

The Particularistic Universalism of International Law in the Nineteenth Century

Responding to Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475 (2010).

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I. INTRODUCTION

Becker Lorca's essay is divided into three main parts—(a) the appropriation of classical international law, (b) international legal regimes, and (c) the particularistic universalism of non-European international lawyers. Each section makes it possible to problematize the current state of research in the history of international law.¹

The first part sets out the essay's main thesis: nineteenth-century international law has not been *imposed* on non-Western peoples but has been *appropriated* by non-European jurists (or "semi-peripheral jurists," as Becker Lorca defines them), who have modified non-Western peoples' rules in ways functional to their countries' interests. To identify this appropriation process as the source driving the global expansion of European international law is to deny the view that such law expanded unilaterally

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¹ See generally Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475 (2010).

through the pressure of Western powers. Rather, the expansion rested on a dialectical interaction between Western and non-Western states.

This appropriation thesis, strongly supported by a variety of primary sources, offers a new interpretation of the way international law developed in the nineteenth century.² Especially notable is Becker Lorca's analysis illustrating how international European law was received by recombining its constitutive elements—legal positivism, sovereignty, and the standard of civility—thus creating a tension between the self-proclaimed universality of international law and the specificity of national interests.

I start out by introducing the important thesis that Becker Lorca terms the particularistic universalism of international law in the nineteenth century, a development that began with the historic turn which followed the natural law of the seventeenth and eighteenth centuries and climaxed with the legal positivism of the nineteenth century. I then expand this thesis by noting how particularistic universalism grew historically out of the plurality of universalistic conceptions of international law proclaimed by different legal civilizations, rather than just by Western civilization. With that done, I critically discuss the standard of civilization by analyzing it not only in legal terms but also from an anthropological and sociopolitical standpoint. Finally, I underscore the continuity of the West's civilizing and hegemonic ideology encapsulated in international law and spanning from the early modern age to the contemporary world, regardless of however much it takes on different conceptual forms.

II. THE TURN TOWARD LEGAL POSITIVISM

In the nineteenth century Europe forsook natural law for legal positivism. This transformation in the history of European constitutionalism answered the states' need to ensure certainty for their law, as opposed to the uncertainty of natural law. Natural law had served its function by carrying the ideologies that fueled the two major revolutions of the late 1700s, the French and the American Revolutions. Until the eighteenth century, it was natural law that supported the claimed universality of international law, and more specifically of the *jus gentium*.³ What led states to abandon natural law in the nineteenth century was a need to each assert an absolute sovereignty in international relations—a sovereignty entailing its own rights, among which was the right to proclaim war without heeding natural law's criteria of justice. Indeed, this

² Becker Lorca's thesis is markedly different, for example, from that argued by Onuma Yasuaki holding that the nineteenth century saw a collapse of non-Western legal regimes, especially the Chinese and the Islamic ones, making it possible for Western international law to universalize, thus imposing its hegemony on non-Western states. See Onuma Yasuaki, *When Was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L L. 1, 64 (2000).

³ On the concept of *jus gentium*, see, e.g., KARL-HEINZ ZIEGLER, *FATA IURIS GENTIUM* (2008).

transformation made it possible to supersede the concept of a just war (theorized by authors like Vitoria, Grotius, and Vattel), whose criteria of justice—defending the homeland, recouping that which has been taken away, punishing an offense, and the like—were criteria of natural law.

However, as Becker Lorca rightly observes, the paradigm that took hold in the nineteenth century was a compound construction combining both positive and natural law. On the one hand, the European states grounded their international law in *jus publicum europaeum*, a positive law recognizing each state’s sovereignty and right of war, while excluding any possibility of criminalizing its sovereign’s conduct. The states were considered *justi hostes*: they could act even without a *justa causa*.⁴ But, on the other hand, this international law was linked to natural law so as to justify its claim to validity, or else to legitimize the European states’ colonial dominion.

The European paradigm of international law governed relations between secular and Christian states in the European geopolitical area, but at the same time claimed universality. Becker Lorca analyzes in a deep and innovative way the contradiction inherent in European law’s claim to universality. Significantly, his essay thrashes out not only the European paradigm itself but also, and especially, its appropriation by the non-European (or semi-peripheral) jurists. On the other hand, the literature has so far confined its focus to Western authors.⁵ We must therefore consider international European law first, and then the complex ways in which, as Becker Lorca discusses, this law interacts with that of non-European peoples.

III. INTERNATIONAL POSITIVE LAW AND NATURAL LAW

Nineteenth-century authors like J. C. Bluntschli claimed that even though international law grew out of the conscience of Europe’s Christian peoples, this law was universal in scope and could therefore be extended to non-Christian peoples as well. For Bluntschli, what made such a universal extension possible was his claim that European international law laid its foundation in natural law, whose universal scope cut across all cultural differences. Bluntschli grounded his argument by drawing on the work of Samuel Pufendorf, who posited natural law as the foundation of international law and extended it to all religious confessions. This became the basis on which Bluntschli claimed Western international law to be universal and hence compatible with the pluralism of cultures and religions. He thus claimed that international law was compatible with the religions of all peoples, “whether they

⁴ See generally CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DES JUS PUBLICUM EUROPAEUM* (1950).

⁵ A case in point is MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001). Even with this limitation, Koskenniemi’s work is highly innovative for bringing out not only the logic of international positive law but also the hegemonic “discourse” (in Foucault’s sense) that such law carries with respect to non-European peoples.

worshipped God as Christians or as Buddhists, as Muslims, or as Confucians,”⁶ and that an extension of international law to non-Christian countries “bound all peoples to its *own* legal principles.”⁷ In short, international law was universalizable, but it still bore an unmistakably European mark, for it issued from the family of Christian and European peoples.

This clear-cut conception of international law meant that only by imposition could such law be extended to non-Christian and non-Western peoples—a view that no doubt acted to legitimize Western colonialism.⁸ Other writers, like the Scottish-born Lorimer, whom Becker Lorca analyzes, ascribed a specific ideological function to natural law: that of justifying the idea of non-Western inferiority. Indeed, Lorimer claimed that while relations among Western states were governed by international *positive* law, relations with non-civilized states were instead subject to *natural* law.⁹ Elsewhere, as Becker Lorca underscores, Lorimer specified that the law of nations was for all to see, on the basis of facts of nature, and that the natural inequality among states was to be elevated to a “de facto principle” ruling out any formal equality among states.¹⁰ According to Lorimer, natural law was thus functional to the view that non-Western peoples were themselves in a condition of inferiority.

Bluntschli grounded in natural law the universality of international law, and in this way legitimized the latter’s imposition on peoples having cultures and religions apart from the Christian civilization of Western peoples. Lorimer grounded in natural law the inequality among states and their different degrees of political recognition, along a scale that “constitutes the major premise of the positive law of nations.”¹¹ Savage peoples only get “human recognition,” that is, humane treatment, and “partially civilized” states, such as Turkey, Persia, China, Siam, and Japan, get “partial

⁶ JOHANN C. BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER ZIVILISIRTEN STATEN 17 (1868).

⁷ *Id.*

⁸ This assessment is offered in WILHELM G. GREWE, EPOCHEN DER VÖLKERRECHTSGESCHICHTE 532 (1984).

⁹ See generally 1 JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES (1883) [hereinafter LORIMER, OF NATIONS] (cited in Becker Lorca, *supra* note 1, at 489). More to the point, “humanity, in its present condition, divides itself into three concentric zones or spheres—that of civilized humanity, that of barbarous humanity, and that of savage humanity,” the first comprising Europe with its colonies; the second Turkey, Persia, China, Siam, and Japan; and the third the rest of humanity. *Id.* at 101. And they each have their own form of political recognition, qualified as “plenary” for the first sphere, “partial” for the second, and “natural or mere human” for the third. *Id.*

¹⁰ See Becker Lorca, *supra* note 1, at 489. In analyzing “the natural or *de facto* basis on which positive law rests,” Lorimer specified that “the laws of nature are . . . necessary inferences . . . from the facts” and that “the laws of the nation, public and private, are similar inferences.” JAMES LORIMER, THE INSTITUTES OF LAW: A TREATISE OF THE PRINCIPLES OF JURISPRUDENCE AS DETERMINED BY NATURE 250 (1880).

¹¹ LORIMER, OF NATIONS *supra* note 9, at 103.

recognition,” which resolved itself into the legitimation of unequal treaties.¹² Nineteenth-century natural law thus lost its seventeenth- and eighteenth-century standing as a force for equal rights, becoming instead a basis on which to justify the inferiority of non-Western peoples.

Becker Lorca illustrates how the positivism of Western international law has instead been *appropriated* by the semi-peripheral jurists, who thus changed it to fit the interests of their states. This is where his essay is most innovative, analyzing the work of many authors (including Carlos Calvo, Fedor Fedorovich Martens, Etienne Carathédory, and Tsurutaro Senga) to show how they suited the fundamental concepts of international positive law to the specificities of their own legal regimes. Becker Lorca accordingly investigates international law in relation to different legal regimes—those of the Ottoman Empire, China, and the Latin-American countries.

There is much explanatory insight to be gained by so looking at the West’s relation to these regimes. The concept Becker Lorca uses for this interpretive strategy—particularistic universalism—captures the inherent difficulty involved in working out this multiplex relation, but the historical perspective so gained offers a fresh understanding of nineteenth-century international law.

IV. FROM PLURAL UNIVERSALISMS TO PARTICULARISTIC UNIVERSALISM

In the sixteenth and seventeenth centuries, those who theorized on the *jus gentium*—Vitoria, Vasquez, Grotius, Pufendorf—viewed this law as universal and hence extendable to all peoples on earth. But the actual extension of Western *jus gentium* was in fact quite limited. It excluded the Muslim world, which since the seventh century had had its own Islamic law of nations (the so-called *shari‘a*), as well as the Chinese empire, which too had its own normative system that traced back to the Han Dynasty in the third century B.C. Like Western *jus gentium*, both of these normative systems claimed universality. Islam held itself out as a legal, social, political, and religious system to be extended across the entire world, while the Chinese system considered the emperor the worlds’ sovereign.¹³ The existence of plural self-proclaimed universal systems evinces a relativism suggesting that this reality is best interpreted through the concept of *plural universalisms*.

With the nineteenth century came the primacy of the West and its legal system—a consequence of the other legal systems’ collapse. As a result, the international law of the international global society was formed. This was a development of the late nineteenth century, when the Ottoman Empire, China, and Japan were forced to enter a regional international society that had its center in Europe.¹⁴

¹² *Id.* at 102.

¹³ See Yasuaki, *supra* note 2, at 12–19.

¹⁴ *Id.* at 63–64.

Some commentators have observed that before the nineteenth century, when the Europeans reached Asia, they found a web of inter-country relations based on long-standing traditions that were in no way inferior to those of the West.¹⁵ The rules and procedures of international law in the sixteenth and seventeenth centuries originated out of the relations the Portuguese, Dutch, English, and French trading companies built with the Asian sovereigns through treaties, diplomatic exchanges, and commercial relations pursued in the East Indies. It should be noted that there existed in Asia, before the Europeans arrived, ancient customs allowing foreigners to enter while still protecting commercial activities.¹⁶ Until the eighteenth century, international law was based on treaties and customs that took into account relations with the Asian states.¹⁷

These relations were either concealed or denied in the international law treaties of the colonial period (during the nineteenth century), when the Asian and African countries could no longer play a role in shaping international law. Rather, these treaties were “developed in response to the requirements of the Western business civilization.”¹⁸

Becker Lorca’s essay offers a different version than the previous narrative. Granted, Europe’s international legal thought *was* made universal in the nineteenth century, but only because the semi-peripheral jurists refashioned its basic concepts and principles.¹⁹ This complex web is analyzed by Becker Lorca by separately considering the relations established between the Western powers and the legal regimes of the Ottoman Empire, China, and the Latin American countries.

With the Ottoman Empire, the turning point is twofold. It is conventionally identified with the Treaty of Paris of 1856—allowing the empire to “participate in the advantages of public law and the European concert of nations”—and with the introduction of the capitulations regime.²⁰ However, the system of extraterritorial jurisdiction can be traced back to the 1535 treaty between Francis I of France and

¹⁵ See CHARLES HENRY ALEXANDROWICZ, AN INTRODUCTION TO THE HISTORY OF THE LAW OF NATIONS 224 (1967). Cf. R. P. Anand, *The Role of Asian States in the Development of International Law*, in THE FUTURE OF INTERNATIONAL LAW IN A MULTICULTURAL WORLD 109 (René-Jean Dupuy ed., 1984).

¹⁶ Charles Henry Alexandrowicz, *Treaty and Diplomatic Relations Between European and South Asian Powers in the Seventeenth and Eighteenth Centuries*, in 2 RECUEIL DES COURS: 1960, 203 (A. W. Sijthoff ed., 1961).

¹⁷ Cf. Manohar L. Sarin, *The Asian-African States and the Development of International Law*, in THE FUTURE OF INTERNATIONAL LAW IN A MULTICULTURAL WORLD, *supra* note 15, at 120.

¹⁸ Oliver James Lissitzyn, *International Law in a Divided World*, 34 INT’L CONCILIATION Mar. 1963, at 1, 58.

¹⁹ See Becker Lorca, *supra* note 1, at 503.

²⁰ Treaty of Paris, Russ.-Ottoman Empire, Mar. 30, 1856 (author trans., “participer aux avantages du droit public et du concert Européen.”).

Suleiman the Magnificent.²¹ These legal arrangements created a protégé system guaranteeing foreign residents personal, economic, and legal privileges, like the right to reside in the Ottoman territories, freedom of worship, and tax-exempt status. The capitulations started out as unilateral concessions the sultans granted to foreign sovereigns, but then, as the Ottoman Empire went into decline, these agreements became bilateral and conferred reciprocal rights. The capitulations were firstly international treaties governing diplomatic relations, declaring an end to hostilities and establishing war compensation. As Becker Lorca concludes, this brought about a “Europeanization of Turkish legal and institutional order.”²² He therefore rightly finds that these complex relations, considered within the long historical process out of which they evolved, cannot be construed as having been “imposed.”

To better understand this assessment, we must consider the full complexity of the relations between Ottoman and Western law. Even though the Ottoman Empire declined the late eighteenth century, it was not until after the *nineteenth* century that Ottoman law began to interact with Western law. Prominent among the reforms introduced from this interaction was codification. This codification was mainly patterned after Western models, as with the 1850 commercial code and the 1858 criminal code, both based on the French model.

To be sure, these transformations were driven by new economic needs and ideologies, such as those behind the push for modernization and secularization. But the consistent underlying rationale was to adjust to Western law—a spontaneous rather than a coerced reception, and nowhere did it affect personal status or family law. Even so, negative consequences did ensue, leading not only, on the international level, to the capitulations system, which diminished Ottoman sovereignty, but also to the breakup of the empire’s legal unity, engendering a legal system “both plural, the communities still being subject to their own religious laws in private matters, and mixed.”²³ In effect a hybrid system, one based on the coexistence of different legal cultures, was created.

The same complexity and ambivalence can be found in China’s international system, based on other countries’ recognition of the Chinese emperor’s supremacy, while paying the emperor tributes in exchange for his recognition of their status within the empire. The measure of a *people’s* civilization thus depended on *its* acceptance of the

²¹ MAJID KHADDURI, *THE ISLAMIC LAW OF NATIONS: SHAYBANI’S SIYAR* 63 (1966). This peace treaty gave French nationals the right to trial under their own laws in their own consulates.

²² See Becker Lorca, *supra* note 1, at 511, 538–39 (underscoring how in so moving gradually closer to European law, diplomats like Étienne Carathéodory and Gabriel Noradounghian played an important role).

²³ See Esin Örucü, *The Impact of European Law on the Ottoman Empire and Turkey*, in *EUROPEAN EXPANSION AND LAW: THE ENCOUNTER OF EUROPEAN AND INDIGENOUS LAW IN 19TH- AND 20TH-CENTURY AFRICA AND ASIA* 49 (Wolfgang J. Mommsen & Jaap de Moor eds., 1992).

emperor's virtue: those who did not were deemed barbarous. The system collapsed in the nineteenth century with the Opium Wars, through which Westerners gained access to China's ports, and hence to its import market.

The privileges so accorded to the West included personal privileges (such as the right to reside in China and buy houses) and judicial ones (recognizing, among other things, the adjudicative jurisdiction of foreign consuls).²⁴ This resulted in an unequal system, the so-called treaty port system, established under the 1842 Treaty of Nanking and the 1858 Treaty of Tientsin. China, however, saw these treaties not as impositions but as temporary concessions made to the "barbarians" so as to gradually draw them into the empire's civilization. According to the Ch'ing Dynasty's logic, the concessions were only a way to manipulate the Americans and the Europeans, who were looked upon by the Chinese as the "southern barbarians," to be progressively civilized through the superiority of the Chinese empire.²⁵ Thus, while the treaties were considered binding by the Chinese and the Europeans alike, "the assumptions, images and backgrounds were still extremely different from each other."²⁶

Becker Lorca finally considers the Western powers' relations with Latin America. The legal regime governing these relations was altogether different from those governing the Ottoman capitulations and the Chinese treaty ports, as it was geared toward establishing conditions of reciprocity based on Europe recognizing as sovereign the South American states that had come out of colonial rule.

As Becker Lorca rightly observes, only the lack of adequate historical research specific to different geopolitical areas can explain the dominance of the exclusionary view that Western international law was *imposed* through the West's global expansion, thus developing into an international legal system. If in reconstructing nineteenth-century international law we instead analyze the different contexts of its historical development, we will importantly discover, by contrast, that (a) the different legal regimes resulted from *negotiations* with the Western states and that (b), even if the treaties favored the West, they were accepted in view of their perceived long-term advantages, notably the non-Western states' ability to access foreign markets and be recognized as sovereign. Further, the rules introduced into different legal systems by the treaties bore the imprint of cultural traditions rooted in the history of the non-Western states. And, finally, this innovative historical reconstruction enables Becker Lorca to coherently reach two fundamental conclusions: (a) nineteenth-century international law was a *plural law*,²⁷ and (b) the Eurocentric conception of international law needs to be revisited. Indeed, historical research makes it possible to (a) bring out

²⁴ Becker Lorca, *supra* note 1, at 511–12.

²⁵ See Yasuaki, *supra* note 2, at 32 (*quoting* SATO SIN-ICHI, KINDAI CHUGOKU NO CHISHIKIJIN TO BUNMEI 54–60 (1996)).

²⁶ See Yasuaki, *supra* note 2, at 32. *Cf.* John King Fairbank, *The Early System in the Chinese World Order*, in *THE CHINESE WORLD ORDER: TRADITIONAL CHINA'S FOREIGN RELATIONS* 261–62 (John King Fairbank ed., 1968).

²⁷ See Becker Lorca, *supra* note 1, at 520.

the *specificity* of different legal regimes and to (b) recognize international law as a *universal* law established among civil states. It is on the basis of this connection between the *universality* of international law and the centrality of the non-Western states' *national interests* that Becker Lorca can set forth the original concept of *particularistic universalism*.

V. RECOGNITION AND THE STANDARD OF CIVILIZATION

The third part of Becker Lorca's essay develops the concept of particularistic universalism by analyzing the different ways international law was appropriated by different legal regimes. It thus emerges that relations with Latin America were essentially predicated on the West recognizing these states as no longer subject to colonial rule, and hence as *sovereign* states. Relations with the Ottoman Empire, China, Russia, and Japan instead depended on the standard of civilization, limiting these geopolitical areas' access to the international community and warranting their unequal treatment. The South American states were recognized as sovereign because the great Western powers, especially Great Britain, were interested in preventing their return to colonial domination.

Further, it is with a specific understanding of Latin American history that the semi-peripheral jurists appropriated international law. Important among these jurists was Carlos Calvo, whom Becker Lorca discusses at length. Calvo noted that "there is no universal code applicable to the questions and conflicts arising among states,"²⁸ commenting that he sought to remedy an oversight of his predecessors and contemporaries who "left this vast American continent in the shadows, even as its influence and power grow by the day and its populations are keeping abreast of those in Europe on the road to civilization and enlightenment."²⁹

Encapsulated here are the elements of particularistic universalism. As Becker Lorca observes, this can be appreciated by looking at the way Calvo reframes the traditional constructs of international law, especially that of intervention. Arguing that a state's absolute sovereignty entailed its legislative and judicial independence, Calvo asked: "If a state's independence and corresponding rights are absolute, on what principles will interventions in such states rest?"³⁰ Calvo equated the standing of the European states to that of the South American states, finding that any intervention in a Latin American state would be illegal, for it would exclusively be based on brute force. "The pursuit of private claims," he stated, "does not *de plano* justify a government's armed intervention, and since this is the rule the European states invariably follow in their own relations, there is no reason for them not to follow the same rule in their

²⁸ Carlos Calvo, *Préfaces des deuxième et troisième éditions*, in *LE DROIT INTERNATIONAL, THÉORIQUE ET PRATIQUE: PRÉCÉDÉ D'UN EXPOSÉ HISTORIQUE DES PROGRÈS DE LA SCIENCE DU DROIT DES GENS*, at v (A. Rousseau et al. eds., 3d ed. 1880) (author trans.).

²⁹ *Id.* at vi (author trans.).

³⁰ *See id.* at 266–67 (author trans.).

relations with the nations of the New World.”³¹ Calvo’s work exemplifies one of Becker Lorca’s fundamental theses, for it shows how the concepts of international law—especially those of sovereignty and intervention—were *appropriated* by the semi-peripheral jurists to protect the interests of the non-Western states vis-à-vis the Western powers.

The appropriation of international law under the doctrine of recognition is one matter; its appropriation under the standard of civilization is another, as in the case of Russia and Japan. Becker Lorca importantly observes this, going back to the legal-positivist turn. Whereas in the age of natural law the *jus gentium* governed communities recognized merely by virtue of their existence, in the age of legal positivism no country could join the family of civilized nations without accordingly meeting a standard of civilization. This explains why Russia assimilated the conceptual system of international law.³²

Becker Lorca notices how in the eighteenth century, Russia began a modernization process that reached into the second half of the nineteenth century with a specific effort to introduce international law into given areas of international relations, such as humanitarianism at war. He focuses here on the work of Fedor Fedorovich Martens, an internationalist of Saint Petersburg University, who advanced a principle of clear Kantian derivation, making a state’s internal reality the measure of its participation in the international community.³³ This made it possible to seize on the connection that Russia bore to European civilization, including by virtue of Russia’s Christian tradition. In Becker Lorca’s reconstruction, Martens emblematically typifies the internationalist who appropriated international law to further the interests of his own state.

Similarly, Kentaro Kaneko and Tsurutaro Senga used the characteristics of Japanese judicial institutions to show that Japan had long before entered into the concert of universal civilization. Kaneko claimed that Japan was equipped with a constitutional regime, a law regulating the judicial system, a civil code, and a commercial code—thus concluding that Japan’s laws and institutions stood on a par with those of Europe and the United States.³⁴ Japan was thus worthy of membership in the family of civilized nations, which meant that all unequal treaties with the Western powers had to be revisited. So here, too, the jurists’ appropriation of Western law was functional,

³¹ See *id.* at 266–67, 351 (author trans.).

³² See Becker Lorca, *supra* note 1, at 537.

³³ In Martens’s own words, “le degré de développement auquel est parvenu un État au point de vue de son organisation intérieure et en ce qui concerne les intérêts matériels et moraux de ses habitants, donne l’exacte mesure de sa participation à la vie commune des nations.” 2 FEDOR FEDOROVICH MARTENS, TRAITÉ DE DROIT INTERNATIONAL, at i-ii (Alfred Leo trans., 1886).

³⁴ See Kentaro Kaneko, *Les institutions judiciaires du Japon*, in 25 REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 338 (1893). Cf. Becker Lorca, *supra* note 1, at 497.

serving to fight back the West's hegemony. Kaneko importantly also noted here that Japan went beyond just assimilating a foreign civilization: "Cette nation est destinée à créer et à engendrer un type nouveau de civilisation sur la base des éléments puisés au dehors."³⁵ In short, Kaneko showed that while Japan did appropriate Western law in furtherance of its national interests, it tailored this appropriation to its own cultural specificity, knowing it could engender its own legal culture.

The same frame of thought can be found in Tsurutaro Senga's work on consular jurisdiction,³⁶ arguing that its institution came without grasping its implications, namely, a loss of sovereignty for the Japanese government. Here, too, it was to oppose the Western powers' presence in Japan that the concept of sovereignty was adopted. It should also be mentioned that these two authors' work contributed decisively to the abolition of consular jurisdiction toward the end of the nineteenth century.³⁷

VI. APPROPRIATION AND IMPOSITION

The standard of civilization Becker Lorca refers to is essentially a *legal* criterion, setting forth the condition that no state could be admitted into the family of civilized nations unless it protected the life, liberty, and property of foreigners, who had to be treated in accord with the rule of law as conceived by the Western countries.³⁸

But, as mentioned at the outset, the standard of civilization should also be considered from an anthropological and sociopolitical perspective. This would round out the strictly legal approach, thereby making it possible to see how European international law was in part *appropriated* from non-Western geopolitical realities, and in part *imposed* on them. Unlike the Ottoman Empire, China, Japan, and Russia, which did not fall into the grip of Western imperialism, Africa and vast territories in Asia did, and European international law was accordingly forced onto these areas by way of unequal treaties and protectorates of various forms.³⁹

³⁵ Kaneko, *supra* note 34, at 356.

³⁶ See TSURUTARO SENGA, *GESTALTUNG UND KRITIK DER HEUTIGEN. KONSULARGERICHTSBARKEIT IN JAPAN* (1897). On Kaneko and Senga and their significance, see Kinji Akashi, *Japanese 'Acceptance' of the European Law of Nations: A Brief History of International Law in Japan, c. 1853–1900*, in *EAST ASIAN AND EUROPEAN PERSPECTIVES ON INTERNATIONAL LAW* 1, 11–14 (Michael Stolleis & Masaharu Yanagihara eds., 2004).

³⁷ Akashi, *supra* note 36, at 21.

³⁸ GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 84 (1976). Cf. GERRIT W. GONG, *THE STANDARD OF 'CIVILIZATION' IN THE INTERNATIONAL SOCIETY* 6 (1984).

³⁹ As Yasuaki observes, the European states recognized "the capacity of African rulers under international law *as long as they appeared party of a treaty purporting the cession of their territory and the establishment of protectorates.*" Yasuaki, *supra* note 2, at 49 (emphasis added). When the African countries became colonies, the colonial powers' relations with them "came to be a matter of domestic jurisdiction." *Id.* at 50.

What calls for reflection, then, is the concept of civilization itself. Starting from the late eighteenth century, this concept was equated with that of progress, understood as the development and “perfecting of social life.”⁴⁰ Every human group was recognized to have a civilization, but the white peoples of Western Europe and North America were argued to be superior in that respect.⁴¹ Qualitative differences were thus introduced to explain the different degrees of development and the different legal systems of European and non-European peoples—civilized on the one hand, non-civilized on the other.⁴²

Thus, John Stuart Mill thought he could clearly set out the characteristics that distinguished civilized peoples from savage ones. According to Mill, civilized peoples live in fixed dwellings in cities or villages and engage in commerce, agriculture, and manufacture.⁴³ None of these are activities that can be observed among the “savages,” except in primitive forms. Further, as Mill commented, in “savage life there is little or no law, or administration of justice; no systematic employment of the collective strength of society, to protect individuals against injury from one another. . . . We accordingly call a people civilized, where the arrangements of society, for protecting the persons and property of its members, are sufficiently perfect to maintain peace among them.”⁴⁴ These were the characteristics of Western civilization; it was thus necessary to justify their extension to other peoples beyond Europe.

A recurrent theme of political and legal reflection on the problem of civilization was the distinction between civilization as an *event*—a condition already attained—and civilization as a *process*,⁴⁵ a progression toward the only possible form of civilization, that of the West. The *event* of civilization had already taken place in Europe and the United States, a circumstance that fully legitimized their bringing good governance to still-uncivilized peoples and their promoting commerce as a foundation on which to achieve economic and technological progress. Within the paradigm of European international law, this Western hegemony could find various means—aside from conquest and the cession of territories by local African rulers, it could include the relinquishment of sovereignty through unequal protectorate treaties.⁴⁶

⁴⁰ FRANÇOIS GUIZOT, HISTOIRE GÉNÉRALE DE LA CIVILISATION EN EUROPE DEPUIS LA CHUTE DE L'EMPIRE ROMAIN JUSQU'À LA RÉVOLUTION FRANÇAISE (1828).

⁴¹ LUCIEN FEBVRE, *Civilisation: Évolution d'un mot et d'un group d'idées*, in POUR UNE HISTOIRE À PART ENTIÈRE 481 (1962).

⁴² See EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS (2002).

⁴³ John Stuart Mill, *Civilization* (1836), reprinted in ESSAYS ON POLITICS AND SOCIETY 117, 120 (J. M. Robson ed., 1977).

⁴⁴ *Id.* at 120.

⁴⁵ See KEENE, *supra* note 42, at 114.

⁴⁶ For a specific reference to the forms of colonialism in Africa, see Yasuaki, *supra* note 2, at 39–50.

Thus, as Becker Lorca rightly observes, colonial rule is a factor we must consider in judging whether Western international law was appropriated or imposed. We can then properly speak of imposition where colonialism *was* present, as in Africa and many parts of Asia, and of appropriation where it was *not*, as in the Ottoman Empire and Russia.

VII. CONCLUSION

What Becker Lorca's study offers is an important interpretation of international law in the contemporary world. Even with the qualifications previously made as concerns the standard of civilization, we still have a compelling image of a global history of international law in the nineteenth century, revealing a transnational legal discourse based on the interaction between European and non-European legal regimes.⁴⁷

The semi-peripheral jurists' effort in the nineteenth century, as they set about internalizing European international law, was to help their states be recognized as having legal personality, which would thus give these states a standing on which to modify or cancel the unequal treaties with the Western powers. As Becker Lorca observes, the semi-peripheral jurists' approach to international law in the twentieth century consisted in taking distinctive regional and cultural traits into account, thus giving life to different *varieties* of international law, including the Latin American, Asiatic, and Islamic varieties, among others.⁴⁸ This point—underscoring the need to elucidate such regional and cultural inflections of international law—drew attention especially after World War II.

The cultural difficulty experienced by the new states that came out of colonial rule lay in absorbing an international law they found to be Eurocentric,⁴⁹ and hence extraneous to the traditions of Asia, Africa, and Latin America. It was thus declared that international law could not exclusively be based on Western legal thought: it needed to accommodate a variety of legal principles—Confucian, Buddhist, Muslim, Asian, and African.⁵⁰ Significant in this respect was Jenks's view that we should build a "multicultural" legal system, one that can no longer be Eurocentric, for it needs to become the common law of mankind.⁵¹

⁴⁷ See Becker Lorca, *supra* note 1, at 548.

⁴⁸ *Id.* at 550.

⁴⁹ R. P. ANAND, *NEW STATES AND INTERNATIONAL LAW* 45 (rev. 2nd ed., Hope India Publ'ns 2008) (1972).

⁵⁰ FILMER STUART CUCKOW NORTHROP, *TAMING OF THE NATIONS: A STUDY OF THE CULTURAL BASES OF INTERNATIONAL POLICY* 267–77 (1952). *Cf.* ANAND, *supra* note 49, at 48–49.

⁵¹ C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). *Cf.* Anand, *supra* note 15, at 114.

After the pre-nineteenth-century plural universalisms and the nineteenth-century pluralistic universalism comes what may be described as the multiculturalism of contemporary international law. The postcolonial debate, however, has also seen writers arguing that the problem is not so much one of *cultural* differences as one of conflicting *national* interests—meaning we must evaluate to what extent the initiatives undertaken in Asia, Africa, and Latin America can be explained by pointing to the different development these areas have had with respect to the West, and how this translates into doctrines designed to protect those countries' interests. As Sarin comments, the attitudes and policies of developing countries are much less likely to be driven by cultural factors and values than by their economic and political development.⁵²

In response to the postcolonial states' assertion of constructs functional to their interests—witness the idea of permanent sovereignty over natural resources or that of self-determination—the Western states have forged in international law a paradigm to legitimize their neocolonial interventions. This neocolonial paradigm is no longer based on the standard of civilization, but on concepts such as democracy, good governance, and human rights, and essential in this respect is the interpretive contribution of the writers in the Third World Approaches to International Law (TWAAIL) network.⁵³ These writers have correctly found a continuity linking the doctrines deployed to legitimize the Western colonialism begun in the modern age (an example being Francisco de Vitoria's thought) and the neocolonial conceptions developed after World War II: the conceptual forms did change, to be sure, but not the “discourse” (in Foucault's sense) of Western superiority—that of the Christian peoples and civilized peoples, then that of developed peoples, and finally, today, that of democratic peoples championing the principles of human rights. In this sense, the *jus gentium* and, subsequently, international law have each been viewed as representing legal systems which, by virtue of their embodying that ideological discourse, have legitimized colonialism and neocolonialism, respectively.

We can thus conclude that the twentieth century continues to bring forth the plural meanings that Becker Lorca has correctly ascribed to nineteenth-century international law.⁵⁴ For even now international law justifies the present forms of colonialism, on the one hand, while proposing to assert and protect the interests of non-Western states, on the other.

⁵² See Manohar L. Sarin, *The Asian-African States and the Development of International Law*, in THE FUTURE OF INTERNATIONAL LAW IN A MULTICULTURAL WORLD, *supra* note 15, at 117, 137.

⁵³ These writers—prominent among whom are Antony Anghie, James Thuo Gathii, Balakrishnan Rajagopal, and B. S. Chimni—are criticized by Becker Lorca for an approach he views as still Eurocentric. See Becker Lorca, *supra* note 1, at 503 n.84.

⁵⁴ See *id.* at 551.