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The Grotius Lecture Series

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THE GROTIUS LECTURE SERIES*

CHRISTOPHER WEERAMANTRY**

NATHANIEL BERMAN***

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* *Editors' Note:* The following is a revised version of talks presented at the American Society of International Law's ("ASIL") 93rd Annual Meeting in March 1999. The Grotius lecture series is a new lecture series cosponsored by the American University Washington College of Law and the ASIL. The purpose of the Grotius lecture series is to open the ASIL forum to distinguished scholars for discussion about new and important voices that might not be heard in international law and to create expanded space and opportunities to explore the intellectual underpinnings of international law and the issues of our time. The theme of the Grotius lecture talks by Judge Weeramantry and Professor Nathaniel Berman concerns colonialism and its impact on the development of international law.

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III. A RESPONSE TO BERMAN: IN THE WAKE OF
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I. OPENING TRIBUTE TO HUGO GROTIUS

BY CHRISTOPHER WEERAMANTRY

The inaugural Grotius lecture of any assembly of international lawyers is an occasion for deep reflection on the fundamentals of our discipline. It also is a moment to attempt to recapture the spirit of inspiration that moved this great pioneer of our discipline to struggle out of the limitations of the thought-frame of his times and carve out new pathways for international relations in the uncharted waters lying ahead.

Our conference organizers have given us the challenging task of debating competing views of the history and examining the limits of international law—specifically, the aftermath of empire. Since this is the inaugural Grotius lecture, and since Grotius played such a seminal role in laying the foundations of the system of international law under which European empires emerged, I thought it appropriate to preface the valuable presentations you are about to hear with some observations connecting the title of this lecture series with our specific theme for today.

It was an unprecedented situation that faced the newly emerging states of Grotius’s time. Detached from their traditional moorings to church, empire, and a higher law, they were groping for new principles of conduct and interrelationship to provide a compass for the tempestuous waters that lay ahead.

Grotius rose to the occasion—a towering intellect with a passionate vision of an ordered relationship among nations—a relationship based not on the dogma of religion or the sword of conquest, but on human reason and experience. He based his principles largely on knowledge gleaned *a posteriori* from the experience of history, not on *a priori* pronouncements prescribing in advance how humanity should behave.

The legal order Grotius envisioned derived its rationale and moral

strength from the parallel relationship between states, rather than a vertical relationship between states and a higher order. He built a bridge between the classical past and the unforeseeable future by using his immense learning to quarry what principles he could from the mines of Greek, Roman, Judaic, and Christian wisdom. He brought a sense of order to what would otherwise have been a chaos of competing state interests.

In doing so, Grotius made intensive use of the comparative method—much neglected by his successors. I shall refer to this later in my presentation. The thoughts and works of Grotius have touched most of the basic streams of international law that have flowed through the past three centuries in one way or another. Whether Grotius merely directed the incipient streams into their later course or struck the stone with the rod of his intellect and indeed brought forth the stream from which they began will long be a subject of controversy in each area of international law.

For Grotius's contribution, all succeeding generations are in his debt. The new world order of European states that Grotius envisaged became a reality—the dominant reality of the international legal and political scene. The nation-state system took over the world, both the world of nation-states and the “other” world lying outside.

It was an eminently successful system for those nation-states, but it was dangerous. Some would misread Grotius's system as prescribing a lighted area of law and order for those within the fold, and an area of outer darkness for those without.

It is true that Grotius warned against this in some strong passages in *Mare Liberum* and elsewhere. But the imperial enterprise—the acquisition of the rest of the world by the nation-states of the Grotius system—was built upon this misreading of Grotius, thus, leaving the rest of the world open for conquest, its property available for annexation, and its people available for subjugation. The imperial system marched ahead without let or hindrance from international law.

That is now a past chapter. We are left with the aftermath of empire and the task of cleaning up its problems. Indeed, this is one of the major areas of study for the international lawyers of the future. The success or failure of the future new world order depends on how we handle this problem area now.

We must find new solutions as Grotius found new solutions for the

problems of his time. It is fitting that this should be the theme of the first of the Grotius lecture series. If things have gone wrong with the world system, let us not blame Grotius for this. Grotius took a first step—a magnificently successful first step—in replacing the Hobbesian scenario of the law of the jungle with an ordered system of respect for principles that ranked higher than physical might.

The focus of Grotius' endeavors was the narrow circle of European states. The global community of states, however, is the focus of our endeavors. International law developed the Grotian system with a blind spot in relation to the world outside. If this was a blind spot in international law, then let us avoid similar blind spots in international law today.

This is especially important as we face more fundamental changes than any that Grotius faced. As Richard Falk has stated, we are living at a 'Grotian moment' in world history.¹ This is the challenge thrown to us today. This is the topic the organizers want us to address and we must dig deep into our resources of knowledge, experience, and vision to rise to it. Otherwise, by default, we may transmit a blighted legacy of inadequate planetary stewardship to all future generations.

Technology has brought us awesome powers—powers awesome enough to blast humanity out of existence. The era of empires has ended. Dozens of new states have been released to sink or swim under their own exertions, irrespective of whether their basic infrastructures have remained intact or have been destroyed after centuries of colonial rule. We cannot adequately address these questions unless we broaden the foundation from which international law draws its inspiration.

In this regard, Grotius has much to teach us. His methods drew from his commanding mastery of the historical, theological, and comparative knowledge of his time. I shall argue that one reason why the colonial enterprise passed out of control was that international law had confined itself within too narrow a cabinet of its own making, shutting itself out from the rich perspectives available to it from

1. See Richard A. Falk, *On the Recent Further Decline of International Law*, in *LEGAL CHANGE: ESSAYS IN HONOUR OF JULIUS STONE*, 264, 272 (A.R. Blackshield ed., 1983) (explaining that the phrase "Grotian moment" implies the "process of political reconstruction").

other cultures and disciplines. We must not make the same mistake again. Today more than ever before, we can fertilize international law with the immensity of cross-cultural and interdisciplinary reservoirs of knowledge available in our time.

There are many factors that can help us in our task. For example, we have a universal association of states bound by a common charter, a global judiciary, a globally acceptable network of multilateral treaties, and a vast edifice of human rights concepts built upon the dignity and intrinsic worth of the human person. Moreover, the individual has been brought within the ambit of international law. Each one of these factors has transformed the international scene.

These are vistas Grotius never knew. What would he not have done with them had they been available in his time? We have so much in common with him. We are witnessing, as Grotius did, the dismantling of an older order that had held sway for centuries. Like Grotius, we are seeking the friendly association of states and the peaceful resolution of disputes; we are also searching for principles of stability amidst the chaos of competing state interests. Finally, like Grotius, we are experiencing a sudden expansion of knowledge and power never seen before.

This session will explore an area of special significance to a global community, the majority of whose members were formerly subject nations of the massive empires that have straddled the globe since Grotius's time. All this is intensely relevant to any age that may be witnessing a transition from one form of national subjugation to another. For centuries, we have been familiar with the subjugation of nations by the sword. We are moving into a future where such subjugation could well be the result of economic, rather than military activity.

Is this also an aftermath of the age of empire? When Grotius spoke of the great society of states, no doubt he had only European states in mind. What was the admission ticket to that society? Was it geographical location, a common religious background, or a common background of accepted moral principle?

If there was a principle of inclusion, was there also a principle of exclusion? Is there in operation today a different principle of exclusion not evident because unstated, but still a reality of which all nations must take note?

Is there a select club of powerful states whose edicts reach just as far as the edicts of colonial powers at the height of their influence? Have we to ask all over again what principles of international law determine the admission ticket to this club?

It is relevant to our situation to ask why and to what extent Grotius's scheme, however unintended by him, set international law on a course that divided humanity into two categories—those within the pale who enjoyed special rights and those without the pale who had no rights and were, therefore, available for conquest and subjugation?

Could Grotius have thought of these questions? In saluting this man of genius, should we not recognize that he took humanity on a giant step forward and that every giant step has giant implications that all the powers of genius cannot anticipate, but some of which represent a great advance towards the ultimate goal of peace among the nations and the peaceful resolution of disputes?

When the old European order had run its course, Grotius had to find his way through the debris. Now that the age of empires has run its course, it is our task also to clear up the debris.

I cite an observation of one of the outstanding international lawyers of our time, Professor Röling: “[i]t is my deep conviction that lawyers fail in their historic mission if they hesitate to tackle the political and sensitive issues connected with the progressive development of international law. In honoring Grotius, we lawyers are reminded of a gigantic task before us and of a heavy responsibility.”²

We look forward to the presentation that is to follow. Professor Berman is one who has addressed this gigantic procedural task in the context of the substantive topic before us today. Having read Professor Berman's writings in the past, I can assure you that you will be treated to a most stimulating discussion of perhaps the most important problem facing international law in our time.

2. B.V.A. Röling, *Are 'Grotius' Ideas Obsolete in an Expanded World?* in HUGO GROTIUS AND INTERNATIONAL RELATIONS 281, 299 (Hedley Bull, et al. eds. 1990).

II. IN THE WAKE OF EMPIRE

BY NATHANIEL BERMAN*

[Note: this is a revised version of a presentation to the American Society of International Law's 93rd Annual Meeting in March, 1999. The theme of the Meeting was "On Violence, Money, Power and Culture: Reviewing the Internationalist Legacy", preceded by a "Symposium on Sex, Poverty and Imperialism". Rather than changing the format for publication, I have tried to keep some of its flavor as an oral presentation.]

INTRODUCTION

May 8, 1945: V-E Day. German surrender. Victory over fascism in Europe. Sovereign equality triumphant. In Paris, jubilation: "The Democracies Celebrate Victory".³ And the radio proclaims: "Today we have recovered . . . the right to be free men."⁴

May 8, 1945: V-E Day celebrations across Algeria link the Allied victory to denunciations of French rule. Demonstrators wave the forbidden nationalist flag, often surrounding it with flags of the victorious Allies. They brandish placards: "Long Live the United Nations," "Long live the Atlantic Charter," "Long Live Democracy," "Long Live Independent Algeria," "Down with Colonialism." In Sétif, as they pause before the Café de France, demonstrators refuse police orders to lower the Algerian flag. Police fire on Saal Bouzid, the flag-bearer—the day's first fatality. In city after city, police intervene against the marchers. Anti-French rioting and rebellion follow.⁵

The French army responds ferociously and massively. Thousands of Algerians fall to urban massacre and rural bombardment. Much of the local French press, from liberal to Communist, accuses the Algerian rebels of collaboration with fascism—claiming that "Fifth Col-

* I thank Dan Danielsen, David Kennedy, Julie Stone Peters, and the participants in the March 1999 Dighton Writers Workshop.

3. LE POPULAIRE, May 9, 1945, at 1.

4. *Le Triomphe Des Alliés*, LE MONDE (PARIS), May 9, 1945, at 1.

5. See REDOUANE AINAD TABET, *LE 8 MAI 1945 EN ALGÉRIE*, 44-52 (1985) (describing the Algerian anti-colonial revolt).

umnists" of "Hitlerian inspiration" instigated the rebellion.⁶ And a detail, seldom absent from European accounts: "the blood-curdling *you-you* ululations of their women" which "incited the men to attack, linking up with a very ancient tradition of encouragement for warriors."⁸

May 8, 1945: The beginning of our era—the triumph of liberal democracy in western Europe *and* the reaffirmation of colonialism in Africa. In Paris, the rebirth of "free men"; in Algeria, blank terror before the voices of women, the "atavistic other female."⁹

May 8, 1945: Projected onto this split screen, what does this juxtaposition of Europe and Africa show us? An artificial link between unrelated events? Or a hinge between the intra-European and colonial faces of the post-war world, a hinge we should look for at every celebration of a "new international law," every reinvention of an "international community"?

I begin with *May 8, 1945* as a way of taking up the challenge of our conference to "review the internationalist legacy," specifically its genealogy in violence, power, money, culture, sex. As international lawyers, we all wish international law well; we all mourn its failures. Before a split image like *May 8, 1945*, we may want to believe that victory over fascism was international law's essence and the reaffirmation of colonialism its antithesis. But I think we all harbor an ambivalence about international law, a suspicion that this belief may be wishful thinking. Our general theories about international law—from the apologetic to the utopian, from the reformist to the critical—are all attempts to manage this ambivalence. But images like *May 8, 1945* activate ambivalence and defy management. Tell

6. See FRANCINE DESSAIGNE, *LA PAIX POUR DIX ANS* 147-66 (Sétif, Guelma, mai 1945) (1990) (comparing reports of the Algerian revolt in the French press).

7. ALISTAIR HORNE, *A SAVAGE WAR OF PEACE* 25 (Viking Press 1978).

8. DESSAIGNE, *supra* note 6, at 19; *see also Rapport du général Duval sur le moral des populations* (May 30, 1945) in 1 *LA GUERRE D'ALGERIE PAR LES DOCUMENTS* 219, 220 (Jeans-Charles Jauffret ed., 1990).

9. Cf. Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 *NEW ENG. L. REV.* 1509 (1992) (comparing human rights responses to female genital mutilation).

me what you think about *May 8, 1945* and I'll tell you who you are. . .or, at least, how you manage your ambivalence. . .professional, political, moral, instinctual.

For a first take on this ambivalence, let's contrast a genealogy of international law in violence, power, money, culture, sex, with an approach more familiar to the discipline. This approach views international law as inaugurated by a clear founding moment, a moment with a precise date, 1648, and location, Westphalia. Westphalia, in the canonical interpretation, inaugurated international law because it fundamentally broke with the norm of hierarchical relations between peoples. Prior to 1648, in this view, the world's main civilizations all grounded such relations on imperial legitimacy. Mutual recognition by some European sovereigns at Westphalia ushered in the notion of sovereign equality, which it would be the task of future generations to implement fully and extend universally.¹⁰

Or, put simply, *1648*: the break between empire and law.

The legacy bequeathed by the Westphalian break: the duty to cleanse international law of any residual elements of imperial or patriarchal injustice, indeed, to view any such elements *as* residual. In the U.S., this approach takes the form of a project I call restatement-and-renewal. Periodic restatements of international law carry forward the tradition of the "modern international law" inaugurated in 1648. Periodic calls for renewal, for a "new international law," reframe the tradition in the light of policy innovation and situational flexibility, in the light of ever-new versions of modernity.

The genealogical approach rejects this account of international legal history as an ever-advancing dialectic of restatement and renewal. It views international legal history as pockmarked by a series of catastrophes and mutations, as rocked by the countless forms of colonial conquest and anti-colonial resistance. It views law's self-proclaimed disciplinary and jurisdictional limits as shifting fortifications for patriarchal power. It suspects that each gesture of greater inclusion in the "international legal community" has been accompanied by a gesture of exclusion. It argues, with Tony Anghie, that the

10. See HENKIN, ET AL., *INTERNATIONAL LAW* (3rd ed. 1993). For an analysis of 1648 in legal historiography, see David Kennedy, *Religion and International Law*, 82 AM. SOC'Y INT'L L. PROC. 198 (1988).

legal notion of sovereignty was forged not only in such intra-European crucibles as the Thirty Years War, but also in the fires of colonial conquest, such as Spanish expansion in the Americas—predating Westphalia by more than a century.¹¹

"Genealogy": the investigation of family pedigrees. People seek out genealogists to prove noble lineage, legitimacy of title, natural succession. But the genealogist knows that things are not what they seem: family history always includes lawless unions, scandalous relations, illicit progeny, swindled fortunes, madwomen in the attic. In this spirit, international legal genealogy rejects linear accounts of the origins and progress of the "international legal community." It recounts the forging of that community through acts of *unholy* matrimony, through liaisons mostly asymmetrical, even when consensual, and all-too-often irreversibly coercive and massively violent—and usually constructing the power of some patriarch or other.

Genealogy sees international law—its doctrines as well as its participants—as normatively impure, culturally heterogeneous, and historically contingent. This approach enables it both to mourn legal history's horrors *and* to believe in law's ever-present emancipatory potential. For genealogy, it is precisely international law's *lack of coherence*, the instability of its transitory configurations of rules and players, that makes it a hopeful enterprise. The genealogist advocates juggling, dislocating, reordering, even bastardizing, the legal family's motley brood.

How would a Restater-Renewer and a Genealogist understand my title, "In the Wake of Empire?" For a Restater-Renewer, the wake of empire signifies precisely, a Wake: a party at a long-overdue death, a wake at which a "new international law" assumes its role as rightful Heir to decadent emperors. It is the wake at the end of the Thirty Years' War or World War I or World War II or the Gulf War or the Cold War. (Law's foundational celebrations always seem to take place in the shadow of some slaughterhouse.)

A Genealogist, shifting metaphors, might see international law as

11. See generally Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321 (1996) (arguing that the modern notion of sovereignty emerged out of Spanish writings on the conquest of the Americas).

attending to the disorder left in the wake of the mighty battleship of empire: law as imperial Valet. The imperial Valet channels, orders, regularizes the dislocations of empire. Like all skilled Valets, it can also shape imperial action, and certainly imperial self-understanding. Like a clever Valet, it can even at times pass itself off as the ship's Captain. Over time, after countless role-reversals, Captain and Valet may become nearly indistinguishable.

Perhaps these perspectives meet at some point. In fact, maybe an Heir is never anything more than a Valet pretending to be the master, a pretense only the servants can validate. Or, put more bluntly: has international law always sought recognition as Imperial Heir by proving that it can manage the "Primitive Other" better than its Imperial predecessors?

Let me presume that there is a Restater-Renewer and a Genealogist in all of us. I'm going to explore our common ambivalences through a dialogue between a Restater-Renewer and a Genealogist, a dialogue about my fetish-date: *May 8, 1945*. I'm not going to give you the voices of all Restater-Renewers and Genealogists, just two randomly drawn from my imagination. Between the two voices I place some quotes from international legal history. And so, a dialogue about *May 8, 1945*, the date on which liberalism in Europe, colonialism in Africa, and patriarchal anxiety spectacularly converged.

A DIALOGUE

The Restater-Renewer: May 8, 1945 – you're kidding. In 1999, should we really replay tired anti-colonial rhetoric? Doesn't the U.N. now include every region, culture, and race? Aren't women finally beginning to be heard? Shouldn't we build a new world of liberal democracies instead of morbidly dwelling on the past?

Inis Claude, authority on international organization, 1995:

The success of the [anti-colonial] movement . . . reflected the failure of the idea of trusteeship that had figured in both the Covenant of the League of Nations and the Charter of the U.N. . . . [I]t is one of the tragedies of twentieth century international organization that such an idea

never caught on. . . .¹²

Lloyd George, British Prime Minister, 1919:

There was no large difference between the principles of the [League of Nations'] Mandate System and those of the [colonial] Berlin Conference.¹³

The Genealogist: Great—we go straight to the heart of the matter: is pointing at the two sides of *May 8, 1945* an unhealthy obsession with the past, or a response to something urgent in the present? Like the period immediately following World War II, the decade since 1989 has seen a variety of bids to re-invent the international community. Out of this array of disparate projects, certain themes from other periods of reinvention have re-emerged with some insistence: for example, internationalist fears and fantasies about nationalism, and the nostalgia for international trusteeship, from Cambodia to Kosovo. These fantasies and nostalgia are linked in some equivocal way to imperial history.

The passage from Lloyd George asserts continuity between two crucial stages in the project of international cooperation for the management of Europe's Others: the 1885 international settlement that regularized the colonial Scramble for Africa and the 1919 system that inaugurated the idea of benevolent tutelage on behalf of a standing international organization. Inis Claude mourns the failure to preserve this project after 1945 in a third incarnation, that of U.N. Trusteeship. Some of those mourning and reviving this project today would join those like Lloyd George and, more cautiously, Hersh Lauterpacht,¹⁴ who stress its continuity with colonial regimes like the Berlin Act. Others would vociferously reject this imperial nostalgia and assert that 1919's Mandate system, and, more unequivocally,

12. Inis L. Claude Jr., *The United Nations of the Cold War: Contributions to the Post-Cold War Situation*, 18 *FORDHAM INT'L L.J.* 789, 790 (1995).

13. Duncan Hall, *The Trusteeship System*, 24 *B.Y.I.L.* 33, 37 (1947) (quoting Lloyd George).

14. Hersh Lauterpacht and R.Y. Jennings, *International Law and Colonial Questions, 1870-1914*, (1959) in *HERSH LAUTERPACHT, INTERNATIONAL LAW, COLLECTED PAPERS* 95, 109-115 (Elihu Lauterpacht ed., 1975).

1945's Trusteeship project, broke with empire. Before simply joining the mourners or revivers of this project, let's think about the meaning and uses of such assertions of break and continuity, let's think about the project's ambivalent history.

The Restater-Renewer: OK, you raise good questions about these historically important institutions. Despite the impression I may have given, I *am* very concerned with the past—with those aspects of the past that can help us in the present. Let's figure out which aspects of past international cooperation to retain and which to discard. But with this Algeria thing you're really making a mountain of significance out of a molehill of accidents. So the two events, V-E Day in Europe and the massacres in Algeria, happened on the same day. But in defeating the Nazis, the French were vindicating law; in affirming colonialism, they were just perpetuating an outdated politics. Law's duty was to overcome this bad politics, to implement the good principles that are the true legacy of 1945.

Robert Delavignette, Director of the French Colonial Institute, October, 1945:

During the German occupation... When [France] was imprisoned and disfigured in Europe itself, we thought that she was alive and beautiful somewhere in Africa or in the Antipodes... In our saddest hours, where was our hope, if not in the fact that La France still lived in its colonies overseas...¹⁵

The Genealogist: I concede that this may be one of those cases where the meaning of an historical puzzle—here, the link between the two faces of *May 8, 1945*—will always be open to debate. But let me ask you: is it really so easy to delink them?

For many Europeans, especially European leaders, defense of empire and resistance to Nazism were indissoluble. The passage from Delavignette epitomizes the Gaullist imperial fantasy throughout the war, a time when "the soul of occupied France seemed to have taken

15. Robert Delavignette, *Le Procès de la colonisation française*, 15 RENAISSANCES 14, 16-17 (Oct. 1945) (published in Algiers).

refuge in Africa,"¹⁶ when the "French Empire provided a body" for the "heart and soul" of Free France.¹⁷ It poignantly reconstructs French identity through such colonial projections. The Frenchman imagines his own identity as something reflected back to him from somewhere in Africa—or maybe from the "Antipodes"—where his true love, La Belle France, still lives. Imagining her beautiful face, he sees his own true identity, so cruelly belied by the ugliness around him and within him.

The Algerian demonstrators of *May 8, 1945*, struck at French self-understanding by disrupting this back-formation, this reconstruction of identity through the return of a glorified reflection from the colonial screen. They sought to make it impossible for French beauty to be yet another colonial natural resource transshipped back to the metropole. Their strategy and the ferocious response it provoked make it very hard to fully separate the two major events of *May 8, 1945*. Nor were the Algerian events aberrational: from 1944 to 1947, anti-colonial uprisings met fierce French repression from Morocco to Syria to Madagascar to Vietnam.¹⁸

There have been many moments when the identity of an "international community", too, has emerged as a back-formation of its relation to its imperial periphery: as Tony Anghie has shown about 16th century European sovereignty in relation to the peoples of the Americas,¹⁹ as R.P. Anand has shown about the Concert of Europe in relation to Asia,²⁰ as Judge Fouad Ammoun and Tony Anghie have shown about the Congress of Berlin in relation to Africa,²¹ as Annel-

16. Pierre Olivier Lapie, *The New Colonial Policy of France*, 23 FOREIGN AFF. 104, 111 (1944).

17. See generally RENÉ CASSIN, LE RÉVEIL DE L'EMPIRE FRANÇAIS 9 (1941).

18. See YVES BENOT, MASSACRES COLONIAUX 5-7 (1994).

19. See Anghie *supra* note 11.

20. See R.P. Anand, *Attitudes of the Asian African Countries Towards Certain Problems of International Law in THIRD WORLD ATTITUDES TOWARDS INTERNATIONAL LAW* 5 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

21. See *Western Sahara*, 1975 I.C.J. 12, 86 (Oct. 16, 1975) (separate opinion of Judge Ammoun); see also *North Sea Continental Shelf* (F.R.G. v. Den. and Neth.), 1969 I.C.J. 3, 133 (Feb. 20, 1969) (separate opinion of Judge Ammoun), Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 37-38 (1999).

ise Riles has shown about the 19th century legal West in relation to its cultural Rest,²² as Ruth Gordon has shown about the U.N. in relation to the European colonies²³—and as others have shown about Europe's relation to its own periphery: Christian Europe in relation to the Ottoman Empire,²⁴ the League of Nations in relation to Eastern European nationalism,²⁵ the 1930s democracies in relation to Spain,²⁶ and on to NATO in relation to Kosovo. At each of these moments, an "international community" discovered its own identity by differentiating itself from an Other which the community projected as requiring its efforts to civilize or restrain, develop or manage, pacify or sequester.

In 1945, this community was rediscovering its identity on a variety of contested terrains, among them a shift from European to American leadership. This shift remains disputed and incomplete, but always retains a reference to the peripheral Other. With only a minimal willingness to read metaphorically, we can find this dynamic in the words of Henry Shelton, chairman of the American Joint Chiefs of Staff, on March 8, 1999:

The road to next month's NATO summit is not a straight line from Brussels to Washington . . . but one that takes a detour through the Balkans.²⁷

22. See Note, *Aspiration and Control: International Legal Rhetoric and the Essentialization of Culture*, 106 HARV. L. REV. 723, 732-38 (1993).

23. See Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12 AM. U. J. INT'L POL'Y. 903, 946 (1997).

24. E.g., Nathaniel Berman, *The International Law of Nationalism: Group Identity and Legal History*, in DAVID WIPPMAN, ED., INTERNATIONAL LAW AND ETHNIC CONFLICT (1997).

25. E.g., Nathaniel Berman, "But the Alternative Is Despair": *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

26. E.g., Nathaniel Berman, *Between "Alliance" and "Localization": Nationalism and the New Oscillationism*, 26 N.Y.U. J. INT'L L. & POL'Y. 449, 453-56 (1994).

27. Henry Shelton, *The Transatlantic Commitment*, speech at conference on "Nato at Fifty," (Mar. 8, 1999) (transcript available at <http://www.nato50otan>).

The “detour” in the reconstitution of the international community’s identity since World War II, the shift from Europe to the U.S., “from Brussels to Washington,” has always passed through the peripheral Other. The American acceptance of the imperial relay from the French in Vietnam was only the most unequivocal of an array of events with a variety of political, moral, and legal valences.

Of course, the reconstitution of identity may always fail: the destination postponed by the “detour” through the Other may never be reached. Only time will tell of the effects on the identity of the “international community” of the Kosovo operation that began today [March 24, 1999]. And such identities form differently depending on how the community imagines its many Others: its Balkan, Polish, African, Indian, Spanish, even “Antipodean” Others. Tell me who your Others are . . . or, rather, tell me how you fantasize your Others . . . and I’ll tell you who you are . . . or at least who you dream of being.

The Restater-Renewer: Surely you don’t want to underestimate the shift in international law’s center from Europe to the U.S. Let’s take 1945: even if there was some absurd link in the French mind between resisting Germans and affirming empire, *May 8, 1945*, ushered in a new world. Old-fashioned colonialism was dead—even if the French and British hadn’t yet realized it. American policymakers insisted on the obsolescence of the European empires throughout the war . . . and sought in San Francisco to set the world on the road to decolonization.

Pierre-Olivier Lapie, French Governor of Chad, 1945:

How are we to create men out of those who are not yet men and then to make citizens out of them and the others who are already more advanced in civilization? That is the dual task . . . The new French colonial policy is this: . . . *the colonizing nation’s sole aim is to transform the colonized areas into states which will someday be its own equals* . . . Under such a policy, France is

sure that to the ideals of Liberty, Equality, and Fraternity the colonial peoples will add a fourth—loyalty to France.²⁸

Harold Stassen, American Delegation to the San Francisco Conference, May 18, 1945:

Independence . . . was a concept developed out of the past era of nationalism. We should be more interested in inter-dependence than in independence and for this reason it might be fortunate to avoid the term "independence".²⁹

The Genealogist: I agree that we shouldn't underestimate the 1945 Americans, but we may disagree about what a full understanding of their position involves. The movement from a European to an American center for international law was more complicated than a stage in law's march to ever-greater inclusiveness—a march whose 1945 leg would be an American initiation of decolonization. The claim of a post-war, American-led break with empire ignores the evidence that the Europeans were not as uniformly attached to formal colonialism as this claim suggests, nor were the Americans so clearly opposed to it, despite wartime pronouncements.

The passage from the French Governor Lapie shows the ability of the imperial imagination to reinvent itself under changing conditions. This colonial administrator explicitly sets forth a project of formal decolonization—as a means of perpetuating French dominance. Your claim of an historical break can only work if you treat imperialism as a single phenomenon that disappears with the death of specific players and legal forms. But decolonization was only the end of a *specific form* of imperial domination, one that only took definitive shape in the late 19th century.

Conversely, the quote from Stassen suggests that the American position was something other than a reversal of the imperial past. For Stassen, who decisively shaped the American position on Chapter XI

28. Pierre Olivier Lapie, *The New Colonial Policy of France*, 23 FOREIGN AFF. 104-11 (1944) (emphasis added).

29. WILLIAM ROGER LOUIS, IMPERIALISM AT BAY 538 (1978).

of the Charter, the new, postwar conception of "interdependence" did not depend on a formal reversal of colonial dependence—neither the first nor the last time that interdependence would be invoked in the service of inequality. Stassen here converges with many French colonial reformers who sought to provide self-government within a new "*Union Française*"; this reform would "bring the colonized countries to a higher stage of international solidarity while sparing them the ordeal . . . of national egoism."³⁰

The key to the American position lies not simply in sympathy for the colonial powers—American policymakers often preferred interdependence under U.N. auspices rather than under some *Union Française*—but in the confidence of a rising power at a moment of reconstruction. American leadership would guarantee that interdependence would secure the interests of the peoples concerned. Or, as Abe Fortas, then with the Interior Department, declared in 1945:

When we take over the Marianas and fortify them we are doing so not only on the basis of our own right to do so but as part of our obligation to the security of the world . . . What was good for us was good for the world.³¹

We have seen this kind of confidence this month [March, 1999] in the otherwise surprising insouciance with which NATO has dispensed with U.N. authorization for action in Kosovo. This dispensation reflects implicit confidence in the identity between NATO power and international legitimacy at a time when NATO perceives no serious rival claimants to that legitimacy.

So I'm not positing a tedious history of unchanging international hierarchy. The Americans did seek a shift in international law's center in 1945. But it was far from obvious what such a shift would mean for international inequality. As the passages from Lapie and Stassen show, both support and discouragement of colonial inde-

30. Henri Laurentie, *Les Colonies françaises devant le monde nouveau*, 15 *RENAISSANCES* 3, 4 (Oct. 1945) (published in Algiers).

31. LOUIS, *supra* note 29, at 481 (quoting Abe Fortas).

pendence could form parts of imperial projects for world leadership.

The Restater-Renewer: I'm glad you acknowledge that international legal history is not some monotonous story of European and American domination. I agree, of course, that the end of colonial empires did not *by itself* equalize power between the West and the Rest—and certainly that independence is not a magical path to utopia. You act as though I'm a rigid formalist rather than an heir to Legal Realism's critique of doctrinaire distinctions. So perhaps I spoke a bit hastily before about colonialism as political and the victory over fascism as legal. Let me rephrase: 1945 effected a salutary shift in *power*. Pragmatic and forward-looking Americans won a big fight against formalistic and sovereignty-worshipping Europeans in putting trusteeship in the Charter. As your Algerians showed with their banners, *May 8, 1945* signaled the *promise* of a better world under a better law. International law's duty ever since has been to make good on that promise.

Manifesto of the Algerian people, 1943, Introduction:

The landing of the Anglo-Americans [in Algiers, November 1942] has placed the Algerian people in touch with other realities. They realize that, in the sphere of modern technology, everything is relative. Europe, so powerful in relation to Africa, follows *in the wake of the Americans*.³²

Manifesto of the Algerian People, 1943, Text:

Since last November, Algeria has been under Anglo-American occupation. . . . In a declaration made in the name of the Allies, President Roosevelt promises that the rights of all peoples, large and small, will be respected in the organization of the new world. . . . The Algerian people demand . . . the abolition of colonialism.³³

32. BOUCIF MEKHALED, CHRONIQUES D'UN MASSACRE, 8 MAI 1945, 25 (1995) (emphasis added).

33. *L'Algérie devant le conflit mondial, Manifeste du peuple algérien* (Feb. 1943) in 1 LA GUERRE D'ALGERIE PAR LES DOCUMENTS, 31, 31-38 (Jeans-Charles

Manley O. Hudson, Editorial Board, *American Journal of International Law*, 1944:

[India's] vaunted "national self-consciousness" has emerged under British tutelage. . . . The *sweeping assumption that all peoples are fit to govern themselves* and to control their territories and resources in an exclusive manner is based on an inadequate understanding of the great problem of colonial administration.³⁴

Philip Marshall Brown, Editorial Board, *American Journal of International Law*, January 1945:

The present war has given a great impetus to the acceptance of the principle that colonial administration must be considered as a trusteeship in behalf of the subject peoples. . . . The arguments now generally used in criticism of the colonial powers, as in the case of India, are not based so much on charges of unjust exploitation as on *the abstract right of all peoples to attain self-government*. . . . The term imperialism, with all of its opprobrious connotations, may no longer be fairly applied.³⁵

The Genealogist: We seem to be moving closer in our shared rejection of rigid distinctions. But I want to expand who we look at when we say that practice gives meaning to formal legal regimes. In 1945, pragmatism may have looked very different from the American and Algerian perspectives. Let's start with the Algerians.

May 8, 1945 started as a day of hope—but are you sure it was hope for a world under your law? The notion of a break between empire and law cannot explain *May 8, 1945* normatively any more than methodologically. As the Algerian Manifesto suggests, there are moments when anti-colonialists might choose an "inter-imperial"

Jauffret ed., 1990).

34. Manley O. Hudson, *The International Law of the Future*, 38 AM. J. INT'L L. 278, 282 (1944) (emphasis added).

35. Philip Marshall Brown, *Imperialism*, 39 AM. J. INT'L L. 84, 84, 86 (1945) (emphasis added).

strategy, playing one empire against the other, rather than a supposedly “non-imperial” and “legal” strategy. This Manifesto, which played a crucial role in the rebirth of Algerian nationalism, opens with an implicit threat to shift colonial allegiance from France to the U.S. These kinds of statements freaked out the French authorities. Police reports of the time are filled with paranoia about whether British and American spies were in league with Algerian nationalists.

In fact, there *were* those in Algeria after the American landing in 1942 who tried to play the Americans against the French, just as there had been some prior to that landing who had tried to play the German card. To be sure, the Atlantic Charter and the San Francisco Conference had raised great hopes among Algerians. North African nationalist leaders had had a variety of contacts with American emissaries. But key Algerian leaders soon understood that the Allies’ main goal in North Africa was to keep it calm and pro-Western during the war.³⁶ So the American card was played not because the Algerians necessarily thought that America stood on the side of “law,” but primarily because it served a local strategy to create dissension among the imperial powers.

Different anti-colonial strategists could come to incompatible conclusions about the right legal path to pursue: around the same time as the Algerian manifesto, the anti-colonial writer Aimé Césaire urged integration of Martinique with France, rather than independence—in part due to fear that French domination would be replaced with American domination. In fact, some Algerian Communists adopted the same view.³⁷ Césaire made it clear that his opposition to independence was strategic: its goal, in his words, was

not to bark with the dogs, nor to throw my pearls before swine. Rather, Martinican dependence would be willful, calculated, cunning.³⁸

The strategies of the colonized have been just as multiple as those of

36. See REDOUANE AINED TABET, 8 MAI 1945 EN ALGÉRIE 202 (1987).

37. See HENRI ALLEG ET AL., 1 LA GUERRE D’ALGÉRIE 255 (1981).

38. Aimé Césaire, *Panorama*, 10 TROPIQUES 7, 10 (1944).

the colonizers. Whether or not one thinks Césaire a good strategist, his rejection of the notion of a break between law and empire proceeded from his pragmatic calculation of strategic possibility.

Conversely, the passages from *American Journal of International Law* editors Hudson and Brown reflect American pragmatism about the place of the colonized territories after the war. Like Stassen, Hudson and Brown reject the notion that the opposite of colonialism is independence. Just as many Americans rejected European colonialism as obsolete, so policy-makers and opinion-shapers like Stassen, Hudson, and Brown rejected anti-colonialist nationalism as outdated—even before its realization. Hudson describes the nationalism of the colonized as an achievement of colonialism in order to bolster his attack on the “sweeping assumption” of self-determination. Brown’s rejection of the term “imperialism” to describe the new, enlightened colonialism leads him to minimize the difference between formal colonial rule and international trusteeship. Cutting through “colorful terms” like “imperialism” or “independence,” the pragmatic American purports to touch the real problems underlying them:

the exploitation of the natural resources of territories fortuitously occupied by peoples who are not as yet able to govern themselves . . . in the interests of the native populations as well as of those nations which may require those products.³⁹

In the passages from the Algerian Manifestants and the American Editors, we see two pragmatic perspectives, each of which rejects a dichotomy between law and empire—though with radically divergent intents.

Some consequences of such rejections for a genealogical telling of international legal history: the international law that invented the forms of colonialism was just as “legal” as the international law that invented the Dayton Accords; the international law that intervened in the “failed state” of Somalia in the 1990s was just as “imperial” as

39. Brown, *supra* note 35, at 85.

that which justified colonizing the “failed state” of India in the 19th century. Conversely, the choice made in the 1940s by Césaire and the Algerian Communist Party for continued union with France may have been just as “anti-imperial” as the nationalist choice for independence. *Not that these actions are morally or politically equivalent.* Rather, a genealogist rejects making normative evaluation depend on whether a policy is *either* imperial *or* legal. Imperial power *and* international law take many forms—and this makes it possible to play one form against another. Projecting certain parts of international law, like the colonial justifications of the 19th century, into some non-legal sphere called “empire” simply gives law an alibi, a claim it was not present at those events the discipline now condemns.

Similarly, we shouldn’t be deceived by the legal forms of the putatively post-colonial era, especially by the post-colonial state. Remember the great cliché about colonialism: the British ruled indirectly, the French directly. This cliché is woefully inadequate in the study of comparative colonialism. Still, the post-colonial state provided the opportunity for a creative mixture of the two in the relationship between imperial centers and post-colonial elites. Read James Gathii: the history of the imposition of the economic programs of the metropolitan centers has taken many forms.⁴⁰ Post-colonial elites have entered into a series of shifting alliances with a variety of American, Soviet, French, and World Bankers who would “develop” the economic “primitive.” The post-colonial state, which often constructs its own identity through its unstable relations to the Other of its own hinterlands, is no more of a single phenomenon than colonialism itself—as the post-independence history of Algeria itself painfully shows. The construction of the centralized Algerian state through subordination of its Berber, female, secularizing, even dialectal Arab, Others is a complex and bloody tale.⁴¹

The Restater-Renewer: I’m relieved that you embrace pragmatism and reject the dogmatism of left and right. Maybe you’re not so far from the mainstream of American thinking. In fact, now that such

40. See James Gathii, *Empowering the Weak While Protecting the Powerful: A Critique of Good Governance Proposals* (1999) (unpublished S.J.D. thesis, Harvard University) (on file with author).

41. See generally KHALIDA MESSAOUDI, *ENTRETIENS AVEC ELISABETH SCHEMLA: UNE ALGERIENNE DEBOUT* (1995).

statements are no longer distorted by Cold War polemics, I fully join your claim that there is always some politics in law—a quintessentially American Legal Realist point. Legal doctrine has no meaning except in the context of its pragmatic implementation. But my pragmatism is idealistic. I reject arguments that sound amoral, which refuse to take a position on the choices we face. I believe that law must have both the normative authority of the international community, at a distance from state power politics, and also effectiveness, close enough to the realities of power to be relevant to the world we live in.

Treaty of Münster, 1648:

In the Name of the Most Holy and Individual Trinity.

The Genealogist: How could anyone not share your desire to be as contemporary, as relevant, as possible while retaining normative authority? So you might be surprised that I respond to your reiteration of American practical idealism with this passage—seemingly so far removed in time, place, and sensibility. But I'm sure you recognize the words. They are the first words of “modern international law,” of the Peace of Westphalia. I invoke the Peace of Westphalia here to provide a different way of approaching your concern about amorality, a concern I fully share. Your desire to be normatively relevant can make it difficult to see the extent to which you frame specific, current problems within general schemas bequeathed by history. Your practical idealism, which claims to be in touch with the realities on the ground, often operates with such frames from long ago and far away. What may seem to you like amorality is my attempt to reflect on the usefulness of these general frames before judging particular situations through their optic.

For example, when you invoke past ideals for inspiration, you often present the Peace of Westphalia as the first time that a potentially universal community of equal sovereigns took over from a particularistic imperial monopoly. But the first words of this treaty herald its particularism. Whatever the complexities of invocations of the Trinity in 1648, they signal the parochial self-conception of the rising power of Europe which, like all rising powers, mistook itself for the universal. Such periodic announcements of a shift from particularis-

tic sovereignty to universalistic community have gone on for centuries—though some think such a shift was invented only after the Cold War.

What do these periodic reinventions of international law signify? We agree that they can hardly by themselves equalize the world's power and wealth. Rather, they try to manage a world whose structure they imagine in remarkably constant terms: a structure in which the Great Powers organize themselves internationally for the management of the relationships among themselves and between themselves and the less powerful. Let's look at the Peace of Westphalia—it sets a pattern that one can find in every major document of international law, all the way to Rambouillet. The Treaty of Münster describes its goal as a "*Christian and Universal Peace*," a peace concluded between two sovereigns, the King of France and the Holy Roman Emperor, each described as "*the most Serene and the most Potent Prince*." It contains a variety of provisions for religious freedom, what one would today call "minority rights." Such rights, then as now, are always accompanied by protections for sovereignty, as in the Treaty of Münster's declaration that "all the Vassals, Subjects, People, Towns, Boroughs . . . shall belong to the most Christian King . . ."

The Peace of Westphalia sets a pattern followed by all major international legal documents. Every such document sets itself the task of managing an international order imagined as divided into three elements:

- (1) a substantively grounded international community (Christendom of the 17th century, Europe of the early 19th, Civilization of the late 19th, all the way to today's Liberal Democracies);
- (2) sovereigns, those "*Princes*" whose "*potency*" and "*serenity*" are periodically reimagined;
- (3) those viewed as not full participants in the community of sovereigns, those "*Vassals, Subjects, People*" whose rights and subordinate role are variably conceived.

All major documents of international law share this structure: the 1885 Berlin Act on Africa, the 1906 Algeciras Act on Algeria, the

League Covenant, the U.N. Charter, the Dayton Accords, Rambouillet, even, I would claim, the 1936 Non-Intervention System in relation to the Spanish Civil War and the 1938 Munich Agreement. You may call some of these "imperial"; you may call some of these "legal": hardly a scientific dichotomy, as you agree.

Of course, these regimes manage the relationships among their elements differently—differences that might decide the lives and deaths of millions. To take a recent example: the arms embargo/non-intervention system in Bosnia before 1995 differed radically from the intervention/quasi-protectorate system deployed since 1995. But such vast differences do not signify some shift from a sovereignty-oriented system towards a community-oriented system. Rather, they show reorganization within a structure, a reorganization of the relations among the Great Powers and between the Great Powers and their modern "Vassals."

Or to take an historical example: in establishing the Non-Intervention System during the Spanish Civil War, the Great Powers organized themselves in a structure that was no less an "international community" than the League of Nations established by World War I's Principal Allied and Associated Powers. Moreover, the Non-Intervening Powers projected the Iberian margin of Europe as just as exotically Other as the Principal Allied and Associated Powers had its Eastern European margin a generation earlier—places of violence and instability, with varying potentials for integration into a pacific legal order.⁴² In 1936, as in 1919, the projection of a European periphery that required international management was deeply tied to the construction of the identity of an international community. Still, the birth of the Non-Intervention System's international community sounded the death knell of its predecessor.

The Restater-Renewer: What possible significance does the structure have? If, as you say, the differences can determine the lives and deaths of millions, to what end are you pointing at the similarities? Why dwell on structures so general they are compatible with the liberal order of Versailles and the ugly power politics which destroyed it in the 1930s? Isn't the U.S., the only remaining superpower, duty-bound to use its might to make the world a better place? Let's figure

42. See Berman, *supra* note 26, at 478.

out which specific doctrines and institutions produce the good results and which the bad—let's learn from past mistakes, instead of fatalistically lamenting evil structures.

General Act of the Conference of Berlin, 1885:

Article 1. The trade of all nations shall enjoy complete freedom . . .

Article 2. All flags without distinction shall have free access

Article 6. All the Powers exercising sovereign rights or influence in the aforesaid territories bind themselves to watch over the preservation of the native tribes and to care for the improvement of the conditions of their material and moral well-being⁴³

The Genealogist: This might be our point of strongest agreement and of strongest disagreement. I certainly agree that we should experiment with doctrines and institutions to see how to achieve more justice. Perhaps you will even agree to include in such “experiments” the efforts by postwar anti-colonialists to exploit the tensions within international law for their own ends—even though such experiments don’t easily fit within canonical histories of international law. And I, too, think that it does no good simply to lament hierarchy within international institutions as long as such hierarchy is associated with persistent imbalances in real power and wealth. If one really cares about bringing about a more just world, one must start by recognizing inequality—it would be folly to pretend that the United States is not more responsible for global distribution than San Marino. I would gladly bracket for a moment intricate theories about whether law “leads” or “follows” such inequalities. Recognizing such imbalances doctrinally and institutionally is a necessary step towards using law to ameliorate them. *How* one responds to that inequality is, of

43. General Act of the Conference of Berlin, Feb. 26, 1885, *reprinted in* ARTHUR BERRIEDALE KEITH, *The Belgian Congo and the Berlin Act* 302, 302-304 (1919).

course, another matter altogether.

But ignoring the complexities of structural continuity can often make it very difficult to assess such "experiments"—their success and failure, their meaning for future efforts. You may think, for example, that you've achieved some historical legal breakthrough while merely tinkering with the mix of elements—or, on the contrary, that you've remained faithful to a legal regime while allowing it to be hijacked by nefarious interests. Let's say we want to judge the relationship between the Berlin Act and the Mandate and Trusteeship Systems. If we fail to notice structural continuities, we may overestimate the extent to which Mandates or Trusteeships broke with imperial domination. We may point to League innovations like the Permanent Mandates Commission and declare colonialism dead. Or we may point to U.N. Charter Chapters XI-XIII and declare that all the ambiguities left over from the Mandate system have been resolved. In asserting such breaks, we ignore the enduring imbalances in power and wealth with which all of these legal forms have been associated.

Focusing on specific doctrinal or institutional changes, while disregarding structural continuity, allows us to think that we are moving "from sovereignty to community." We forget that colonialism could only function within a community (embodied, for example, in the regime established by the Berlin Act), and Mandates and Trusteeships had to ensure respect for sovereignty (for example, in the textual ambiguities and sovereign discretion on the ultimate goal of tutelage). I'm not just saying that "there is nothing new under the sun," though assertions of discontinuity are often historically inaccurate. I'm saying that a focus on things like imaginary "shifts from sovereignty to community" divert attention from the consequences for distribution of power and wealth of both the old and new regimes.

Assertions of continuity and discontinuity are often at the heart of arguments about the value of legal regimes. Lloyd George, Hersh Lauterpacht, and others have asserted continuities between the Berlin Act and the Mandate and Trusteeship Systems, retrospectively commending Berlin for its adumbration of later developments. But let's assume that we recoil before the rather horrifying results of Berlin. How should we evaluate its relationship to its successors? Shall we object to assertions of continuity and save League Mandates and

U.N. Trusteeships? From this perspective, the Berlin Act was a kind of colonialist parody *avant la lettre* of the authentic international trusteeship later established by the League and the U.N. Or perhaps we should accept continuity and condemn trusteeship: from this perspective, the Berlin Act haunted these later systems as their secret truth—viz., that those systems were masks for colonialism. The appearance of structural similarity often makes identifying differences *controversial*—dependent on a host of cultural, political, and historical assumptions—and *unstable*—dependent on the way in which a particular regime is interpreted and implemented by conflicting parties.

And these uncertainties go beyond lawyers' arguments: they affect the way political actors and the general public perceive international settlements. Let's take another example: were the self-determination, minority rights, sovereign prerogatives, and international supervision embodied in the 1938 Munich Agreements⁴⁴ a parody of the noble principles of Versailles, or does Munich show us the truth about Versailles? Again, the appearance of structural continuity between 1919 and 1938, and the debatable assumptions needed to evaluate that appearance, made Munich attractive to some, outrageous to others. This phenomenon allowed the drafters of the Munich Agreements to track the form of the Versailles Treaty, even while parodying it—and, at least on the German side, intending to destroy it. Yet, the seeming continuity in structure enabled the Munich Agreements to appear reasonable, even seductive, to policymakers as well as ordinary people in Britain and France.

Each international legal framework is an unstable reorganization of power relationships, with quite different degrees of room for maneuver. Differences in legal form may or may not signal redistribu-

44. I include in the "Munich Agreements" the three agreements that sealed the dismemberment of Czechoslovakia in 1938. See United Kingdom Delegation (Munich) to Viscount Halifax, *reprinted in* II Documents on British Foreign Policy, at 627-629 (3d Ser. 1938); Czech-German agreement on citizenship and option, *reprinted in* II REICHSGESETZBLATT 896 (1938); Czech-German agreement on national minorities, *reprinted in* XII DOCUMENTS DIPLOMATIQUES FRANÇAIS, at 798 (2d Ser. 1938). See generally Nathaniel Berman, *Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia, and "Peaceful Change"*, 65 NORDIC J. OF INT'L L. 421 (1996).

tion of power and wealth. In that sense, I agree with the American pragmatists that a belief in dichotomies, like those between colonialism and independence, indicates naive thinking. But so do dichotomies between sovereignty and community, empire and law, and so forth. You simply can't tell whether the Berlin Act is better than the Mandate System by asking which has more sovereignty and which more community—all such regimes contain all the elements. The question is to what ends they have been put—and to what extent the framework allows challenges to prevailing distributions of power and wealth.

The Restater-Renewer: If what you're calling for is more empirical work on how legal regimes actually work in practice, I can only applaud. It seems to me that we both reject stale polemics between absolutist positions—views that would require us to judge a regime, such as trusteeship, as either all good (“emancipatory”) or all bad (“imperialist”). And we agree that lawyers have to deal with the real world, especially with the realities of power. One of the main goals of international law is to try to make the deployment of power more humane. So let's move off these abstract theoretical points for a moment and talk about real people. I don't see what point you're making with your accounts of what I, too, think are terrible colonial atrocities. Whatever the legal status of Algeria in 1945, massacres have always been illegal and they can even justify humanitarian intervention if they are bad enough. No one did anything about the French massacres in 1945—but that is an empirical problem. It is a question for a psychology of racism, an international relations study of Great Power politics, even a cultural studies analysis of the media of the time. It's not a purely *legal* question, though we should work to make law respond more consistently to such incidents.

Restatement of Foreign Relations Law (Third):

International law . . . consists of rules and principles of general application dealing with the conduct of states and of international organizations and with their relations inter se, as well as with some of their relations with persons,

whether natural or juridical.⁴⁵

The Genealogist: By referring me to psychology, to IR, to cultural studies, you're sending me off to the land of the other disciplines, to law's outside. But you don't always insist on the dichotomy between law and non-law. Sometimes you try to bring law and non-law together in your Legal Realist mode—then you look to other disciplines to concretize law's abstractions or provide ballast for its shifting indeterminacies. At other times you try to keep them separate, like when you try to explain inaction in the face of French atrocities. The distinction you've invoked for this last purpose threatens to reinstate the alibi for law provided by the law/empire dichotomy—a dichotomy we've agreed doesn't really hold up. In looking outside law for such explanations, you try to save your faith in law by asking other disciplines to explain that law's apparent failures actually stem from other factors.

The Restater-Renewer: Don't you think that you're a bit paranoid? Now you want to find exaggerated connections between disciplines just like you did between events in Europe and events elsewhere.

Georges Scelle, leading French international lawyer, in response to an anti-colonial revolt in the Riff region of Morocco, 1925:

[T]he League of Nations has without a doubt no competence at all in the Moroccan affair. The Rif, the Riffans . . . have no international personality of any degree. Morocco is a country under protectorate with two protecting States [France and Spain]; the League of Nations has no capacity to intervene in the domain of a protectorate. . . . *[L]egally, one cannot even say that there is a war—an international war, of course, because there is a war in the larger sense of the term*⁴⁶

45. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES sec. 101 (1987).

46. GEORGES SCELLE, CAHIERS DES DROITS DE L'HOMME 496 (1925).

The Genealogist: Maybe I've gone too far in my suspicions about the relations between disciplines. But I'd like to give one specific example about how the projection of colonial governance outside international law forms a strand in the genealogy of interdisciplinarity. Looking outside law to explain European action or inaction in Africa follows in a long tradition. I've just quoted a 1925 legal opinion by Georges Scelle about an anti-colonial revolt against France and Spain in the Riff region of Morocco. The War of the Riff and the international reaction to it foreshadowed the anti-colonial struggles that reshaped the world in the 1950s and 1960s.

What place does this event have within international legal history? One answer might be simply—None. No major French, American, or British international law journal published an article about this war. Why? Because as a “colonial” war it was not viewed as “international.” In fact, Georges Scelle gave the opinion I've just quoted only because he was asked to do so by the French Human Rights League. (By the way, the majority view in the Human Rights League was that human rights concerns precluded support for the rebels; instead, the majority advocated a reformed, even socialist, colonialism—forming a link in a tradition that leads all the way to today's nostalgia for trusteeship.)

For international law, this major conflict, this harbinger of global change, simply didn't exist. Or, more precisely: Scelle projects colonial affairs into a “larger” domain (“war in a larger sense”)—a domain of cultural and political conflict, presumably to be studied by interdisciplinarians. Similarly, Scelle denies legal existence to the central figures in this drama, the Moroccan rebels. He casts their identity, too, into some other domain.

To find debate on this war, we must turn to those who are not viewed as part of “international legal history”—Communist agitators, human rights activists, Surrealist artists, Moroccan guerrillas. Should we, as international lawyers, go and study them? If we don't, if we accept the period's disciplinary self-definition, then we're complicit in the way that definition legitimated colonial power. If we reject this self-definition, we might consider a Communist propagandist or a Surrealist provocateur as just as much of an international lawyer as an imperial liberal like Georges Scelle—in fact, in terms of subject matter, more entitled, since Scelle forecloses legal discussion

of colonialism, the major international question of the last five centuries. Yet, if we follow the debate into the “larger” domain of culture and politics, we’re also following Scelle’s instructions and preserving law from the colonial taint. Whatever choice we make about interdisciplinarity in our historical study, the interwar period’s construction of disciplinary difference provides law with its colonial alibi.⁴⁷

Now consider law’s refusal to recognize the existence of anti-colonial rebels. If we reject this refusal, then we should view the Moroccan rebels’ rights and duties just as legally cognizable as those of any state. But we would then be missing the identity-constitutive role of international law, both in its inclusions and exclusions: for it was precisely the refusal of international legal status to such groups that set the terms in which anti-colonial struggle would be formulated in the ensuing decades. The kinds of anti-colonial rebels who “had no international personality of any kind” in 1925 would eventually cycle through a variety of legal identities: “minorities” with cultural rights, “peoples” with self-determination rights, “individuals” with human rights, and so on. International law’s disciplinary boundaries are a terrain of struggle for identity-politics: those constituted as law’s outsiders reshape that law through resistance to those boundaries. Again, international law’s role in this process is unstable: the terms in which people have sought recognition in the 20th century have emerged through mortal struggle — between the identities projected from the metropolises and their internalization, displacement, and transformation by the marginalized.

Sometimes, as in the current Algerian civil war, the terms set by this dynamic can lead to horrors long after colonialism passes from the scene. For example, the colonial power attempted to heighten both linguistic and gender divisions within Maghreb society in order to assimilate elements of that society to French culture.⁴⁸ The colonial power wanted to provide a social base for the legal argument that events in North Africa were domestic French matters,

47. Cf. *Aspiration and Control*, *supra* note 22.

48. See, e.g., MONIQUE GADANT, *LE NATIONALISME ALGÉRIEN ET LES FEMMES* (1995); Mohammed Harbi, *Nationalisme Algérien et Identité Berbère*, 11 *PEUPLES MÉDITERRANÉENS* 31 (1980).

rather than international questions subject to outside scrutiny. The dominant anti-colonial movements and then the post-colonial state sought to use this legacy to define struggles for Berber identity and women's emancipation in terms of complicity with colonialism. Feminists and Berberists continue to fight against this inflection of their struggles by the persistent aftershocks of colonialism.

The Restater-Renewer: Well, I hope you're not going to blame international law for everything bad that happens for all time everywhere. For example, you make a big deal out of telling us that French accounts of *May 8, 1945*, were filled with irrational prejudices, such as those against Muslim women. Doubtless, but this is simply a red herring. Post-war international law has given rights to women—even if slowly. It has sought to take women out of their subordinate, domestic roles, as in your Algerian demonstrations, and has given them international legal status. International law has been the ally of women against local patriarchies.

Resolution of the Etats Généraux of Feminism, Paris 1931:

... Considering the necessity for French women who stand in relation to indigenous people to possess full civil and political rights; Considering that France has the greatest interest in heightening the prestige of all its citizens, the Etats Généraux of Feminism . . . demands . . . the immediate right to vote for all French women.⁴⁹

The Genealogist: First, let me say that the terrified French accounts of the Algerian demonstrations do not necessarily place the women in subordinate roles—on the contrary, these accounts describe them as the secret matrix of revolt. As an official French report recounted:

The *you-yous* of the women excited their husbands and encouraged them to continue the action; when they began to retreat, the women said

49. Naïma Kitouni-Dahmani, *Femmes dans la tourmente coloniale*, 19 CONFLUENCES 37, 43 (1996) (quoting the Resolution).

to them, "where are you going?"⁵⁰

The reality was no doubt even more complex.

In any event, I don't think you can simply identify the cause of all women with the cause of international law. Let's look at the provocative phrase invented by Celina Romany: "*women as aliens*".⁵¹ With this phrase, Romany seeks to provide an analysis of international law's historical attitude towards women, as well as a law reform proposal to extend women's rights. "Women as aliens" tries to capture international law's image of women: as excluded, as exposed, as latent fifth column, as well as sheltered, as protected, as sacred ward. Romany would reject the idea that recent reforms show that international law is finally living up to its own best principles. Instead, she extends the feminist critique of liberal social contract theory to the macro-liberal society of inter-state relations. State sovereigns, like the sovereign of each family, constitute themselves as equal, rational, and universal through the projection of passions and inequalities into a pre-legal natural sphere, the sphere where sexual hierarchy prevails. Romany opens legal historiography to this hidden genealogy of international society.

This hidden story has begun to be excavated by much recent critical writing. David Kennedy has uncovered the forgotten origins of the League of Nations idea in women's peace movements and has shown how those movements were excluded from the scene by the end of World War I.⁵² Karen Knop's work on the interwar period and the United Nations Trusteeship system has uncovered the role of women in the development of the theory and practice of self-determination.⁵³ Taken together, these two stories—the suppression

50. Rapport du Général Duval, (30 mai 1945), in 1 LA GUERRE D'ALGERIE PAR LES DOCUMENTS 219, 220 (Jeans-Charles Jauffret ed., 1990)..

51. See generally Celina Romany, *Women as Aliens: A Feminist Critique of the Public/ Private Distinction in International Human Rights Law*, 6 HARV. HUM. RTS. J. 87 (1993) (analyzing the international human rights framework in light of feminist political theory).

52. See David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 878 (1987).

53. Karen Knop, *The Making of Difference in International Law: Interpretation, Identity and Participation in the Discourse of Self-Determination* (1999)

of the role of women in creating centralized international institutions and in transforming the colonial system—fundamentally reconfigure the genealogy of the international management of an imbalanced world.

Now let's look at the law-reform proposal Romany puts forward under her *phrase-provocatrice*, "women as aliens". Romany resurrects, yet radically transforms, the venerable doctrine of state responsibility for injury to aliens in order to extend women's rights. In the traditional doctrine, aliens are protected only due to their embodiment of an *alien sovereignty*. In the modern doctrine of human rights, lawyers claim to have brought all human beings under the wings of the "international community." Romany rejects both of these views. She invokes *radical alienation* as the starting place for feminist critique and reconstruction. Romany seeks a doctrine as radically detached from *both* sovereignty *and* the "international community" as the subjects she seeks to empower.

But Romany argues further that even this unique position is inadequate, conceptually or politically, due in part to the intersection between gender and other identities. As the 1931 women's suffrage resolution of the Etats Généraux of Feminism suggests, even Western feminist identity has at times partly emerged as a back-formation of the colonial process. This resolution sought to constitute French women—and *French* women only—as full French citizens, by virtue of their role in colonization, their "relation to indigenous people." Far from simply occupying a space of radical alienation, the differentiation of women's identities positions women firmly, but all too unequally, in an imbalanced world. Vasuki Nesiah's critical concept of a "feminist internationality"⁵⁴ and Hope Lewis' studies of "Inter/National Black Women"⁵⁵ enjoin us to think about the positional-

(Unpublished S.J.D. thesis, University of Toronto) (on file with author).

54. See Vasuki Nesiah, Comment, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN'S L.J. 189, 192 (1993) (urging recognition by feminist analysis of the international dimensions of differences among women).

55. See Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/National Black Women in the United States*, 76 OR. L. REV. 567, 577-78 (1997) (arguing for a postcolonial feminist analysis of Third World women in the U.S.).

ity of feminist identities in such a world.

The Restater-Renewer: Well, I don't know about these internal feminist debates but I do welcome Romany's law reform proposal. Finally you're agreeing that the way forward is a pragmatic effort to improve doctrine. Let's get away from these accusations of irrational dreams of sexual domination that you genealogists are always making. The current renewal of international law is helping women in concrete ways.

Marshall Bugeaud, French Conqueror of Algeria, 1840s:

Ah, if only there were no Arabs in Algeria. Or if they were like those effeminate peoples of India . . . But the experience of this [Algerian] Nation, so vigorous, so well-prepared for war, so superior from this point of view to the European masses . . . imposes the obligation upon us to establish . . . in its midst the most vigorous possible population of European settlers.

The Genealogist: But those dreams are more complex than you realize. Just as you think that eliminating a particular kind of political domination will cleanse law of imperial taint, so you think that controlling a particular kind of sexual desire will cleanse pragmatism of colonial fantasies. You underestimate the polymorphousness of imperial desire. Such desire often took the form of a drive for penetration, "peaceful" or not, of a feminized East. As a sensitive liberal, you've learned not to express such desires. Yet, it also has taken the form of a homoerotic ambivalence towards a masculinized East. Marshall Bugeaud, as we've just seen, proffers his fascination with the virility of the "Arab warrior" as the very grounds for colonization. But just as these and other desires at times fueled colonialism, so many kinds of desire have lit the fire under anti-colonial agitation in the metropolises as well as in the colonies. So by all means, let's join innovators like Romany and use the resources of international law to transform the world. But let's not imagine that "getting down to pragmatic law reform" means that desire can be set aside: desire is irreducible. Don't deny your desire, tell me of its quality.

The Restater-Renewer: Here I think we need to end our conversa-

tion. There are things I'd rather not talk about.

CONCLUSION

For all of us, there are things "we'd rather not talk about." With this dialogue, I've tried to bring forward some of these things. I've also tried to intervene in current debates in a variety of ways: (1) to bring together the double consciousness of many of us, critical critics in the morning, international functionaries after lunch; (2) to bring together the intra-European history of international law and its colonial and post-colonial history; and (3) to bring these perspectives together in a way that would not create a new grand narrative that would simply be the mirror image of the canonical story.

On the contrary, international legal history must be pluralized: just as imperial identity forms differently in relation to its different Others, so international legal history has a variety of temporal lines, which the genealogist must disentangle. Tony Anghie's story of the reinvention of European sovereignty in relationship to the colonization of the Americas runs on a temporal line that is only obliquely related to other stories, such as the reconstruction of the Concert of Europe in relationship to the dismantling of the Ottoman Empire or the post-World War II reconstruction of international law in relation to the decolonizing world. Genealogists are interested in how these obliquely related lines intersect *and* diverge.

Whatever the complexities of its genesis, the world we share is a world struggling with the wake of empire—and its legacy of horror. Both internationalists and nationalists seek to redeem the horror of the past through a purified foundation: internationalists through an ahistorical liberal democratic model, nationalists through a mythical historical authenticity. By contrast, genealogists view the history of subordination as fundamentally irredeemable, though continuing to look at law as a possible terrain of emancipatory struggle.

Can one break with redemptive ideologies, yet denounce, even more fiercely, the legacy of horror? Read contemporary Caribbean authors who preserve the memory of their catastrophic history—without embracing the authenticity religions of their nationalist elders.

In the words of Edouard Glissant:

The Caribbean is the site of a history constituted by rupture and whose beginnings lie in the brutal dislocations of the slave trade.⁵⁶

This catastrophic genesis means that Caribbean

historical consciousness could not gradually build up in a progressive and continuous manner, like that of the Europeans, peoples who have often produced a totalitarian philosophy of history. Rather, it has slowly aggregated under the effects of shock, contraction, painful negation, and explosion.⁵⁷

As a result, Glissant rejects the quest for foundations:

We who participate in composite civilizations, born of this self-legitimizing [colonial] expansion, we must first of all renounce the notion of legitimacy, if we want to effectively combat the trauma which gave us birth.⁵⁸

For Glissant, the goal is not a new coherent story, by which traumatized peoples could write a history as totalitarian as the Europeans; on the contrary, he urges the acceptance of discontinuity, the rejection of foundational myths. To do otherwise would be to deny the traumatic shocks at the core of history. Glissant portrays the Caribbean relationship to its traumatic past with a psychoanalytic schema:

The slave trade as traumatic shock, settlement in the new country as the phase of repression, the

56. EDOUARD GLISSANT, *LE DISCOURS ANTILLAIS* 130-31 (1981).

57. *Id.*

58. *Id.*

servile period as latency, the “liberation” of 1848 [the formal abolition of slavery] as reactivation, periodic deliriums as symptoms, and all the way to the repugnance for “dwelling on the past” which would be a manifestation of the return of the repressed.⁵⁹

Glissant's approach to Caribbean history requires fierce, even brutal honesty, refusing all redemptive consolations. He acknowledges that to view the history of a suffering people as the “course of a neurosis” might be considered by some to be “derisory or odious.” Still, he rejects the heroic myths of the nationalist generation without any firm replacement other than this naked self-examination.

Can international law, written by history's victors, muster the courage to look frankly, painfully, at the horrors of its own past?

59. *Id.* at 133.

III. A RESPONSE TO BERMAN: IN THE WAKE OF EMPIRE

BY CHRISTOPHER WEERAMANTRY

You have just been treated to a thought provoking presentation of what, by any standard, is one of the most challenging areas of international law. It is a timely and perceptive analysis from opposing points of view of issues that deserve the most concerned attention of all international lawyers at this defining moment of the future course of international law. I shall commence my presentation with some personal perspectives from the receiving end of colonialism.

I was born into a colonial situation in Sri Lanka, then a colony under the administration of the British Crown. It was a country with a recorded history dating back 2,500 years, a country whose embassies at the courts of Rome and China were noted in the records of those empires, and a country with extensive ancient cities and sophisticated irrigation works. Its institutions of higher learning in Buddhism attracted scholars from the entire region 2000 years ago.

Yet, all around me as I grew up were the symbols of conquest — administrators serving the interests of the colonial power, mercantile houses serving the interests of foreign shareholders, an education system that taught British and European history to the exclusion of our own, and colonial clubs reserved for those who administered the empire.

A famous poem by an Englishman, Reverend W.S. Senior, who had adopted Sri Lanka as his home, captured the anguish of a colonized people:

**My cities are laid in ruins.
Their courts through the jungle spread.
My scepter is long departed.
And the stranger Lord instead.**

On the positive side, there was an excellent judicial system modeled on the British tradition, a carefully assembled administrative structure that functioned with great efficiency and an education system that, though European-oriented and accessible only to a few, was

one of the finest available anywhere. Lawyers from over 100 different nation-states, which were former colonies of the imperial powers, would no doubt express similar sentiments.

It was natural that when we received independence half a century ago—incidentally, the same year that I became a lawyer—my colleagues and I viewed this whole structure of empire with a questioning eye. We sought to examine the legal and moral foundations on which such a structure could have been constructed and maintained for so long.

Here was one of history's principal manifestations of force legitimized by law. Here was a forcible expropriation of territory on an unprecedented scale that was rigorously upheld by a law described as international.

That expropriation was wrapped in a cloak of unquestioned legality for over three centuries—three centuries that had witnessed epoch-making revolutions aimed at entrenching the principle of human freedom. The same international system that applauded this freedom remained strangely mute regarding its denial in the vast territories which that legal system enabled the metropolitan powers to acquire and rule.

There was an enigma here, easily apparent to those who were in subjection, but not readily apparent to those in power. We dug deep into the sources of international law and our ancient history to understand the legal basis of our subjection after 2000 years of independence.

The international lawyers of the time would have immediately told us that the questions we were asking were historical, social, philosophical, or military, but not legal. I venture, however, to think that it was also a legal question, for an important part of the reason why that kind of domination based on conquest and appropriation was possible was that it was entirely legal under the international legal system of the time.

Indeed, part of the reason why such acts were perfectly legal was that the lawyers who fashioned and maintained the system excluded all non-legal material from their consideration. They were lawyers implementing the law of their time in the strictly positivistic and professional manner expected of them. They had no time or inclination to consider historical, social, economic, or philosophical material,

which might have a bearing on their subject, but of which it was not a part.

We young lawyers asked ourselves, what indeed was the moral basis of this international legal system that admitted and legalized such unbridled imperial expansion? In seeking to answer this, we naturally turned to the seminal authors who had laid the foundations of the existing international legal system. Grotius was a leader among them and we admired the high principles that guided his work.

As domestic lawyers in a Roman-Dutch jurisdiction, we had additional reasons to admire Grotius as one of the leading authorities of the domestic law of Holland—in which context we regularly cited him in our courts.

Here indeed we confronted another enigma, as it was the same Grotius who was the legal advisor of the Dutch East India Company which had colonized our country. The enigma deepened, as we also looked with admiration at Grotius the comparativist who gave us so much guidance in operating the five different legal systems that obtained in our country.

We were also aware of Grotius, the theologian who showed such a mastery of Jewish and Christian sacred scripture. To us, therefore, there were many Grotiuses. This stressed the importance of looking at his work in its total context, subject to the overarching spirit of humanism that animated it.

I believe international law developed the way it did because it took some of Grotius's work out of its context. International law, like the work of Grotius, can also produce disparate results. In some of its applications, international law can achieve international justice in a very visible fashion. Yet, it can also entrench international injustice when it is too legalistically applied, unless we look deeper, beyond the black letter, to the underlying spirit of justice that governs and animates it.

In the whole enterprise of colonialism, that underlying spirit was often lost sight of through emphasis on legalism and form. International law, studied and applied legalistically, became one of the principal supports of colonialism.

Today, we should be aware that legalism divorced from the spirit

of international law can entrench concepts and institutions that produce injustice, thereby cloaking injustice with the mantle of legalism. In all branches of international law—international commercial law, environmental law, communications law, maritime law, the law of state responsibility, and the law relating to sovereignty over natural resources, this danger is ever present.

Today's topic and Professor Berman's dramatic presentation of it through two opposing viewpoints highlights the pitfalls we must avoid, especially at this stage in international law. The contours we set for international law may well govern it for some generations to come.

Professor Berman's presentation examines two views of international law—the liberal, cosmopolitan, or mainstream version, and the other version, which in Professor Berman's view, comprises discontinuities, catastrophes, or mutations imposed by the West upon the rest of the world.

What is the relationship between these two versions of our discipline? How do they coexist? The fact that they have coexisted for so long is yet another enigma. For many Third World international lawyers, their first encounters with international law were quite complicated. They were not textbook problems, such as one encounters in an academic classroom, but problems that affected their heritage and daily lives.

On the one hand, international law claims to further justice and to offer a means of redressing problems of which we are acutely aware—problems of expropriation and disempowerment. On the other hand, it is the same international law that appears to have helped in creating this situation. In many ways it continued to entrench it. This intensified the Third World's search for a more equitable framework for international law.

Needless to say, any study of international law and colonialism, like any other legal principle or topic, is incomplete without a search for its moral foundations. But for us, the problem was more intense and we struck an immense void. In general, international law tended to skirt over this issue. This further compounded our problem because by implication, our silence gave the impression of reliance on the political and administrative authorities' position on the justifications of the colonial enterprise.

In my work on Third World perspectives on equality and freedom, published in the 1970s,⁶⁰ I recorded some of the conceptual justifications I had come across. These justifications were often found in the pronouncements of proconsuls and parliamentarians. They were such that international lawyers would have been expected to repudiate as being devoid of the basic moralities around which legal principles are structured. The obligation was particularly strong in international law, which is so heavily based on natural law.

International law, however, was silent. It did not repudiate these justifications. Indeed, in some quarters it accepted them. It was as if a legal curtain had been cast over the departures from basic morality that they involved. Here are some of the justifications advanced:

Joseph Chamberlain:

The imperialist powers as custodians of the Tropics, are 'trustees of civilization for the commerce of the world.'⁶¹

Lord Curzon, a famous Viceroy of India:

The Almighty has placed your hand on the greatest of his plows and if the Englishman has left a little justice or happiness or prosperity, a spring of patriotism, a dawn of intellectual enlightenment or a stirring of duty where it did not before exist - that is enough. That is the Englishman's justification in India.⁶²

Lord Lugard, one of the most celebrated proconsuls in Africa:

The merchant, the miner and the manufacturer

60. CHRISTOPHER WEERAMANTRY, *EQUALITY AND FREEDOM: SOME THIRD WORLD PERSPECTIVES* (Sarvodaya Vishva Lekha Publishers, Colombo 1999) (1976).

61. LORD F. D. LUGARD, *THE DUAL MANDATES IN BRITISH TROPICAL AFRICA* 60 (2d ed., 1923).

62. G. CURZON, *LORD CURZON IN INDIA: BEING A SELECTION FROM HIS SPEECHES AS VICEROY & GOVERNOR-GENERAL OF INDIA 589-90* (T. Raleigh ed. 1906).

do not enter the tropics on sufferance. . . as 'interlopers,' or as 'greedy colonialists,' but in fulfillment of the Mandate of civilisation.⁶³

Lord Balfour, former Prime Minister, speaking of the British occupation of Egypt in Parliament:

[I]s it not a good thing for these great nations—I admit their greatness—that this absolute Government should be exercised by us? I think it is a good thing. I think experience shows they have got under it a far better government than. . . they ever had before, and which not only is a benefit to them, but is undoubtedly a benefit to the whole of the civilised West.⁶⁴

In all quarters, there were attempts, however inadequate, to build up a moral justification for the enterprise of colonialism. Without it, there was a major vacuum in the entire enterprise. What is surprising to us, at this point in time, is that international law steered far clear of such attempts. It turned a blind eye to one of the greatest weaknesses of its system.

In the literature of international law, there was no serious attempt to address the moral foundations of the right to conquer others and appropriate their territory. The moral issues were hidden behind the doctrine of sovereignty and the sovereign will. This was a principle so solidly established that it served as a totally impenetrable barrier to the inquirer seeking to drill through it to the moralities or immoralities that lay beyond.

What attempts were made to provide a moral justification were not dissimilar to the justifications given by de Vitoria centuries earlier. In commenting on the assumption of the administration of such territories by the sovereigns of Spain, he observed that this was a course

63. LUGARD, *supra* note 61, at 61.

64. 17 PARL. DEB., H.C. (5th ser.) 1142 (1910); also cited in EDWARD SAID, *ORIENTALISM* 33 (1979).

sovereigns would be bound to take, just as if the natives were infants.⁶⁵

This sovereignty doctrine not only imposed barriers in the way of inquiry, but also imposed barriers on the subject people themselves in asserting their rights. They lacked the international personality which international law specified as a prerequisite for challenging their victimization by their conquerors.

Perceptive writers like Edward Said have pointed out that 19th century European literature was permeated with pride in Empire. In English literature, he refers to Ruskin, Tennyson, Meredith, Dickens, Arnold, Thackeray, George Eliot, Carlyle, and Mill as having seen a tremendous display of British power, virtually unchecked across the entire world, and even as identifying themselves with it in one way or another.⁶⁶

Such was the climate of intellectual opinion in which western international lawyers functioned in the 19th century. Though they had more reason than the literary figures to probe the ethical foundation of their discipline, perhaps they also fell victim to the prevailing climate of intellectual opinion. It was under their guidance that the doctrine of sovereignty, with all its implications for colonial rule, acquired its solidity and impenetrability.

The Third World thinkers, at the receiving end of colonialism, clearly saw the gap in the moral foundations of the imperial enterprise. Yet, this gap is what the discipline of international law failed to perceive. For example, at the Congress of Berlin in 1884, Africa was partitioned without any regard for the total absence of any moral foundations for the entire enterprise. Later generations would not fail to perceive this hollowness in the moral base of colonialism.

The legal structure erected over those faulty foundations had to collapse. The building could be propped up for some time, but eventually it would succumb to the primary laws of engineering—

65. See FRANCISCO DE VITORIA, *DE INDES ET DE IURE BELLI RELECTIONES*, 161 (Ernest Nys, ed., Carnegie Institution 1917) (1696) (observing that the sovereigns of Spain would be justified in taking control of the administration of a land where natives, lacking in intelligence, were similar to infants).

66. See EDWARD SAID, *CULTURE AND IMPERIALISM* 105 (1994) (explaining that Victorian writers identified closely with the spirit of imperialism).

that however ornate a structure may be, in the absence of sound foundations, it must inevitably collapse. That is what happened to the colonial enterprise.

It must not be thought that Third World scholarship in this field was silent on these matters. For the past century, at least, the Third World has been attempting to project its views into traditional international law. This body of writing took its inspiration from ancient and important traditions of justice, peace, and the oneness of the human family—some of them dating back over two and three millennia.

They are an important part of the global heritage. However, these traditions were held back from making their due contribution to international discourse through a lack of understanding of their richness and depth and through the view that they did not constitute real legal literature, in the strict sense of the term.

When Third World scholars sought to bring these insights into modern international discourse, they were often denigrated as not being sufficiently scientific to contribute to the logical, scientific, positivist approach that modern scholarship demanded. It was said that they were emotional and lacking in objectiveness.

Third World writers were attempting to blend into modern international law, not only their actual experiences of the effects of colonialism and how they might be avoided, but also the rich perspectives available in their cultures on the concepts of peace, human dignity, social economic and cultural values, and concepts of the unity of the human race, intergenerational rights, and even planetary welfare.

But they were not heard. Their voices fell on deaf ears. The independent structure of uplifting principles constructed on all these matters, for example, by the philosophy of Buddhism, was totally unknown within the palisaded enclosure of 19th century international law.

Apart from the many writers who highlighted the basic injustices on which colonialism was built, as a representative selection, let me mention a few names of Third World jurists. A comprehensive list cannot be made, as many of them did not have access to the regular publishers whose works get into the catalogues and reviews.

Judge Alvarez of Chile, a prophet of the new international legal order before its time, was heroically attempting in the earliest days of the International Court, to make traditional international law aware that a new era had dawned after World War II. He gave expression to the deepest ideals embodied in Latin American thinking regarding international law. But the seeds he sowed fell on stony ground.

A later voice on the Court was Judge Fuad Ammoun of Lebanon, who valiantly sought with enormous erudition to introduce comparative perspectives ranging from classical Greek and Roman law to Islamic law, into the jurisprudence of the Court.

At the commencement of the 1960s, there was a great intellectual ferment among Third World scholars. For lack of time, I will only mention Georges Abi Saab's discourses on international law⁶⁷ and the new nation states in 1962, George Castenada's discussions in 1961,⁶⁸ and Ali Fatouro's in 1964.⁶⁹

Judges from developing countries also made notable contributions. Judges Elias and Nagendra Singh, both later to become Presidents of the International Court, did much to draw world attention to the relevant principles and teachings of African and Hindu cultures.

Judge Keba M'baye, later Vice President of the Court, played a pioneering role in formulating the conceptual basis of the right to development.⁷⁰ R.P. Anand of India drew wisdom from the traditional cultures of India to focus attention on the fragility of the ecosystem

67. See Georges Abi Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOW. L.J. 95 (1962) (discussing the effects of international law on the newly independent Afro-Asian nations).

68. See George Castenada, *Underdeveloped Nations and the Development of International Law*, 15 INT'L ORG. 38 (1961) (examining the use of purely declarative codes of customary rules adopted by the United Nations General Assembly as a means of encouraging the progressive development and codification of international law).

69. See A.A. Fatouro, *International Law and the Third World*, 50 VA. L. REV. 783 (1964) (calling for Western nations to reassess the workings of international law in light of the newfound independence of third world nations).

70. See generally Kéba Mbaye, *Le Droit au Développement Comme un Droit de l'homme* 5 REVUE DES DROITS DE L'HOMME 505 (1972).

and the need for international law to consider its protection.⁷¹

Judge Bedjaoui, later President of the Court, in his 1979 book on the New International Economic Order,⁷² drew a telling linkage between the international order of poverty and the poverty of the international order.

In St. Louis, at the World Congress on Equality and Freedom, which was held to celebrate the American Bicentennial in 1976, I had the opportunity to draw attention to numerous strands of Third World thought, which could be a valuable fertilizing influence for the international law of the future.

My presentation from the Third World point of view followed two presentations from the points of view of the other two worlds. I vividly recall how the two speakers who preceded me, one of whom was the President of the Congress himself, later observed that there were so many strands of Third World thought that were unknown to them simply because they had never come to their attention.

I mention this personal experience to underline another important imbalance in information that still prevails. The intellectual traffic in this world of mass communication continues to flow from the developed world to the developing world with scarcely any traffic flowing in the opposite direction.

It is important to note that there is a strong movement of more recent scholarship in Asia and Africa, not to speak of Latin America, which is taking up the challenge and adding rich contributions of its own.

Yasuaki Onama, Yamagihara Masaharu, and an entire school of Japanese scholars have begun to question some of the fundamentals of the methodology of European international law, going all the way back to Grotius.⁷³

71. See R.P. Anand, *Development and Environment: The Case of the Developing Countries*, 20 INDIAN J. INT'L L. 1 (1980) (describing the present eco-crisis in developing countries).

72. See MOHAMMED BEDJAOUI, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER*, 24 (1979) (noting how prosperous countries have steadily grown richer at the expense of the underdeveloped countries, which have become progressively poorer).

73. See generally Anthony Carty, *Japanese Deconstructions of the Grotian*

B.S. Chimni and M. Sornaraja have been studying economic inequalities in international concepts and institutions and questions of economic justice. I have also noted with great interest the new work of younger scholars such as Makau Mutua, James Gathii, Dianne Otto, Karin Michelson, Ruth Gordon, and Balakrishnan Rajagopal on the broad subject of the relationship between international law and colonialism.

This list is by no means a comprehensive one and is representative only of a few among a broad base of scholars too numerous to mention. The pioneering work of Hillary Charlesworth on feminism is also surely having a significant impact on our approach to colonialism and international law.

I also take special pride in the reference in Professor Berman's presentation to the work of Anthony Anghie, my former student and research assistant at the Nauru Commission, in shifting our understanding of the founding moments of modern international law and of the role of colonialism in the formation of the most fundamental concepts, doctrines, and institutions of modern international law.⁷⁴

I must stress that my discussion of Third World scholarship is not for a moment forgetful of the extremely far reaching, deeply researched, and deeply felt contributions that have emanated from western scholars. Professor Berman's presentation provides an outstanding example.

There are many others who have made significant contributions in this area. I could mention a large number of names, but I will content myself by mentioning as illustrations Professor Richard Falk and Professor Edith Brown Weiss, both of whom have done a great deal in advancing issues regarding comparative culture and the Third World that need attention in the field of international law.

I must also pay special tribute to Professor David Kennedy, not only for his outstanding work, but also for doing so much to encourage the work of young scholars in this area. This is important and groundbreaking work. I am delighted to learn that some of these

Tradition in International Law, 66 BRIT. Y.B. INT'L L. 477 (1995).

74. See Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. AND LEGAL STUD. 321 n.3 (1996) (calling for an examination of de Victoria's role in international law's colonial origins).

younger scholars will be speaking at this conference. I look forward to attending their presentations and learning from them.

Professor Berman has provided us with a careful and illuminating analysis of how an event like the Riffan Rebellion in Morocco in 1925 could be completely excluded from the scrutiny of international lawyers. It is precisely this kind of marginalization of the issues they raise and of their work and its significance that often affects the work of Third World scholars in gaining recognition. These scholars are often required to conform to the mainstream definition of the proper international lawyer in order to gain acceptance in academic and professional circles. As a result, they are compelled to shed much of their originality. But this does not mean that they have wholeheartedly accepted the adequacy of that approach.

The difficulties Third World scholars encounter in the treatment of colonialism and international law are not always visible from the outside. While working for their countries, they encounter and are compelled to use many doctrines and procedures that are structured against them.

I had a similar experience at the Nauru Commission,⁷⁵ which resulted in the first claim by a dependent territory against its former administering power. It was clear from my inquiries and research that international law had devised a number of doctrines and procedures that were structured precisely to preclude such claims from being easily met.

To give you another personal experience, I have now been on the bench of the International Court for eight years and I find it interesting to note that despite the fact that many claims are made by Third World countries, no Third World lawyers appear before us on a regular basis, although we wish that they would.

In fact, this idea has recently attracted some scholarly attention. I was fascinated to receive only a couple of weeks ago a detailed research study of this phenomenon by two young scholars, K.T. Gaubatz and M. MacArthur. This is only the beginning—much research has yet to be done.

75. See generally CHRISTOPHER G. WEERAMANTRY, NAURU: ENVIRONMENTAL DAMAGE UNDER INTERNATIONAL TRUSTEESHIP, (Oxford Univ. Press 1992) (examining the duties that colonial powers have to their conquered territories).

I come now to the interdisciplinary field to which Professor Berman has referred. Sociology, economics, history, psychology, and literature are generally rich in insights on colonialism. They contain parallel streams of thought on the same subjects that lie at the heart of colonialism in international law. But international law has shut its eyes to them. Albert Memmi, in *The Colonizer and the Colonized*, and Edward Said in *Culture and Imperialism* and *Orientalism* were honing in on them, not merely from a human point of view, but also from a conceptual point of view. There is also a vast literary tradition going back to Joseph Conrad. I need only mention his works *Nostromo* and *The Heart of Darkness*, or Mark Twain and his little known, but telling work *King Leopold's Soliloquy*, not to speak of writers like Thoreau, with whom Mahatma Gandhi had intellectual links.

All of these writers had immense contributions to make to international law if international law would only have looked at them. But they were excluded from consideration on the basis that they were outside the discipline of international law. The international law of the time did not use the same approach to comparative and interdisciplinary material that was characteristic of the work of Grotius. I strongly believe that the international law of the future should take such perspectives into consideration because it can enrich itself enormously from the insights available from these various areas.

Nor can we neglect the voluminous writings of people like Jawaharlal Nehru, Sri Aurobindo, Swami Vivekananda, Sarojini Naidu, and others. All of this could have helped enormously in building up some sensitivities to the real problems of colonialism, which the literature of international law sadly lacked. Members will recall in that context how Grotius, in his *Prolegomena to War and Peace*, said that he had availed himself of testimony, no matter where it came from—of philosophers, historians, poets, and even auditors in helping him to frame his principles.⁷⁶

So, international law in the age of colonialism refused to do what Grotius so ably and conscientiously did in laying the foundational stones in this discipline. Professor Berman has so appropriately referred to the lack of an interdisciplinary relationship as a very im-

76. See generally HUGO GROTIUS, *DE JURE BELLI ET PACIS* 63-66 (1853).

portant factor in the development of international law.

With the greater resources of comparative legal knowledge available to us, we are obliged to use such knowledge to the fullest. The fields of environmental law, intergenerational law, obligations *erga omnes*, and so many other fields would be much the richer if they would consider the wisdom of traditional systems. Our generation has a double obligation to use these methods because the society of states today is far more cosmopolitan than it was in Grotius's time. We have far more comparative knowledge available to us than Grotius ever had. It is quite unjustifiable, therefore, to let international law steer its course without regard to the vast amount of wisdom available from these sources. To do so would be to impose a kind of cultural domination upon the new nation states that constitute the vast bulk of the world community of nations.

This prompts another thought. What would Grotius have done if he had available to him the cornucopia of comparative and interdisciplinary knowledge, which is available to us today? Moreover, all the great global traditions have much to say on questions at the heart of colonialism such as the subjugation of alien peoples, the appropriation of their property, the use of repressive methods of government, slavery, trusteeship for future generations, and the respect due to nature and the like. We could benefit from all of this.

As I have already indicated, international law has failed thus far to function at the cross-cultural level. I can illustrate this in a telling way by pointing out how it has failed to note the pioneering work in international law of the Islamic jurists - for example, Al Shaybani, who as early as the eighth century—eight centuries before Grotius—was writing treatises that covered topics such as the laws of war, the sanctity of treaties, international trade in time of war, diplomatic protection, and the like. They went into such detail as to prescribe that a prisoner's correspondence should be sent to his home, even across the lines of battle.

The work of these Islamic writers on international law was picked up by Spanish writers such as King Alfonso of Castile, whose encyclopedic *Siete Partidas* incorporated some of the insights of the Islamic writers in its sections on international law. The influence of Islamic writers on the Spanish, and the Spanish writers upon the Dutch, is a subject I cannot expand upon here. Nor can I speak of the

degree of detail with which, for example, ancient Hindu law analyzed the laws of war. I mention these only to reemphasize what I stated earlier. That is, international law has passed the stage where it can any longer afford to be mono-cultural.

I congratulate Professor Berman on his stimulating presentation. He has dramatized two opposing views in a remarkable manner that clarifies our thinking regarding the great issues involved. His presentation also warns us that unless we thoughtfully analyze the mistakes of the past, we will perpetuate new forms of subjection and domination by covering them with cloaks of legality, as was done with colonialism in the past.

The national souls of many an emergent nation are thick with the scars of colonialism. But one of the great hopes of the future is that international lawyers, wherever they may come from, are working together, thoughtfully and constructively, and contributing their best to the cooperative world order that will succeed the world order of conquest and domination.

Colonialism was a dark chapter in global history and it has fortunately ended. After the long twilight struggle of dying empires, we must prepare ourselves to sail beyond the sunset of that world order and into the sunrise of a new world order of justice, peace, and reconciliation. It is for us, international lawyers, to rise to this task. I am sure that with the idealism, knowledge, and wisdom, which I see all around me, international law will rise resurgent to face its new responsibilities in the stirring times ahead.