transnational merchant law, which plays an important part in the global economy through partially constructing legal relations between private actors, is premised on sovereign states recognizing the private property rights of these actors. If for example a merchant from state X cannot own property in state Y, he cannot in the first place conclude a contract concerning that property with a merchant from state Y, a potential breach of which terms could later be contested before a private arbitrator applying the lex mercatoria. On these private legal frameworks see Claire Cutler, *Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003).

[6] The 'long nineteenth century' is customary dated between the French Revolution in 1789 and the beginning of the First World War in 1914, following Hobsbawm, *Age of Revolution 1789-1848*. It has however been recently

Foreigners' property rights refer to the bundle of legal rights that enable foreign nationals in varying decrees to acquire, possess, sell, deed and inherit private property –whether it be merchandise, real estate, bonds, immaterial rights, or until quite late human beings– in the jurisdiction of another state. The existence of transnational trade and investment usually rests on the fact that natural or corporate individuals from state X can expect the protection of relatively secure private property rights in state Y, irrespective of the fact that they are conducting business on the territory of another sovereign state. Foreigners' property rights contribute crucially to the functioning of a global economy, by transferring a central feature of domestic societies into international society, thus removing elements of a 'state of nature' from transnational economic relations. As this study will show this has not always been the case, and the shift to stronger rather than weaker property rights for foreigners –a trend that is still with us– was very much a nineteenth century phenomenon. The importance of studying the protection accorded to foreign private property for understanding international trade and investment, and thus the global economy, has been recognized by both International Relations scholars and international lawyers.[7] More generally, foreigners' property rights allow investigating the tension between property and sovereignty as parallel ordering principles of world politics as this is precisely where a state's sovereign rights can clash with its duties to protect private property as a member of international society.[8]

---

argued that there existed significant continuities in the French state's quest for modernization that extended from the French defeat in the Seven Years War in 1756-63 to the Napoleonic and Restoration periods. According to Peter Sahlins France's defeat led old regime officials to begin experimenting with more systematic economic reforms, a crucial dimension of which was to seek more transnational trade and investment through strengthening foreigners' property rights, after 1763. See *Unnaturally French. Foreign Citizens in the Old Regime and After* (Ithaca, New York: Cornell University Press, 2004).

[7] Lipson, *Standing Guard*; Miles, *Origins of International Investment Law*; Keene, *Beyond the Anarchical Society*. For earlier work focusing explicitly on foreigners' property rights by international lawyers, see for example Alexander P. Fachiri, "International Law and the Property of Aliens," *British Year Book of International Law* 10 (1929); John H. Herz, "Expropriation of Foreign Property," *American Journal of International Law* 35 (1941); George Schwarzenberger, "The Protection of British Property Abroad," *Current Legal Problems*, 1952.

[8] For an argument about the centrality of sovereignty and property for modern international order, Keene, *Beyond the Anarchical Society*; Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), ch. 2.; "Histories of International Law: Dealing with Eurocentrism" (Utrecht: Universiteit Utrecht. Faculteit Geesteswetenschappen, 2011); "Empire and International Law: The Real Spanish Contribution," *University of Toronto Law Journal*, 61, no. 1, (2011); "Ius Gentium and the Birth of Modernity," in *Constructing International Law. The Birth of a Discipline*, edited by Milos Vec and Luigi Nuzzo (Frankfurt am Main: Vittorio Klostermann, 2012).

As it would be unnecessary and impossible to provide a total history of all legal norms in all states regulating the status of foreigners' private property for the period 1763-1914, this study focuses on the evolution of two legal norms that contemporary lawyers recognized as most crucial for the status of foreign property and were contested fiercely in both legal doctrine and actual legal disputes.[9] The evolution of foreigners' property rights is traced through a primary focus on two key concepts: the '*droit d'aubaine*' in Part One and the 'standard of civilization' in Part Two of the thesis. From the seventeenth to the mid-nineteenth centuries, various restrictions to foreigners' ability to deed or inherit property in European states became largely conceptualized as the originally French legal practice of the droit d'aubaine. Legal publicists understood the droit d'aubaine to amount to the most significant restriction to foreigners' property rights. From the mid-nineteenth century, most debate with regards to foreigners' property rights in international legal doctrine centers on the question whether there exists a strong customary legal norm protecting foreigners and their property that was grounded through the idea of civilization. From the beginning of the twentieth century this contested customary legal norm was conceptualized as the 'standard of civilization'.

The conventional understanding

The existing interpretation of the evolution of foreigners' property rights is quite fragmentary, with most of the long nineteenth century dropping strangely out of the picture. This usual story tells us how European legal practice was inspired by the political and legal thought of Grotius, Locke and Emer de Vattel who emphasized the importance of private property.[10] European trading companies secured property rights in the extra-European world beginning with the seventeenth century, either through

[9] There exists voluminous material in international legal doctrine on these two concepts. They were also very often in the centre of actual disputes pursued through various legal practices.
[10] On the role of Grotius' thought in the extra-European world, Keene, *Beyond the Anarchical Society*, 60. Miles, *Origins of International Investment Law*, 35. Keene refers to Locke and Vattel's influence as well in the extra-European context, *Beyond the Anarchical Society*, 102. On Vattel in the context of the changing of law between European states, Lipson, *Standing Guard*, 10 n. 10.

bilateral treaty-making with extra-European actors or the colonisation of territory. The activities of the Dutch in the East Indies, and the British in India and North America have been emphasized in particular.[11] Yet during the seventeenth and eighteenth centuries European states also established networks of bilateral trade treaties that protected private property rights amongst themselves. The principal powers such as Spain, the Netherlands, France and Britain playing important roles in this evolutionary process.[12] By the middle of the nineteenth century a well-established customary legal norm protecting foreigners' private property had come to being within the society of states. This norm, inspired by the legal thought of Vattel in particular, was then enforced especially by Britain and the United States in investment disputes with Latin American states.[13] The protection of private property continued as a self-evident norm in international society up until the end of the long nineteenth century.[14] This nineteenth century norm has been identified as synonymous with what twentieth century lawyers conceptualized as an 'international minimum standard' in the treatment of foreigners and their property.[15]

As the crucial legal framework for the growth of transnational trade and investment, the story of foreigners' property rights also has implications for wider conventional understandings of the making

[11] Keene, *Beyond the Anarchical Society*, 60–96. Miles on the Dutch East India Company in the East Indies, *Origins of International Investment Law*, 35–41.
[12] Lipson, *Standing Guard*, 8–12. Miles, *Origins of International Investment Law*, 24–25.
[13] On the pivotal role of Vattel, see Lipson, *Standing Guard*, 8 n. 10; Miles, *Origins of International Investment Law*, 47 fn. 188; Keene, *Beyond the Anarchical Society*, 104. Lipson argues that the customary law norm exists by the mid-nineteenth century, *Standing Guard*, 8, 37–38. Miles concurs that capital-exporting states were regularly asserting a right to compensation for expropriated property by the mid-nineteenth century, *Origins of International Investment Law*, 51. Keene argues that the norm exists by the time of the Hague conferences, *Beyond the Anarchical Society*, 103–05. Yet none investigates the origins of this norm. Despite of the fact that Miles provides overviews of seven nineteenth century investment disputes, *Origins of International Investment Law*, 55–69. Lipson's detailed narrative begins only with late nineteenth century Latin America, *Standing Guard*, 37–64.
[14]Keene, *Beyond the Anarchical Society*, 103–5. Though Burch argues for the importance of private property in the making of modern world politics, he does not trace the international evolution of the shift towards stronger private property rights –and the more general separation of the political and economic spheres– that he argues originally takes place in seventeenth century England, *"Property" and the Making of the International System* , viii–ix, 9, 15, 148–51.
[15] Miles notes that the idea of a 'minimum standard' is crucial for the study of international investment law in the nineteenth century, but does not track the origins of the concept and link it to that of the 'standard of civilisation', *Origins of International Investment Law*, 47–50. In contrast the connection between the 'standard of civilization' and 'international standard' is recognized in Ian Brownlie, *Principles of Public International Law*, 1st ed. (Oxford: Clarendon Press, 1966); Martins Paparinskis, *International Minimum Standard and Fair and Equitable Treatment* (Oxford: Oxford University Press, 2013); Carsten-Andreas Schultz, "Civilisation, Barbarism and the Making of Latin America's Place in 19th-Century International Society," *Millennium: Journal of International Studies* 42, no. 3 (2014): 837–59.

of the modern global economy, and world politics in general. An influential narrative in International Relations considers the long nineteenth century as the beginning point of the making of a 'liberal international order'. Liberal thinkers inspired the liberal order. The ideas of political thinkers, the most influential of which was Locke, were taken up by writers of legal doctrine, the most pre-eminent of which was Vattel. These ideas then slowly trickled down to practice, with the result that increasingly liberal states gradually created an open and rule-based order based on multilateral treaty-making and international institutions. This process, motivated by Locke and Vattel's liberal vision of the rule of law, led liberal democracies to champion most importantly free trade but also other liberal values through multilateralism.[16] According to an influential strand of this story Britain and later on the United States led the efforts to build a liberal political and economic order based on global free trade. It was the 'liberal' Anglo-American powers who pushed other states to adopt a liberal approach to world politics.[17] This nineteenth century liberal story, challenged an older International Relations narrative that conceived of Locke's liberal idea of strong private property rights in domestic society as merely the foundation for analogously strong sovereign rights in modern international society theorized by Vattel.[18] This earlier liberal story, focusing on the seventeenth and eighteenth centuries, is largely identical with the classical English school narrative in which sovereignty in international

[16] Ikenberry, *Liberal Leviathan*, 1–2, 15–17, 62–63. On Locke's key role Ikenberry draws on Doyle, *Ways of War and Peace*, 225. Though Reus-Smit refers to a 'modern international society' rather than a 'liberal international order' he too argues that increasingly liberal European states create a novel order through multilateral treaty-making in the late nineteenth century. The liberal shift was inspired by the 'Enlightenment' ideas of political theorists such as Locke that had been applied to international society by legal theorists such as Vattel, *Moral Purpose of the State*, 123–45.

[17] In particular Ikenberry, *Liberal Leviathan*, 1–2, 15–17, 62–63. See also Ikenberry, "The Future of the Liberal World Order. Internationalism After America", *Foreign Affairs* (May/June 2011). For similar arguments for Anglo-American exceptionalism, Walter Russell Mead, *God and Gold. Britain, America, and the Making of the Modern World* (London: Atlantic, 2007), preface to the British edition xiii-xiv, 82, 124-5; Paul Kennedy, *The Parliament of Man. The United Nations and the Quest for World Government* (London: Allen Lane, 2006), ix–x, 4-5. In contrast Reus-Smit argues that the role of the US in particular in the making of modern international society and its key institution of multilateral treaty-making has been overemphasized, *Moral Purpose of the State*, 154. Justin Rosenberg largely agrees with the analysis that the most liberal states –Britain and the United States– created a capitalist world order and consequently modern international relations in the nineteenth century and also rightly notes that this liberal order was not particularly consensual. Rosenberg is not however particularly interested in analyzing the 'legal superstructure' of this capitalist global economy, *Empire of Civil Society*, 162–172.

[18] John Gerard Ruggie, "Continuity and Transformation in the World Polity. Toward a Neorealist Synthesis," *World Politics* 35, no. 2 (1983): 275–78. See also Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 14.

society is seen as analogous with property in domestic society, though Grotius instead of Locke and Vattel is privileged as the key theorist of the shift.[19]

These conventional accounts are to a considerable extent a function of the method with which they approach the history of international law. They highlight how the contextual understanding of international legal thought, with a particular emphasis on great legal theorists such as Grotius or Vattel, has become an important focus in the history of international law. This methodological emphasis is premised on an implicit understanding of the dynamics of legal change. In this doctrinal story legal change first takes place through doctrine and then afterwards somehow trickles down into legal practice. In order to reinterpret the history of foreigners' property rights it is first necessary to reconsider the broader question of how exactly are we to approach the history of international law.

My argument

I argue that the so called 'practice turn' in social theory offers the best place to begin the history of international law, as it offers a way to link the history of ideas to that of actually existing patterns of social order through the study of practitioners. Yet the basic insight of a 'practice of legality' needs to be developed significantly in order to be applied to the historical study of the legal frameworks of world politics.

First the conventional idea of international legal practice needs to be reimagined. A focus on the 'profession of international law' is too narrow. Often the most influential actors in global legal practices were not lawyers but for example parliamentarians and diplomats. Contemporary lawyers' understandings of the law do however allow us to disaggregate the usual notion of a unified practice of

[19] Hedley Bull, "The Importance of Grotius in the Study of International Relations," in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.) *Hugo Grotius and International Relations* (Oxford: Clarendon Press, 1992), 75–77; Hedley Bull, *The Anarchical Society. A Study of Order in World Politics*, (Basingstoke: Palgrave, 1977), 31, 39, 266.

international law into a plurality of interlinked legal practices in order to analyze their relative roles. Furthermore Western international law was not unified both in respect to the importance of specific legal practices and of substantive understandings of the law. Contested regional viewpoints can thus be contextually reconstructed as analytical categories based on contemporary practitioners' understandings of difference. The global legal order does not also consist only of the law between sovereign states. Domestic legal practices played a huge role in structuring relations between different communities in both metropolitan and colonial contexts.

Second the conventional idea of a legal text needs to be reconceptualised. The usual methods for studying social practices are not directly applicable to historical work as the practitioners of the world of yesterday are dead. The 'text' remains curiously under conceptualised even though it forms the basis for studying the history of the global legal order. Drawing on the theory of literature, I argue that a contextual study of the author's intentions is not sufficient to understand the historical significance of a legal text. It is necessary to think more broadly about the changing nature of legal texts with regards to their form, genre and production. Printing not only changed the way legal knowledge could be organized and circulated, but different editions allowed to change the text itself. Besides the context of the writing of a legal text, its use by both contemporary and later practitioners is of crucial importance. The reception of a legal text could change drastically with time and the text's meaning could be very different for later practitioners. Moreover, the very content of the legal text could change after the death of its original author as the result of the agency of later editors.

Third the new method highlights an important alternative dynamic of legal change that first takes place through legal practices and is introduced to doctrine only afterwards. With posthumous editors often drastically modifying canonical works in order to make them more useful for contemporary practitioners. In this practice story legal change predominantly takes place through practitioners pursuing their interests within broad bounds set by normative expectations rather than with the novel speculations of great thinkers. I thus lay out in Chapter One a specific methodological application of the broad insights of the practice turn and literary theory for the history of international law.

Furthermore the method, that in particular disputes the influential contextualist focus, allows me to conceptualize a novel interpretation of the dynamics of international legal change, which challenges the influential doctrinal story.

When applied to the case of foreigners' property rights, the new method allows for a radical reinterpretation of their history and, more broadly, the making of the liberal international order. Against conventional wisdom, contractual multilateralism did not play a key role in the strengthening of foreigners' property rights during the course of the long nineteenth century. Instead these key legal frameworks of the liberal international order were increasingly protected through customary unilateralism. The complementation of previously central bilateral treaty-making with the unilaterally invented and enforced notion of a strong customary norm protecting foreigners and their property resulted in a shift from contract to custom in the sources of the legal frameworks of the global economy.

The evolution of foreigners' property rights in international legal doctrine is tracked in Chapters Two (droit d'aubaine) and Four (standard of civilization). This overview is structured through a focus on the role and reception of some of the most famous classics of international legal doctrine: the works of Hugo Grotius (1625), Emer de Vattel (1758), Henry Wheaton (1836) and Lassa Oppenheim (1905).[20] I argue that these works do not play a pivotal role in the evolution of foreigners' property rights. Instead changes that had occurred through other legal practices were introduced afterwards in later editions of these works. Later lawyers reinterpreted and modified works of legal publicists to reflect changing understandings of the law. Sometimes these shifts in foreigners' property rights had already been transferred to international legal doctrine through other less-well known works. More often the editors themselves played a crucial role in changing international legal doctrine by drastically modifying the content of canonical works in order to make them useful for contemporary lawyers. I thus challenge

[20] Grotius, *De Iure Belli Ac Pacis*, 1st ed. (1625); Emer de Vattel, *Les Droit Des Gens. Ou Principes de La Loi Naturelle, Appliqués À La Conduite et Aux Affaires Des Nations et Des Souverains*, 1st ed. (London: apud liberos tutior [Neuchâtel: Journal Helvétique], 1758); Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science*, 1st ed. (Philadelphia, 1836); Lassa Oppenheim, *International Law: A Treatise*, 1st ed., vol. 1 (London: Longmans, 1905).

the conventional stories of foreigners' property rights and the liberal international order, in which great thinkers, the foremost of which is Vattel, play a pivotal role in their evolution. The fact that legal doctrine was mainly reactive to legal changes taking place through practice highlighting the need to decentre legal thought in the study of the global legal order.

Chapter Three tracks the unmaking of restrictions to foreigners' property rights in legal practice with a focus on the abolition of the droit d'aubaine in the period 1763-1843. I argue that this first systemic shift towards stronger protection for foreigners' property rights takes place contractually. Predominantly through bilateral treaty making and later domestic legal codification. Though this shift was partly justified through the broad Enlightenment idea of the 'progress of civilisation', specific positive law was still needed to abolish the droit d'aubaine. The contractual shift unmaking the droit d'aubaine was motivated not only by the notion of the 'progress of civilisation' but more specifically by a desire to modernize economies based on the ideas of political economists advocating stronger property rights in a more free market economy. With Locke and legal thinkers, such as Vattel, being notably absent from this story. The shift was led by liberal French decision makers pursuing modernisation and joined by other mainly Continental European states. French diplomats began systematically constructing a network of reciprocal treaties abolishing the droit d'aubaine after the defeat to Britain in the Seven Years War (1763). By the time of the French Revolution this included the most important European trading nations and other smaller modernizing states had began creating similar networks. Thus this shift towards stronger foreigners' property rights was not undertaken by nascent 'liberal democracies' after the American or French Revolutions but significantly predated them.

From 1789 onwards the changing of newly codified domestic law became the most important legal practice for unmaking restrictions to foreigners' property rights. As exemplified by Napoleon's *Code civil* of 1804 this was predominantly based on the condition of reciprocity that was ascertained through the exchange of diplomatic notes. After the fall of Napoleon, modernizing European states continued unmaking these restrictions through conditional domestic legal change complemented by

networks of reciprocal agreements. Though restoration France in 1819 unilaterally abolished restrictions to all foreigners' property rights, other European countries followed its lead only slowly. Contractual legal change was thus predominantly pursued through bilateral arrangements, complemented by rare unilateral actions, instead of multilateralism with the exception of the regional framework of the post 1815 German Confederation. In contrast to these developments, British and American domestic courts continued to uphold a ban on foreign ownership of real estate based on the common law. This was only overturned through legislation in Britain in 1870 and some US states continued to uphold restrictions until the early twentieth century. Thus instead of the Anglo-Americans, who have conventionally been perceived as the key players in the making of the liberal international order, the shift towards stronger foreigners' property rights was first led by France that was seeking to catch up with the power and prosperity of Britain.

Chapter Five explores the second systemic shift that took place with the strengthening of a customary legal norm protecting foreigners' property rights. The norm began to complement the more narrow and contingent rights that had been previously established contractually. This development reinvented an older weak customary norm that had made diplomatic intervention possible in the case of a denial of justice after local remedies offered by domestic courts had been exhausted. What was novel in the new conception of the norm was that domestic remedies needed not be always exhausted when a state's civilization was deemed lacking. This exception implying that some states could be more sovereign than others, potentially entailing a hierarchical conception of international order. Though the existing literature on foreigners' property rights refers to the customary norm its origins have remained underexplored.

I argue that British diplomats engaged in disputes with poorer capital-importing Southern European and Latin American states in effect created the stronger customary norm in the middle of the nineteenth century. Though Britain had traditionally concluded and later invoked trade treaties in disputes it increasingly began to claim that there also existed a strong customary legal norm grounded through the idea of civilization irrespective of specific treaty law. The British 1840s claims on Greece

constituted the key case in this reinvention of the older norm. This move in which foreign secretary Viscount Palmerston played a crucial role, was grounded on the acquiescence of the advocate general John Dodson. The Greek claims, which led to the 1850 British armed intervention, known as the Don Pacifico crisis, became a watershed as Palmerston's actions were heavily criticized as being contrary to the sovereign equality of states, existing trade treaties and the legal doctrine of Vattel. Yet Palmerston, who instead of Vattel justified his actions through the notion that Greece had failed in its duties as a civilized state in not upholding the customary norm, prevailed in the debate.

Practitioners, and in due course legal doctrine, began to refer to examples of Britain invoking this more expansive norm as evidence of its existence in international law. With American diplomats also soon using this novel idea. Chapter Six tracks how the notion of a strong customary norm continued to be most often invoked in disputes between the Anglo-American powers and Southern European and Latin American states in the latter part of the long nineteenth century. These weaker, and predominantly new, states had followed the Continental European trend towards giving foreigners' property rights through codified law. Several Latin American states subjected the far-reaching and rather vague reinvented norm to a radical challenge, which contested the possibility of diplomatic intervention altogether and was coined as the 'national standard' in the treatment of foreigners and their property by Latin American lawyers. Though the threat of military intervention usually led to acquiescence to the stronger state's diplomatic demands.

In practice the reinvention of the customary norm by hegemonic states led to the emergence of a more hierarchical legal framework for the global economy. With the most powerful states predominantly enforcing the norm on weaker states that also had lower status in international society. Anglo-American diplomats and lawyers continued to use the idea of 'civilization' as a justification for the existence of a norm protecting their nationals' economic interests abroad. With former American secretary of state Elihu Root coining the strong customary norm protecting foreigners and their property as the 'standard of civilization' at the 1910 meeting of the American Society of International Law. International arbitration tribunals' case law recognized the existence of the customary norm in

the 1920s as the ‘international standard’, which Root had used as an alternative epithet though the continuity under changed aliases has remained underexplored. This story of a largely forgotten nineteenth century shift from contract towards customary unilateralism in the legal frameworks of the global economy crucially goes completely against the conventional understanding of the making of a liberal international order by the Anglo-American powers through multilateral treaty making.

I then continue the story of foreigners’ property rights to the twenty-first century. The ‘standard of civilization’ has continued as a pivotal element of the legal frameworks of the global economy under its new aliases of the ‘international minimum standard’ and the ‘fair and equitable treatment’ standard. Latin American states continued to contest the customary norm until very recently and this opposition also foiled US led efforts to secure foreigners’ property rights through multilateral treaty making. Instead the US began including an affirmation of the customary norm as a ‘fair and equitable treatment’ standard in bilateral treaties. In a parallel move West Germany, joined by other European countries and the US, began including a clause giving investors direct access to international arbitration before the exhaustion of any domestic remedies. American and West German decision makers were not worried about this as they pursued bilateral treaties in order to protect their foreign investment in developing countries and did not think this would impact their own ‘superior’ domestic legal systems. It was only with the neoliberal turn of the 1990s that foreigners’ property rights, now based on a fusion between a customary norm and bilateral treaties, became largely uncontested in international society. With a continuation of the absence of multilateral contractualism from this crucial dimension of the liberal international order. These changes in legal practice became afterwards reflected in a posthumous edition of the most influential contemporary work of international legal doctrine thus dovetailing to an important alternative dynamic of legal change already encountered in earlier parts of the thesis.

Chapter One: The Case for a History of Global Legal Practices

This chapter outlines a new framework for the historical study of international law. I have argued that the problems in the conventional story of foreigners' property rights, or more broadly that of the liberal international order, are to a large extent consequences of underlying erroneous conceptions of how to study the history of international law. These conceptions are in their turn informed by implicit assumptions about how and why law changes. This chapter outlines a history of global legal practices as an alternative method, and then discusses how this framework is applied to the case of foreigners' property rights. The contextual understanding of treatises of great legal thinkers has become an important focus in the historical study of international law. This chapter argues for an alternative approach going beyond classics of legal doctrine to study the interlinked global legal practices that constituted actual patterns of social order. Dead practitioners can however only be accessed through texts which remain under conceptualized. I argue that literary theory provides the most helpful insights for developing a framework for studying legal texts. The historical importance of a legal text depends not only on why it was written but on how it was used, reinterpreted and even modified by later practitioners. The new method highlights an important alternative dynamic of legal change that first takes place through legal practices and is introduced to doctrine only afterwards with posthumous editors often drastically modifying canonical works in order to make them more useful for contemporary practitioners. In this practice story legal change predominantly takes place through practitioners pursuing their interests within broad bounds set by normative expectations rather than with the novel speculations of great thinkers.

The importance of the study of international law for understanding world politics is nowadays widely recognized within the discipline of International Relations. This insight naturally extends to scholars engaged in the historical study of world politics, whether for the purpose of developing a new historical interpretation or positivist theoretical innovation. Thus the study of international law has been a vital dimension of the 'historical turn' in IR that has built on the classical English school research agenda of pursuing a historical understanding of world politics whilst criticizing much of the substantive results of this earlier work.[21] However the historical study of international law is today not limited to IR theorists, and has become a multidisciplinary endeavour with the recent 'historical turn' in international law and the 'international turn' in the history of political thought.[22] Despite this insight on the crucial importance of international law for the historical understanding of world politics, scholars have spent relatively little explicit attention on the question of how exactly one should study the history of international law?

In practice the contextual understanding of international legal thought, with a particular emphasis on great legal theorists such as Hugo Grotius or Emer de Vattel, has become an important focus in the historical study of international law. This observation applies to not only IR scholars but also international lawyers and historians of political thought. This popular approach however has two important limitations when applied to the history of international law. First the emphasis on the contextual understanding of treatises of legal doctrine, most often those written by great thinkers, leaves the tracking of the reception and possible influence of these great thinkers in both later legal doctrine and practice largely underexplored. Second the substantive focus on legal thought leaves practice and the relationship between legal theory and practice largely underexplored though most of this literature is premised on an implicit understanding of the dynamics of legal change. In this

[21] Duncan Bell, "International Relations: The Dawn of a Historiographical Turn?," *British Journal of Politics and International Relations* 3, no. 1 (2001): 115–26; Keene, Edward, "The English School and British Historians," *Millennium: Journal of International Studies* 37, no. 2 (2008).
[22] Tuck, *Rights of War and Peace*; David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2012); Duncan Bell, ed., *Victorian Visions of Global Order Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2012); Koskenniemi, *Gentle Civilizer of Nations*; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Jouannet, *Liberal-Welfarist Law of Nations*; Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford: Oxford University Press, 2012).

doctrinal story legal change first takes place through doctrine and is then afterwards introduced to legal practice. Before outlining my alternative method and historical interpretation, I will briefly explore the effects of these two limitations in the existing literature.

The doctrinal approach emphasizes developing a contextual understanding of authorial intention in treatises of legal doctrine, with particular focus on those written by great thinkers. What the author was trying to achieve by his argument can be understood through contextualising his actions with reference to contemporary debate. As Edward Keene argues with reference to Grotius' *De Jure Belli ac Pacis*, 'it is suspiciously coincidental, to say the least, that this account of public and private rights in the law of nations, despite its broadly conservative orientation, provided justifications for the Dutch 'Revolt' as a public war against the usurpations of Philip II and as a private war with the Portuguese and Spanish in the East and West Indies.'[23] We possess excellent contextual studies of Grotius' legal thought in relation to divisible sovereignty, private property, the freedom of the seas and society.[24] In similar vein Antony Anghie emphasizes that Francisco de Vitoria's jurisprudence reconceptualised existing doctrines or 'invents new ones, in order to deal with the novel problem of the Indians.'[25] Vitoria 'executes a formidable series of manoeuvres by which an idealized form of particular Spanish practices become universally binding. Indians are excluded from the realm of sovereignty, and Indian resistance to Spanish incursions becomes aggression which justifies the waging of a limitless war by a sovereign Spain against non-sovereign Indians.'[26] For Martti Koskenniemi 'the doctrine of *ius gentium* as propounded by' the Salamanca School, and in particular Francisco Suárez who 'is known as the first writer working with a distinctly "modern" view of the subject by dividing it into legal rules common to all or most nations and rules applicable in the relations between nations', grew as theologians and jurists 'were seeking to respond to the religious split in Christendom as well as to the

[23] Keene, *Beyond the Anarchical Society*, 58.
[24] Ibid.; Martine van Ittersum, *Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615)* (Leiden: Brill, 2006). Evgeny Roshchin, "(Un)Natural and Contractual International Society: A Conceptual Inquiry," *European Journal of International Relations* 19, no. 2 (2011).
[25] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 15.
[26] Ibid., 30. See also Brett Bowden, "The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization," *Journal of the History of International Law* 7, no. 1 (2005); *The Empire of Civilization: The Evolution of an Imperial Idea* (Chicago: Chicago University Press, 2009).

social, economic and political transformations they saw around themselves.'[27] There also exist a number of influential works seeking to contextualise various aspects of Vattel's *Le Droit des Gens* through reference to Enlightenment discourse.[28]

This popular methodological agenda shares considerable similarities with Quentin Skinner's contextualist approach to the history of political thought, though Skinner's methodological writings have been an explicit influence to only a minority of the authors.[29] Skinner's famous essay on method –*Meaning and Understanding in the History of Ideas*– argues that the key to the history of political thought, with particular focus on pivotal great thinkers, lies in developing a contextual understanding of authorial intention. As Skinner writes, with reference to Machiavelli and Hobbes, the 'essential question which we therefore confront in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice have been intending to communicate by the utterance of this given utterance.'[30] We can in other words understand the role of say *Leviathan* in the history of political thought by analyzing what the work meant for Hobbes. Yet the contextual focus on authorial intention, most often in relation to great thinkers, has an important methodological limitation in the history of international law. It leaves the tracking of the reception and possible influence of great thinkers in both later legal doctrine and practice largely underexplored. In other words from the viewpoint of the historical understanding of the role of international law in world politics the analysis of how a particular thinker's work was received and used by other and later legal thinkers and practitioners is at least as important as developing a contextual understanding of the author's original argument. The crucial question becomes how are we then for example to study what

[27] Koskenniemi, "Ius Gentium and the Birth of Modernity", 3. See also "Empire and International Law".
[28] Reus-Smit, *Moral Purpose of the State*, ch 6 "Modern International Society." For works exclusively focusing on Vattel, Jouannet, *Liberal-Welfarist Law of Nations*; Walter Rech, *Enemies of Mankind. Vattel's Theory of Collective Security* (Nifhoff: Brill, 2013).
[29] van Ittersum, *Profit and Principle* draws on Skinner and the Cambridge school on method, though explicitly emphasizing the social context; Edward Keene, *International Political Thought: An Historical Introduction* (Cambridge: Polity, 2005) explicitly draws on Skinner with regards to method in the history of international political thought; Christian Reus-Smit, "Reading History through Constructivist Eyes," *Millennium: Journal of International Studies* 37, no. 2 (2008) explicitly draws on Skinner on historical constructivist method. Roshchin's recent iconoclastic conceptual history of "international society" which contextualizes Grotius' work is also in terms of method explicitly "informed by a number of precepts spelled out by Quentin Skinner", "(Un)Natural and Contractual International Society: A Conceptual Inquiry," 248.
[30] Quentin Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory* 8, no. 1 (1969): 48–49.

role Grotius' legal thought plays in the later development of both legal thought and practice? Though recent work in particular has turned more attention to the reception, use and even the modification of legal texts, there does not yet exist much explicit conceptual work on the implications of this relative shift from the contextualist focus on authorial intention.[31]

The emphasis on developing a contextual understanding of legal thought also leaves practice and the crucial relationship between legal theory and practice largely underexplored. In other words do legal theorists influence the legal practices that constitute actually existing patterns of social order in world politics, and if they do then what are the specific dynamics of this interaction? Instead most of this literature is premised on an implicit assumption of the dynamics of legal change. In this doctrinal story legal change first takes place through doctrine and is then afterwards introduced to legal practice. It is thus not completely clear why for Keene it is 'fair to say that over time an especially close relationship developed between the specific propositions of the Grotian theory of the law of nations … and the modern practices of colonialism and imperialism.'[32] Anghie has also argued that 'Vitoria's real importance lies in his developing a set of concepts and constructing a set of arguments which have been continuously used by western powers in their suppression of the non-western world and which are still regularly employed in contemporary international relations in the supposedly post-imperial

[31] On reception Karma Nabulsi, *Traditions of War. Occupation, Resistance, and the Law* (Oxford: Oxford University Press, 1999); Edward Keene, "Images of Grotius," in *Classical Theory of International Relations*, ed. Beate Jahn (Cambridge: Cambridge University Press, 2006); Ian Hunter, "Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations," in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. Ian Hunter and Shaunnagh Dorsett (New York: Palgrave Macmillan, 2010); Elisabetta Fiocchi Malaspina, *L'eterno ritorno del Droit des gens di Emer de Vattel (secc. XVIII-XIX). L'impatto sulla cultura giuridica in prospettiva globale.* Frankfurt am Main: Max Planck Institute for European Legal History, 2017; and most explicitly Claire Vergerio, "Constructing the Right to War. Alberico Gentili and His Receptions in International Law" (DPhil thesis, University of Oxford, 2017); also implicitly Roshchin, "(Un)Natural and Contractual International Society: A Conceptual Inquiry"; More generally J. G. A Pocock, "Texts as Events: Reflections on the History of Political Thought," in *Political Thought and History. Essays on Theory and Method* (Cambridge: Cambridge University Press, 2009) argues for the importance of studying reception in the history of political thought; See also Beate Jahn, "Introduction: Classical Theory and International Relations in Context," in *Classical Theory in International Relations*, ed. Beate Jahn (Cambridge: Cambridge University Press, 2006); On later modifications to the original legal text, Gerrit W. Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984), 24-35; Hunter, "Global Justice and Regional Metaphysics", 22–23, also "Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry," *History of European Ideas* 39, no. 4 (2013): 477–502; Fiocchi Malaspina, *L'eterno ritorno*, ch. 4.

[32] Keene, *Beyond the Anarchical Society*, 60.

world.'[33] For Koskenniemi the *ius gentium* of Suárez 'delimits political power within the sphere of territorial sovereignty and liberates private *dominium* to express itself as ownership so as to contribute to the creation of a world-wide capitalist economy … In elaborating how this should take place in detail, Grotius would become simply a Protestant Suárez.' This 'twofold *ius gentium* … laid the basis for a system of private property and commercial exchanges that would operate beyond the reach of statehood and that would later become the true representative of the Kantian-liberal project'.[34] Similarly the role of Vattel's legal thought has been emphasized in the making of modern international law and international society.[35] In Christian Reus-Smit's words, Vattel 'represents an important bridge between the naturalism of the absolutist era and the positivism of the modern.'[36] The 'legislative ideal of procedural justice … filtered into international legal thought in the late eighteenth century, finding expression in the writings of early "positivist" legal theorists' even though it 'was not until the middle of the nineteenth century … that this principle began structuring the actual practices of states, establishing over time a distinctly modern international institutional architecture.'[37] For Emmanuelle Jouannet the influence of Vattel's 'paradigm model' of 1758 on both legal doctrine and practice was so pivotal that the 'classical nineteenth century world truly was the *Vattelian moment*.'[38]

This assumption that great thinkers play pivotal roles in the history of international law seems again at first sight quite compatible with Skinner's study of the evolution of early modern European political thought, with a particular focus on the making of the modern concept of the 'state'. Skinner highlights in particular the role of two pivotal thinkers, Niccolo Machiavelli and Thomas Hobbes, in this process.[39] As Skinner argues, of 'all these writers of advice-books, it is Machiavelli in *Il Principe* who

[33] Antony Anghie, "Francisco de Vitoria and the Colonial Origins of International Law," *Social Legal Studies* 5 (1996), 332.
[34] Koskenniemi, "Ius Gentium and the Birth of Modernity", 22.
[35] Reus-Smit, *Moral Purpose of the State*, ch 6 "Modern International Society"; Jouannet, *Liberal-Welfarist Law of Nations*. Also Anghie, *Imperialism, Sovereignty and the Making of International Law*.
[36] Reus-Smit, *Moral Purpose of the State*, 132.
[37] Ibid., 132–33.
[38] Jouannet, *Liberal-Welfarist Law of Nations*, 12–13, 111–12.
[39] Quentin Skinner, *Visions of Politics: Volume II. Renaissance Virtues* (Cambridge: Cambridge University Press, 2002), ch. 14 "From the state of princes to the person of the state"; See also Skinner's *Reason and Rhetoric in the Philosophy of Hobbes* (Cambridge: Cambridge University Press, 1996); *Machiavelli* (Oxford: Oxford University Press, 1981); *The Foundations of Modern Political Thought. Vol 1: The Renaissance*

shows the most consistent willingness to distinguish the institutions of *lo stato* from those who have charge of them … More clearly than any previous writer on public power, Hobbes enunciates the doctrine that the legal person lying at the heart of politics is neither the *persona* of the people nor the official person of the sovereign, but rather the artificial person of the state.'[40] Thus 'Hobbes's declaration can … be viewed as marking the end of one phase in the history of political theory and the beginning of another and more familiar one.'[41] Yet as we have seen the doctrinal approach in the history of international law makes a more ambitious argument in which the legal theory of great thinkers also trickles down to legal practice that constitutes actually existing patterns of global order. This implicit understanding of legal change shares similarities with John Maynard Keynes' famous broader argument about practitioners usually being unwitting slaves of defunct theorists and academic scribblers. For Keynes the 'ideas of economists and political philosophers … are more powerful than is commonly understood. Indeed the world is ruled by little else.'[42] Yet crucially the influential implicit doctrinal story of legal change has largely been assumed rather than demonstrated as the relationship between legal doctrine and practice has remained largely underexplored. How precisely does the seventeenth century legal theory of Grotius influence nineteenth century patterns of European colonialism; how precisely does the eighteenth century legal theory of Vattel influence crucial nineteenth century changes in the practice of international law? Though recent work in particular has turned more attention to connecting thought to practice, there does not yet exist much explicit conceptual work on this shift away from more traditional history of thought.[43]

(Cambridge: Cambridge University Press, 1979); *The Foundations of Modern Political Thought. Vol 2: The Age of Reformation* (Cambridge: Cambridge University Press, 1979).

[40] Skinner, *Visions of Politics: Volume II. Renaissance Virtues*, 378, 404.

[41] Ibid., 368.

[42] Cited in Bowden, *Empire of Civilization*, 5-6.

[43] For works emphasizing the role of legal practice Koskenniemi, *Gentle Civilizer*; Edward Keene, "A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century," *International Organization* 61, no. 2 (2007): 311–39; Edward Keene, "The Age of Grotius," in *Routledge Handbook of International Law*, ed. David Armstrong, (Oxford: Routledge, 2009), drawing on the earlier work of Maurice Keens-Soper, "The Practice of a States-System," in *The Reason of States. A Study in International Political Theory*, ed. Michael Donelan (London: Allen & Unwin, 1978); Randall Lesaffer, "International Law and Its History: The Story of An Unrequited Love," in *Time, History and International Law*, ed. Malgosia Fitzmaurice and Matthew Craven (Leiden: Brill, 2006); David Armitage, *Foundations of Modern International Thought*, ch 8 'Parliament and international law in eighteenth-century Britain'; Julia Costa Lopez, "The Legal Ordering of the Medieval International" (DPhil thesis, University of Oxford, 2016).

I will next outline the alternative historical method in detail, with sections on rethinking international legal practice, legal texts and the dynamics of legal change. After having conceptualised a history of global legal practices, I will proceed to the important question of where exactly one can find legal texts necessary for the study of past global legal practices. This section will be organized through a short historical overview of the emergence of various key genres of legal publications that form a basis for studying past legal practice. The final section provides a practical roadmap on how the method will be applied in this thesis to the history of foreigners' property rights.

A history of global legal practices

The key insight of the practice turn in International Relations is that in order to develop a better understanding of world politics one must study agents engaged in international practices that constitute, change and reify patterns of order. In Emmanuel Adler and Vincent Pouliot's words, practices 'are socially meaningful patterns of action, which, in being performed more or less competently, simultaneously embody, act out, and possibly reify background knowledge and discourse in and on the material world.'[44] The study of practices allows to investigate the relationship between ideas and institutional outcomes through looking at actors who are simultaneously enabled and bounded by the practices through which they contest rules. As Cornelia Navari argues, social practices do not determine discrete outcomes but 'at best they guide' with the agents remaining 'relatively autonomous'.[45]

[44] Emanuel Adler and Vincent Pouliot, "International Practices: Introduction and Framework," in *International Practices* (Cambridge: Cambridge University Press, 2011), 6.
[45] Cornelia Navari, "The Concept of Practice in the English School," *European Journal of International Relations* 17, no. 4 (2011): 618.

The practice turn and international law

When applied to international law, the idea of practice allows the study of practitioners contesting, reifying and changing legal norms within legal institutions. The focus on practitioners, relatively competent agents enabled and bounded by a shared social world of the legal practice, enables a better analysis of legal change rather than a more structural framework privileging norms and institutions. Jutta Brunnée and Stephen Toope's concept of a 'practice of legality' explicitly applies the practice turn to the study of international law, and offers an exceptionally useful conceptual starting point. They argue that law's 'distinctiveness rests in the concept and effects of legal obligation … legal obligation is best explained as resulting from the work of communities of legal practice that uphold specific criteria of legality'.[46] In doing so they draw on the work of the legal theorist Lon Fuller according to whom, legal norms are distinguished from other types of social norms by specific '"background" criteria of legality'. They must be general rules, accessible to the public, not retroactive, clear, realistic, relatively constant and should be upheld by 'actions of officials operating under the law'.[47] 'Fidelity' or legal obligation is felt because adherence to these criteria 'in the creation of norms and in their continuing application – produce law that is legitimate in the eyes of the persons to whom it is addressed.'[48] Crucially for Brunnée and Toope the influence of legal norms can only be understood through 'an explicit focus on the practices that sustain legality'[49]. Thus only when a community of practice 'is engaged in a practice of legality rooted in the specific "Background" criteria of legality can shared legal understandings, be they procedural or substantive, modest or ambitious, be produced, maintained, or altered'.[50] Agents cannot build and contest legal norms in isolation 'but only as part of a community of practice – because legality is itself a shared understanding' of the fact that

[46] Jutta Brunnée and Stephen J. Toope, "Interactional International Law and the Practice of Legality," in *International Practices*, ed. Emanuel Adler and Vincent Pouliot (Cambridge: Cambridge University Press, 2011), 108. The concept of legality in international law is developed at greater length in Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law. An Interactional Account* (Cambridge: Cambridge University Press, 2010).
[47] Brunnée and Toope, "Interactional International Law and the Practice of Legality," 113–14.
[48] Ibid., 115.
[49] Ibid., 109.
[50] Ibid., 117.

interactions 'should be *legal*, rather than purely social or political'.[51] Despite offering an excellent starting point, I argue that the idea of a 'practice of legality' needs to be developed in two distinct ways for the purpose of studying the history of the global legal order.

First the idea of a practice of international law needs to be explicitly problematised. Instead of a monolithic unified practice the global legal order is constituted of a plurality of legal practices, which have changed over time, and the analysis of which allows for a more fine-grained understanding of social and legal change. Though Brunnée and Toope suggest that there 'exist multiple, overlapping communities of legal practice' based on specific issue areas within a 'global practice community that upholds the basic legality requirements' they do not specify how one is to conceptualise and identify these sub practices.[52] Moreover Brunnée and Toope do not explicitly discuss who the practitioners or agents of the global practice of legality are. Though they implicitly suggest that these practitioners are not limited to the narrow profession of international law but include other competent actors.[53] Diplomats, statesmen, NGO staff and other groups of experts such as scientists play pivotal roles in the context of the global climate change regime, which is used as an example of international legal change.[54] This implicit take-way, that the competent practitioners of the global legal order, are not limited to the core expert group of professional international lawyers, offers a key value added to the history of international law.

The idea of a focus on 'practitioners' rather than doctrine in the history of international law is of course not new. Yet one limitation to Koskenniemi's seminal *Gentle Civilizer of Nations* is the work's exclusive focus on reconstructing the rise and fall of a particular liberal internationalist 'sensibility' within the emerging 'modern' profession of international law from around 1870 onwards.[55] Though this gives focus to an important disciplinary and professional history, practitioners need to be conceptualized more broadly if the aim is to produce a broader interpretation of the history of the

[51] Ibid., 130, 131.
[52] Ibid., 131.
[53] Ibid., 117, 129.
[54] Ibid., 125-6.
[55] Koskenniemi, *Gentle Civilizer*, 2-4.

global legal order. David Armitage's study of the increasing use of positivist international legal argument in eighteenth century British parliamentary debates points to one relatively neglected legal practice, which is very important for understanding global legal change and in which many key practitioners have not been trained and do not identify as lawyers.[56] In similar vein Koskenniemi has more recently argued that the 'increasingly professionalised' system of eighteenth century European diplomacy and treaty-making constitutes the context for the positivist turn in international legal doctrine.[57] Lauren Benton and Lisa Ford's work on the legal ordering of the early nineteenth century British empire has also emphasized the relatively minor role played by international lawyers. Most competent practitioners of what they conceptualize as the 'vernacular imperial constitution' lacked a formal legal education.[58] In other words, the historical study of the global legal order requires going beyond the core of professional lawyers to analyze broader vernacular global practices of legality. To use a contemporary domestic analogy, in order to understand how and why law changes in the United States one has to analyze legal practices that extend beyond the self-conscious profession of law.

Yet the plurality of legal practices constituting the global legal order at a given point in time must be grounded in the contemporary understandings of a core expert group of legal practitioners who identify as international legal professionals. As Adler and Pouliot argue 'defining what counts as an international practice and what does not is best left with practitioners themselves in their actual performance of world politics.'[59] Lawyers' views on the sources of the law offer an excellent contextual viewpoint for identifying the plurality of relevant legal practices. What were 'sources of law' from the perspective of the particular legal practice of legal doctrine writing actually constitute textual records of the activities of other legal practices. Thus lawyers provide a contextual heuristic for identifying legal practices when they list sources of law in doctrinal works. Ironically the clues for

[56] Armitage, *Foundations of Modern International Thought*, ch 8.
[57] Martti Koskenniemi, "Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law," *Constellations* 15, no. 2 (2008), 194-5. See also "The Advantage of Treaties: International Law in the Enlightenment," *Edinburgh Law Review* 13, no. 1 (2009) which reinterprets the relationship of international legal doctrine with broader political thought.
[58]Lauren Benton and Lisa Ford, *Rage for Order. The British Empire and the Origins of International Law 1800-1850* (Cambridge, Massachusetts: Harvard University Press, 2016), 13-8 cited at 17.
[59] Adler and Pouliot, "International Practices: Introduction and Framework," 7.

getting beyond a history of legal thought to the study of practices actually lie within works of international legal doctrine.[60] Without grounding legal practices contextually the possibilities for conceptualizing relevant legal practices seem potentially endless. In Peter Wilson's words, grounded theorizing enables scholars to gather 'data on practitioner understandings of the institutional structure of international society.'[61]

For example Joseph Chitty's English edition of Vattel (1834) and Henry Wheaton's *Elements of International Law* (1836) played crucial roles in recognizing the case law of both international and domestic tribunals as a source of international law within international legal doctrine.[62] Though Wheaton's 'impact on the 19th century is often said to be comparable to that of Emer de Vattel in the 18th century or that of Hugo Grotius in the 17th century' Chitty has in contrast almost completely dropped out of the history of international law, which dovetails with the influential focus on 'great thinkers'.[63] The addition of case law was based on the important role courts had in Anglo-American legal practice –Chitty practiced law as a barrister and Wheaton had previously edited the reports of the US Supreme Court. Including 'adjudications of international tribunals, such as boards of arbitration and courts of prize' explicitly among the 'various sources of international law' was markedly different from the earlier international legal doctrine of G. F. von Martens (1789) who had defined treaties and custom, inferred from the diplomatic practice of states, as the sources of the 'positive Law of Nations'

[60] For recent works emphasizing the need to study international legal practice: Keene, "A Case Study of the Construction of International Hierarchy"; Keene, "The Age of Grotius", drawing on the earlier work of Keens-Soper, "The Practice of a States-System"; Lesaffer, "International Law and Its History"; Also Armitage, *Foundations of Modern International Thought*, ch. 8. Koskenniemi's *Gentle Civilizer* is temporally limited by its focus on the making of a "modern international law" with a distinctive professional and disciplinary identity in the late nineteenth century.

[61] Peter Wilson, "The English School Meets the Chicago School: The Case for a Grounded Theory of International Institutions," *International Studies Review* 14 (2012): 586.

[62] Wheaton, *Elements* (1st ed. 1836), 48–50; Emer de Vattel, *The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, by Joseph Chitty, Esq. Barrister at Law*, (London: Sweet, Stevens & Sons, Maxwell, 1834), liv, fn. 1; Chitty's earlier doctrinal work had already included judicial practice as a source of international law, see, *A Practical Treatise on the Law of Nations, Relative to the Legal Effect of War on the Commerce of Belligerents and Neutrals and On Orders in Council and Licences. To Which Are Added, Extracts from Grotius, Bynkershoek, and Vattel : Also, the Letter of Sir William Scott, and of the Duke of Newcastle, &c. Containing Matters Applicable to the Law of Prize* (Boston, 1812); *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating Thereto: With an Appendix of Treaties, Statutes, and Precedents*, vol. 1. (London: Butterworth, 1824); on Chitty's Vattel, see Hunter, "Global Justice and Regional Metaphysics," 22–23.

[63] Lydia Liu, "Henry Wheaton 1785-1848," in *Oxford Handbook of the History of International Law*, ed. Bardo Fassbender and Peters (Oxford: Oxford, 2012), 1132; Also Gong, *Standard of "Civilisation."* On Chitty see the note above.

in his *Précis du droit des gens moderne de l'Europe fondé sur les traites et l'usage*.[64] Yet we must not apply this heuristic uncritically. In fact domestic courts had already played an important role as a global legal practice during the late eighteenth century. If we rely solely on texts of international legal doctrine our understanding of the history of the global legal order will remain relatively inaccurate and patchy. Despite of this limitation, international legal doctrine has thus helped us to recognize several legal practices that were extremely relevant by the early nineteenth century: Treaty-making the vast majority of which was still bilateral –'open' plurilateral treaties developed only in the latter half of the century[65]; Diplomacy that both constituted a source of customary law and was in itself becoming even more legalized through recourse to legal advisers[66]; The judicial practice of both international and domestic courts which interpreted international law in disputes and in so doing often modified it.

The narrow focus on the practice of '*international* law' also needs to be problematized in order to develop a better understanding of the history of the legal frameworks of world politics. The narrow idea of 'international law' as the law between sovereign states leaves out crucial patterns of global legal order. Domestic legal practices, both in contested colonial and metropolitan contexts, played a huge role in international society.[67] Keene argues that at 'the same time that the 'Westphalian system' of equal and mutually independent territorially sovereign states was taking shape, quite different colonial and imperial systems were being established beyond Europe'.[68] Thus leading 'to the creation of a distinct extra-European pattern of international order'.[69] Once again even though the shrinking of the sphere of fully sovereign international actors to encompass only Christian or European states is an

[64] Wheaton, *Elements* (1st ed. 1836), 47–50; Georg Friedrich de Martens, *Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe: With a List of the Principal Treaties, Concluded since the Year 1748 down to the Present Time, Indicating the Works in Which They Are to Be Found*, trans. William Cobbett (1795), 11–12. Also Vattel, *Les Droit Des Gens (1st Ed. 1758)*, xxi-xxii.
[65] On the advent of open-ended plurilateral treaties with reference to the Paris Declaration of 1856, Jan Lemnitzer, *Power, Law and the End of Privateering* (Basingstoke: Palgrave Macmillan, 2014).
[66] For an overview of legal advise in British diplomacy, Arnold Duncan Lord McNair, *International Law Opinions : Selected and Annotated. Three Volumes* (Cambridge: Cambridge University Press, 1956).
[67] For key works on international law and colonialism, Anghie, *Imperialism, Sovereignty and the Making of International Law*; Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History: 1400-1900* (Cambridge: Cambridge University Press, 2002); Keene, *Beyond the Anarchical Society*; Koskenniemi, *Gentle Civilizer*, ch 2.
[68] Keene, *Beyond the Anarchical Society*, 97.
[69] Ibid., 11. Also Koskenniemi, *Gentle Civilizer* and more broadly Andrew Hurrell, *On Global Order. Power, Values, and the Constitution of International Society* (Oxford: Oxford University Press, 2007).

extremely significant feature of nineteenth century international legal doctrine, for example the work of Wheaton, there is no reason to limit our inquiry by these increasingly narrow contemporary conceptions of international law that left out most of the global legal order that framed relations between different communities. We may thus add domestic law-making and judicial practice – interpreting and in effect often modifying domestic law– to our plurality of relevant legal practices.

In a parallel move, the idea of a unified and uncontested European or Western practice of 'international law' needs to be challenged. In fact there existed very significant regional differences in both understandings of the content of the law and of the relative importance of various legal practices. Louise Fawcett observes in the context of Latin America that 'the West/non-West dichotomy … obscures as much as it clarifies'.[70] These regional variations in legal practices that can serve as useful analytical concepts can be once again reconstructed based on contemporary lawyers' understandings. For example nineteenth century lawyers commonly noted the differences between Anglo-American and Continental European legal practices, particularly with regards to the relative importance of judicial practice. In Carlos Calvo's words, whereas '[u]ne sentence ou decision judiciaire est considérée en Angleterre et aux Etats-Unis comme une preuve évidente de la juste application de la loi : c'est une declaration de la loi commune' amongst 'les peoples monarchiques du continent européen, les decisions judiciaires ne jouissent pas de la même autorité'.[71] The patterns of de facto hierarchy or 'informal empire' between the core Western powers and the 'rest' of international society constituted a significant background factor to legal contestation.[72] As Koskenniemi argues 'the mainstay of Western domination has been the informal one – rule through private property, and contract – instead

[70] Louise Fawcett, "Between West and Non-West: Latin American Contributions to International Thought," *International History Review* 34, no. 4 (2012): 679–80.

[71] Charles Calvo, *Le Droit International Théorique et Pratique. Cinquiéme edition* (Paris: Rousseau, 1896), tome premier, 158.

For a translation: '[a] judicial sentence or decision is regarded in England or the United States as clear evidence of the correct application of the law : it is a statement of the common law' amongst 'the monarchist peoples of the European continent, judicial decisions do not enjoy the same authority'.

[72] Gong, "Standard of Civilization"; Rosenberg, Empire of Civil Society; Kayaoglu, Legal Imperialism, Koskenniemi, "Histories of International Law"; Schultz, "Civilisation, Barbarism and the Making of Latin America's Place"; Arnulf Becker Lorca, *Mestizo International Law A Global Intellectual History 1842–1933* (Cambridge: Cambridge University Press, 2015).

of formal annexation. If there is any pattern of a *longue durée* in the legal articulation of empire, this is it.'[73]

Second Brunnée and Toope's idea of a practice of international law is limited by the implicit presentism brought about by a focus on contemporary world politics. This results in a lack of awareness on historical method, which is a more general feature of the practice turn in International Relations. Iver Neumann's fair critique of 'armchair' analysis of texts on global politics rather than gathering 'contextual data from the field' through interviews and participant observation does not carry to historical work.[74] The usual means of interviewing practitioners are not available for historians who go beyond the very recent past, and the scholar has to base her/his work almost exclusively on texts. Thus the question of how to study legal texts is the crucial question for method in the history of the global legal order. Despite of this, conceptualising the 'text' has elicited surprisingly little attention from scholars of the history of international law. In the following section, I propose an explicit method for the study of legal texts that goes beyond the conventional focus on context to also examine both the nature and the use of the text, in order to understand its significance for the history of the global legal order. I argue that in terms of method for studying legal texts, the most constructive ideas are available not in the history of political thought, but from theorists of literature.

Literary theory and global legal practices

Texts need to be studied in their context, in order to discover why their author wrote them. It is necessary to ask what sort of debates was the practitioner engaging in and what did he seek to achieve through his actions. As Quentin Skinner argues with regards to Niccolo Machiavelli and Thomas Hobbes the 'essential question which we therefore confront in studying any given text, is what its author, in writing at the time he did write for the audience he intended to address, could in practice

[73] Koskenniemi, "Histories of International Law", 18.
[74] Iver B. Neumann, "Returning Practice to the Linguistic Turn: The Case of Diplomacy," *Millennium: Journal of International Studies* 31, no. 3 (2002): 628.

have been intending to communicate by the utterance of this given utterance.'[75] Yet this conventional focus of studying minor texts as context for understanding great thinkers needs be turned upside down when the object of inquiry is the history of the global legal order.[76] The focus is no longer in understanding how contemporary developments in legal practices provide the background for the seminal moves of great writers of legal doctrine such as Hugo Grotius or Emer de Vattel but rather on change in those legal practices themselves. Great thinkers may have indeed played major or minor roles in the evolution of these legal practices. Thus the attention needs to be redirected from thinking of the social world as context for great thinkers to how ideas play out in legal practices and constitute contested patterns of legal order. Understanding what a legal text meant to its author is only the first step in studying its significance for the history of the global legal order. We must also more broadly consider the nature of text and its use by other practitioners. This dovetails with John Pocock's apt observation that '[s]tudents of literature know that text-reader relationships are complex and unpredictable affairs; students of 'the history of ideas' may need to be reminded that they are a very large part of what they are studying.'[77] This broad insight has been echoed in legal theory. In Ian Ward's words 'law *as* literature … seeks to apply the techniques of literary criticism to legal texts.'[78] The following section outlines a discrete application of this broad observation to the historical study of the global legal order.

The nature of the legal text needs to be analysed in detail rather than taken as a given starting point. The primary purpose of legal texts is practical, they are intended to help practitioners to navigate within practices that constitute the legal order. Legal practices are to a considerable extent

[75] Skinner, "Meaning and Understanding in the History of Ideas," 48–49.
[76] For recent contextualist works on the history of international law: Keene, *Beyond the Anarchical Society*; van Ittersum, *Profit and Principle*; Reus-Smit, *Moral Purpose of the State*; Jouannet, *Liberal-Welfarist Law of Nations*; Rech, *Enemies of Mankind. Vattel's Theory of Collective Security*.
[77] Pocock, "Texts as Events: Reflections on the History of Political Thought," 115. See also James Der Derian and Michael J. Shapiro, eds., *International/Intertextual Relations. Postmodern Readings of World Politics* (New York: Lexington, 1989) which interestingly applies postmodernist literary theory, including Roland Barthes' work, to the study of a number of genres of texts and practices with reference to world politics including Machiavelli's political thought, Freud's thought on psychology, sports, military manuals, modern IR theory including Kenneth Waltz's work, spy novels and newspaper articles. In contrast this thesis focuses on legal thought and practice.
[78]Ian Ward, *Law and Literature. Possibilities and Perspectives* (Cambridge: Cambridge University Press, 1995), 3. For a broad critique of applying literary theory to law, see Richard Posner, *Law and Literature. Third Edition (*Cambridge, Mass.: Harvard University Press, 2009).

characterized by the use of texts in order to store, contest and disseminate information. The sixteenth century saw an extremely important change in the nature of the text with the advent of printing. This constituted perhaps the most important change in the nature of the text between the invention of writing itself and the advent of the Internet. Despite of this the implications of this shift have been very seldom analysed from the point of view of legal practice.[79] Printing allowed for significantly more efficient storing, disseminating, and searching of legal knowledge. Yet this change was gradual. David McKitterick argues that while 'we speak today, using radical and dramatic vocabulary, of a printing revolution … innovations in printing were gradual both in its technical achievements and in its social … consequences'.[80] New genres of practical legal texts were published the gradual emergence of which allows for a new way of tracking the history of the global legal order. The fact that the law became increasingly not only a written but also a published practice played a key role in creating an increasingly public and global legal social space. The nature of the printed book itself also evolved greatly from the sixteenth to the nineteenth centuries. The main body of the text became increasingly accompanied by footnotes, and the text became easier to search through indices.[81] One often ignored key attribute of text in general is that it is not constant but usually changes. What crucially changed with printing was that the text could be explicitly and discretely changed through later editions. In the words of David Hume, '[t]his power, which Printing gives us, of continually improving and correcting our Works in successive Editions, appears to me the Chief Advantage of that Art.'[82]

Legal texts need to be studied beyond trying to find out what its author meant by it, in order to understand their significance for the history of the global legal order. At least as important as the

[79] The only book I am aware of is David J. Harvey, *The Law Emprynted and Englysshed. The Printing Press as an Agent of Change in Law and Legal Culture 1475-1642* (Oxford: Hart, 2015) focusing on early modern English common law. Within IR Torbjörn Knutsen recognizes the importance of printing for the dissemination of political thought, *A History of International Relations Theory* (Manchester: Manchester University Press, 1997), 60, also 180.

[80] David McKitterick, *Print, Manuscript and the Search for Order 1450-1830* (Cambridge: Cambridge University Press, 2003), 4. Also Adrian Johns, *The Nature of the Book. Print and Knowledge in the Making* (Chicago: Chicago University Press, 1998); Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge: Cambridge University Press, 1983).

[81] Mark Greengrass, *Christendom Destroyed. Europe 1517-1648* (London: Allen Lane, 2015), 229–30.

[82] Hume to William Strahan, 25.3.1771, cited in McKitterick, *Print, Manuscript and the Search for Order 1450-1830*, 135.

intention of the author was the use of the text by other practitioners. The reception of a text could change considerably across time, sometimes radically changing the meaning of the text from that of its author's. It is not enough to understand what Vattel meant by *Droit des gens*, it is also of crucial importance to investigate how the text was received and used by contemporary and later practitioners.[83] This can be achieved through a reception history of texts. Hans Robert Jauss argues that the 'historical life of a literary work is unthinkable without the active participation of its addressees'. The 'understanding of the first reader will be sustained and enriched in a chain of receptions from generation to generation' and it is 'in this way the historical significance of a work will be decided'.[84] Crucially a 'literary work is not an object that stands by itself and that offers the same view to each reader in each period.'[85] For example later lawyers understood Grotius' *De Jure Belli ac Pacis* through the Enlightenment idea of the progress of civilisation emerging from a barbarous 'Middle Age', even though Grotius significantly predated this new notion of history as progress as becomes clear from Jean Barbeyrac's 1724 French translation of Grotius, which introduces the neologism 'civilization' to the treatise.[86] The take away point from this is that a text can be interpreted by posterity in ways that are squarely at odds to what its author meant by it. In Umberto Eco's words, the 'fact that' a 'work could be looked at in a completely different way … was purely accidental to the communication itself. It was an aberrant decoding which the artist would never have thought of.'[87]

The idea of the use of texts needs also be taken beyond the idea of the reception of a constant text. If there exist multiple editions of a text, it is not enough to study a 'definitive' final edition written

[83] For studies of the reception of doctrinal work, Nabulsi, *Traditions of War*; Keene, "Images of Grotius"; Hunter, "Global Justice and Regional Metaphysics"; Fiocchi Malaspina, *L'eterno ritorno*; Vergerio, "Constructing the Right to War"; More generally Pocock, "Texts as Events: Reflections on the History of Political Thought" argues for the importance of the study of reception in the history of political thought.
[84] Hans Robert Jauss, "Literary History as a Challenge to Literary Theory (1967)," in *Toward an Aesthetic of Reception*, trans. Timothy Bahti (Brighton: Harvester Press, 1982), 19–20.
[85] Ibid., 21.
[86] Hugo Grotius, *De Iure Belli Ac Pacis Libri Tres. In Quibus Ius Naturae & Gentium : Item Iuris Publici Praecipua Explicantur* (Paris: Nicolaus Buon, 1625), book ii, chapter vi, xiv; Hugo Grotius, *Le Droit de La Guerre et de La Paix*, ed. Jean Barbeyrac (Amsterdam, 1724), book ii, chapter vi, xiv.
[87] Umberto Eco, "Towards a Semiotic Inquiry into the Television Message (1965)," in *Internationalizing Cultural Studies*, ed. John Nguyet Erni and Ackbar Abbas, trans. Paola Splendore (Oxford: Blackwell, 2005), 238.

before the author's death. As noted by Hume, '[i]t is one great advantage that results from the Art of printing, that an Author may correct his works, as long as he lives.'[88] Yet in order to study the history of global legal practices it is paramount to understand that published legal texts are also very often extensively changed after the death of the author. Editors of posthumous editions can alter the text in order for it to be up to date and thus useful and attractive for contemporary legal practitioners. In this respect it is useful to distinguish between change within the 'core text' and 'around the core text', namely through adding footnotes –that can at times be contradictory to the substance of the original text– or additional documents and organizing devices such as indices. The latter seems to have been the norm for works of international legal doctrine until around the turn of the twentieth century.[89] For example the extensive 'original contributions' undertaken by Richard Dana in what is held to be the most influential edition of Henry Wheaton's *Elements of International Law* (1866) 'are all in the form of notes … and signed with the letter D.'[90] By 1915 Coleman Phillipson wrote that whilst 'preceding editors left Wheaton's text throughout intact … Now, in view of modern requirements, the whole – both original text and editorial additions– has been subjected to revision'. Rather modestly concluding that 'the present editor ought perhaps to be regarded as a co-author of this edition of the book, rather than as an editor in the usual sense of the term.'[91]

This brings us directly to the idea of the 'author' of a legal text, which has remained curiously under problematised. Despite of the fact that it is crucial for developing a better understanding of not only the history but also of the broader dynamics of legal change. If an important legal norm is for example

[88] Hume to William Strahan, 22.7.1771 cited in McKitterick, *Print, Manuscript and the Search for Order 1450-1830*, 135.

[89] Gong, *Standard of "Civilisation"* aptly notes that the core texts of Wheaton and Oppenheim's doctrinal works change considerably in later and posthumous editions, 24-35; Hunter similarly recognises the addition of significant early nineteenth century footnotes to Vattel's eighteenth century text by Joseph Chitty in "Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry"; "Global Justice and Regional Metaphysics", 22-3. Fiocchi Malaspina eruditely analyses additions made to several nineteenth century editions of Vattel in *L'eterno ritorno*, ch. 4. In contrast to Gong, Hunter and Fiocchi Malaspina, for example Anghie refers to Wheaton arguing something in 1866, seemingly not realizing that the 1866 edition which is cited is actually posthumous, *Imperialism, Sovereignty and the Making of International Law*, 54.

[90] Henry Wheaton, *Elements of International Law, Eighth Edition, Edited with Notes by Richard Henry Dana Jr.*, ed. Richard Henry Dana Jr. (Boston: 1866), editor's preface, v–vi.

[91].Henry Wheaton and Coleman Phillipson, *Wheaton's Elements of International Law, Fifth English Edition, Revised Throughout, Considerably Enlarged and Re-Written* (London: Stevens and Sons, 1916), "Preface to the Fifth English edition," vi, viii.

added to a text of international legal doctrine after the death of the original author, then surely we need to rethink our conception of the 'author' at least with regards to that particular aspect of the work. For example Wheaton has conventionally been seen as a key actor in inventing the idea of a 'standard of civilization' whereas the norm seems first to have been discussed only in the 1929 edition.[92] Eighty-one years after Wheaton's death. Thus problematising the idea of the 'author' between say Wheaton's first edition of 1836, Dana's edition of 1866, Phillipson's edition of 1915 and the Berriedale edition of 1929 has very significant implications for understanding the history of the crucial norm of a 'standard of civilization'. This notion dovetails somewhat with Roland Barthes' strong critique of the contextualist idea that 'once the Author is discovered, the text is "explained:''. Instead in 'a multiple writing, indeed, everything is to be distinguished'.[93] Significantly the title of Barthes' essay –'The Death of the Author'– has been interpreted as a pun on the medieval romance *Le Morte d'Arthur*. Though King Arthur's story is principally known through this version composed by Thomas Malory, Malory's text is based on earlier written versions of the Arthurian cycle that drew on a prior oral tradition. The question is no longer limited to Wheaton's original 'authorial intention' but also several later 'editorial intentions'. To use an analogy from the history of political thought: it would probably be quite a significant finding if the modern concept of the 'state' had actually been outlined in *Leviathan* not by Hobbes but by an obscure eighteenth century editor.

We have already noted that the idea of the author seems to change in international legal doctrine around the turn of the twentieth century when it became acceptable for an editor to rewrite the 'core text' itself. This analysis dovetails with Michel Foucault's broad notion that the 'author function does not affect all discourses in a universal and constant way' that also drew from literary theory.[94] In other genres of legal texts that are less innovative in terms of the text itself, the question of authorship had been far more vague even earlier. The series of collections of international treaties began by Martens

[92] Henry Wheaton and A. Berriedale Keith, *Wheaton's Elements of International Law. Sixth English Edition, Revised Throughout, Considerably Enlarged and Re-Written* (London: Stevens and Sons, 1929), 201–2. Contra Gong, *Standard of "Civilisation."*

[93] Roland Barthes, "The Death of the Author," trans. Richard Howard, *Aspen Magazine*, no. 5–6 (1967): 5.

[94] Michel Foucault, "What Is An Author? (1969)," in *Aesthetics, Method and Epistemology*, ed. James D. Faubion, trans. Robert Hurley (New York: The New Press, 1969), 212–13. Foucault notes that 'criticism and philosophy took note of the disapperance–or death–of the author some time ago', 211.

in 1791 continued to be updated and referred to as 'Martens' *Recueil*' long after the demise of their original author. Similarly Britain's parliamentary records are known as the *Hansard* to this day after Thomas Curson Hansard who took over publishing them in 1812. Foucault argues that in medieval times '"Hippocrates said," "Pliny recounts," were not really formulas of an argument based on authority; they were the markers inserted in discourses that were supposed to be received as statements of demonstrated truth.'[95] Similarly the 'author function' of Martens' *Recueil* and the *Hansard*, which inform legal practitioners of the reliability and utility of the text is perhaps not that different from our mundane experience with *Campbell's Soup* or *Uncle Ben's Rice*.

This new approach to the study of legal texts helps us to understand that the global legal order today looks very different from the intentions of the different generations of practitioners who disagreeing fiercely on both its basic plan and finer details sought to build it in widely different directions with disregard for the health and safety of its future occupants. Not perhaps unlike a very ancient, sprawling, nefarious and grand house that was originally built for quite another purpose. In Evelyn Waugh's words, the 'builders did not know the uses to which their work would descend; they made a new house with the stones of the old castle; year by year, generation after generation, they enriched and extended it'.[96]

An alternative dynamic of legal change

The new method highlights an important alternative dynamic of legal change that first takes place through legal practices and is introduced to doctrine only afterwards with posthumous editors often drastically modifying canonical works in order to make them more useful for contemporary practitioners. In this practice story legal change predominantly takes place through practitioners

[95] Ibid., 212–13.
[96] Evelyn Waugh, *Brideshead Revisited. The Sacred and Profane Memories of Captain Charles Ryder* (London: Penguin, 1962), 330. For a similar metaphor of a cathedral to understand the development of international organizations, Craig Murphy, *International Organization and Industrial Change. Global Governance since 1850* (Cambridge: Polity, 1994).

pursuing their interests within broad bounds set by normative expectations rather than with the novel speculations of great thinkers.

This practice story significantly qualifies an implicit assumption of international legal change present in most of the literature. As we have seen, in the conventional doctrinal story legal change first takes place through doctrine and is then afterwards introduced to legal practice. In Benton and Ford's words, according to an influential understanding of the origins of international law '[t]he star of this tale is the jurist Emer de Vattel, whose 1758 treatise, *The Law of Nations*, instructed a generation of followers that the world order was made up of sovereign states. The wide circulation of Vattel's work … has suggested to some historians that the nineteenth century presented an opportunity to work out the details of a system whose contours were already known.'[97] Koskenniemi too has argued that an idealist history reducing the field 'to a projection of a few great minds' advancing Western liberalism is not credible 'and fails to account for the external pressures to which the doctrines of these men sought to provide responses.'[98]

The main alternative to an ideational history of international law has conventionally been an interest based 'realist' understanding. Wilhelm Grewe's *Epochs of International Law* is perhaps the most well known of these accounts emphasizing the role of material interests, of in particular hegemonic states, as driving international legal change. Grewe for example argues that 'emotional motives alone' could not have led to Britain's decision to end the slave trade because of its 'broad political and economic importance'. Abolition became 'an imperative necessity for Britain for economic reasons, and for reasons of colonial policy.'[99] More broadly Grewe's analysis of the eighteenth and nineteenth centuries focuses 'on the way the particular institutions or doctrines developed in response to the

[97] Benton and Ford, *Rage for Order*, 20.
[98] Koskenniemi, *Gentle Civilizer*, 8. See also "Histories of International Law", 9-12, which conceptualizes 'idealist' histories at 9.
[99] Wilhelm G. Grewe, *Epochs of International Law. Translated and Revised by Michael Byers* (Berlin: Walter de Gruyter, 2000), 554-69, cited at 555. See also Koskeniemi's criticism in "The Epochs of International Law," *International and Comparative Law Quarterly* 51, no. 3 (2002) at 749-50.

policies and needs of the leading power.'[100] The limitation of an almost exclusively interest based 'realist' explanation of international legal change of course lies in that it cannot account for the role of normative ideas and the 'logic of appropriateness'. Neta Crawford has for example demonstrated how the abolition of the slave trade was driven primarily by changing 'normative and constitutive beliefs'. Leading 'ethical argument, which mobilized individuals to form and join social movements to change the domestic political and international conditions that supported slavery' rather than economic interests.[101] Realism cannot also account for why Britain imposed considerably more intrusive legal frameworks on weak African actors in contrast to weak European ones. Instead even the policy makers of a very powerful actor were relatively bound by expectations set by prevailing ideas of law and appropriateness grounded in 'civilization'.[102] 'Realist' and 'idealist' histories are not 'sustainable alone, without help from its counterpart'.[103]

The practice story of international legal change outlined in this chapter conceptualizes a neglected and important dynamic of legal change. In contrast to the doctrinal or ideational story, I argue that legal change predominantly first takes place through practice. In contrast to interest-based and realist accounts, even powerful practitioners pursuing their interests are loosely –or 'relatively indeterminately' to borrow a term[104]– bound by prevailing normative ideas, conceptions of 'legality' and cultural expectations. In other fashionable words, practitioners pursue interests through a 'bounded rationality'.[105] After legal change has predominantly taken place through practice –with key practitioners often not being professional lawyers– it is transferred from practice-orientated genres of

[100] Koskenniemi, "Epochs of International Law", 749.
[101] Neta Crawford, *Argument and Change in World Politics. Ethics, Decolonization and Humanitarian Intervention*. (Cambridge: Cambridge University Press, 2002), 162.
[102] Keene, "A Case Study in the Contruction of International Hierarchy".
[103] Koskenniemi, "Histories of International Law", 9.
[104] Koskenniemi, *From Apology to Utopia*; For a critique of structuralism, Koskenniemi, *Gentle Civilizer*, 1; Koskenniemi, *From Apology to Utopia*, New epilogue.
[105] For an application of a 'bounded rationality' framework to the study of international law, Lauge N. Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy : The Politics of Investment Treaties in Developing Countries* (Cambridge: Cambridge University Press, 2015). For the point that the practice turn and bounded rationality are compatible, Quentin Bruneau, "Knowing Sovereigns: Forms of Knowledge and the Changing Practice of Sovereign Lending" (DPhil thesis, University of Oxford, 2016). For the compatibility of rationalist and constructivist logics, Christian Reus-Smit and Duncan Snidal, "Between Utopia and Reality: The Practical Discourses of International Relations" in *The Oxford Handbook of International Relations* (Oxford: Oxford University Press, 2008).

legal texts to legal doctrine. Through either less well-known contemporary doctrinal works or the posthumous editions of canonical texts of great thinkers. Both of these types of work sought to incorporate new legal changes in order to be useful and thus attractive for practitioners. Whilst my argument does not thus seek to explain everything it says something discrete about an important underexplored dynamic of international law and opens a new avenue for further research. This alternative dynamic of legal change has been uncovered through reconceptualizing international legal practice and then rethinking the 'meaning and understanding' of a text, the idea of a 'legal text' and the idea of an 'author' of a legal text. Now after setting out the method, it is time to turn to the more practical but extremely important question of where exactly one can find textual traces of past global legal practices.

Where to look for global legal practices?

Martin Wight's insight that one of the main challenges in the study of international theory was knowing where to find it carries to a history of global legal practices.[106] The challenge facing the scholar of the development of the modern global legal order is opposite to that of a historian of antiquity. There exists a huge abundance of legal texts, a very significant part of which has been published. This very fact is in itself important though it has not been extensively problematised. We have an abundance of published legal texts, because they were printed for contemporary legal practitioners to help store, organize, disseminate, contest and change legal knowledge. Law was increasingly changing into a practice that was based on not only text, but also more specifically on

[106] Martin Wight, "Why Is There No International Theory?," in *Diplomatic Investigations. Essays in the Theory of International Politics*, ed. Martin Wight and Herbert Butterfield (London: George Allen, 1966), 38. Edward Keene, "Where Should We Look for Modern International Thought?," *Contemporary Political Theory* 13, no. 4 (2014): 397–402. Also Keene, "The Age of Grotius,".

printed text. My analysis grounded in contemporary international legal doctrine suggested that at least by the early nineteenth century the following other legal practices were extremely relevant for the global legal order: international treaty-making, diplomacy more generally, domestic law-making and the judicial practice of both international and domestic courts. This contextually constructed framework fits well with Randall Lesaffer's argument that apart 'from the obvious 'international' sources such as treaties, declarations of war and decisions by international tribunals and arbitrators, there are many municipal law sources to be considered' together with diplomatic and political sources.[107] I will next go through printed genres of legal texts that are particularly relevant for understanding these practices in a roughly chronological sequence. That is in the order that these genres were invented, before broadening the analysis to include non-printed legal texts. This exercise is not only helpful as a broad heuristic about where to find legal texts to study past legal practices, but also provides a starting point for a different way of thinking about the history of the global legal order through the evolution of its constituent practices.

Legal doctrine

If we understand 'international legal doctrine' broadly as learned treatises on the law governing relations between different communities and their members, this genre in its Western variant goes back to ancient times. Early modern natural law writers understood themselves as part of a tradition that drew from Aquinas and Cicero. Works of international legal doctrine began to be published soon after printing had more or less been standardized as a technology by 1520.[108] As an apt illustration of the shift, Francisco de Vitoria's natural law thought on relations between Spaniards and native inhabitants in the Americas was delivered as lectures at the University of Salamanca (1539) and was only afterwards published. By the late sixteenth century the protestant Italian scholar Alberico Gentili, who became Regius Professor of Civil Law at Oxford, was formulating his thought on the rights of

[107] Lesaffer, "International Law and Its History", 323.
[108] Greengrass, *Christendom Destroyed. Europe 1517-1648*, 246–47.

legation and those of war in treatises written for publication (and published in 1585 and 1598). We have already seen, that though studying the sources of law conceptualized in international legal doctrine serves as a useful heuristic identifying other legal practices, there are limitations to this approach. Martens (1789) to a large extent ignored courts as a legal practice despite of the fact that it was very relevant for the global legal order in the late eighteenth century. Yet the real break in international legal doctrine takes place between Vattel (1758) and Martens.[109] Despite of the fact that also Vattel declares the sources of the 'conventional' or positive law of nations –that is the law that is not deduced through reason and constitutes natural law– as treaties and custom. Crucially Vattel concerns himself only with 'simply laying down the general rules and principles which the law of nature furnishes for the direction of sovereigns in this respect'. For him 'particular detail of the various treaties and customs of different states belongs to history, and not to a systematic treatise on the law of nations.'[110] In complete contrast, Martens concerns himself almost exclusively with the 'positive law of nations' founded upon treaties and custom.[111] Moreover he also provides a systematic listing of '*Books necessary to those who study the Law of Nations*' who in order to 'form an useful library for the studying of the positive law of nations' should seek all the collections of treaties, collections of other public acts including 'political journals' (ie newspapers), historical works (including biographies and memoirs of diplomats and statesmen) and works written on the law of nations.[112] At this point it is useful to note that though Martens refers to newspapers as an important source of state practice treatises on international legal doctrine begin to be complemented by professional legal journals only with the foundation of the *Revue de droit international et de législation comparée* in 1868.[113] These periodicals, containing not only records of new legal practice but also learned essays on specific legal

[109] The argument about the positivist break is emphasised in Keene, "A Case Study of the Construction of International Hierarchy"; "The Age of Grotius."; Koskenniemi, "Into Positivism". Also Arthur Nussbaum, *A Concise History of the Law of Nations. Revised Edition* (New York: Macmillan, 1954).
[110] Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, Revised, Corrected, and Enriched with Many Valuable Notes Never before Translated into English.*, ed. Anonymous (London: Robinson, 1797), preface, xvii; Vattel, *Les Droit Des Gens* (1st ed. 1758), xxi–xxii, in the original French: 'donner les Principes généraux & les Regles, que la Loi Naturelle fournit pour la direction des Souverains a cet égard'. Thus '[l]e detail des différens Traités & des diverses Coutumes des Peuples appartient a l'Histoire, non pas a un Traité systématique du Droit des Gens.'
[111] Martens, *Summary of the Law of Nations* (Cobbett ed. 1795), introduction 1.4 (pp. 4-5).
[112] Ibid., introduction 1.8 (pp. 11-12).
[113] Koskenniemi, *Gentle Civilizer*, 12-19.

questions, must be recognized as a key additional source on the evolution of legal thought that complements the older format of book-length doctrinal works. We shall next look at the emergence in print of genres of legal texts that offer crucial evidence of other global legal practices although mostly ignored in international legal doctrine before the positivist shift that took place around 1800 and in which Martens, Chitty and Wheaton played important roles.

Case law reports

Most early modern European legal systems were largely based on customary law, and thus reports of judicial practice as evidence of case law were being published already in the sixteenth century. Domestic courts applied not only domestic law but often interpreted international law which admiralty courts were understood to apply exclusively. In addition domestic law that affected foreigners' rights also had significant implications to the global legal order. One of the earliest reports of English common law cases was published in 1571 as *Les comentaries ou les reportes de Edmunde Plowden*, still written in archaic 'law French' that derived from the Norman conquest. Plowden argued that he had collected judicial practice 'with a view to my private instruction only, without the least thought or intention of letting it appear in print'. However after lending the work to friends it was 'transcribed by clerks and other ignorant persons who did not perfectly understand the matter, the copies were very corrupt, for in some places a whole line was omitted, and in others one word was put for another, which entirely changed the sense, and again in other places spaces were left where the writers did not understand the words'. After hearing that printers intended to make a profit from publishing these pirated versions and having been encouraged by many lawyers to make the work public Plowden changed his mind. In 'order to prevent and avoid these defects, I considered with myself whether it was not better for me to put this work in print … hoping that it might be of some benefit to the students of the law'.[114] This was followed by Sir Edward Coke's law reports (1600-1615) that have

[114]Edmund Plowden, *Les Comentaries Ou Les Reportes de Edmunde Plowden*, 1571, Preface, v–vi, (1792 translation of the original from 1571).

been recognized as the most influential early work that sought to help practitioners make sense of the common law and that was enabled through printing.[115] The case law of various English tribunals such as the King's Bench and the Court of Chancery, which also dealt with significant topics of international law such as diplomatic immunity, was systematically published by the eighteenth century.[116] Though in contrast, the reports of English admiralty courts were first published only during the Napoleonic wars (1799-) when in Jennifer Pitt's words Sir William Scott's 'learned and highly respected' opinions 'quickly became an authoritative source for maritime and international law in both Britain and America'.[117] Judicial precedents pertaining to questions of international law were included in a broader genre of a 'legal encyclopedia' in late eighteenth century France, where Joseph-Nicolas Guyot published 64 volumes of a *Répertoire universel et raisonné de jurisprudence civile, criminelle, canonique et bénéficiale* between 1775 and 1783. Guyot's reference work may well have been particularly useful in the context of the fragmented French domestic legal system, which continued to be largely based on varieties of customary law until the revolution.[118]

Treaty collections

In contrast, collections of international treaties began to be published only at the turn of the eighteenth century. First in Latin in Gottfried Leibnitz's *Codex Juris Gentium Diplomaticus* in 1695 and then in French in Jean Dumont's *Recueil de traites d'alliance, du paix, et de commerce entre les rois, princes, et etats, depuis la Paix de Munster* in 1710. From 1726 onwards Dumont began publishing a massive *Corps universel diplomatique* purportedly starting off with Charlemagne.[119] Keene argues that early eighteenth century 'attempts to provide some specialized training for diplomats' –such as the French

[115] Harvey, *Law Emprynted and Englysshed*.
[116] Armitage, *Foundations of Modern International Thought*.
[117] Jennifer Pitts, "Empire and Legal Universalisms in the Eighteenth Century," *American Historical Review* 117, no. 1 (2012): 115.
[118] J-N Guyot, ed., *Réportoire Universel et Raisonné de Jurisprudence En Matiere Civile, Criminelle, Canonique, et Bénéficiale*, 27 vols. (Paris, 1784). On the old regime legal system, Sahlins, *Unnaturally French*.
[119] Gotofredus Guilielmus Leibnitz, *Codex Juris Gentium Diplomaticus*, 1693; Jean Dumont, *Recueil de Divers Traitez de Paix, de Confederation, D'alliance, de Commerce, &c* (The Hague, 1710); Jean Dumont, baron de Carlscroon, *Corps Universel Diplomatique Du Droit Des Gens* (Amsterdam: 1726-31).

foreign minister marquis de Torcy's attempt to create an *Académie Politique* or the institution of the Regius chairs in Modern History at Oxford and Cambridge– an important part of which was also the study of the history of treaties 'helped fuel demand for a new and influential genre of legal scholarship.'[120] The short-lived *Académie Politique* was crucially linked with the creation of a foreign ministry archive, with the students also tasked to organize treaties and diplomatic correspondence for reference as a part of their training. The publication of treaty collections such as Dumont's for the use of the public was thus matched with states' private efforts to keep track with positivist international law. For example Jean-Yves de Saint-Prest, who was head of both the new French *dépôt* and academy, compiled a collection of peace treaties for private use. This was only published (1725) anonymously after Saint-Prest's death in Amsterdam with the help of one of his former students.[121] Dumont's series was kept up to date after his death and became a standard work that was only superseded by the *Recueil* Martens began publishing in 1791. A move that was very much in tune with the positivist approach towards international law he had adopted in his doctrinal treatise two years before. In Martens' words, '[l]'utilité de la connoissance des traités modernes conclus entre les Puissances de l'Europe est trop reconnue pour avoir besoin d'etre démonstrée.' His collection sought to make treaties that had never been published or were hard to get hold off easily available for those interested in learning the modern law of nations of Europe.[122] These general series were complemented by smaller ones centered on particular states, and even on a particular type of treaty concluded by that state. *Hertslet's Commercial Treaties* (1840) covering Britain's trade treaties is one notable example of the genre. Nowadays the best reference on treaties is Clive Parry's *Consolidated Treaty Series* that tries to reproduce all treaties concluded since 1648 based on earlier treaty collections.[123]

---

[120] Keene, "The Age of Grotius," 138. Drawing on Keens-Soper, "The Practice of a States-System," 33, 43 26f.
[121] Maurice Keens-Soper, "The French Political Academy, 1712: A School for Ambassadors," in *The Art of Diplomacy*, by François de Callières, ed. Maurice Keens-Soper and Karl Schweizer (Leicester: Leicester University Press, 1983), 197, 208.
[122] Georg Friedrich de Martens, *Recueil Des Traités*, 2nd ed. (Göttingen, 1818), Extrait de la preface du t.i. de la premiere edition, i-ii.
The author's translation: 'The usefulness of knowledge of the modern treaties concluded between the Powers of Europe is too well recognized to have need of demonstration.'
[123] *Hertslet's Commercial Treaties* (London, 1840); Clive Parry, ed., *Consolidated Treaty Series*, hereinafter *CTS* (Dobbs Ferry, New York: Oceana Publications, 1969).

Legal codifications and parliamentary records

Though the texts of specific acts of positive domestic law created by a parliament or a monarch became published already in the sixteenth century, a major qualitative change took place with the shift towards the codification of domestic legal codes that began in late eighteenth century Continental Europe.[124] The most famous example of this genre is Napoleon's *Code civil* (1804) which replaced the multiple jurisdictions of old regime law that was largely based on custom, with a uniform published law code that regulated all individuals within a clearly demarcated territorial state. Yet the French case is merely a part of a wider European trend that began with modernizing late eighteenth century old regimes, and continued throughout the wars of the French Revolution and the Restoration that followed Napoleon's demise. The *Allgemeines Landrecht für die Preußischen Staaten* an earlier version of which was commissioned by Frederick the Great already in the middle of the century was finally adopted in 1794. Napoleon's *Code civil* is important because it became a standard the variants of which were adopted by many smaller European states –such as recently enlarged Baden-Baden in 1806– thus leading to a far greater standardization of European legal systems, which had important effects for the global economy as the convergence of legal frameworks significantly lessened the legal transaction costs of transnational trade and investment. The codification turn was not merely a European shift, but acquired a very important global dimension during the course of the nineteenth century. Spain's newly independent American colonies adopted variants of the Chilean civil code written by Andrés Bello and based on European models.[125] In the latter half of the century non-European states such as the Ottoman Empire and Japan would also adopt civil codes based on European models.[126] Both in new Western states and old non-Western ones the drive for legal modernization was at least to a considerable extent motivated by a desire to better safeguard their sovereignty from European intervention. It was this shift towards codification in Continental Europe that led to what nineteenth century lawyers understood to constitute a divergent Anglo-American

[124] Peter van den Berg, *The Politics of European Codification: A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands* (Groningen: Europa Law Publishing, 2007).
[125] Fawcett, "Between West and Non-West."
[126] Kayaoglu, *Legal Imperialism*.

practice of law that remained very much based on custom and judicial precedent. As domestic law-making slowly shifted from monarchs to parliaments, records of parliamentary debates which began to be published in the eighteenth century become a key source for understanding why states chose to adopt certain legal norms that had implications for the global legal order. This insight is not a novel one, as lawyers have long regarded the *travaux preparatoires* or documents related to law-making as a source for interpreting the law. The British parliament had debated in secret until 1771 forcing printers to publish accounts of the proceedings under fictitious headings such as the *Proceedings of the Lower Room of the Robin Hood Society*. It is worth noting though that the most successful series of reports, published from 1802 onwards and which became known as the *Hansard* after its most notable proprietor, was taken over by the state only in 1909. The move towards publishing parliamentary debates was mirrored by other liberal Western states. The *Annals of Congress* was set up in 1834 to document debates from 1789 onwards. Similarly the French state began publishing a *Recueil complet des Débats Législatifs & Politiques des Chambres Francaises* beginning from 1787 in the 1870s.[127]

Diplomatic papers and arbitration digests

As for diplomacy conceptualized as a more general practice, the British Foreign Office's decision to begin publishing *British and Foreign State Papers* 'FOR SALE' in the 1830s marks an important shift with regards to published sources. Before this lawyers such as Martens had to decipher state practice, which constituted the source of customary law, from miscellaneous historical works and journalistic sources. Now the greatest trading power began publishing a selection of diplomatic correspondence and international agreements 'intended' according to its advertisement 'to comprise the Principal Documents which have been made public, relating to the Political and Commercial Affairs of Nations, and to their Relations with each other, from the termination of the war in 1814'. The work 'was formerly printed, exclusively for the use of the Government … but the general interest attached to

[127] For examples of excellent studies on how parliaments discussed international law and domestic law relevant for the global legal order, Armitage, *Foundations of Modern International Thought*; Sahlins, *Unnaturally French*.

these Collections has led to its Publication.'[128] As a break from the chronological exposition of the British series Francis Wharton's *Digest of the International Law of the United States taken from Documents Issued by Presidents and Secretaries of State and from Decisions of Federal Courts and Opinions of Attorneys-General,* which amounted to a broad thematic exposition of both US diplomatic and judicial practice on various rules of international law, was published by the Government Printing Office in 1886. Yet the diplomatic practice of states did not merely constitute the source of customary international law, but also became increasingly legalized as a practice through greater recourse to legal advisers. For example Britain's government had institutionalized legal advice in foreign affairs through the office of the King's Advocate in the early seventeenth century. Arthur McNair edited the first selection of British law officers' opinions on questions of international law in the 1960s, and though by themselves the opinions of law officers did not constitute a source of customary law as the actions of a state were identified with its head of state or foreign minister they offer a fascinating and underused insight into studying what practitioners thought of a particular legal norm at a given point in time.[129] Finally, the proliferation of international arbitrations by ad hoc tribunals in the later nineteenth century that had already been conceptualized as a source of law by Wheaton in 1836, led to the publication of their judicial practice. The first systematic exposition of international arbitral practice, John Bassett Moore's a *History and Digest of the International Arbitrations to which the United States has been a Party,* was once again published by the US government from 1898 onwards. This was followed by the first general *Recueil des Arbitrages Internationaux* beginning in 1798 edited by Alfred de Lapradelle and Nicolas Politis from 1905 onwards.

It is of course the case that published legal texts can be compared to the visible parts of an iceberg. There exists a huge amount of legal texts in various archives. Despite of this it is useful to think explicitly about what genres of legal texts exist, and when legal texts representing these genres were first compiled and published for the use of practitioners. First this offers a way to study international

[128] *British Foreign and State Papers* (hereinafter *BFSP*), vol. iii 1815-16 (London: 1838), advertisement.
[129] McNair, *International Law Opinions*. Nowadays supplemented by Clive Parry, ed., *Law Officers' Opinions to the Foreign Office, 1793-1860. A Reproduction of the Manuscript Series with Index and Commentaries*, 97 vols. (Westmead: Gregg International Publishers, 1970).

law that goes beyond the at times somewhat narrow and misleading picture that is to be gained from the great classics of international legal doctrine. Consulting published reports of cases of domestic (and later international) tribunals, collections of international treaties, domestic legal codes, parliamentary debates and papers related to diplomacy offers key avenues for a closer study of the global legal practices of judicial practice, treaty-making, domestic law-making and diplomacy without the necessity of trying to make sense of vast amounts of archived legal texts at the very beginning of a project. That published legal texts can aid the scholar of the history of the legal frameworks of world politics is no coincidence, as they were created in order to help practitioners, engaged in more mundane pursuits, to make sense of the legal order. Second thinking of law as not just a practice that is based extensively on texts, but also on published legal texts can offer a new broader insight into the history of the global legal order. Genres of legal texts that were published for contemporaries serve as an indication that they must have been especially useful for practitioners.

The application

The chapter will now conclude with providing a practical roadmap on how this historical method will be applied to the case of foreigners' property rights. The chapter plan is based on the alternative interpretation of legal change advanced in the thesis. With Chapters Two and Four highlighting the fact that international legal doctrine mostly reacted to changes that had taken place in legal practice with 'great thinkers' playing a small role in the process. Rethinking the nature of legal texts has allowed legal doctrine to be innovatively studied through multiple editions of treatises, which allows greater precision in tracing legal change and the roles of 'great thinkers'. Chapters Three, Five and Six will then provide a detailed analysis of the changes to foreigners' property rights in legal practice that afterwards found their way into legal doctrine. These chapters draw on the reconceptualization of international legal practice, which entails going beyond a narrow focus on lawyers to include other

influential practitioners, such as diplomats and parliamentarians, who often play key roles in legal change. The categories of printed primary sources that are used to track foreigners' property rights are those outlined in the previous section: In order to complement doctrinal accounts, legal practices are studied through collections of international treaties, domestic legislation, judicial records, diplomatic correspondence and legal advice, and records of parliamentary debates. In addition to these printed records of global legal practices, the thesis makes use of archival materials in the form of specific diplomatic and legal advice correspondence that allow for more detailed process tracing of legal change.[130] Most of the primary sources are available in English. Some are written in French. On occasion shorter passages written in Latin, Italian, Spanish, Portuguese, German, Dutch and Scandinavian have also been used.

Chapters Two (droit d'aubaine) and Four (standard of civilization) provide a history of foreigners' property rights in international legal doctrine. In contrast to the conventional story I will show that the works of great thinkers such as Hugo Grotius (1625), Emer de Vattel (1758), Henry Wheaton (1836) and Lassa Oppenheim (1905) do not play a pivotal role in the evolution of these rights.[131] Instead changes that had occurred through legal practices were introduced afterwards in later editions of their works. Sometimes these shifts in foreigners' property rights had already been transferred to international legal doctrine through other less well-known works –as we can begin to ascertain from references in the canonical works. I thus highlight the role of G. F. von Martens (1789), Joseph Chitty (1812, 1824), Robert Phillimore (1855-57) and Ian Brownlie's (1966) doctrinal works.[132] However more often the editors of later editions of canonical works have directly played a crucial role in changing international legal doctrine by drastically modifying the content of these canonical works in order to make them useful for contemporary lawyers. I will demonstrate this by a comparative analysis

[130] These consist of the Sir John Dodson Papers (Dep. Monk Bretton), Bodleian Libraries, University of Oxford; Sir James Graham Papers, British Library; James Brown Scott Papers, Georgetown University Library; Viscount Palmerston Papers, Hartley Library, University of Southampton; Elihu Root Papers, Library of Congress; Foreign Office Papers, UK National Archives, State Department Papers, US National Archives.
[131] Grotius, *De Iure Belli Ac Pacis* (1625); Vattel, *Le Droit Des Gens* (1758); Wheaton, *Elements* (1836), Oppenheim, *International Law*, vol. 1. (1905).
[132] Georg Friedrich de Martens, *Précis Du Droit Des Gens Moderne de l´Europe Fondé Sur Les Traités et L'usage* (1789); Chitty, *A Practical Treatise*; *Commercial Law*; Robert Phillimore, *Commentaries upon International Law*, vols. 2-3 (London: 1855-7); Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1966).

of various editions of canonical works, which highlights the importance of the following editions: Jean Barbeyrac's (1721) French edition of Grotius, Joseph Chitty's (1834) English edition of Vattel, Coleman Phillipson's (1916) and A. Berriedale Keith's editions (1929) of Wheaton, and Arnold McNair (1928) and Hersch Lauterpacht's (1937) editions of Oppenheim.[133] I conclude with a discussion of contemporary legal doctrine. Highlighting how recent changes in legal practice became afterwards reflected in a posthumous edition of the most influential contemporary doctrinal work.[134] Thus dovetailing with the dynamic of legal change laid out elsewhere in the thesis.

Chapter Three argues that French decision-makers played a leading role in unmaking restrictions to foreigners' property rights, the most significant of which was the droit d'aubaine, in Continental Europe in the late eighteenth and early nineteenth centuries. My account of the French dimension of the story draws from Peter Sahlins' detailed account, which however does not cover the broader European shift in any detail.[135] The unmaking of the droit d'aubaine is tracked with reference to treaty collections, based primarily on Jean-Baptiste Gaschon's specialized work from 1818 and the *Consolidated Treaty Series*, which also contain references to domestic legislation.[136] With regards to domestic legislation Pierre Lainé's work from 1900 offers a valuable overview on the basis of which it is possible to consult individual statutes.[137] Sahlins' French story, which includes important and considerable archival work, offers an excellent starting point in uncovering the motivations behind the unmaking of the droit d'aubaine. In order to understand why the shift took place, I have tracked how decision-makers drew from ideas in contemporary Enlightenment discourse, in particular the work of Montesquieu and the French political economists –instead of Vattel's legal doctrine.[138] Records of the French parliamentary debate on the final abolition of the droit d'aubaine in 1819 in particular offer

[133] Grotius, *Le Droit de La Guerre et de La Paix* (Barbeyrac ed. 1724); Vattel, *Law of Nations* (Chitty ed. 1834); Wheaton and Phillipson, *Wheaton's Elements* (1916); Wheaton and Berriedale Keith, *Wheaton's Elements*; Lassa Oppenheim, *International Law: A Treatise.* Edited by Arnold McNair. 4th ed, vol. 1. (London, 1928); Lassa Oppenheim, *International Law: A Treatise.* Edited by Hersch Lauterpacht, vol. 1. (London, 1937).
[134] Ian Brownlie, *Brownlie's Principles of Public International Law*, ed. James Crawford, 8th ed. (Oxford: Oxford University Press, 2012).
[135] Sahlins, *Unnaturally French*.
[136] Jean-Baptiste Gaschon, *Code Diplomatique Des Aubains* (Paris, 1818). *CTS*.
[137] Pierre Lainé, "Etude Sur La Capacité Successorale Des Étrangers En France. These Pour Le Doctorat" (Université de Paris, 1900).
[138] Sahlins, *Unnaturally French*.

extensive evidence on the arguments that drove both the proponents and opponents of the shift.[139] I have also extended the particular French story to a broader understanding of the motivations of other states involved in the process. With particular reference to American diplomatic correspondence involving Henry Wheaton, then US minister in Berlin, in order to analyze the final act of this process in which the US sought to conclude treaties abolishing the droit d'aubaine with European powers in the 1840s.[140]

Chapter Five analyzes how Anglo-American practitioners played a key role in inventing a strong customary norm protecting foreigners' property rights that was grounded through the idea of civilization in the latter half of the nineteenth century. The account draws on the most detailed available secondary literature, from which closer process tracing of the shift is however mostly absent.[141] The identification of key cases –the Sicilian sulphur dispute of the late 1830s and the Greek claims of the 1840s– on the basis of the secondary literature has been cross-checked through consulting relevant entries (eg 'claims' and 'property') in the indices of McNair and Parry's compilations of British legal advice. This consultation of records of legal advisers' practice has been done in order to be more confident of the importance of these particular cases for the evolution of the customary norm protecting foreigners' property.

After identifying these cases –which were also perceived as important by contemporaries– I have gone beyond published sources to reconstruct British decision-making, focusing in particular on the interaction between foreign secretary Viscount Palmerston and his legal adviser John Dodson. As in contrast to Chapter Four, there does not exist secondary literature on the topic that has extensively used the available archival sources. Foreign Office legal advice and domestic correspondence boxes

[139] *Archives Parlementaires de 1787 a 1860. Recueil Complet Des Débats Législatifs & Politiques Des Chambres Francaises*, vols. xxi-xxiv (Paris, 1871-3).
[140] Hunter Miller, ed., *Treaties and Other International Acts of the United States*, vol. 4 (Washington, 1931), 547–48. "Report of the Secretary of State to the United States Senate, 24.11.1843," Appendix to the Congressional Globe (Washington, December 1843).
[141] Alexander P. Fachiri, "Expropriation and International Law," *British Year Book of International Law* 6 (1925): 159–71; Lipson, *Standing Guard*; Miles, *Origins of International Investment Law*; Also Schwarzenberger, "The Protection of British Property Abroad".

on Greece at the UK National Archives contain crucial, and to my knowledge previously unused, letters from Palmerston's private secretary and Palmerston himself to Dodson that make it possible to analyze British decision-making in the Greek claims case.[142] In contrast Dodson's personal papers –at the Bodleian Libraries, Oxford– contain only the copies of his reports. Palmerston's papers –kept at the Hartley Library, University of Southampton– include relevant documents for building a better picture of both the Sicilian and Greek disputes; these include for example foreign office memoranda on Britain's legal argumentation that were distributed to cabinet members after the interventions.[143] Secondary sources further suggested that 1833 correspondence with Sir James Graham, then first lord of the admiralty, on Portugal –stored in the British Library– allow for an additional viewpoint on how Palmerston's views on foreigners' property rights evolved.[144] The *Hansard* and newspapers, together with diplomatic memoirs and legal doctrine, allow the tracking of how Palmerston's adopted viewpoint in the Greek crisis of 1850 was received.

In contrast the broad contours of the American practice, for which legal advice does not survive –even at the US National Archives– with the exception of a small number of relevant opinions of the US attorney general, have been reconstructed based on published diplomatic correspondence. The key cases for Chapter Six, which have been identified with help from secondary accounts, have again been cross-checked (with key terms such as 'claims' or 'property') through consulting key published sources such as the *Foreign Relations of the United States* in order to be more confident of the importance of these cases in the evolution of American practice vis-à-vis the customary norm.[145] Elihu

[142] Law Officers' Reports: Greece, vol. 1., 1829-1856, FO 83/2286; Greece domestic various January to July 1847, FO 32/158. In contrast Law Officers' Reports: Sicily, 1808-1840, FO 83/2340 does not unfortunately contain correspondence to Dodson but only his report to Palmerston, 16 October 1837 (which is reproduced in Parry, *Law Officers' Opinions*, 1970, vol 66, pp. 467–9). All of the cited correspondence is part of the Foreign Office Papers, UK National Archives.

[143] Dodson only kept copies of his official opinions. These can be found, together with some additional papers concerning his work as advocate general, in boxes 19-34 of the Dodson family / Monk Bretton papers (Dep. Monk Bretton), Bodleian Libraries, University of Oxford. Palmerston's papers are kept at the Hartley Library, University of Southampton. Laurence Fenton, *Palmerston and The Times. Foreign Policy, the Press and Public Opinion in Mid-Victorian Britain* (London: I.B. Tauris, 2013) refers to these two memoranda at 109.

[144] I am indebted to David Brown for help with this reference, which he also cites in *Palmerston. A Biography* (New Haven, CT: Yale University Press, 2010) at 533 n. 204. Sir James Graham Papers, British Library.

[145] *Foreign Relations of the United States*, hereinafter *FRUS* (Washington, various years); John Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been Party* (Washington: Government Printing Office, 1898); John Bassett Moore, *A Digest of International Law as Embodied in*

Root and James Brown Scott's personal papers –at the Library of Congress and Georgetown University Library– do however exceptionally shed some additional light on the context of Root's crucial 'standard of civilization' speech delivered to the American Society of International Law in 1910.[146] The main developments of British post-1850 practice with regards to foreigners' property rights has been similarly reconstructed based on secondary accounts and the published diplomatic correspondence available in the *British Foreign and State Papers*. I have also studied important early twentieth century international arbitrations that discussed the idea of a customary norm through their published reports. After having identified the cases based on the secondary literature which has been cross-checked through Stuyt's *Survey* that includes the topics of all international arbitrations.[147] I then conclude with an overview of the main developments regarding foreigners' property rights until the twenty-first century, which analyzes key changes that took place through legal practices that have been identified using the secondary literature.[148]

Conclusion

The chapter began by conceptualizing a history of global legal practices as an alternative to the influential contextual focus in the history of international law. The following empirical section then offered an overview of the emergence of key genres of practically orientated legal texts that need be studied in addition to doctrine to develop a better understanding of the history of international law.

Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State, 8 vols. (Washington: Government Printing Office, 1906).

[146] Elihu Root Papers, Library of Congress; James Brown Scott Papers, Georgetown University Library.

[147] A. M. Stuyt, *Survey of International Arbitrations: 1794-1989* (The Hague: Martinus Nijhoff, 1990).

[148] Key works include Lipson, *Standing Guard*; Poulsen, *Bounded Rationality and Economic Diplomacy*; Taylor St John, "The Power of Modest Multilateralism : The International Centre for Settlement of Investment Disputes (ICSID), 1964-1980" (DPhil thesis, University of Oxford, 2015).

This overview has shed light on a crucial previously understudied process; the implications of the ‘printing revolution’ for the legal practices that underpinned the global legal order. This shift in the ways legal knowledge could be produced, distributed and modified has important potential implications for both historically oriented work and positivist theory-building. The chapter then concluded by briefly outlining how the novel methodological approach can be applied to the case of foreigners’ property rights. The next chapters will now provide this new history of foreigners' property rights.

Part One: France, Old Regimes and the Unmaking of the Droit d'Aubaine

Chapter Two: The Droit D'Aubaine in Legal Doctrine

The first part of the thesis deals with restrictions to foreigners' property rights, with a particular focus on the droit d'aubaine. From the seventeenth to the mid-nineteenth century, various restrictions to foreigners' ability to deed or inherit property in European states became largely conceptualized as the originally French legal practice of the droit d'aubaine. Legal publicists understood the droit d'aubaine to amount to the most significant restriction to foreigners' property rights. In addition to the droit d'aubaine doctrinal texts often refer in the same passage to the *droit de détraction*, a milder tax on the estate of a dead foreigner or a tax on emigration levied when a foreigner sold his estate and left a country. Moreover some states imposed a blanket ban on foreigners acquiring or owning certain types of property, most commonly real estate.

This chapter tracks the evolution of the droit d'aubaine in international legal doctrine. Against conventional wisdom, I argue that Grotius (1625) and Vattel (1758), who are usually thought to have played pivotal roles in the development of international law, play a very small part in introducing the unmaking of the droit d'aubaine to international legal doctrine.[149] Indeed the impression of modernity

[149] Grotius, *De Iure Belli Ac Pacis*; Vattel, *Les Droit Des Gens*. As has been noted, the roles of Vattel and Grotius are emphasized in Lipson, *Standing Guard*; Miles, *Origins of International Investment* Law and Keene, *Beyond the Anarchical Society*. More broadly Hedley Bull, "The Grotian Conception of International Society," in *Diplomatic Investigations. Essays in the Theory of International Politics*, ed. Herbert Butterfield and Martin Wight (London: George Allen, 1966) juxtaposes the role of Grotius as the theorist of a 'solidarist' international law to the 'pluralism' of Oppenheim. Keene, *Beyond the Anarchical Society* argues for Grotius' pivotal role in the legal frameworks of colonialism. Jouannet, *Liberal-Welfarist Law of Nations* has recently argued for the crucial role of Vattel in the making of modern international law. For similar arguments on the importance of Vattel, Reus-Smit, *Moral Purpose of the State*; Ruggie, "Continuity and Transformation in the World Polity". For a classic history of international law that is constructed around great legal theorists Koskenniemi, *From Apology to Utopia*, chapter 2.

in these authors is to a large extent a consequence of the fact that scholars usually consult posthumous editions that have been 'updated' by later editors to reflect changes that had taken place through legal practice. Whilst recounting this particular story, two more general shifts in international legal doctrine become simultaneously apparent. First there is a gradual change towards the Enlightenment idea of the progress of civilisation in legal doctrine. Second legal doctrine becomes more and more positivist, and less reliant on natural rights argument. Counter intuitively the idea of the progress of civilization emerging from the Dark Ages is absent even in Vattel, even though the concept of civilisation had been introduced to legal doctrine by Jean Barbeyrac in his French edition of Grotius in 1724. Similarly Vattel still prefers natural law argument and is largely uninterested in offering a positivist analysis of the nascent shift towards the unmaking of the droit d'aubaine through treaty-making. After offering this account of Grotius and Vattel, I move forward to the positivist authors who provide the first more empirical expositions of foreigners' property rights in international legal doctrine.

The world of the droit d'aubaine: towards the idea of the progress of civilization

The importance of studying multiple editions of a text becomes evident with the most recent English translation of Hugo Grotius' *De Jure Belli ac Pacis* –the one published in the Carnegie series of classics of international law in 1913– where the editor has entirely cut out the short passage on foreigners' inheritance rights.[150] Instead we have to turn to the last full translation of Grotius into English, the 1738 edition based on the French translation of Jean Barbeyrac (1724). Grotius argues that although a will 'may receive its Form from the Civil Law, yet is it in Substance and Reality very like the Right of Property, and, that being once established, belongs to the Right of Nature'. This argument about a natural right to deed property is backed up by references to classical authorities and the Bible; the Greek biographer '*Plutarch* very well saw this' as well as the Roman orator '*Quintilian*, the Father'. Indeed, it 'was by Vertue of this natural Right, that *Abraham*, in Case he should die

[150] Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres*, trans. Francis W. Kelsey (Washington: Carnegie Institution, 1913).

without Issue, was to have left all his Effects to *Eliezer*, as is plain from the Passage, *Gen*. xv. 2.'[151] Thus the fact that foreigners 'have not in some Places a Power to dispose of their Effects by Will, is not from the Law of Nations, but from the Civil Law of such or such a State'.[152]

The passage ends with the following invocation: 'I am much mistaken, if it does not proceed from those Ages when Foreigners were looked upon as so many Enemies; and therefore, among the more civilized Part of Mankind, it hath been justly abolished and laid aside.'[153] At first sight it seems that Grotius is already engaging in the standard eighteenth century Enlightenment critique of restricting foreigners' inheritance rights; Due to a civilizing process a right established in feudal times has been 'justly abolished'? Not quite so as becomes evident when consulting earlier editions of Grotius' work. The revised 1632 Latin text edited by Grotius himself states that 'ni fallor, ab illa veniens aetate qua externi quasi pro hostibus habebantur : itaque apud moratiores populos merito exolevit.'[154] Thus 'moratiores', the comparative plural of 'moratus' usually understood as 'endowed with character or manners of a specified kind' and more specifically as well-mannered or gentle has been translated into the neologism 'civilized'.[155] This translation seems to date to Barbeyrac's French edition of 1724, published almost a century after Grotius' Latin text, on which the English edition of 1738 is based. Barbeyrac's French states that 'je suis fort trompé si cette Loi ne vient des siécles ou les Etrangers étoient presque regardez comme Ennemies. Aussi voions-nous qu´elle a été abolie avec raison parmi les Peuples civilizez.' It is fascinating to find the adjective 'civilized' in international legal doctrine already in 1724, as the noun 'civilization' is usually understood to have become a widely used and

[151] Grotius added these classical and Biblical references to the passage in the second edition published in 1632. Though Barbeyrac's French edition translates Grotius' citations of Plutarch and Quintilian, provided in the original Greek and Latin, these are not reproduced in Morrice's English edition. See Grotius, *De Iure Belli Ac Pacis* (1625), book ii, chapter vi, xiv; Hugo Grotius, *De Jure Belli Ac Pacis Libri Tres. In Quibus Jus Naturae, Gentium, Item Juris Publici Praecipue Explicantur. Editio Nova Ab Auctore Ipso Recognita & Correcta: De qua Vide Pagina Sequenti* (Amsterdam: Guilielmus Blaeu, 1632), book ii, chapter vi, xiv; Grotius, *Le Droit de La Guerre et de La Paix* (Barbeyrac ed. 1724), book ii, chapter vi, xiv; Hugo Grotius, *The Rights of War and Peace*, ed. Jean Barbeyrac, trans. John Morrice (London, 1738), book ii, chapter vi, xiv.

[152] Grotius, *Rights of War and Peace* (Morrice ed. 1738), book ii, chapter vi, xiv. The recent Richard Tuck edition is a reprint of this text of 1738: 'The 1738 English translation of Barbeyrac's French edition, which is reprinted here, was in large part the work of John Morrice.' Hugo Grotius, *Rights of War and Peace*, ed. Jean Barbeyrac and Richard Tuck (Indianapolis: Liberty Fund, 2005) vol i., xxxv.

[153]Grotius, *Rights of War and Peace* (Morrice ed. 1738), book ii, chapter vi, xiv.

[154]Grotius, *De Jure Belli Ac Pacis*, 2nd ed. (1632), book ii, chapter vi, xiv.

[155] "moratus/a/um" from P. G. W. Glare, *Oxford Latin Dictionary* (Oxford: Clarendon Press, 1982) which is based on classical Latin. Passages in Cicero are referred to for the ordinary meaning.

more or less fixed concept –first in French– in the early 1770s.[156]

The other significant change in the Barbeyrac edition in comparison to Grotius' original is the addition of –extensive– footnotes. The first footnote annexed to the aforementioned passage refers to another part of the text as dealing with more length with 'des siécles ou les Etrangers étoient presque regardez comme Ennemies'.[157] This other passage is important becomes it shows that the Enlightenment understanding of history as progress interrupted by the darkness of the feudal ages is absent from Grotius. In this second passage –to cite the English edition of 1738– Grotius argues that the 'Principle of Natural Right, which maintains that there is a Kind of Natural Relation between all Mankind and therefore it is a heinous Crime for one Man to hurt another, was effaced of old before the Flood, so it was again some time after, by a general Corruption of Manners, so razed and obliterated, that it was accounted to rob and plunder Strangers'. Thus 'the Word *Hostis*, *an Enemy*, in the old *Latin* signifies no more than a Foreigner.'[158] The second footnote to the first mentioned passage on foreigners' inheritance rights significantly qualifies Grotius' argument that '[a]ussi voions-nous qu´elle a été abolie avec raison parmi les Peuples civilizez' by noting that '[e]lle n'a pas été tout-á-fait abolie.' and referring readers to Jean Bodin's *de la République* on this point.[159] The footnote is significant not only because it qualifies the text but also because it refers to Bodin's 1577 work –even though it was considerably older than that of Grotius– as evidence of the custom of contemporary states such as France and England indicating at least some shift towards positivism.[160] The reference to Bodin is also

[156]Grotius, *Le Droit de La Guerre et de La Paix*, (Barbeyrac ed. 1724), book ii, chapter vi, xiv. Keene, "A Case Study of the Construction of International Hierarchy" notes in the context of the expression "doctae et cultae" and "barbarae et incultae" peoples in Christian Wolff 's international legal doctrine (1749) that translations "of legal texts sometimes conceal the novelty of 'civilized' or 'civilization' as terms in common usage". Norbert Elias, *The Civilizing Process. The History of Manners*, trans. Edmund Jephcott (New York: Urizen Books, 1978), 38–40 dates civilization to the early 1770s, even though it had been used in the 1750s by the marquis de Mirabeau. Similarly Bowden, *Empire of Civilization*, 26–28.

[157] The 1738 English translation for this is: 'those Ages when Foreigners were looked upon as so many Enemies'.

[158] Grotius, *Rights of War and Peace* (Morrice ed. 1738), book ii, chapter xv, v.

[159] Grotius, *Le Droit de La Guerre et de La Paix* (Barbeyrac ed. 1724), book ii, chapter vi, xiv. For the 1738 English translation: 'therefore, among the more civilized Part of Mankind, it hath been justly abolished and laid aside.' … 'It has not been quite abolished.'

[160] In this context it is worth mentioning that that though Barbeyrac is mostly famous for editing Grotius (1724) and Samuel Pufendorff's (1718) doctrinal works he also (1739) compiled a collection of ancient treaties as part of a posthumous supplement to Jean Dumont's collection of international treaties –regarded as a key harbinger of a positivist conception of international law– in which Jean Rousset de Missy primarily updated the existing

significant because Barbeyrac thus understood limitations to foreigners' inheritance rights in general to be synonymous with the 'droit d'aubeine', an originally specifically French practice that Bodin uses to refer to limitations to foreigners' inheritance rights in general.[161]

Emer de Vattel

The first thing a reader notes in the section on foreigners' property rights in the nowadays standard English edition of Emer de Vattel's *Droit des gens* (1863), which is based on Joseph Chitty's edition of 1834, is that it refers to foreigners' inheritance restrictions as *escheatage* rather than as the droit d'aubaine.[162] Going back to the first edition of Vattel from 1758, it becomes clear that this was not the case in the French original text. Vattel argues that

> [c]e que nous avons établi dans les trois paragraphes précédens, suffit pour faire voir avec combien peu de justice le Fisc s'attribue, dans quelques Etats, les biens qu´un étranger y délaisse en mourrant. Cette pratique est fondée sur ce qu´on appelle de *Droit d´Aubaine*, par lequel les étrangers sont exclus de toute succession dans l´Etat, soit aux biens d´un Citoyen, soit a ceux d´un étranger, & par consequént ne peuvent être institués héritiers par Testament, ni recevoir aucun

---

work by adding extra volumes publishing contemporary treaties. Though his edition of Grotius does not cite treaty collections, in the preface to this later work Barbeyrac emphasizes the role of treaties in the study of international law, and argues that Grotius too sought to combine ancient precedents with modern ones –though in fact Grotius prioritized the former. Barbeyrac and Rousset de Missy were both members of the Huguenot diaspora in the Netherlands. See Jean Barbeyrac, *Histoire Des Anciens Traitez, Ou Recueil Historique et Chronologique Des Traitez Répandus Dans Les Auteurs Grecs & Latins , & Autres Monumens de l'Antiquité , Depuis Les Tems Les plus Reculez, Jusques a L'empereur Charlemagne* (Amsterdam, 1735), preface. On Barbeyrac, Koskenniemi, "Advantage of Treaties", 40.

[161] Jean Bodin, *Les Six Livres de La République* (Paris, 1577), Livre I, Chap VI, pp. 68–69.

[162] Emer de Vattel, *Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, from the French of Monsieur de Vattel. From the New Edition, by Joseph Chitty, Esq. Barrister at Law. With Additional Notes and References by Edward D. Ingraham, Esq.* (Philadelphia: T. & J. W. Johnson & Co., 1867). At § 112 Escheatage, for the whole passage see also § 113 The right of traite foraine and §114 Immovable property possessed by an alien. The editor Edward D. Ingraham writes in his "Preface to this Edition" that "whenever it appeared that the notes of the English editor", that is Joseph Chitty, "required additions to render the doctrine advanced in them clearer, or more intelligible, such additions have been made; care having been taken to distinguish the matter added by enclosing it in brackets."
For the English translation (from the 1867 edition): 'What we have established in the three preceding sections is sufficient to show with how little justice the crown (le Fisc, in the original French), in some states, lays claim to the effects left there by a foreigner at his death. This practice is founded on what is called *echeatage* (*Droit d'Aubaine*, in the original French), by which foreigners are excluded from all inheritances in the state, either of the property of a citizen or that of an alien, and, consequently, cannot be appointed heirs by will, nor receive any legacy.' … 'a very polite and learned (très-éclairé, in the original French which is perhaps best understood in this context as 'very enlightened') people, they could not accustom themselves to consider foreigners as men entitled to any right in common with them.'

Legs.[163]

In support, Vattel refers to the authority of Grotius and notes that even though the Romans became 'un peuple très-poli & très-éclairé, ils ne pouvoient s´accoutumer a regarder les étrangers comme des hommes avec lesquels ils eussent un Droit commun.'[164]

This statement is supported by a reference to the second century CE Roman lawyer Sextus Pomponius derived from Bodin's account (1577) of the origins of the droit d'aubaine which Vattel is explicitly following. Bodin had argued that the feudal right actually had immemorial Roman origins: 'Il apert donc que ce droit d´aubeine est des plus ancies & qui a tousiours esté commun tant aux Grecs, & aux Romains'.[165] Thus Vattel still ascribes to the earlier view of Barbeyrac that was derived from the opinion of Bodin on the Roman origins of the droit d'aubaine though this view had been challenged by Enlightenment thinkers who argued for an idea of the progress of civilisation that had been interrupted by the dark and barbarous feudal ages. French Enlightenment thinkers had increasingly begun criticizing the droit d'aubaine as a barbaric anachronism from the 1750s onwards. Most famously Montesquieu in his *Esprit des loix* (1748) argued that 'one of the effects of the general calamity' caused by the invasion of the Roman empire by barbarians 'was the destruction of commerce … Soon there was almost no more commerce in Europe; the nobility, who reigned everywhere, did not trouble themselves with it.' It was in these times that the 'les droits insensés d´aubaine & de naufrage' were established because 'men thought that as foreigners were not united with them by any communication of the civil right, they did not owe them, on the one hand, justice of any sort or, on the other, pity of any sort'. In contrast the Romans 'who made laws for the whole universe, had made very humane ones

[163] Vattel, *Les Droit Des Gens* (1758), book ii, chapter viii, 112–114.
[164] Ibid.
[165] Bodin, *Les Six Livres de La République* (1577), Livre I, Chap VI, pp. 68–69.
The author's translation: 'therefore it appears that this *droit d'aubeine* is most ancient & that it was always common to the Greeks & as well the Romans'. In contrast, for an early English translation Jean Bodin, *The Six Bookes of a Common-Weale. VVritten by I. Bodin a Famous Lawyer, and a Man of Great Experience in Matters of State. Out of the French and Latine Copies, Done into English, by Richard Knolles*, trans. Richard Knolles (London, 1606), book i, chap. vi, 65: 'Whereby it is plaine that right (droit d"aubeine, in the original French) of application, or of Albinage(as some call it) to haue beene most auntient, and common as well to the Greeks and Romans'.

concerning shipwrecks' with reference to the *Corpus Juris Civilis*.[166] Ironically though Vattel does not follow Montesquieu's Enlightenment story of the droit d'aubaine as a vestige of the feudal age, he derives the French translation for his reference to Pomponius on the purported Roman origins of the droit d'aubaine from another passage in *Esprit des loix*.[167]

With regards to foreigners' property rights in contemporary law Vattel argues that the droit d'aubaine 'a été successivement adouci, ou meme aboli, dans la plupart des Etats civilisés.' Thus Vattel follows Barbeyrac in conceptualising the abolition of the droit d'aubaine as part of the progress of civilisation in Europe. Vattel asks '[c]omment reste-t-il quelque chose d´un Droit si barbare, dans notre Europe, si éclairée, si pleine d´humanité ?'[168] Yet Vattel does not tell us the story of this partial abolition in any detail demonstrating how he is still very much a part of the natural rights tradition. Out of his two empirical examples of the unmaking of the droit d'aubaine one is derived from Bodin –who wrote nearly two centuries before Vattel– and refers to an edict by the eleventh century Holy Roman Emperor Frederick II. The other refers to the Elector of Saxony as an example of a 'Souverain juste & équitable' who in accordance with the law of nature does not enforce the droit d'aubaine on foreigners on the basis of reciprocity. With regards to Vattel's passing mention of the 'Droit de *Traite-Foraine*' (enabling a sovereign to retain a portion of property which was sent out of his territories and more commonly known in French as the droit de détraction) and the right of a state to refuse foreigners the ownership of real estate his natural law framework –and the lack of empirics– is complete. Thus '[l]e Droit de *Traite-Foraine* est plus conforme a la Justice & aux devoirs mutuels des Nations … Comme la fortie de ces biens est une perte pour l´Etat, il peut bien en recevoir un équitable dédommagement.' Similarly the argument that '[t]out Etat est le maitre d'accorder ou de refuser aux étrangers la faculté de posséder des terres, ou d´autres biens immeubles, dans son territoire' is based purely on 'raison'

[166] The recent Cambridge edition translates droit d'aubaine of the original French into escheatage, Charles Secondat Baron de Montesquieu, *The Spirit of Laws*, ed. Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 386. For the original, Charles Secondat Baron de Montesquieu, *Esprit Des Loix*, 2nd ed., (Paris, 1757), Liv. XXI Chap. XVII.

[167] Vattel, *Les Droit Des Gens* (1st ed. 1758), book ii, chapter viii, 112–114. Montesquieu, *Esprit Des Loix* (2. ed. 1757), Liv. XXI Chap. XVII.

[168] For the English translations (from the 1867 edition): 'has been successively mitigated, or even abolished, in most civilized states' … 'Why does there still remain any vestige of (not in the original?) so barbarous a law in Europe, which is now so enlightened and so full of humanity ?'

with no empirical examples.[169] This is not surprising as Vattel explicitly states in his preface that 'Je dois me borner a donner les Principes généraux & les Regles, que la Loi Naturelle fournit pour la direction des Souverains a cet égard: Le détail des différens Traités & des diverses Coutumes des Peuples appartient a l'Histoire , & non pas a un Traité systématique du Droit des Gens.'[170]

The unmaking of the droit d'aubaine: a positivist shift

After demonstrating how Grotius and Vattel did not play important parts in recording the shift towards stronger foreigners' property rights in international legal doctrine, it is time to turn to an analysis of the positivist authors who played pivotal roles in this process. G. F. de Martens (1789) was the first author to provide an analysis of the shift towards unmaking the droit d'aubaine through bilateral treaty-making. Martens' positivist vision of international legal doctrine that was primarily based on treaty law drew from the genre of published collections of international treaties. Jean Louis Kluber (1815) linked Martens' positivist analysis of the droit d'aubaine with the Enlightenment idea of the progress of civilisation from 'le moyenage'. Yet it is important to note that the shift towards stronger foreigners' property rights was not complete, and that significant restrictions remained in place in particularly in Britain and the United States. This becomes evident from Joseph Chitty's influential English edition of Vattel (1834) that provides an analysis of restrictions to foreigners' property rights

[169]Vattel, *Les Droit Des Gens* (1st ed. 1758), book ii, chapter viii, 112–114.
For the English translations (from the 1867 edition): 'sovereign … so just and equitable' … 'The right of *traite foraine* (called in Latin *jus detractus*) is more conformable to justice and the mutual obligation of nations … As the exportation of that property is a loss to the state, she may fairly receive an equitable compensation for it.' … 'Every state has the liberty of granting or refusing to foreigners the power of possessing *lands* or other immovable property within her territory.'
[170] Ibid., tome i, preface, xxii.
The author's translation: 'I must confine myself to give the general Principles & Rules, that Natural Law provides for the direction of Sovereigns in this regard: The detail of different Treaties & various Customs of Peoples belongs to History, & not to a systematic Treatise of the Law of Nations.' In contrast for an older English translation (from the 1867 edition), preface, §24: 'All that can be done on this subject, in a treatise on the Law of *Nations*, is to lay down those general rules which nations (Souverains, in the original French) are bound to observe with respect to their *treaties*. A minute detail of the various agreements made between particular nations, and of the rights and obligations thence resulting, is matter of fact, and belongs to the province of history.'

in Britain based on case law. Though Chitty has been almost completely absent from histories of international law, he was the first author to explicitly introduce the jurisprudence of courts as a source of law in international legal doctrine (1834 and already in 1812, 1824). In this he drew from the strong role of courts in Anglo-American legal practice and the genre of published collections of case law. In 1836 Henry Wheaton provided an analysis of foreigners' property rights in international legal doctrine that combined the Enlightenment idea of the progress of civilisation with a broad positivist outlook of the sources of law based on the strictly practice-orientated works of Chitty and Martens.

G. F. von Martens and Jean Louis Kluber

The full title of Georg Friedrich von Martens' 1789 work is worth citing: *Précis du droit des gens moderne de l´Europe fondé sur les traités et l'usage. Auquel on a joint liste des principaux traités conclus depuis 1748 jusqu´a présent avec l´indication des ouvrages ou ils se trouvent.*[171] Thus in contrast to Grotius and Vattel, Martens was not interested in abstract natural law, but rather in the positive law of nations based on custom and treaties. This becomes clear when examining Martens' account of the droit d'aubaine –I will refer to the English edition of 1795, which accurately reproduces the original text and footnotes.[172] In virtue of the droit d'aubaine 'the heritage of a foreigner, who dies without leaving heirs in the country, falls to the sovereign, or to the chief magistrate of the place where he dies, to the exclusive of the heirs that he may have out of the country.' However, Martens then argues that this 'right which was formerly exercised with the utmost rigour towards all foreigners, particularly in France, and, from her example, in all the states of Europe, has been in process of time pretty generally abolished by law or treaty. Even France exercises it now towards a very few states only, and almost all the other states have laid it totally aside, except that they may now and then

[171] The title of William Cobbett's English translation (1795) is translated as: 'Summary of the Law of Nations, founded on the treaties and customs of the modern nations of Europe: with a list of the principal treaties, concluded since the year 1748 down to the present time, indicating the works in which they are to be found'. I have cross checked the accuracy of the translation.

[172] Martens, *Summary of the Law of Nations* (Cobbett ed. 1795), book iii, chapter iii, (17–18), pp. 99–101. For the French original, Martens, *Précis Du Droit Des Gens* (1789), book iii, chapter iii (78–79), pp. 114–117.

exercise it by way of retaliation.' Not only does Martens offer this general interpretation of the unmaking of the droit d'aubaine that emphasizes the importance of France the core text is also supported by detailed footnotes providing references to various dimensions of this shift. The contrast with Vattel's account could hardly be greater. Thus for example the 'catalogue of treaties, letters patent, &. by which France renounced this right, in behalf of many, powers, and almost all the states of the Empire, may be seen in Mr. de St. GEREMS, de usu albinagii tu Gallia, Argentor. 1778. 4. SCHOLOZER, Staatsanzeigen, Heft 31. 1787. P. 239. and the following.' As for 'the exercise of this right in Germany, see MOSER, auswärtiges Staatsrecht, p. 331.'[173]

Martens' account of two other restrictions on foreigners' property rights has a similar empirical focus.

> To the right of *Aubaine* has succeeded the more moderate one of *deduction (jus detractus)*, (droit de détraction in the original French) in virtue of which the sovereign, or other magistrate, retains a part of the heritage, which falls to foreigners out of the state, in permitting them to succeed to the rest. The exercise of this right is still more general, even among the states and imperial cities of the Empire : however, in a great number of treaties, it has been abolished, or the contracting parties have agreed not to excercise it, except by way of retaliation.

A footnote on the aforementioned 'great number of treaties' refers the reader to 'BONNHOFER, de jure detractus'. In similar vein, the '*tax on emigration* (*gabelle d´émigration* in the original French) is paid in many places by all those, whether born subjects or naturalized foreigners, who quit the state with their property, in order to settle themselves in another country … it has been abolished in a great number of states by particular covenants, or, at least, abolished so far as not to raised but by way of retaliation.' For Germany where 'this tax is raised frequently enough' Martens refers to 'PUTTER, *institutiones juris publ.* (1787)'.[174] In contrast it is remarkable that Martens does not cite the natural rights tradition in international legal doctrine –in the form of either Vattel or Grotius– in his account of foreigners' property rights. Thus it becomes very clear that Martens' positivist idea of legal doctrine draws primarily not on the natural rights based doctrine of Grotius and Vattel, but rather from the genre of published treaty collections. Indeed Martens began publishing his famous contribution to the

[173] Martens, *Summary of the Law of Nations* (Cobbett ed. 1795), book iii, chapter iii, (17–18), pp. 99–101.
[174] Ibid.

genre, which was to become the standard reference, from 1791 onwards.[175] The references to works by Johann Jakob Moser (1701-1785) and Johan Stephan Pütter (1725-1807) –a contemporary of Martens at Göttingen– shed additional light on Martens' more immediate intellectual context as these authors have been noted as prominent early examples of the shift to positivism in international legal doctrine.[176] Though Martens' account of the unmaking of the droit d'aubaine does not interestingly bother to mention the idea of the progress of civilization a footnote refers to '*Montesquieu, esprit des loix*, Liv. 21. C. 17.' for the origins of the right. This is remarkable because as we have seen –in contrast to Bodin whom Grotius, Barbeyrac and Vattel followed– Montesquieu understood the droit d'aubaine to be a relic of the Dark Ages rather than Roman law. Martens may thus well be the first author through which this Enlightenment account of the droit d'aubaine's origins implicitly reached international legal doctrine.[177]

The story of the unmaking of the droit d'aubaine in Jean Louis Kluber's *Droit des gens moderne de l´Europe* (1819) is similar to the one in Martens, except that Kluber explicitly contrasts 'les états modernes' with the novel concept of 'le moyenage' during which 'le *fisc* exerça généralement le *droit d'aubaine* (*jus albinagii, Heimfalls- ou Fremdlingsrecht*)'.[178] Nowadays, Kluber wrote, it is mostly exercised as a counter-measure. Kluber's references though –which are even more extensive than Martens'– cite neither the natural rights tradition in international legal doctrine or Montesquieu for the origins of the right, but concentrate exclusively on foreigners' property rights in contemporary state practice. As we saw above, Kluber also helpfully provides his readers with German equivalents to French and Latin concepts. Besides referring to treaty collections such as Martens' *Recueil*, he also mentions important recent developments in domestic law with regards to the droit d'aubaine –such as the reintroduction of reciprocity in the French *Code civil* in 1804– or international treaties –for

[175] The importance of Martens in the positivist shift in international law is emphasized in Keene, "A Case Study of the Construction of International Hierarchy"; Keene, "The Age of Grotius"; Koskenniemi, "Into Positivism". On the importance and origins of the genre of published collections of international treaties Keens-Soper, "The Practice of a States-System,"; Keene, "The Age of Grotius."
[176] See for example Koskenniemi, 'Advantage of Treaties', 57, 59.
[177] Martens, *Summary of the Law of Nations* (Cobbett ed. 1795), book iii, chapter iii, (17–18), pp. 99–101. Martens, *Précis Du Droit Des Gens* (1789), book iii, chapter iii (78–79), pp. 114–117.
[178] The author's translations: 'the modern states' … 'the Middle Ages' … 'the tax authorities (le fisc, in the original French) practiced the *droit d'aubaine* in general'.

example between France and Saxony in 1813 and Electoral Hesse and the Two Sicilies in 1818– in a rather fragmentary manner. Kluber's treatment of the milder tax on foreigners' inheritance known as '*droit* de *detraction* ou de *transfert* (*census hereditatis vel legati, Abzugsgeld, Abschoss*)' and the tax on emigration and transferring property referred to as 'le *droit de retraite* ou de *sortie* en cas d´émigration (*gabella seu census emigrationis Nachsteuer, Nachschoss*)' is similar with references to recent domestic legislation and international treaties. Of these the general abolition of these rights within the regional multilateral framework of the German Confederation in the constitution of 1815 and a resolution of the diet in 1817 are particularly notable.[179]

Joseph Chitty and Henry Wheaton

Yet the shift towards stronger foreigners' property rights was not complete, as Britain and the United States in particular retained significant restrictions. This becomes clear from Joseph Chitty's positivist work that was the first to explicitly introduce case law as a source of law in international legal doctrine. His 1834 English edition of Vattel's *Droit des gens* modified the work considerably by adding extensive footnotes on state practice to the core text that focused on natural rights argument. Chitty's significant modifications stand in contrast to the previous English edition of 1797, which had only very small additions to the revised French edition (1773) that included some new footnotes by Vattel.[180] Chitty's footnotes introduce a significant shift in positivist sources doctrine, as unlike the

[179] Jean-Louis Kluber, *Droit Des Gens Moderne de l´Europe* (1819), book I, chapter ii, (82–83), pp. 135–140.
[180] Chitty writes in his preface that "the last edition, upon which any care was bestowed, was published in A.D. 1797". Vattel, *Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, by Joseph Chitty, Esq. Barrister at Law.*, ed. Joseph Chitty (London: Sweet, Stevens & Sons, Maxwell, 1834), Preface to Present Edition. Though the anonymous editor of the 1797 edition claimed that in addition to adding 'the author's valuable notes from the posthumous edition, printed at Neufchatel in 1773' he had undertaken numerous alterations to this 1773 edition, including additional footnotes, this seems somewhat doubtful. Even when compared to Vattel's first edition of 1758. His discussion of sources in the preface has no new footnotes, and Vattel's natural rights argumentation remains unchanged. Also the discussion on foreigners' property rights remains unchanged in the core text, and there are no additions to the footnotes. See Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, Revised, Corrected, and Enriched with Many Valuable Notes Never before Translated into English.*, ed. Anonymous (London: Robinson, 1797), preface, § 112. Escheatage. § 113. The right of traite foraine. §114 Immovable property possessed by an alien.

Continentals Martens or Kluber who focus on treaties and domestic codification, he introduces – British– judicial decisions as an important source of international law. Chitty sought his edition to be of practical value for lawyers practising within a common law tradition. Thus in the beginning of Vattel's rather abstract discussion of the droit d'aubaine (translated as *escheatage*) and foreigners' property rights, Chitty has a footnote referring to his own writing (!) on the subject with particular reference to British practice '[a]s to *alienage* in general, and the jealous provisions in England against foreigners, see 1 Chitty's Commercial law; 108 to 169.'[181] Though Chitty added only this additional footnote to the sparse references on the droit d'aubaine or de détraction, Vattel's natural right argument to the effect that '[e]very state has the liberty of granting or refusing to foreigners the power of possessing *lands* or other immovable property within her territory' is accompanied by a long footnote discussing British case law; 'By the municipal law of Great Britain, no alien can inherit or hold real property. Thus, *Doe* v. *Acklam*, 2 Bar. & Cress. 799, establishes that a person born in the United States, since 1783, when the two countries were separated, cannot inherit lands in England ; and the same point was afterwards decided in *Doe d. Auchmuty* v. *Mulcaster*, 5 Barn. & Cress. 771.'[182]

The huge distance between the original author's and the editor's visions of legal doctrine is also very visible in the preface. Though Vattel's core text still argues that 'minute detail' of positive law 'does not belong to a systematic treatise on the law of nations' which must merely give 'a general theory of it', Chitty inserts a gargantuan footnote on the first page on the 'Sources of positive Law of Nations'. In the footnote Chitty both supports his argument on the sources of law with references to case law and explicitly introduces case law as a source of law. Thus 'Lord Mansfield, in Triquet v. Bath … stated as the declaration of Lord Talbot, that the law of nations is to be collected from the practice of different nations, (and see per Sir William Scott, in The Fladoyen)'.[183] And at the end of the footnote Chitty refers to 'a great accession of learning, information, and authority upon the law of nations [that] has been afforded by the valuable decisions of Sir W. Scott (afterwards Lord Stowell), and of Sir J.

[181] Vattel, *Law of Nations* (Chitty ed. 1834), § 112. Echeatage (or doctrine of alienage). fn 116.
[182] Ibid., § 114 Immovable property possessed by an alien, fn 117. For the previous paragraphs, § 112. Echeatage (or doctrine of alienage). § 113 The right of traite foraine.
[183] Ibid., preliminaries, §. Definition of the law of nations, fn 1 (at lv).

Nicholl in the Court of Admiralty and Prize Court, and by several decisions in our Courts of Law and Equity.'[184] It is worth to note that Chitty explicitly writes that the 'object of the present Editor has … been to collect and condense, *in numerous notes,* the *modern rules and decisions*, and to fortify the positions in the text by references to other authors of eminence, and by which he hopes that this edition will be found of more practical utility, without interfering with the text'.[185]

Chitty's positivist idea of legal doctrine, combining Martens' orientation towards treaties with the emphasis on case law (that was derived from published law reports) in Anglo-American legal practice, had already developed before his edition of Vattel. His earlier works (1812, 1824), which as we have seen he frequently advertises in his edition of *Droit des gens*, constitute the first positivist studies of contemporary international law written in English.[186] Indeed Chitty emphasized in the title of his *Treatise on the Laws of Commerce and Manufactures, and the Contracts relating thereto* that it included *an Appendix of Treaties, Statutes, and Precedents,* and proposed in the advertisement to publish an annual supplement of new relevant law 'so as to continue the practical Utility of the Work.'[187] The innovative nature of Chitty's 1824 work was recognized by his contemporary Andrés Bello (1832) who argued that it represented 'si no me engano, apareció por la primera vez bajo una forma regular y metódica' of the case law of admiralty courts in international legal doctrine.[188] Also James Kent's famous *Commentaries on American Law*, which included a part on international law, already referred to Chitty's *Commercial Law* in 1826.[189] In contrast though Robert Plumer Ward (1795) had already applied a positivist approach to a history of international law written in English he crucially did not go beyond the age of Grotius and engage in detail with contemporary developments.

[184] Ibid., preliminaries, fn 1 (at lv).
[185] Ibid., preface to present edition, iv.
[186] Joseph Chitty, *A Practical Treatise on the Law of Nations, Relative to the Legal Effect of War on the Commerce of Belligerents and Neutrals and On Orders in Council and Licences. To Which Are Added, Extracts from Grotius, Bynkershoek, and Vattel : Also, the Letter of Sir William Scott, and of the Duke of Newcastle, &c. Containing Matters Applicable to the Law of Prize* (Boston, 1812); Joseph Chitty, *A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating Thereto: With an Appendix of Treaties, Statutes, and Precedents*, vol. I (London: Butterworth, 1824).
[187] Chitty, *Commercial Law* (1824), advertisement to the four volumes.
[188] A. B. (Andrés Bello), *Principios de Derecho de Jentes* (Reprint of 'Obra Publica En Santiago de Chile En 1832' at Caracas: Valentin Espinal, 1837), Prólogo, v–vi.
The author's translation: 'if I am not mistaken, appeared (/was published) for the first time in a regular and methodical form'.
[189] James Kent, *Commentaries on American Law*, vol. I (New York, 1826).

Though Ward argued that 'it has never yet been the fortune of the annals of the world (at least not within my knowledge) to produce, from any commentator, A HISTORY OF THE LAW OF NATIONS … it was scarcely necessary to go' beyond the treatise of Grotius with 'the works of PUFFENDORF and VATTEL … finally' closing 'the present Enquiry.' Thus Ward 'pretends not to lay down what the law now is, but merely endeavours to point out what it *has been.*'[190] Yet despite of Chitty's pivotal role he has been thus far almost completely absent from histories of international law.[191]

In 1836 Henry Wheaton provided an analysis of foreigners' property rights in international legal doctrine that explicitly combined the Enlightenment idea of the progress of civilisation with a broad positivist outlook of the sources of law based on the strictly practice-orientated works of Chitty and Martens. Thus Wheaton's rather short account of foreigners' property rights conforms to the Enlightenment story of the progress of civilisation from the Middle Ages, which we have encountered in Martens and Kluber, even more explicitly. The '*jus albinatus*, or *droit d'aubaine*' was established in the 'rude ages' of the 'feudal system' and this 'barbarous and inhospitable usage' has in 'the progress of civilization … been by degrees almost entirely abolished.' Interestingly the droit d'aubaine is understood as a French institution (in contrast to Kluber and Vattel who are both cited) which was prior 'to the French revolution … either abolished or modified by treaties' and after the revolution done away with domestic law most recently in 1819 'admitting foreigners to the right of possessing

[190] For a different take Reus-Smit, *Moral Purpose of the State*, 132–33 Reus-Smit argues for Ward's importance in the shift towards positivism. Contrasting the approach of Ward and G. F. von Martens with that of Grotius; Ward, *An 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, Two Volumes* (London: Butterworth, 1795), vol i, xix–xx, xlvii, xlviii; Similary whilst James Mackintosh's 1799 lectures on international law, which do not survive, had a positivist framework they must have moved on a very general level as the series also comprised the law of nature and public law, Mackintosh, *A Discourse on the Study of the Law of Nature and Nations ; Introductory to a Course of Lectures on That Science, to Be Commenced in Lincoln's Inn Hall, Second Edition* (London, 1799).

[191] For examples of absence Keene, "A Case Study of the Construction of International Hierarchy"; Keene, "The Age of Grotius"; Koskenniemi, *From Apology to Utopia*; Koskenniemi, "Into Positivism"; Casper Sylvest, "International Law in Nineteenth-Century Britain," *British Year Book of International Law*, 2005; Mark W. Janis, *The American Tradition of International Law. Great Expectations, 1789-1914* (Oxford: Clarendon Press, 2004); Nussbaum, *A Concise History of the Law of Nations. Revised Edition*; In contrast it has been noted that Chitty's work influenced Bello, Frank Griffith Dawson, "The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility," *British Year Book of International Law* 57 (1986): 253–315; Fawcett, "Between West and Non-West"; Also Hunter, "Kant and Vattel in Context" has noted that Chitty added extensive notes to his edition of Vattel's work.

both moveable and immoveable property … in the same manner with native subjects.' Wheaton also notes that the '*droit de retraction*, or *droit de retrait* (jus detractus)' which is characterized as an 'analogous usage' has also been 'reciprocally abolished in most civilized countries'. The 'municipal laws of most countries' prohibiting 'foreigners from holding real (or immoveable) property within the territory of the state', which date from the 'feudal system in Europe', are mentioned in passing with no references for example to the aberrant British case.[192]

The third edition of Wheaton published in 1846 extended this passage by bringing in more examples of state practice from an American perspective. With regards to the *droit de detraction* (the spelling of the term has changed from the first edition) Wheaton notes that 'stipulations contained in a great number of subsisting treaties, between the United States and various Powers of Europe and America' have abolished it, citing as an example an 1828 treaty with Prussia found in 'Elliot's Am. Diplom. Code, vol. i. p. 388.' In contrast to the first edition, Wheaton also notes that the exemption from the prohibition of real estate in Britain given to American citizens who already owned land in Britain before American independence granted in the 1794 trade treaty 'is rapidly becoming obsolete by the lapse of time' with a reference to Kent's *Commentaries on American Law* (1826-1830).[193] In contrast to Chitty, who only refers to British courts, Wheaton explicitly includes 'adjudications of international tribunals, such as boards of arbitration and courts of prize' among the 'various sources of international law' and cites at least British and American domestic courts. For example referring to the application of international law by the English admiralty court judge Sir William Scott and the US Supreme Court president John Marshall in his discussion on the sources of law.[194]

[192] Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science*, 1st ed. (Philadelphia, 1836), part ii, ch ii, § Droit d'Aubaine, pp. 99–100.
[193] Henry Wheaton, *Elements of International Law: With a Sketch of the History of the Science*, 3. ed., 1846, part ii, ch ii, § 4 Droit d'Aubaine, pp. 128–30.
[194] Wheaton, *Elements* (1. ed. 1836), part I, ch I, § 14 Sources of international law, fn 20, 21, at pp. 48–50.

Conclusion

This chapter has tracked the evolution of the droit d'aubaine in international legal doctrine. I have demonstrated that the conventional methodological focus on the study of great legal theorists leads to a deficient understanding of legal change.[195] Thus showing how a history of global legal practices, through reconceptualising legal texts, can provide a better understanding of a crucial case of legal change vis-à-vis traditional histories of international legal doctrine.

Against conventional wisdom, I have shown that two of the most famous classics of international legal doctrine –the treatises of Hugo Grotius (1625) and Emer de Vattel (1758)[196]– did not play a pivotal role in the evolution of foreigners' property rights. Instead changes that had occurred through other legal practices were introduced afterwards in later editions of these works. Sometimes these shifts in foreigners' property rights had already been transferred to international legal doctrine through other less well-known works. I have thus highlighted the importance of G. F. von Martens (1789) and Joseph Chitty's (1812, 1824) works for introducing the limited positivist shift towards stronger foreigners' property rights –that centered on the unmaking of the droit d'aubaine– to international legal doctrine. However often the editors of later editions of canonical treatises have directly played a crucial role in changing international legal doctrine by drastically modifying the content of these works in order to make them useful for contemporary lawyers. Thus it was Jean Barbeyrac (1721) who first introduced the novel concept of 'civilization' to international legal doctrine in his passage on foreigners' inheritance rights in his French edition of Grotius. I have also highlighted how Joseph Chitty (1834) introduced case law as an explicit source of law to mainstream international legal doctrine in his edition of Vattel.

[195] For influential existing accounts with the conventional focus see fn. 149.
[196] Grotius, *De Iure Belli Ac Pacis*; Vattel, *Les Droit Des Gens*.

Chapter Three: The Unmaking of the Droit D'Aubaine in Legal Practice

The previous chapter demonstrated significant shortcomings in the conventional understanding that changes in foreigners' property rights were driven by the doctrinal innovations of great thinkers such as Vattel. We saw instead that doctrine sought to subsequently embrace legal changes that were taking place in practice through posthumous editions of canonical works and less well-known contemporary treatises. This chapter will now look at legal practice in order to locate the real roots of the movement towards the unmaking of the droit d'aubaine.

I provide an account of how restrictions to foreigners' property rights were to a significant extent undone in the period 1763-1843, with a particular focus on the abolition of the *droit d'aubaine* –an inability to deed or inherit property– that was seen in contemporary international legal doctrine as a crucial dimension of the broader transformation. The chapter highlights the fact that this first systemic shift towards stronger protection for foreigners' property rights takes place contractually. Predominantly through bilateral treaty making and later domestic legal codification. The first part focuses on the pivotal role of France before broadening out to a more general account of the European transformation encompassing the agency of other states. The shift was led by liberal French decision makers pursuing modernisation and joined by other mainly Continental European states. French diplomats began systematically constructing a network of reciprocal treaties abolishing the droit d'aubaine after the defeat to Britain in the Seven Years War (1763). By the time of the French Revolution this included the most important European trading nations and other smaller modernizing states had began creating similar networks. Thus this shift towards stronger foreigners' property rights

in European international society was not undertaken by nascent 'liberal democracies' after the American or French Revolutions but significantly predated them.

From 1789 onwards newly codified domestic law became the most important legal practice for unmaking restrictions to foreigners' property rights. The shift from bilateral treaties to domestic legislation as the preferred means for unmaking the droit d'aubaine was a result of the legal modernization processes that allowed states, in particular France, to regulate society more efficiently through domestic legislation than had been possible in the old regime. As exemplified by Napoleon's *Code civil* of 1804 the unmaking of restrictions to foreigners' property rights was still predominantly based on the condition of reciprocity that was ascertained through the exchange of diplomatic notes. After the fall of Napoleon, modernizing European states continued unmaking these restrictions through conditional domestic legal change complemented by networks of reciprocal agreements. Though restoration France in 1819 unilaterally abolished restrictions to all foreigners' property rights, other European countries followed its lead only slowly. Contractual legal change was thus predominantly pursued through bilateral arrangements, complemented by rare unilateral actions, instead of multilateralism with the exception of the internal regional framework of the post 1815 German Confederation.

The following section provides a comparative overview of the diverging trajectory of Britain and the United States. In contrast to these developments, British and American domestic courts continued to uphold a ban on foreign ownership of real estate based on the common law. This was only overturned through legislation in Britain in 1870 and some US states continued to uphold restrictions until the early twentieth century. Thus instead of the Anglo-Americans, who have conventionally been perceived as the key players in the making of the liberal international order, the shift towards stronger foreigners' property rights was first led by France that was seeking to catch up with the power and prosperity of Britain.[197] The final part of the chapter analyses what motivated key decision makers to

[197] This dovetails with Ellen Wood's account of the making of modern capitalism, *The Pristine Culture of Capitalism. A Historical Essay on Old Regimes and Modern States* (London: Verso, 1991).

abolish the droit d'aubaine. Though this shift was partly justified through the broad Enlightenment idea of the 'progress of civilisation', specific positive law was still needed to abolish the droit d'aubaine. The contractual shift unmaking the droit d'aubaine was motivated not only by the notion of the 'progress of civilisation' but more specifically by a desire to modernize economies based on the ideas of French political economists advocating stronger property rights in a more free market economy. With legal thinkers, such as Vattel, and Locke being notably inconspicuous in this story.

A Continental European transformation

The French king confiscated the droit d'aubaine, the right to seize the estates and property of aliens unless they had native heirs, from feudal lords in the thirteenth and fourteenth centuries. Though other incapacities and occasional taxes imposed on foreigners were later also conceptualized as a part of the droit d'aubaine, the inability to deed or inherit property became the central distinguishing feature between citizens and foreigners in old regime France.[198] As Jean Bodin wrote in 1577, '[m]ais le plus notable priuilege que le citoyen a par dessus l'estranger est, qu'il a pouuoir de faire testament ,& disposer de ses biens selon les coustumes : ou bien laisser ses proches parens heritiers : l'estranger n'a ny, l'vn ny l'autre, & ses biens sont acquis au seigneur du lieu où il est mort.'[199] The early modern state 'invested symbolically in the droit d'aubaine as a mark of absolute sovereignty' of the king and sought to impose this law in the entire kingdom until the early eighteenth century. Apologists of the absolutist state such as Bodin sought to defend this peculiarly French institution in two ways. First by claiming that the droit d'aubaine was actually widespread across Europe: 'Qui n'est point vn droit nouueau en

[198] Sahlins, *Unnaturally French*, 1–7, 32. The best account on the French droit d'aubaine is Sahlins, there is also a short overview in Michael Rapport, "'A Languishing Branch of the Old Tree of Feudalism': The Death, Resurrection and Final Burial of the Droit d'Aubaine in France," *French History* 14, no. 1 (2000): 13–40.

[199] Bodin, *Les Six Livres de La République* (1577 ed.), Livre I, Chap. VI, pp. 67–69, cited at 67-8.
For a 1606 English translation:
'But the most notable priueledge that the citisen had aboue the straunger, is, that he had power to make his will, and to dispose of his goods, according to the customes ; or leaue his neerest kinsmen his heires ; whereas the straunger could do neither the one nor the other, but his goods fell vnto the lord of the place where he died.'
The translation is from Jean Bodin, *The Six Bookes of a Common-Weale. VVritten by I. Bodin a Famous Lawyer, and a Man of Great Experience in Matters of State. Out of the French and Latine Copies, Done into English, by Richard Knolles*, trans. Richard Knolles (London, 1606), book i, chap. vi, p. 65.

France, comme les Italiens se pleignent, ains aussi commun au Royaume d'Angleterre, d'Ecosse, de Naples, de Sicile, & à tout l'Empire d'Orient'.[200] In fact limitations to foreigners' property rights in early modern Europe varied greatly although French jurists such as Bodin began equating them with the French 'droit d'aubaine' (glossed as 'jus albinagii' in early modern Latin).[201] We have earlier seen that foreigners' inheritance restrictions in general became conceptualized as the 'droit d'aubaine' in international legal doctrine from at least Barbeyrac's French translation of Grotius onwards.[202] Second Bodin argued that this feudal right actually had immemorial Roman origins: 'Il apert donc que ce droit d'aubeine est des plus ancies & qui a tousiours esté commun tat [?] aux Grecs, & aux Romains'.[203]

Ironically the drive to impose the king's right across the fragmented kingdom was to an extent undermined by another mark of his sovereignty; The power to grant exemptions to the droit d'aubaine either individually or collectively. Wealthy and well-connected foreigners sought letters of naturalisation from the crown, which conferred the status of a subject. Sometimes a collective exemption to a particular group might be granted either through domestic legislation –in old regime France, letters patent signed by the king– or an international treaty. For example the trade treaty concluded with the Dutch at the peace conference of Nijmegen in 1678 granted 'subjects of each party … in dominions of the other' the right to 'be exempted from the law of Aubain … their said goods shall pass to their heirs' and they 'shall be treated as natural born subjects'.[204] In the trade treaty

---

[200] Bodin, *Les Six Livres de La République*, Livre I, Chap VI, p. 68.
For the 1606 English translation: 'Which is no new law in Fraunce , as the Italians complaine,but a thing common also vnto the kingdome of Naples, of Sicilie, and all the East' in *Six Bookes of a Common-Weale* (Knolles ed. 1606), book i, chap. vi, p. 65. Knolles notably drops out 'the kingdom of England, and Scotland' from Bodin's list. In contrast the marginal of Bodin's original even (slightly oddly) indicates the passage as concerning the 'Droit d'aubeine en Angleterre'. '[L]'Empire d'Orient' ruled by 'le grand seigneur' refers to the Ottoman Empire.

[201] Bodin, *Les Six Livres de La République*, Livre I, Chap VI, p. 68.
The 'tat' in the passage is perhaps a printing error for 'tant' translating as so much, so or such.
The author's translation: 'therefore it appears that this *droit d'aubeine* is most ancient & that it was always common to the Greeks & as well the Romans'. In contrast, for the 1606 English translation: 'Whereby it is plaine that right (droit d'aubeine, in the original French) of application, or of Albinage(as some call it) to haue beene most auntient, and common as well to the Greeks and Romans' from *Six Bookes of a Common-Weale* (Knolles ed.), book i, chap. vi, 65.

[202] Grotius, *Le Droit de La Guerre et de La Paix* (Barbeyrac ed. 1724), book ii, chapter vi, xiv.

[203] Bodin, *Les Six Livres de La République*, Livre I, Chap. VI, pp. 68–69.

[204] Article x, English translation in Charles Jenkinson, *A Collection of All the Treaties of Peace, Alliance, and Commerce between Great-Britain and Other Powers from the Treaty Signed at Munster in 1648 to the Treaties Signed at Paris in 1783* (London, 1785), volume i, 218.

concluded with Britain at the Utrecht peace conference of 1713 merchants and other subjects of both countries were given the right to give away merchandize, money, debts and movables to foreign heirs 'any law, statute, edict, custom or droit d'Aubene whatever to the contrary notwithstanding'.[205] It is notable that the Anglo-French treaty excludes real estate from the exemption to the droit d'aubaine. France refused to grant British subjects a full exemption as this would not have been reciprocal due to the ban on foreign ownership of land in Britain. Despite the fact that exemptions from the droit d'aubaine were a feature in some French trade treaties the abolition of the right was not yet in itself a policy objective of the absolutist French state. Furthermore even though for example the Dutch had been exempted from the right in several seventeenth century treaties, Dutchmen residing in France continued to seek letters of naturalisation in order to assure their estates in the event of death or frequent war. As we have seen, the legal status of Britons was even more ambiguous.[206]

France and the unmaking of the droit d'aubaine

It was only in the aftermath of the Seven Years War that the modernizing French state began systematically dismantling the droit d'aubaine. As Peter Sahlins argues, in 'a series of some sixty-six international treaties and collective grants signed between the early 1766 and 1782, the French state abolished or exempted (albeit in a conditional and reciprocal manner) nearly every foreigner in France from the droit d'aubaine'.[207] The turning point was the convention signed in 1765 with the margrave of Baden-Baden, a Rhineland prince who shared a border with France and had requested a renewed exemption from the French foreign ministry in 1761. To cite the preamble to the treaty:

> Le sérénissime Margrave de Bade-Bade ayant fait connoitre au Roi le désir qu´il avoit que les liaisons de parenté, voisinage, commerce et bonne correspondance qui sont entre leurs sujets respectifs, fussent affermies et augmentées par l´exemption réciproque de droit d'aubaine dans leurs Etats, et S. M. très-chrétienne s´étant trouvée animée du même esprit, le Roi et le sérénissime Margrave, pour assurer a leurs sujets l'effet de leurs bonnes intentions, ont résolu de les constater

[205]Ibid., volume ii, 5.
[206] Sahlins, *Unnaturally French*, 173–174.
[207] Ibid., 13–14.

par une convention formelle entre eux.[208]

Even though the treaty decrees 'une abolition totale et réciproque du droit d´aubaine' the lesser inheritance tax of 'droit de détraction appelé en allemand *abschuss* ou *abzug*', which some towns and lords still had the right to levy in both Alsace on the French side of the border and in Baden-Baden, could still be exercised on the basis of reciprocity.[209]

Within three years France had concluded treaties abolishing the droit d'aubaine with a dozen more principalities on its eastern border (Margraviate of Baden-Durlach, Principality of Nassau-Saarbrucken, Duchy of Zweibrucken, the Electorate Palatine, Principality of Nassau-Usingen, Bishopric of Strassbourg, Landgraviate of Hesse-Cassel, Elector-Archbishopric of Trier, Electorate of Bavaria, Landgraviate of Hesse-Darmstadt, Prince-Bishopric of Spire, Elector-Archbishopric of Cologne, Prince-Bishopric of Liege) These treaties were modeled on the Baden-Baden one; having in most cases the same stipulations. For example the 1768 abolition treaty with the Prince-Bishop of Liege also exempts dues 'which might legitimately be due in virtue of whatever titles or an immemorial possession by specific seigneurs and towns of the king's obedience, and notably the *droit de détraction*, called in German *Abschluss* or *Abzug*, which is levied in Germany on the export of goods and the sale price of immovable property deriving from bequests.' [210] The smallest of international actors were exempted from the droit d'aubaine sometimes not by a treaty but by a collective naturalisation issued as letters patent of the king (an act of domestic legislation). Letters patent granted to the members of the Sovereign Order of Malta in 1765 followed exactly the formula of an individual letter of naturalisation. Other actors that acquired an exemption via letters patent

[208] The treaty is reproduced in Gaschon, *Code Diplomatique Des Aubains*, 214–219.
For a translation: 'The most serene Margrave of Baden-Baden having made known to the King his desire that the relations of kinship, neighbourliness, commerce and good correspondence between their respective subjects be strengthened and increased by a reciprocal exemption from the droit d'aubaine in their States, and His most christian Majesty finding himself animated by a matching spirit, the King and the most serene Margrave, in order to assure their subjects of the effect of their good intentions, have determined to record these in a formal convention amongst themselves.'
[209] Ibid., 214–219, at articles 1-2.
For a translation: 'a total and reciprocal abolition of the droit d'aubaine' and 'droit de détraction called in German *abschuss* or *abzug*'.
[210] For a list of agreements abolishing the droit d'aubaine involving France for the period 1753-1791, Sahlins, *Unnaturally French*, 335–340. The treaty with Liegé is cited in ibid., 232–33.

included the Free Imperial Town of Frankfurt and the free imperial nobles of Swabia, Franconia and the Rhine in 1769.[211] The surge in abolitions of the droit d'aubaine continued throughout the 1770s. The treaty network also became to include larger and more distant states that were not members of the Holy Roman Empire. Treaties with the Duchy of Parma (1768), Grand Duchy of Tuscany (1769), the United Provinces (1773) and the United States (1778) simply abolished the droit d'aubaine –with no stipulations for continuing the levying of a droit de détraction– unlike in most agreements with the smaller German principalities. Thus the trade treaty with the rebellious American colonies through which France recognized them simply decreed that

> Subjects and Inhabitants of the said United States … shall not be reputed Aubains in France, & consequently shall be exempted from the Droit d'Aubaine or other similar Duty under what name soever … And the said Heirs, whether such by particular Title, or ab intestat, shall be exempt from all Duty called Droit de Detraction, or other Duty of the same kind … The Subjects of the most Christian king shall enjoy on their Part, in all the Dominions of the sd. States, an entire and perfect Reciprocity.[212]

By the eve of the French Revolution the old regime had exempted nearly every foreigner in France and in effect abolished the institution of the droit d'aubaine. The sixty-six treaties or collective exemptions signed by the king were enforced in practice by French courts. The rulings of the Paris Parlement, the highest court in the land, supported a broad interpretation of foreigners' inheritance rights including the right to inherit from French natives based on international treaties. In 1781 the parlement ruled in favour of the Abbé Lemmens of Maastricht in a dispute concerning a slave plantation in Saint-Domingue based on a 1773 treaty with the Dutch that decreed that 'the French and the Dutch will be treated in every way and everywhere as natural subjects of the authority of the country where they would reside'. The solicitor general Joly de Fleury upheld in 1784 *Comtesse Doria* v *Marie Jeanne Bellow* that an abolition of the droit d'aubaine –based on a treaty with Portugal from 1778– entailed the 'right to inherit among kin without regard to nation'.[213]

[211] Ibid., 230.
[212] Article 13 (11), *Treaty of Amity, Commerce and Navigation between the United States and the Most Christian King*, 1778, http://avalon.law.yale.edu/18th_century/fr1788-1.asp.
[213] Sahlins, *Unnaturally French*, 256–258.

The Constituent Assembly followed the piecemeal abolitions of the old regime with a general abolition of the droit d'aubaine and de détraction in August 1790. The act describes these as 'contrary to the principles of fraternity which should bind all men, whatever be their country or government' and calls for 'this law, established in barbarous times' to be 'proscribed in a nation which has founded its institutions upon the rights of men and citizens, and that for this reason should open its bosom to all the peoples of the earth, inviting them to enjoy under a free government the sacred and inviolable rights of humanity'. In the following year another act explicitly made it possible for foreigners also to inherit from French citizens. The new codified civil law of 1804 that Napoleon named after himself, however reintroduced the old regime foreign ministry's prerequisite of reciprocity. A 'foreigner will possess in France the same civil rights as are or will be accorded to the French by the treaties of the nation to which this foreigner belongs'.[214] This led the French Empire to construct a new network of agreements unmaking restrictions to foreigners' property rights in the Europe it dominated. This network differed from the old regime one in two respects; These agreements, though usually reaffirming the abolition of the droit d'aubaine, were mainly concerned with the lesser droit de détraction that had been maintained in the older treaties. The minister of justice Claude-Ambroise Reignier decreed in 1804 –in response to an inquiry by foreign minister Talleyrand– that formal treaties were no longer to be required for the abolition of restrictions. Reciprocity could also be agreed upon through an exchange of diplomatic notes referring to domestic legislation. What was important was the principle.[215] In practice this could lead to the rather droll outcome that in 1806 Napoleon in his capacity as the Emperor of the French concluded an agreement on the matter with himself in the capacity of King of Italy; inheritance restrictions were thus abolished reciprocally by domestic decrees between the nominally separate entities. The final years of the empire witnessed the construction of a more extensive network of abolitions building on those concluded by the old regime. In 1811-13 France concluded agreements reciprocally abolishing the droit d'aubaine and de détraction with Prussia, Denmark and several smaller client states (Anhalt-Bernburg, Frankfurt, Lippe-Detmold, Lucca and Piombino, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Schwarzburg-Sonderhausen,

[214] For these citations, ibid., 299.
[215] Ibid., 299–300.

Schwarzburg-Rudolstadt and Waldeck).[216]

The final chapters in the French story offer indications of how by the turn of the nineteenth century the unmaking of the droit d'aubaine had become part of mainstream European political practice that extended beyond a specific state or regime type. The Paris peace treaty of 1814 concluded by France with the victorious great powers –that was subsequently affirmed at the Vienna Congress– did not cancel but rather affirmed the network of bilateral reciprocal abolitions of restrictions to foreigners' property rights concluded by the illegitimate Napoleonic regime; 'L'abolition des droits d'aubaine, de détraction et autres de la même nature, dans les pays qui l'ont réciproquement stipulée avec la France … est expressément maintenue.'[217] Finally in 1819 the Restoration assembly readopted a general abolition of the droit d'aubaine, closing the French story of the unmaking of this right. The *droit civil* that had established the distinction between subjects and foreigners in early modern France had been opened to foreigners.

The broader European shift

Yet as we have already seen from international legal doctrine, the unmaking of restrictions to foreigners' property rights was not only a French story. The fact that the French 'droit d'aubaine' became understood as a general concept for the variety of restrictions on foreigners' inheritance rights in various European countries highlights the need to write a more international account of this shift that moves beyond the French perspective. Baden-Baden's 1761 initiative to renegotiate an agreement on the droit d'aubaine with France –which started off the crucial French treaty-network to abolish the right and became a model for later specialized treaties– is an example of the largely forgotten agency of other Continental states –often small or middle ones– in this European process of transformation.

[216] Ibid., 300–1.
[217] Cited in Gaschon, *Code Diplomatique Des Aubains*, livre i, chapitre I, p. 17.
For a translation: 'The abolition of the rights of aubaine, detraction and others of a similar nature, in the countries that have reciprocally stipulated this with France … is expressly maintained.'

This section seeks to provide an overview of this shift by outlining some broad patterns. The account is based on an overview of treaties explicitly dealing with foreigners' property rights in the period 1750-1850 from the *Consolidated Treaty Series*.[218] Thus this story is to an extent limited by the fact that many trade treaties that contained provisions on these rights have not been consulted. Shifts in relevant domestic legislation can be tracked through both the *CTS* and Pierre Lainé's overview.[219]

In general foreigners' civil incapacities to act as legal subjects diminished over the course of the early modern period. The incapacities had often included restrictions on the right to own or transmit property. As we have seen in Grotius, these restrictions became criticized as contradictory to the law of nature. Particularly in the Netherlands and England the incapacities 'tended to wane as commercial societies and cultures replaced agrarian and aristocratic ones.'[220] The shift was taking place not only in domestic legal practices, but also in international law through treaty-making. For example the Dutch created an extensive network of trade treaties with European states in part to safeguard Dutch merchants' property rights.[221] In protestant Northern Europe the 'question' of foreigners' legal incapacities 'was intimately linked to the juridical incorporation' of the Huguenots, French protestants that sought refuge after Louis XIV in 1685 revoked the freedom of worship that had been granted to them in the Edict of Nantes.[222] The Dutch Republic, Brandenburg-Prussia and several other protestant German territories sought Huguenot migrants' skills and capital in order to boost their economies and trade. In contrast English policy remained more passive as is clear from a letter written to the English ambassador in Paris in 1679 deploring that 'those that have not zeal enough to endeavour' Huguenot immigration 'for the preserving of our religion, might have wit enough to do it for the increasing of our trade'. Indeed aberrantly despite considerable debate on the merits of immigration, incapacities for foreigners remained –most notably the ban on owning real estate– and in certain dimensions became

[218] *CTS*.
[219] Lainé, "Etude Sur La Capacité Successorale Des Étrangers En France."
[220] Sahlins, *Unnaturally French*, 7.
[221] Sir Geoffrey Butler and Simon Maccoby. *The Development of International Law* (London: Longmans, 1928), 217–18, 504.
[222]Sahlins, *Unnaturally French*, 7.

even greater in early eighteenth century England.[223] We shall return to this peculiarly English story later on. In this overall European context the droit d'aubaine still largely enforced by the absolutist French state in the early eighteenth century was becoming more and more exceptional and archaic.

There thus exists a broader and to an extent earlier European story of the abolition of restrictions to foreigners' property rights. As has been noted, the initiative to the 1765 treaty, which became a model for subsequent bilateral agreements through which France began systematically abolishing the droit d'aubaine came from Baden-Baden though the French side importantly decided to extend the request for a regional exemption in Alsace to a one encompassing the entire kingdom. Most agreements abolishing the droit d'aubaine that were to follow resulted from requests made to the French foreign ministry by principalities situated in the Holy Roman Empire.[224] France was however not the only old regime that began concluding treaties explicitly unmaking restrictions to foreigners' property rights in the latter part of the eighteenth century. Between 1763 and 1797 the Kingdom of Sardinia constructed a small treaty-network that abolished restrictions to foreigners' property rights with Austria, Bavaria, Spain, Portugal and Prussia. Only the last of these treaties (from 1797 with Prussia) refers to the droit d'aubaine and de détraction (Abzug), earlier treaties abolish restrictions without explicitly referring to these French and German concepts. Only the editor of the Sardinian treaty collection published in 1836 has glossed the earlier ones too as dealing with the 'droit d'aubaine' which had by then become to a large extent synonymous with property restrictions in general.[225] In a more limited fashion, in 1784 the Grand Duchy of Tuscany and Austria abolished inheritance restrictions between themselves. The Habsburgs ruled both states; Grand Duke Leopold would later succeed his brother Emperor Joseph II on the throne of Austria.[226] This trend was not only limited to the Italian peninsula; North European, particularly German, states also began abolishing inheritance restrictions between themselves. The small network of agreements constructed by the Kingdom of Denmark, a significant

[223]G. C. Gibbs, "The Reception of the Huguenots in England and the Dutch Republic, 1680-1690," in *From Persecution to Toleration. The Glorious Revolution and Religion in England*, ed. Ole Peter Grell, Jonathan Israel, and Nicholas Tyacke (Oxford: Clarendon Press, 1991), 299–300.
[224] Sahlins, *Unnaturally French*, 288.
[225] Comte Solar de Marguerite, *Traités Publics de La Royale Maison de Savoie*, vol. iii (Turin, 1836), 251, 279, 480, 496, 564.
[226] *CTS*, vol. 49, 197–201.

part of which lay within the Holy Roman Empire, serves us a good example. In 1772 Denmark and Saxony exchanged declarations decreeing the abolition of 'Abschoss oder Abzugs- Geld in Erb – und andern Fällen'.[227] By 1792 Denmark had concluded similar agreements with Brunswick-Wolfenbuttel, Sweden, Munster, Prussia and Baden.[228]

Napoleon's reorganization of the German lands, which brought about the demise of the framework of the Holy Roman Empire in many ways profited middling German states that managed to survive as French clients. Larger and middling states were often rewarded by territorial enlargement in the form of annexing the lands of the ecclesiastical principalities and the smallest self-governing units of the Empire. The survivors often sought modernization of their domestic legal systems by adopting variations of the *Code Napoleon*. For example Baden-Baden which had been considerably enlarged at the expense of the former prince-bishopric of Konstanz and the Habsburgs, and whose margrave was made a sovereign grand duke when the Empire was dissolved in 1806, adopted a variant of the French civil code in 1809. These statutes would remain in force with modifications until finally in 1900 a unitary civil code was adopted in the new German Empire created by Prussia. It is important to note though, that some German states such as Prussia had already embarked on the project of the codification of civil law before the French revolution –something that the French old regime was never able to achieve. Domestic legislation would serve as a crucial practice through which restrictions to foreigners' property rights were unmade. Article 33 of the *Allgemeines bürgerliches Gesetzbuch für die gesammten Deutchen Erbländer der Österreichischen Monarchie* of 1811 followed the Code Napoleon of 1804 in abolishing restrictions on the basis of reciprocity.[229] Thus there was no longer need for formal 'Freyzugigkeits-Vertrag' such as the one concluded between the Habsburg monarchy and Baden in 1808.[230] However as we have already seen in Kluber and agreements

[227] Ibid., vol. 45, 81–4.
For a translation: 'Abschoss or Abzug (Abzug can be translated as deduction) tax in inheritance and other cases'.
[228] Ibid., vol. 47, 473–76, vol 48, 499–501, vol 53–57, 83–88, 377–80.
[229] *Allgemeines Bürgerliches Gesetzbuch Für Die Gesammten Deutchen Erbländer Der Österreichischen Monarchie* (Vienna, 1811), vol i, art 33.
For a translation: '*The general civil law code for the entire German hereditary lands of the Austrian monarchy*'.
[230] *CTS*, vol. 60, 207–212.
For a translation: 'treaty on the freedom of movement'.

concluded with France, legal modernization in Napoleonic Europe was pursued not only through domestic law but also complementary international agreements –though formal treaties were getting more rare– that were necessary for the requirement of reciprocity to function. Between 1810 and 1815 Prussia constructed a smaller German centric variant of the French network of agreements to further reciprocally abolish the droit de détraction; the Prussians concluded such agreements with at least Saxony, Saxe-Coburg, Baden, Mecklenburg-Schwerin, Mccklenburg-Strelitz, Nassau, Anhalt-Bernburg and Anhalt-Dessau.[231]

These trends of legal modernization in many ways continued after the demise of French hegemony in 1815. Though modified to reflect the victorious great powers' preferences Napoleon's territorial settlement of Germany was also mostly confirmed. Yet though even most of the actors remained the same –as did their preferences for conservative modernization– their legal relations needed to be reestablished after the demise of the Napoleonic system. This is clear from the surge of treaty-making and domestic legislation surrounding foreigners' property rights between 1814 and 1820 taking place primarily in the German lands and the Italian peninsula. In the German case, foreigners' property rights were referred to in the constitution of the new German Confederation, which was approved by the great powers in June 1815 in Vienna as a new framework to replace the demised Empire. The German Confederation included in its members both of the German great powers, Austria and Prussia, together with the rest of the German states that had survived the destruction of the smallest units of the Empire including neighbouring Denmark and the Netherlands part of whose territories had been located within the Empire. According to article xviii of the constitution the 'droit d'issue ou de détraction, ou autre impôt' taxing the property of a departing foreigner were to be abolished. It is noteworthy that the droit d'aubaine is not referred to in this agreement between German states. [232] Yet

[231] Ibid., vol. 61, 265–69, 427–30, 435–37, 369, vol. 62, 41–5.
[232] Act relative to the Federal constitution of Germany, Act IX of General Treaty of Vienna Congress, reproduced in ibid., vol. 64, 443–452. The following states were parties to the Confederation; Austria, Prussia, Bavaria, Saxony, Hanover, Wurtemberg, Baden, Electoral Hesse, Grand Duchy of Hesse, Denmark, Netherlands, Grand Ducal and Ducal Houses of Saxony, Brunswick and Nassau, Mecklenberg-Schwerin, Mecklenburg-Strelitz, Holstein-Oldenburg, Anhalt and Schwartzburg, Hohenzollern, Liechtenstein, Reuss, Schaumburg-Lippe, Lippe and Waldeck, the Free Cities of Lubeck, Francfort, Bremen and Hamburg.
For a translation: 'the right of exit or detraction (droit d'issue or détraction), or other tax'.

this was not a clear multilateral treaty framework on foreigners' property rights as the article was in force only provided that there did not exist 'conventions particulieres et réciproques n'en aient autrement statué.'[233]

In practice despite of the new constitution, German states continued concluding or reaffirming bilateral agreements on the issue. Of the eighteen treaties or exchanges of declarations concluded between members of the confederation on the topic 1815-1819 ten involve Prussia and nine the newly constituted Kingdom of the Netherlands. Austria is conspicuously absent from these agreements as it had already in 1811 mirrored France in unilaterally abolishing restrictions to foreigners' property rights on the basis of reciprocity. The first of these agreements was a treaty concluded by the Netherlands and Hanover in July 1816 stipulating that '[l]e droits connus sous le nom de *Jus detractus , Gabella hereditaria* et *Census emigrationis* … toutes les impositions de cette nature restant abolies réciproquement pour toujours entre les deux Pays.'[234] This treaty would serve as a model for the later Dutch agreements with Saxe-Weimar, Prussia, Bavaria, Wurtemberg, Waldeck, Holstein-Oldenburg and the Grand Duchy of Hesse. The first Prussian post-Napoleonic bilateral treaty on foreigners' property rights was similarly concluded with Hanover in September 1816 abolishing the 'Abschoss und Abfahrtsgeld' and thus establishing 'Freyzugigkeit'. These agreements would often extend earlier treaties of the Napoleonic era –for example Prussia's 1816 droit de détraction waivers with Saxe-Coburg and Nassau referred to treaties from 1812. Yet the eighteen agreements fall far from establishing a dense bilateral treaty-network between members of the German confederation; why did the network remain relatively patchy?

In June 1817 the Diet of the German Confederation passed a resolution affirming the protection of the property rights of a subject of member state X in the territory of member state Y, which was evidently

[233] Ibid., vol. 64, 443–452.
For a translation: 'specific and reciprocal conventions that have ruled differently on it.'
[234]Ibid., vol. 66, 285–286.
For a translation: 'The rights known through the name of *Jus detractus* , *Gabella hereditaria* et *Census emigrationis* (right of detraction, inheritance tax, and the emigration assessment) … all the taxes of this nature remain reciprocally abolished for ever between the two Countries.'

considered more binding than the formulation of the constitution itself, thus removing the need to conclude bilateral treaties on the topic. The resolution is referred to in declarations exchanged by Prussia and Wurtemberg in January 1818. Instead of 'une Convention particuliere' with regards to the abolition of the 'Droit de Détraction et de Sortie' the two states declare themselves to be enforcing the resolution of the Diet.[235] In 1819 members of the confederation exchanged declarations on the matter only two times and referred to the Diet's resolution of 1817.[236] Thus a regional multilateral framework abolishing restrictions to foreigners' property rights –doing away with the need for a bilateral treaty-network– had been gradually put together between the member states of the German confederacy. This framework, as we shall see, was closed as third party states could not join it and had to instead conclude treaties with separate member states.

In the Italian peninsula no equivalent of the German confederation existed. Moreover the reestablished old regimes that succeeded Napoleon's 'Kingdom of Italy' were still quite frequently enforcing far more drastic restrictions to foreigners' property rights that were understood as Italian variants of the droit d'aubaine. Nonetheless modernizing Italian states sought to abolish these restrictions through bilateral treaty-making, that built on pre-Napoleonic treaties, and domestic legal change. The kingdoms of Sardinia and the Two Sicilies led the process and further extended their older networks of agreements beyond the Italian peninsula. In January 1817 Sardinia and the Duchy of Modena concluded a treaty abolishing 'diritto d'Albinaggio, di detrazione, e qualunque altro fosse contrario alla liberta delle successioni'.[237] A similar wording was used in subsequent Sardinian conventions –with Parma and Piacenza, Tuscany, Massa and Carrara, the Two Sicilies and the Papal States– and was translated in the nearly contemporary *British State and Foreign Papers* as abolishing the 'Droit d'Aubaine, de Détraction et tout autre contraire à la liberté des Successions et Dispositions

[235] Ibid. reproduces the French translation of the *BFSP*, vol. 68, 259–260.
For translations: 'a specific convention' and 'right of detraction and of exit (right of détraction and of sortie)'.
This resolution of the diet is referred to in Kluber, *Droit Des Gens Moderne de l´Europe* (1819), book I, chapter ii, (82–83), pp. 135–140. See also Andreas Fahrmeir, *Citizens and Aliens. Foreigners and the Law in Britain and the German States 1789-1870* (New York: Berghahn, 2000), 23.
[236] For Prussia and Schaumburg-Lippe, February 1819, *CTS*, vol. 69, 491–492. For the Netherlands and the Grand Duchy of Hesse, May 1819, ibid., vol. 70, 133–134.1/12/2018 10:09:00 AM
[237] Cited from *CTS*, vol. 67, 17–20.
For a translation: 'the right of Albinaggio, of detrazione (aubaine, détraction), and any other that were contrary to the freedom of inheritance'.

réciproques'.[238] In 1820 Sardinia would extend this network beyond the peninsula by agreements with the Netherlands and Prussia.

The approach of the Two Sicilies to the abolition of the droit d'aubaine differed from that of Sardinia in two respects; first its perspective seems to have been more of a European than an Italian one from the beginning, and the abolitions were mostly achieved not through treaty-making but domestic legislation. After concluding treaties with Sardinia, Prussia and the Netherlands earlier in the year, the Two Sicilies in August 1818 passed a decree that abolished the droit d'aubaine from foreigners on the basis of reciprocity. This policy undertaken by the restored Bourbon king was thus similar to the one Napoleon had adopted in 1803. Immediately after passing the decree Naples invited several European states to bilaterally declare a reciprocal abolition of the droit d'aubaine. The correspondence with Wurtemberg serves as a good example. Since 'le droit d'aubaine ne seroit plus exercé dans le royaume des deux Siciles rélativement aux sujets, de celles d´entre les puissances qui ne l´exerceroient plus vis-à-vis de sujets de Sa Majesté … Sa Majesté … ayant desiré d'étendre les effets de ce décret, en faisant inviter Sa Majesté le roi de Wurtemberg d'en appliquer réciproquement les dispositions à leurs états'.[239] Naples did not think a bilateral treaty to be necessary but was rather seeking a more easy and informal understanding in the form of a declaration; 'pour éviter les formalités et longeurs d´un traité solennel' the Two Sicilies 'ne desiroit de la part du gouvernement de Wurtemberg qu´une simple déclaration'.[240] Similar agreements were concluded with at least Austria, Oldenburg, the Grand Duchy of Hesse and Sweden-Norway.

These Italian developments were reflective of a broader European transformation. The declarations

[238] For a reproduction of the *BFSP* French translation of the January 1818 treaty between Sardinia and the Duchy of Massa and Carrara, ibid., vol. 68, 265–268.
For an English translation: 'right of aubaine, of détraction and all others contrary to the freedom of inheritance and reciprocal measures'.
[239] Cited from ibid., vol. 69, 321–324.
For a translation: 'the droit d'aubaine would no longer be practiced in the kingdom of two Sicilies relative to the subjects, of those among the powers who would no longer practice it towards subjects of His Majesty … His Majesty … desiring to extent the effects of this decree, in doing this invites His Majesty the king of Wurtemberg to reciprocally implement these dispositions in their states'.
[240] Ibid., vol. 69, 321–324.
For a translation: 'in order to avoid the formalities and lengths of a solemn treaty' the Two Sicilies 'desired from the part of the government of Wurtemberg only a simple declaration'.

exchanged between the Two Sicilies and Austria refer to the fact that the Habsburg Monarchy had in 1811 abolished the droit d'aubaine through domestic legislation that required reciprocity.[241] In the following year the new composite kingdom of Sweden-Norway headed by the renegade Napoleonic marshal Jean-Baptiste Bernadotte in his new role as crown prince Karl Johann began a diplomatic campaign similar to the one initiated by Naples. A Swedish note sent to Tuscany informs the grand duchy that Sweden has abolished not only the droit d'aubaine but also the 'droit de détraction (jus detractus)' through domestic legislation that requires reciprocity, and informs Tuscany that if it prefers not to sign a treaty on the matter a simple declaration is enough. Tuscany chose to reply with a simple declaration,[242] as did its neighbour Modena which informed the Swedish minister that 'diritto d'albinaggio e detrazione' had been abolished by Modena on the basis of reciprocity in 1814 and that Modena found no need to make a specific formal treaty ('apposito formale trattato') on the subject.[243] Besides Tuscany and Modena, this Swedish drive to abolish restrictions on foreigners' property rights on the basis of reciprocity through diplomatic declarations resulted in agreements with at least Meckenburg-Strelitz (located on the Baltic Sea), Parma, the Electorate of Hesse, the Grand Duchy of Hesse, the Two Sicilies, Bavaria and Austria.

Thus in the five years following the fall of Napoleon there existed a broad trend to abolish restrictions on foreigners' property rights across Europe. This European transformation was not a break but a continuation of patterns of legal modernization undertaken during the hegemony of Napoleon's France –whose policies on foreigners' property rights interestingly mirrored not those of the Revolutionary Republic but of the old regimes. In contrast with the late eighteenth century during which France came to play an exceptionally important role in creating a treaty-network abolishing the droit d'aubaine, the leaders of these processes were with the exception of Prussia middle powers –the Netherlands, Sardinia, the Two Sicilies and Sweden-Norway. An exclusively French story ending in the unilateral general abolition of the right in 1819 overlooks this broader European shift. The study of this diffusion

[241] Ibid., vol. 69, 261–262.
[242] Cited from ibid., vol. 70, 116–118.
[243] Cited from ibid., vol. 70, 183–186.
For the translations: 'right of detraction', 'the right of albinaggio and detrazione (aubaine and détraction)' and 'specific formal treaty'.

of the unmaking of restrictions to foreigners' property rights is crucial as the object of inquiry in this chapter lies in analyzing legal change in international society rather than nationally focused legal history.

The trend towards the unmaking of restrictions to foreigners' property rights through the domestic legislation of European states continues throughout the nineteenth century. In contrast to the dominant pattern of reciprocal abolitions based on a combination of domestic legislation and diplomatic notes that characterized post Napoleonic Europe, there was a gradual shift in which many states followed the French model of 1819 and joined it in abandoning the requirement of reciprocity for foreigners' property rights. For example Belgium joined in 1865 and the Netherlands in 1869. By 1900 most European countries had adopted the French model. Only Austria, certain member states of the lately created German Empire, and a handful of others still insisted on reciprocity.[244]

An Anglo-American perspective

Having thus told the French and European stories of the unmaking of restrictions to foreigners' property rights, we now turn to Britain –and later on the United States– who in influential narratives in International Relations is assumed to have pushed and pulled more conservative and archaic Continental Europeans in to the direction of a liberal global economy.[245] Eighteenth century Britain has often been portrayed as an opposite of old regime France. The creation of the first liberal, modern or capitalist state enabled Britain to become the first industrialized economy and acquire predominance in the extra-European world.[246] What place does Britain actually play in the story of foreigners' property rights?

William Blackstone's highly influential *Commentaries on the Laws of England* (1765-69) gives us a

[244] Lainé, "Etude Sur La Capacité Successorale Des Étrangers En France," 76–8.
[245] Ikenberry, *Liberal Leviathan*. To an extent also Rosenberg, *Empire of Civil Society*.
[246] Wood, *Pristine Culture of Capitalism*; Teschke, *Myth of 1648*.

succinct overview of foreigners' property rights in eighteenth century Britain. Blackstone explicitly contrasts the rights of 'an alien' to 'bring an action concerning personal property' and to 'make a will, and dispose of his personal estate' with France 'where the king at the death of an alien is entitled to all he is worth, by the droit d'aubaine or jus albinatus, unless he has a peculiar exemption'. A foreigner could also 'acquire a property in goods, money, and other personal estate, or may hire a house for his habitation' as these indulgences to strangers are 'necessary for the advancement of trade.' Foreigners were also allowed to 'trade as freely as other people; only they are subject to certain higher duties at the custom-house'. Yet there remained a crucial exception in British legal practice that significantly curtailed foreigners' property rights; they were not allowed to purchase or own real estate. 'If an alien could acquire a permanent property in lands, he must own an allegiance, equally permanent with that property to the king of England' or in other words to have been naturalised as a British subject. Otherwise 'the nation might in time be subject to foreign influence, and feel many other inconveniences.'[247] As we have seen this ban on land ownership resulted in the French refusal to abolish the droit d'aubaine with regards to real estate for British subjects on the grounds of reciprocity –a restriction, which was only unilaterally revoked by France in 1787.

The right to acquire land was linked to becoming a British subject. The two centuries old procedures to do so were reminiscent of old regime France, as they were very expensive and thus available to only a small elite of foreigners; The Crown could confer the status of a 'denizen' –officially somewhere between an alien and a subject– through letters patent. Parliament could make a foreigner a 'naturalised subject' through a private bill. In effect the status of a 'denizen' and a 'naturalised subject' were basically the same as they 'conferred the right to inherit and possess real estate, as well as the right to vote in parliamentary elections'.[248] The influx of protestant refugees from France and the Rhenish Palatinate in the late seventeenth century had prompted a long debate on whether England adopt a more active policy of encouraging immigration to advance trade and increase the population.

[247] William Blackstone, *Commentaries on the Laws of England*, 1st ed. (Oxford: Clarendon Press, 1765), vol. 4, book I, ch. 10 "Of People, Whether Aliens, Denizens or Natives", 361–62.
[248] Fahrmeir, *Citizens and Aliens*, 69. See also Daniel Statt, *Foreigners and Englishmen. The Controversy over Immigration and Population. 1660-1760* (Newark: University of Delaware Press, 1995), 33.

Proponents of immigration sought to get rid of the cumbersome individual naturalisation procedures in favour of a simple general naturalisation procedure available to all foreigners.[249] Such an 'act for naturalizing foreign protestants' was finally passed by a Whig government in 1708 whereas 'the Increase of People is a Means of advancing the Wealth and Strength of a nation ; and whereas many Strangers of the Protestant or reformed Religion, out of a due Consideration of the happy Constitution of the Government of this Realm, would be induced to transport themselves and their Estates into this Kingdom, if they might be made Partakers of the Advantages and Privileges with the natural-born Subjects thereof do enjoy'. Interestingly the act stipulated that 'all Persons born out of the Ligeance of her Majesty, her Heirs or Successors, who shall qualify themselves in the Courts of *Chancery, Queen's Bench, Common Pleas*, or *Exchequer*, within the Kingdom of *Ireland*, or at some General Quarter-Sessions of the Peace' were to 'be deemed, adjudged, and taken to be her Majesty's natural-born Subjects of the … Kingdom of *Ireland*'.[250] Thus this legal fiction provided that foreigners were to be naturalised as Irish rather than English or Scottish subjects –presumably in order for them to get rid off limitations to their economic rights whilst not granting them the political right to vote for the Parliament in Westminster.

This radical break with previous policy did away with the restriction to –protestant– foreigners' land ownership by enabling them to become naturalised subjects easily and cheaply. The change was opposed by vested economic interests such as guilds and the City of London and was done away by a Tory government only three years later, 'whereas divers Mischiefs and Inconveniences have been found by Experience to follow … to the Discouragement of the natural-born Subjects of this Kingdom, and to the Detriment of the Trade and Wealth thereof'.[251] Daniel Statt argues that even though the debate on encouraging immigration continued during the early part of the eighteenth century by 1760 'pleas for the encouragement of immigration' in order to increase the British

[249]Statt, *Foreigners and Englishmen*, 20–22.
[250] 7 Anne c.5 (Foreign Protestants Naturalization Act 1708) in *The Statutes at Large, From the Tenth Year of KING WILLIAM the Third, to the End of the Reign of QUEEN ANNE*, new edition (London, 1769), vol. 4.
[251] 10 Anne c. 5 (Naturalization Act 1711), in ibid.

population ‘came to an end’.[252] This is somewhat ironic as this is precisely the moment when old regime France begins finally to unmake the droit d’aubaine in order to encourage immigration and foster economic development. As we have seen in Chitty and Wheaton, astonishingly Britain upheld the ban on foreign ownership of real estate well into the nineteenth century in contrast to the French and broader European trends to unmake restrictions to foreigners’ property rights. As the French lawyer Pierre Lainé remarked, ‘l’Angleterre, jusqu´à une époque récente a eu une legislation très rigoureuse pour les étrangers. Cela tient aux origins de cette legislation qui remontent au Moyen-Age et à son caractere qui est demeuré feudal.’[253] Counter intuitively the prohibition on the ownership of land –and British ships– lasted until the Naturalization Act of 1870. Article 2 of this act decreed that real ‘and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject’, even though this still excepted real estate situated elsewhere within the British empire.[254]

We have already seen how in the 1786 Anglo-French trade treaty Britain was unwilling to abolish this restriction for French subjects even if that entailed a partial continuation of the droit d’aubaine for Britons resident in France. This indifferent British attitude does not seem to have changed after the fall of Napoleon. The Paris peace treaty of 1814 concluded by the great powers with France confirmed only reciprocal abolitions of the droit d’aubaine –thus seemingly exempting the French unilateral exemption made to British subjects in 1787. An exchange of declarations between the Two Sicilies and Britain from 1819 –resulting from the campaign began by the Two Sicilies to abolish the droit d’aubaine on the basis of reciprocity– is illustrative of Britain’s position. The British minister at

[252] Statt, *Foreigners and Englishmen*, 20–23.
[253] Lainé, “Etude Sur La Capacité Successorale Des Étrangers En France,” 79.
For a translation: ‘in England, there has been until recent times very strict legislation for foreigners. This is because of the origins of this legislation which goes back to the Middle Ages and of its character which remains feudal.’
[254] The Naturalization Act, 1870 in *The Law Reports, The Public Statutes Passed in the Thirty-Third and Thirty-Fourth Years of the Reign of Her Majesty Queen Victoria, 1870*, vol. v (London: 1870), art. ii (at pp. 166-7). See also Fahrmeir, *Citizens and Aliens*, 179–180.

Naples declared that

> le Droit d'Aubaine n´existe pas en Angleterre, où les Etrangers peuvent librement disposer de toutes les propriétés qu´ils y possedent, ou par testament, ou autrement. Il déclare en outre que les Sujets de Sa Majesté Sicilienne ont toujours joui, et continueront a jouir dans la suite, de tous les privileges à cet égard qui sont accordés aux Nations les plus favorisées … Qu´ils y peuvent librement acquérir, sous quel titre que ce soit, et posséder toute espèce de biens.[255]

The British note ends however with a qualification; 'à l´exception de ceux dont la jouissance et la possession sont défendues aux Etrangers par les Loix Constitutionnelles du Pays.'[256] In other words even though the droit d'aubaine and most other –Continental varieties of– restrictions on foreigners' property rights do not exist in Britain, Britain retains this peculiar unilateral prohibition on the ownership of real estate which is argued to be a part of its domestic constitution and thus an integral part of its rights as a sovereign state. It is perhaps not surprising that unlike old regime France the weak Two Sicilies did not insist on reciprocity; 'the Droit d'Aubaine will not be levied upon English Subjects, and that it will therefore be lawful for them to acquire and to possess in the Royal Dominions, real and personal property of every description, and to bequeath the same to their heirs, in any manner they may think proper.'[257] It is however important to appreciate that despite this unilateral reservation Britain actively concluded more general trade treaties with other states, and that these treaties often had provisions respecting foreigners' property rights. For example Britain and the Two Sicilies had in 1816 concluded a trade treaty –alluded to in the British declaration– establishing most favoured nation status to subjects 'non seulement par rapport aux personnes et propriétés – mais aussi à l'egard de toute espèce d'article dont ils font commerce'.[258]

---

[255] Cited in *CTS*, vol. 70, 103-4.
For a translation: 'the Droit d'Aubaine does not exist in England, where foreigners can freely dispose of all the properties they possess, by testament or by other means. He declares that additionally the Subjects of His Sicilian Majesty have always enjoyed, and will further continue to enjoy, all the privileges in this regard which are granted to the most favoured Nations … That they can freely acquire, in any manner whatsoever, and possess all species of goods'.
[256] Ibid.
For a translation: 'except for those the enjoyment and possession of which are forbidden for foreigners by the Constitutional Laws of the Country.'
[257] Ibid.
[258] British - Two Sicilies trade treaty, 26 September 1816 in ibid., vol. 66, 343–52. Cited at art iv.
For the translation: 'not only in relation to persons and properties … but also with regard to all species of goods that they trade'.

Even more counter intuitively in light of the usual story of the making of a liberal order by an even more liberal republican English-speaking power, some states in the US retained restrictions on the property rights of foreigners beyond 1900. As Lainé remarks, 'aux Etats-Unis, la legislation est imprégnée du même esprit feudal que le droit anglais. C'est une consequence de leur commune origine.' The State of New York made it possible for the children of an American woman and a foreign man to inherit real estate only in 1872 and in 1900 California, Texas, Tennessee and Indiana still prohibited foreigners from inheriting landed property.[259] In contrast the civil codes of the Latin American republics –drawing on the one drafted by Andrés Bello for Chile– pursued the French model doing away with restrictions to foreigners' economic rights. France granted the rebellious American colonies an exemption to the droit d'aubaine in the first trade treaty that the United States concluded, but the Americans continued to face a restriction on owning real estate in Britain until 1870 –with the exception of land acquired before the American Revolution. As we have seen in Wheaton, as American trade grew –and the United States wished to attract more European settlers and capital– the US began to conclude more treaties with regards to securing property rights with European states. Wheaton himself, as American minister to Prussia, was in 1843 authorized to negotiate explicit treaties on property rights with Saxony, Bavaria, Wurttemberg, the Electorate of Hesse, the Grand Duchy of Hesse and Baden. These were the largest states of the German Confederation after Prussia. The US had already concluded trade treaties that included clauses on property with Prussia (1828), the Hanseatic Republics (1827) and Hanover (1840). The text of the American-Bavarian convention of 1845 on the '*droit d'aubaine* and taxes of emigration' abolished every 'kind of *droit d'aubaine, droit de retraite*, and *droit de détraction* or tax on emigration'.[260] These treaties thus included not only restrictions on foreigners' property rights but also the abolition of the taxation of the property of emigrating nationals: an important consideration for the United States that sought to attract affluent immigrants.

[259] Lainé, "Etude Sur La Capacité Successorale Des Étrangers En France," 85–6.
For a translation: 'in the United States, the legislation is steeped with the feudal spirit just as is English law. This is a consequence of their shared origin.'
[260] *Convention for the Mutual Abolition of the Droit d'Aubaine and Taxes on Emigration Between the United States and the King of Bavaria*, 1845, http://avalon.law.yale.edu/19th_century/bav1845.asp.
For a translation: 'right of aubaine, right of retreat, and right of detraction'.

These treaties concluded by Wheaton who had described the droit d'aubaine as a legacy of the 'rude ages' of the 'feudal system' that 'the progress of civilization' has 'by degrees almost entirely abolished' are significant in two dimensions.[261] First it demonstrates concretely that irrespective of the particular French origins of the droit d'aubaine the concept was used to refer to inheritance limitations more generally. And that by the 1840s states wishing to be done with limitations to foreigners' property rights would simply list all possible legal terms for such limitations in a treaty. As Wheaton and the US sought to include in the treaties not only the securing of *foreigners'* property rights but also of the *emigrating subjects* of the signatories, the droit de retraite or 'tax on immigration' is explicitly included besides the droit d'aubaine and de détraction.[262] The Wheaton treaties are also important because it seems that they are the last treaties specifically concluded with regards to foreigners' property rights. After this point Western states do not deem it necessary to conclude specific treaties on the topic –even though property rights are often affirmed in more general trade treaties. The role of the US in Western international society was still relatively peripheral by the point that restrictions to foreigners' property rights had long ago become archaic exceptions. Though the US federal government wanted to attract wealthy immigrants –and thus concluded old style bilateral treaties with various German states– many member states of the union were still implementing restrictions on foreigners' property rights that were analogous to those of Britain. Second this idiosyncratic epilogue to the story of the droit d'aubaine and foreigners' property rights more generally, is important as it serves as a practical illustration of the relationship of histories of legal doctrine and practice. Without looking at legal practice and Wheaton's role as a diplomat one cannot get beyond his cursory reference of the abolition of the droit d'aubaine as due to the progress of civilization. Understanding the making of foreigners' property rights as an important dimension of modern world politics requires one to go beyond the usual doctrinal story.

[261] Wheaton, *Elements of International Law: With a Sketch of the History of the Science* (1836), ch. ii (6), pp. 99–100.
[262] Miller, *Treaties and Other International Acts of the United States*, vol. 4, 547–48.

Civilisation and capital

Why then did France from 1765 onwards decide to gradually abolish the droit d'aubaine? A good place to begin looking for answers to this puzzle is the aberrant case of the last such bilateral abolition from 1787. The new trade treaty concluded between Britain and France in 1786 –known usually as the Eden treaty, after the main British negotiator William Eden– did not abolish the droit d'aubaine with regards to real estate as France regarded the British refusal to allow ownership of land for French subjects as a breach of reciprocity. Thus the treaty granted most favoured nation status to subjects of both states only with regards to 'les Successions des Biens mobiliers'.[263] Yet in the following year France took an unprecedented step by unilaterally exempting British subjects from the droit d'aubaine 'relativement aux successions mobiliaires et immobiliaires' through letters patent.[264] The preamble states that the king had concluded 'un traité de commerce et de navigation' with Britain 'pour faciliter et augmenter les relations de commerce et autres entre nos sujets respectifs'.[265] The same logic applies to the unilateral letters patent itself. As we have already seen in the text of the 1765 treaty with Baden-Baden, the official justification of all of these agreements turned on promoting and facilitating reciprocal commerce and communication.

French Enlightenment thinkers had increasingly begun criticizing the droit d'aubaine as a barbaric anachronism from the 1750s onwards. Most famously Montesquieu in his *Esprit des loix* (1748) argued that 'one of the effects of the general calamity' caused by the invasion of the Roman empire by barbarians 'was the destruction of commerce' in Europe. It was in this time that 'les droits insensés d´aubaine & de naufrage' had been established in contrast to 'very humane' Roman law.[266] We have already encountered this Enlightenment story of the droit d'aubaine in Martens and Kluber –who both

[263] Art xliv. For a translation: 'inheritances of movable goods'.
The treaty is reproduced in G. F. de Martens, *Recueil Des Traités*, 2nd ed. (Göttingen, 1818), vol. iv, 179.
[264] Cited from Gaschon, *Code Diplomatique Des Aubains*, 11–17.
For a translation: 'regarding inheritances of movables and immovables'.
[265]Ibid.
For a translation: 'a treaty of commerce and navigation with Britain in order to facilitate and increase the commercial and other relations between our respective subjects'.
[266] For a translation: 'the senseless rights of aubaine and naufrage (aubaine and shipwreck)'. In contrast the recent Cambridge edition translates droit d'aubaine of the original French into escheatage. Montesquieu, *Spirit of Laws* (1989), 386. For the original, Montesquieu, *Esprit Des Loix* (2. ed. 1757), Liv. XXI Chap. XVII.

reference Montesquieu instead of the older story of the Roman origins of the right found in the legal doctrine of Bodin, Grotius and Vattel. Yet the French state's drive to unmake the droit d'aubaine was less influenced by these abstract arguments about either the barbaric history of the right or its inherent inhumanity and injustice, than by more self-interested and narrowly rationalist economic considerations. As Sahlins argues the French foreign ministers and their staffs understood the idea of commerce 'in a strict economic sense: the state's interests lay in attracting the greatest flow of wealth and economic activity, and that included the principle of encouraging foreigners to settle in the kingdom.'[267]

The French political economists

The case for unmaking the droit d'aubaine in the interests of economic development had been adopted by a particular strand of Enlightenment thinkers, the heterogenous practice of the late eighteenth century French political economists. These thinkers formed a part of a broad critique of mercantilist thought and practices in France, Britain and elsewhere in the middle of the eighteenth century. These Enlightenment thinkers naturally built on earlier economic thought, including the influential German cameralist tradition, though that story lies beyond the empirical focus of this thesis. The most distinct and influential grouping within the eighteenth-century French practice consisted of the so called physiocrats, whom contemporaries referred to as the *économistes.* The term 'physiocracy' or rule of nature had been coined in 1767 by a prominent disciple of the group, du Pont de Nemours, to describe their doctrine. He would with hindsight in 1815 argue that the physiocrats sought to construct the 'the science of natural law applied, as it should be, to civilized societies' bringing about 'enlightened justice in all social relations–international and external'.[268] The key principles of physiocratic thought were published by Francois Quesnay –a physician to first the official mistress of the king, madame de Pompadour and later to Louis XV himself– and the marquis de Mirabeau during the Seven Years War.

[267] Sahlins, *Unnaturally French*, 236–37.
[268] Elizabeth Fox-Genovese, *The Origins of Physiocracy. Economic Revolution and Social Order in Eighteenth-Century France* (Ithaca, New York: Cornell University Press, 1976), 9–10.

The defeat of France, the weak financial condition of the state and the perception of decline in comparison to Britain made questions about economic and social reforms an even more pressing concern.[269]

The answer of Quesnay and Mirabeau to the challenge of restoring the glory of France was as follows: Instead of commerce or manufacture the basis of all wealth lies in agriculture. For Quesnay land 'is the universal blessing of humanity' and Mirabeau argued that to seek commerce was 'to gather up the flowers of the economic tree and suppress its fruit'.[270] The state should promote investment in the inherently most productive sector of the economy (agriculture) by freeing up the grain trade. This was to be achieved by abolishing state regulation and allowing farmers to sell their produce at market prices domestically and even abroad. A new universal tax on land would solve the monarchy's fiscal problems. No broader political change was needed. The absolute monarchy provided the best framework for development based on 'economic science' by securing absolute property rights and increased economic freedoms. For Mirabeau France was an archetypal 'large agricultural state' governed out of necessity by an hereditary monarch.[271] For the physiocrats the British economic model, perceived to be built almost exclusively on foreign trade, manufacturing and the existence of a large public debt, was in general unstable and less productive. More specifically an economic model built on international commerce and manufacture required a mixed constitution and was thus not suited for French society. The fickle idea of trying to transform a large territorial monarchy such as France to a 'commercial society' of the kind of Britain was fraught with peril for Quesnay and Mirabeau. Though trade could be extremely profitable it was a profoundly uncertain basis for social life. Thus 'commercial societies', 'a new kind of secondary and artificial society' though 'free wealthy, and powerful' within narrow boundaries are 'less secure so far as its basis and duration are concerned, less capable of extension, and unable to form a great empire'. These societies are 'transitory and subject to change, owing to their excesses, to their carelessness, or to the enterprise of

[269] Ibid., 17–19.
[270] Richard Whatmore, *Republicanism and the French Revolution. An Intellectual History of Jean-Baptiste Say's Political Economy* (Oxford: Oxford University Press, 2000), 48–50.
[271] Ibid., 52–53.

their neighbours, since the way in which they are constituted renders them too much exposed to competition.'[272]

In this denial of the British economic example the physiocrats followed Montesquieu. Montesquieu had argued before the Seven Years War that there was no need for France to imitate Britain and become a commercial nation as it was rich in produce and almost self-sufficient. A British style commercial policy would merely create instability in the large kingdom of France.[273] Yet as we have seen, the skepticism towards the perceived specific British commerce led developmental path did not prevent Montesquieu from regarding restrictions to foreigners' property rights as vestiges from barbarous times that ought to be abolished in a modern civilized monarchy. The physiocrats with their strong emphasis on private property shared these sentiments. The same critique of the droit d'aubaine as a vestige of the Dark Ages can also be found for example in Mirabeau's nearly contemporaneous *L´Ami des hommes, ou traité de la population* (1756) which decried the 'wretched droits d'aubaine' as linked with 'blind barbarism'.[274] On commerce, Mirabeau wrote what 'are nations if not large families? The duty of legislators is to unite them' and dismantle 'repugnant distinctions of native residents and foreigners'. The abolition of tariffs between neighbours ought to, however, be undertaken on a reciprocal basis.[275] Thus even the most anti British and commercial strands of economic thought were emphatically for economic freedom and foreigners' property rights in general. The physiocrats can be regarded as a distinct group not only because of their loyalty towards the doctrine of Mirabeau and Quesnay, but also because of the regular Tuesday dinners they held in Paris from 1767 onwards at Mirabeau's house and their in-house journal *Ephémérides du Citoyen* (1765-72).

Yet it is wrong to equate the physiocracy of Quesnay and Mirabeau with the mainstream of late

[272] Istvan Hont, *Jealousy of Trade. International Competition and the Nation-State in Historical Perspective* (Cambridge, Massachusetts: Harvard University Press, 2005), 190–192. Mirabeau and Quesnay, *Rural Philosophy*, cited in translation in ibid., 192.
[273] Whatmore, *Republicanism and the French Revolution*, 45.
[274] Mirabeau cited in Sahlins, *Unnaturally French*, 240. For a translation of the title: 'The Friend of men, or a treatise on population'.
[275] Mirabeau cited in ibid., 238–41.

eighteenth century French political economic thought. This is a nineteenth century simplification that owes much to Alexis de Tocqueville's interpretation of the old regime.[276] Many influential economic thinkers were skeptical about the peculiar preference for agriculture advocated by the physiocrats and advocated a more general *laissez faire* economic policy that was more positive of the roles of foreign commerce, manufacture and the example of Britain. In the closing years of the old regime, some thinkers would also begin to question aspects of the French political model and advocate limited representative structures within the overall framework of the monarchy. Particularly influential was intendent du commerce Vincent de Gourney who was credited by his associate Anne-Robert-Jacques Turgot, later controller-general of the finances (1774-76) with the maxim *laissez faire, laissez passer*.[277] Du Pont described Gourney as the founder of 'the science of political economy' in the 1750s alongside Quesnay.[278] In fact Gourney and the group of people who associated with him had 'a far more general view of the nature of the economic system than the later specifically agricultural vision of Quesnay and his followers'. Gourney sponsored the translation of English writings on the economy and the group associated with him was far more positive about foreign trade, the British model and government intervention in certain sectors of the economy.[279] The continuing perception of French decline caused some thinkers from the 1770s onwards to begin advocating limited political change. Whilst minister Turgot argued privately for establishing assemblies for landed proprietors: once the landed class perceived itself as citizens they would become more patriotic and then unite in support of the king. After Turgot's resignation and death his disciples Du Pont, the royal barrister Le Trosne and the marquis de Condorcet continued advocating limited representative government based on property qualifications. Condorcet defined a republic in his life of Turgot (1786) as a 'civilized monarchy' whose laws protected the natural rights to property ownership.[280] These writers, who are sometimes labeled as 'second generation physiocrats', 'kept faith with the possibilities of legal despotism vested in monarchy' and considered the experimental provincial assemblies of the last years of the monarchy

[276] Liana Vardi, *The Physiocrats and the World of the Enlightenment* (Cambridge: Cambridge University Press, 2012), 2–3, 12.
[277] Antoin E. Murphy, *Richard Cantillon. Entrepreneur and Economist* (Oxford: Clarendon Press, 1986), 313–14. For a translation of the phrase: 'let do, let pass'.
[278] Du Pont cited in ibid., 307.
[279] Ibid., 309–19.
[280] Whatmore, *Republicanism and the French Revolution*, 61–68, Condercet cited at 66.

as ‘a final chance to rework the crown’s troubled and fractured links … with the main property owners of the kingdom’.[281]

Crucially despite their considerable disagreements all strands of French political economists were united in advocating stronger property rights and economic freedom, including the unmaking of the droit d’aubaine, as a way of rejuvenating the civilized monarchy. Turgot wrote citing Du Pont that the right ‘repels a relatively large number of skillful men and useful artists, of capitalists and merchants, from settling in France, who otherwise would want nothing more than to establish their businesses here, and even dissuades rich individuals, drawn by the charms of our customs and society, and by the pleasant climate and the governance’.[282] For Le Trosne the droit d’aubaine ‘comes from feudal tyranny; this royal right is a residue of our ancient barbarity softened by civilization and converted to fiscal dues’ thus following Montesquieu’s account of the feudal origins of the right.[283] Turgot’s successor as controller-general of finances, Jacques Necker (1776-83, 1788-89) argued in *De l’Administration des finances de la France* published in 1784 that the proceeds from this ‘ill-advised and barbaric right’ are ‘almost entirely consumed by the costs of formalities, and by the attributions which belong to judicial officials.’[284] In contrast to Montesquieu, the influence of international legal doctrine –in particularly that of the contemporary work of Vattel– on the views of French economic thinkers on the droit d’aubaine seems at best indirect.

How did the ideas of the economic thinkers, including the widely shared view of the necessity of the unmaking of the droit d’aubaine transform themselves into practice and concrete policies? The Physiocrats actively propagated their ideas as policy solutions in both print and at their evening gatherings in Paris. As Mirabeau boasted to his brother in 1769, if ‘you saw our Tuesdays, the students whom we have produced, the young men of note going to them with such pleasure, the works which

[281] T. J. Hochstrasser, “Physiocracy and the Politics of Laissez-Faire,” in *The Cambridge History of Eighteenth-Century Political Thought*, ed. Mark Goldie and Wokler (Cambridge: Cambridge University Press, 2006), 437–38.
[282] Turgot cited in Sahlins, *Unnaturally French*, 242–43.
[283] Le Trosne cited in ibid., 240.
[284] Necker cited in ibid., 243.

are coming out of them, and *evidence*–so destructive of preconceived opinion, the eternal hangman of humanity–being diffused among young minds, these adepts succeeding to offices, and the revolution in the policy of nations visibly brewing … you would perhaps consider that *the fly on the coach wheel* has done well to stick to the helm.'[285] These 'dinner-assembly-classrooms' were attended not only by Frenchmen but by Rhineland princes 'all disciples of the "doctrine", who returned periodically to Paris … to take philosophical vacations' from largely unsuccessful attempts to free grain trade.[286] In 1770 Karl Friedrich, the margrave of Baden-Durlach and the hereditary prince of neighbouring Baden-Baden, wrote to Mirabeau declaring that these seemed 'like the portico of Athens, except that I believe economic philosophy to be more useful to the humanities that that [sic] which was taught by Greek philosophers'.[287] Karl Friedrich 'seems to have been influenced by the physiocratic ideas almost from the time of their first appearance in 1756' and was attracted to a framework of economic reform that was simultaneously committed to enlightened absolute rule.[288] In 1776 Karl Friedrich began corresponding with Mirabeau with regards to experiments with a universal land tax. Mirabeau answered the margrave's practical questions and 'doubts on the applicability of the economic science' with vague generalizations, and the experiments would later end in failure.[289] The French ministry of the duc de Choiseul (1758-70) was also 'broadly sympathetic' to the physiocrat program and experimented in freeing the grain trade. This however led to a famine in 1769-70 and the reintroduction of restrictions on the grain trade. Physiocratic ideas were widely criticized and the movement deflated quickly.[290] In 1772 their in house journal was finally closed down.

Yet not all of the physiocrats' policy recommendations were cancelled as failures. The French foreign ministry under Choiseul acceded to the requests for reciprocal exemptions from the droit d'aubaine from Karl Friedrich's Baden-Durlach and Baden-Baden. Crucially these treaties with the two

[285] Mirabeau in Robert L. Meek, *The Economics of Physiocracy. Essays and Translations* (Cambridge, Massachusetts: Harvard University Press, 1963), 33.
[286] Sahlins, *Unnaturally French*, 238, citing 'doctrine' from Karl Friedrich.
[287] Karl Friedrich cited in ibid., 401. Karl Friedrich inherited Baden-Baden in the following year.
[288] Helen P. Liebel, "Enlightened Bureaucracy versus Enlightened Despotism in Baden, 1750-1792," *Transactions of the American Philosophical Society* 55, no. 5 (1965): 47–48.
[289] Keith Tribe, *Governing Economy. The Reformation of German Economic Discourse 1750-1840* (Cambridge: Cambridge University Press, 1988), 124–25.
[290] Hochstrasser, "Physiocracy and the Politics of Laissez-Faire," 426.

principalities concluded nearly simultaneously in late 1765 'touched off a wave of mutual and reciprocal abolitions' undertaken by France that continued beyond the fall of Choiseul in 1770.[291] As Choiseul wrote in a draft proposal for a treaty with Wurttemberg in 1766, the object of the French government was to assure 'reciprocal and free commerce between their respective subjects'.[292] Despite the short-lived life span of the physiocratic movement, French political economy also spread widely in late eighteenth century Europe. The ideas of 'French physiocrats and the laissez-faire economists' were gradually diffused in Italian states through newspapers and agricultural societies and governments began establishing 'supreme counsels of economics' from the 1760s onwards.[293] We have already seen how the Kingdom of Sardinia constructs a small treaty-network for the abolition of the droit d'aubaine beginning with a 1763 treaty with Austria, the power that ruled Lombardy. Indeed physiocratic 'teachings … seemed especially relevant to Tuscany's agricultural economy'[294] and the Habsburg brothers Leopold, grand duke of Tuscany, and Joseph, Holy Roman Emperor and ruler of the Austrian hereditary lands, were both 'devoted adherents' of physiocratic ideas.[295] The brothers abolished restrictions on foreigners' property rights between Tuscany and Austria in 1784, and in 1811 the new Austrian civil code followed the Code Napoleon in abolishing such restrictions on the basis of reciprocity. Though physiocracy left a negligible impression on the cameralist economic thought taught at German universities, it caused a 'brief but intense wave of discussion and publication' in reading societies and directly influenced the policies of at least Baden and Austria.[296]

Economic thinkers did not only try to convert practitioners behind their thought but in many cases combined these two roles themselves. As we have already encountered, Vincent de Gourney did not only sponsor a group of economic thinkers in the 1750s but also served as intendent du commerce. Abbé de Mably criticized Gourney as being 'eagerly listened to by a crowd … destined to become

[291] Sahlins, *Unnaturally French*, 229–30.
[292] Draft treaty cited in ibid., 236.
[293] Anna Maria Rao, "Enlightenment and Reform," in *Early Modern Italy*, ed. John A. Marino (Oxford: Oxford University Press, 2002), 240–41.
[294] Till Wahnbaeck, *Luxury and Public Happiness. Political Economy in the Italian Enlightenment* (Oxford: Oxford University Press, 2004), 8–9, 91.
[295] Fox-Genovese, *Origins of Physiocracy*, 11.
[296] Tribe, *Governing Economy*, 120–26.

Intendants or Ministers and thought they knew it all by crying: liberty, liberty, all that is needed is to keep quet and to have laisser faire.'[297] The most famous member of this group, Turgot became controller-general of the finances in 1774. Rather less spectacularly, Du Pont had in the previous year been appointed finance minister of the now unified margraviate of Baden in order to oversee Karl Friedrich's ailing physiocratic experiments.[298] Yet why did French finance ministers not succeed in effecting a general abolition of the droit d'aubaine even though Turgot proposed this step in 1774 and Necker followed in 1780? The foreign ministry also subscribed to the economic argument for the unmaking of the droit d'aubaine. This is clear from not only the treaties' preambles but also from correspondence. A letter written by the Intendent of Alsace in 1763 with regards to the negotiations with Baden-Baden emphasizes that 'the king has wished to reach accords to abolish the droit d'aubaine with respect to most foreign nations, out of concerns about commercial relations and proximity (voisinage)'.[299] We have already noted then foreign minister Choiseul's draft proposal of a treaty with the Duchy of Wurttemberg seeking to foster 'reciprocal and free commerce'.[300] In 1785 comte de Vergennes argued in a memorandum to the council of state that we 'began to be enlightened on this matter only under the reign of Louis XIV. But the few exceptions conferred by this king were only temporary … Louis XV gave a greater development to the principles. This monarch accorded exemptions to the droit d'aubaine to all nations that asked it.'[301]

The crucial difference was that successive foreign ministers argued that the right should only be abolished through bilateral agreements concluded on the basis of reciprocity. Vergennes argued for reciprocity using both mercantilist economic arguments and an appeal to France's status. According to Vergennes piecemeal abolitions could be used as 'an enticement to obtain some commercial advantages from other nations that so desired to be exempted'. The idea of a unilateral and general abolition of the droit d'aubaine was also 'English and Genevan' and thus 'incompatible with the French monarchical tradition'. It was only finally in 1787 when the fiscal situation of the state was

[297] Mably cited in Murphy, *Richard Cantillon*, 311.
[298] Liebel, "Enlightened Bureaucracy versus Enlightened Despotism in Baden, 1750-1792," 48.
[299] The intendent cited in Sahlins, *Unnaturally French*, 229–30.
[300] Choiseul cited in ibid., 236.
[301] Vergennes cited in ibid., 247.

already getting untenable that Vergennes changed his course in order to attract British trade and investment to the French economy. Vergennes argued that it

> is not at the demand of the English minister that the abolition of the droit d'aubaine be proposed; it is despite him that is must be done. This suppression must not be considered an act of condescension, but from a political perspective … If this right were to be levied on French (nationals), it would not be motive enough to do the same to others. For reciprocity is never a reasonable thing except when it can be done without damage to one's country, and the droit d'aubaine is even more harmful to nations that collect it than to foreigners whose wealth it usurps …[302]

Thus the foreign ministry finally agreed to ignore the requirement of reciprocity and agreed to a unilateral abolition of the droit d'aubaine with respect to Britain out of pressing economic considerations.

What is remarkable in this late eighteenth century story is that old regimes were driven to commence the gradual unmaking of restrictions to foreigners' property rights with the absence of any explicit role for international legal doctrine –particularly the contemporary one of Vattel– which is usually held as a key transmission belt for diffusion of political thought into legal practices. Decision makers were instead drawing on the writings of political economists, many of whom framed their arguments with reference to Montesquieu's political thought. Economic theorists, holding moderately reformist views, would often also work as practitioners trying to affect and implement the policies of the state.

This rationale of economic reform undertaken to attract capital –drawing on the policy advice of laissez faire economists such as Turgot or Necker and rationalized within a historical vision of the progress of civilisation based on the Enlightenment thought of Montesquieu– would continue to the nineteenth century beyond the rupture caused by the French Revolutionary Wars. The only exception to this narrative of capital and civilisation was the Constitutient Assemby's abstract rationale for a general abolition of the droit d'aubaine and de détraction in August 1790 based solely on a radical vision of France as a harbinger of the progress of humanity. The act describes these rights as 'contrary

[302] Vergennes cited in ibid., 244–46.

to the principles of fraternity which should bind all men, whatever be their country or government' and calls for 'this law, established in barbarous times' to be 'proscribed in a nation which has founded its institutions upon the rights of men and citizens, and that for this reason should open its bosom to all the peoples of the earth, inviting them to enjoy under a free government the sacred and inviolable rights of humanity'.[303] As we have seen the old regime prerequisite of reciprocity was reintroduced in Napoleon's civil code in 1804, leading France to augment the existing network of bilateral agreements on the issue. Restoration France underwrote these agreements concluded by the Napoleonic regime in the peace treaty of 1814. Yet why in 1818 did the conservative Restoration government seek to reintroduce the unconditional abolition of restrictions to foreigners' property rights approved by the Revolutionary assembly in 1791?

The French parliamentary debate on the droit d'aubaine

The French parliamentary debate of 1818-1819 shows us that by that time a broad consensus existed on the fact that the droit d'aubaine was both useless and barbaric, and that it had been gradually unmade due to the progress of civilisation that was seen as synonymous with the agency of the French monarchical state. There also existed a unified view on the rationale that made the government to introduce the motion; in order to develop its economy France needed to attract more foreign capital. The disagreement hinged on whether reciprocity was a useful thing, whether an unconditional abolition of the droit d'aubaine was necessary or detrimental for France's relative economic development. The government's case in the Chamber of Peers was made by the duc de Lévis who had published on France state finances and been in favour of extending British privileges. For Lévis the droit d'aubaine was based on 'la barbarie du moyen age, repugne aux sentiments naturels de justice et d'humanité'. [304] The progressive unmaking of this barbaric right begins with the 'magnanimous' Saint

[303] Act cited in Butler and Maccoby, *Development of International Law*, 199–201.
[304] *Archives Parlementaires de 1787 a 1860. Recueil Complet Des Débats Législatifs & Politiques Des Chambres Francaises* hereinafter *AP*, vol. xxi (1871), 749–50.
For a translation: 'the barbarism of the Middle Ages, disgusting to natural feelings of justice and humanity'.

Louis and continues in a fairly linear process until the reign of Louis XV, whose ministers took advantage from long intervals of peace and concluded numerous international treaties on the topic.[305] Montesquieu, one of the geniuses of the Enlightenment, held the droit d'aubaine senseless and the king's minister Necker proved that the right was both unproductive and unjust. The unilateral abolition of the right towards British subjects in 1787 began a new era in French law and had been advocated for some time by writers of 'l'économie politique'.[306] The right was completely abolished by the Constituent Assembly as contrary to equity and fraternity, even though the practical conduct of the revolutionaries towards foreigners was a shocking contrast to these high sentiments. It was only due to the influence of 'le Gouvernement qui existait à cette époque' that the condition on reciprocity was introduced in 1804.[307] Today France's finances were depleted and she needed foreign investment. Fortunately Lévis held that 'beaucoup de riches capitalists auraient le désir d'entreprendre de grandes speculations rurales sur le sol francais'.[308] The criterion of reciprocity in politics is never reasonable. Moreover a policy of retaliation –the duke chose to refer to reciprocity as 'le talion'– was a dimension of 'la justice des temps barbares'.[309] Other speakers echoed Lévis' story of the progress of civilisation. Though the marquis de Pastoret's long list of authoritative citations includes also ancient sages such as Cicero and the greatest modern publicists including Grotius and Vattel, the emphasis is again on citing Montesquieu and reporting the common opinion of two ministers of Louis XVI. Even though Messieurs Turgot and Necker did not always agree on the principles of the administration of the state they were both in favour of the universal abolition of the droit d'aubaine.[310] The comte de Boissy-d'Anglas who chose to skip the ancients also referred to Necker's calculations on the negligible revenue the tax brought to the state.[311]

---

[305] Ibid., 749–50.
[306] Ibid., 750–51.
For a translation: 'political economy'.
[307] Ibid., 637.
For a translation: 'the Government which existed at that time'.
[308] Ibid., 751.
For a translation: 'many rich capitalists would desire starting large rural speculations on French soil (perhaps better translated as rural real estate speculations)'.
[309] Ibid., 752.
For translations: 'like for like' was a dimension of 'the justice of barbaric times'.
[310] *AP*, vol. xxii (1872), 638.
[311] Ibid., 630.

Both sides agreed that the debate hinged on mundane contemporary considerations of how to attract more foreign capital to France; the progress of civilisation merely provided a framework for this specific policy debate. 'L'argent, l'argent! les capitaux! la diminution de l'intéret! les fabriques! voila les mots qui retentissent à cette tribune' according to the marquis de Marbois who opposed the motion.[312] The unilateral abolition of the droit d'aubaine was not necessary in order to attract the capitalists of England, because the civil code already provided simple and easy procedures for acquiring full civil rights either through resident status or citizenship.[313] There were fears that the abolition of the droit d'aubaine would make it possible for foreigners to invest in France whilst staying abroad, and then to withdraw their profits at will to the detriment of France.[314] The image of England as France's old enemy, and stereotypes about the nomadic nature of wealthy Englishmen and the cunning policies of the English state were also invoked.[315] Yet the yes side carried the day. Boissy-d'Anglas argued that it was essential for the prosperity of France to attract the 'hommes riches et industrieux, des capitalists de tous les pays'.[316] It was too much to ask them to give up their nationality in order to acquire protection for their investments abroad. Instead France should abandon this ridiculous, impolitic and barbaric legislation and adopt the encouraging measures through which the sovereigns of Sweden and Norway bring culture to their wastelands.[317] The idea of reciprocity is never reasonable in political affairs. For Boissy-d'Anglas the invention of one new machine is more profitable for England than the arrival of one thousand French migrants. She needs not French capital and does not desire foreigners to buy up her lands. In short, in contrast to France, England does not require French help in order to 'perfectionner son industrie et améliorer son commerce'.[318]

---

[312] *AP*, vol. xxiv (1873), 553.
For a translation: 'Money, money! Capital! Reduction of interest! Factories! these are the words that reverberate at this rostrum'.
[313] Ibid., 553.
[314] Marquis de Maleville in *AP*, vol. xxii (1872), 625.
[315] Deputy de Bonald in *AP*, vol. xxiii (1873), 233.
[316] *AP*, vol. xxii (1872), 629.
For a translation: 'rich and industrious men, capitalists of all countries'.
[317] Ibid., 630.
[318] Ibid., 629.
For a translation: 'perfect her industry and improve her commerce'.

Americans and the twilight of the droit d'aubaine

We have already seen how other Continental European states shared the conviction on the need to unmake restrictions to foreigners' property rights. The only dimension in which the French debate of 1819 was particular was that the advocates of universal and unilateral abolition won the day. The European shift away from the requirement of reciprocity towards the French model would be a gradual and drawn out process. The motives behind the US initiative to conclude treaties unmaking restrictions to property rights with several German states in the 1840s allows us to track how the two ideas of progress of civilisation and the desire to attract foreign capital animated not only European monarchists but also New World republicans. In a 1843 dispatch to Washington requesting full powers to conclude conventions for the abolition of the '*droit d'aubaine & droit de détraction*' with Saxony, Bavaria, Wurtemburg, Electoral and Grand Ducal Hesse Henry Wheaton considered restrictions on property rights 'odious' taxes originating 'in the barbarous ages of the feudal system, when man was chained to the soil on which he grew' that 'have been almost universally abolished by compact, & the common consent of most civilized nations'.[319] This idea of the progress of civilisation explicitly echoed Wheaton's own writings on international legal doctrine.[320]

More practically, Wheaton argued that this is 'a matter of very considerable importance with respect to our intercourse with Germany' due to 'the vast emigration constantly going on from this country to the U. States'. In fact Wheaton and the US sought to broaden the reach of treaties securing foreigners' property rights to include the *emigrating* subjects of the signatories. This tax on emigration that included not only foreigners but the state's emigrating subjects is referred to in the treaties as the droit de retraite, the concept under which it is usually known in legal doctrine including that of Wheaton.[321]

[319] The dispatch is reproduced in Miller, *Treaties and Other International Acts of the United States*, vol. 4, 547–48.
[320] Wheaton, *Elements* (1836), ch. ii (6), pp. 99–100.
[321] Wheaton, *Elements* (1846), part ii, ch. ii (4), pp. 128–130.

Thus the 'odious prohibitions & taxes' included not only 'the acquisition & transfer, by the citizens & subjects of one country of property situated in another' but also 'the sale of their property by the citizens & subjects of one country emigrating to another'. The challenge from the American perspective was that in 'all the German States, where it is not otherwise provided by Treaty, a tax is levied on all property sold, & the proceeds of which are carried out of the country by Emigrants, which amounts, in most instances, to ten *per centum* on the capital thus transferred'. That 'amount would consequently be gained to the U. States by the proposed stipulations'. Also with regards to the conventional 'free disposition of property by testament or inheritance' on both sides, Wheaton argued that 'I cannot perceive that we should lose more than we should gain' as 'if there be many cases accurring of persons dying in the U. States, & leaving heirs in Germany, there are also probably as many cases of naturalized Germans, resident in the U. States, who are entitled to inherit the property of their relations deceased in Germany.'[322]

Secretary of State A. P. Upshur's report to the Senate on 'the important subject of our relations with the Germanic Association or Customs Union' relating to 'the commerce and navigation of the United States' shares the views expressed by the American minister in Berlin. The only difference is that Upshur skips the framework of the progress of civilisation mentioned by Wheaton and concentrates solely on the practical policy goal of acquiring more foreign capital. The secretary of state argued that emigration 'from Germany to the United States presents a subject of great importance to us. We receive from the States associated in the German Union most valuable emigrants, consisting chiefly of farmers of excellent characters and industrious habits'. Moreover these emigrants 'bring to their adopted country sufficient gold and silver to enable them to purchase and settle lands.' Thus Upshur explicitly argues, the 'number and value of the people who come to us from all Germany may thus be well appreciated, not only in their personal character, but in the addition which they make to our actual wealth.' Unfortunately a 'heavy tax' is levied in 'a great part of Germany, upon money and other personal property taken out of the country by emigrants'. It is in order 'to remove the impediment to to [sic] emigration presented in the heavy tax imposed on the property of the emigrants' that Upshur has

[322] Miller, *Treaties and Other International Acts of the United States*, vol. 4, 547–48.

authorized Wheaton to conclude 'special conventions for the abolition of the droit d'aubaine and droit de détraction.'[323] The American motivations are thus clear, even though the secretary of state seems to have confused the two obscure French legal terms –the droit de détraction and the droit de retraite– with each other.

Having now provided an account of the ideas about capital and civilisation that drove the unmaking of restrictions to foreigners' property rights, we must consider why states chose to use certain legal practices rather than others as the means of achieving this end? Two key dimensions help us understand the shift from bilateral treaty-making towards domestic legislation as the primary means of unmaking restrictions: The diminishing appeal of the idea of reciprocity in foreigners' property rights and the increasing ability of the state to control society through universally applicable legislation. The French old regime embarked on the path of reciprocal abolitions –against the advice of political economists– because of conventional mercantilist ideas. According to Vergennes piecemeal abolitions could be used as 'an enticement to obtain some commercial advantages from other nations that so desired to be exempted'. The idea of a unilateral and general abolition of the droit d'aubaine was also 'English and Genevan' and thus 'incompatible with the French monarchical tradition'.[324] Another underlying incentive for this gradual approach implemented through individual treaties or letters patent was that old regime France did not have a clear framework for introducing universal legislation. This limitation was most clearly seen in the inability of the king to raise more taxes as he refused to convene the Estates General, thus forcing the state to rely on increased lending. The kingdom was divided into multiple separate legal jurisdictions and the king ruled through ad hoc letters patent. Indeed the droit d'aubaine was one of the few legal prerogatives that manifested royal sovereignty over the entire kingdom. The complete revocation of this right, in contrast to piece meal exemptions granted by the crown, would demolish one of the symbols of the king's 'absolute' sovereignty over the fragmented society of orders that characterized eighteenth century France.[325]

[323] "Report of the Secretary of State to the United States Senate, 24.11.1843."
[324] Vergennes cited in Sahlins, *Unnaturally French*, 244–46.
[325] Ibid., 1–6.

These de facto limitations to the sovereignty of the state evaporated with the advent of the centralised Napoleonic regime that was able to mould society to a far greater extent and introduced a universally applicable civil code. As we have seen, other European monarchical regimes had been pursuing similar projects of conservative modernization that aimed at constructing a more effective and centralised state already in the late eighteenth century. The influence of balance of exchange thinking led however to a continued attachment to conditionality with regards to foreigners' property rights, in practice this would result in domestic legislation that unmade restrictions based on proof of reciprocity from the foreigner's state. Such legislation was adopted by for example France in 1804, Austria in 1811, Modena in 1814, the Two Sicilies in 1818 and Sweden-Norway before 1819. In contrast to the eighteenth century the introduction of this conditional domestic legislation was seen to remove the need for express bilateral treaty-making, instead an exchange of diplomatic notes was held sufficient. This was the advise given by the justice minister to the French foreign ministry in 1804 and in 1818 the Two Sicilies did not think a bilateral treaty with Wurtemberg necessary but rather sought a more easy and informal understanding in the form of a declaration ('pour éviter les formalités et longeurs d´un traité solennel' the Two Sicilies 'ne desiroit de la part du gouvernement de Wurtemberg qu´une simple déclaration').[326] Similarly in 1819 the foreign ministry of Modena informed the Swedish minister that the 'diritto d'albinaggio e detrazione' had been abolished by Modena on the basis of reciprocity in 1814 and that Modena found no need to make a specific formal treaty ('apposito formale trattato') on the subject.[327] These diplomatic declarations based on conditional domestic legislation offered a way to circumvent the necessity of bilateral treaty-making, until gradually most European states discarded the idea of reciprocity and adopted the 1819 French model of a universal and unilateral unmaking of restrictions to foreigners' property rights.

Strangely in view of the usual narrative of the making of a liberal international order, multilateral

[326] Cited from *CTS*, vol. 69, 321–324.
For a translation: 'in order to avoid the formalities and lengths of a solemn treaty' the Two Sicilies 'desired from the part of the government of Wurtemberg only a simple declaration'.
[327] Ibid., vol. 70, 116–118, 183–186.
For the translations: 'the right of albinaggio and detrazione (aubaine, and détraction)' and 'specific formal treaty'.

treaty-making had only a very limited role in the unmaking of restrictions to foreigners' property rights traced in this chapter. The major exception to this was the abolition of the Abzug between members of the German Confederation by a resolution of the federal diet in 1817.[328] Even then this regional multilateral arrangement unmaking restrictions to foreigners' property rights did not extend to the relations of the individual member states with third powers. We have seen how in the 1840s the United States had to negotiate separate treaties on foreigners' property rights with individual members of the Zollverein. Even though the German Customs Union negotiated tariffs agreements with third powers in a centralized manner, these more fundamental restrictions to foreigners' property rights remained within the sovereign competence of the member states. Ironically the models of 'regional multilateralism' provided by relatively decentralized federal structures of the United States and the new German Empire made possible the fact that several of the member states of these conglomerates still retained some restrictions on foreigners' property rights in 1900. By which point the French lawyer Lainé considered them blatantly archaic on the basis of his comparative study of Western legal frameworks for foreigners' property rights.[329] The larger question of why open-ended multilateral treaty making, which emerges only with the Paris declaration on the rules of maritime warfare of 1856, had only a relatively small effect on foreigners' property rights will be investigated in the following chapters.

Conclusion

Butler and Maccoby have noted with specific reference to the droit d'aubaine that the 'first twenty years of the nineteenth century saw much movement in the same direction' of abolition. Sometimes 'it took the form of a specific agreement … sometimes the proclamation of a general offer of reciprocal action'.[330] This chapter however provides the first in depth account of this crucial transformation in European international society –that goes beyond the specifically French story ably told by Sahlins–

[328] Kluber, *Droit Des Gens Moderne de l´Europe* (1819), book I, chapter ii, (82–83), pp. 135–140.
[329] Lainé, "Etude Sur La Capacité Successorale Des Étrangers En France," 77, 85–86, 88–90.
[330] Butler and Maccoby, *Development of International Law*, 200.

and is complemented by an analysis of both the ideas that drove the substantive shift towards foreigners' property rights, and the reasons that led to the prominence of particular legal practices in its actual implementation.

As we have seen, this history of the unmaking of the droit d'aubaine is not consistent with the usual narrative of the making of a liberal international order centered on the implementation of the ideas of Locke or Vattel by the liberal democratic Anglo-American powers through multilateral treaty-making in the latter half of the nineteenth century. The chapter challenges the conventional narrative of the making of 'a liberal international order' in four dimensions: A central dimension of this order, foreigners' property rights, were already largely in place before 1789 and had largely become self-evident by around 1850 thus questioning the centrality of the 'short nineteenth century'. The states that led this process, most notably France, were not 'liberal democracies' but modernizing old regimes, some of which were restored by 1815. The liberal French political economists who advocated the abolition of the droit d'aubaine were largely supportive of progress within the framework of the old monarchy. The usual suspects for the making of a liberal international order, Britain and later the United States remained in the sidelines and retained restrictions on foreigners' property rights until the late nineteenth century. Foreigners' property rights were also mostly legalized not through that master institution of modernity, multilateral treaty making, but first bilateral treaty-making and later increasingly domestic legislation. With multilateralism playing a relatively limited role vis-à-vis foreigners' property rights even in the regional contexts of the German Confederation or the United States. Finally, the shift was not primarily motivated by practitioners reading Vattel's contemporary legal doctrine (not to mention Locke's early modern political thought) but by rather a specific strand of Enlightenment thought, the French political economists.

Part Two: Anglo-Americans and the Making of the ‘Standard of Civilization’

Chapter Four: The 'Standard of Civilization' in Legal Doctrine

The second part of the thesis explores the idea of a strong customary norm protecting foreigners' property rights in international law. This notion of a customary norm was grounded through the idea of civilization and began to complement the more narrow and contingent rights that had been previously almost exclusively established through bilateral treaty making. From the mid-nineteenth to the mid-twentieth century, most debate with regards to foreigners' property rights in international legal doctrine centers on the question whether there exists a strong customary legal norm protecting foreigners and their property that is grounded through the idea of civilization. During the first decades of the twentieth century this norm was conceptualized as a contested 'standard of civilization'. After the mid-twentieth century, this was rebranded as first the 'international minimum standard' and later the 'fair and equitable treatment standard', which are still invoked in contemporary international investment disputes.

This chapter tracks the evolution of the customary norm, best known as the 'standard of civilization', in international legal doctrine. Against conventional wisdom, I argue that some of the most famous classics of international legal doctrine –Emer de Vattel (1758), Henry Wheaton (1836) and Lassa Oppenheim (1905)[331]– did not play a pivotal role in the evolution of the norm. Instead changes that

[331] Vattel, *Les Droit Des Gens*; Wheaton, *Elements*; Oppenheim, *International Law: A Treatise*, vol. 1. As has been noted, the role of Vattel is emphasized in Lipson, *Standing Guard*; Miles, *Origins of International Investment* Law and Keene, *Beyond the Anarchical Society*. Jouannet, *Liberal-Welfarist Law of Nations* has recently argued for the crucial role of Vattel in the making of modern international law. For similar arguments on the importance of Vattel, Reus-Smit, *Moral Purpose of the State*; Ruggie, "Continuity and Transformation in the World Polity". Gong, *Standard of "Civilization"* considers Wheaton and Oppenheim to have played pivotal

had occurred through other legal practices were introduced afterwards in later editions of these works. Studying the reception of these treatises demonstrates that later lawyers reinterpreted and modified works of legal publicists to reflect changing understandings of the law. Sometimes these shifts in foreigners' property rights had already been transferred to international legal doctrine through other less well-known works. Often the editors themselves played a crucial role in changing international legal doctrine by drastically modifying the content of canonical works in order to make them useful for contemporary lawyers.

The analysis of change in international legal doctrine laid out in this chapter is extremely important because it once again runs counter to a widespread conventional understanding privileging the role of great legal theorists as pivotal agents of legal change. Thus highlighting how a history of global legal practices, through reconceptualising the study of legal texts, can provide a better understanding of a crucial case of legal change vis-à-vis traditional histories of international legal doctrine.

The making of a stronger customary norm

The conventional narrative holds that the idea of a customary norm protecting foreigners' property rights in international legal doctrine can be traced to Vattel (1758). It then takes states a long time before they begin applying Vattel's idea in the earlier part of the nineteenth century.[332] Yet this usual Vattelian story is almost completely wrong. The passage that has been cited is actually not directly relevant to the question. More generally Vattel actually places a very heavy emphasis on sovereignty and non-intervention in his doctrinal work. Though Vattel in another passage does actually introduce

roles in the origins of the 'standard of civilization'. Hedley Bull, "The Grotian Conception of International Society," in *Diplomatic Investigations. Essays in the Theory of International Politics*, ed. Herbert Butterfield and Martin Wight (London: George Allen, 1966) juxtaposes the role of Grotius as the theorist of a 'solidarist' international law to the 'pluralism' of Oppenheim.

[332] For this conventional story, Lipson, *Standing Guard*; Miles, *Origins of International Investment Law*. Also to an extent, Keene, *Beyond the Anarchical Society*. In contrast McNair, *International Law Opinions* holds that the norm existed in early modern practice, and was then carried to legal doctrine by for example Grotius and Vattel. Also Chittharanjan Felix Amerasinghe, *Local Remedies in International Law*, 2nd ed. (Cambridge: Cambridge University Press, 2004) and Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) argue for the medieval origins of the norm. See next footnote.

an idea that if a foreigner has been treated in a manifestly unjust way his home state can intervene diplomatically, he does not however link the idea to contemporary state practice. Early nineteenth century legal doctrine either followed Vattel in reproducing the idea of the possibility of a diplomatic intervention in the case of manifest injustice without linking it to state practice (Andrés Bello, 1832, Joseph Chitty's edition of Vattel, 1834) or dispensed with the idea altogether in an even stronger emphasis on sovereignty and non-intervention (Henry Wheaton, 1836).

I argue that the British lawyer Robert Phillimore (1855-57) in effect introduced a positivist conception of a strong customary norm to international legal doctrine. Phillimore linked the idea of diplomatic intervention in the case of manifest injustice to contemporary mid-nineteenth century British state practice. Phillimore referred to as an example of the existence of the norm to Britain's contested 1850 intervention in Greece known as the Don Pacifico incident. Furthermore Phillimore crucially mirrored Britain's Greek intervention in grounding the new conception of a strong customary norm protecting foreigners and their property with the idea of civilisation. This development reinvented an older weak customary norm that had made diplomatic intervention possible in the case of a denial of justice after local remedies offered by domestic courts had been exhausted. What was novel in the new conception of the norm was that domestic remedies needed not be always exhausted when a state's civilization was deemed lacking. This exception implying that states could be more sovereign than others, which potentially entailed a hierarchical conception of international order.

The Argentine lawyer Carlos Calvo (1863) soon contested the idea of a customary norm protecting foreigners' property rights altogether. Calvo's radical challenge mirrored contemporary Latin American state practice and drew on the earlier doctrine of Vattel and Wheaton with its strong emphasis on sovereignty and non-intervention, to argue that states did not have the right to diplomatic intervention and that foreigners could not expect stronger protection for their property than that was accorded to citizens. Despite this critique, the idea of a strong customary norm became accepted in the mainstream of international legal doctrine. I demonstrate this by tracing the idea from Phillimore to Lassa Oppenheim (1905) who wrote the most influential doctrinal work of the earlier part of the

twentieth century. Phillimore's pivotal role becomes clear by tracing Oppenheim's array of references backwards, and specifically by comparing different editions of Andrés Bello's contemporary work (1832, 1844, 1864).

Emer de Vattel

In the early nineteenth century foreigners' property rights were to a very great extent based on bilateral trade treaties. Though the idea of a customary norm protecting foreigners and their property in the event of a 'denial of justice' had existed from the Middle Ages and continued in the early modern period it was quite weak. The norm was subject to the exhaustion of 'local remedies', thus diplomatic intervention or indeed reprisals was possible only after the foreigner had unsuccessfully appealed to the highest local court after an extremely blatant injustice.[333] Writers of legal doctrine such as Grotius –who was still citing the Romans and Homer for the existence of the norm– and Vattel then afterwards affirmed this existing state practice.[334]

The importance of studying a textual passage in context becomes clear when considering the view that the idea of a strong customary norm protecting foreigners' property rights can be traced to Vattel. The passage that has been cited in English translation argues that '[q]uiconque maltraite un Citoyen offense indirectement l'Etat , qui doit protéger ce Citoyen. Le Souverain de celui – ci doit venger son

[333] McNair, *International Law Opinions*, vol. 2, pp. 297, 312, 314; See also Amerasinghe, *Local Remedies*, 22–30; and Paulsson, *Denial of Justice*, 13–26; For an older work Hans W. Spiegel, "Origins and Development of Denial of Justice," *American Journal of International Law* 32, no. 1 (January 1938).

[334] '[E]xteri autem jus habent cogendi, sed quo uti non liceat quamdiu per judicium suum possint obtinere. Tali igitur de causa aut corpora aut res subditorum ejus qui jus non reddit capi posse, non quidem natura introductum est, sed moribus passim receptum. Vetustissimum exemplum est apud Homerum Iliados … Aliud examplum est in historia Romana' in Grotius, *De Iure Belli ac Pacis* (1632), book iii, chapter ii, iv-v, cited at v. For the Morrice English translation, 'But Strangers have a coercive Power, tho'it be not lawful to use it, whilst they may recover their Right in a judicial Way. Therefore in such a Case, that both the Persons and Moveables of his Subjects, that refuses to render Justice, may be seized, is not indeed authorized by Nature, but generally received by Custom. We have a very old Example of this in *Homer*'s *Iliad* … Another Example we have in the *Roman* History', in 1738 edition, book iii, chapter ii, iv-v, cited at v. See also the same passage in Grotius 1625 and Barbeyrac (1724) editions. Vattel, *Le Droit des Gens* (1758), tome i, book ii, chapter vii, §84 Jurisdiction.

injure , obliger s'il le peut, l'aggresseur à une entière réparation,ou le punir'.[335] Yet importantly Vattel is here actually primarily referring to injuries committed by citizens of one state on citizens of another one rather than injuries committed by one state on the citizens of another state. As becomes clear from the following significant qualification: 'il seroit injuste d'imputer à la Nation , ou au Souverain, toutes les fautes des Citoyens. On ne peut donc dire en général , que l'on a reçû une injure d'une Nation , parce qu'on l'aura reçue de quelqu'un de ses membres.'[336]

Moreover Vattel places a strong emphasis on sovereignty and non-intervention in general: 'C'est une conséquence manifeste de la Liberté & de l'indépendance des Nations , que toutes sont en droit de se gouverner comme elles le jugent a propos , & qu'aucune n'a le moindre droit de se mêler du Gouvernement d'une autre. De tous les Droits qui peuvent appartenir à une Nation , la Souveraineté est sans-doute le plus précieux'.[337] Specifically with regards to jurisdiction Vattel argues that in a nation's territory it is up to her (sic) or the sovereign 'de rendre la Justice dans tous les lieux de son obéissance , de prendre connaissance des crimes qui se commettent & des différends qui s'élèvent dans le pays. Les autres Nations doivent respecter ce droit.'[338] Yet later on in this passage Vattel does actually invoke the idea of a weak customary norm protecting foreigners and their property. If a foreigner has been treated in a manifestly unjust way his home state can intervene diplomatically. 'Le Prince ne doit donc intervenir dans les Causes de ses sujets en pays étranger , & leur accorder sa

[335] Vattel, *Les Droit Des Gens* (1st ed. 1758), liv. ii, chap. vi. § 71. Le Souverain doit venger les injures de l'Etat, & protéger les Citoyens. Lipson cites the English translation of Chitty's edition of Vattel book ii, chapter iv, § 71. Lipson cites the English translation of Chitty's edition of Vattel book ii, chapter iv, § 71, Lipson, *Standing Guard*, 8, 278–79, n. 10; Miles cites the same passage from Fenwick's 1916 translation, *Origins of International Investment Law*, 47 fn. 188.
For the English translation (1867 edition, based on Chitty): 'Whoever uses a citizen ill, indirectly offends the state, which is bound to protect this citizen ; and the sovereign of the latter should avenge his wrongs, punish the aggressor, and, if possible, oblige him to make full reparation'.
[336] Ibid., liv ii, chap vi, § 73. On ne peut imputer a la Nation les actions des particuliers (p. 310).
For the English translation (1867 edition): 'it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not, then, to say, in general, that we have received an injury from a nation because we have received it from one of its members.'
[337] Ibid., liv ii, chap iv, § 54 Aucune Nation n'est en droit de se meler du Gouvernement d'une autre. (297–98).
For the English translation (1867 edition): 'It is an evident consequence of the liberty and independence of nations, that all have a right to be governed as they think proper, and that no state has the smallest right to interfere in the government of another. Of all the rights that can belong to a nation, sovereignty is, doubtless, the most precious'.
[338] Ibid., liv ii, chap vii, § 84 Jurisdiction (pp. 317–8). For the English translation (1867 edition): 'to exercise justice in all the places under her jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country. Other nations ought to respect this right.'

protection , que dans les cas d'un déni de justice , ou d'une injustice évidente & palpable , ou d'une violation manifeste des règles & des formes , ou enfin d'une distinction odieuse , faite au préjudice de ses sujets , ou des Etrangers en général.' He does not however link this idea to examples of state practice of peace-time diplomatic interventions on behalf of citizens and their property.[339]

Actually Vattel's lone reference to contemporary state practice in the form of the Silesian Loan Case opinion emphasizes the weakness of this norm.[340] The British government's legal advisers' argued in this 1753 opinion for a very strong conception of sovereignty and thus the need to exhaust 'local remedies', which in effect made the scope for diplomatic intervention or indeed armed reprisals on grounds of 'denial of justice' very limited. The opinion, subsequently lauded by not only Vattel but also Montesquieu, holds that

> [t]he Law of Nations, founded upon Justice, Equity, Convenience and the Reason of the Thing, and confirmed by long Usage, don't allow of Reprizals, except in Case of violent Injuries, directed or supported by the State, and Justice, absolutely denied, *in Re minime dubia*, by all the Tribunals, and afterwards by the Prince. When the Judges are left free, and give Sentence according to their Conscience, though it should be erroneous, that would be no Ground for Reprizals. Upon doubtful Questions, different Men think and judge differently ; and all a Friend can desire, is, that Justice should be as impartially administered to him, as it is to the Subjects of that Prince, in whose Courts the Matter is try'd.[341]

It is noteworthy that in mid-eighteenth century international legal doctrine –when European international society was still limited to Western Europe– the idea of exceptions to the requirement of exhausting local remedies based on a lack of 'civilization' is yet absent from this norm, which is linked to a very strong conception of sovereignty. Moreover as we have seen this weak and limited customary norm did not offer any redress from extensive and longstanding restrictions to foreigners'

[339] Ibid., liv ii, chap vii, § 84 Jurisdiction (pp. 317–8). For the English translation (1867 edition): 'The prince, therefore, ought not to interfere in the causes of his subjects in foreign countries, and grant them his protection, excepting in cases where justice is refused, or palpable and evident injustice done, or rules and forms openly violated, or, finally, an odious distinction made, to the prejudice of his subjects, or of foreigners in general.'
[340] Ibid., tome i, book ii, chapter vii, §84 Jurisdiction.
[341] Report of the Law Officers of 18 January 1753, cited in McNair, *International Law Opinions*, vol. 2., 303. It was signed by Lee, Paul, Ryder and Murray (then solicitor general and later lord chief justice as Earl Mansfield). Vattel refers to the report as 'un excellent morceau de Droit des Gens', in *Les Droit des Gens* (1758), tome i, book ii, chapter vii, §84 Jurisdiction.

property rights including variations of the droit d'aubaine and détraction in many Continental European states or the ban on foreign ownership of real estate in Britain and its colonies.

Early nineteenth century legal doctrine either followed Vattel in reproducing the idea of a weak norm that made diplomatic intervention possible after the exhaustion of local remedies in the case of a manifest injustice without linking it to state practice or dispensed with the idea altogether in an even stronger emphasis on sovereignty and non-intervention. Thus Andrés Bello (1832) follows Vattel closely though he does not explicitly cite him. Bello likewise emphasises that '[d]e la independencia y soberanía de las naciones se sigue que á ninguna de ellas es permitido dictar á otra la forma de gobierno, la religion ó la administracion que esta deba adoptar'.[342] With regards to foreigners Bello argues that '[e]l extranjero á su entrada contrae tácitamente la obligacion de sujetarse á las leyes y á la jurisdiccion local, y el estado le ofrece de la misma manera la proteccion de la autoridad pública, depositada en los tribunals … Los actos jurisdiccionales de una nacion sobre los extranjeros que en ella residen, si son conformes á sus propias leyes, deben ser respetados de las otras naciones.' However as in Vattel there is an exception in cases of manifest injustice: 'Si éstos contra derecho rehusasen oir sus quejas, ó le hiciesen una injusticia manifiesta, puede entónces interponer la autoridad de su propio soberano'.[343] Though Bello notes that a foreigner can then request diplomatic assistance from his minister, consul or even government, this idea is qualified by the need to first exhaust local remedies and is not backed up by positivist references to contemporary state practice.

---

[342] A. B. (Andrés Bello), *Principios* (1832), parte primera, estado de paz, capitulo I, de la nacion y el soberano, 7. Derechos que se deriban de la independencia y soberanía de las naciones (p. 16).
The author's translation: 'From the independence and sovereignty of nations follows that none of them is permitted to dictate to another the form of government, religion or administration that they should adopt'.

[343] Ibid., Capitulo v, de los ciudadanos y los extranjeros, 7. Mansion de los extranjeros en el territorio; sus derechos y oblicaciones segun sus diferentes clases (pp. 54–55). Interestingly Bello begins the paragraph by arguing that 'En fin, es obligacion del soberano que les da aeojida, atender á su seguridad, haciéndoles justicia en sus pleitos, y protejiéndolos aun contra los naturales, demasiado dispuestos á maltratarlos y vejarlos, particularmente en paises de atrasada civilizacion y cultura.'
The author's translation: 'By his entry the foreigner tacitly agrees to the obligation of abiding by the local laws and jurisdiction, and the state in the same way offers him the protection of public authority, deposited in the courts … The jurisdictional acts of one nation over foreigners who reside in her, if in agreement with her own laws, must be respected by the other nations.' … 'If these contrary to right refuse to hear his complaints, or carry out a manifest injustice against him, he can then interpose the authority of his own sovereign' … 'In short, it is the duty of the sovereign who gives them hospitality, to attend to their security, doing justice in their legal actions, and protecting them even against the citizens (naturales, in the original Spanish), too ready to mistreat and harass them, particularly in countries with backward civilization and culture.'

In contrast Wheaton's work (1836) has an even stronger emphasis on sovereignty and non-intervention, and does not mention Vattel's idea of the possibility of a diplomatic intervention in the case of manifest injustice at all. For Wheaton '[e]very state … may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign state can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact or by such a clear case of necessity as immediately affects its own independence, freedom and security.'[344] Wheaton's exceptions to this rule do not include diplomatic protection extended to citizens and their property.[345] Instead the 'supreme, exclusive power of civil and criminal legislation is also an essential right of every independent state. This sovereign right extends … to the regulation of all the real (or immovable) and personal (or movable) property within the territory, whether held by a feudal or allodial tenure, and whether it belongs to subjects or foreigners.'[346]

Robert Phillimore

Next I will show how Robert Phillimore (1855-57) in effect introduced the positivist idea of a strong customary norm to international legal doctrine, by linking the idea of diplomatic intervention in the case of manifest injustice to contemporary mid-nineteenth century British state practice. Phillimore argued that though it

> has been said that every individual who enters a foreign territory, binds himself, by a tacit contract, to obey the laws enacted in it for the maintenance of the good order and tranquility of the realm **...** Foreigners, whom a State has once admitted unconditionally into its territories, are entitled not only to freedom of injury, but to the execution of justice in respect to their transactions *with the subject of that State.* No country has the right to set, as it were, a snare for foreigners ; therefore

[344] Wheaton, *Elements* (1. ed. 1836), part I, ch ii Rights of Independence, § 1 Independence of the state in respect to its internal government. (p. 131).
[345] Ibid., part ii, ch i Right of Self–Preservation, § 4 Right of intervention (pp 109–113).
[346] Ibid., part ii, ch ii Rights of Independence, § 5 Exclusive power of civil and criminal legislation (p. 136).

> conditions hostile to their interests, or different from general usage, must be specified beforehand.[347]

Thus the 'State, to which the foreigner belongs, may interfere for his protection when he has received positive maltreatment, or when he has been denied ordinary justice in the foreign country.' In the latter case the 'State must be satisfied that its citizen has exhausted the means of legal redress afforded by the tribunals of the country in which he has been injured. If those tribunals are unable or unwilling to entertain and adjudicate upon his grievance, the ground for interference is fairly laid ... It is only after these propositions have been irrefragably proved, that the State of a foreigner can demand reparation at the hands of the Government of his country'. In the case both 'Executive as well as the Judicial Authorities' refuse redress 'recourse can be had to *Reprisals*'.[348] What is crucial about Phillimore's argument is that even though he cites the natural rights doctrine of Grotius and Vattel profusely he also refers to contemporary state practice. Thus the fact that 'foreigners ... are entitled ... to the execution of justice' is backed up by a footnote referring to 'Debates in both Houses of Parliament on the Affairs of Greece and the Claims of Don Pacifico.–Hansard's Parl. Deb. June, 1850.'[349]

For Phillimore the right to diplomatic intervention in cases of manifest injustice was a broad one and also extended to subjects who were debtors of another state. Thus the 'right of interference on the part of a State, for the purpose of enforcing the performance of justice to its citizens from a foreign State, stands upon the unquestionable foundation, when the foreign State has become itself the debtor of these citizens.'[350] Crucially once again Phillimore does not only rely on Vattel on this point, but also refers to contemporary (British) state practice. 'It seems to have been in accordance with this important rule of International Law, that the following circular was addressed, in 1848, by Viscount Palmerston, the Secretary of State for Foreign Affairs, to the British representatives in foreign States'. In his instructions to his diplomats, Palmerston maintained that 'there can be no doubt whatever of the

[347] Robert Phillimore, *Commentaries upon International Law*, 1st ed., vol. 2 (London: W. Benning, 1855), chapter ii "Right of protecting citizens in foreign countries", p. 3. For the passage as a whole pp. 3–7.
[348] Ibid., pp 4–5.
[349] Ibid., p. 3, fn (f).
[350] Ibid., chapter iii "Right of protecting citizens in foreign countries.–debts of the state.", pp. 8–9. For the passage as a whole pp. 8–14.

perfect right which the Government of every country possesses to take up, as a matter of diplomatic negotiation, any well-founded complaint which any of its subjects may refer against the Government of another country'. Thus 'the Government of one country is entitled to demand redress for any one individual among its subjects who may have a just but unsatisfied pecuniary claim upon the Government of another country'.[351] Phillimore provides a detailed discussion of Britain's contested intervention in Greece in 1850 known as the Don Pacifico incident in the context of reprisals, which are 'most commonly ... resorted to for the purpose of redressing injuries inflicted upon the Right of Individuals.'[352]

Crucially Phillimore's discussion of the Greek intervention mirrors the British government's argument by grounding a strong customary norm protecting foreigners and their property through the idea of civilisation. Thus Phillimore argues that 'the real question of International Law at issue in this case was, whether the state of the Greek tribunals was such, as to warrant the English Foreign Minister in insisting upon M. Pacifico's demand being satisfied by the Greek Government, before that person had exhausted the legal remedies which, it must be *presumed*, are afforded by the ordinary legal tribunals of every civilised State.'[353] Though Phillimore is markedly skeptical as to the solidity of Britain's legal argumentation in this specific case –'[t]hat M. Pacifico had not applied to the Greek Courts of Law for redress appears to be an admitted fact'[354]– what is important for the history of international legal doctrine is that he uses this example of contemporary state practice as positivist evidence of the existence of a strong customary rule protecting foreigners and their property from manifest injustice in 'every civilised State'. This development reinvented an older weak customary norm that had made diplomatic intervention possible in the case of a denial of justice after local remedies offered by domestic courts had been exhausted. What was novel in the new conception of the norm was that domestic remedies needed not be always exhausted when a state's civilization was deemed lacking. Even though Phillimore is skeptical whether this applied to the particular Greek case, acknowledging

[351] Ibid., Palmerston's January 1848 circular is referenced from The Times, 21 April 1849, pp. 9–11.
[352] Robert Phillimore, *Commentaries upon International Law,* 1st ed., vol. 3 (London: W Benning, 1857), chapter ii "Reprisals", cited at pp. 11–12. For the whole passage pp. 10–35.
[353] Ibid., p. 29, for Phillimore's discussion of the Don Pacifico incident in general, pp. 29–33.
[354] Ibid., p. 29, also 32.

the existence of an exception to the rule of local remedies implied that some states could be more sovereign than others, which in effect potentially entailed a hierarchical conception of international order.

The pivotal role of the Pacifico incident of 1850 for Phillimore becomes clear when contrasted to his preceding discussion of Britain's earlier intervention in the Two Sicilies in 1840, which was justified through invoking an existing trade treaty and not the idea of a strong customary legal norm linked to civilization. Britain considered the decision of the Naples government to grant a French enterprise a monopoly in Sicily's profitable sulphur trade, which caused losses to British merchants, an infringement of a trade treaty from 1816. Phillimore writes that foreign secretary Palmerston called 'immediately to terminate the monopoly, and to grant full indemnity for all losses sustained by British subjects since its commencement.'[355] The following Chapter Five will develop in detail how this earlier position differs from Palmerston's later actions with regards to Greece. Thus Phillimore's doctrinal account dovetails to a 1840s shift in British legal practice concerning foreigners' property rights: treaty law became supplemented by an idea of a strong customary legal norm grounded through the idea of civilization. This discussion remains unaltered in the second edition of the *Commentaries* (1873) by which time Phillimore had served as the British government's principal adviser on questions of international law.[356] The following paragraphs will show how contemporaries noted the crucial significance of Phillimore's account of the Pacifico incident, which introduced the novel idea of a strong customary legal norm into international legal doctrine.

[355] Ibid., pp. 27-28.
[356] Robert Phillimore, *Commentaries upon International Law, Second Edition*, vol. 3 (London: Butterworths, 1873), chap ii, xxiii (pp. 35–41). Phillimore served as advocate general 1862-67 before appointed judge of the high court of admiralty.

Receptions of Phillimore

Carlos Calvo (1863) soon contested the idea of a customary norm protecting foreigners and their property altogether. Drawing on the earlier doctrine of Wheaton, Calvo argued that '[l]a souveraineté absolue d'un État a pour corollaire naturel et forcé l'indépendance dans le domaine législatif et judiciaire.'[357] In the context of his discussion of state responsibility Calvo explicitly criticises the idea that states have a right to diplomatic intervention and that foreigners could expect stronger protection for themselves and their property than that was accorded to citizens. Noting that this question had given rise to many serious conflicts between New World governments and the European great powers. 'La regle que dans plus d'une circonstance on a tenté d'imposer aux Ètats américains, c´est que les étrangers méritent plus de considération, des égards et des priviléges plus marqués et plus étendus que ceux accordés aux nationaux mêmes du pays ou ils résident.' Calvo considered that '[c]e principe est intrinsèquement contraire a la loi d´égalité des nations'. Calvo moreover accused the Europeans of double standards as they did not invariably apply this rule in disputes between themselves.[358] Next proceeding to a lengthy examination of predominantly contemporary European state practice in order to demonstrate that European states did not recognise a strong customary norm protecting foreigners

[357]In this paragraph I cite the later 1896 French edition of Calvo's work as this is the one referenced by Lassa Oppenheim (*International Law*, 1st ed., vol. 1 (1905), Abbreviations.). Wheaton is cited first in a long list of authorities in Calvo, *Le Droit International Théorique et Pratique*, cinquiéme edition (Paris: Rousseau, 1896), vol. i, livre iii, §109 (p. 266). I will however track the references backwards to earlier editions. His doctrinal work was first published in 1863 in Spanish and French. Calvo's views on this have not changed since the 1860s. See Carlos Calvo, *Derecho International Teórico Y Práctico de Europe Y América* (Paris: D'Amyot, Durand et Pedone-Lauriel, 1868), tomo primero, Capitulo ii, § 75. See also § 74 and Prefacio. The 1868 Spanish edition seems a reprint of the first edition of 1863 as the Prefacio does not have any mention of modifications.
The author's translation: 'The absolute sovereignty of a State has as a natural and and inevitable corollary independence in the legislative and judicial domain.'

[358] Calvo, *Le Droit International* (5. ed. 1896), vol. iii, livre xv "Devoirs mutuels des états", § 1278 "Responsabilité des gouvernements a raison de préjudices éprouvés ou de délits commis par des étrangers". Again this passage has not changed substantively from earlier editions. See the following : Charles Calvo, *Le Droit International Théorique et Pratique Précédé D'un Exposé Historique Des Progres de La Science Du Droit Des Gens, Troisieme édition Complétée* (Paris: Guillaumin, Thorin, Pedone-Lauriel, Rousseau, 1880), tome premier, Livre VI, § 361. Charles Calvo, *Le Droit International Thérique et Pratique Précédé D'un Exposé Historique Des Progres de La Science Du Droit Des Gens, Deuxieme édition Corrigée et Considérablement Augmenté*, 2nd ed. (Paris: Durand et Pedone, Lauriel, Amyot, Guillaumin, 1870), Liv. vii, § 290. Calvo, *Derecho International* (1868), Cap. Ix Deberes mutuos de los estados, § 294 Regla general sobre la proteccion debida por los gobiernos a los residentes extranjeros.
The author's translation : 'The rule that on more than one occassion they tried to impose on American States is that foreigners deserve more consideration, more marked and extensive regards and privileges than those granted on the nationals themselves of the country in which they reside.' … 'This principle is intrinsically contrary to the law of the equality of nations'.

and their property amongst themselves and could not thus impose it on the Latin American states. Amongst the cases referred to by Calvo –from the 1870 edition onwards– is the Don Pacifico incident, on which he cites the contemporary opinion of an involved French diplomat baron Gros who argued that 'il est admis en principe, et ce principe est conforme a l'équité' that diplomatic intervention was not possible before legal remedies offered by local authorities had been first exhausted.'[359] Calvo holds that not only the practice of European countries but also of the United States 'énergiquement et invariablement, dans les cas analogues, repoussé le principe d'indemnité et d'intervention diplomatique'.[360]

This radical Latin American challenge, which contested the possibility of diplomatic intervention altogether, was later coined as the 'national standard' with regards to foreigners and their property or alternatively the 'Calvo doctrine'.[361] The label of a 'Calvo doctrine' is however misleading with regards to the origins of this heavily contested alternative norm, as once again legal change emerges from legal practice –of the delegates of the Mexican constitutional convention– and is only afterwards introduced to legal doctrine thus demonstrating 'Calvo's lack of originality' in this respect.[362] The idea was expressed in Mexico's 1857 constitution, which declared that aliens 'are obliged to ... respect the institutions, laws and authorities of the country, subjecting themselves to the judgements and decisions

[359] Calvo, *Le Droit International* (5. ed. 1896), § 1281, for Calvo's exposition of state practice in general, § 1278–1290.
This passage has not changed substantively after the reference to the Don Pacifico incident was introduced in the 1870 edition. See Calvo, *Le Droit International* (2. ed. 1870), tome premier, Liv. vii, § 293. For the beginning of the discussion on foreigners' and their property rights, § 290–292. The reference to the Don Pacifico incident is still absent from the shorter discussion in the earlier 1868 edition. See Calvo, *Derecho International* (1868), Cap. Ix, § 294.
[360]Calvo, *Le Droit International* (5. ed. 1896), § 1282. This passage with the reference to the United States has not substantively changed since being introduced in 1870. See Calvo, *Le Droit International* (2. ed. 1870), § 294. In contrast see the slightly earlier discussion in Calvo, *Derecho International* (1868), Cap. Ix, § 294.
The author's translation: 'it is accepted in principle, and that principle is consistent with equity' … 'energetically and invariably, in analogous cases, rejected the principle of compensation and diplomatic intervention'.
[361] See eg Brownlie, *Principles*, 1st ed. (1966), Part ix: the protection of individuals and groups, xxi injury to the persons and property of aliens on state territory, 4, standard of national treatment, 5 international minimum standard, 6 two standards in perspective.
[362] Dawson, "The Influence of Andres Bello", 307. I disagree with Dawson's viewpoint that Calvo is unoriginal in respect to not only legal practice but also Bello's doctrine. As we have seen, Bello does not deny the possibility of diplomatic intervention in the event of a 'denial of justice'. Dawson somewhat contradictorily also acknowledges this in the same passage and writes that late nineteenth century 'Latin-American constitutions and legislation in the main attempted, as did Bello, to reconcile the need to protect the integrity of the domestic judicial process with recognition in certain cases of an alien's rights to seek the assistance of his Government when local judicial relief was not available or was inadequate.' Cited at 308.

of the courts, without the power to invoke additional remedies other than those available to Mexicans'.[363]

Despite Calvo's critique, Phillimore's idea of a strong customary norm protecting foreigners and their property became accepted in the mainstream of international legal doctrine. I demonstrate this by tracing the idea from Phillimore to Lassa Oppenheim (1905) who wrote the most influential doctrinal work of the earlier part of the twentieth century.[364] Oppenheim argued that '[b]y a universally recognized customary rule of the Law of nations every State holds a right of protection over its citizens abroad to which corresponds the duty of every State to treat foreigners on its territory with a certain consideration which will be discussed'. More specifically a 'State *can* exercise this right when one of its subjects is wronged abroad in his person or property'.[365] Phillimore's pivotal role becomes clear by tracing Oppenheim's array of references backwards, and specifically by comparing different editions of Bello's contemporary work (1832, 1844, 1864). As we have seen Bello (1832) does not refer to contemporary state practice with regards to the idea of the possibility of diplomatic intervention in the case of manifest injustice towards a foreigner or his property. This is still the case in the second edition of his work (1844) but has changed in the third edition of 1864. In it Bello writes that '[c]omo un ejemplo de la aplicación de esta regla, se me permitirá compendiar aquí la exposición del célebre caso de don Pacifico, que encontramos en el tomo III de Roberto Phillimore, pájinas 29 i siguientes.'[366] Before going on to paraphrase Phillimore's account.[367]

[363] Cited in ibid., at p. 307.
[364] Oppenheim, *International Law* (1. ed. 1905), vol. 1., § 319 Foreigners under the Protection of their Home State. For the passage on the "Position of Foreigners After Reception" in general, § 317–322.
[365] Ibid., §317 (p. 372), §319 fn. 1 (pp. 374–5).
[366] The author's translation: 'As an example of the application of this rule, allow me to summarize here the exposition of the famous case of don Pacifico, which we can find in volume III of Roberto Phillimore, page 29 and following.'
[367] Andrés Bello, *Principios de Derecho Internacional, Tercera Edición* (Valparaiso: Imprenta de la Patria, 1864, reprinted in *Obras Completas de Don Andres Bello, Volumen X Derecho Internacional*, Santiago de Chile: Pedro G. Ramirez, 1886), 119–21. In contrast to Andres Bello, *Principios de Derecho Internacional, Segunda Edicion, Aumentada Y Correjida* (Caracas: J. M. de Rojas, 1847), Capitulo v, de los ciudadanos y los extranjeros 7. Mansion de los extranjeros en el territorio; sus derechos y oblicaciones segun sus diferentes clases, at p. 77. See also, A. B. (Andres Bello), *Principios* (1832), Capitulo v, de los ciudadanos y los extranjeros 7. Mansion de los extranjeros en el territorio; sus derechos y oblicaciones segun sus diferentes clases, at pp. 54–55. This particular difference between the 1864 and earlier editions is highlighted by Dawson, "The Influence of Andres Bello", 307.

Furthermore going through Oppenheim's references on the 'position of aliens after reception' allows one to track how the idea of a customary norm became a mainstream notion in international legal doctrine. Whilst citing Phillimore and other publicists, Oppenheim points to William Edward Hall (1881) and John Westlake (1904) in particular for a detailed discussion of the 'right of protection over citizens abroad'.[368] Hall argues that states 'possess a right of protecting their subjects abroad which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions ; they have the right, that is to say, to exact reparation for maltreatment of their subjects by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain'.[369] Phillimore is referred to on this point, and furthermore Hall criticizes Calvo's account by suggesting that he should have looked for British published documents to get the facts of 'an illustrative case' right.[370] Hall concludes by holding that 'there is no difference in principle between wrongs inflicted by breach of a monetary agreement and other wrongs for which the state, as itself the wrong-doer, is immediately responsible' and cites Palmerston's circular of 1848 which had been 'more lately reaffirmed by Lord Salisbury' in 1880 on this point. [371]

In conceding the existence of the strong customary norm that is grounded through the idea of civilisation John Westlake (1904) highlights its substantive vagueness. Thus if government action is 'wanting either to the judicial or to the administrative department, the state to which a foreigner belongs has a claim to step in for his protection which often has this in common with political claims, that the justice which the foreign power demands for its subject is not measurable by definite rules.' Often when a 'subject complains of the breach of a definite rule included in the *modus vivendi* of nations, and even where it is otherwise whatever pertains to justice in the case of an individual is nearly allied to the science of law, depending largely as it does on the general notions on which the

[368] Oppenheim, *International Law* (1. ed. 1905), vol. i, §317 (p. 372), §319 fn. 1 (pp. 374–5).
[369] William Edward Hall, *A Treatise on International Law. Fourth Edition*, 4th ed. (Oxford: Clarendon Press, 1895), part ii, chap vii, § 87 "Protection of subjects abroad", 291–92. For the whole passage 291–96. I have checked that the used fourth edition of 1895 has only very small changes when compared to the first edition of 1881. See William Edward Hall, *A Treatise on International Law*, 1st ed. (Oxford: Clarendon Press, 1881).
[370] Hall, *Treatise* (4. ed. 1895), 291–92, fn. (1).
[371] Ibid., 293–94 and fn. (1).

peoples of European civilization are agreed that legal and administrative procedure ought to be based.' Thus Westlake concludes as 'they do exceptions to the general rule of submission to the territorial jurisdiction or administration, they are perhaps of all parts of international law that on which it is most difficult to say anything precise, and are peculiarly fitted for arbitration.'[372] Though Westlake does not cite legal doctrine on this point, he refers to contemporary state practice of the United States noting the 'frequency of their citizens' dealings with the West Indies and Spanish America as the cause of US despatches abounding on the subject of their protection.'[373] Westlake argues that the US has 'by the great extent to which their citizens have engaged in enterprises in countries where the security of civil rights has not been of the highest order' adopted 'a very cautious policy' and thus been 'sparing' in its 'exercise of the common right of interfering in case of a denial of justice'.[374] Finally in explicit contrast to Hall, who is referred to, Westlake thinks 'that the assistance of their state ought not to be granted to the bondholders of public loans, unless the defaulting government presumes to treat its internal and external debts on terms of inequality unfavourable to the latter'. Though he concedes that 'both Lord Palmerston and Lord Salisbury maintained the view that the right of intervention on behalf of bondholders is unquestionable'.[375]

Legal doctrine was of course not unanimous on the existence of a customary norm. For example Travers Twiss (1861) who is included in Oppenheim's references still adhered to the strong sovereignty and non-intervention that we have seen in Vattel, Wheaton and Calvo. For Twiss the 'Empire of a Nation within its own territory is of Natural Right exclusive and absolute' and the 'Right of Civil and Criminal Legislation in respect of all property and persons within the territory of a Nation is an incident of the Right of Empire'. Thus 'the Laws of every Nation bind of Natural Right all property situate within its territory as well as all persons resident therein, whether they be natives or strangers and that they control and regulate all the acts done or contracts entered into within its

[372] John Westlake, *International Law* (Cambridge: Cambridge University Press, 1904), part i peace, chapter xiv "The Protection of Subjects Abroad", 313–14. For whole passage, 313–20.
[373] Ibid., 314–15, citing examples of published US diplomatic correspondence from Wharton's *Digest*.
[374] Ibid., 317.
[375] Ibid., 319. Westlake also cites Rivier as an example of "Continental writers" upholding "such intervention as an important exercise of the right of self–preservation applied to the national fortune".

limits.'[376] With regards to contemporary state practice, though Twiss concedes the exceptional 'position of Europeans whilst resident amongst Asiatics' he argues that extraterritoriality is 'in the highest degree exceptional'.[377] Yet it was the viewpoint of Phillimore, Hall and Westlake that continued to prevail in early twentieth century international legal doctrine.

By 1910 the former US secretary of state Elihu Root could make an explicit argument for the existence of an 'established standard of civilization' protecting foreigners and their property in a presidential address of the American Society of International Law with a lone empirical reference to Palmerston's speech to the House of Commons during 'the famous Don Pacifico case', first cited in international legal doctrine by Phillimore in 1855.[378]

Coining the 'standard of civilization'

We have seen how the idea of a strong customary norm protecting foreigners and their property had become part of the mainstream of international legal doctrine by the turn of the twentieth century. This customary norm had been grounded from its mid-nineteenth century origins on the idea of civilisation. The following section looks at how this customary norm became explicitly conceptualised as a contested 'minimum standard of civilisation' during the first decades of the twentieth century. This fact that the infamous 'standard of civilisation' in effect consisted of the rebranding of an older customary norm has been previously largely ignored. The conventional understanding of the making of the 'standard of civilisation' sees Henry Wheaton (1836), the writer of perhaps the most influential

[376] Travers Twiss, *The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace. A New Edition, Revised and Enlarged*, 2. ed., vol. 1 (Oxford: Clarendon Press, 1884), book I, ch x right of jurisdiction, § 157. Incidents of the Right of Empire. I have here cited the second edition of 1884 as this is referenced by Oppenheim rather than the first edition of 1861. The text has not substantively changed. See Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, 1st ed., vol. 1 (Oxford: Clarendon Press, 1861), part I, §150.
[377] Twiss, *Law of Nations* (2. ed. 1884), 1:§ 163 Exceptional position of Europeans whilst resident amongst Asiatics. The passage has not changed from the first edition. See Twiss, *Law of Nations* (1. ed. 1861), 1:§156 Exceptional position of Europeans whilst resident amongst Asiatics.
[378] Elihu Root, "Address of Hon. Elihu Root, President of the Society, on The Basis of Protection to Citizens Residing Abroad," *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)*, vol. 4 (28–30 April 1910), 21–22.

nineteenth century work on international legal doctrine, as playing a crucial role in this process. Yet Wheaton, who as we have seen had a very strong emphasis on sovereignty and non-intervention, does not actually introduce the idea of a 'standard of civilisation' in any of the editions written by himself (1836, 1846). Furthermore the idea does not even implicitly exist in increasingly heavily modified posthumous editions of Wheaton (1855, 1866, 1878, 1916) until 1928. The term 'minimum standard of civilisation' does not feature even in Lassa Oppenheim (1905), who wrote the most influential early twentieth century work of legal doctrine, who merely reproduces the customary norm protecting foreigners and their property without linking it to the idea of civilisation. I argue that the explicit concept of the 'ordinary standards of civilization', was crucially only introduced to international legal doctrine by Arnold McNair (1928) in his edition of Oppenheim's *International Law*. McNair's crucial move mirrored Elihu Root, who had coined a 'standard of civilization' protecting foreigners and their property in his 1910 address to the American Society of International Law. Hersch Lauterpacht, the next editor of Oppenheim (1937), built upon McNair's changes and developed an even lengthier discussion of a 'minimum standard of civilization' that more explicitly noted the fact that the norm was increasingly contested in legal doctrine and state practice. Those contesting the idea advocated placing nationals and foreigners on the same footing and were perceived to draw from Carlos Calvo's (1863) earlier critique. The extensive references of McNair and Lauterpacht (and A. Keith Berriedale who edited *Wheaton's International Law* in 1928) on foreigners and their property allude to the great attention given to the issue by interwar lawyers in specialised professional journals such as the *British Year Book of International Law*.

Henry Wheaton

Though Wheaton (1836) has conventionally been understood to play a pivotal role in the invention of the 'standard of civilisation', the concept does not actually feature in his work.[379] As we have seen,

[379] For the usual story, Gong, *Standard of "Civilisation,"* 26–28. See also Bowden, "The Colonial Origins of International Law", 16.

Wheaton actually has a very strong emphasis on sovereignty and non-intervention. Wheaton argues '[e]very state … may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. Among these is that of establishing, altering, or abolishing its own municipal constitution of government.'[380] Wheaton's very limited exceptions to this rule do not include diplomatic protection extended to citizens and their property. For him the right of sovereignty can be limited only by 'some special compact'[381] or the 'equal correspondent rights of other states growing out of the same primeval right of self-preservation' which in practice refers to rare cases of intervention on grounds of security and the balance of power. [382] Instead the 'supreme, exclusive power of civil and criminal legislation is … an essential right of every independent state. This sovereign right extends … to the regulation of all the real (or immovable) and personal (or movable) property within the territory … whether it belongs to subjects or foreigners.'[383] More broadly it is interesting that Wheaton still associates the Enlightenment idea of civilisation with that of Christendom. As is clear when he defines the object of his enquiry as the 'law of nations, or international law, as understood among civilized, Christian nations'.[384] The last edition Wheaton himself edited (1846) does not modify his strong emphasis on sovereignty and non-intervention.[385] The only relevant minor change is a shift towards the idea of civilisation as Wheaton forgoes the reference to Christendom and now defines his object of study as 'International law, as understood among civilized nations'.[386] The notion of a 'standard of civilization' is equally absent from Wheaton's *History of the Law of Nations* (1845).[387]

---

[380] Wheaton, *Elements* (1. ed. 1836), part I, ch ii Rights of Independence, § 1 Independence of the state in respect to its internal government. (p. 131).
[381] Ibid.
[382] Ibid., part ii, ch i Right of Self–Preservation, § 4 Right of intervention (pp. 109–113).
[383] Ibid., part ii, ch ii Rights of Independence, § 5 Exclusive power of civil and criminal legislation (p. 136).
[384] Ibid., part I, chapter I "Sources and Subjects of International Law", § 11 "Definition of international law" (p. 46).
[385] Wheaton, *Elements* (3. ed. 1846), part ii Absolute International Rights of States, ch i Right of Self–Preservation and Independence, § 13 Independence of the state in respect to its internal government, also § 4 Right of intervention; part ii, ch ii Rights of Civil and Criminal Legislation, § 5 Exclusive power of civil and criminal legislation.
[386] Ibid., part I Definition, Sources, and Subjects of International Law, chapter I "Sources and Subjects of International Law", § 14 Definition of international law.
[387] Wheaton, *History of the Law of Nations in Europe and America; From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks & Co., 1845). This historical work is an enlarged English edition of an (1838) essay that won the prize for an Institut of France competition on 'Quels sont les progrès qu'a fait le droit des gens en Europe depuis la Paix de Westphalie?' As is expected Wheaton understands advances in the

Moreover the idea of a customary norm protecting foreigners and their property does not even implicitly exist in increasingly heavily modified posthumous editions of Wheaton's *Elements* until 1928. The posthumous editions of William Beach Lawrence (1855) and Richard Henry Dana Jr., whose 1866 work would become an influential standard edition of Wheaton, did not affect the text's strong emphasis on sovereignty and non-intervention.[388] The idea of a customary norm protecting foreigners and their property stayed absent from Wheaton, even though his editors sought to keep the text up to date by adding extensive footnotes.[389] In contrast, though the emphasis on non-intervention stayed the same in A. C. Boyd's edition (1878) he did add a reference recording a shift in contemporary state practice.[390] Boyd argued in his additional sub paragraph that the 'main reason' for the intervention by Britain, France and Spain in Mexico in 1861 'was to obtain the payment of debts contracted by the Mexican government' with their citizens.[391] It was only with Coleman Phillipson's

---

law of nations to be based on 'the rapid progress of civilization' (preface, iv-v). With regards to Wheaton's more specific historical interpretation he refers to Vattel as merely an 'elegant abridger' of Wolf (177) and emphasizes the role of Martens whose 1785 Göttingen lectures on the positive European law of nations 'has since passed through several editions, revised and corrected by the author until it has become a justly esteemed manual of the science.' (325) Wheaton considered contemporary doctrinal writers, with the exception of Martens and perhaps Sir James Mackintosh, as epigoni of Vattel who had not 'sensibly contributed to the progress of this branch of science' (749-50). Thus ignoring for example Chitty. Though more broadly Wheaton argued in this passage that 'progress' made since 1789 should be 'traced in practical discussions … rather than in the systematical treatises' of jurisprudents.

[388] Henry Wheaton, *Elements of International Law. Sixth Edition, with the Last Corrections of the Author, Additional Notes, and Introductory Remarks, Containing a Notice of Mr. Wheaton's Diplomatic Career, and of the Antecedents of His Life*, ed. William Beach Lawrence (Boston, 1855), part ii, ch. I, § 12 Independence of the State in respect to its internal government, also § 3 Right of intervention or interference ; part ii, ch. ii, § 1 Exclusive power of civil legislation. Henry Wheaton, *Elements of International Law, Eighth Edition, Edited with Notes by Richard Henry Dana Jr.*, ed. Richard Henry Dana Jr. (Boston: 1866), part ii, ch. I, § 72 Independence of the State in respect to its internal government, also § 63 Right of intervention or interference; part ii, ch. ii, § 77 Exclusive power of civil legislation. As we can see Dana changed the numbering of paragraphs into a continuous one extending throughout the treatise.

[389] Wheaton, *Elements* (Lawrence ed. 1855). full title of which is illustrative: *Elements of International Law. Sixth Edition, with the Last Corrections of the Author, Additional Notes, and Introductory Remarks, Containing a Notice of Mr. Wheaton's Diplomatic Career, and of the Antecedents of His Life*; Wheaton, *Elements* (Dana ed. 1866), editor's preface, v–vi, "The original contributions of the editor are all in the form of notes, which are indicated by numbers, enclosed in brackets and signed with the letter D." Dana's footnotes are at times extremely extensive, see for example part ii, ch. I, in particular § 76.

[390] Henry Wheaton, *Elements of International Law, English Edition, Edited with Notes, and an Appendix of Statutes and Treaties, Bringing the Work Down to the Present Time, by A. C. Boyd*, ed. A. C. Boyd (London, 1878), For the old overall emphasis on sovereignty and non–intervention, part ii, ch. i, § 72 Independence of the State in respect to its internal government, also § 63 Right of intervention or interference; part ii, ch. ii, § 77 Exclusive power of civil legislation.

[391] Ibid., part ii, ch. I, § 76a Intervention in Mexico in 1861. Though some other new cases of intervention are also mentioned, such as the Crimean war at additional subparagraphs §70a–d, they still fit with Wheaton's argument about exceptions in the case of upholding security and the balance of power. See also, § 76b The French garrison in Rome.

edition (1916) that Wheaton's core text began to be modified. Phillipson argued that 'in view of modern requirements, the whole–both original text and editorial additions–has been subjected to revision' and that he 'ought perhaps to be regarded as a co-author of this edition of the book, rather than as an editor in the usual sense of the term.'[392] Yet ironically Phillipson retained Wheaton's original emphasis on sovereignty and non-intervention.[393] With regards to the Mexican intervention of 1861 that was already mentioned by Boyd, Phillipson refers to the opinion of no other than Calvo. Though somewhat qualifying Calvo's interpretation of Britain's legal position, Phillipson still writes that 'M. Calvo justly says that this intervention "constitue pour les puissances qui s'y sont laissé entrainer un précédent aussi peu digne d'éloges que funeste a leur consideration et a leurs intérets". (Droit international, bk iii, 191)'.[394]

Thus counter-intuitively the idea of a customary norm protecting foreigners and their property reaches *Wheaton's Elements of International Law* only with A. Berriedale Keith's edition of 1929. Ninety-three years after the publication of the first edition and eighty-one years after the death of Wheaton himself. Berriedale Keith does this by adding a new subheading of cases on 'Intervention to redress wrongs of subjects' to the passage on the 'Rights of Intervention' which as we have seen was conceptualised very narrowly by Wheaton and subsequents editors.[395] In practice this new passage builds directly on Alexander Fachiri's 1925 article 'Expropriation and International Law' published in the *British Year Book of International Law* from which the examples of state practice are derived.[396] Berriedale Keith argues that while a 'State has admittedly the right to care for the interests of her subjects abroad, the limits of intervention on their behalf are decidedly vague'.[397] He then goes on to recent state practice of the Anglo-American powers. 'The United States has always placed the matter

[392] Henry Wheaton and Coleman Phillipson, *Wheaton's Elements of International Law, Fifth English Edition, Revised Throughout, Considerably Enlarged and Re-Written* (London: Stevens and Sons, 1916), preface to the Fifth English edition, vi, viii.
[393] Ibid., part ii, ch. I, p. 125 (Independence as to internal government), also pp. 90–92 (Right of intervention); part ii, ch. ii, p. 131 (Exclusive power of legislation).
[394] Ibid., part ii, ch. I, pp. 123–24 (Intervention in Mexico, 1861), on cases of intervention in general, pp. 93–130. These are in general political with some new ones that have been added by Phillipson.
[395] Henry Wheaton and A. Berriedale Keith, *Wheaton's Elements of International Law. Sixth English Edition, Revised Throughout, Considerably Enlarged and Re-Written* (London: Stevens and Sons, 1929), part ii, chapter i, iii Rights of Intervention, Intervention to redress wrongs of subjects at pp. 201–202.
[396] Fachiri, "Expropriation and International Law," *British Year Book of International Law* 6 (1925): 159–71.
[397] Wheaton and Berriedale Keith, *Wheaton's Elements* (Berriedale Keith ed. 1929), at pp. 201–202.

high among the duties of the State (Moore, Digest, vi. 247-324; Fachiri. B. Y. I. L. 1924 [sic], pp. 159-71.): it has demanded fair treatment, nor has it accepted merely equal treatment with the subjects of the foreign State in cases in which such treatment has appeared to it insufficiently in accord with American conceptions of the fundamental rights of men … British practice, like American, has depended essentially on the circumstances of each case.' Recent international arbitrations (1910, 1912) are referred to as 'they seem to establish a principle that confiscation of property, or the payment of nominal compensation, is a ground for intervention, even where there is no discrimination between nationals and non-nationals.' Yet it must be emphasised that Berriedale Keith acknowleges the fact that the idea of a customary norm had been and continued to be contested. Efforts 'have been made by South American jurists to secure agreement in the drastic limitation of the right of intervention for the purpose of enforcing payments of debts due to nationals, whether under State loans or State contracts (On the Calvo and Drago doctrines, see chap. vi. Post.)' However these 'have not succeeded in securing any principle of international law'. He ends by noting that it is 'however, clear that intervention here, as always, is primarily dictated by political considerations. The Powers of Europe abstained from armed intervention in Russia on account of the confiscation of the property of their nationals' after the October Revolution.[398]

Lassa Oppenheim

Having established that Wheaton cannot have played a pivotal role in coining the 'minimum standard of civilisation' in international legal doctrine, the next logical author to look at seems to be Lassa Oppenheim (1905) who wrote the most influential early twentieth century doctrinal work. However Oppenheim merely reproduces the idea of a customary norm protecting foreigners and their property, which as we have seen derives from Robert Phillimore (1855-57). Moreover in contrast to Phillimore and John Westlake (1904) Oppenheim does not link the customary norm to the idea of civilisation. Though more generally Oppenheim argues that the 'the basis of the Law of Nations is the common

[398] All citations in this paragraph are from Ibid., at pp. 201–202.

consent of the civilised States'.[399] In his discussion of the 'Position of Foreigners After Reception' Oppenheim holds that although 'foreigners fall at once under the territorial supremacy of the State they enter, they remain nevertheless under the protection of their home State. By a universally recognized customary rule of the Law of nations every State holds a right of protection over its citizens abroad ... State *can* exercise this right when one of its subjects is wronged abroad in his person or property'.[400] Though Oppenheim interestingly does not cite state practice on this point he does specifically refer to William Edward Hall (1881) and John Westlake (1904).[401] As a consequence of this 'right of protection over its subjects abroad which every State holds ... every State is by the Law of Nations compelled to grant to foreigners equality before the law with its citizens as far as safety of person and property is concerned. A foreigner must in especial not be wronged in person or property by the officials and Courts of a State.' Oppenheim concludes by arguing that corrupt 'administration of the law against natives is no excuse for the same against foreigners, and no Government can cloak itself with the judgment of corrupt judges.'[402]

Thus even though in the middle of the passage Oppenheim rather contradictorily advocates granting foreigners 'equality before the law ... as far as safety of persons and property is concerned' this it not an 'excuse' for 'corrupt administration of the law ... against foreigners' who remain under the protection of a customary norm that allows for the diplomatic intervention of their home state. Interestingly this paragraph on the 'Protection to be afforded to Foreigners' Persons and Property' refers to neither state practice nor legal doctrine, despite of the fact that Oppenheim is usually understood as the high point of legal positivism.[403] Oppenheim did not modify his account of the customary norm in the 1912 edition.[404] Though he elsewhere added 'any act that violates the body, the honour, or the property of' citizens of another state as an object of international delinquencies in his

[399] Oppenheim, *International Law* (1. ed. 1905), vol. 1., § 71.
[400] Ibid., § 319 Foreigners under the Protection of their Home State. For the passage on the "Position of Foreigners After Reception" in general, § 317–322.
[401] Ibid., § 319 fn 1, 3.
[402] Ibid., § 320 Protection to be afforded to Foreigners' Persons and Property.
[403] Ibid., § 320.
[404] Lassa Oppenheim, *International Law: A Treatise*, 2nd ed., vol. 1 (London, 1912), Though two new references to specialist legal doctrine are added to § 319, the discussion on foreigners and their property at § 320 remains without references.

discussion of state responsibility. A footnote to this paragraph makes it explicit that Oppenheim considers 'public debts due to foreigners' as constituting a part of 'property'. [405] These passages remained unchanged in the posthumous edition of 1920 edited by Ronald F. Roxburgh.[406]

It was only with Arnold McNair's edition (1928) of Oppenheim's *International Law* that the explicit concept of the 'ordinary standards of civilization' was introduced to the mainstream of international legal doctrine. McNair added a footnote to the paragraph on the 'Protection to be afforded to Foreigners' Persons and Property' in which he referred readers on 'the question whether equality of treatment of aliens and nationals is the test or whether aliens are entitled to be treated in accordance with the ordinary standards of civilization' to '*Robert's* Claim before the American-Mexican Claims Commission' and 'Fachiri in B.Y., 1925'.[407] Moreover he also refers the reader to Oppenheim's discussion of state responsibility for international delinquencies that, from the 1912 edition onwards, included acts violating a foreigner's person, honour or property.[408] McNair added a new subparagraph to this discussion that engaged more fully with criticisms of this customary norm that Oppenheim had previously merely dismissed in a footnote.[409] Thus the 'Governments of a number of Central and South American Republics frequently insert in contracts with the nationals of foreign States a clause (known as the 'Calvo clause') whereby the foreign national agrees that any claim or dispute arising under the contract shall be disposed of by the local tribunals and shall not be the subject of 'international reclamation,' thereby purporting to renounce any claim upon his home State

[405] Ibid., § 155 Objects of International Delinquencies. In fn. 1 Oppenheim moreover specifically considers that "a State which does not pay its public debts due to foreigners and refuses, on the demand of the home state of the foreigners concerned, to make satisfactory arrangements commits international delinquency there is no doubt" and refers readers to his discussion of the "so–called Drago doctrine" and the Hague Convention concerning the Employment of Force for the Contract of Debts at §135, no. 6. For the discussion on "State Responsibility for International Delinquencies" in general, §151–156.
[406] Lassa Oppenheim, *International Law: A Treatise*, ed. Ronald F. Roxburgh, 3rd ed., vol. 1 (London, 1920), Roxburgh merely added a new reference to specialist legal doctrine to the beginning of the passage on the "position of aliens after reception". "Every student desiring information on a special point arising out of the position of aliens after reception or concerning citizens and their property abroad must study the excellent and standard work of Borchard, The Diplomatic Protection of Citizens Abroad (1919)." at §317, fn. 1. Also § 155 remains the same.
[407] Lassa Oppenheim, *International Law: A Treatise*, ed. Arnold McNair, 4th ed., vol. 1 (London, 1928), § 320, fn. 1.
[408] Ibid., § 155.
[409] Ibid., § 155a. In contrast to Oppenheim, *International Law* (2. ed. 1912), vol. 1., § 155 fn 1. Also Oppenheim, *International Law* (Roxburgh ed. 1920), vol. 1., § 155 fn. 1.

for its protection.' McNair however argues that it 'is believed that while they may often have the legal effect of ousting the jurisdiction of an international tribunal until the remedies of the local courts have been exhausted, nevertheless the weight of authority is against the validity of so much of a 'Calvo clause' as purports to make an individual renounce the right which International Law confers, not upon him but upon his home State, of protecting him against treatment which contravenes the rules of International Law.' A long footnote refers to specialized contemporary case law and legal writing on the topic.[410]

A comparison with J. L. Brierly's exactly contemporary doctrinal work (1928) helps to demonstrate that the term 'ordinary standards of civilization' used by McNair was not yet established in international legal doctrine though the notion of linking the customary norm protecting foreigners and their property with the idea of civilization was very much part of the mainstream. Brierly argues that states 'must observe a certain standard of decent treatment' towards aliens.[411] If 'a state has a low standard of justice towards its own nationals, an alien's position is in a sense a privileged one, for the standard of treatment to which international law entitles him is an objective one, and he need not, even though nationals must, submit to unjust treatment.' Brierly does note at this point that this 'statement of the law is denied by certain Latin-American states, which hold that if a state grants equality of treatment to nationals and non-nationals it fulfils its international obligation'. Yet referring to William Edward Hall's work (1881) Brierly explicitly holds that 'international law itself is a product of the special civilization of modern Europe, and reflects the essential facts of that civilization so far as they are fit subjects for international rules; and among those facts is the existence in most states of a municipal law, consonant with modern European ideas, and so administered that foreigners may obtain criminal and civil justice from it … When a state fails to observe this standard it is said to be guilty of a 'denial of justice'.'[412] Edwin Borchard's (1914) specialist legal work *Diplomatic Protection of Citizens Abroad* –which is also referred to in Oppenheim from Roxburgh's 1920 edition onwards–

[410] Oppenheim, *International Law* (McNair ed. 1928), vol. 1., § 155a. The footnote includes also a reference to Borchard.
[411] J. L. Brierly, *The Law of Nations. An Introduction to the International Law of Peace* (Oxford: Clarendon Press, 1928), 137–138. For the passage on "Jurisdiction over Aliens" in general, 137–45.
[412] Ibid., 138–39.

is then cited at length for a definition of 'denial of justice'.[413] Borchard argues that 'treaties and international practice' has 'secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty and property'. A state thus cannot violate this 'somewhat indefinite standard of treatment' established by international law 'without incurring international responsibility'. Furthermore an alien cannot be deprived 'of the right to appeal to the diplomatic protection of his own government' if this vague 'minimum of rights' has been violated. [414]

Hersch Lauterpacht, the next editor of Oppenheim (1937), built upon McNair's changes and developed an even lengthier discussion on the customary norm that noted explicitly the fact that it was increasingly contested particularly as far as it applied to foreigners' property in both legal doctrine and state practice. It is in this discussion that Lauterpacht crucially introduces the explicit concept of a 'minimum standard of civilization' to international legal doctrine. Lauterpacht achieved this by adding a further new sub paragraph to the discussion on state responsibility for delinquencies on 'The Plea of Non-Discrimination' whilst retaining McNair's earlier modifications elsewhere.[415] Lauterpacht argues that it is 'a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations.' Thus a state 'when charged with a breach of its international obligations with regards to the treatment of aliens, cannot validly plead that according to its Municipal Law and practice the act complained of does not involve discrimination against aliens as compared with nationals.' For Lauterpacht this 'applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum standard of civilization, and that a State which fails to measure up to that standard incurs international liability.' As in McNair's edition, contemporary international arbitrations such as the *Roberts* claim before the US-Mexican commission (1926) is cited on this point.[416] However in contrast to the earlier doctrine of

[413] Ibid., 139–40. See Oppenheim, *International Law* (Roxburgh ed. 1920), vol. 1., §317, fn. 1. The work had originally been published as Edwin Borchard, "The Diplomatic Protection of Citizens Abroad" (PhD dissertation, Columbia University, 1914).
[414] Citations are from the 1928 edition: Edwin Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: Banks Law Publishing, 1928), Minimum of Rights Due to Aliens, at p. 39.
[415] Lassa Oppenheim, *International Law: A Treatise*, ed. Hersch Lauterpacht, vol. 1 (London, 1937), § 155d The Plea of Non–Discrimination. For the other relevant passages that had been modified by McNair, §155 and §320.
[416] Ibid., §155d fn. 4. See in contrast Oppenheim, *International Law* (McNair ed. 1928), vol. 1., §155a.

McNair, Lauterpacht distinguishes that this 'position is more difficult with regard to the treatment of the property of aliens as compared with that of nationals.' Though the 'rule is clearly established that a State is bound to respect the property of aliens' it 'is qualified, but not abolished, by two factors'. First a state can undertake 'far-reaching interference with private property in connection with taxation, measures of police, public health, and the administration of public utilities.' The second point basically refers to revolutions. Fundamental 'changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the disposed nationals offer a satisfactory solution of the difficulty.' Lauterpacht suggests that it is probable that 'consistently with legal principle, such solution must be sought in the granting of partial compensation.' On this point Lauterpacht's new footnote adds considerably more references to McNair's already formidable review of interwar case law and legal writing. The huge footnote includes not only writers who were broadly in favour of what Lauterpacht reconceptualised as the 'minimum standard of civilization' such as Fachiri and Borchard, but also contemporary dissenting voices such as John Fischer Williams who criticized Fachiri's analysis in the *British Year Book of International Law* (1929).[417]

Old wine in a new bottle: towards the 'international minimum' and 'fair and equitable treatment' standards

This section looks at how the strong customary norm protecting foreigners and their property that had been conceptualised as a 'minimum standard of civilisation' in international legal doctrine during the early decades of the twentieth century was yet again rebranded. In the years after the Second World War the 'minimum standard of civilisation' was reconceptualised as an 'international minimum standard'. The idea of a 'standard of civilisation' based on European mores had been tainted both by

[417] Oppenheim, *International Law* (Lauterpacht ed. 1937), vol. 1., § 155 fn. 5. See for example Sir John Fischer Williams, "International Law and the Property of Aliens," *British Year Book of International Law* 9 (1928).

Europe's descent to barbarity and the shift towards ideas of strong sovereignty and national self-determination that drove the decolonisation process.[418] Yet this innocuous 'international minimum standard', which is still invoked in contemporary international investment disputes, consists in substantive terms of the old 'minimum standard of civilisation'.[419] Thus though the idea of 'civilisation' has been explicitly abandoned by international legal doctrine it survives beneath the waterline. This transformation of the 'standard of civilisation' and the fact that it is still part of international legal doctrine under its new assumed identity has been oddly neglected. The section will then conclude with a brief discussion of the latest contemporary metamorphosis of the norm as the complementary 'fair and equitable treatment' standard.

The first shift becomes clear when comparing Hersch Lauterpacht's post war editions of Oppenheim (1948, 1955) that still despite of the founding of the organisation of the United Nations ascribe to the old notion of the 'minimum standard of civilisation'. In contrast the same passage in Robert Jennings and Arthur Watts' ninth edition of Oppenheim published over four decades later (1992) has reconceptualised the idea as the 'international minimum standard'. This conceptual shift was first undertaken in international legal doctrine by Ian Brownlie in 1966. Brownlie's move drew on earlier legal practice, as Root had already in his 1910 speech referred to an 'international standard' that he held synonymous with the 'standard of civilization'.[420] The 1920s opinions of the US-Mexican general claims commission also used both 'ordinary standards of civilization' and 'international standards'.[421] This 'international minimum standard' was contested by those advocating a 'national

[418] On this shift in general, Keene *Beyond the Anarchical Society*.
[419] The continuity from the 'standard of civilisation' to the 'international minimum standard' has been largely ignored in the literature. See the standard account in Gong, *Standard of "Civilisation"*. Miles, *The Origins of International Investment Law* at 47–50 anachronistically equates the "international minimum standard", for which Borchard (1914) is erroneously referenced though he does not use the concept, with the nineteenth century customary norm protecting foreigners and their property. Paparinskis' excellent study that has a contemporary and legal positivist focus is an exception, though he does not elaborate on the consequences of this conceptual history for our understanding of the history of the global legal order. See *International Minimum Standard*, 20.
[420] "Address of Hon. Elihu Root, President of the Society, on The Basis of Protection to Citizens Residing Abroad," Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917), vol. 4 (28-30 April 1910), 21-2.
[421] For 'ordinary standards of civilization', "Harry Roberts (United States v. Mexico), Opinions of the Commissioners (1927) 100, 105." Cited in Green Haywood Hackworth, *Digest of International Law*

standard' placing foreigners and their property on the same footing as nationals, thus drawing from Calvo and interwar critics of the 'minimum standard of civilisation'. The most recent rebranding of the norm as a complementary 'fair and equitable treatment' standard in legal practice was afterwards added to a posthumous edition (2012) of Brownlie's treatise, which has nowadays superseded *Oppenheim's* as the most influential reference work in international legal doctrine.

Lassa Oppenheim

Lauterpacht writes in 1948 that he 'discarded the idea of merely re-printing the sixth edition' as 'the proper course seemed to be to bring this volume up to date, in a new edition, as far as possible.' This was because there 'would be no justification for neglecting, in a treatise of this kind' the setting up of the 'United Nations and of the institutions ... under its aegis.'[422] Yet despite of the new post war international legal order Lauterpacht's analysis of the 'minimum standard of civilization' remained unchanged. Lauterpacht still argued as he had in 1937 that it 'is a well-established principle that a State cannot invoke its municipal legislation as a reason for avoiding its international obligations ... This applies in particular to the question of the treatment of the persons of aliens.' Though qualified the 'rule is clearly established that a State is bound to respect the property of aliens.' In exceptional cases 'consistently with legal principle ... solution must be sought in the granting of partial compensation.'[423] Lauterpacht's discussion remains unchanged in the 1955 edition, even though the footnote on the subject now includes references 'to problems which arose after the Second World War'.[424] Contemporary legal doctrine continued to reflect Lauterpacht's conceptual framework. Paul Guggenheim (1947-48) referred to a '*Mindeststandard der zivilisierten Staaten* den Masstab fur die

(Washington: Government Printing Office, 1940), vol. 3, pp. 636–7-40. For 'international standards', Neer case, cited in ibid., vol. 3, pp. 636–7.

[422] Lassa Oppenheim, *International Law: A Treatise*, ed. Hersch Lauterpacht, 7th ed., vol. 1 (London: Longmans, Green and co, 1948), preface to the seventh edition, v.

[423] Ibid., § 155d, also § 320.This remains unchanged from Oppenheim, *International Law* (Lauterpacht ed. 1937), §155d and §320.

[424] Lassa Oppenheim, *International Law: A Treatise*, ed. Hersch Lauterpacht, 8th ed., vol. 1 (London: Longmans, 1955), §155, fn. 1, for the passages in general § 155 and also § 320.

Rechte and Pflichten der Fremden' and George Schwarzenberger (1955) dropped the 'minimum' out of Lauterpacht's concept and wrote simply of a 'Standard of Civilisation in International Law'.[425]

Schwarzenberger's meandering essay however reimagines the discrete notion of a 'standard of civilization' to refer to the broader question of the relationship between 'Civilisation and International Law', which for example includes the idea of entry criteria to the family of civilized nations.[426] The concept is also anachronistically applied to the nineteenth century (and beyond).[427] This somewhat obscure work's importance lies in the fact that ideas introduced in it seemingly formed the basis for Gerrit Gong's hugely influential tacit reconceptualization of the 'standard of civilization' (1984).[428] Gong argues that '[b]y 1905, at the latest, a standard of 'civilization' had emerged as an explicit legal principle and an integral part of the doctrines of international law prevailing at the time. Schwarzenberger describes it as 'an elastic but, nevertheless, relatively objective standard for the treatment of foreign nationals' that had 'crystallised into a rule of international customary law' from the middle of the nineteenth century.'[429] This seems conventional enough at first sight, even though Root's speech took place five years later. The reference to Schwarzenberger in this passage is also from a later textbook (1976), which provides a conventional take on 'Minimum Standards in Favour of Foreigners'.[430]

---

[425] Paul Guggenheim, *Lehrbuch Des Völkerrechts*, vol. 1 (Basel, 1947), 307. The author's translation: 'minimum standard of civilized states the benchmark for the rights and duties of aliens'.
George Schwarzenberger, "The Standard of Civilisation in International Law," *Current Legal Problems*, 1955, 220. For the concept Schwarzenberger cites his own 'International Law, Vol. 1, 1949' at 'p. 98 et seq.' The cited passage actually provides quite a conventional discussion of 'Limitations in Favour of Foreigners: The Minimum Standards of International Law' beginning with the *Neer* case, in contrast with the 1955 essay. See Georg Schwarzenberger, *International Law*, vol. 1 (London: Stevens, 1949), at p. 98 et seq. Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens* (Leiden: Sijthoff, 1949), argues at p. 81 that the "minimum standard – appears in the doctrinal writings under different, though related names: theory of the standard of civilized justice, or minimum standard of international law or civilization." For "standard of civilized justice" he refers to "Borchard A. S. Proceedings 1939, p. 60.", for the "minimum standard of international law" to the sixth edition of Oppenheim (1947) edited by Lauterpacht at "vol I, p. 283.", and for the "standard of civilization" to the aforementioned passage in Guggenheim (1947–48). Yet the cited passage in Oppenheim, *International Law (Lauterpacht* ed. 1948), vol. 1: discusses the Monroe doctrine (p. 283, ie §139 The Monroe Doctrine, §140 Merits of the Monroe Doctrine), and the sixth edition actually still refers to the "minimum standard of civilisation" (§155d) in the passage introduced by Lauterpacht in 1937.
[426] Schwarzenberger, 'Standard of Civilisation', 212, 220.
[427] Ibid., eg at 220-21.
[428] Gong, *Standard of "Civilization"*, citing Schwarzenberger's essay at 24.
[429] Ibid., 14.
[430] Georg Schwarzenberger and E. D. Brown, *A Manual of International Law*, 6th ed. (Milton: Professional Books, 1976), 84.

Crucially Gong however applies the notion of a 'standard of civilisation' acontextually to analyse quite a different dimension of international legal order. In effect reconceptualizing the norm as a set of criteria regulating membership of late nineteenth and early twentieth century international society. Thus building on ideas we have seen expressed in Schwarzengerger's earlier essay, even though Gong seemingly misquotes the conventional account from Schwarzenberger's later textbook as a basis for what is actually quite a novel understanding of the norm. This becomes clear from his argument that 'with the emergence of Japan, the implicit set of customary practices, carried from the European state tradition into a global setting by the expansion of the international society, became an explicit standard of 'civilization'.' Gong then cites Oppenheim's (1905) three conditions for a state to be recognized as a sovereign member of the family of civilized nations: 'A State to be admitted must, first, be a civilized State which is in constant intercourse with members of the Family of Nations; Such a State must expressly or tacitly consent to be bound for its future international conduct by the rules of International law; and Those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.'[431]

The question of membership of international society was indeed linked with ideas of 'civilization' and was a crucially important dimension of late nineteenth century and early twentieth century international law. Yet, in contrast to Gong, contemporary lawyers understood the 'standard of civilization' to refer to something quite different and specific. Namely the protection of foreigners and their property in states that had been at least in principle recognized as full members of the family of civilised nations. Gong's tacit reconceptualization of the 'standard of civilization' has however been so successful that its alternative contextual meaning has largely dropped out of the picture among not only IR scholars but also historians of international law.[432]

[431] Gong, *Standard of "Civilization"*, 30.

[432] For examples of works following Gong: Koskenniemi, *Gentle Civilizer*, 132-6; Bowden, "The Colonial Origins of International Law"; Keene, "The Standard of 'Civilisation', the Expansion Thesis and the 19th-Century International Social Space," *Millennium: Journal of International Studies* 42, no. 3 (2014); Becker Lorca, *Mestizo International Law*, 65-75; Benton and Ford, *Rage for Order*, 19. For recent works that exceptionally note the substantive focus of the concept though the implications of this for the history of the

I will now return to conclude the briefly interrupted contextual story of the 'standard of civilization' in international legal doctrine. In contrast to Lauterpacht (1955) Robert Jennings and Arthur Watts' ninth edition (1992) has rebranded the idea as an 'international minimum standard'. The new edition looks at first sight different. The new editors not only changed the title to *Oppenheim's International Law* and updated the substance but also revised the structure of 'Lauterpacht's 'Oppenheim''. This they argue is undertaken because of the work's 'status as a practitioner's book, rather than as an academic treatise, and its attempt to provide a helpful beginning for an inquiry into particular problems.'[433] Yet though the label of the norm has changed to the 'international minimum standard' remarkably the substance of this particular discussion remains essentially unchanged. Watts and Jennings argue that the 'state in whose territory an alien resides must afford his person and property at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law, and must grant him at least equality before the law with its own nationals as far as safety of person and property is concerned.'[434] For them it is 'a well-established principle that a state cannot invoke its municipal legislation as a reason for avoiding its international obligations ... This applies in particular to the question of the treatment of the persons of aliens. It has been repeatedly laid down that there exists in this matter a minimum international standard'. Following Lauterpacht, they concede that the 'position is more difficult with regard to the treatment of the property of aliens as compared with that of nationals.'[435] Yet despite of the fact that states have a 'broad measure of discretion ... by customary international law, in relation to the treatment' of aliens and their property, including a qualified right of expropriation in return for adequate compensation, this is still not unlimited. Jennings and Watts explicitly argue that 'quite apart from any treaty obligations which may

---

global legal order are left somewhat underexplored, Paparinskis, *International Minimum Standard*, 20; Schultz, "Civilisation, Barbarism and the Making of Latin America's Place", 847–49.

[433] Lassa Oppenheim, *Oppenheim's International Law, Ninth Edition*, ed. Robert Jennings and Arthur Watts, 9th ed., vol. 1 (paperback reprint of the 1992 ed. at London: Longmans, 1996), preface to the ninth edition, xi–xiii.

[434] Ibid., §405 Protection afforded to the persons and property of aliens.

[435] Ibid., § 409 National and international standard of treatment: non–dicrimination. Cited at pp. 931, 933.

limit that discretion ... a state's obligation to observe in its treatment of aliens certain minimum international standards applies also in respect of their property.'[436]

Ian Brownlie

However the conceptual shift from a 'standard of civilization' to an 'international minimum standard' had taken place in mainstream international legal doctrine already in 1966. Ian Brownlie contrasted a 'standard of national treatment' with an 'international minimum standard' in his *Principles of Public International Law* which was to become perhaps the most influential doctrinal work of the latter half of the twentieth century.[437] Brownlie argued that there 'has always been considerable support for the view that the alien can only expect equality of treatment under the local law because he submits to local conditions with benefits and burdens and because to give the alien a special status would be contrary to the principles of territorial jurisdiction and equality.' Interestingly Brownlie also offers a short historical interpretation of the debate. The 'principle of national treatment had support from many jurists in both in Europe and Latin America prior to 1940' and was 'advocated as early as 1868 by the Argentinian jurist Calvo'.[438] In contrast since 'the beginning of the present century legal doctrine has opposed an 'international minimum standard', 'a moral standard for civilized states', to the principle of national treatment.' Leading 'protagonists' of this position included according to Brownlie amongst others Borchard and Oppenheim. Brownlie argues that this 'standard has also enjoyed the support of many tribunals and claims commissions' and cites the US-Mexican commission's judgment in the *Neer* claim (1926) for a definition of the norm: The 'propriety of governmental acts should be put to the test of international standards ... the treatment of an alien, in order to constitute an international delinquency should amount to an outrage, to bad faith, to willful

[436] Ibid., §407 Property of aliens: expropriation, cited at pp. 911–12.
[437] Ian Brownlie, *Principles of Public International Law*, 1st ed. (Oxford: Clarendon Press, 1966), Part ix: the protection of individuals and groups, xxi injury to the persons and property of aliens on state territory, 4, standard of national treatment, 5 international minimum standard, 6 two standards in perspective. On Brownlie's influence, Ian Brownlie, *Brownlie's Principles of Public International Law*, ed. James Crawford, 8th ed. (Oxford: Oxford University Press, 2012), preface.
[438] Brownlie, *Principles* (1. ed. 1966), 424–25, also fn. 2.

neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'[439] As we have seen, by 1976 Schwarzenberger who wrote of a 'standard of civilisation' in 1955 had dropped civilisation from the concept and was referring to a 'minimum standard of international law'.[440]

The discussion of the 'international minimum standard' Brownlie wrote for the first edition of 1966 remained almost unchanged, with the addition of some contemporary references, until the latest –and first posthumous– eight edition of what is now known as *Brownlie's International Law* (2012) edited by James Crawford.[441] Recent changes in legal practice were then reflected in a posthumous edition of what had become the most influential contemporary work of international legal doctrine. Thus dovetailing with a dynamic of international legal change already analyzed in earlier parts of this thesis. In the words of prominent international lawyers, Brownlie's *Principles* 'has for many years been recognized as one of the great classic treatises of international law'[442] and '[i]t is difficult to overestimate the importance of successive editions of Ian Brownlie's *Principles* for the teaching of international law over the last 45 years.'[443] Crawford's *Brownlie's International Law* complemented Browlie's discussion of an international minimum standard with references to recent international arbitrations affirming the norm and by adding a section on the fair and equitable treatment standard.

In contrast to Brownlie's last seventh edition (2008) Crawford has in his *Brownlie's* updated the passage through citations of the NAFTA tribunal's two recent conflicting interpretations of *Neer*, which pertain to the question of whether the international minimum standard is synonymous with the 'fair and equitable treatment' standard of modern bilateral investment treaties (BITs).[444] The proponents of the latter viewpoint interpret the 'fair and equitable treatment' standard as even more

[439] Ibid., 425–26.
[440] Georg Schwarzenberger and E. D. Brown, *A Manual of International Law, Sixth Edition*, 6th ed. (Guildford: Professional Books, 1976), 84.
[441] Brownlie, *Principles* (1. ed. 1966), 424–429. Ian Brownlie, *Principles of Public International Law, Seventh Edition* (Oxford: Oxford University Press, 2008), 522-8. Brownlie, *Brownlie's Principles* (Crawford ed. 2012), 611–616. Brownlie died in 2010 in a car accident in Cairo.
[442] Bruno Simma, cited in backcover of Brownlie, *Brownlie's Principles* (Crawford ed. 2012).
[443] Ibid., preface.
[444] Brownlie, *Brownlie's Principles* (Crawford ed. 2012), 614. See also Brownlie, *Principles* (2008), 528.

expansive and complementary to the older norm.[445] Crawford has also added an entirely new section on 'Breach of the fair and equitable treatment standard', which is defined as 'an autonomous standard of investment protection set out in the vast majority of BITs'.[446] Crawford's new passage notes the debate on whether 'FET' (fair and equitable treatment standard) is 'linked to the customary standard of minimum treatment of aliens' and argues that in 'ascertaining the meaning and scope of the FET standard, tribunals have often considered it in relation to the international minimum standard of treatment, particularly in the context of NAFTA arbitration.'[447]

Conclusion

This chapter has tracked the evolution of the notion of a strong customary norm protecting foreigners and their property, most commonly known as the 'standard of civilization', in international legal doctrine. Against conventional wisdom, I have shown that some of the most famous classics of international legal doctrine –the treatises of Emer de Vattel (1758), Henry Wheaton (1836) and Lassa Oppenheim (1905)[448]– did not play a pivotal role in the evolution of the 'standard of civilization'. Instead changes that had occurred through other legal practices were introduced afterwards in later editions of these works. Sometimes these shifts in foreigners' property rights had already been transferred to international legal doctrine through other less well-known works –as we can begin to ascertain from references in the canonical works. I have thus highlighted the key roles played by Robert Phillimore (1855-57) and Ian Brownlie (1966). Phillimore introduced a strong customary norm protecting foreigners and their property that is grounded in the idea of civilization to international legal doctrine. Brownlie rebranded the norm as the 'international minimum standard' that survives to this day. However often the editors of later editions of canonical works have directly played a crucial

[445] On this debate in contemporary arbitral practice and legal doctrine, Paparinskis, *International Minimum Standard*, 160-6; Salacuse, *Law of Investment Treaties*, 222-8.
[446] Brownlie, *Brownlie's Principles* (Crawford ed. 2012), 616 – 9, cited at 616.
[447] Ibid., 617.
[448] Grotius, *De Iure Belli Ac Pacis*; Vattel, *Les Droit Des Gens*; Wheaton, *Elements*; Oppenheim, *International Law: A Treatise*, vol. 1.

role in changing international legal doctrine by drastically modifying the content of these canonical works in order to make them useful for contemporary lawyers. I have thus shown that Arnold McNair (1928) reconceptualised Phillimore's idea of a strong customary norm as the 'ordinary standards of civilization' in his edition of Oppenheim. Whilst the precise term 'minimum standard of civilization' was coined in Hersch Lauterpacht's edition (1937) of Oppenheim, which also first highlighted a distinction between the two key elements of the norm: the protection of foreigners' persons and of their property. I have moreover shown that the most recent reinvention of the notion as a 'fair and equitable treatment standard' was also introduced to Brownlie's by then classic treatise in James Crawford's (2012) posthumous edition.

Second this new history of foreigners' property rights in international legal doctrine presents a significant substantive contribution to our understanding of the evolution of the global legal order. With regards to our understanding of the development of foreigners' property rights, I have provided the first detailed analysis of the emergence of a strong customary legal norm protecting foreigners and their property in international legal doctrine in the middle of the nineteenth century. I have argued for the pivotal role of the positivist doctrine of Robert Phillimore in this process, in contrast with the older interpretation that focused on Vattel.[449] Drawing on contemporary British state practice, Phillimore crucially grounded the new conception of a strong customary norm protecting foreigners and their property in the idea of civilisation. This development reinvented an older weak customary norm that had made diplomatic intervention possible in the case of a denial of justice after local remedies offered by domestic courts had been exhausted. What was novel in the new conception of the norm was that domestic remedies needed not be always exhausted when a state's civilization was deemed lacking. This exception implying that some states could be more sovereign than others, which potentially entailed a hierarchical conception of international order.

[449] Cited in Lipson, *Standing Guard*, 8, 278–79, n. 10. In Miles, *Origins of International Investment Law*, 47 fn. 188. See also Keene, *Beyond the Anarchical Society*, 103–105.

The customary norm was soon subjected to a radical Latin American challenge, which contested the possibility of diplomatic intervention altogether. This was coined as the 'national standard' with regards to foreigners and their property or alternatively the 'Calvo doctrine'. After Carlos Calvo who, mirroring contemporary Latin American practice, first laid out this position in legal doctrine in 1863. With regards to the later development of this norm, I have highlighted the fact that the infamous 'minimum standard of civilization' actually consisted of this customary norm protecting foreigners and their property that had merely been relabelled in the early decades of the twentieth century.[450] Crucially the contemporary 'international minimum' and 'fair and equitable treatment' standards in international investment law in their turn also actually draw from this 'minimum standard of civilization' that was rebranded after the Second World War. Though our conventional understanding of the history of foreigners' property rights has been largely oblivious of these shifts, and furthermore anachronistically already refers to the late nineteenth century customary norm as the 'international minimum standard'.[451]

[450] Gong's standard account misses this. For works that have noted this though they do not investigate its origins in international legal doctrine, see Brownlie, *Principles* (1. ed. 1966), 424–429; Paparinskis, *International Minimum Standard*, 20; Schultz, "Civilisation, Barbarism and the Making of Latin America's Place", 847–49.
[451] Miles, *Origins of International Investment Law*, 47–50. Exceptionally for recent work Paparinskis, *International Minimum Standard*, at 20 recognizes the origins of the "international minimum standard" as the "minimum standard of civilization".

Chapter Five: The Making of the 'Standard of Civilization' in Legal Practice

This chapter explores the origins of a strong customary norm protecting foreigners' property rights in international legal practice. This reinvented customary norm, grounded through the idea of civilization, began to complement the more narrow and contingent rights that had been established through bilateral treaty making. Though the pivotal importance of the norm –that is nowadays best known by its later appellation as the 'standard of civilization'– for the global legal order has been widely recognized, our understanding of its making remains somewhat fragmentary.[452]

I argue that British diplomats and legal advisers engaged in disputes with poorer capital-importing Southern European and Latin American states in effect created the stronger customary norm in the middle of the nineteenth century. Though Britain had traditionally concluded and later invoked trade treaties in disputes it increasingly began to claim that there also existed a strong customary legal norm between 'civilized' states irrespective of specific treaty law. This development reinvented an older weak customary norm that had made diplomatic intervention possible in the case of a denial of justice after local remedies offered by domestic courts had been exhausted. What was novel in the new conception of the norm was that domestic remedies needed not be always exhausted when a state's civilization was deemed lacking. This exception implying that some states could be more sovereign than others, which potentially entailed a hierarchical conception of the international legal order.

[452] For most detailed accounts of foreigners' property rights in the nineteenth century Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law*; See also Lipson, *Standing Guard*; Schwarzenberger, "The Protection of British Property Abroad"; Keene, *Beyond the Anarchical Society*.

The British 1840s claims on Greece constituted the key case in this reinvention of the older norm. This move in which foreign secretary Viscount Palmerston played a crucial role, was grounded on the acquiescence of the advocate general John Dodson. The Greek claims, which led to the 1850 British armed intervention, known as the Don Pacifico crisis, became a watershed as Palmerston's actions were heavily criticized as being contrary to the sovereign equality of states, existing trade treaties and the legal doctrine of Vattel. Yet Palmerston, who instead of Vattel justified his actions through the notion that Greece had failed in its duties as a civilized state in not upholding the customary norm, prevailed in the parliamentary debate. Moreover newspapers and public opinion saw the foreign secretary as a liberal who defended the interests of the merchant classes, the rights of British subjects abroad and thus Britain's greatness. Practitioners, and –as we have seen in the preceding chapter– in due course legal doctrine, began to refer to examples of Britain invoking this more expansive norm as evidence of its existence in international law. With American diplomats also soon using this novel idea.

The chapter will proceed as follows. I will first provide an overview of the role of legal advisers in Anglo-American diplomacy during the course of the long nineteenth century. I argue that this curiously underexplored practice is key for tracking the reinvention of a customary norm protecting foreigners' property rights. Diplomats consulted legal advisers as to what the law was, and legal advisers provided a legal justification for an adopted policy. In practice legal advisers often not only applied but also helped to modify the law to justify adopted policies. The section concludes with a brief discussion of the relevant sources. I will then proceed to outline how foreigners' property rights were legalized in the early part of the nineteenth century primarily through bilateral trade treaties. This section provides an analysis of an 1830s dispute over rights accorded to British merchants through a trade treaty with the restored Bourbon kingdom of the Two Sicilies as a case invoked as a representative example of this legal framework also by contemporaries. The next section provides a detailed analysis of how Britain began increasingly invoking the novel idea of a stronger customary norm protecting foreigners' property rights that broadened the more narrow and contingent rights granted by trade treaties. Though conventionally the Latin American experience is highlighted as

evidence of the existence of hierarchy premised on the idea of civilization in nineteenth century international society, the 1840s disputes with the new kingdom of Greece constitute the crucial case for the development of this argument by British practitioners.[453] It was this dispute, engendering significant political debate in Britain that ended in a vindication of the adopted foreign policy, which became to be seen central in later accounts of the development of the norm.

Legal advisers in Anglo-American diplomacy

This section provides a short overview of the role of legal advisers in Anglo-American diplomacy during the course of the long nineteenth century. In practice legal advisers often not only applied the law but also helped modify it to justify policies. The focus on legal advisers adopted in this chapter also has broader implications for our understanding of world politics. It highlights the fact that diplomacy had to a very considerable extent become 'legalized' a long time before the Hague peace conferences which have been conventionally seen pivotal in this process.[454] This perspective also allows a more detailed analysis of the dynamics of change in customary international law that goes beyond the traditional focus on the practice of international courts.[455] I will begin by providing an overview of the role of legal advisers in British diplomacy, before proceeding to giving an account of the American practice. The section will conclude with a discussion of the source material, which highlights the puzzling yet quite likely possibility that in contrast to Britain American legal advice was never systematically collected and archived. The section focuses on Britain, and to a lesser extent the United States, because of the key roles these states played in the making of the legal frameworks of

[453] For a focus on Latin America Fawcett, "Between West and Non-West"; Carlos Poggio Teixeira, *Brazil, the United States, and the South American Subsystem: Regional Politics and the Absent Empire* (New York: Lexington, 2012). Schultz has a broader focus and also briefly discusses Southern Europe in "Civilisation, Barbarism and the Making of Latin America's Place".
[454] Reus-Smit, *Moral Purpose of the State*; Martha Finnemore, *The Purpose of Intervention. Changing Beliefs About the Use of Force* (Ithaca, New York: Cornell University Press, 2003).
[455] For the traditional emphasis on the role of arbitration and courts Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford: Oxford University Press, 1933); Also Jackson H. Ralston, *International Arbitration from Athens to Locarno* (Stanford, California: Stanford University Press, 1929); Coleman Phillipson, "The Influence of International Arbitration on the Development of International Law," in *Two Studies in International Law* (London: Stevens and Haynes, 1908).

the global economy. Before we proceed it may be worth noting that existing accounts of nineteenth century international law in Britain and the United States have to a very large extent ignored the practice of legal advisers.[456] Though this chapter's narrow focus on Anglo-American practice is justified through the crucial role that they played in this particular case, it is important to note that an in depth comparative study of the evolution of the practice of legal advisers constitutes one particularly interesting topic for further research in the history of international law.

Legal advisers in Britain

In England the crown's chief adviser on questions of international law was known as HM advocate general from around 1600 onwards.[457] In contrast to most English lawyers who were trained in the common law the King's, or at times Queen's, advocate was trained in the civil law. Civil law, which is more commonly nowadays known as Roman law, was taught at the ancient universities and applied within ecclesiastical courts –that had jurisdiction in for example marital disputes– and in the high court of admiralty. The relatively small profession of advocates (as opposed to barristers practicing the common law trained in the inns of court) was organized in a London college known as 'Doctors' Commons'.[458] Crucially the early modern jus gentium was largely built upon the foundations of Roman law, and lawyers tried to ground their arguments in contemporary disputes on its authority. The advocate general together with his common law counterparts of attorney general and solicitor general were collectively known as the crown's legal officers. In practice the advocate general became the Foreign Office's principal legal adviser after its establishment in 1782, even though he was not a

[456] Sylvest, "International Law in Nineteenth-Century Britain"; Janis, *American Tradition of International Law*; For an exception Keene, "A Case Study of the Construction of International Hierarchy".
[457] The main source is McNair, *International Law Opinions*, vol. i, preface xvii-xxiii, note on the sources, xxi-iii, and vol. iii, appendix i, 402-6, and ii 407-30, "The Debt of International Law in Britain to the Civil Law and the Civilians."
[458] Brian P. Levack, "The English Civilians 1500-1750," in *Lawyers in Early Modern Europe and America*, ed. William Prest (London: Croom Helm, 1981) in particular at 180-9, 125; Daniel Coquillette, *Civilian Writers of Doctors' Commons. Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law* (Berlin: Duncker & Humblot, 1988); G. D. Squibb, *Doctor's Commons: A History of the College of Advocates and Doctors of Law* (Oxford: Oxford University Press, 1977); Also R. H. Helmholz, *The Ius Commune in England* (Oxford: Oxford University Press, 2001); McNair, *International Law Opinions*; Keene, "The Age of Grotius" in particular at 134.

part of the staff and continued to work from his chambers in Doctors' Commons. The foreign secretary, or in practice his private secretary, often delivered written questions known as 'cases' to which the advocate would respond with his opinion which was referred to as a 'report'.

There is thus a considerable amount of truth –at least in a formal sense that does not preclude lawyers acting as apologists to power– to Arnold McNair's argument that it 'is a delusion affecting the minds of many laymen and not a few lawyers that governments in the conduct of foreign affairs act independently and capriciously and without reference to legal principle' even with regards to the nineteenth century.[459] The separate profession of British civil lawyers came to an end when the ecclesiastical and admiralty courts were reorganised in the 1850s and opened up to common lawyers. This also led to the dissolution of Doctors' Commons and to the fact that when the last HM advocate general Travers Twiss resigned in 1872 as a consequence of a sex scandal a successor was not appointed. Instead the Foreign Office recruited James Parker-Deane as a part-time lawyer, until finally in 1886 the increase in workload led to the appointment of a full-time in house legal adviser. The decline of civil law as a professional niche led to many civil lawyers reinventing themselves as specialists on the law of nations and to take an active part in turning international law into a more institutionalized sub discipline.[460] Equally the end to the small fiefdom of civil lawyers made the subfield more accessible and mainstream, and thus perhaps also more interesting for ambitious lawyers and competitive.

Legal advisers in the US

In the United States the attorney general, whose position was established in 1789, was the government's chief legal adviser in both domestic and international questions. The fact that attorneys general in practice only worked part time until the 1850s serves as a useful reminder of the tiny size of

[459] McNair, *International Law Opinions*, vol. i, preface, xvii. For sources on the practice of civil lawyers see the preceding footnote.
[460] Sylvest, "International Law in Nineteenth-Century Britain."

the early federal government. However beginning with 1820 departments began gradually recruiting in house solicitors who complemented the attorney general as a source of legal advice. Congress first created a claims clerk whose work consisted of studying complaints presented by American citizens regarding violations of their persons or property by foreign governments in 1848. Though this office was abolished in 1855 ten year later an examiner of claims was appointed to the department and this time the purview of the legal adviser was extended to all questions of international law. The establishment of a Department of Justice headed by the attorney general finally in 1870 led to departmental lawyers becoming employees of the new department on paper though in practice this did not entail the centralisation of legal advice. In 1891 a law bureau headed by a solicitor was created for the State Department, which officially remained under the authority of the justice department until the contemporary office of the legal adviser to the Department of State was finally established in 1931.[461] Though the attorney general seems thus to have been the government's sole adviser on international law until the mid century very few of his opinions concern foreign affairs. Already in 1859 the attorney general J. S. Black had informed secretary of state Lewis Cass that whether a claim by an American citizen against the Russian government should be pressed by the minister at St Petersburg 'is a question to be decided to according to your own discretion.'[462] It has been argued that by at least the end of the century it was standard practice for the State Department legal advisers to determine claims, and presumably other questions of international law, without consulting the attorney general.[463] This survey of American practice has been cursory at best because there seems to exist very little secondary literature on this topic.[464]

[461] On this correspondence with the US national archives was particularly helpful, see David Langbart, "Department of State Records," November 6, 2015; Also David R. Deener, *The United States Attorneys General and International Law* (The Hague: Martinus Nijhoff, 1957), 11, 24, 27-31; Albert Langeluttig, *Department of Justice of the United States* (Baltimore: Johns Hopkins University Press, 1927), 4, 8-9, 67.
[462] Perkins's Claim Upon the Russian Government, Attorney General J. S. Black to Secretary of State Lewis Cass, 23 May 1859 in A. J. Bentley, ed., *Digest of the Official Opinions of the Attorneys-General*, vols. i–xvi (Washington), vol. ix (1885), 338-9.
[463] Deener, *US Attorneys General and International Law*, 324 fn. 55, 343.
[464] Ibid.; Langeluttig, *Department of Justice of the United States*.

Finding legal advisers: the sources

The practice of legal advisers can be traced through their correspondence with diplomats. In Britain legal advice given to the Foreign Office began to be archived separately from its foundation onwards, thus greatly facilitating the consultation of past opinions. These files also include some of the opinions given to other government departments such as the admiralty or Colonial Office. Before 1782 legal advice does not seem to have been systematically collected making predating research 'largely a question of 'hit and miss'.'[465] From 1861 onwards the Foreign Office also began printing an annual series of legal opinions for internal use.[466] Arnold McNair published a selection of these opinions, mainly from the period 1782-1902, in 1966.[467] This was supplemented by Clive Parry's monumental series reproducing surviving legal advice given to the Foreign Office before 1861 together with a thematic index and summary of contents.[468] The drawback to the McNair / Parry collections is that it reproduces only legal advice, and not the correspondence from the Foreign Office to the legal adviser thus giving only a partial perspective into the policy-making process. Fortunately, the FO legal advice files, which are organized by countries, do contain quite a lot of this correspondence, if not all of it. Parts of this correspondence to the legal advisers can also be found in country files containing miscellaneous or domestic correspondence.

In contrast locating nineteenth century legal advice to the US State Department is far more challenging if not impossible. Though the official opinions of the attorneys general began to be published in 1852 –and this series also includes surviving earlier opinions, which began only to be collected from 1817 onwards– this is not very helpful as the bulk of advice on questions of international law seems to have been provided by departmental lawyers from 1848 onwards. These opinions were not published, and even more puzzlingly it seems quite possible that they were never systematically collected. At least today there exists no systematic collection of nineteenth century legal advice to the State Department,

[465] McNair, *International Law Opinions*, vol. i, note on the sources, xxi-iii, cited at xxi.
[466] *CTS*, vol. 96, preface, x.
[467] McNair, *International Law Opinions*.
[468] Parry, *Law Officers' Opinions to the Foreign Office 1793-1860*, 97 vols. (1970).

and instead it is probable that only traces of these opinions survive in a scattered fashion within the State Department and possibly the Justice Department archives.[469] With the kind help of David Langbart of the US National Archives, I located the two series of internal state department reports and correspondence that, in all likelihood quite fragmentarily as they consist of only twenty-one volumes in total, cover the entire period up to around 1906. Moreover one of the series, the reports of the diplomatic bureau, covers only the years 1863-91.[470]

Many if not the majority of the reports in these volumes concern claims made by US citizens on foreign governments. These claim reports do not however contain much legal reasoning, but rather usually reproduce sums and the facts of the case. The reports, it seems, were written by clerks of the diplomatic bureau and usually signed by the bureau chief at least in the period 1863-91.[471] Very little legal advice with regards to these claims reports seems to survive, though it seems the solicitor was consulted relatively frequently. A list of attached correspondence to the report on the claim of a Mrs Mary Downs against Colombia from 1885 for example includes a 'Report of Dr Wharton No 113' though tantalizingly this is not reproduced in the volume.[472] Francis Wharton, a renowned expert on international law, worked as the solicitor in 1885-88. A cursory investigation of the volumes locates only one solicitor's opinion on a claim. This consists of a small note from 1887, that is marked 'Department of State, Office of the Solicitor', regarding the case of Thomas N. Smith against Mexico.

[469] David Langbart, of the US National Archives, kindly wrote to me that '[a]lthough the central files for the period to 1906 include virtually no internal memorandums and reports, there are some separate series of decentralized files that do include documentation of that nature … Reports of Clerks and Bureau Officers, 1790-1911. Arranged roughly chronologically. Reports to the Secretary of State regarding matters affecting U.S. foreign relations such as foreign claims, treaties, questions of international law, and legislation. These records are available on National Archives Microfilm Publication M800 … Reports of the Diplomatic Bureau, 1863-1891. Arranged roughly chronologically in eight volumes and a ninth covering the entire period. Reports prepared by the Diplomatic Bureau on various issues such as U.S. claims against foreign governments and foreign claims against the U.S. These records, RG 59 Entry A1-745, are not on microfilm.' Citation from Langbart, "Department of State Records." Benjamin Allen Coates similarly notes that the 'State Department archives do not contain separate records for the office of the solicitor, so a precise determination of all legal work throughout this period is impossible. However, there is a card index beginning in 1910 purporting to include all the correspondence with the solicitor's office. Though it is not, in fact, comprehensive, it does permit a rough accounting. The largest category of correspondence, if not the absolute majority in all years, involved the protection of US financial interests abroad' in, *Legalist Empire. International Law and American Foreign Relations in the Early Twentieth Century* (Oxford: Oxford University Press, 2016), p. 220 n. 70.

[470] Reports of Clerks and Bureau Officers, 1790-1911, 12 vols., at M800; Reports of the Diplomatic Bureau 1863-1891, 9 volumes at RG 59 Entry A1-745, in "State Department Papers", US National Archives.

[471] Reports of the Diplomatic Bureau 1863-1891, 9 vols. See for example vol. 7 (1874-87), report 27 Smith Case of Thomas N., against the Mexican Government, 23 March 1887.

[472] Ibid., vol. 7 (1874-87), report 7 Casadevall, Claim of Mrs. Mary Downs, 1 August 1885.

In it the solicitor (presumably Wharton though the initials are not clear) laconically declares to the chief of the diplomatic bureau, who had sent a one page report on the case, that '[t]his is apparently a good claim. I think the papers should be sent to Mr. Manning with instructions to present the case to the Mexican Government. Respectfully &c.'[473] Though at times quite scholarly and detailed solicitor's opinions on other questions of international law survive from around the turn of the twentieth century none of these –covering for example the principle of *uti possidetis* in reference to the Anglo-Venezuelan border dispute, the sinking of the USS Maine in Havanna, concessions to a foreign company in the newly occupied Philippines, and even a 'List of the Best Later Works on International Law' – concern the peace time problematic of foreigners' property rights.[474] The specific sources used in this chapter's account of the customary norm protecting foreigners' property rights have already been laid out in Chapter One.

Foreigners' property rights in a world of treaty law

This section provides an overview of how foreigners' property rights were protected in the early part of the nineteenth century. I argue that these rights were to a very great extent legalized through bilateral treaty making, which led leading states to construct extensive networks of trade treaties. In disputes over property rights the foreigner's state usually grounded its case by invoking the provisions of an existing trade treaty. I will begin with providing an overview of British treaty making with new or restored states in Latin America and Southern Europe. This broader approach allows for an investigation of the underexplored similarities in Latin American and Southern European states' experiences in world politics.[475] I will then provide an analysis of an 1830s dispute over rights

[473] Ibid., vol. 7 (1874-87), report 27 Smith Case of Thomas N., against the Mexican Government, 23 March 1887, and the attached report from the office of the solicitor, 31 March 1887.
[474] Memorandum on the applicability of the doctrine or principle of *Uti Possidetis* to the Anglo-Venezuelan Boundary Dispute, 14 January 1896, in Reports of Clerks and Bureau Officers, 1790-1911, vol. 9 (1895-98), p. 169; A Short Memorandum List of the Best Later Works on International Law, ibid, p. 497; Report of W. L. Penfield, "The case of the *Maine*.", ibid, p. 783. Also Opinion of John Bassett Moore on "Concessions to Australasia and China Telegraph Co." (opinion on questions presented by General Otis in his telegrams of Apr. 14, 1899, to the Adjutant General), 31 May 1899, p. 97, in ibid, vol. 10 (1898-1911).
[475] For an exception Schultz, "Civilisation, Barbarism and the Making of Latin America's Place".

accorded to British merchants through a trade treaty with the Two Sicilies as a case that also contemporaries invoked as a representative example of this legal framework. Based on John Dodson's legal advice, foreign secretary Palmerston grounded Britain's position during the dispute on the provisions of an 1816 trade treaty. Though the Neapolitan government contested this interpretation, the Two Sicilies caved into the British demands after a naval demonstration. A similar strong emphasis on treaty law is also visible in an 1840 legal memorandum laying out the post hoc case for Britain's naval intervention in Naples and even in an earlier 1833 letter in which Palmerston discussed British merchants' property in Portugal with a cabinet colleague. The section will conclude with cases of parallel American practice, in which diplomatic intervention in Salvador is justified through the existence of a trade treaty and the US attorney general upholds the idea of strong sovereignty, which can be limited by treaties, and does not refer to a customary norm protecting foreigners and their property.

In the early nineteenth century foreigners' property rights were to a very great extent based on bilateral trade treaties. Though the idea of a customary norm protecting foreigners and their property in the event of a 'denial of justice' had existed from the Middle Ages and continued in the early modern period it was quite weak. The norm was subject to the exhaustion of 'local remedies', thus diplomatic intervention or indeed reprisals was possible only after the foreigner had unsuccessfully appealed to the highest local court after an extremely blatant injustice.[476] Writers of legal doctrine such as Grotius and Vattel then afterwards affirmed this existing state practice. In contrast to Grotius, who was still citing the Romans and Homer for the existence of the norm, Vattel's lone reference is to contemporary state practice in the form of the Silesian Loan Case opinion.[477] This 1753 opinion is important as in it the legal advisers of the British government argued for a very strong conception of sovereignty and thus the need to exhaust 'local remedies', which in effect made the scope for diplomatic intervention or indeed armed reprisals on grounds of 'denial of justice' very limited. The

[476] McNair, *International Law Opinions*, vol. 2, pp. 297, 312, 314; See also Amerasinghe, *Local Remedies*, 22–30; and Paulsson, *Denial of Justice*, 13–26; For an older work Spiegel, "Origins and Development of Denial of Justice".
[477] Grotius, *De Jure Belli Ac Pacis* (1632), book iii, chapter ii, iv-v. Vattel, *Le Droit des Gens* (1758), tome i, book ii, chapter vii, §84 Jurisdiction.

opinion, subsequently lauded by Montesquieu and Vattel, argues that '[t]he Law of Nations, founded upon Justice, Equity, Convenience and the Reason of the Thing, and confirmed by long Usage, don't allow of Reprizals, except in Case of violent Injuries, directed or supported by the State, and Justice, absolutely denied, *in Re minime dubia*, by all the Tribunals, and afterwards by the Prince.'[478] It is noteworthy that in the mid-eighteenth century –when European international society was still limited to Western Europe– the idea of exceptions to the requirement of exhausting local remedies based on a lack of 'civilization' is yet absent from this norm, which is linked to a very strong conception of sovereignty. Moreover this weak and limited customary norm did not offer any redress from extensive and longstanding restrictions to foreigners' property rights including variations of the droit d'aubaine and détraction in many Continental European states or the ban on foreign ownership of real estate in Britain and its colonies.

Towards denser treaty networks

Thus the crucial importance of treaty law led states to construct treaty networks that were seen as pivotal for fostering foreign trade. It is clear from the fact that Charles Jenkinson, soon to become president of the board of trade, produced (in 1785) a collection of Britain's treaties that he thought of them as crucial for 'our Trade System'.[479] We have already seen how France began deconstructing the droit d'aubaine in the 1760s through a network of reciprocal treaties. The lack of a customary norm and a positivist conception of international law also led Britain to construct a network of bilateral treaties outlawing the slave trade after the Napoleonic wars.[480] Thus it is not surprising that Britain

[478] Report of the Law Officers of 18 January 1753, cited in McNair, *International Law Opinions*, vol. ii, 303. It was signed by Lee, Paul, Ryder and Murray (then solicitor general and later lord chief justice as the Earl Mansfield).
[479] Charles Jenkinson, *A Collection of All the Treaties of Peace, Alliance, and Commerce between Great-Britain and Other Powers from the Treaty Signed at Munster in 1648 to the Treaties Signed at Paris in 1783* (London, 1785), vol. i, advertisement, iii; See also Armitage, *Foundations of Modern International Thought*, 151.
[480] Keene, "A Case Study of the Construction of International Hierarchy."

recognized the independence of Latin American states through concluding trade treaties that secured the property rights of British subjects in these new members of international society.[481]

The preamble to the first of these treaties, contracted with the provinces of Rio de la Plata (modern day Argentina) in 1825 states that extensive '[c]ommercial Intercourse having been established for a series of years ... it seems good for the security as well as encouragements of such Commercial Intercourse, and for the maintenance of good understanding ... that the Relations now subsisting between them should be regularly acknowledged and confirmed by the signature of a Treaty of Amity, Commerce, and Navigation.'[482] The provisions of the treaty itself do not differ from those typically concluded between European states. The text stipulates that there 'shall be ... a reciprocal freedom of Commerce ... the Merchants and Traders of each Nation, respectively, shall enjoy the most complete protection and security for their Commerce ; subject always to the Laws and Statutes of the two Countries respectively.'[483] The treaty also guarantees nationals of the contracting powers both most favoured nation status and a national standard of treatment. Entailing that the nationals of no third state would be granted better conditions and that Britons would be granted the same property rights as citizens of the River Plate and vice versa. Thus in 'whatever relates to the lading and unlading of Ships, the safety of merchandize, goods, and effects, the disposal of property of every sort and denomination, by sale, donation, or exchange, or in any other manner whatsoever, as also the administration of Justice, the Subjects and Citizens of the Two Contracting Parties shall enjoy, in their respective Dominions, the same Privileges, Liberties, and Rights, as the most favoured Nation'. Furthermore they 'shall not be charged ... with any higher Duties or Imposts' or 'ordinary taxes, under any pretext whatsoever, greater than those that are paid by Native Subjects or Citizens.'[484] The treaty in addition expressly protects foreigners' reciprocal right 'to dispose of their property, of every

[481] D. C. M. Platt, *Finance, Trade and Politics in British Foreign Policy, 1815-1914* (Oxford: Clarendon Press, 1968).
[482] Treaty of Amity, Commerce and Navigation between Great Britain and the Provinces of the Rio de la Plata 2. February 1825 in *CTS*, vol. 75, 75-84. Cited at 76.
[483] Ibid., art ii.
[484] Ibid., art ix.

description, by Will or Testament, as they may judge fit'.[485] The text of the agreement with the River Plate would be used as a template for later British trade treaties with newly independent Latin American states. Thus the provisions of the agreements signed with Colombia in 1825, Mexico in 1826, Venezuela in 1834 and Bolivia in 1840 are largely identical.[486]

Yet the creation of new states in the early nineteenth century was not limited to Latin America. Notably in 1832 the European great powers agreed to establish a kingdom of Greece, in the southern part of the modern state, following the Greeks' longstanding struggle for independence from the Ottoman Empire. Not surprisingly the signing of a trade treaty between Britain and Greece followed five years after the creation of the Greek state.[487] The provisions of this treaty signed by foreign secretary Palmerston do not substantially differ from those concluded with new Latin American states. Most favoured nation status is again granted, together with freedom of commerce and disposition of property. Subjects of both parties are likewise entitled to the same property rights and access to courts as natives.[488] Thus in 'all that relates to the police of Ports, to the lading and unlading of vessels, and to the safety of merchandize, goods, and effects, the local Laws and police regulations of each Country shall be applied to the subjects of both, without discrimination or distinction ; and, throughout the whole extent of the Territories of each Contracting Party, the subjects of both shall enjoy full and entire protection for their persons and property.' The treaty also specifies that they

> shall have free and easy access to the Courts of Justice in the prosecution and defence of their rights ... it being understood that they shall conform, in this respect, to the obligations imposed upon native subjects by the Laws of the Country. In all that concerns the administration of justice, they shall enjoy the same privileges, rights, and franchises that belong to natives ... and their property shall be subject to no other charge, requisition, or tax, than those to which the property of natives shall be liable.[489]

[485] Ibid., art xiii.
[486] British-Colombian trade treaty, 18 April 1825 in ibid., vol. 75, 195–208; British-Mexican trade treaty, 26 December 1826 in ibid., vol. 39, 39–55; British-Venezuelan trade treaty, 29 October 1834 in ibid., vol. 84, 433-9; British-Bolivian trade treaty 29 September 1840 ibid., vol. 91, 1-17.
[487] British-Greek trade treaty, 4 October 1837 in ibid., vol. 87, 73–83.
[488] Ibid., art i, viii, x, xiii.
[489] Ibid., art x.

Trade treaties were of course not only concluded with new states. The failure of Napoleon's empire led to multiple agreements between Britain and restored European governments. For example in 1816 Britain concluded a trade treaty with the newly returned Bourbon monarch of the Two Sicilies (modern day southern Italy and Sicily). According to the reciprocal provisions of the treaty 'Sa Majesté le Roi des 2 Siciles promet que le commerce Britannique en général, et les Sujets Britanniques qui l'exerceront, seront traités, dans tous ses Etats, sur le même pied que les Nations les plus favorisées, non seulement par rapport aux personnes et propriétés des dits Sujets Britanniques, mais aussi à l'égard de toute espece d'article dont ils font commerce, et les Impôts ou autres charges payables sur les dits articles ou sur les Bâtiments dans lesquels l'importation aura lieu.'[490] Furthermore 'Sa Majesté Sicilienne s'engage, dans toutes les occasions, à garantir aux Sujets de Sa Majesté Britannique qui résideront dans ses Etats et Domaines, la conservation de leurs propriétes et de leur sûreté personnelle, de la même manière qu'elle est garantie à ses Sujets, et à tous les Etrangers appartenants aux Nations les plus favorisées et les plus privilégiées.'[491]

An aberrant provision in a trade treaty concluded five years before with Portugal, which had survived a Napoleonic invasion only with the assistance of a British army, highlights similarities in the legal frameworks of Britain's trade policy towards other Southern European and Latin American states, which was premised on at least a nominal conception of sovereign equality. In the treaty Portugal 'desiring to protect and facilitate the Commerce of the subjects of Great Britain' notably confirmed the medieval institution of the 'Judges Conservator' elected by British residents, which in effect granted Britain a form of extraterritoriality in Portugal and its colonies. In contrast Portuguese subjects would have to make do with the promise that their 'persons and property' would be protected 'through the

[490] British - Two Sicilies trade treaty, 26 September 1816 in ibid., vol. 66, 343–52. Cited at art iv.
For a translation: 'His Majesty the King of 2 Sicilies promises that British commerce in general, and the British Subjects who will practice it, will be treated, in all his States, on an equal footing with the most favoured Nations, not only in relation to persons and properties of said British Subjects, but also with regards to all species of goods which they trade, and the Taxes or other charges payable on the said goods or on the Vessels in which the importation will take place.'
[491] Ibid., art v.
For a translation: 'His Sicilian Majesty commits to, in all occasions, to guarantee to the Subjects of His Britannic Majesty who will reside in his States and Domains, the preservation of their properties and of their personal security, in the same manner as it is guaranteed to his Subjects, and to all Foreigners belonging to the most favoured and privileged Nations.'

acknowledged equity of British jurisprudence, and the singular excellence of the British Constitution'[492] (!). The trade treaty concluded after the secession of Brazil in 1827 decreed 'that the Office of Judge Conservator for the British Nation shall subsist only until some satisfactory substitute for that jurisdiction shall be established, capable of providing, in an equal degree, for the protection of the Persons and property of His Majesty's Subjects' highlighting how formal inequality in international society was increasingly perceived as unacceptable.[493] Thus the only cases of de facto unilateral extraterritoriality for British subjects in Western states only accentuate the contrast with the trade treaties Britain typically concluded in both Latin America and Southern Europe on a formally equal basis that was linked to a strong conception of sovereignty.

The Anglo-Sicilian dispute

I will next provide an analysis of a late 1830s dispute over rights accorded to British merchants in the Two Sicilies as a representative example of the application of this legal framework based on bilateral trade treaties.[494] It was this case that was also referred to by both sides of the 1850 debate on Britain's Greek intervention. Drawing on John Dodson's legal advice, Palmerston grounded Britain's position during the dispute on the provisions of the aforementioned trade treaty of 1816. The diplomatic intervention concerned the Neapolitan government's intention to grant a monopoly on the profitable trade in sulphur to a French company, and our story begins in September 1837 when a group of British merchants in Palermo complained to William Temple, the British minister in Naples, about the likelihood of a 'dangerous experiment of a monopoly' in the sulphur trade.[495]

After Temple reported to foreign secretary Palmerston, who was also his brother, asking for instructions his despatch was forwarded to the advocate general John Dodson for a legal opinion by

[492] British - Portuguese trade treaty, 19 February 1810 in ibid., vol. 61, 70–80. Cited at art x.
[493] British - Brazilian trade treaty, 17 August 1827 in ibid., vol. 77, 375–93. Cited at art vi. On the office of the judge conservator in general, see Schultz, "Civilisation, Barbarism and the Making of Latin America's Place".
[494] See also Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law*.
[495] Merchants of Palermo to William Temple, 26 September 1837, *BFSP*, vol. 28, 1173–7. Cited at 1177.

the parliamentary under secretary William Fox-Strangways. Dodson, a former Tory MP trained in both civil and common law, served as the foreign office's chief legal adviser from 1834 to 1852. Dodson's reply, written at Doctors' Commons, is worth citing in detail as its format is typical for nineteenth century British legal advice. The report first reiterates the question at hand, and then proceeds to Dodson's professional opinion before ending formulaically.[496]

> My Lord, I am honoured with your Lordship's Commands signified in Mr Fox Strangway's Letter of the 11th Instant, transmitting the accompanying Despatch from Her Majesty's Minister at Naples which related to an application that has been made by a French Company to the King of Naples to sanction a decision of the Govt of Sicily, granting to that Company an Exclusive Monopoly in the Sulphur Trade of that Island, and directing my attention to the 4th article of the Treaty of 1816 between Great Britain and the Kingdom of the Two Sicilies, and to request I would report my opinion, whether, under the Stipulation of that Article, Her Majesty's Govt would be authorized to remonstrate against the Grant of such a Monopoly **...** In obedience to your Lordship's Commands, I have the Honor to report that, I am of opinion that the Government of Sicily cannot grant an Exclusive Monopoly of the Sulphur Trade of that Island to a French Company, without a Breach of the 4th article of the Treaty of 1816 by which it is Stipulated, that British Commerce in General, and the British Subjects who carry it on, shall be treated throughout the Dominions of the King of the Two Sicilies upon the same Footing as the most Favoured Nations, not only with respect to their Persons and Property, but <u>also with regard to every species of article in which they may traffic</u>, and, I have therefore no doubt that under the Stipulations of that article, Her Majesty's Government would be authorized to remonstrate against the Grant of such a Monopoly … I have the Honor to be My Lord, Your Lordship's Most obedt Humble servant.[497]

Palmerston's instructions to Temple follow Dodson's legal opinion in stating that 'in case the project entertained by the Sicilian Government of granting a monopoly of the sulphur trade to a private company should be further proceeded with, I have to desire that you will lose no time in apprising Prince Cassaro', the Neapolitan foreign minister, 'that Her Majesty's Government cannot consider the grant of such a monopoly in any other light than as an infraction of the Treaty of 1816, the IVth Article' of which Palmerston then proceeds to reproduce from Dodson's despatch.[498] Cassaro however denied that granting a sulphur monopoly violated the Anglo-Sicilian trade treaty as this would not specifically affect British merchants. In 'virtue of existing Conventions, British commerce and

[496] Though unfortunately Fox-Strangways' letter to Dodson does not survive in the Foreign Office papers, Dodson's paraphrasing of similar surviving requests with reference to Greece is very accurate. For this see the Greek correspondence between Palmerston and Dodson analysed in this chapter. For the relevant FO box on the Anglo-Sicilian dispute: Law Officers' Reports: Sicily, 1808-1840, FO 83/2340, there also seem not to exist boxes of domestic and miscellaneous correspondence on Sicily from this period in which the letter could otherwise be potentially found.

[497] Sir John Dodson to Viscount Palmerston, 16 October 1837, Law Officers' Reports: Sicily, 1808-1840, FO 83/2340, UK National Archives, which is reproduced in Parry, *Law Officers' Opinions*, 1970, vol. 66, 467–9.

[498] Viscount Palmerston to William Temple, 27 October 1837, *BFSP*, vol. 28, 1165.

subjects have the right of being treated as the most favoured nations, and the project is general for all nations.'[499] Dodson was again asked for a legal opinion 'as to what should be the reasons to be given to the Neapolitan Government for continuing to differ from their view of the question' and argued

> it may be answered that as the proposed Grant is to be made exclusively to a French Company it places the Subjects of France, or some of them at least, upon a more favored Footing than the Subjects of Her Majesty, and it may further be observed that, if the argument of Prince Cassaro is to be deemed good and conclusive in respect of the one article of Sulphur, it is obvious that it may be equally good for every other article, and that upon this supposition a Monopoly in each, and every article of Sicilian Commerce, might be granted to a Company composed of the Subjects of France, or of any other Foreign Country, whereby the Subjects of Great Britain, would be utterly excluded from Sicilian Commerce, notwithstanding the expert Stipulation' in the 4th article of the treaty.[500]

Palmerston's further instructions to the British minister at Naples again reiterated the contents of Dodson's legal opinion:

> You will further point out to Prince Cassaro that, if the argument used by his Excellency is good and conclusive in respect to sulphur, that argument must be equally good for every other article of commerce ; and that, consequently, a monopoly of trade for each and every article of Sicilian produce might, in like manner, be granted to a company of the subjects of France or of any other foreign country, whereby the subjects of Great Britain would be utterly and entirely excluded from all commerce in articles the produce of the Neapolitan dominions, notwithstanding the express stipulations in the Treaty ...

This near verbatim passage is then again followed by a reproduction of Dodson's treaty citation. Palmerston continued by stating that even if a monopoly would be held be some British subjects, this would still violate Britain's demand for equal treatment for all British subjects. Temple is then finally instructed to 'distinctly explain' that Britain would consider the implementation of the proposed measure as 'an infraction of the Treaty of 1816' and that in such an eventuality it must 'reserve ... the right of adopting such measures as circumstances may seem to require'.[501] Despite Temple's less implicit phrasing of 'serious and unpleasant consequences which might arise from the hasty and inconsiderate adoption' of a sulphur monopoly the Neapolitan government did not cave in to Britain's

[499] Prince Cassaro to William Temple, 18 November 1837 in ibid., 1167.
[500] Sir John Dodson to Viscount Palmerston, 9 January 1838, FO 83/2340 reprinted in Parry, *Law Officers' Opinions*, vol. 66, 472–4; Also Sir John Dodson to Viscount Palmerston, 26 December 1837, FO 83/2340, reprinted in ibid., vol. 66, 470–1.
[501] Viscount Palmerston to William Temple, 26 January 1838, *BFSP*, vol. 28, 1167–9.

diplomatic intervention.[502] Naples acceded to the British demand only after Britain placed an embargo on Sicilian ships in Malta and the British navy was instructed to seize Neapolitan vessels as reprisals in 1840.

This exclusive emphasis on treaty law remains in a memorandum –setting out a position on negotiations for a new trade treaty with Sicily– that Palmerston wrote and sent to the prime minister Viscount Melbourne shortly after the intervention. '[I]n the Sicilian sulphur case ... our Demands were just, and borne out of our Treaty Rights'. 'I told ... the Neapolitan Govt must satisfy us on that Point; and fulfill the Existing Treaty'.[503] An earlier 1833 letter from Palmerston to Sir James Graham, the first lord of the admiralty, on Portugal echoes the Sicilian sulphur case and provides an additional viewpoint both in terms of Palmerston's great concern for British property abroad and the priority which he accords to treaty law in his argument. The foreign secretary argued for a more expansive armed intervention in Portugal in order to assist British wine merchants, whose port had become stuck in the middle of a civil war, in removing their wares. Palmerston defended intervention on behalf of 'our merchants' to his cabinet colleague because 'we have also a Right nay indeed it is our Duty, to protect the Persons & Property of British subjects all over the world, but none more especially in Places where they are found by virtue of Treaties with other states'.[504]

An American perspective

The section will conclude with cases of parallel American practice, in which diplomatic intervention in Salvador is justified through the existence of a trade treaty and the US attorney general ascribes to a

[502] William Temple to Prince Cassaro, 1 February 1838 in ibid., 1170–1.
[503] 'Memorandum on Ld Lyndhurst's Motion for Production of Papers rel: to Negotiations between Neapolitan & British Govts', 26 May 1840, MM/IT/10A, cited at 1, 2. Palmerston instructed to '[m]ake copy of this, & send it to Ld Melbourne' on the following day, MM/IT/10A/enc. 1. Both memorandum and note are part of the "Palmerston Papers", Hartley Library, University of Southampton.
[504] Viscount Palmerston to Sir James Graham, 5 July 1833, Add MS 79706, ff. 25-7, at the "Sir James Graham Papers", British Library. I am indebted to David Brown for help with this reference, which he also cites in *Palmerston* at 533 n. 204.

strong conception of sovereignty that can be limited by treaties, and does not refer to the idea of a customary norm protecting foreigners and their property. In 1852 the Salvadorean government passed a decree making the sale of gunpowder a state monopoly and prohibiting its export, which was most unfortunate for the business interests of Henry Savage, an American citizen, who had imported a large quantity of gunpowder into Salvador a few months before.[505] In his 1855 instructions for a claim for indemnity secretary of state William L. Marcy argued that an American-Salvadorean trade treaty from 1850 provided American citizens with the same property rights as Salvadoreans and that the creation of a gunpowder monopoly was against Salvadorean law. Marcy wrote that the trade treaty provides citizens of both countries the 'power * * * to engage in all kinds of trade, manufactures, and mining upon the same terms with the native citizens," to "enjoy all the privileges and concessions in these matters which are or may be made to the citizens of any country," and to "enjoy all the rights, privileges, and exemptions in navigation, commerce, and manufactures which native citizens do or shall enjoy, submitting themselves to the laws, decrees, or usages there established to which native citizens are subjected."'[506] Thus according to Marcy an American citizen was entitled to the same protection as Salvadoreans and as the new gunpowder monopoly violated provisions of the Salvadorean constitution against ex post facto legislation and the confiscation of property Savage was entitled to compensation. This diplomatic dispute was settled through only arbitration a decade later when the claim was 'finally adjudicated ... in favour of Mr. Savage'.[507] In 1837 the attorney general Benjamin F. Butler was asked for his opinion after the French chargé d'affaires had complained to president Martin Van Buren of 'gross violence' against two French citizens in New Orleans. Butler argued that there 'can be no doubt, under the laws of nations, and independently of any treaty provisions, that alien subjects of a state with whom the United States are at peace, coming within our territory, and placing themselves, with the consent of the general and State governments, under the safeguard of our laws, are entitled to be protected in their personal rights, in like manner as

[505] See also Fachiri, "International Law and the Property of Aliens".
[506] "Mr. Marcy to Mr. Marling, April 21, 1855, MSS. Dept of State." Cited in Moore, *Arbitrations,* vol. ii, 1855–7; See also Mr. Marcy, Sec of State, to Mr. Borland, January 19, 1854 cited at ibid.
[507] US minister Mr Partridge to secretary of state Mr Seward, 17 March 1865, cited at ibid; See also Stuyt, *Survey of International Arbitrations*, 77.

citizens'.[508] Thus the case, though not directly concerned with property, indicates that foreigners' rights were understood to be primarily protected only through domestic law or a possible bilateral trade treaty.[509] The idea of a strong customary norm protecting foreigners and their property is thus absent.

The making of a stronger customary norm

The next section provides a detailed analysis of how British diplomats began invoking the idea of a stronger customary norm protecting foreigners' property rights thus broadening the more narrow and contingent rights granted by trade treaties. I argue that though conventionally the Latin American experience is highlighted as evidence for the existence of hierarchy grounded through the idea of somewhat deficient civilization within nineteenth century international society, the crucial case for the development of this argument were British disputes with the new kingdom of Greece in the 1840s.[510]

Though Britain had concluded a trade treaty with Greece in 1837 British diplomats never invoked its provisions during the disputes as it conformed to a strong conception of sovereignty. Instead foreign secretary Palmerston eventually grounded Britain's diplomatic interventions, that in effect came to ignore the Greek judicial system, on a more vague and expansive idea of a customary norm protecting foreigners and their property that was linked to the idea of civilization, to which conceptualization his legal adviser advocate general John Dodson acceded. What was novel in Palmerston's use of the norm was its new expansiveness and justification through the idea of civilization, which resulted in a potentially hierarchical vision of international order. That is, because Greece had blatantly failed in its

[508] Benjamin F. Butler to Martin Van Buren, 5 July 1837 in *Official Opinions of the Attorneys General of the United States : Advising the President and Heads of Departments in Relation to Their Official Duties and Expounding the Constitution, Subsisting Treaties with Foreign Governments and with Indian Tribes, and The Public Laws of the Country, Edited by Benjamin F. Hall* (Washington, 1852), vol. 3, 253–5.
[509] Deener, *US Attorneys General and International Law*, 306–7.
[510] John Gallagher and Ronald Robinson, "The Imperialism of Free Trade," *The Economic History Review* 6, no. 1 (1953); Rosenberg, *Empire of Civil Society*; Fawcett, "Between West and Non-West"; Poggio Teixeira, *Brazil, US, and the South American Subsystem*. To a lesser extent Schultz who also discusses Southern Europe in "Civilisation, Barbarism and the Making of Latin America's Place".

duties as a civilized state to protect foreigners and their property its sovereignty and the jurisdiction of its courts, which Britain had recognized in treaties, could in effect be qualified. This clear failure made it unnecessary to exhaust local remedies offered by local courts before the possibility of a diplomatic intervention on the grounds of a denial of justice thus in effect creating a world in which some states could be more sovereign than others. It is important to note though that Palmerston innovated within broad bounds set by contemporary ideas of law and appropriateness grounded in 'civilization'. Thus, although the Greek government could be disciplined for having failed in its duties as a 'civilized' state, Palmerston did not question its sovereignty in principle. This suggests a contrast to his earlier actions in 1841 with reference to Britain's legal relations with African 'Native Chiefs' who, in effect, lost their status as international actors because they became considered as `barbarous'.[511]

The Greek government finally accepted Britain's claims, most notable of which concerned the violation of the property rights of George Finlay and David Pacifico, after a naval intervention in 1850 the legality of which Palmerston famously defended in the House of Commons. In a memorandum distributed to the cabinet before the debate Palmerston downplayed his actual role in the decision-making process and implied that he had merely acceded to Dodson's legal advice and that there was nothing novel in interventions aiming to protect subjects and their property.

The heated parliamentary debate provides a wealth of information on the reception of Palmerston's Commons argument that defended the notion of a strong customary norm protecting foreigners and their property grounded on the idea of civilization –the failures in which justified the intervention in Greece. Notably the opposition argued that Britain's adopted policy ran counter to both the existing trade treaty, in which Britain had just recognized Greek sovereignty and domestic jurisdiction, and Vattel's legal doctrine that also argued for a strong conception of sovereignty that required the exhaustion of local remedies before the possibility of diplomatic intervention. Yet Palmerston prevailed in the debate, and newspapers hailed him as a liberal champion defending the rights of British subjects abroad, thus protecting the interests of the merchant classes and Britain's global

[511] See Keene, "A Case Study of the Construction of International Hierarchy."

prestige. In the aftermath, the newly extremely popular, Palmerston continued to actively press British claims abroad and distributed his Commons speech to all employees of the Foreign Office.

Britain's intervention, which was popularized as the 'Don Pacifico affair', became seen as a crucial case for the making of a positivist customary norm protecting foreigners and their property justified through the idea of civilization. The Don Pacifico affair, and specifically Palmerston's speech, is first referred to as state practice supporting the existence of a strong customary norm in international legal doctrine in Robert Phillimore's *Commentaries* (1855-7). The speech is also later cited in John Bassett Moore's *Digest* (1906) and forms the only empirical example of former US secretary of state Elihu Root's address (1910) conceptualising a 'standard of civilisation' protecting foreigners and their property.[512] Though twentieth century works usually refer to the case of George Finlay for the existence of a customary norm, rather than to the controversial 'Don Pacifico affair', both claims must actually be understood in the context of Britain's 1840s diplomatic dispute with Greece.[513] This section will conclude with an overview of an American diplomatic intervention in Greece in 1853.[514] The Jonas King case, in which the Greek government again acquiesced to the existence of a strong customary norm protecting foreigners' property, demonstrates the United States using a similar argument to ground its diplomatic intervention in Greece in the immediate aftermath of the 'Don Pacifico affair'.

The Anglo-Greek dispute

Our story begins in 1830 two years before the establishment of a Greek kingdom when George Finlay, in his own words, 'purchased some property near Athens from the Turkish proprietors, who were

[512] Phillimore, *Commentaries*, 1st ed., vol. 2 (1855), 4–5; Phillimore, *Commentaries*, 1st ed., vol. 3 (1857), 29, see also 32; Moore, *Digest*, vol. 6, 681–2; Root, "Address of Hon. Elihu Root, President of the Society, on The Basis of Protection to Citizens Residing Abroad" (1910).
[513] Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law*; In contrast to Schwarzenberger, "The Protection of British Property Abroad"; Lipson, *Standing Guard* dates the customary norm to the mid-nineteenth century without a specific discussion of the origins.
[514] See also Fachiri, "Expropriation and International Law."

about to quit the provinces ceded to the newly created Hellenic State'. The newly arrived monarch, Otto of Bavaria, needed a country residence and unfortunately for Finlay a part of his land 'was occupied by the Greek Government when the construction of the royal palace was commenced in the early part of the year 1836, and it has since been inclosed within the royal gardens.' Thus Finlay argued, in an 1842 letter to the foreign secretary the Earl of Aberdeen, he was 'deprived of a part of my property in Greece by the Government of that country'.[515] Finlay's lobbying was effective to the extent that Aberdeen transmitted the 'copy of a letter from Mr. Finlay, stating the circumstances under which he has been deprived by the Government of Greece of some property near Athens, which he had purchased from certain Turkish proprietors in the year 1830, and requesting the good offices of Her Majesty's Government in pressing his claim for indemnification upon the Greek Government' to Edmund Lyons, the British minister in Athens. Aberdeen instructed Lyons, who according to Finlay was 'already aware of the merits of his case' and had 'had some communication with the Greek Government thereupon', to 'follow up your representations in favour of Mr. Finlay's claim in such manner as you may deem best calculated to obtain that compensation to which Mr. Finlay may appear to be entitled.'[516]

Aberdeen's intervention is significant in two ways. First he seems not to have bothered to consult John Dodson's legal advise on this question, and second it seems that Finlay had actually not exhausted local remedies, that is gone through the Greek courts, which was usually required before diplomatic intervention.[517] For example a year later in 1843 Dodson dismissed a claim against Mexico as 'Mr Kinder has failed to show that' the sentence of a Mexican court 'is Evidently and palpably unjust'. Dodson's conceptualisation of a weak customary norm protecting foreigners and their property in

[515] George Finlay to the Earl of Aberdeen, 18 October 1842, in *BFSP*, vol. 39, 410–2.
[516] The Earl of Aberdeen to Sir Edmund Lyons, 31 October 1842, in ibid., vol. 39, 412.
[517] There are no records of legal advice on the Finlay case in the FO papers (for the relevant box, FO 83/2286). Also a post hoc FO legal memorandum notes that the queen's advocate was not consulted with regards to Finlay's claim, see Memorandum showing the Dates of the Claims on Greece for Redress, and the Opinions of the Queen's Advocate thereupon, Foreign Office 6 June 1850, cited at p. 3, MM/GR/30 A, Palmerston Papers. There only exists a decade older opinion by Dodson in which he dismisses a previous, and apparently not directly related, 'pretension' by Finlay 'with reference to a Tax imposed upon certain Property purchased by him in Greece'. Dodson considered him 'not entitled to the especial Interference of His Majesty's Minister in his behalf' as the '[l]aw of which Mr Finlay alone, complains, is stated to be general in its application'. Sir John Dodson to Viscount Palmerston, 29 October 1836, in Parry, *Law Officers' Opinions*, 1970, vol. 38, 218.

which only ‘evident and palpable Injustice can warrant the Interference of a Foreign Government with the Definitive Sentences of the Tribunals of any Independent State’ is grounded through a citation of Vattel's legal doctrine.[518] ‘Vattel expresses himself throughly on this subject in the 6th Chapter of his Second Book (§ 84) He says ... To undertake to examine the Justice of a definitive Sentence is to attack the Jurisdiction of Him who has passed it. The Prince ought not then to interfere, in the Causes of his Subjects, and to grant them His Protection, excepting in the Cases of Refusal of Justice, palpable and Evident Injustice, a Manifest violation of Rules and Forms, as in short and odious Distinction made to the Prejudice of His Subjects or of Foreigners in General.’[519] This 1843 report offers a crucial contrast to Dodson’s legal opinions on David Pacifico’s claim against Greece, to which we turn next, in which he no longer cites Vattel’s natural law doctrine and accedes to Palmerston’s novel expansive conceptualisation of the norm.

The British minister’s diplomatic intervention was not however effective. This led to Aberdeen’s successor as foreign secretary Palmerston to instruct Lyons two years later in 1846 ‘to present a note to the Greek Minister, stating that you are instructed to state to the Greek Government the great regret which is felt by the British Government at learning that the claim of Mr. Finlay to receive adequate compensation for the land of which he was arbitrarily and, as is alleged by him, without legal authority, disposed, has not yet been satisfied’.[520] Palmerston’s letter is however more interesting because of the long justification it offers for Britain’s demand.

> Now in all countries it is understood that when land belonging to a private individual is required for purposes of great public utility or of national defence, private right must so far yield to public interest, that the individual is compelled by law to give up his land to the public, provided always that he shall receive for it from the public its full and fair value. But in all countries a marked distinction in this respect has been drawn between the necessities of the public service and the convenience and accommodation of the Sovereign. This distinction has been observed in despotic as well as in constitutional monarchies.

[518] Sir John Dodson to the Earl of Aberdeen, 20 May 1843, in Parry, *Law Officers' Opinions*, vol. 44, 486–8.
[519] Ibid. Dodson seems to have translated this as the citation is accurate though the phrasing is slightly different from the English editions of 1797 and 1834. See also McNair, *International Law Opinions*, vol. ii, 'Denial of Justice', 295-322 for a discussion of similar, and earlier, cases.
[520] Viscount Palmerston to Sir Edmund Lyons, 7 August 1846 in *BFSP*, vol. 39, 431–2.

On this point Palmerston writes that 'there is still to be seen at the King of Prussia's country residence at Sans Souci a building close to the royal palace, which remains as a record that even Frederick the Great at the height of his power, paid the most scrupulous respect to the right of property of one of the humblest of his subjects, and was prevented by his respect for that right from adding to the royal garden a small piece of ground' which its owner refused to sell.[521]

Even if 'His Majesty the King of Greece thought fit ... to follow a different course, and by he exercise of despotic power forcibly to dispossess private individuals of their property, in order to convert that property to his own use by making it the site of his palace and gardens, His Majesty was at all events bound to pay to those private individuals, immediately and without any delay, a full and ample price for the property thus forcibly taken from them.' Palmerston crucially argues that 'when the question is whether a British subject in a foreign country shall or shall not be compelled to accept an inadequate compensation for an act of injustice by which he has suffered, the British Government can pay no attention to the argument, that compensations equally inadequate have been accepted by natives or by the subjects of other States, for similar injuries sustained by them.' Britain 'is entitled to expect that justice shall be done to British subjects in whatever country they may reside'.[522] Thus Palmerston grounds Britain's diplomatic intervention in the idea of a customary norm protecting foreigners and their property from 'an act of injustice'. The aforementioned trade treaty, which in contrast contains merely provisions of equal treatment with natives, is not referred to. Palmerston mirrored his predecessor Aberdeen in not referring the developments in the Finlay case to Dodson's legal advice.

Despite Britain's repeated diplomatic interventions George Finlay's claim was however still not settled by the spring of 1847, when Lyons reported to Palmerston of another complaint against the Greek government by David Pacifico, 'a native of Gibraltar'.[523] According to the British minister it 'has been the custom in Athens for some years to burn an effigy of Judas on Easter-day, but this year the Government, in consequence of the baron C. M. de Rothschild', head of the Naples branch of the

[521] Ibid.
[522] Ibid.
[523] Sir Edmund Lyons to Viscount Palmerston, 20 May 1847, in ibid., 332.

banking family, 'being here, took measures to prevent its taking place and; the brigands who infest the capital took advantage of the occasion to spread a report that M. Pacifico, who is a Jew, was the cause of the discontinuance of this annual custom, and to excite the people against him in order that they might plunder his house.' Lyons wrote that he had 'not failed to represent to M. Coletti', the Greek interior minister, 'that there is a great distinction between a common burglary and a protracted attack upon a large and conspicuous house in the middle of the day by several hundred persons'. Aided 'instead of being repressed, by soldiers and gendarmes, and who were accompanied and encouraged, if not headed, by persons whose presence naturally induced a belief amongst the soldiers and the mob, that the outrages they were committing would be indulgently treated by the Government.'[524]

Palmerston and Dodson

Once it reached London the permanent under-secretary Henry Unwin Addington acting on Palmerston's behalf forwarded Lyons' despatch to John Dodson for his legal opinion on June 4th. This correspondence between Palmerston and Dodson is crucial for tracking the making of a stronger customary norm protecting foreigners and their property that is grounded in the idea of civilization. The existing Anglo-Greek trade treaty, signed by Palmerston himself in 1837, which offered no support for Britain's attempts to bypass the jurisdiction of the Greek courts is not referred to at any point. The Queen's advocate was requested to 'report to Lord Palmerston your opinion whether this is a case in which this Govt would be borne out in requiring the Greek Govt to compensate M. Pacifico.'[525] After a reminder sent on the 30th in which Addington stated that he 'is directed by Viscount Palmerston to request that he [Dodson] will report to His Lordship at his early convenience', Dodson finally wrote back on July 2nd. The advocate general's reply was however ambiguous. In 'obedience to your Lordship's commands I have taken the despatch into consideration and have the

[524] Ibid.
[525] Henry Unwin Addington to Sir John Dodson, 4 June 1847. It seems drafts by Addington in the FO papers are initialled 'H.U.A', FO 83/2286 66 Greece. See also Dodson's reply to Viscount Palmerston, 2 July 1847, FO 83/2286 68 Greece, which is also reproduced in Parry, *Law Officers' Opinions*, vol. 38, 288–91.

honour to report that the Information therein contained is scarcely sufficient to enable me to form a decided opinion upon the Question put by Your Lordship's direction.' Dodson argued that if

> in despite of the Notice given him by Sir E. Lyons, Monsieur Coletti and the Greek Authorities used no endeavour to check the outrage, I am of opinion that Her Majesty's Government would be entitled to demand compensation for the losses sustained by M. Pacifico : but, if on the other hand the Greek Authorities acted with due promptitude, and used their best, although ineffectual exertions to afford defence to M. Pacifico, I think that Her Majesty's Government would not be borne out in holding the Greek Government to be responsible for the losses of M. Pacifico.

This report seems not to have been satisfactory to Palmerston, as the foreign secretary wrote on the same day that '[i]t seems to me that the Queeens adv's Principle would go to the full rather [?] and beyond the limitation which he assigns to it. For why would the British Govt be entitled to demand Compensation if Coletti had taken no steps when informed of what was going on?'[526] Palmerston crucially argued that '[s]imply because it is the Duty of every Civilized Gov to protect Persons & Property within its Jurisdiction and if it neglects to do so having the means of doing so, it should [?] be answerable for Consequences'. Thus explicitly grounding the notion of a strong customary norm protecting foreigners and their property on the idea of civilization. The foreign secretary concluded that 'it seems to me that in Principle there could be little difference between the Case of Coletti having neglected to employ the Force which was in the Town, and of the Case of his having employed a Force which proved insufficient to ending the outrage.' The small note then ends with the request that 'I should like before writing to Sir E Lyons to have any observations of Queens adv. upon this Point' and is signed simply 'P. 2/7 47'.[527] It seems this informal letter, which lacks a recipient, was intended for Addington as an instruction for drafting a reply to Dodson.

The draft copy of Addington's letter to the advocate general from June 7 reproduces Palmerston's note faithfully, with an addition at the end –it seems from the handwriting– by Palmerston himself.[528] This new passage reiterates the core argument in stating that '[i]t appears to Ld Palmerston if the Doctrine

[526] Viscount Palmerston to Henry Unwin Addington (?), 2 July 1847, FO 32/158 Greece domestic various January to July 1847 121-122.
[527] Ibid.
[528] Henry Unwin Addington to Sir John Dodson, 7 July 1847, FO 83/2286 69 Greece. See also Dodson's reply to Viscount Palmerston, 13 July 1847, FO 83/2286 71 Greece, also reproduced in Parry, *Law Officers' Opinions*, vol. 38, 292–6.

were admitted that a Govt was relieved from Responsibility in such Cases provided it could show that it had made an Effort though an insufficient one to restrain [?] outrage, the Lives & Properties of Foreigners would have no Security in a Country in which as at present in Greece the Govt would be glad to connive at such outrages even if it did not secretly encourage and incite them'.[529] In other words a strong conception of a customary right protecting foreigners and their property was again justified through reference to Greece's present failure to fulfill its duties as a civilized state. The draft is then signed 'P', which based on an overview of correspondence in the consulted boxes, seems to have indicated that Palmerston was satisfied and the letter could be copied and sent.

In his clarifying report of June 13 Dodson chose to accede to the foreign secretary's viewpoint. 'In obedience to your Lordship's commands, I have the honour to report that I perfectly accede to the Justice of the Propositions laid down by Your Lordship, respecting the responsibility of a Government for the protection of the Lives and Properties of Foreigners, resident within its Dominions'.[530] This crucial affirmation of Palmerston's argument is notably not supported by any reference to either legal doctrine or state practice. Instead Dodson appeals to equity –'the Justice of the Propositions'– in a move that is not uncommon when lawyers find themselves defending a weak legal argument. Dodson continues by apologising for the ambiguity of the previous report. '[I]n explanation of my former Report (the terms of which are perhaps, not so clear and explicit as they ought to have been), I take leave to say that the inefficiency therein adverted to, of the exertions to afford defence to M. Pacifico, had reference to the promptitude and activity of the authorities in sending assistance, rather than to the amount of Force, which was, or ought to have been employed on the occasion.' Thus as according 'to the statement of M. Pacifico, the outrage complained of lasted about an hour and a half, and if M. Coletti, and the other Greek Authorities, did not as soon as they received information of what was going on, take the earliest means of repressing it, the blame and consequent responsibility for the

[529] Ibid.
[530] Sir John Dodson to Viscount Palmerston, 13 July 1847, 13 July 1847, FO 83/2286 71 Greece.

damage, must rest with the Greek Government.' Dodson then concludes with the empirical caveat that '[w]hat was the real state of facts in this respect Sir Edmund Lyons can best judge.'[531]

Palmerston has here, in effect, justified a strong expansive variation of the old idea of diplomatic intervention resulting from a denial of justice through the novel idea of 'civilization'. As we have seen the possibility of diplomatic intervention, and even armed reprisals, resulting from a denial of justice is already present in medieval and early modern legal practice. Palmerston's move suggests a comparison with Grotius's use of a similar argument on the unavailability of judicial remedies as a basis for his novel defence of the Dutch East India's Company's violence against the Portuguese in the extra-European world.[532] Both cases illustrate a dynamic in which practitioners reinvent old legal ideas in order to pursue their interests in novel situations. Palmerston's reinterpretation of the customary norm is then, as previously noted, afterwards taken up in Phillimore's doctrinal work, which –in addition to citing authorities such as Grotius and Vattel– refers to the British parliamentary debate on the Greek intervention and invokes the idea of civilization on this point.

The armed intervention

Having thus affirmed his viewpoint with Dodson, it seems Palmerston on the same day instructed Addington to draft a reply to Athens to the effect that 'Sir E Lyons to get from Mr Pacifico a detailed statement of his Losses, and then to present a Note demanding Compensation from Greek Govt.'[533] Palmerston's despatch, dated on July 19, reads that 'Her Majesty's Government have had under their consideration your despatch ... stating that you had applied to the Greek Government to compensate M. Pacifico, a British subject residing at Athens, for the loss and injury sustained by him and his family ... when his house was broken into and plundered in the open day by a riotous assemblage of

[531] Ibid.
[532] On Grotius and unavailability of judicial remedies, see Keene, *Beyond the Anarchical Society*, 50-51.
[533] Viscount Palmerston to Henry Unwin Addington (?), 13 July 1847, FO 32/158 Greece domestic various January to July 1847 143.

persons.'[534] The British minister was instructed 'to get from M. Pacifico a detailed statement of his losses' and if that estimation 'shall appear to you to be just and reasonable, and if his statement is supported by satisfactory proof, you will present a note to the Greek Minister for Foreign Affairs, requiring his Excellency to direct that the sum so claimed shall be paid to M. Pacifico.' Lyons' further note to the Greek government was however left unanswered.[535] As a consequence of this Dodson argued that Pacifico's 'Losses and Sufferings, have been aggravated by the Greek Government having left Sir E. Lyons' note so long unanswered. I am therefore, of opinion that it will expedient to Instruct Sir Edmund Lyons to renew his application to the Greek Government, and again to urge them to make due compensation to M. Pacifico.'[536] Despite further representations, the Greek government did not however accede to Britain's demands the key of which concerned the claims of George Finlay and David Pacifico. Thus Lyons transmitted 'to your Lordship herewith copies of 2 further letters which have passed between M. Colocotroni', the Greek foreign minister, 'and me with regards to the claims of M. Pacifico and Mr. Finlay' in late 1848.[537] In the following spring Palmerston wrote in his instructions to the new British minister at Athens that '[y]ou will find, by referring to the archives of the British Mission at Athens, that Sir Edmund Lyons has from time to time been instructed to urge the Greek Government to settle satisfactorily the various claims which certain of Her Majesty's subjects have brought against that Government, and I have to instruct you to continue to press upon the Greek Government those claims which still remain unsettled, especially the claims of M. Pacifico and of Mr. Finlay.'[538] Thomas Wyse dutifully obliged by writing to the new Greek foreign minister that he is 'instructed by Viscount Palmerston ... to press upon the Greek Government those claims which still remain unsettled, especially the claims of M. Pacifico and Mr. Finlay.'[539]

[534] Viscount Palmerston to Sir Edmund Lyons, 19 July 1847, in *BFSP*, vol. 39, 334.
[535] Sir Edmund Lyons to Viscount Palmerston, 1 October 1847, in ibid., 335; Sir Edmund Lyons to M. Glarakis, 14 September 1847, in ibid., 335–6.
[536] Sir John Dodson to Viscount Palmerston, 18 March 1848, in Parry, *Law Officers' Opinions*, vol. 38, 306–8.
[537] Sir Edmund Lyons to Viscount Palmerston, 7 December 1848, in *BFSP*, vol. 39, 465; Sir Edmund Lyons to M. Colocotroni, 6 December 1848, in ibid., 481–2.
[538] Viscount Palmerston to Thomas Wyse, 7 May 1849, in ibid., 471.
[539] Thomas Wyse to M. Glarakis, 19 June 1849, in ibid., 483; Also Thomas Wyse to Viscount Palmerston, 28 June 1849, in ibid.; Thomas Wyse to M. Glarakis, 2 July 1849, in ibid., 472–5; Thomas Wyse to Viscount Palmerston, 8 July 1849, in ibid., 471–2.

In the autumn of 1849 the British government decided to press its demands through a naval intervention.[540] After Greece did not comply with Wyse's ultimatum demanding 'reparation be made for ... wrongs and injuries' sustained by British subjects and protected persons 'within 24 hours' British ships blockaded the port of Athens in January 1850.[541] The Greek government unsurprisingly eventually accepted Palmerston's demands, which were headed by the claims of Finlay and Pacifico, and thus the longstanding disputes over the property rights of British subjects were eventually resolved through military force.[542] Palmerston's letter to his brother William Temple, who was still minister at Naples, from the following month offers an additional private perspective into the decision for armed intervention. Palmerston considered the Greek government as essentially corrupt and that Britain had been very patient with its legitimate demands. He argued that 'King Otho is the enfant gati de l'absolutismo [sic, this mixture of French and Spanish probably translates as the spoilt child of absolutism], and therefore all the arbitrary courts are in convulsions at what we have been doing; but it is our long forbearance, and not our precipitation that deserves remark.' More generally, he thought Britain's tough line with Greece useful in other similar cases as it showed Britain's willingness to resort to force. Palmerston wrote that '[w]hat has happened may serve as a hint to other Governments who turn a Deaf ear to our Demands & think to wear us out by Refusals or Evasions.'[543]

The parliamentary debate

The Greek intervention resulted in heavy and steadily increasing domestic criticism of the government and the prime minister Lord John Russell, prodded by the Queen and her husband Albert, ended up

[540] Viscount Palmerston to the Lords Commissioners of the Admiralty, 30 November 1849, in ibid., 483–4; Viscount Palmerston to Thomas Wyse, 30 November 1849, in ibid., 484.
[541] Thomas Wyse to M. Londos, 5/17 January 1850, in ibid., 509–10; Also Thomas Wyse to Viscount Palmerston, 22 January 1850 in ibid., 506–9.
[542] For Britain's demands see, Viscount Palmerston to the Marquess of Normanby, 13 February 1850, in ibid., 522–3.
[543] Viscount Palmerston to William Temple, 15 February 1850, GC/TE/333, Palmerston Papers.

considering reassigning Palmerston to the colonial office.[544] As pressure kept mounting it seems Palmerston had the foreign office to produce a 'CONFIDENTIAL' printed memorandum 'showing the Dates of the Claims on Greece for Redress, and the Opinions of the Queen's Advocate thereupon' in order to defend himself in front of his cabinet colleagues. The gist of this document is in that it fails to mention Palmerston at all. The impression the reader gains from it is that the British minister's despatches from Athens are immediately referred to the Queen's advocate whose opinions are then relayed back to Athens –with the foreign secretary playing no part in this routine and legalistic process. Thus on 'Mr Pacifico's Claim' the memoradum quotes the mundane part of Dodson's afore discussed crucial report of 13 July 1846 in which he simply states that provided Pacifico's version of events is accurate 'the blame and consequently responsibility for the damage, must rest with the Greek Government.'[545] Though the report does mention the seeming irregularity that 'Mr Finlay's claim was not referred to the Queen's Advocate' Palmerston presumably could explain this away as his predecessor Aberdeen's decision.[546] All in all the government had, according to the memorandum, been simply following sound and old-fashioned legal advice.

As the House of Lords began debating a motion of censure on the Greek intervention on June 17[547], Palmerston prepared to back up his defence by having the foreign office produce a 'Statement of Instances in which, from 1700 downwards, the British or any other European Government has enforced Redress for Wrongs of Subjects in Foreign Countries'.[548] This list of thirty-three instances, beginning in 1729 and ending with Britain's Greek intervention of 1850, seems to have been intended to provide Palmerston with evidence of state practice backing his crucial argument about the existence of a strong customary norm protecting foreigners and their property that could at times result in

[544] Lord John Russell to Viscount Palmerston, 22 May 1850, Palmerston Papers GC/RU/343. See also David Brown, *Palmerston and the Politics of Foreign Policy 1846-55* (Manchester: Manchester University Press, 2002); Brown, *Palmerston*; Fenton, *Palmerston and The Times*.
[545] 'Memorandum showing the Dates of the Claims on Greece for Redress, and the Opinions of the Queen's Advocate thereupon', Foreign Office 6 June 1850, cited at p. 3, Palmerston Papers MM/GR/30 A.
[546] Ibid.
[547] For Lord Stanley's motion on 17 June see *Hansard's Parliamentary Debates*, vol. cxi (London, 1850), 1332. Stanley, who was to succeed Russell as prime minister in 1852, is better known by his eventual title as the Earl of Derby.
[548] 'Statement of Instances in which, from 1700 downwards, the British or any other European Government has enforced Redress for Wrongs of Subjects in Foreign Countries', Foreign Office, 17 June 1850, Palmerston Papers MM/GR/31.

legitimate armed intervention. Though the linkage between this more general practice of interventions and Palmerston's specific argument for the Greek intervention is left ambiguous, as the list for example includes the 1840 British sulphur monopoly intervention in Naples even though we have seen that was exclusively grounded on treaty law. The fact that the intervening European governments on this list are almost exclusively Britain or France and the interventions take place in Southern Europe, Latin America and the extra-European world presumably dovetailed with Palmerston's views on civilization.

The statement lists only three cases of armed intervention for the period 1700-1815, with thirty for 1816-50. The claimants are almost exclusively Britain (15 interventions) or France (15), with one Russian, Spanish and joint Anglo-French intervention each. As for those at the receiving end of these interventions, Western states on this list consist solely of Southern European and Latin American countries –Greece (Pacifico intervention), Portugal (3), Spain (3), Two Sicilies (2, including the sulphur monopoly), Buenos Ayres (2), Mexico (1), New Granada (3), Nicaragua (1), Salvador (1), Venezuela (1). The list of interventions in the extra-European world contains a very heterogenous group of international actors –the African Chief of Fouta (?), Algiers (5), China (first opium war), Cochin-China (1), Madagascar (2), Sandwich Islands (1), Tahiti (2), Tripoli (1), Turkey (1). The presence of an 1844 French intervention against an African chief as an international law precedent in the FO memorandum seems curious as Palmerston had already in 1841 questioned the status of at least 'petty' African chiefs as international actors.[549] Most of the interventions seem to have concerned violations of foreigners and their property rights under the rubrics of injuries, commercial injuries, claims, and the more specific –British– grievances of the seizure of opium and sulphur monopoly. The majority of these were resolved through concluding a treaty. Though in some cases compensation had been awarded directly or the intervening power had merely undertaken armed reprisals without reaching a settlement, as when France undertook the 'Destruction of Famatave [?]' on Madagascar in 1847 for 'Injuries to Trade'.

[549] Keene, "A Case Study of the Construction of International Hierarchy".

The government crucially lost the vote in the Lords, and tried to restore its standing by having a motion expressing confidence in its foreign policy introduced in the House of Commons with Russell judging it too late to throw Palmerston overboard.[550] Palmerston defended the legality of the military intervention in Greece before the Commons in a marathon speech lasting from 9.45 pm to 2.20 am on 25-26 June 1850.[551]

The first part of Palmerston's argument was conventional enough, and conformed to a weak idea of a customary norm protecting foreigners and their citizens. Diplomatic intervention in cases of denial of justice was limited by a strong conception of sovereignty that made it necessary to first exhaust local remedies. '[I]f our subjects abroad have complaints against individuals, or against the Government of a foreign country, if the courts of law of that country can afford them redress, then, no doubt, to those courts of justice the British subject ought in the first instance to apply ; and it is only on a denial of justice, or upon decisions manifestly unjust, that the British Government should be called upon to interfere.'[552]

Yet crucially Palmerston held this requirement to exhaust local remedies as not absolute. One could ignore the jurisdiction of certain domestic courts thus in effect making some countries more sovereign than others. Palmerston argued that 'there may be cases in which no confidence can be placed in the tribunals, those tribunals being, from their composition and nature, not of a character to inspire any hope of obtaining justice from them. It has been said, "We do not apply this rule to countries whose Governments are arbitrary or despotic, because there the tribunals are under the control of the Government, and justice cannot be had ; and, moreover, it is not meant to be applied to nominally constitutional Governments, where the tribunals are corrupt."'[553] Thus 'our doctrine is, that, in the first instance, redress should be sought from the law courts of the country ; but that in cases where redress

[550] For John Roebuck's motion on 18 June see *Hansard*, vol. cxii (1850), 108.
[551] For Palmerston's entire speech, see ibid., 380–443. For the timing of the speech, McNair, *International Law Opinions*, vol. ii, 238.
[552] *Hansard*, vol cxii (1850), 351–2.
[553] Ibid.

cannot be so had–and those cases are many–to confine a British subject to that remedy only, would be to deprive him of the protection which he is entitled to receive.'[554]

Palmerston rationalized this qualification and the variation in which it resulted through the idea of civilization. The foreign secretary explicitly concluded that his policy, expounding a strong notion of a customary norm protecting foreigners and their property, was conducive 'to the maintenance of peace, to the advancement of civilization, to the welfare and happiness of mankind.'[555] This viewpoint was echoed by lord president the 3rd Marquess of Lansdowne's flattery of the Commons, and implicit criticism of the Lords, as the assembly best representing 'the mercantile and manufacturing interests of' not only the country but also 'the world'.[556] With regards to the Greek case at hand, Palmerston argued that '[e]very sort of abuse was practiced. In all times, in Greece, as is well known, there has prevailed, from the daring habits of the people, a system of compulsory appropriation–forcible appropriation by one man of that which belonged to another ; which, of course, is very disagreeable to those who are the victims of the system, and exceedingly injurious to the social condition, improvement, and prosperity of the country.'[557] The foreign secretary continued by alleging 'instances of barbarity of the most revolting kind practiced by the police' and argued that '[i]f the people of the country are liable to have heavy stones placed upon their breasts, and police officers to dance upon them ... foreigners have no right to be better treated than the natives, and have no business to complain if the same things are practised upon them. We may be told this, but that is not my opinion, nor do I believe it is the opinion of any reasonable man.'[558] On the Pacifico claim, Palmerston declared that 'I think that there is no civilised country where a man subjected to such grievous wrong ... would not justly expect redress from some quarter or other ... [t]he Greek Government neglected its duty'.[559]

[554] Ibid., 383–4.
[555] Ibid., 443.
[556] *Hansard*, vol. cxi (1850), 1332-3.
[557] *Hansard*, vol. cxii (1850), 386.
[558] Ibid., 386- 7.
[559] Ibid., 395.

The foreign secretary backed his argument by referring to past instances of armed interventions intended to secure compensation to injured subjects. Palmerston declared that '[m]any instances of such measures have been quoted in this debate as having been adopted by the Governments of other countries, especially by the French Government'. Palmerston specifically referred to recent French actions in Naples in 1848. During a riot a French naval squadron, which was in the bay, had demanded immediate action from the Neapolitan government to protect French nationals' property with the threat that otherwise they would land and 'take care of them'.[560] What is left unclear is of course how this past state practice actually supports his novel argument for a strong customary norm with its concomitant weaker conception of the need to exhaust local remedies. Palmerston stays notably silent on legal doctrine, of say Vattel, or the standard Silesian Loan Case reference because these actually ascribe to a stronger conception of sovereignty. Others on the government benches tried to back up the foreign secretary. Russell aptly pointed out that the decision for diplomatic intervention, that in effect bypassed the exhaustion of local remedies, in the Finlay claim was actually originally undertaken by Palmerston's predecessor who was now criticizing Palmerston for following a similar policy. 'The Earl of Aberdeen, instead of saying to Mr. Finlay, "Take your place before the tribunals," said to Sir Edmund Lyons, "Use your good offices to obtain redress for Mr. Finlay."'[561]

More generally Russell considered that diplomatic intervention in cases of wrongs for which redress cannot be obtained was 'in conformity with the usage of this nation and of all other civilised nations of Europe and of the world'. To back this up Russell referred to sixteen cases of US diplomatic interventions since 1830 and 'every one' knowing that France has taken 'the strongest measures' in this context. Russell specifically echoed Palmerston by referring to the recent riot in Naples, 'which the Government was unable to suppress', leading to the destruction of French nationals' property and the granting of compensation.[562] Rather more originally the home secretary Sir George Grey argued for the Sicilian sulphur case as a precedent for the Greek intervention. In 'an analogous case which occurred not many years ago ... British merchants in Sicily had suffered from the acts of the

[560] Ibid., 397-8.
[561] Ibid., 700.
[562] Ibid., 701.

Neapolitan Government' and prime minister Melbourne had 'admitted that we had an undoubted right to enforce justice'.[563] The fact that Palmerston and Russell's references to previous state practice supporting the British intervention in effect amounted to citing French and US actions gives an indication of which other actors British policy makers considered as core members of the society of civilized states and thus in the same reference group with Britain.

Lansdowne presumably tried to shift responsibility from Palmerston to Dodson –perhaps influenced by the same implicit argument in Palmerston's memorandum. By arguing that 'every one of the claims that involve any doubt as to the question of law, is referred, with all the documents belonging to each case, to the Queen's law advisers, and in no instance has a claim been made in which, after full and deliberate consideration of the papers, the Queen's advocate did not say the party had a right to obtain compensation.' Though '[i]t may be that an exaggerated view had been taken' of the Pacifico case 'there was the distinct concurrence of the law advisers of the Crown in the grounds on which the demand was made.'[564] Palmerston seems to have thought it impolitic to being seen as taking part in throwing Dodson overboard and felt the need to defend his professional integrity by arguing that 'the distinguished individual who holds the office of Queen's Advocate' is characterised not only by learning but also 'independence of mind' and 'sense of justice'.[565] This defense of Dodson also dovetailed with his argument that there was nothing novel in the strong conception of a customary norm protecting foreigners and their property and that it was grounded in 'the opinion which the legal advisers of the Crown have given in numerous cases ; and it is the opinion on which we have founded our replies to many applications for our interposition in favour of British subjects abroad'.[566]

The other side of the coin for Palmerston's argument about Greece's failure to fulfill its duties as a civilized state, which provided the justification for intervention, was an appeal to English exceptionalism. The foreign secretary concluded his apologia by questioning the House 'whether, as

[563] Ibid., 538.
[564] *Hansard*, vol cxi (1850), 1344.
[565] *Hansard*, vol. cxii (1850), 381.
[566] Ibid.

the Roman, in days of old, held himself free from indignity, when he could say *Civis Romanus sum ;* so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong.'[567] Similar patriotic appeals to protecting itinerant new Romans and their property included Lansdowne's move to conceptualise the debate as vindicating 'the honour of the country' and confirming 'that right which is most essential to her welfare and prosperity as a great commercial country'.[568] John Roebuck, in proposing the government's motion, had also argued that 'the object of the noble Lord [Palmerston] has been to extend ... the great aegis of England's protection' to her wandering sons.[569]

This did not go down uncontested though. With William Gladstone, who provided the most detailed rebuttal of Palmerston's argument, noting that the 'subject, indeed, of the restraints of international law may not at this moment be palatable to Gentlemen whom I see sitting yonder (*on the lower Ministerial benches*); it may not easily harmonise with their sense of their mission to propagate liberal opinions through the world; but it is nevertheless essential'.[570]

Gladstone disputed Palmerston's idea of a strong customary norm protecting foreigners and their property that would in certain cases make diplomatic intervention possible before local remedies had been exhausted. Gladstone began ironically by approvingly citing the conventional first part of Palmerston's argument 'I [Gladstone] understand him to say, that if the law be found palpable deficient, a British subject may seek another remedy ; but that he can have no other remedy whatever until he has exhausted all the means which the law affords him.' Gladstone argued that this indeed was 'the general principle which governs this question' of which 'there can in terms be little dispute'. As for the Greek claims under debate, Gladstone contended that 'in the cases before us, Mr. Finlay and M. Pacifico did not exhaust, nor try to exhaust, the remedies which the law of Greece supplied.'[571] In contrast to Palmerston, Gladstone grounded this argument in legal doctrine. 'I have here the citations

[567] Ibid., 444.
[568] *Hansard*, vol. cxi (1850), 1333-4.
[569] *Hansard*, vol. cxii (1850), 231.
[570] Ibid., 556.
[571] Ibid., 557.

from Vattel, who is perfectly clear upon it'.[572] Aberdeen had already quoted Vattel's 'very high authority' on this point that 'in in order to justify the issuing of reprisals, you must have exhausted every means afforded to you by the laws and the tribunals of the country.' Palmerston's predecessor had continued by then citing the Silesian Loan Case, which as we have seen constitutes the sole empirical reference in Vattel. Aberdeen hailed the legal advisers' opinion as 'the standard authority upon all matters connected with such subjects from that day to this. It was drawn up, as is known, by Lord Mansfield'.[573] The former foreign secretary was also echoed by Sir Frederick Thesiger who grounded his argument that 'there were certain principles as well known and firmly established' in international law as in 'the municipal law of each country' on what Vattel had laid down 'upon this very question' before proceeding to follow Vattel in again citing the Silesian Loan Case opinion as having 'attracted the admiration of the most famous philosophers and jurists, including Montesquieu, who had designated it *une reponse sans replique*.'[574] In a similar vein, Palmerston was also criticized in the Commons for not quoting 'the authorities, although he had them there' as the principles 'laid down by Vattel and confirmed by all the jurists' ran contrary to the Greek intervention.[575]

Palmerston had argued that the requirement to exhaust local remedies was not absolute through invoking the idea of civilization. Gladstone contested this as resulting in 'one rule for the weak and another for the strong'. [576] More broadly at the end of his speech he contested Palmerston's conception of civilization by appealing to the 'general sentiment of the civilised world' to 'recognise, and recognise with frankness, the equality of the weak with the strong ; the principles of brotherhood among nations, and of their sacred independence'.[577] With regards to the Greek case Gladstone argued the Commons will not support establishing immunities that would never be claimed 'from Russia, or

[572] Ibid., 556.
[573] *Hansard*, vol. cxi (1850), 1353-4.
[574] *Hansard.*, vol. cxii (1850), 266.
[575] Ibid., 646.
[576] Ibid., 561.
[577] Ibid., 589.

from Austria, or from France,' for British residents in Greece because of the kingdom's 'small extent and resources'.[578]

As for Palmerston's crucial argument that 'the tribunals of Greece are practically so corrupt that these cases could not with propriety be taken before them', Gladstone replied that he had precluded this by an Anglo-Greek trade treaty that had explicitly recognized the jurisdiction of the Greek courts and thus weakened the case for diplomatic intervention before the exhaustion of local remedies even further.[579] The emphasis on treaty law constitutes a complete contrast to Palmerston and others on the government benches who, for understandable reasons, never cite the Anglo-Greek trade treaty of 1837 as its conception of strong and equal sovereignty is completely at odds with the idea of a strong customary norm grounded in an implicitly hierarchical idea of civilization. Gladstone argued that Britain had arrogated 'an arbitrary power to pass by and ignore the courts of law' despite 'the clear declarations of a treaty, that our subjects in Greece shall stand with respect to all matters touching the administration of the law, and touching the tribunals, in the same position, with the same rights, as natives of the country'.[580] Thus Gladstone held Britain had 'not only violated the general law of nations, but has infringed the particular obligations of a treaty'. In a theatrical conclusion to the passage it is then revealed that the name attached to the 1837 treaty 'on the part of England is no other than that of "Palmerston."'[581]

Gladstone had already in the same vein declared the home secretary's citation of the Sicilian sulphur case as a precedent for the Greek intervention 'in truth totally irrelevant' as it was based on treaty law. Gladstone argued that the 'case of the sulphur claim was founded upon the construction of a treaty ... That was a principle of unquestioned obligation; whereas in the case of Greece, you have proceeded wholly on vague and arbitrary notions of your own'.[582] Gladstone's emphasis on treaty law was echoed in Benjamin Disraeli's comments, in which he declared treaties to constitute 'the authentic

[578] Ibid., 561.
[579] Ibid., 561-2.
[580] Ibid.
[581] Ibid.
[582] Ibid., 549-50.

form' of the law of nations.[583] Idiosyncratically Disraeli argued that extraterritoriality agreements 'are the means by which, if the local and municipal law is clearly deficient, the law of nations, in the authentic form of treaties, steps in to supply what is wanting, and to prevent those appeals to force, and those rude and barbarous appliances which, it seems, are the fashion of this age of progress.'[584] This criticism of the government for not establishing extraterritorial rights through a treaty with newly independent Greece was however crucially out of touch with international law of the 'age of progress' that accorded formal equality to all actors that were regarded as full members of international society and thus created incentives for Palmerston's more implicit hierarchical conception of order grounded through the idea of civilization.

Gladstone also heavily criticized Palmerston's conception of English exceptionalism summed up in the *Civis Romanus sum* analogy as being inimical to an international order based on sovereignty equality. Gladstone argued that a Roman citizen 'was a member of a privileged caste ; he belonged to a conquering race, to a nation that held all others bound down by the strong arm of power. For him there was to be an exceptional system of law ; for him principles were to be asserted, and by him rights were to be enjoyed, that were denied to the rest of the world.'[585] More broadly Gladstone's critique of Palmerstonian exceptionalism also targeted its vision of Britain exporting liberal ideas to less Enlightened places at the expense of international law. He thus also took aim at MPs 'professing to hold what are termed strong liberal opinions' for supporting Palmerston 'because they believe that he uses energetically the influence of this country for the propagation of those opinions among the other nations of the world.'[586] Richard Cobden echoed this viewpoint when criticizing self-identified fellow-liberals for supporting Palmerston's Greek intervention. Cobden argued that 'if you want to benefit nations struggling for their freedom, establish as one of the maxims of international law the principle of non-intervention ... I believe the progress of freedom depends more upon the maintenance of peace, the spread of commerce, and the diffusion of education, than upon the labours of cabinets

[583] Ibid., 725-6.
[584] Ibid.
[585] Ibid.
[586] Ibid., 548.

and foreign offices.'[587] Former prime minister Sir Robert Peel also contested Palmerston's take on English exceptionalism by arguing for a venerable tradition of British non-interventionism in contrast to France and the US. '[T]he true policy of this country is non-intervention in the affairs of others' and that this doctrine had been 'maintained by Mr. Fox., Mr. Pitt, Lord Grenville, Mr. Canning, and Lord Castlereagh'.[588] The government 'may quote instances in which the United States have attacked Portugal [sic], and in which France has sent fleets to Naples; but the policy of England should be to set the example of a different course of action'.[589]

Yet the government won the motion and it was Palmerston who was cheered from the public gallery and escorted home by an excited crowd.[590] More exclusively and idiosyncratically, the Reform Club banquet held in the foreign secretary's honour also featured a satirical Latin poem ridiculing Gladstone and celebrating Britannia's imperium over the seas with Palmerston cast as a liberal princeps and scourge to Scythians and other barbarians.[591] According to the colonial secretary Earl Grey 'this discussion ... which was intended to damage Palmerston had left him the most popular man in the country ... Cobden's vote and speech would probably cost him the West Riding at the next election ... amongst all the middle classes Palmerston was immensely popular'.[592]

The aftermath

This viewpoint is echoed by the newspaper reception of the Greek debate, which was overwhelmingly supportive of Palmerston as a champion of liberal ideas, merchants' interests and Britain's greatness. The other side of the coin to this was a critique of both Cobdenite non-interventionist ideas of free

[587] Ibid., 671, 673.
[588] Ibid., 691-2.
[589] Ibid., 684.
[590] Brown, *Palmerston*, 320.
[591] 'Palmerstoniana ; or, Classical Illustrations of the late Grand Debate, presented to Lord Palmerston on the day of the banquet', 20 July 1850, in Palmerston Papers MM/GR/57. See also Fenton, *Palmerston and The Times*, 114.
[592] Charles Greville, from 1 July 1850 in *Memoirs*, part 2, iii, 347-8, cited in Brown, *Palmerston and the Politics of Foreign Policy*, 115–16.

trade and of the perceived disinterest of the Lords in promoting British economic interests. The *Manchester Guardian* argued that the

> merchants of this neighbourhood are largely embarked in foreign commerce, and have numerous establishments scattered over the world, in countries under every variety of government, and in every stage of civilisation. We imagine they will not hear with much satisfaction that, in the deliberate opinion of the British house of lords, they are entitled to, and must expect to receive, no other protection, in their persons or their property, than that which they can obtain from a due enforcement of whatever law may happen to exist for the time in the country in which their establishments are.[593]

The paper considered 'the rights of individuals and of nations ... the same'. A victory for the opposition 'would have ... endangered the progress of all' the Mancunian merchants 'profess to hold dear in the condition of European states'.[594] The *Globe* similarly opined that the foreign secretary had united the free trade classes that were 'determined to hold fast by their love of liberal institutions in foreign as well as in domestic politics'.[595] The paper further pontificated that 'Lord PALMERSTON, the House of Commons, and the Nation, are henceforth at one ... The great seats of manufacturing industry became aware that they were fighting for their own cause in supporting a Minister whose protecting arm was over every one of his countrymen, at the Court of the most arbitrary despot, or amid the mobs of the most unbridled democracy; and last night the House of Commons worthily answered the call of its constituents'.[596] The *Daily News* joined this chorus in applauding the Commons' endorsement of the 'maintenance of English interests and liberal influence abroad.'[597]

More critical viewpoints were rare in the press. Moreover both *Guardian* and *Morning Post*, echoing Palmerston's views, accused *The Times* as serving as a fifth column advancing the agenda of his predecessor Aberdeen and the French government, which had disapproved of the intervention.[598] In contrast to the other papers, the *Times*, which had ridiculed Palmerston through calling the Greek intervention '*his* Peloponnesian war' and argued that the passing of the Lords' motion declared 'to the

[593] The Manchester Guardian, 29 June 1850, cited in ibid., 110.
[594] The Manchester Guardian, 3 July 1850, cited in ibid., 110.
[595] The Globe, 26 June 1850, cited in ibid., 113.
[596] The Globe, 29 June 1850, cited in ibid., 113.
[597] The Daily News, 24, 26 June, 1 July 1850, cited in ibid., 113.
[598] Fenton, *Palmerston and The Times*, 112.

world that the Foreign Office of England is not England', merely acknowledged the foreign secretary's 'most able and most interesting defence'.[599] *The Times* also published an anonymous letter to the editor, rather aptly entitled 'Greece.–Vattel *versus* Palmerston', echoing a prominent strand of the criticism Palmerston received in the parliamentary debates.[600] Even *The Economist*, which regarded Pacifico's claims as exaggerated, thought it 'proper' that Palmerston campaigned for a British victim of 'popular prejudice'.[601]

Palmerston, elated by his success, was determined to continue with his emphasis on protecting British subjects abroad. Palmerston self-contentedly noted on an earlier letter from Russell –suggesting relocating Palmerston to another ministry– that the prime minister was forced to back down in a cabinet meeting. The foreign secretary had replied to Russell's proposal 'that after the general and decided approbation of my policy & conduct which had been expressed from one end of the country to the other by all the Liberal Party it was quite impossible for me to consent to any such arrangement' and threatened to resign altogether.[602] As an indication of Palmerston's commitment to pursuing British claims abroad, a letter from Russell from January of the following year (1851) is worth referring to. Though the prime minister informed Palmerston of the Queen's wish that diplomatic intervention in relation to some British subjects' claims against Portugal be discontinued, the foreign secretary simply noted in the margin that '[t]his was not done'.[603] Moreover Palmerston promoted his viewpoint rigorously within his Foreign Office fiefdom, and there is also some evidence that this proselytizing was not without effect. A future ambassador recalled how the foreign secretary gave a copy of his speech –'I am much pleased still to possess a copy'– to every clerk.[604] In 1851 a young diplomat, who had watched the speech from the gallery, paraphrased it effectively in a note to the

[599] The Times, 22 February, 19 June, 27 June, cited in ibid., 109, 111, 114.
[600] The Times, 28 June 1850. Also referred to in Fiocchi Malaspina, *L'eterno ritorno*, 210 fn. 178.
[601] The Economist, 16 March, 15 June, cited in Brown, *Palmerston and the Politics of Foreign Policy*, 113.
[602] Lord John Russell to Viscount Palmerston, 22 May 1850, Palmerston Papers GC/RU/343/enc 1.
[603] Lord John Russell to Viscount Palmerston, 7 January 1851, Palmerston Papers, GC/RU/390.
[604] Sir Henry Drummond Wolff, *Rambling Recollections* (Macmillan, London 1908), vol. i., 118.

Tuscan authorities of which Palmerston 'was highly and characteristically delighted ... and a very good mark was entered'.[605]

Palmerston's other contemporary parliamentary remarks provide additional evidence for his hierarchical conception of civilization. These make clear that the foreign secretary considered some southern European states, including Greece and Spain, and Latin American states 'less open to statements and arguments concerned with justice and right' than other European states, including Britain, and the United States.[606] With reference to why claims by British subjects against the United States had not resulted in diplomatic intervention in contrast to Greece, Palmerston argued (just over a fortnight before the Greek debate) that '[w]e draw no distinction between what happens in Europe and what happens in America; but there is one distinction which practically exists, and that is, that the tribunals of the United States are more open to statements and arguments concerned with justice and right, than the tribunals in some other parts of the world which I hope I may be spared from mentioning.'[607] A year later in June 1851 Benjamin Disraeli enquired what steps the government was undertaking regards to a petition by a British subject against Venezuela. The foreign secretary replied that the case, which was under consideration, drew attention to 'a great many in which British subjects have suffered the grossest injustice from the Governments and inferior authorities of the republics of South America, and more especially from those of Central South America.' Palmerston crucially argued that

> [a]rbitrary government is bad enough in the mother country; but it is obvious, when that system is applied to a distant colony, and the tyranny of the home country is entrusted to inferior authorities, scattered over the colony, and acting as irresponsible agents, its tendency is to demoralise the whole community. And I am concerned to say that a sense of right and wrong, and of the

[605] Esmé Wingfield-Stratford, *This Was a Man. The Biography of the Honourable Edward Vesey Bligh, Diplomat – Parson – Squire* (London, 1949), 85.

[606] Platt, *Finance, Trade and Politics* does not recognise the relevance of Southern Europe for the making of international investment law and the similarities between the two regional experiences in his account that emphasises the relevance of Latin America. In contrast Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law* both discuss Southern European and Latin American cases in their accounts.

Affairs of Greece, 4 June 1850, in *Hansard's Parliamentary Debates*, vol. 111, 716–20. Accessed at http://hansard.millbanksystems.com/commons/1850/jun/04/affairs–of–greece on 1 August 2016.

[607] Affairs of Greece, 4 June 1850, in ibid., vol. 111, 716–20. Accessed at http://hansard.millbanksystems.com/commons/1850/jun/04/affairs–of–greece on 1 August 2016.

> principles of justice, is not to be found in the same degree among the tribunals and authorities of the Spanish American States as in the countries of Europe.[608]

More broadly these remarks dovetail with the conception of implicit civilizational hierarchy in the references to past interventions during the Greek debate, where Palmerston and Russell emphasized the state practice of Britain, France and the United States.

An American perspective

This section will conclude with an overview of an American diplomatic intervention in Greece in 1853.[609] The Jonas King case, in which the Greek government again acquiesced to the existence of a strong customary norm protecting foreigners' property, shows the United States using a similar argument to ground its diplomatic intervention in the immediate aftermath of the 'Don Pacifico affair'. The Americans, echoing British actions, justified the diplomatic intervention though local remedies had not been exhausting by claiming that 'the President can place no confidence' in Greek tribunals.[610] Reverend King, a banished American missionary, had also complained to the State Department of the appropriation of his land to public purposes. The secretary of state Edward Everett, in his instructions to the American minister to Turkey, argued that although the

> rule of public law is settled, that a private citizen in a foreign country is not entitled to the forcible interference of his government to procure him redress of wrongs till justice has been denied him by the local tribunals **...** had not the conduct of the courts of Greece, in the trial of Dr. King, sufficiently shown that he could not expect justice at their hands. The rule of public law to which I have referred takes for granted that the tribunals are entitled to confidence, and the President can place no confidence in those of Greece in any case where Dr. King is concerned.[611]

---

[608] The Case of Mr Ward and the Venezuelan Government, in ibid., vol. 117, 780–2. Accessed at http://hansard.millbanksystems.com/commons/1851/jun/16/the–case–of–mr–ward–and–the–venezuelan on 1 August 2016.

[609] Moore, *Digest*, vol. vi, 262–4 (§ 913 Denial of justice). See also Fachiri, "Expropriation and International Law."

[610] Edward Everett secretary of state to Mr Marsh minister to Turkey, "No. 24, Feb. 5, 1853, S. Ex. Doc. 9, 33 Cong. 2 sess. 5, 8, 9." Cited in Moore, *Digest*, vol. vi, 262–4 (§ 913 Denial of justice).

[611] Edward Everett secretary of state to Mr Marsh minister to Turkey, "No. 24, Feb. 5, 1853, S. Ex. Doc. 9, 33 Cong. 2 sess. 5, 8, 9." Cited in ibid.

Furthermore ‘the government of Greece has never placed its refusal to indemnify Dr. King on the ground that his claim has not been duly adjudicated by the tribunals, but has positively disclaimed all responsibility, and attempted to turn him over to the municipality of the city of Athens, by which, in turn, he is thrown back upon the general government. Such being the state of things, the President feels it his duty to interfere to procure redress to Dr. King.’ Whilst waiting for the Greek government’s reply the American minister was instructed ‘by taking the opinion of intelligent and impartial foreigners, by recent sales of land in the vicinity, by a private arbitration of disinterested persons, or by any other sources of information, to ascertain what amount of loss Dr. King has really suffered’ in order to immediately propose a reasonable sun. ‘If the Greek government is discreet, they will immediately close with this offer, and you will use all your address to induce them to do so’. If they refuse Mr Marsh was instructed to propose referring the ‘whole question to the arbitration of a friendly power’. Though the diplomat was conveyed to Athens in an American warship, in a contrast to Britain's earlier conduct, Everett instructed the minister ‘[c]onsidering the great disparity of the parties’ to ‘in all your conferences with the Greek minister, avoid the language of menace, and be especially careful to leave your government entirely uncommitted as to ulterior measure’.[612] In response to the American demand Greece ‘offered to pay an indemnity for the land’, though the precise amount was contested and settled only two years later.[613]

Conclusion

This chapter has offered an account of the invention of a strong customary norm protecting foreigners and their property, grounded through the idea of civilization, in international legal practice. After outlining how foreigners’ property rights were almost exclusively protected through bilateral trade treaties in the early nineteenth century, I have proceeded to argue that mid-nineteenth century British diplomats played a crucial role in making a strong customary norm part of positivist international law.

[612] Ibid.
[613] Ibid.

This reinvention of a traditionally weak older norm crucially argued that a state did not necessarily have to exhaust local remedies in order to intervene diplomatically in a case of denial of justice. Whether local remedies were deemed effective was a function of whether a state was fulfilling its duties as a 'civilized' state, thus in effect resulting in a potentially hierarchical conception of international order in which some states could end up as more sovereign than others. This story has been tracked in detail with reference to British diplomatic correspondence on Greece in the 1840s, highlighting how advocate general John Dodson acceded to foreign secretary Palmerston's novel conceptualization of the customary norm. Before proceeding to an analysis of the immediate reception of Palmerston's notion with a particular focus on the extensive British parliamentary debate on the Greek intervention of 1850.

Moreover the chapter has highlighted the previously underexplored practice of legal advice in nineteenth century Anglo-American diplomacy. I have argued that this practice is crucial for the tracking of the evolution of customary norms and thus investigating the dynamics of legal change. This does not mean that legal advisers were necessarily the key agents, but that diplomats thought that having a legal justification for a policy was very important, as is shown in this chapter's account of British and American diplomatic interventions. More broadly the focus on legal advisers offers a new perspective for the analysis of the 'legalization' of world politics. Thus questioning the conventional emphasis on the turn of the twentieth century, in particular with reference to arbitration and the Hague peace conferences, in our existing accounts of this process.[614] In spite of the narrow focus on the Anglo-American experience adopted in this chapter, which is justified through the pivotal role of these states in the evolution of the legal frameworks of the global economy, this perspective has potential to be applied to more general studies of the legalization of diplomacy.

[614] For the older narrative privileging arbitration, see Lauterpacht, *Function of Law*. For a focus on the Hague conferences, see Reus-Smit, *Moral Purpose of the State*; Finnemore, *Purpose of Intervention*.

Chapter Six: The Reception of the 'Standard of Civilization' in Legal Practice

This chapter explores the reception of the idea of a strong customary norm protecting foreigners' property rights, grounded through the idea of civilization, further in international legal practice. As we have seen, the British 1840s claims on Greece constituted the key case in this reinvention of the older norm. The idea of a strong customary norm continued to be most often invoked in disputes between the Anglo-American powers and Southern European and Latin American states in the latter part of the long nineteenth century. These weaker, and predominantly new, states had followed the Continental European trend towards giving foreigners property rights through codified domestic law. Several Latin American states subjected the far-reaching and rather vague reinvented norm to a radical challenge, which contested the possibility of diplomatic intervention altogether and was coined as the 'national standard' in the treatment of foreigners and their property by Latin American lawyers. Though the threat of military intervention usually led to acquiescence to the stronger state's diplomatic demands.

In practice the reinvention of the customary norm by hegemonic states led to the emergence of a more hierarchical legal framework for the global economy. With the most powerful states predominantly enforcing the norm on weaker states that also had lower status in international society. Anglo-American diplomats and lawyers continued to use the idea of 'civilization' as a justification for the existence of a norm protecting their nationals' economic interests abroad. With former American secretary of state Elihu Root coining the strong customary norm protecting foreigners and their property as the 'standard of civilization' at the 1910 meeting of the American Society of International Law. This story of a largely forgotten nineteenth century shift from contract towards customary

unilateralism in the legal frameworks of the global economy crucially goes completely against the conventional understanding of the making of a liberal international order by the Anglo-American powers through multilateral treaty making. [615]

The chapter will proceed as follows. After outlining the contested receptions of the the novel conception of a strong customary norm, I will provide an overview of how the norm was enforced in the latter part of the long nineteenth century. Most of these diplomatic disputes took place between the Anglo-American powers and weaker Latin American and Southern European states that were pressured to accede to the idea of a strong customary norm. Counter intuitively legal advice and diplomacy remain the key practices for studying the enforcement of this norm, as international arbitration tribunals' case law recognized the existence of the norm only in the 1920s as the 'international standard', which Root had used as an alternative epithet though the continuity under changed aliases has remained underexplored. The 'standard of civilization' did not thus die with the end of the long nineteenth century. Instead I argue that it has remained a crucial, and at least until recently heavily contested, element of the legal frameworks of the liberal economic order. The last part of the chapter will track the story of the customary norm protecting foreigners and their property, under its new aliases of the 'international standard' and most recently the 'fair and equitable treatment standard', until the twenty-first century.

Receptions of the strong customary norm

Britain's intervention, which was popularized as the 'Don Pacifico case', eventually became seen as a crucial case for the making of a positivist strong customary norm protecting foreigners and their property justified through the idea of civilization. The Don Pacifico affair is first referred to as state practice supporting the existence of this notion in international legal doctrine in Robert Phillimore's *Commentaries* (1855-7). Phillimore, who was appointed to Dodson's old position of advocate general

[615] Ikenberry, *Liberal Leviathan*; To an extent also Reus-Smit, *Moral Purpose of the State*.

in 1862 (Palmeston being then prime minister), grounded his argument that 'foreigners ... are entitled to the execution of justice' through referring to 'Debates in both Houses of Parliament on the Affairs of Greece and the Claims of Don Pacifico.–Hansard's Parl. Deb. June, 1850'.[616] Though Phillimore is markedly skeptical as to the solidity of Britain's legal argument in this specific case –'[t]hat M. Pacifico had not applied to the Greek Courts of Law for redress appears to be an admitted fact'– what is important is that he uses this example of contemporary state practice as positivist evidence for the existence of a strong customary rule protecting foreigners and their property from manifest injustice in 'every civilised State'.[617]

The still controversial early reception of the Pacifico incident can also be gauged from an 1863 British parliamentary debate, which concerned a diplomatic dispute with Brazil that had also been resolved through a naval intervention. Britain had accused Brazil of an inadequate response to the theft of cargo, and alleged killings of some crew members, after a British merchant vessel had been shipwrecked. Though Russell –now foreign secretary in a cabinet headed by Palmerston– defended his conduct through invoking the notion that 'it is part of the general law of nations, and that it is part of the municipal law of almost every civilized nation, that the persons and property of foreign subjects shall be respected in the other country' he notably did not ground this argument through reference to Palmerston's actions in the Pacifico incident.[618] Instead Russell echoed his own remarks from thirteen years before and argued that the widespread use of naval interventions by Britain, France and the US in order to protect their nationals' rights constituted evidence for the existence of the customary norm. 'I find in looking at the proceedings which have taken place for some years past, that there have been, from 1831 to the present time, twenty-one cases in which France has adopted coercive measures in order to obtain redress; twenty-two eases in which Great Britain has adopted coercive measures in order to obtain redress; and twenty-three cases in which the United States have adopted similar measures for that purpose.' This crucially for Russell 'shows at least that in the case of these great maritime countries measures of a coercive nature are sometimes used if they cannot obtain redress

[616] Phillimore, *Commentaries*, vol. ii (1855), 4-5.
[617] Phillimore, *Commentaries*, vol. iii (1857), 29, see also 32.
[618] *Hansard*, vol. clxxi (1863), 19th June 1863, 1137.

without them.'[619] Even though he does not engage with the issue of whether these interventions had been grounded through a treaty or customary law.

It is the opposition instead who referred to Palmerston's 1850 conduct as a negative example. The Earl of Malmesbury implicitly accused Russell of having 'two measures—one for the weak [states] and another for the strong.'[620] After having ironically argued that 'I am quite certain that the noble Earl [Russell] is not in the habit of imitating the language uttered in another place [the Commons], and which is assumed there by a noble Viscount [Palmerston] ... which consists in resting his case upon the old claim, "Civis Romanus sum." Now, of all the foolish misapplications of a dead language ... I never in my life heard of a worse.' [621] Malmesbury had twice served as foreign secretary in governments headed by the Earl of Derby, who had proposed the motion of non-confidence over the Greek intervention in 1850. Though Russell did not directly defend Palmerston's Roman analogy he approvingly instead referred to Oliver Cromwell as a 'great man' and 'true Englishman' who had said in 'plain English, that he was determined to make the name of an Englishman be as much respected as ever that of a Roman had been.' Echoing Palmerston's earlier language Russell told the Lords that '[i]t is not a thing to be ashamed of, that we should wish to see the British name respected: and where the life or property of a British subject is in question, we think it a duty to interfere.'[622] The notion of an implicit hierarchy within the society of states is also still present not only in terms of Britain's own reference group of 'great maritime countries' but also with Russell's argument that in 'these South American affairs, it is often necessary to have recourse to force to protect your commerce and obtain justice' and that the weakness of the Brazilian state did not allow for its impunity.[623]

In contrast Palmerston's actions in the Pacifico incident had lost their controversial edge within Anglo-American practice by the turn of the twentieth century. The American reception of Palmerston's idea of a positivist strong customary norm justified through the idea of civilization can

[619] Ibid., 1138.
[620] Ibid., 1136. Malmesbury's speech is referred to in Fiocchi Malaspina, *L'eterno ritorno*, 213, fn. 188.
[621] Ibid., 1132.
[622] Ibid., 1144-45.
[623] Ibid.

be further tracked in John Bassett Moore's *Digest* (1906) which cited 'Lord Palmerston, in the House of Commons, June 25, 1850, on the case of Don Pacifico' on the crucial point that '[l]ocal remedies need not be exhausted ... where justice is wanting'.[624] This reference to the British intervention in Greece is Moore's oldest example of state practice on this point and the only one in which the US is not involved.[625] Most of the section's citations are related to diplomatic disputes concerning the property of American citizens in Mexico and in which US secretaries of state justify diplomatic intervention before judicial remedies were exhausted due to the notorious weaknesses of Mexico's domestic legal system.[626] Secretary of state Hamilton Fish's 1873 despatch to the American minister in Venezuela epitomizes the US viewpoint: 'A claimant in a foreign state is not required to exhaust justice in such state when there is no justice to exhaust.'[627]

This idea of a strong customary norm protecting foreigners' property was subjected to a radical challenge by several Latin American states, which contested the possibility of diplomatic intervention altogether. The idea was expressed in Mexico's 1857 constitution, which declared that aliens 'are obliged to ... respect the institutions, laws and authorities of the country, subjecting themselves to the judgements and decisions of the courts, without the power to invoke additional remedies other than those available to Mexicans'.[628] This unsurprisingly popular viewpoint in Latin America was later coined as the 'national standard' with regards to foreigners and their property or alternatively the 'Calvo doctrine' as Carlos Calvo introduced it into international legal doctrine in his 1863 work.[629] The label of a 'Calvo doctrine' is however misleading with regards to the origins of this heavily contested alternative norm, as once again legal change emerges from legal practice –of the delegates

[624] Moore, *Digest*, vol. vi, 677–82 cited at 681-2.
[625] Ibid., 677–82.
[626] Ibid. In the only citation in the section that is not related to enforcing American citizens property rights in Latin America secretary of state Daniel Webster argued in 1851 that diplomatic intervention in Britain became permissible, despite the lack of an appeal to the lords of appeal, as the American 'claimants had incurred great expense in the prosecution of their rights before the admiralty court and had not the means for carrying the case further in the form in which it was there presented.' See ibid., 677.
[627] Ibid, cited at 677.
[628] Cited in Dawson, "The Influence of Andres Bello" at 307.
[629] I discuss these developments in Chapter 5.

of the Mexican constitutional convention– and is only afterwards introduced to legal doctrine thus demonstrating 'Calvo's lack of originality' in this respect.[630]

These diametrically opposed receptions of the idea of a strong customary norm provide the context for former US secretary of state Elihu Root's speech (1910) in which he explicitly conceptualised a 'standard of civilization' protecting foreigners and their property whilst using the 'Don Pacifico case' as his only empirical example of state practice.[631] Root argued that

> [e]ach country is bound to give to the nationals of another country in its territory the benefit of the same laws, the same administration, the same protection, and neither more nor less: provided the protection which the country gives to its own citizens conforms to the established standard of civilization ... There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it accords to its citizens is that its system of law and administration shall conform to this general standard. If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens.[632]

This crucial argument is exclusively grounded through citing what '[i]n the famous Don Pacifico case, Lord Palmerston said, in the House of Commons'.[633] The cited passages being the ones reproduced in Moore's *Digest* suggest that this was Root's source for the reference. The former secretary of state argued that nations 'to which such observations apply must be content to stand in an intermediate position between those incapable of maintaining order, and those which conform fully to the international standard. With this understanding there are no exceptions to the rule and no variations from it.'[634]

---

[630] Ibid., 307-8. See also the discussion in my Chapter 5, fn. 361.
[631] The speech was published in the *American Journal of International Law*; Elihu Root, "The Basis of Protection to Citizens Residing Abroad," *AJIL* 4, no. 3 (1910). I cite the slightly earlier edition from the "Proceedings of the American Society of International Law at Its Annual Meeting" (1907-1917), vol. 4 (28-30 April 1910), in particular 20-1. There also exists a separate, presumably even earlier, contemporary printed edition; "The Basis of Protection to Citizens Residing Abroad, Opening Address by Hon. Elihu Root as President of the American Society of International Law, the Fourth Annual Meeting of the Society, In Washington, April 28, 1910" (Byron S. Adams, Washington, D.C.), Elihu Root Papers, box 221, Library of Congress. There are no discernable changes between the editions.
[632] Root, "Address of Hon. Elihu Root, President of the Society, on The Basis of Protection to Citizens Residing Abroad", 20–21.
[633] Ibid., 21.
[634] Ibid., 21–22.

The origins of this presidential address at the American Society of International Law (founded in 1906) are to an extent illuminated by surviving correspondence between Root and the society's secretary James Brown Scott, which also further illustrates the intimate connection between the society's expert opinions and State Department policies. Scott suggested '[k]nowing that you like to consider in your presidential address timely questions' whether Root 'would perhaps be willing ... to lay down in authoritative form the principles which should govern the country in extending protection to its citizens residing abroad.'[635] Root agreed to the topic, and later sent the draft to Scott to 'read over ... and see whether it is all right'.[636] This letter was actually delivered to the state department where Scott was then working as the solicitor and thus the government's chief legal adviser. More over Scott had been appointed as solicitor by none other than Root, after Scott, then at Columbia law school, had written to the secretary of state that '[i]t has occurred to me that you might care to make a non-political appointment of some one who has specialized in International Law.' [637] This correspondence and the fact that the 'standard of civilization' was coined in an ASIL presidential address –which was then published in the *American Journal of International Law*– thus dovetails with the influential notion of a novel kind of 'professionalization', in which new professional organizations played a key part, changing international legal practice in the closing years of the long nineteenth century.[638]

Though later secondary literature usually refers to the George Finlay claim for the existence of a rule of customary international law, rather than to the more controversial Don Pacifico affair, this section has conclusively shown that these cases are actually intimately linked and constitute the core of Britain's 1840s diplomatic disputes with Greece.[639] Though McNair, writing in 1956, argued that the Pacifico incident 'is of more importance politically than legally' several prominent late nineteenth

[635] James Brown Scott to Elihu Root, 2 January 1910, "Elihu Root Papers", box 68 1910 A-B, at the Library of Congress.
[636] Elihu Root to James Brown Scott, 23 April 1910, "James Brown Scott Papers", box 7 folder 4, at Georgetown University Library.
[637] James Brown Scott to Elihu Root, 30 December 1905, James Brown Scott Papers, box 7 folder 4.
[638] Koskenniemi, *Gentle Civilizer*, also Finnemore, *Purpose of Intervention*; Nabulsi, *Traditions of War*.
[639] Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law* both exclusively refer to the Finlay claim. Exceptionally for later works Schwarzenberger, "The Protection of British Property Abroad" recognises the importance of the Pacifico affair.

century Anglo-American international lawyers seem not to have shared this viewpoint. McNair further thought that 'Dodson is disappointing on this affair, and made no attempt to discuss the principles governing the responsibility of a State in such circumstances or the exhaustion of local remedies.'[640] Yet irrespective of the questionable integrity and quality of Dodson's legal advice I have demonstrated that the fact that Dodson acceded to Palmerston's notion of a strong customary norm protecting foreigners and their property grounded in the idea of civilization had crucial consequences for the history of international law. As was opportunistically recognised by late nineteenth century international lawyers who began to refer to Palmerston's speech on the Pacifico affair as evidence of state practice supporting the notion of a positivist customary norm that was premised on an implicitly hierarchical conception of international order. These included Root, who in 1910 coined the customary norm as the 'standard of civilization' in a speech that the state department solicitor conceptualized as laying 'down in authoritative form the principles' governing the protection of citizens abroad.

Enforcing the strong customary norm

This section looks at how the new notion of a strong customary norm protecting foreigners and their property grounded in the idea of civilization was enforced in the latter part of the long nineteenth century. I argue that the customary norm was most often invoked in diplomatic disputes between the Anglo-American powers and weaker Latin American and Southern European states that were pressured to conform with the idea.[641] Diplomacy and legal advice remain the key practices for studying the enforcement of this norm, as international arbitration tribunals' case law recognized the existence of the norm only in the 1920s. Though the norm was often invoked in diplomatic interventions that were resolved through setting up an ad hoc arbitration to adjudicate the claims, the

[640] McNair, *International Law Opinions*, vol. ii, 238.
[641] Contra Platt, *Finance, Trade and Politics* who dismisses the importance of European disputes for the development of international investment law. The case selection in Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law* shows that they implicitly consider Southern Europe and Latin America as the two key regions.

existence of the contested customary norm was side stepped as the tribunals' jurisdiction usually rested nearly exclusively on a specific bilateral treaty.

I will begin by outlining several late nineteenth century diplomatic interventions in Latin America in which American diplomats invoked the idea of a strong customary norm protecting foreigners' property, as further demonstration of the adoption of the notion in the State Department. This is followed by an analysis of British and American diplomatic correspondence invoking the norm in disputes with Portugal and Venezuela, which were resolved through arbitrations at the close of the long nineteenth century (1889-91, 1902-4, 1913). The latter two disputes are particularly important as they also involved other European states (Germany, Italy, Belgium, France, Spain, Sweden-Norway, and also exceptionally Mexico) as claimants and thus demonstrate the widening acceptance of the idea of a strong customary norm. The section will conclude with an overview of how, after former secretary of state Root's 1910 speech in which he coined the strong customary norm as the 'standard of civilization' –or alternatively the 'international standard'–, American diplomatic correspondence began referring to an 'international minimum standard' in the aftermath of world war one. International arbitration tribunals' case law recognized the existence of the customary norm conceptualized as the 'international standard' –or the 'standard of civilization'– only beginning with the US-Mexican mixed commission in the 1920s.

US interventions in Latin America

Several late nineteenth century diplomatic interventions in Latin America, in which American diplomats invoked the idea of a strong customary norm protecting foreigners' property, demonstrate how the State Department further adopted the notion already present in the 1853 Jonas King claim against Greece. It must be emphasized though that in addition to diplomatic interventions being grounded in the existence of this norm, the provisions of trade treaties also continued to be invoked as we saw earlier in the Henry Savage claim against Nicaragua in 1855. In the same year the department

received its first complaint from the American owners of the United States and Paraguay Navigation Company.[642] Though proofs of ownership and damage to property were at first deemed 'very inadequate' by secretary of state William L. Marcy, after further lobbying he instructed the American minister at Buenos Ayres that the conduct of the Paraguayan government appeared 'to have been not only unjust and oppressive , but to have produced the loss of a large amount of property' and that Paraguay ought to be presented 'a claim for the damages sustained by its unjustifiable proceedings towards the company' without referring to treaty law.[643] President James Buchanan echoed Marcy's viewpoint in his annual message to Congress in 1857. 'Citizens of the United States ... who were established in business in Paraguay, have had their property seized and taken from them, and have otherwise been treated by the authorities in an insulted and arbitrary manner, which requires redress.'[644] After diplomatic pressure did not work, the US embarked on a demonstration of its naval force that led Paraguay to accept arbitration in order to determine the precise amount of compensation. Though exceptionally, and to the embarrassment of the American government, the commission concluded based on the facts that the company was not entitled to compensation it did not question the legal argument on which the diplomatic intervention was based.[645] Even more explicitly, secretary of state Lewis Cass wrote in 1858 to the Nicaraguan government that the 'United States believe it to be their duty, and they mean to execute it, to watch over the persons and property of their citizens visiting foreign countries, and to intervene for their protection when such action is justified by existing circumstances and by the law of nations.'[646]

American correspondence with regards to Mexico offers further indication of the influence of the idea of a strong customary norm. In 1873 secretary of state Hamilton Fish argued that it 'may, in general,

[642] See Moore, *Arbitrations*, vol. ii, 1485–1549. Also Miles, *Origins of International Investment Law*.
[643] William L. Marcy secretary of state to Mr. Peden minister at Buenos Ayres, 18 July 1856, cited in Moore, *Arbitrations*, vol. ii, 1491–2. Also, for Marcy's reaction to the first memorial of the company to the State Department on 15 January 1855, ibid.
[644] James Buchanan, annual message to Congress, 8 December 1857, cited in ibid., 1492–3.
[645] Award of the commissioners C. Johnson (US), José Berges (Paraguay), 13 August 1860, reproduced in ibid., 1502–28. For the treaty establishing the tribunal, see special convention between US and Paraguay, 4 February 1859, in *CTS*, vol. 120, 253–8.
[646] Lewis Cass secretary of state to Mr. Lamar, 25 July 1859, later referred to in "Mr Cass, Sec. of State, to Mr. Body, Mar. 3, 1860, 52 MS. Dom. Let. 11." Cited in Moore, *Digest*, vol. vi, 287 (§916 Debts and contracts). See also Fachiri, "Expropriation and International Law," 162.

be true that when foreigners take up their abode in a country they must expect to share the fortune of the other inhabitants, and can not expect a preference over them. While, however, a government may construe according to its pleasure its obligation to protect its own citizens from injury, foreign governments have a right, and it is their duty, to judge whether their citizens have received the protection due to them pursuant to public law and treaties.'[647] This notion was dovetailed by his successor Frederick Frelinghuysen in his 1885 instructions to the American minister in Mexico.

> The duty is always incumbent upon a government to exercise a just and proper guardianship over its citizens, whether at home or abroad. A municipal act of another state can not abridge this duty, nor is such an act countenanced by the law or usage of nations. No country is exempted from the necessity of examining into the correctness of its own acts. A sovereign who departs from the principles of public law can not find excuse therefor in his own municipal code. This government, being firmly convinced that the position of the Mexican government is untenable, can not assent to it. "You will so inform the minister for foreign affairs in such form as you may deem proper."[648]

In a fascinating contrast the State Department disputed the validity of a British claim against the US in the same year arguing that the matter concerning a British subject murdered in the US territory of New Mexico belonged to its domestic courts which were naturally perfectly up to the job. Frelinghuysen's successor, Thomas Bayard grounded this viewpoint on

> an eminent English publicist, as highly esteemed in this country as in England, whose recent decease is so greatly mourned. "The state," says Sir R. Phillimore (International Law, II, 4), "must be satisfied that its citizen has exhausted the means of legal redress offered by the tribunals of the country in which he has been injured. If these tribunals are unable or unwilling to entertain and adjudicate upon this grievance the ground for interference is fairly laid.[649]

[647] "Mr. Fish, Sec. of State, to Mr. Foster, Dec. 16, 1873, MS. Inst. Mex. XIX, 48." Cited in Moore, *Digest*, vol. vi, 265 (§913 Denial of Justice). See also Fachiri, "Expropriation and International Law," 163.
[648] "Mr Frelinghuysen Sec. of State, to Mr. Morgan, min. to Mex., No. 732, Feb. 17, 1885, For. Rel. 1885, 575." Cited in Moore, *Digest*, vol. vi, 312-3 (§919 Legislative limitations). See also Fachiri, "Expropriation and International Law," 163.
[649] Thomas F. Bayard secretary of state to Mr West, 1 June 1885, in *FRUS*, 1885, pp. 450–9 (No. 320), cited at p. 458.

Britain, US and the Delagoa Bay Railway claim

An analysis of British and American diplomatic correspondence invoking the idea of a customary norm in plurilateral disputes with Portugal and Venezuela, which were resolved through arbitrations at the close of the long nineteenth century (1889-91, 1902-4, 1913), allows the tracking of the widening acceptance of the notion of a strong customary norm. In 1889 both Britain and the United States complained to the Portuguese government following the seizure of the Delagoa Bay Railway (situated in present day Mozambique), which was owned by British and American investors.[650] The complaint preceded any attempt to exhaust domestic remedies thus illustrating how certain blatant variants of a denial of justice, including confiscation, began to be conceptualized as justifying an immediate diplomatic intervention.

Foreign secretary the Marquess of Salisbury instructed the British minister at Lisbon that 'Her Majesty's Government are of opinion that the Portuguese Government had no right to cancel the Concession, nor to forfeit the line already constructed ... In their judgment, the British investors have suffered a grievous wrong' without any reference to treaty law. Salisbury declared that

> [i]f the Portuguese Government admit their liability to compensate the British Company for any injury to which their interests or property have been subjected by the confiscation of the line and the seizure of the materials upon it, Her Majesty's Government will admit that the amount of that compensation is a proper matter for arbitration **...** you will state that Her Majesty's Government are anxious for an amicable settlement, and rely on the sense of justice of the Portuguese Government to repair the wrong which has been the consequence of their action.[651]

At this point it is useful to note that Salisbury's actions also serve as an indication of a consensus with regards to the notion of a customary norm amongst British policy-makers as he had earlier served under Derby and been a prominent critic of Russell's foreign policy.

[650] See also Fachiri, "Expropriation and International Law," 165–66; Miles, *Origins of International Investment Law*.
[651] The Marquess of Salisbury to Mr Petre, 10 September 1889, in *BFSP*, vol. 81, 688–91.

The instructions written by the secretary of state James Blaine were almost identical. '[T]his government is forced to the conclusion that the violent seizure of the railway by the Portuguese Government was an act of confiscation which renders it the duty of the Government of the United States to ask that compensation should be made to such citizens of this country as may be involved.' Blaine continued that the 'question can readily be determined, the Portuguese Government first agreeing to admit its liability to make compensation for the losses occasioned by its forcible seizure of the railway in disregard of the rights of the concessionaire and the owners.' The US 'is desirous of reaching an early and amicable settlement of the case, and hopes that the Portuguese Government will be disposed to repair the injuries which its action has produced.'[652] The arbitration treaty is typical to the late nineteenth century in that it limits the commission's jurisdiction merely to 'fixing the amount due by Portugal to the claimants of the other two countries'.[653] Because Portugal had already conceded to paying compensation the commission does not have to consider the contentious issue of whether there exists a customary norm protecting foreigners and their property on which Britain and the United States had based their diplomatic interventions. Thus the 'mandate which the three governments have agreed to refer to the arbitration tribunal is, to fix, as it shall deem most just, the amount of the compensation due by the Portuguese Government to the claimants of the other two countries, in consequence of the rescission of the concession of the Lourenco Marques Railroad, and the taking possession of that railroad'. Thereby settling 'the controversy existing between the three governments on the subject.'[654]

European and US consensus in the Venezuela crisis

In the Venezuela crisis of 1902-03, Britain and Germany, later joined by Italy, staged a joint naval intervention in order to pressure the Venezuelan government to pay up claims made on behalf of their

[652] James Blaine secretary of state to Mr Loring, 8 November 1889, at "MSS. Dept. of State", in Moore, *Arbitrations*, vol. ii, 1866–70, cited at 1869–70.
[653] Protocol between Portugal, Britain and the United states signed in June 1891, preamble. Reproduced in ibid., 1874–7, preamble cited at 1874.
[654] Ibid., art i.

subjects.[655] However before embarking on this planned intervention the British ambassador in Washington was instructed to communicate the Anglo-German plans to secretary of state John Hay. This correspondence serves as a good demonstration of the consensus that existed between the Anglo-American powers on the notion of a strong customary norm protecting foreigners and their property. Foreign secretary the 5th Marquess of Lansdowne instructed Michael Herbert to communicate that Britain had 'within the last two years, had grave cause to complain of unjustifiable interference on the part of the Venezuelan Government with the liberty and property of British subjects.' As it 'was felt that a continuance of such conduct could not be tolerated, and His Majesty's Minister at Caracas was instructed to record a formal protest, and to intimate clearly ... that unless explicit assurances were received that such incidents should not recur, and unless full compensation were promptly paid wherever shown to be justly due, His Majesty's Government would take such steps as might be necessary to exact the reparation which they were entitled to demand'. Herbert was tasked to inform the Americans that the Venezuelan 'reply was wholly unsatisfactory, and practically ignored' British remonstrances and that in 'view of the nature of this reply, His Majesty's Government are compelled to consider what course it may be necessary to pursue in order to enforce their demands.'[656] The ambassador replied two days later that he had 'communicated to Mr. Hay this morning the substance of your Lordship's telegram' and that 'His Excellency stated, in reply, that the US 'Government, although they regretted that European Powers should use force against Central and South American countries, could not object to their taking steps to obtain redress for injuries suffered by their subjects, provided that no acquisition of territory was contemplated.'[657]

The naval blockade forced Venezuela to concede to the European powers' demands. In the arbitration protocols signed with Britain, Germany and Italy Venezuela explicitly acceded to its liability, and the commissions' remits were limited to ascertaining the validity and deciding the amounts of individual

[655] See Tomas Wallenius, "An Empire of Private Property. The Venezuela Arbitrations of 1903-04" (University of Oxford MPhil thesis, 2013). Also D.C.M. Platt "The Allied Coercion of Venezuela, 1902-1903: A Reassessment", *Inter-American Economic Affairs* (15, Spring 1962); Platt, *Finance, Trade and Politics*; Miles, *Origins of International Investment Law*.
[656] The Marquess of Lansdowne to Sir Michael Herbert, 11 November 1902, in *BFSP*, vol. 95, 1081–2 (no 134).
[657] Sir Michael Herbert to the Marquess of Lansdowne, 13 November 1902, in ibid., 1084 (no 138).

claims. Thus in the British-Venezuelan protocol Venezuela recognized 'in principle the justice of the claims which have been preferred by His Majesty's Government on behalf of British subjects.'[658] British claims that were not compensated immediately were 'referred to a Mixed Commission ... which shall examine the claims and decide upon the amount to be awarded in satisfaction of each claim.' Venezuela was crucially forced to admit its 'liability in cases where the claim is for injury to, or wrongful seizure of property, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: (a) Whether the injury took place and whether the seizure was wrongful, and (b) If so, what amount of compensation is due.'[659] This restriction was challenged by Venezuela in the *De Lemos* claim before the British-Venezuelan commission on the grounds that 'it is morally impossible that Great Britain, which deservedly ranks among the most enlightened nations of the world, should accomplish a juridical act proscribing ... the principles of justice, the postulates of law, which form the wealthiest treasure of civilization.'[660] The American umpire Francis Plumley did not however agree and held that

> [t]here can be no fair doubt that the language of the protocol contained in Article III and quoted by the learned agent for the British Government limits the discussion and determination of each case falling within its scope to the question of injury to the property of the claimant by the Venezuelan Government and the resultant compensation if injury is found. As the case stands inquiry is limited to an interpretation of these expressions: The Venezuelan Government admit their liability in cases where the claim is for injury to * * * property, and consequently the questions which the Mixed Commission will have to decide will only be: (a) Whether the injury took place * * *.[661]

In contrast the protocol signed with the mediating US, which became the template for those settling the demands of Belgium, France, Spain, Sweden-Norway, and Mexico, was at least somewhat less explicitly restrictive in that '[c]laims owned by the citizens of the United States of America against the Republic of Venezuela ... shall be examined and decided by a Mixed Commission'. The commission 'shall decide all claims upon a basis of absolute equity, without regard to objections of a technical

[658] British-Venezuelan Protocol for the Settlement of British Claims, 13 February 1903, art i. Reproduced in *CTS*, vol. 192, 414–7.
[659] Ibid., art iii.
[660] British-Venezuelan commission, De Lemos case, in Jackson H. Ralston, ed., *Venezuelan Arbitrations of 1903* (Washington: Government Printing Office, 1904), 302–22.
[661] Ibid., 308–9.

nature, or of the provisions of local legislation.'[662] Despite these small differences in how draconic the wording of the protocols was from Venezuela's perspective, the crisis and arbitrations overall illustrate how strong foreigners' property rights were a priority –that trumped the sovereignty of a Latin American state– for Western European countries and the US at the turn of the twentieth century.

Towards recognizing the customary norm in arbitral practice

The Portuguese religious properties case, heard before the newly established Permanent Court of Arbitration just before the onset of the first world war, is significant because lawyers representing all parties –Britain, France, Spain and Portugal– acceded to the existence of an explicit customary norm protecting foreigners and their property grounded in the idea of civilization.[663] In contrast to earlier arbitrations, this legal argument was relevant because the tribunal had a wider jurisdiction, which included the application of customary international law. Thus according to the 1913 agreement '[l]e tribunal examinera et réglera lesdites réclamations en statuant, d'après le droit conventionnel éventuellement applicable, et à défaut d'après les dispositions et les principes généraux du droit et de l'équité.'[664] The tribunal, 'chargé de statuer les réclamations relatives aux biens des nationaux britanniques, espagnols et français saisis ("arrolados") par le Gouvernement de la République portugaise à la suite de la proclamation de la République' confiscating properties owned by religious groups, was composed of three arbitrators one of whom was the former secretary of state Elihu Root.[665]

[662] US - Venezuelan Protocol for the Settlement of American Claims, 17 February 1903, art i. Reproduced in *CTS*, vol. 193, 1–3.
[663] See also Fachiri, "Expropriation and International Law."
[664] Agreement between Great Britain, France, Portugal, and Spain to submit to Arbitration the Question of Religious Properties Seized in Portugal, 31 July 1913, art iii. Cited in ibid., 168–69.
For a translation: 'The tribunal will examine and resolve the aforementioned claims whilst ruling, according to potentially applicable treaty law, and for want of the former the provisions and general principles of law and equity.'
[665] Art. iii, and also ii. Cited in ibid., 168–9.
For a translation: 'The tribunal charged with ruling on the claims relating to the property of British, French and Spanish nationals seized ("arrolados") by the Government of the Portuguese Republic following the proclamation of the Republic', arrolados can also be translated from Portuguese as listed.

The British counsel argued that 'His Majesty's Government are of opinion that the Portuguese State in taking possession, as it has done, of property legally acquired by British nationals in conformity with the legislation of Portugal and under the cover and protection of its public and private law, has acted *contrary to the principles of the law of nations* which governs the relations between states.' Though

> [it] is part of the generally recognized principles of international law that foreigners are subject to the laws of police and security of the state upon the territory of which they find themselves, and that the laws of that state also govern the rights of immovable property which they acquire there ... foreigners are entitled to count upon the legal protection and guarantees under the cover of which they came into the country and acquired their rights.

It is then crucially asserted that '[r]espect of property, respect of acquired rights, these are the legal principles of all civilized countries. It is upon the security which they assure and the confidence they inspire that the relations entertained by nations with each other are based.'[666] The French and Spanish made similar arguments, and crucially Portugal did not contest this notion of the existence of a customary norm. 'The Government of the Portuguese Republic reply that far from contesting the legal principles upon which the three Governments base these arguments, they approve them without reserve, respectful of law and equity.'[667] The arbitrators did not though rule on the idea of a customary norm because the dispute was ultimately settled consensually.[668]

From the 'international' to the 'fair and equitable treatment' standard

The 'standard of civilization' did not however die with the end of the long nineteenth century. In the aftermath of the First World War, the United States invoked Elihu Root's idea of an international standard in its diplomatic correspondence. International arbitrations also affirmed the 'standard of

[666] "Observations générales" by the British government, cited and translated in ibid.
[667] "Observations générales" by the Portuguese government, cited and translated in ibid.
[668] Ibid.

civilization / international standard' in their case law. Mexico and other Latin American states however continued to contest the existence of the customary norm. This opposition also foiled US led efforts to secure American investors' rights through multilateral treaty making. Following the Second World War, the US began including a 'fair and equitable treatment' standard in trade treaties thus seeking to affirm the contested customary norm in bilateral relationships. Secretary of state Cordell Hull had coined the term in 1938, and it was in effect substantively equivalent with the older 'standard of civilization / international standard'.

The strengthening challenge from developing countries to foreigners' property rights continued to foil attempts at multilateral treaty making. In this context West Germany, followed by other European states and eventually also the US, began concluding specific bilateral investment treaties (BIT) in order to protect their overseas investments. BITs included a 'fair and equitable treatment' standard mirroring American practice from almost the beginning. In another major innovation BITs began to include a dispute settlement provision giving foreign investors direct access to international arbitration through the International Center for the Settlement of Investment Disputes (ICSID). This provision completely deals away with the requirement to exhaust local remedies before investors can invoke international law. American and West German decision makers were not worried about this as they pursued BITs specifically in order to protect their foreign investment in developing countries and did not think this would impact their own superior domestic legal systems.

Unsurprisingly Latin American countries led the opposition to these efforts, and both BITs and international arbitrations based on them remained relatively few until the 1990s. Since then however BITs and international arbitrations based on them have mushroomed, with even the majority of Latin American countries dropping their longstanding adherence to a 'national treatment' by signing up to their provisions. Thus the standard of civilization has recently arguably become less contested and stronger than ever. Not only in terms of a customary norm protecting foreign property now known as the 'international minimum standard' or a potentially even more robust 'fair and equal treatment standard'. But also through in effect completely scrapping the requirement to exhaust local remedies

before investors can appeal to international law. Despite the formal reciprocity of this provision, core states have traditionally perceived this provision as de facto not applying to themselves and concerning only developing countries. As has been noted, these recent changes in legal practices have also been afterwards reflected in the most influential contemporary work of international legal doctrine. Crawford's posthumous edition of Brownlie's *Principles of Public International Law* complemented Brownlie's discussion of an international minimum standard with references to recent international arbitrations affirming the norm and by adding a section on the fair and equitable treatment standard. Thus conforming to a dynamic of legal change we have already seen in earlier parts of the thesis.

American diplomatic correspondence first invoked Elihu Root's notion of an international standard protecting foreigners and their property in 1918. The acting secretary of state Frank Polk instructed the ambassador in Mexico that the 'United States is firmly of the opinion that the great weight of international law and practice supports the view that every nation has certain minimum duties to perform with regard to the treatment of foreigners, irrespective of its duties to its own citizens'. '[I]n default of such performance, it is the right of the foreign government concerned to enter protest. Not the least of these duties ... is to refrain from measures resulting in confiscation of the vested property rights of foreigners, acquired in good faith and in accordance with the laws of the country in which the property is situated.'[669] This communication was indexed in 1941 as the first reference to 'Aliens, International standard in treatment of' in the *Foreign Relations of the United States* publication series.[670]

International arbitral tribunals also for the first time affirmed the 'standard of civilization / international standard' in their case law in the late 1920s. In the *Roberts* case, the commissioners of the US-Mexican general claims commission ruled that '[f]acts with respect to equality of treatment of aliens and nationals may be important in determining the merits of a complaint of mistreatment of an

[669] Frank Polk acting secretary of state to Mr Fletcher ambassador in Mexico, 12 December 1918. Reproduced in *FRUS*, 1918, pp. 784-9.
[670] Ibid., Index, Annual Volumes 1900-1918 (Washington, 1941), 47.

alien. But such equality is not the ultimate test of the propriety of the acts of authorities in the light of international law. That test is, broadly speaking, whether aliens are treated in accordance with ordinary standards of civilization.'[671] Similarly in the *Neer* case

> [w]ithout attempting to announce a precise formula, it is in the opinion of the Commission possible to go a little further than the authors quoted, and to hold (first) that the propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.[672]

Mexico and other Latin American states however continued to contest the existence of the customary norm. This opposition also foiled US led efforts to secure American investors' rights through multilateral treaty making. Instead following the Second World War, the US began including a 'fair and equitable treatment' standard in trade treaties thus seeking to affirm other states' commitment to the contested customary norm through the backdoor of bilateral agreements.[673] Secretary of state Cordell Hull had coined the novel term in 1938 in diplomatic correspondence with Mexico, and it was in effect substantively equivalent with the older 'standard of civilization / international standard'. Hull denied the 'national standard' and argued that 'when aliens are admitted into a country the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations'.[674] With particular reference to expropriation of foreign property, Hull declared that 'it was fair and reasonable, equitable and right, to accompany a taking of property by payment of just compensation.'[675] This is grounded through reference 'as one of the many examples of enlightened authoritative opinion of present times' to the judgment of the American

[671] "Harry Roberts (United States v. Mexico), Opinions of the Commissioners (1927) 100, 105." Cited in Green Haywood Hackworth, *Digest of International Law* (Washington: Government Printing Office, 1940), vol. 3, 640.
[672] Neer case, cited in ibid., 636–7. This passage in Hackworth's *Digest* notably begins with a citation of Root's 1910 speech, 635-40.
[673] Poulsen, *Bounded Rationality and Economic Diplomacy*, 49. Jeswald Salacuse, *The Law of Investment Treaties* (Oxford: Oxford University Press, 2010), 290.
[674] Secretary of State to the Mexican Ambassador (Castillo Nájera), 22 August 1938, in *FRUS* 1938, vol. 5, document 665, cited at 344.
[675] Ibid., 326-7.

umpire of the 1903 British-Venezuelan mixed claims commission in the *Selwyn* case.[676] Hull's specific demand for 'prompt, adequate, and effective payment' of compensation in cases of expropriation was later coined as the 'Hull doctrine' in customary international law.[677] The failure to uphold fair and equitable treatment would according to Hull 'imperil the very foundations of modern civilization. Human progress would be fatally set back.'[678]

The Mexican foreign minister Eduardo Hay unsurprisingly challenged Hull's viewpoint. Hay subscribed to the idea of a national standard that denied the possibility of diplomatic intervention. Whilst doing so Hay questioned Hull's conception of the standard of civilization as generally antiquated and specifically contrary to Latin American state practice. Mexico has 'adjusted its acts to the standards of international law in accordance with the evolution which the traditional concepts of that law have necessarily undergone. Far from judging that its attitude departs from the standard accepted by the civilized world in general and by the republics of this continent in particular, my country considers that its interpretation represents the unanimous conviction of the Ibero-American Republics'.[679] Hay argued that urgent 'social necessity' had forced Mexico's agrarian reforms and their concomitant expropriation of private land owned by both Mexicans and foreigners without immediate compensation.[680] For Hay, who did not have the opportunity to cite international tribunals to back his case, this long standing Latin American state practice with reference to a national standard had been best conveyed in Carlos Calvo's doctrinal work. 'The opinion of Latin America in this respect, has already been brilliantly expressed by the illustrious Argentine authority on international law, Calvo, who, using his indisputable authority, maintained in the classic treatise ...'[681]

[676] Ibid., 331-2.
[677] Brownlie, *Principles* (1966), 432 fn 5. Zachary Elkins, Andrew Guzman and Beth Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000", *International Organization* 60 no. 4 (2006), 812-14.
[678] *FRUS* 1938, vol. 5, 334.
[679] Eduardo Hay to the US ambassador (Daniels) in Mexico, 1 September 1938, enclosed in US ambassador to Mexico (Daniels) to the secretary of state, 1 September 1938, document 666, in ibid., cited at 354.
[680] Ibid., 355.
[681] Ibid., 362-3.

The strengthening challenge from developing countries to foreigners' property rights continued to foil attempts at multilateral treaty making after the Second World War. A drive for more robust investment protection was a key dimension of American efforts to establish an International Trade Organization in the late 1940s. Latin American states again played a prominent role in the opposition but were also soon joined in their efforts by many newly independent African and Asian countries.[682] This challenge was to culminate with calls for a 'New International Economic Order' and UN general assembly resolutions affirming a sovereign state's right to expropriate property without compensation standards based on customary international law beginning in the 1960s. The *Charter of Economic Rights and Duties of States,* which the UN general assembly passed in 1974, marked the highpoint of these efforts.[683] It claimed on the basis of the 'full permanent sovereignty of states' that '[n]o State shall be compelled to grant preferential treatment to foreign investment'. Thus every state had the right '[t]o nationalize, expropriate or transfer ownership of foreign property', with only '[a]ppropriate compensation' determined by the state itself. Furthermore any disputes over compensation 'shall be settled under the domestic law of the nationalizing State and by its tribunals'.[684] Only a handful of European countries, including West Germany and UK, and the United States voted against this explicit challenge to the international minimum standard.[685]

It is in this polarized context that both weakened the protections offered by customary law and made multilateralism impossible that West Germany, which had emerged as the largest European economy, sought to protect its investments in the Third World through a new and specific instrument, bilateral investment treaties. West Germany and Pakistan signed the first BIT in 1959.[686] Other European countries and eventually also the United States followed the Germans in adopting and promoting BITs.[687] These treaties mirrored earlier American treaty practice in trying to affirm contested

[682] Poulsen, *Bounded Rationality and Economic Diplomacy*, 49-50. Lipson, *Standing Guard*, 85-7.
[683] Lipson, *Standing Guard*, 87-90, Poulsen, *Bounded Rationality and Economic Diplomacy,* 60.
[684] United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States, chapter II, article 2. Accessed at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2778 on 20 April 2017.
[685] Lipson, *Standing Guard*, 88-9.
[686] Poulsen, *Bounded Rationality and Economic Diplomacy*, 49-52. Salacuse, *Law of Investment Treaties*, 91.
[687] Poulsen, *Bounded Rationality and Economic Diplomacy*, 58-9, 69. Salacuse, *Law of Investment Treaties*, 92-95.

customary law by including a 'fair and equitable treatment' standard from almost the beginning.[688] In a major innovation BITs also began to include a dispute settlement provision giving foreign investors direct access to international arbitration through the International Center for the Settlement of Investment Disputes (ICSID). This provision completely deals away with the requirement to exhaust local remedies before investors can invoke international law.

American and West German decision makers pursued these bilateral treaties specifically in order to protect their own foreign investment in developing countries. Herman Abs, director of Deutche Bank and adviser to the finance minister, had in 1957 called for a 'Magna Carta for the protection of foreign interests' in practice entailing 'an International Convention, backed by an international Court of Arbitration, which would establish an effective and enforceable rule of law for private foreign investment, protecting investors and recipient nations alike'. Abs ruefully noted recent examples of 'interferences with the rights of private foreign capital' and criticized 'the well-known attitude of some less developed countries, according to which the Western world is actually obliged to pay for the advancement of their economies, out of its own pocket ... and entirely without return.'[689] US vice president Richard Nixon tried to frame his similar efforts to promote American investment abroad, which included a proposal for 'a privately operated international investment guarantee', in more positive terms. Nixon argued that economic growth generated by private capital was 'vital for the future of the whole free world. In many nations, the pattern of economic development is being shaped for a century ahead. If this pattern is statist, then human freedom will be the loser.'[690]

Because American decision makers thus saw international investment as a one-way street, they did not think that eliminating the requirement to exhaust local remedies would impact their own superior domestic legal system. When the convention establishing ICSID came up for ratification in the US Senate an American diplomat explained that US support for it 'is primarily designed to establish another mechanism for peaceful settlement of investment disputes between investors and the less

[688] Salacuse, *Law of Investment Treaties*, 218-21.
[689] 'The Capitalist Magna Carta', *Time Magazine* 26 August 1957, at 49-50.
[690] 'The Valiant Venture', ibid., at 44.

developed countries… Also, from the nature of the Convention, there appears to be little likelihood that claims against the United States by private investors would be suggested for decision under the Convention. The legal and administrative remedies already available to the private investor in the United States are broad and effective.'[691] The German representative at an earlier consultative conference on the draft convention had similarly 'stressed the willingness of the developing countries to participate in the scheme' as 'a decisive factor in its success'.[692] Secretary of state George Schultz would similarly argue that the American BIT program had been initiated in 1981 'to encourage and protect U.S. investment in developing countries.' Traditional provisions of trade treaties 'granting rights which are not important to the typical U.S. investor were eliminated and replaced with more specific language ... Perhaps most significantly, the BIT goes beyond the traditional FCN (friendship, commerce and navigation treaty) to provide investor-host country arbitration in instances where an investment dispute arises.'[693]

The United States viewed BITs, as had been the case with the broader trade treaties that preceded them, as a means of affirming the contested international minimum standard protecting foreign property. Schultz thus argued that the 'BIT was designed to protect investment not only by treaty but also by reinforcing traditional international legal principles and practice regarding foreign direct private investment.'[694] Thus the model American BIT included 'general treatment protections designed to be a guide to interpretation and application of the treaty. Thus, the Parties agree to accord investments "fair and equitable treatment" and "full protection and security" in no case "less than that required by international law."' Schultz further stressed in his letter of submittal concerning the US-Turkish agreement of 1985 that the 'model BIT' on which this specific treaty was based 'also confers protection from unlawful interference with property interests and assures compensation in accordance with international law standards. It provides that any direct or indirect taking must be: for a public purpose; nondiscriminatory; accompanied by the payment of prompt, adequate and effective

[691] Letter from MacArthur to Harris, 27 March 1965, cited in St John, "Power of Modest Multilateralism", 146.
[692] St John, "Power of Modest Multilateralism", 123.
[693] Letter of Submittal to the President concerning US-Turkey BIT, 19 February 1986. Available at https://2009-2017.state.gov/e/eb/ifd/43365.htm, accessed 13.04.2017.
[694] Ibid.

compensation; and in accordance with due process of law and the general standards of treatment discussed above.'[695] The Americans also thought that BITs would consolidate –and even strengthen– customary international law indirectly through their dispute settlement clause that gave jurisdiction to investor friendly international arbitrators. The State Department legal adviser had thus endorsed the ICSID convention in 1966 as 'it is anticipated that decisions through the convention's mechanism will create a significant new body of international law. Thus international law in this area can be expected to grow as the result of this convention.'[696]

These efforts of European countries and the United States to bolster investor protection remained however relatively unsuccessful. This was because relatively few developing countries were willing to sign the new bilateral agreements. For example British diplomats reported, whilst pursuing a failed BIT negotiation in 1974, that 'British investors were looked upon with suspicion' in Jamaica and that an 'attempt to "freeze" customary international law as understood by HMG in our favour ... did not fit comfortably into the changing Caribbean scene'.[697] In particular almost no Latin Americans states signed BITs as they continued to adhere to a strong conception of sovereignty and the 'national standard' through denying a customary international norm protecting foreign property and opposing the establishment of ICSID.[698] This all changed in the 1990s. BITs mushroomed as developing countries influenced by free market ideas desired foreign investment and even the majority of Latin American states dropped their long standing contestation of the principles of international investment law by signing up to them.[699] For example Mexico signed up to the North American Free Trade Agreement (NAFTA), which is in practice to a large extent a trilateral BIT, in 1992 with Canada and its old bête noire the United States. With the proliferation of BITs the ICSID tribunals also finally saw widespread use and began (re)interpreting international law through their judgments.[700]

[695] Ibid.
[696] St John, "Power of Modest Multilateralism", 147.
[697] FCO 59/1200, cited in Poulsen, *Bounded Rationality and Economic Diplomacy*, 63-4.
[698] Poulsen, *Bounded Rationality and Economic Diplomacy*, 57-60, 69.
[699] Ibid., 71, 82-83, 109. Also Elkins, Guzman and Simmons, 'Competing for Capital' for a graphic with number of BITs signed per year, 815.
[700] Salacuse, *Law of Investment Treaties*, 388.

Thus the standard of civilization has recently arguably become less contested and stronger than ever. Not only in terms of a customary norm protecting foreign property now known as the 'international minimum standard' or a potentially even more robust 'fair and equal treatment standard'. But also through in effect completely scrapping the customary requirement to exhaust local remedies before investors can appeal to international law. Despite the formal reciprocity of this provision, we have seen how core states have traditionally perceived this provision as de facto not applying to their own 'superior' domestic legal systems and concerning only the protection of their investments in developing countries. This shift towards stronger and less contested foreigners' property rights has thus been based on affirming the previously heavily contested customary norm through the backdoor of bilateral treaty making. Thus blending the previous contractual and customary approaches towards securing foreign property. With the treaty provisions allowing investors immediate access to international arbitration further strengthening the customary norm by creating new case law precedents for its existence and extensive scope.

Thus the heart of the liberal economic order remains not multilateral and is still instead built on bilateral treaties, customary law and the jurisprudence of international tribunals.[701] Moreover even the requirement to exhaust local remedies has largely been eliminated. Widespread protests against the recently proposed Transatlantic Trade and Investment Pact (TTIP) between the European Union and the United States in effect concerned applying the long forgotten but still potent 'standard of civilization' to relations between the core states themselves, through subscribing to the fair and equitable treatment standard and completely doing away with local remedies. Whereas traditionally these provisions had been meant to protect their foreign investments in peripheral and developing states. There had been considerably less protests against these earlier BITs concluded between the core and developing states. Even Brexit and the rise of Trump can also be recontextualised as reactions against the decline of a hierarchical international order, which privileged the nationals of the old core states. These votes protested against an alternative 'internationalist', or 'globalist' to borrow a phrase

[701] The fact that the legal frameworks of the core of the liberal economic order are not multilateral is of course puzzling from the viewpoint of the usual liberal story in International Relations. See Ikenberry, *Liberal Leviathan*; Reus-Smit, *Moral Purpose of the State*.

from the ‘Alt Right’, conception of a liberal economic order in which stratification is more transnational and based more on class rather than nationality.

The question that arises with the TTIP project is whether there exists political appetite for a universal ‘standard of civilization’. Previous variations of the norm have de facto been one sided and hierarchical. Core states have not worried about the provisions of BITs applying to their own ‘superior’ legal systems and assumed that in effect not every state is as sovereign as some. What many Europeans and Americans have now seen as novel limitations to democratic sovereignty in the provisions of TTIP have actually been a long standing foundation of an implicitly hierarchical international order. Thus though the novel idea of applying the standard of civilization to relations between core states has recently been heavily contested, the norm continues to structure relations between core states and developing countries with unprecedented strength and lack of contestation.

Conclusion

This chapter has offered an account of the reception of the idea of a strong customary norm protecting foreigners and their property, grounded through the idea of civilization, in international legal practice. This notion became most often invoked in disputes between the Anglo-American powers and weaker Southern European and Latin American states in the closing decades of the nineteenth century, which have been analyzed in the first part of the chapter. The far-reaching and rather vague reinvented norm did not go uncontested with several Latin American states radically denying the possibility of diplomatic intervention altogether. This alternative view was later coined as the ‘national standard’ in the treatment of foreigners and their property in legal doctrine. Following former American secretary of state Elihu Root’s speech of 1910 the customary norm became known as the ‘standard of civilization’ or the ‘international standard’.

This and the preceding chapter thus offer the most in-depth analysis of the underexplored origins of a crucial dimension of the legal frameworks of the nineteenth century global economy that contextualizes the account of international legal doctrine offered in Chapter Four.[702] I have demonstrated how Anglo-American diplomats and lawyers used the idea of 'civilization' to argue for the existence of a stronger norm protecting their nationals' economic interests abroad. In practice this reinvention of the customary norm led to the emergence of a more hierarchical legal framework for the global economy, as typically this stronger norm grounded on the idea of civilization was enforced one-sidedly on weaker, often new, states that also had low social status. This story of a turn to implicit hierarchy in the global economic order squarely contradicts our usual understanding of the making of a 'liberal international order' by the Anglo-American powers.[703] In specific terms the chapters have emphasized how Britain and later on the United States enforced this norm not only on Latin American but also Southern European states highlighting largely underexplored similarities between the experiences of these two regions.[704]

Before the first world war the norm cannot be directly tracked through arbitral practice, as ad hoc commissions had only limited jurisdiction based on the implementation of a specific treaty. The late nineteenth century arbitrations analyzed in this chapter do however offer a crucial viewpoint for tracking the gradual consolidation of a broader sympathetic attitude towards foreigners' property rights amongst Anglo-American and European practitioners during the closing decades of the long nineteenth century. I have then concluded by tracking the story of the norm to the twenty-first century. Though the strong conceptualisation of a customary norm protecting foreigners and their property was recognized in the case law of international arbitration tribunals only in the 1920s, the norm continues as a crucial dimension of contemporary international law under its new guises as the 'international' and most recently 'fair and equitable treatment' standards. These changes in legal practice were then afterwards transferred into the posthumous editions of the most well-known contemporary doctrinal

[702] For the most detailed previous accounts, Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law*.
[703] See Ikenberry, *Liberal Leviathan*. Also to an extent Reus-Smit, *Moral Purpose of the State*.
[704] Contra Platt, *Finance, Trade and Politics*. Fachiri, "Expropriation and International Law"; Miles, *Origins of International Investment Law* implicitly focus on Southern Europe and Latin America.

treatises, thus dovetailing with an alternative dynamic of legal change already noted in earlier parts of the thesis.

Conclusion

In this thesis I have argued for a new approach to the history of international law. My alternative contests an influential conventional focus that has emphasized the contextual understanding of international legal thought, with a particular emphasis on great legal theorists such as Grotius or Vattel. This methodological approach has been premised on an implicit understanding of the dynamics of legal change. In this doctrinal story legal change first takes place through doctrine and then afterwards somehow trickles down into legal practice.

The deeply interrelated questions of 'how to study the history of international law?' and 'how and why international legal change takes place?' are pivotally important for both historical interpretative work and more positivist theorizing. As all scholars draw on prevailing methodological ideas, which are in their turn informed by assumptions concerning the dynamics of legal change. The contextual focus in the history of international law, criticized in this thesis, has moreover become influential across multiple disciplines. Amongst not only IR scholars but also international lawyers and historians of political thought.[705]

[705] See Chapter One. The broad argument for the importance of multidisciplinary engagement with history, law and political theory in the study of International Relations is of course not new. I have however sought to conceptualize a discrete application of this rather broad insight for the history of international law. See Hedley Bull, "International Theory: The Case for a Classical Approach", *World Politics* 18 no. 3 (April 1966); Andrew Hurrell, "Keeping History, Law and Political Philosophy Firmly within the English School", *Review of International Studies* 27 no. 3 (2001).

I have demonstrated the value added of my alternative approach through applying it to the case of foreigners' property rights. These rights are crucial as the legal frameworks that have enabled the growth of economic relations between states. The resulting international capitalist economy is moreover considered a pivotal dimension of the liberal international order. The significant shortcomings of the existing interpretations of the history of foreigners' property rights, and more broadly of the liberal international order, are to a considerable extent a function of the conventional methodological assumptions with which they approach the history of international law.

I have argued in Chapter One that the 'practice turn' in social theory offers the best place to begin the history of the global legal order, as it offers a way to link the history of ideas to that of actually existing patterns of social order through the study of practitioners. Yet the basic insight of a 'practice of legality' needs to be developed significantly in order to be applied to the historical study of the legal frameworks of world politics.

First the conventional idea of international legal practice needs to be reimagined. A focus on the 'profession of international law' is too narrow. Often the most influential actors in global legal practices were not lawyers but for example parliamentarians and diplomats. Contemporary lawyers' understandings of the law do however allow us to disaggregate the usual notion of a unified practice of international law into a plurality of interlinked legal practices in order to analyze their relative roles. Furthermore Western international law was not unified both in respect to the importance of specific legal practices and of substantive understandings of the law. Contested regional viewpoints can thus be contextually reconstructed as analytical categories based on contemporary practitioners' understandings of difference. The global legal order does not also consist only of the law between sovereign states. Domestic legal practices played a huge role in structuring relations between different communities in both metropolitan and colonial contexts.

Second the conventional idea of a legal text needs to be reconceptualised. The usual methods for studying social practices are not directly applicable to historical work as the practitioners of the world

of yesterday are dead. The 'text' remains curiously under conceptualised even though it forms the basis for studying the history of the global legal order. Drawing on the theory of literature, I have argued that a contextual study of the author's intentions is not sufficient to understand the historical significance of a legal text. It is necessary to think more broadly about the changing nature of legal texts with regards to their form, genre and production. Printing not only changed the way legal knowledge could be organized and circulated, but different editions allowed to change the text itself. Besides the context of the writing of a legal text, its use by both contemporary and later practitioners is of crucial importance. The reception of a legal text could change drastically with time and the text's meaning could be very different for later practitioners. Moreover, the very content of the legal text could change after the death of its original author as the result of the agency of later editors.

The new method highlights an important alternative dynamic of legal change that first takes place through legal practice and is introduced to doctrine only afterwards. With posthumous editors often drastically modifying canonical works in order to make them more useful for contemporary practitioners. In this practice story legal change predominantly takes place through practitioners pursuing their interests within broad bounds set by normative expectations rather than with the novel speculations of great thinkers. I have thus laid out a specific methodological application of the broad insights of the practice turn and literary theory for the history of international law. Furthermore the method, that in particular disputes the influential contextualist focus, has allowed me to conceptualize a novel interpretation of the dynamics of international legal change, which challenges the influential doctrinal story.

The chapter plan is based on my alternative interpretation of legal change. With Chapters Two and Four highlighting the fact that international legal doctrine mostly reacted to changes to foreigners' property rights that had taken place in legal practice with 'great thinkers' playing a small role in the process. Rethinking the nature of legal texts has allowed legal doctrine to be innovatively studied through multiple editions of treatises, which enables greater precision in tracing legal change and the roles of great thinkers. Chapters Three, Five and Six have then provided a detailed analysis of the

changes in legal practice that afterwards found their way into legal doctrine. These chapters drew on the reconceptualization of international legal practice, including going beyond a narrow focus on lawyers to include other influential practitioners, such as diplomats and parliamentarians, who often played key roles in legal change. This practice story has challenged the usual interpretation of the history of foreigners' property rights according to which the legal thought of great thinkers, in particular Vattel, afterwards somehow inspired changes in legal practice.[706]

The application of the new method to the case of foreigners' property rights has also allowed a radical reinterpretation of the broader empirical question of the making of the liberal international order. Against conventional wisdom, contractual multilateralism did not play a key role in the strengthening of foreigners' property rights during the course of the long nineteenth century.[707] Instead these key legal frameworks of the liberal international order were increasingly protected through customary unilateralism. The complementation of previously central bilateral treaty-making with the unilaterally invented and enforced notion of a strong customary norm protecting foreigners and their property resulted in a shift from contract to custom in the sources of the legal frameworks of the global economy. I have thus challenged the conventional interpretation of the pivotal role of the legal practice of multilateral treaty making for the origins of the liberal international order.

Moreover this influential interpretation has also subscribed to the doctrinal story of legal change. With the liberal ideas, of Locke and others, being eventually transmitted into legal practice through legal doctrine writers, the foremost of which was Vattel. An influential variant of this interpretation has also argued that first a liberal Britain and later the United States played pivotal roles in the push towards a liberal international order built on contractual law.[708] As we have however seen in Chapter Three, the Anglo-American powers did not play an active role in the reciprocal strengthening of foreigners' property rights through bilateral treaty making. Moreover the later Anglo-American initiative to

[706] For the usual story, Lipson, *Standing Guard*; Miles, *Origins of International Investment Law*; Keene, *Beyond the Anarchical Society*.
[707] For the usual story, Ikenberry, *Liberal Leviathan*; Reus-Smit, *Moral Purpose of the State*.
[708] Ikenberry, *Liberal Leviathan*.

additionally secure these rights through a customary norm marked a shift away from contract to custom in the legal frameworks of a key dimension of the liberal international order.

Challenging conventional interpretations

The new history of foreigners' property rights additionally has significant implications for three other influential IR interpretations concerning the making of modern world politics. The nineteenth century story of the liberal international order challenged an older IR narrative that conceived of Locke's liberal idea of strong private property rights in domestic society as merely the foundation for analogously strong sovereign rights in modern international society theorized by Vattel.[709] This chronologically earlier liberal story, focusing on the seventeenth and eighteenth centuries, is largely identical with the more famous classical English school narrative in which sovereignty in international society is seen as analogous with property in domestic society, though Grotius instead of Locke and Vattel is privileged as the key theorist of the shift.[710] What all of these interpretations share is a largely doctrinal story of legal change, which emphasizes the role of great thinkers. I have challenged this with an alternative interpretation, which has in contrast called for the decentering of legal doctrine and a focus on legal practice.

I have also highlighted the limitations of an argument for a stark dichotomy between a European society of sovereign states grounded on tolerating different viewpoints and an extra-European world in which Europeans constructed imperial systems based on propagating a narrowly European conception of civilization.[711] As I have shown the invention of a strong customary norm protecting foreigners and their property in the mid-nineteenth century was grounded in the idea of civilization and placed distinct limits to toleration within European international society. The fact that this norm was mostly

[709] Ruggie, "Continuity and Transformation in the World Polity", 275–8.
[710] Bull "The Importance of Grotius in the Study of International Relations", 75–77; Bull, *The Anarchical Society*, 31, 39, 266.
[711] Keene, *Beyond the Anarchical Society*; Anghie, *Imperialism, Sovereignty and the Making of International Law*.

enforced by the hegemonic Anglo-American powers on a subset of –Southern European and Latin American– weaker states indicates the presence of an implicit status hierarchy within the society of states. Making it possible that some states could in effect be more sovereign than others.

The customary norm thus points to a relatively underexplored alternative usage of the idea of civilization to rationalize hierarchy in nineteenth century world politics. It is well-established that civilization was employed in the extra-European world to enforce treaties establishing extraterritorial jurisdiction on 'semi-civilized' states that were not deemed ready for full membership of European-dominated international society.[712] The idea of civilization was moreover increasingly employed to completely exclude 'barbarous' entities, such as African 'Native Chiefs', which led to the actual shrinking of the boundaries of the society of states.[713] However a state's sovereignty could in effect also be temporarily qualified through invoking civilization even though it was in principle a full member of European international society. If an existing member was perceived to have failed in its duties as a civilized state it could be disciplined even though it did not risk complete expulsion. This rationalization of interventions through duties that states owed to foreigners shares similarities with early modern European colonial practice, which was then justified by legal thinkers such as Vitoria and Grotius through imagining a universally binding legal order.[714]

More specifically I have questioned the usual interpretation of the 'standard of civilization' in IR and the history of international law.[715] Conventionally the 'standard of civilization' has been understood as a set of vague criteria grounded through the idea of civilization that regulated the entry of non-Western states into European dominated international society in the late nineteenth and early twentieth

[712] Gong, *Standard of "Civilization"*.
[713] Keene, 'A case study in the construction of international hierarchy'; Charles Alexandrowicz, *The European-African Confrontation. A Study in Treaty Making* (Leiden: Sijthoff, 1973).
[714] Keene, *Beyond the Anarchical Society*; Anghie, *Imperialism, Sovereignty and the Making of Modern International Law*.
[715] Gong, *Standard of "Civilization"*; also Koskenniemi, *Gentle Civilizer*; Bowden, *Empire of Civilization*; Keene, "The Standard of 'Civilisation', the Expansion Thesis and the 19th-Century International Social Space"; Anghie, *Imperialism, Sovereignty and the Making of Modern International Law*; Becker Lorca, *Mestizo International Law*; Benton and Ford, *Rage for Order*. For exceptions Brownlie, *Principles* (1966); Schultz, "Civilisation, Barbarism and the Making of Latin America's Place"; Paparinskis, *International Minimum Standard*.

centuries. Though this story captures an extremely important dimension of the making of modern world politics it uses the term 'standard of civilization' acontextually and partially anachronistically. After having been coined in 1910 practitioners understood the 'standard of civilization' quite differently, namely as referring to the customary norm protecting foreigners and their property within states that had already been in principle accepted as full members of international society. The customary norm was in effect an alternative to treaties establishing extraterritoriality, which were deemed as unacceptable within the family of civilized nations. As we have, for example, seen in how Disraeli's call for extraterritoriality was ignored in the British debate on the Greek intervention of 1850.

Marxist scholars have rightly emphasized the role of the global capitalist economy in the making of modern world politics. With the hegemonic Anglo-American powers playing pivotal roles in the making of a nineteenth century liberal international order, which was to a considerable extent based on 'informal empire' in for example Latin America.[716] The relatively archaic nature of the nineteenth century British domestic legal system in comparison with France has also been interpreted as resulting from conscious French reforms. Emanating from a desire to catch up with Britain's power and prosperity that was based on the existence of the first capitalist national economy.[717] Despite these insights Marxists have afforded little attention to property rights as the crucial legal frameworks of the global capitalist economy outside domestic, colonial or extraterritorial contexts.[718] In practice Anglo-American 'informal empire' in for example Latin America primarily concerned the protection of their nationals' property rights at the expense of the host state's sovereignty. Foreigners' property rights were pivotally important as the legal frameworks that enabled the growth of transnational economic relations between states that were in principle full members of international society.[719] More broadly

[716] Rosenberg, *Empire of Civil Society*; Gallagher and Robinson, "Imperialism of Free Trade".
[717] Wood, *Pristine Culture of Capitalism*.
[718] Rosenberg, *Empire of Civil Society*; Wood, *Pristine Culture of Capitalism*; Teschke, *Myth of 1648*; Pal, "Politics of Extraterritoriality". For non-Marxist accounts Keene, *Beyond the Anarchical Society*; Kayaoglu, *Legal Imperialism*.
[719] My story also challenges some of the key assumptions of a more mainstream take on the origins of the global capitalist economy, which shares some similarities with the conventional story of the liberal international order. According to this interpretation a rising Britain, inspired by the economic thought of Adam Smith, began promoting free trade through bilateral treaty making in the aftermath of the American revolution. As we have

the study of these rights allows investigating the tension between property and sovereignty as parallel ordering principles of world politics as this is precisely where a state's sovereign rights can clash with its duties to protect private property as a member of international society.[720]

With regards to the history of international law, my work points out to a need to reconsider an influential interpretation that has emphasized a shift towards a 'modern international law' characterized by a new more distinct professional and disciplinary identity that took place around 1870. I do not dispute the importance of these changes, accompanied by the shift towards frequent multilateral treaty making, as constituting the origins of the contemporary profession of international law.[721] If our aim is however to study the broader question of the making of the legal frameworks of modern world politics a focus on the profession of international lawyers is too narrow both chronologically and substantively. As we have seen the turn to stronger foreigners' property rights significantly predated the advent of the modern profession of international law. Moreover many of the key practitioners in the story were for example diplomats and parliamentarians and did not consider themselves as professional lawyers. This highlights the need for a broader conceptualization of international legal practice if the aim is to understand international legal change rather than writing disciplinary history.

My work also raises a question about history of political thought, or 'global intellectual history' to use a more recent term, as a distinct approach to the study of politics. The recent diversification of the history of political thought from its conventional preoccupation in the contextual analyses of the works of great thinkers such as Locke or Vattel towards more obscure and practice orientated genres

---

however seen, the initiative for the Anglo-French trade treaty of 1786 –which this account considers as crucial– came from the French rather than the British side. With the French unilaterally abolishing the droit d'aubaine after Britain was not willing to unmake restrictions to foreigners' property rights. A declining formerly hegemonic France, drawing on French political economists rather than Smith and seeking to catch up with British power and prosperity, had also led the broader shift towards stronger foreigners' property rights through bilateral contracts already from 1766 onwards. Smith's *Wealth of Nations* was published a decade later. See James Ashley Morrison, 'Before Hegemony: Adam Smith, American Independence, and the Origins of the First Era of Globalization', *International Organization* 66 no. 3 (July 2012).

[720]For an argument about the centrality of sovereignty and property for modern international order, Keene, *Beyond the Anarchical Society*; Koskenniemi, *Gentle Civilizer*, ch. 2.; "Histories of International Law"; "Empire and International Law"; "Ius Gentium and the Birth of Modernity".

[721] Koskenniemi, *Gentle Civilizer*; also Nabulsi, *Traditions of War*; Finnemore, *Purpose of Intervention*.

such as declarations of independence, parliamentary debates, judicial practice or even journalism is undoubtedly helpful in building a far better understanding of the role of ideas in the making of modern world politics.[722] This recent shift towards more practice-orientated history of political thought has in some ways marked a turn away from the contextualist preoccupations of the classical Cambridge school towards the German tradition of 'conceptual history' which tracked political and legal ideas through not only doctrine but also practice.[723] Studying ideas in political practice rather than in theoretical speculations however begs the question whether history of political thought has in effect been transformed into a broader social history of political ideas that looks beyond the traditional preoccupations of the subdiscipline of political theory.

It has been noted that Martin Wight's conceptualization of, for example, the memoirs –or even the parliamentary speeches– of Gladstone or Salisbury as sources of international political thought is considerably different from the classical Cambridge school's focus on intellectual history.[724] Practitioners were embroiled in mundane concerns and did often not think of themselves as 'intellectuals' engaged in theorizing about the international in any abstract sense. If however we persist with a broad definition of international political thought that includes say practitioners' conceptions of the usefulness of abolishing the droit d'aubaine in order to attract foreign investment, the question becomes how is this different from IR constructivists' long standing preoccupation with studying the role of ideas in world politics.[725] It may be that the considerable commonalities that make it difficult to pigeonhole recent practice-orientated works by scholars from both Cambridge and English school backgrounds point to a larger practical problem in contemporary Anglophone political

[722] Armitage, *Foundations of Modern International Thought*; Keene, "Contextualism"; Pitts, "Empire and legal universalisms".
[723] Following Reinhart Koselleck rather than Skinner. For example Koselleck's, *Preußen zwischen Reform und Revolution. Allgemeines Landrecht, Verwaltung und soziale Bewegung von 1791 bis 1848* (Stuttgart: Klett-Cotta, 1967); *Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society*. (Cambridge, Mass.: MIT Press, 1988); *Der politische Totenkult: Kriegerdenkmäler in der Moderne.* (Munich: Fink, 1994); also *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford: Stanford University Press, 2002).
[724] Wight, 'Why Is There No International Theory?"; also Keene "Where Should We Look For Modern International Thought?"; Keene, "Contextualism".
[725] For a comparative analysis of Skinnerian contextualism and IR constructivism, Reus-Smit, "Reading History through Constructivist Eyes". For an argument for considerable similarities between Reus-Smit's approach and Armitage's recent call for 'serial contextualisations' in longue durée history of political thought, Keene, "Contextualism". See David Armitage "What's the Big Idea? Intellectual History and the Longue Duree", *History of European Ideas* 38 no. 4 (2012).

science departments. Historically orientated work has largely survived only within the institutional framework of the subdiscipline of political theory as both comparative politics and IR, particularly in North America, have become increasingly ahistorical. The recent convergence of the traditionally separate histories of politics as theory and practice highlights the considerable limitations in what has become a mainstream delimitation of political theory and the empirical study of politics as separate spheres of enquiry, which have relatively little intellectual interaction.[726]

What actually happened matters also because historical analogies are used to bolster arguments in contemporary policy debates. If an argument about contemporary developments in grounded upon an erroneous interpretation of past events it needs to be reconsidered. The conventional story of the making of the liberal international order as a multilateral contractual project whose construction 'over the last two centuries was led by the United Kingdom and the United States' has for example been used to bolster an argument about the 'The Future of the Liberal World Order' in *Foreign Affairs* magazine. The account of wider 'world-historical developments' is implicitly intended to give increased authority to an analysis of contemporary affairs.[727] This is not to say that historical analogies are in principle useless for making sense of contemporary policy developments. The fact that we analyze the present through comparisons with the past being rather inescapable. A better understanding of how to study the past is thus also useful in order to make more accurate comparative historical analyses. In terms of order in contemporary world politics, in which contractual

[726] For a more narrow alternative conceptualization of the historical turn in IR largely in terms of a new focus on the history of international political thought and the disciplinary history of IR, Bell, "International Relations: Dawn of a Historiographical Turn?". For a call for social history as an approach to the study of IR, Keene "English School and British Historians". The heterogeneous historical turn in IR has recently found institutionalized expression as a separate section at the International Studies Association, whereas previously most historical work had been presented at the English school section.

[727] John Ikenberry, "The Future of the Liberal World Order. Internationalism After America", *Foreign Affairs* (May/June 2011) following Ikenberry, *Liberal Leviathan*. The fact that the conventional Anglo-American multilateral story ignores for example the German Confederation or Latin American regionalism may well have something to do with the context of the 1919 Paris conference in which Britain and the US rather half-heartedly and belatedly embraced multilateralism with regards to the international security order. Having habitually practiced interventions in Latin America and just defeated 'German militarism' it may have been more palatable for the Anglo-Americans to look for historical analogies in distant ancient Greece, which was already familiar from classical education. This amnesia may also have helped to make the League of Nations seem a far more novel departure. On the Greek analogy, Peter Wilson, "Gilbert Murray and International Relations: Hellenism, liberalism, and international intellectual cooperation as a path to peace", *Review of International Studies* 37 (2011).

multilateralism does overall play an important role, a more accurate interpretation might highlight the discontinuities rather than continuities with nineteenth century Anglo-American approaches to the question of international order. The true indirect heirs to the dominant nineteenth century Anglo-American approach to the legal ordering of the global economy may not be the advocates of the post Second World War contractual multilateralism but rather the more recent proponents of a more unilateral approach to international order. The advocates of Brexit and Trump, who long back to a lost age of perceived greatness, have to a large extent drawn on nationalist historical narratives premised on ideas of civilizational superiority that have uncomfortable similarities with Victorian political practice that has been explored in this thesis.

Further research avenues

The method conceptualized in the thesis has considerable potential in being employed in work that goes beyond the empirical limitations of this particular study. In terms of specific signposts for further research, this broad overview of the evolution of foreigners' property rights can with time be complemented by more in-depth work on key aspects of this story. For example through a systematic study of the reception of the idea of a strong customary norm protecting foreigners' property rights in British, American and French diplomatic correspondence and parliamentary debates, which would allow for a more detailed understanding of its diffusion in the practice of the major mid-nineteenth century European liberal powers. In terms of foreigners' property rights in the contemporary global legal order, there exists surprisingly little work on how individuals and corporations seek to become 'legally alien' in order to avail themselves of the protection of international investment law, and thus stronger property rights, particularly in developing countries. This move would have made little sense before the nineteenth century shift towards stronger rather than weaker property rights for foreigners. The absence of contractual multilateralism has moreover interestingly continued until this day with regards to the protection of foreigners' property rights. Even after the diffusion of a neoliberal consensus in the 1990s removed most of the longstanding opposition to the idea of a customary norm

in developing countries, this crucial dimension of the liberal international order has continued to be protected through a mutually reinforcing amalgam of bilateral treaties and customary law rather than multilateral treaty-making. The useful application of the new historical approach is moreover not limited to the further study of the specific case of foreigners' property rights.

Rethinking our conventional understanding of how to study the history of international law has significant potential for further developing our understanding of the broader question of the making of the modern global legal order. One potential avenue suggested by this thesis lies in the in-depth study of the evolution of specific global legal practices. Existing studies of treaty making can be fruitfully complemented by more systematic investigations of the practices of domestic and international courts, domestic law-making, diplomats and legal advisers as well as editors and publishers of legal texts.[728]

For example the underexplored practice of legal advisers offers significant potential for further study as a novel viewpoint on the legalization of diplomacy. With the survival of substantial records of British legal advisers' practice from its nineteenth century heyday pointing to one particularly interesting subset of texts. Legal advisers must however be contextualized within a broader legal practice that included non-lawyers such as diplomats and parliamentarians. Thus the conventional sole focus on legal opinions must be replaced with a study of the full correspondence between the Foreign Office and the legal adviser, as has been done in this thesis, in order to better contextualize their particular role in the decision making process.[729] The fact that in contrast the American State Department did not systematically archive legal advice before the twentieth century is puzzling in light of the emphasis on 'legalism' in conventional interpretations of American foreign policy.[730] Though it may be that this will remain a mystery due to the lack of extant sources. The alternative interpretation of the dynamics of legal change conceptualized in this thesis also points to the need for further study of the interaction between legal thought and practice. In contrast to the conventional

[728] For studies of treaty making, eg Alexandrowicz, *European-African Confrontation*; Keene, "A Case Study in the Construction of International Hierarchy".
[729] For the conventional focus, McNair, *International Law Opinions*; Parry, *Legal Officers' Opinions*.
[730] George F. Kennan, *American Diplomacy, 1900-1950* (New York: New American Library, 1952).

focus on the contextual understanding of great thinkers, the roles of editors and publishers of doctrinal works have previously remained largely underexplored in the history of the global legal order. Even though they played important roles in transferring legal changes that had taken place through practice into doctrine –and other less studied genres of legal texts– which then disseminated knowledge of these legal changes to practitioners.

One interesting potential first step in this regard, before undertaking a systematic comparative study, is presented by an investigation of Chitty. Though Chitty's English edition of Vattel played a very important role in the positivist shift in international legal doctrine it seems that Chitty's practice-orientated legal writings have not yet been subjected to systematic study.[731] An additional key subset of texts for the dissemination of legal knowledge, which began complementing doctrinal treatises from 1868 onwards, is provided by professional international law journals. We have seen how Root's crucial 'standard of civilization' speech was afterwards immediately published in the *American Journal of International Law* (1910) and how the editor Berriedale Keith, whilst finally introducing the notion of a customary norm protecting foreigners and their property into *Wheaton's Elements* (1929), refers to Fachiri's *British Year Book of International Law* article (1925) as a source for recent Anglo-American state practice. The fact that arguments on contemporary customary law were grounded through particular (often anachronistic if not completely erroneous) historical interpretations has meant that some of these essays –including, as an example, Fachiri's influential take on foreigners' property rights[732] – have in practice played key roles in establishing conventional viewpoints on the history of international law. Existing work on the origins of the ground-breaking *Revue de droit international et de législation comparée*, which however lost its popularity fairly quickly, can thus be complemented by systematic studies of later influential journals such as AJIL (1905-) and BYIL (1920-).[733]

[731] On Chitty, Michael Lobban, "Chitty, Joseph, the elder (1775-1841)", in David Cannadine, ed., *Oxford Dictionary of National Biography* (Oxford: Oxford University Press, 2004).
[732] See eg Miles, *Origins of International Investment Law*; Keene, *Beyond the Anarchical Society*.
[733] On the *Revue*, Koskenniemi, *Gentle Civilizer*, 12-19.

The new method can also be applied to tracking the evolution of key legal norms rather than a particular legal practice. As an example treaties, which established extraterritorial rights for Europeans in the extra-European world, played a crucial role in the nineteenth century global legal order. In contrast to our more detailed understanding of the eventual decline of extraterritoriality in the late nineteenth and early twentieth centuries, Gerrit Gong's classic account does not however provide a detailed analysis of the origins of modern extraterritoriality.[734] Though the treaty of Nanking, concluded by Britain and China in 1842 after the latter's defeat in the First Opium War, is the key case for Gong's story as the first agreement that was used as a template for later treaties there is no detailed account of how and why British decision makers, in effect, invented modern extraterritoriality.[735] Gong's most detailed analysis of the treaty of Nanking, which is found in his MPhil thesis instead of the DPhil thesis and the well-known book based on it, is only four pages long. The sole reference to British decision making –a letter from foreign secretary Palmerston to the British envoy– actually emphasizes Britain's demand for the principle of 'perfect equality' in the negotiations with China.[736] Thus the origins of the terms of the eventual treaty, which in contrast established British extraterritoriality in China on a distinctly non-reciprocal basis, are never actually contextualized.

My new approach can, for example, build on Gong's account through a systematic analysis of British decision making, with a tentative focus on Palmerston –as well as Aberdeen who succeeded him as foreign secretary in 1842– and his legal adviser John Dodson. A parallel investigation of contemporary British parliamentary debates would also provide a valuable additional viewpoint on the origins of extraterritoriality, which was advocated in parliament by Palmerston already before the war, and the immediate reception of the 1842 treaty.[737] Further study of the making of modern extraterritoriality would moreover allow for a comparative analysis of alternative contemporary

[734] On the decline of extraterritoriality, Kayaoglu, *Legal Imperialism*; Gong, *Standard of "Civilization"*.
[735] Gong, *Standard of "Civilization"*, 136-8.
[736] Gerrit Gong, "The Concept of "Unequal Treaties": China and the West 1842-1943" (MPhil thesis, University of Oxford, 1979), 39-44, cited at 41. See also "The Standard of "Civilisation" and the Entry of Non-European Countries into International Society: The Cases of China, Japan, and Siam" (DPhil thesis, University of Oxford, 1980), 87-8 and ibid.
[737] On Palmerston in 1838, David Scott, *China and the International System, 1840-1949. Power, Presence, and Perceptions in a Century of Humiliation* (Albany, NY: State University of New York Press, 2008), 19.

British uses of the idea of 'civilization', which as we have seen, included moves towards the complete expulsion of some non-European international actors as well as disciplining existing full members of European international society. With at least some of the key actors, such as Palmerston, remaining the same across the different cases. Thus allowing for a novel viewpoint on how British practitioners played a key role in the making of modern international society during Britain's mid-nineteenth century heyday.[738]

The method that has enabled to track the evolution of foreigners' property rights as the elusive legal frameworks of the liberal global economy can furthermore be applied to study other key dimensions of individual rights in the history of the global legal order, which has thus far remained quite state centric.[739] This for example allows a novel viewpoint on the process of decolonization, which constituted the most important change in twentieth-century world politics. The end of empire came to restrict the freedom of movement of the post-colonial populations: in addition to the independence of India the subsequent restriction of the migration of Indians to Britain marks an underexplored key date in the unmaking of the British empire. The origins of a crucial dimension of our contemporary migration order can thus, for example, be historicized through the study of changing ideas of citizenship and the right of movement in the 'British Commonwealth' and the 'French Community', which constituted tentative federal experiments that sought to consolidate the largest of European empires. These restrictions to migration largely dating from the period of decolonization –reminding us of the European-dominated nineteenth century world in which the right to mobility was largely restricted to certain groups of people– have remained largely invisible in conventional accounts due to a a somewhat ahistorical focus on interstate multilateralism even though they constitute one of the most pressing and polarizing challenges in contemporary world politics.[740]

---

[738] Complementing, for example, existing takes in Benton and Ford, *Rage for Order*; Keene, "A Case Study in the Construction of International Hierarchy".

[739] For an explicit exception, Christian Reus-Smit, *Individual Rights and the Making of the International System* (Cambridge: Cambridge University Press, 2013).

[740] For a somewhat ahistorical focus on interstate multilateralism, Alexander Betts, ed., *Global Migration Governance* (Oxford: Oxford University Press, 2011); Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross, eds., *Foundations of International Migration Law* (Cambridge: Cambridge University Press, 2012). For an ahistorical political theory work, David Miller, *Strangers in Our Midst. The Political Philosophy of Immigration* (Cambridge, Massachusetts: Harvard University Press 2016).

In conclusion I have in this thesis argued for rethinking our conventional understanding of legal practice and legal texts in the history of the global legal order. Doing so has enabled me to challenge a conventional focus on the role of great thinkers and conceptualize an underexplored alternative practice story of legal change. The fact that this argument carries to the twentieth and twenty-first centuries, as has been shown in Part Two, highlights the importance of historical work in the study of the global legal order. A better understanding of the past can offer us clues for reimagining both the empirical and normative dimensions of the current constitution of the global legal order and its possibilities for change. Taking a step back often provides a better viewpoint for interpreting what lies before us.

Bibliography

A. B. (Andrés Bello). Principios de Derecho de Jentes. (Reprint of 'Obra Publica En Santiago de Chile En 1832') Caracas: Valentin Espinal, 1837.
Adler, Emanuel, and Vincent Pouliot. "International Practices: Introduction and Framework." In International Practices. Cambridge: Cambridge University Press, 2011.
Alexandrowicz, Charles. The European-African Confrontation. A Study in Treaty Making. Leiden: Sijthoff, 1973.
Allgemeines Burgerliches Gesetzbuch Fur Die Gesammten Deutchen Erbländer Der Österreichischen Monarchie. Vienna, 1811.
Amerasinghe, Chittharanjan Felix. Local Remedies in International Law. 2nd ed. Cambridge: Cambridge University Press, 2004.
Anghie, Antony. "Francisco de Vitoria and the Colonial Origins of International Law." Social Legal Studies 5 (1996).
———. Imperialism, Sovereignty and the Making of International Law. Cambridge: Cambridge University Press, 2005.
Anonymous (John Locke). Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, And His Followers, Are Detected and Overthrown, The Latter Is an Essay Concerning the True Original, Extent, and End of Civil Government. London, 1689.
Archives Parlementaires de 1787 a 1860. Recueil Complet Des Débats Législatifs & Politiques Des Chambres Francaises. Paris, various years.
Armitage, David. Foundations of Modern International Thought. Cambridge: Cambridge University Press, 2012.
———. "What's the Big Idea? Intellectual History and the Longue Duree." History of European Ideas 38, no. 4 (2012).
Barbeyrac, Jean. Histoire Des Anciens Traitez, Ou Recueil Historique et Chronologique Des Traitez Répandus Dans Les Auteurs Grecs & Latins , & Autres Monumens de l'Antiquité , Depuis Les Tems Les plus Reculez, Jusques a L'empereur Charlemagne. Amsterdam, 1735.
Barthes, Roland. "The Death of the Author." Translated by Richard Howard. Aspen Magazine, no. 5–6 (1967).
Becker Lorca, Arnulf. Mestizo International Law. A Global Intellectual History 1842–1933. Cambridge: Cambridge University Press, 2014.
Bell, Duncan. "International Relations: The Dawn of a Historiographical Turn?" British Journal of Politics and International Relations 3, no. 1 (2001): 115–26.
———, ed. Victorian Visions of Global Order Empire and International Relations in Nineteenth-Century Political Thought. Cambridge: Cambridge University Press, 2012.
———. "What Is Liberalism?" Political Theory 42, no. 6 (2014): 682–715.
Bello, Andrés. Principios de Derecho Internacional, Segunda Edicion, Aumentada Y Correjida. Caracas: J. M. de Rojas, 1847.
———. Principios de Derecho Internacional, Tercera Edición (Reprint of 'Valparaiso: Imprenta de la Patria, 1864') in Obras Completas de Don Andres Bello, Volumen X Derecho Internacional. Santiago de Chile: Pedro G. Ramirez, 1886.
Bentley, A. J., ed. Digest of the Official Opinions of the Attorneys-General. vols. i–xvi. Washington, 1885.
Benton, Lauren. Law and Colonial Cultures. Legal Regimes in World History: 1400-1900. Cambridge: Cambridge University Press, 2002.

Benton, Lauren, and Lisa Ford. Rage for Order. The British Empire and the Origins of International Law 1800-1850. Cambridge, Massachusetts: Harvard University Press, 2016.
Berg, Peter van den. The Politics of European Codification: A History of the Unification of Law in France, Prussia, the Austrian Monarchy and the Netherlands. Groningen: Europa Law Publishing, 2007.
Betts, Alexander, ed. Global Migration Governance. Oxford: Oxford University Press, 2011.
Blackstone, William. Commentaries on the Laws of England. 1st ed. Oxford: Clarendon Press, 1765.
Bodin, Jean. Les Six Livres de La République. Paris, 1577.
———. The Six Bookes of a Common-Weale. VVritten by I. Bodin a Famous Lawyer, and a Man of Great Experience in Matters of State. Out of the French and Latine Copies, Done into English, by Richard Knolles. Translated by Richard Knolles. London, 1606.
Borchard, Edwin. "The Diplomatic Protection of Citizens Abroad." PhD dissertation, Columbia University, 1914.
———. The Diplomatic Protection of Citizens Abroad or the Law of International Claims. New York: Banks Law Publishing, 1928.
Bowden, Brett. "The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization." Journal of the History of International Law 7, no. 1 (2005): 1–24.
———. The Empire of Civilization: The Evolution of an Imperial Idea. Chicago: Chicago University Press, 2009.
Brierly, J. L. The Law of Nations. An Introduction to the International Law of Peace. Oxford: Clarendon Press, 1928.
British Foreign and State Papers. London, various years.
Brown, David. Palmerston. A Biography. New Haven, CT: Yale University Press, 2010.
———. Palmerston and the Politics of Foreign Policy 1846-55. Manchester: Manchester University Press, 2002.
Brownlie, Ian. Brownlie's Principles of Public International Law. Edited by James Crawford. 8th ed. Oxford: Oxford University Press, 2012.
———. Principles of Public International Law. 1st ed. Oxford: Clarendon Press, 1966.
———. Principles of Public International Law. 7th edition. Oxford: Oxford University Press, 2008.
Bruneau, Quentin. "Knowing Sovereigns: Forms of Knowledge and the Changing Practice of Sovereign Lending." University of Oxford, 2016.
Brunnée, Jutta, and Stephen J. Toope. "Interactional International Law and the Practice of Legality." In International Practices, edited by Emanuel Adler and Vincent Pouliot. Cambridge: Cambridge University Press, 2011.
———. Legitimacy and Legality in International Law. An Interactional Account. Cambridge: Cambridge University Press, 2010.
Bull, Hedley. "International Theory: The Case for a Classical Approach." World Politics 18, no. 3 (1966).
———. The Anarchical Society. A Study of Order in World Politics. Basingstoke: Palgrave, 1977.
———. "The Grotian Conception of International Society." In Diplomatic Investigations. Essays in the Theory of International Politics, edited by Herbert Butterfield and Martin Wight. London: George Allen, 1966.
———. "The Importance of Grotius in the Study of International Relations." In Hugo Grotius and International Relations, edited by Hedley Bull, Adam Roberts, and Benedict Kingsbury. "Oxford: Clarendon Press, 1992.
Burch, Kurt. "Property" and the Making of the International System. Boulder, Colorado: Lynne Rienner, 1998.
Butler, Sir Geoffrey, and Simon Maccoby. The Development of International Law. London: Longmans, 1928.
Buzan, Barry, and George Lawson. The Global Transformation. History, Modernity and the Making of International Relations. Cambridge: Cambridge University Press, 2015.
Calvo, Carlos. Derecho International Teórico Y Práctico de Europe Y América. Paris: D'Amyot, Durand et Pedone-Lauriel, 1868.
Calvo, Charles. Le Droit International Théorique et Pratique. Cinquiéme edition. Paris: Rousseau, 1896.

———. Le Droit International Théorique et Pratique Précédé D'un Exposé Historique Des Progres de La Science Du Droit Des Gens, Troisieme Édition Complétée. Paris: Guillaumin, Thorin, Pedone-Lauriel, Rousseau, 1880.
———. Le Droit International Thérique et Pratique Précédé D'un Exposé Historique Des Progres de La Science Du Droit Des Gens, Deuxieme Édition Corrigée et Considérablement Augmenté. 2nd ed. Paris: Durand et Pedone, Lauriel, Amyot, Guillaumin, 1870.
Chitty, Joseph. A Practical Treatise on the Law of Nations, Relative to the Legal Effect of War on the Commerce of Belligerents and Neutrals and On Orders in Council and Licences. To Which Are Added, Extracts from Grotius, Bynkershoek, and Vattel : Also, the Letter of Sir William Scott, and of the Duke of Newcastle, &c. Containing Matters Applicable to the Law of Prize. Boston, 1812.
———. A Treatise on the Laws of Commerce and Manufactures, and the Contracts Relating Thereto: With an Appendix of Treaties, Statutes, and Precedents. Volume I. London: Butterworth, 1824.
Coates, Benjamin Allen. Legalist Empire. International Law and American Foreign Relations in the Early Twentieth Century. Oxford: Oxford University Press, 2016.
Convention for the Mutual Abolition of the Droit d'Aubaine and Taxes on Emigration Between the United States and the King of Bavaria (1845). http://avalon.law.yale.edu/19th_century/bav1845.asp.
Coquillette, Daniel. Civilian Writers of Doctors' Commons. Three Centuries of Juristic Innovation in Comparative, Commercial, and International Law. Berlin: Duncker & Humblot, 1988.
Costa Lopez, Julia. "The Legal Ordering of the Medieval International." University of Oxford, 2016.
Crawford, Neta. Argument and Change in World Politics. Ethics, Decolonization and Humanitarian Intervention. Cambridge: Cambridge University Press, 2002.
Cutler, Claire. Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy. Cambridge: Cambridge University Press, 2003.
Dawson, Frank Griffith. "The Influence of Andres Bello on Latin-American Perceptions of Non-Intervention and State Responsibility." British Year Book of International Law 57 (1986): 253–315.
Deener, David R. The United States Attorneys General and International Law. The Hague: Martinus Nijhoff, 1957.
Der Derian, James, and Michael J. Shapiro, eds. International/Intertextual Relations. Postmodern Readings of World Politics. New York: Lexington, 1989.
Doyle, Michael W. Ways of War and Peace. New York: W. W. Norton, 1997.
Drummond Wolff, Sir Henry. Rambling Recollections. 2 vols. London: Macmillan, 1908.
Dumont, Jean. Recueil de Divers Traitez de Paix, de Confederation, D'alliance, de Commerce, &c. The Hague, 1710.
Dumont, Jean, baron de Carlscroon. Corps Universel Diplomatique Du Droit Des Gens. Amsterdam: 1726-31, n.d.
Eco, Umberto. "Towards a Semiotic Inquiry into the Television Message (1965)." In Internationalizing Cultural Studies, edited by John Nguyet Erni and Ackbar Abbas, translated by Paola Splendore. Oxford: Blackwell, 2005.
Eisenstein, Elizabeth L. The Printing Revolution in Early Modern Europe. Cambridge: Cambridge University Press, 1983.
Elias, Norbert. The Civilizing Process. The History of Manners. Translated by Edmund Jephcott. New York: Urizen Books, 1978.
"Elihu Root Papers." Library of Congress, n.d.
Elkins, Zachary, Andrew Guzman, and Beth Simmons. "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000." International Organization 60, no. 4 (2006).
Fachiri, Alexander P. "Expropriation and International Law." British Year Book of International Law 6 (1925): 159–71.
———. "International Law and the Property of Aliens." British Year Book of International Law 10 (1929).
Fahrmeir, Andreas. Citizens and Aliens. Foreigners and the Law in Britain and the German States 1789-1870. New York: Berghahn, 2000.
Fassbender, Bardo, and Peters, Anne, eds. The Oxford Handbook of the History of International Law. Oxford: Oxford University Press, 2012.
Fawcett, Louise. "Between West and Non-West: Latin American Contributions to International Thought." International History Review 34, no. 4 (2012): 679–704.

Fenton, Laurence. Palmerston and The Times. Foreign Policy, the Press and Public Opinion in Mid-Victorian Britain. London: I.B. Tauris, 2013.
Finnemore, Martha. The Purpose of Intervention. Changing Beliefs About the Use of Force. Ithaca, New York: Cornell University Press, 2003.
Fiocchi Malaspina, Elisabetta, *L'eterno ritorno del Droit des gens di Emer de Vattel (secc. XVIII-XIX). L'impatto sulla cultura giuridica in prospettiva globale*. Frankfurt am Main: Max Planck Institute for European Legal History, 2017.
Foreign Relations of the United States. Washington, various years.
Foucault, Michel. "What Is An Author? (1969)." In Aesthetics, Method and Epistemology, edited by James D. Faubion, translated by Robert Hurley. New York: The New Press, 1969.
Fox-Genovese, Elizabeth. The Origins of Physiocracy. Economic Revolution and Social Order in Eighteenth-Century France. Ithaca, New York: Cornell University Press, 1976.
Gallagher, John, and Ronald Robinson. "The Imperialism of Free Trade." The Economic History Review 6, no. 1: 1953.
Gaschon, Jean-Baptiste. Code Diplomatique Des Aubains, Paris, 1818.
Gibbs, G. C. "The Reception of the Huguenots in England and the Dutch Republic, 1680-1690." In From Persecution to Toleration. The Glorious Revolution and Religion in England, edited by Ole Peter Grell, Jonathan Israel, and Nicholas Tyacke. Oxford: Clarendon Press, 1991.
Glare, P. G. W. Oxford Latin Dictionary. Oxford: Clarendon Press, 1982.
Gong, Gerrit W. "The Concept of "Unequal Treaties": China and the West 1842-1943". MPhil thesis, University of Oxford, 1979.
———. "The Standard of "Civilisation" and the Entry of Non-European Countries into International Society: The Cases of China, Japan, and Siam". DPhil thesis, University of Oxford, 1980.
———. The Standard of "Civilization" in International Society. Oxford: Clarendon Press, 1984.
Greengrass, Mark. Christendom Destroyed. Europe 1517-1648. London: Allen Lane, 2015.
Grewe, Wilhelm G. Epochs of International Law. Translated and Revised by Michael Byers. Berlin: Walter de Gruyter, 2000.
Grotius, Hugo. De Iure Belli Ac Pacis Libri Tres. In Quibus Ius Naturae & Gentium : Item Iuris Publici Praecipua Explicantur. Paris: Nicolaus Buon, 1625.
———. De Jure Belli Ac Pacis Libri Tres. Translated by Francis W. Kelsey. Washington: Carnegie Institution, 1913.
———. De Jure Belli Ac Pacis Libri Tres. In Quibus Jus Naturae, Gentium, Item Juris Publici Praecipue Explicantur. Editio Nova Ab Auctore Ipso Recognita & Correcta: De qua Vide Pagina Sequenti. Amsterdam: Guilielmus Blaeu, 1632.
———. Le Droit de La Guerre et de La Paix. Edited by Jean Barbeyrac. Amsterdam, 1724.
———. Rights of War and Peace. Edited by Jean Barbeyrac and Richard Tuck. Indianapolis: Liberty Fund, 2005.
———. The Rights of War and Peace. Edited by Jean Barbeyrac. Translated by John Morrice. London, 1738.
Guggenheim, Paul. Lehrbuch Des Völkerrechts. Vol. 1. Basel, 1947.
Guyot, J-N, ed. Réportoire Universel et Raisonné de Jurisprudence En Matiere Civile, Criminelle, Canonique, et Bénéficiale. 27 vols. Paris, 1784.
Hackworth, Green Haywood. Digest of International Law. Washington: Government Printing Office, 1940.
Hall, William Edward. A Treatise on International Law. 1st ed. Oxford: Clarendon Press, 1881.
———. A Treatise on International Law. Fourth Edition. 4th ed. Oxford: Clarendon Press, 1895.
Hansard's Parliamentary Debates. London, various years.
Harvey, David J. The Law Emprynted and Englysshed. The Printing Press as an Agent of Change in Law and Legal Culture 1475-1642. Oxford: Hart, 2015.
Helmholz, R. H. The Ius Commune in England. Oxford: Oxford University Press, 2001.
Hertslet's Commercial Treaties, London, 1840.
Herz, John H. "Expropriation of Foreign Property." American Journal of International Law 35 (1941).
Hobsbawm, E. J. The Age of Revolution 1789-1848. London: Weidenfeld & Nicolson, 1962.

Hochstrasser, T. J. “Physiocracy and the Politics of Laissez-Faire.” In The Cambridge History of Eighteenth-Century Political Thought, edited by Mark Goldie and Wokler, 419–42. Cambridge: Cambridge University Press, 2006.
Hont, Istvan. Jealousy of Trade. International Competition and the Nation-State in Historical Perspective. Cambridge, Massachusetts: Harvard University Press, 2005.
Hunter, Ian. “Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations.” edited by Ian Hunter and Shaunnagh Dorsett. New York: Palgrave Macmillan, 2010.
———. “Kant and Vattel in Context: Cosmopolitan Philosophy and Diplomatic Casuistry.” History of European Ideas 39, no. 4 (2013): 477–502.
Hurrell, Andrew. “Keeping History, Law and Political Philosophy Firmly within the English School.” Review of International Studies 27, no. 3 (2001).
———. On Global Order. Power, Values, and the Constitution of International Society. Oxford: Oxford University Press, 2007.
Ikenberry, G. John. Liberal Leviathan. The Origins, Crisis, and Transformation of the American World Order. Princeton, New Jersey: Princeton University Press, 2011.
———. “The Future of the Liberal World Order. Internationalism After America.” Foreign Affairs, no. May / June (2011).
Ittersum, Martine van. Profit and Principle. Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595-1615). Leiden: Brill, 2006.
Jahn, Beate. “Introduction: Classical Theory and International Relations in Context.” In Classical Theory in International Relations, edited by Beate Jahn. Cambridge: Cambridge University Press, 2006.
———. Liberal Internationalism: Theory, History, Practice. Basingstoke: Palgrave Macmillan, 2013.
“James Brown Scott Papers.” Georgetown University Library.
Janis, Mark W. The American Tradition of International Law. Great Expectations, 1789-1914. Oxford: Clarendon Press, 2004.
Jauss, Hans Robert. “Literary History as a Challenge to Literary Theory (1967).” In Toward an Aesthetic of Reception, translated by Timothy Bahti. Brighton: Harvester Press, 1982.
Jenkinson, Charles. A Collection of All the Treaties of Peace, Alliance, and Commerce between Great-Britain and Other Powers from the Treaty Signed at Munster in 1648 to the Treaties Signed at Paris in 1783. London, 1785.
Jouannet, Emmanuelle. The Liberal-Welfarist Law of Nations. A History of International Law. Translated by Sutcliffe, Christopher. Cambridge: Cambridge University Press, 2012.
Kayaoglu, Turan. Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China. Cambridge: Cambridge University Press, 2010.
Keene, Edward. “A Case Study of the Construction of International Hierarchy: British Treaty-Making Against the Slave Trade in the Early Nineteenth Century,” International Organization 61, no. 2 (2007): 311–39.
———. Beyond the Anarchical Society. Grotius, Colonialism and Order in World Politics. Cambridge: Cambridge University Press, 2002.
———. “Contextualism.” unpublished journal article draft, accessed May 2017.
———. “Images of Grotius.” In Classical Theory in International Relations, edited by Beate Jahn. Cambridge: Cambridge University Press, 2006.
———. International Political Thought: An Historical Introduction. Cambridge: Polity, 2005.
———. “The Age of Grotius.” In Routledge Handbook of International Law, edited by David Armstrong. Oxford: Routledge, 2009.
———. “The English School and British Historians.” Millennium: Journal of International Studies 37, no. 2 (2008).
———. “The Standard of ‘Civilisation’, the Expansion Thesis and the 19th-Century International Social Space.” Millennium: Journal of International Studies 42, no. 3 (2014).
———. “Where Should We Look for Modern International Thought?” Contemporary Political Theory 13, no. 4 (2014): 397–402.
Keens-Soper, Maurice. “The French Political Academy, 1712: A School for Ambassadors.” In The Art of Diplomacy, by Francois de Callieres, edited by Maurice Keens-Soper and Karl Schweizer. Leicester: Leicester University Press, 1983.

———. “The Practice of a States-System.” In The Reason of States. A Study in International Political Theory, edited by Michael Donelan. London: Allen & Unwin, 1978.
Kennan, George F. American Diplomacy, 1900-1950. New York: New American Library, 1952.
Kennedy, Paul. The Parliament of Man. The United Nations and the Quest for World Government. London: Allen Lane, 2006.
Kent, James. Commentaries on American Law. Volume I. New York, 1826.
Kluber, Jean-Louis. Droit Des Gens Moderne de l´Europe, 1819.
Knutsen, Torbjörn. A History of International Relations Theory. Manchester: Manchester University Press, 1997.
Koselleck, Reinhart. Critique and Crisis: Enlightenment and the Pathogenesis of Modern Society. Cambridge, Massachusetts: MIT Press, 1988.
———. Der Politische Totenkult: Kriegerdenkmäler in Der Moderne. Munich: Fink, 1994.
———. Preußen Zwischen Reform Und Revolution. Allgemeines Landrecht, Verwaltung Und Soziale Bewegung von 1791 Bis 1848. Stuttgart: Klett-Cotta, 1967.
———. The Practice of Conceptual History: Timing History, Spacing Concepts. Stanford: Stanford University Press, 2002.
Koskenniemi, Martti. “Empire and International Law: The Real Spanish Contribution.” University of Toronto Law Journal 61, no. 1 (2011): 1–36.
———. From Apology to Utopia. The Structure of International Legal Argument. Reissue with new epilogue. Cambridge: Cambridge University Press, 2005.
———. Histories of International Law: Dealing with Eurocentrism. Utrecht: Universiteit Utrecht. Faculteit Geesteswetenschappen, 2011.
———. “Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law.” Constellations 15, no. 2 (2008).
———. “Ius Gentium and the Birth of Modernity.” In Constructing International Law. The Birth of a Discipline, edited by Milos Vec and Luigi Nuzzo. Frankfurt am Main: Vittorio Klostermann, 2012.
———. “The Advantage of Treaties: International Law in the Enlightenment.” Edinburgh Law Review 13, no. 1 (2009): 27–67.
———. “The Epochs of International Law.” International and Comparative Law Quarterly 51, no. 3 (2002): 746–51.
———. The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960. Cambridge: Cambridge University Press, 2001.
Krasner, Stephen. Sovereignty: Organized Hypocrisy. Princeton, NJ: Princeton University Press, 1999.
Lainé, Pierre. “Etude Sur La Capacité Successorale Des Étrangers En France. These Pour Le Doctorat.” Université de Paris, 1900.
Langbart, David. “Department of State Records,” November 6, 2015.
Langeluttig, Albert. Department of Justice of the United States. Baltimore: Johns Hopkins University Press, 1927.
Lauterpacht, Hersch. The Function of Law in the International Community. Oxford: Oxford University Press, 1933.
Leibnitz, Gotofredus Guilielmus. Codex Juris Gentium Diplomaticus, 1693.
Lemnitzer, Jan. Power, Law and the End of Privateering. Basingstoke: Palgrave Macmillan, 2014.
Lesaffer, Randall. “International Law and Its History: The Story of An Unrequited Love.” In Time, History and International Law, edited by Malgosia Fitzmaurice and Matthew Craven. Leiden: Brill, 2006.
“Letter of Submittal to the President Concerning US-Turkey BIT,” February 19, 1986. Available at https://2009-2017.state.gov/e/eb/ifd/43365.htm.
Levack, Brian P. “The English Civilians 1500-1750.” In Lawyers in Early Modern Europe and America, by William Prest. London: Croom Helm, 1981.
Liebel, Helen P. “Enlightened Bureaucracy versus Enlightened Despotism in Baden, 1750-1792.” Transactions of the American Philosophical Society 55, no. 5 (1965).
Lipson, Charles. Standing Guard. Protecting Foreign Capital in the Nineteenth and Twentieth Centuries. Berkeley, California: University of California Press, 1985.

Liu, Lydia. “Henry Wheaton 1785-1848.” In Oxford Handbook of the History of International Law, edited by Bardo Fassbender and Peters. Oxford: Oxford, 2012.
Lobban, Michael, “Chitty, Joseph, the elder (1775-1841)”, in David Cannadine, ed., Oxford Dictionary of National Biography. Oxford: Oxford University Press, 2004.
Mackintosh, James. A Discourse on the Study of the Law of Nature and Nations ; Introductory to a Course of Lectures on That Science, to Be Commenced in Lincoln’s Inn Hall, Second Edition. London, 1799.
Martens, G. F. de. Recueil Des Traités. 2nd ed. Göttingen, 1818.
Martens, Georg Friedrich de. Précis Du Droit Des Gens Moderne de l´Europe Fondé Sur Les Traités et L’usage, 1789.
———, Summary of the Law of Nations, Founded on the Treaties and Customs of the Modern Nations of Europe: With a List of the Principal Treaties, Concluded since the Year 1748 down to the Present Time, Indicating the Works in Which They Are to Be Found. Translated by William Cobbett. 1795.
———.Recueil Des Traités. 2nd ed. Göttingen, 1818.
McKitterick, David. Print, Manuscript and the Search for Order 1450-1830. Cambridge: Cambridge University Press, 2003.
McNair, Arnold Duncan, Lord. “The Debt of International Law in Britain to the Civil Law and the Civilians.” In International Law Opinions, Volume Three. Cambridge: Cambridge University Press, 1956.
———. International Law Opinions : Selected and Annotated. Three Volumes. Cambridge: Cambridge University Press, 1956.
Mead, Walter Russell. God and Gold. Britain, America, and the Making of the Modern World. London: Atlantic, 2007.
Meek, Robert L. The Economics of Physiocracy. Essays and Translations. Cambridge, Massachusetts: Harvard University Press, 1963.
Mieville, China. Between Equal Rights. A Marxist Theory of International Law. London: Pluto, 2006.
Miles, Kate. The Origins of International Investment Law. Empire, Environment and the Safeguarding of Capital. Cambridge: Cambridge University Press, 2013.
Miller, David. Strangers in Our Midst. The Political Philosophy of Immigration. Cambridge, Massachusetts: Harvard University Press 2016.
Miller, Hunter, ed. Treaties and Other International Acs of the United States. Vol. 4. Washington, 1931.
Montesquieu, Charles Secondat, Baron de. Esprit Des Loix. 2nd ed. Paris, 1757.
———. The Spirit of Laws. Edited by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone. Cambridge: Cambridge University Press, 1989.
Moore, John Bassett. A Digest of International Law as Embodied in Diplomatic Discussions, Treaties and Other International Agreements, International Awards, the Decisions of Municipal Courts, and the Writings of Jurists, and Especially in Documents, Published and Unpublished, Issued by Presidents and Secretaries of State of the United States, the Opinions of the Attorneys-General, and the Decisions of Courts, Federal and State. 8 vols. Washington: Government Printing Office, 1906.
———. History and Digest of the International Arbitrations to Which the United States Has Been Party. Washington: Government Printing Office, 1898.
Morrison, James Ashley. “Before Hegemony: Adam Smith, American Independence, and the Origins of the First Era of Globalization.” International Organization 66, no. Summer (2012): 395–428.
Murphy, Antoin E. Richard Cantillon. Entrepreneur and Economist. Oxford: Clarendon Press, 1986.
Murphy, Craig. International Organization and Industrial Change. Global Governance since 1850. Cambridge: Polity, 1994.
Nabulsi, Karma. Traditions of War. Occupation, Resistance, and the Law. Oxford: Oxford University Press, 1999.
Naturalization Act, 1870 in The Law Reports, The Public Statutes Passed in the Thirty-Third and Thirty-Fourth Years of the Reign of Her Majesty Queen Victoria, 1870, vol. v. London, 1870.
Navari, Cornelia. “The Concept of Practice in the English School.” European Journal of International Relations 17, no. 4 (2011): 611–30.

Neumann, Iver B. “Returning Practice to the Linguistic Turn: The Case of Diplomacy.” Millennium: Journal of International Studies 31, no. 3 (2002): 627–51.
Nussbaum, Arthur. A Concise History of the Law of Nations. Revised Edition. New York: Macmillan, 1954.
Official Opinions of the Attorneys General of the United States : Advising the President and Heads of Departments in Relation to Their Official Duties and Expounding the Constitution, Subsisting Treaties with Foreign Governments and with Indian Tribes, and The Public Laws of the Country, Edited by Benjamin F. Hall. Washington, 1852.
Opeskin, Brian, Richard Perruchoud and Jillyanne Redpath-Cross, eds. Foundations of International Migration Law. Cambridge: Cambridge University Press, 2012.
Oppenheim, Lassa. International Law: A Treatise. 1st ed. Vol. 1. London: Longmans, 1905.
———. International Law: A Treatise. 2nd ed. Vol. 1. London, 1912.
———. International Law: A Treatise. Edited by Ronald F. Roxburgh. 3rd ed. Vol. 1. London, 1920.
———. International Law: A Treatise. Edited by Arnold McNair. 4th ed. Vol. 1. London, 1928.
———. International Law: A Treatise. Edited by Hersch Lauterpacht. Vol. 1. London, 1937.
———. International Law: A Treatise. Edited by Hersch Lauterpacht. 7th ed. Vol. 1. London: Longmans, Green and co, 1948.
———. International Law: A Treatise. Edited by Hersch Lauterpacht. 8th ed. Vol. 1. London: Longmans, 1955.
———. Oppenheim’s International Law, Ninth Edition. Edited by Robert Jennings and Arthur Watts. 9th ed. vol. 1. (Paperback reprint of the 1992 ed.) London: Longmans, 1996.
Pal, Maya. “The Politics of Extraterritoriality. A Historical Sociology of Public International Law.” University of Sussex, 2012.
“Palmerston Papers.” Hartley Library, University of Southampton, various years.
Paparinskis, Martins. International Minimum Standard and Fair and Equitable Treatment. Oxford: Oxford University Press, 2013.
Parry, Clive, ed. Consolidated Treaty Series. Dobbs Ferry, New York: Oceana Publications, 1969.
Parry, Clive, ed. Law Officers’ Opinions to the Foreign Office, 1793-1860. A Reproduction of the Manuscript Series with Index and Commentaries. Westmead: Gregg International Publishers, 1970.
Paulsson, Jan. Denial of Justice in International Law. Cambridge: Cambridge University Press, 2005.
Phillimore, Robert. Commentaries upon International Law, Second Edition. vol. 3. London: Butterworths, 1873.
———. Commentaries upon International Law, 1st ed. vol. 2. London: W. Benning, 1855.
———. Commentaries upon International Law, 1st ed. vol. 3. London: W. Benning, 1857.
Phillipson. “The Influence of International Arbitration on the Development of International Law.” In Two Studies in International Law. London: Stevens and Haynes, 1908.
Pitts, Jennifer. “Empire and Legal Universalisms in the Eighteenth Century.” American Historical Review 117, no. 1 (2012): 92–121.
Platt, D. C. M. Finance, Trade and Politics in British Foreign Policy, 1815-1914. Oxford: Clarendon Press, 1968.
———. “The Allied Coercion of Venezuela, 1902-1903: A Reassessment”, Inter-American Economic Affairs 15 (Spring 1962).
Plowden, Edmund. Les Comentaries Ou Les Reportes de Edmunde Plowden, 1571.
Pocock, J. G. A. “Texts as Events: Reflections on the History of Political Thought.” In Political Thought and History. Essays on Theory and Method. Cambridge: Cambridge University Press, 2009.
Poggio Teixeira, Carlos Gustavo. Brazil, the United States, and the South American Subsystem: Regional Politics and the Absent Empire. New York: Lexington, 2012.
Posner, Richard. Law and Literature. Third Edition. Cambridge, Massachusetts: Harvard University Press, 2009.
Poulsen, Lauge Skovgaard. Bounded Rationality and Economic Diplomacy. The Politics of Investment Treaties in Developing Countries. Cambridge: Cambridge University Press, 2015.
Ralston, Jackson H. International Arbitration from Athens to Locarno. Stanford, California: Stanford University Press, 1929.
———, ed. Venezuelan Arbitrations of 1903. Washington: Government Printing Office, 1904.

Rao, Anna Maria. “Enlightenment and Reform.” In Early Modern Italy, edited by John A. Marino. Oxford: Oxford University Press, 2002.
Rapport, Michael. “‘A Languishing Branch of the Old Tree of Feudalism’: The Death, Resurrection and Final Burial of the Droit d’Aubaine in France.” French History 14, no. 1 (2000): 13–40.
Rech, Walter. Enemies of Mankind. Vattel’s Theory of Collective Security. Nifhoff: Brill, 2013.
“Report of the Secretary of State to the United States Senate, 24.11.1843.” Appendix to the Congressional Globe. Washington, December 1843.
Reus-Smit, Christian. Individual Rights and the Making of the International System. Cambridge: Cambridge University Press, 2013.
———. “Reading History through Constructivist Eyes.” Millennium: Journal of International Studies 37, no. 2 (2008).
———. The Moral Purpose of the State. Culture, Social Identity, and Institutional Rationality in International Relations. Princeton, New Jersey: Princeton University Press, 1999.
Reus-Smit, Christian and Duncan Snidal, “Between Utopia and Reality: The Practical Discourses of International Relations” in The Oxford Handbook of International Relations. Oxford: Oxford University Press, 2008.
Root, Elihu. “Address of Hon. Elihu Root, President of the Society, on The Basis of Protection to Citizens Residing Abroad.” Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917), vol. 4 (28-30 April 1910).
———.”The Basis of Protection to Citizens Residing Abroad.” American Journal of International Law 4, no. 3 (1910).
Rosenberg, Justin. The Empire of Civil Society. A Critique of the Realist Theory of International Relations. London: Verso, 1994.
Roshchin, Evgeny. “(Un)Natural and Contractual International Society: A Conceptual Inquiry.” European Journal of International Relations 19, no. 2 (2011): 257–79.
Roth, Andreas H. The Minimum Standard of International Law Applied to Aliens. Leiden: Sijthoff, 1949.
Ruggie, John Gerard. “Continuity and Transformation in the World Polity. Toward a Neorealist Synthesis.” World Politics 35, no. 2 (1983): 261–85.
Sahlins, Peter. Unnaturally French. Foreign Citizens in the Old Regime and After. Ithaca, New York: Cornell University Press, 2004.
Salacuse, Jeswald. The Law of Investment Treaties. Oxford: Oxford University Press, 2010.
Schultz, Carsten-Andreas. “Civilisation, Barbarism and the Making of Latin America’s Place in 19th-Century International Society.” Millennium: Journal of International Studies 42, no. 3 (2014): 837–59.
Schwarzenberger, Georg. International Law, vol. 1. London: Stevens, 1949.
———. “The Protection of British Property Abroad.” Current Legal Problems, 1952.
———. “The Standard of Civilisation in International Law.” Current Legal Problems, 1955.
Schwarzenberger, Georg and E. D. Brown, A Manual of International Law, 6th ed. Milton: Professional Books, 1976.
Scott, David. China and the International System, 1840-1949. Power, Presence, and Perceptions in a Century of Humiliation. Albany, NY: State University of New York Press, 2008.
“Sir James Graham Papers.” British Library, various years.
“Sir John Dodson Papers (Dep. Monk Bretton).” Bodleian Libraries, University of Oxford, various years.
Skinner, Quentin. “Meaning and Understanding in the History of Ideas.” History and Theory 8, no. 1 (1969).
———. Reason and Rhetoric in the Philosophy of Hobbes. Cambridge: Cambridge University Press, 1996.
———. The Foundations of Modern Political Thought. Vol 1: The Renaissance. Cambridge: Cambridge University Press, 1979.
———. The Foundations of Modern Political Thought. Vol 2: The Age of Reformation. Cambridge: Cambridge University Press, 1979.
———. Visions of Politics: Volume II. Renaissance Virtues. Cambridge: Cambridge University Press, 2002.
Solar de Marguerite, Comte. Traités Publics de La Royale Maison de Savoie. Vol. iii. Turin, 1836.

Spiegel, Hans W. “Origins and Development of Denial of Justice.” American Journal of International Law 32, no. 1 (January 1938).
Squibb, G. D. Doctor’s Commons: A History of the College of Advocates and Doctors of Law. Oxford: Oxford University Press, 1977.
St John, Taylor. “The Power of Modest Multilateralism. The International Centre for Settlement of Investment Disputes (ICSID), 1964-1980.” University of Oxford, 2015.
“State Department Papers.” US National Archives.
Statt, Daniel. Foreigners and Englishmen. The Controversy over Immigration and Population. 1660-1760. Newark: University of Delaware Press, 1995.
Stuyt, A. M. Survey of International Arbitrations: 1794-1989. The Hague: Martinus Nijhoff, 1990.
Sylvest, Casper. “International Law in Nineteenth-Century Britain.” British Year Book of International Law, 2005.
Teschke, Benno. The Myth of 1648. Class, Geopolitics, and the Making of Modern International Relations. London: Verso, 2003.
“‘The Capitalist Magna Carta.’” Time Magazine, August 26, 1957.
The Statutes at Large, From the Tenth Year of KING WILLIAM the Third, to the End of the Reign of QUEEN ANNE. New edition. London, 1769.
“‘The Valiant Venture.’” Time Magazine, August 26, 1957.
Treaty of Amity, Commerce and Navigation between the United States and the Most Christian King (1778). http://avalon.law.yale.edu/18th_century/fr1788-1.asp.
Tribe, Keith. Governing Economy. The Reformation of German Economic Discourse 1750-1840. Cambridge: Cambridge University Press, 1988.
Tuck, Richard. The Rights of War and Peace. Political Thought and the International Order From Grotius to Kant. Oxford: Oxford University Press, 1999.
Twiss, Travers. The Law of Nations Considered as Independent Political Communities. 1st ed. Vol. 1. Oxford: Clarendon Press, 1861.
———. The Law of Nations Considered as Independent Political Communities. On the Rights and Duties of Nations in Time of Peace. A New Edition, Revised and Enlarged. 2. Vol. 1. Oxford: Clarendon Press, 1884.
United Nations General Assembly Resolution 3281 (XXIX): Charter of Economic Rights and Duties of States. Accessed at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2778 on 20 April 2017.
Vardi, Liana. The Physiocrats and the World of the Enlightenment. Cambridge: Cambridge University Press, 2012.
Vattel, Emer de. Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, from the French of Monsieur de Vattel. From the New Edition, by Joseph Chitty, Esq. Barrister at Law. With Additional Notes and References by Edward D. Ingraham, Esq. Edited by Joseph Chitty and Edward D. Ingraham. Philadelphia: T. & J. W. Johnson & Co., 1867.
———. Les Droit Des Gens. Ou Principes de La Loi Naturelle, Appliqués À La Conduite et Aux Affaires Des Nations et Des Souverains. London: apud liberos tutior [Neuchâtel: Journal Helvétique], 1758.
———. The Law of Nations; Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, by Joseph Chitty, Esq. Barrister at Law. Edited by Joseph Chitty. London: Sweet, Stevens & Sons, Maxwell, 1834.
———. The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns. From the French of Monsieur de Vattel. A New Edition, Revised, Corrected, and Enriched with Many Valuable Notes Never before Translated into English. Edited by Anonymous. London: Robinson, 1797.
Vergerio, Claire. “Constructing the Right to War. Alberico Gentili and His Receptions in International Law.” University of Oxford, 2017.
Wahnbaeck, Till. Luxury and Public Happiness. Political Economy in the Italian Enlightenment. Oxford: Oxford University Press, 2004.
Waldron, Jeremy. The Right to Private Property. Oxford: Clarendon Press, 1988.
Wallenius, Tomas. “An Empire of Private Property. The Venezuela Arbitrations of 1903-04.” University of Oxford, 2013.

Ward, Ian. Law and Literature. Possibilities and Perspectives. Cambridge: Cambridge University Press, 1995.
Ward, Robert. An 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, Two Volumes. London: Butterworth, 1795.
Waugh, Evelyn. Brideshead Revisited. The Sacred and Profane Memories of Captain Charles Ryder. London: Penguin, 1962.
Westlake, John. International Law. Cambridge: Cambridge University Press, 1904.
Whatmore, Richard. Republicanism and the French Revolution. An Intellectual History of Jean-Baptiste Say's Political Economy. Oxford: Oxford University Press, 2000.
Wheaton, Henry. Elements of International Law, Eighth Edition, Edited with Notes by Richard Henry Dana Jr. Edited by Richard Henry Dana Jr. Boston: 1866.
———. Elements of International Law, English Edition, Edited with Notes, and an Appendix of Statutes and Treaties, Bringing the Work Down to the Present Time, by A. C. Boyd. Edited by A. C. Boyd. London, 1878.
———. Elements of International Law. Sixth Edition, with the Last Corrections of the Author, Additional Notes, and Introductory Remarks, Containing a Notice of Mr. Wheaton's Diplomatic Career, and of the Antecedents of His Life. Edited by William Beach Lawrence. Boston, 1855.
———. Elements of International Law: With a Sketch of the History of the Science. 1st ed. Philadelphia, 1836.
———. Elements of International Law: With a Sketch of the History of the Science. 3rd ed. Philadelphia, 1846.
———. History of the Law of Nations in Europe and America; From the Earliest Times to the Treaty of Washington, 1842. New York: Gould, Banks & Co., 1845.
Wheaton, Henry, and A. Berriedale Keith. Wheaton's Elements of International Law. Sixth English Edition, Revised Throughout, Considerably Enlarged and Re-Written. London: Stevens and Sons, 1929.
Wheaton, Henry, and Coleman Phillipson. Wheaton's Elements of International Law, Fifth English Edition, Revised Throughout, Considerably Enlarged and Re-Written. London: Stevens and Sons, 1916.
Wight, Martin. "Why Is There No International Theory?" In Diplomatic Investigations. Essays in the Theory of International Politics, edited by Martin Wight and Herbert Butterfield. London: George Allen, 1966.
Williams, Sir John Fischer. "International Law and the Property of Aliens." British Year Book of International Law 9 (1928).
Wilson, Peter. "Gilbert Murray and International Relations: Hellenism, Liberalism, and International Intellectual Cooperation as a Path to Peace." Review of International Studies 37 (2011).
———. "The English School Meets the Chicago School: The Case for a Grounded Theory of International Institutions." International Studies Review 14 (2012): 567–90.
Wingfield-Stratford, Esme. This Was a Man. The Biography of the Honourable Edward Vesey Bligh, Diplomat – Parson – Squire. London, 1949.
Wood, Ellen. The Pristine Culture of Capitalism. A Historical Essay on Old Regimes and Modern States. London: Verso, 1991.