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Agency, Universality, and the Politics of International Legal History

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

A widespread “turn to history” has marked international legal scholarship in recent years.¹ In the rich and extensive study to which the present note responds,² Arnulf Becker Lorca offers a new contribution to the growing literature on nineteenth-century international law³ by approaching this period from the semi-periphery. That

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¹ For discussion, see Martti Koskenniemi, *Why History of International Law Today?*, 4 RECHTSGESCHICHTE 61 (2004); Matthew Craven, *Introduction: International Law and its Histories, in TIME, HISTORY AND INTERNATIONAL LAW 1* (Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi eds., 2007).

² Arnulf Becker Lorca, *Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation*, 51 HARV. INT'L L.J. 475 (2010).

³ See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 32–114 (2005); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001); GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL

is, Becker Lorca prioritizes those states which, though not European, were deemed sufficiently “civilized” to engage with the West on something approximating a formally equal basis, or at least with greater power and legitimacy than was ordinarily accorded to “non-civilized” peoples. He argues that nineteenth-century semi-peripheral jurists appropriated and deployed the international law of their time to bolster the sovereignty of their states. It is in such appropriation—and not in some unidirectional process of European expansion or imposition—that he seeks to find an explanation for international law’s incremental “universalization” during the course of the nineteenth century.

Despite its familiar roots in world systems theory,⁴ and its increasing currency among international legal scholars, “semi-periphery” is, like many of its cognates and corollaries, a deeply ambiguous term, suggesting considerations of ethnicity, territory, and politico-economic power alike. However, regardless of how it may be defined, at least one thing remains certain: jurists hailing from or in the service of states on the semi-periphery of the international legal order have often fascinated legal historians with their willingness and ability to put even the most overtly value-laden rules of international law to counter-hegemonic use.⁵ Close enough to dominant centers of economic and intellectual production to come under their influence, but with national traditions and state institutions resilient enough to resist formal colonization, the semi-periphery was a natural home for informed engagement with the international legal rules that facilitated colonialism and imperialism. By adopting a comparative approach, Becker Lorca aims to demonstrate that such engagement drove international law to become “a global legal order” in the nineteenth century.⁶

The complex patterns of influence and interaction engendered by these relations made themselves felt in a variety of legal instruments. A well-known example, and

LEGAL ORDER (2004); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 65 NORDIC J. INT’L L. 385 (1996); Casper Sylvest, *International Law in Nineteenth-Century Britain*, 75 BRIT. Y.B. INT’L L. 9 (2004).

⁴ For classic exposition, see Immanuel Wallerstein, *Semi-Peripheral Countries and the Contemporary World Crisis*, 3 THEORY & SOC’Y 461 (1976). As is well known, world systems theory seeks to describe and explain the emergence and development of global politico-economic systems by analyzing relations between “core,” “semi-peripheral,” and “peripheral” states. These relations change over time, generating different hegemonic regimes, divisions of labor, and modes of development. See, e.g., 1, 2, 3 IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM* (1974, 1980, 1989); CHAOS AND GOVERNANCE IN THE MODERN WORLD SYSTEM (Giovanni Arrighi & Beverly J. Silver eds., 1999); *THE WORLD SYSTEM: FIVE HUNDRED YEARS OR FIVE THOUSAND?* (Andre Gunder Frank & Barry K. Gills eds., 1993).

⁵ See, e.g., Liliana Obregón, *Completing Civilization: Creole Consciousness and International Law in Nineteenth-Century Latin America*, in INTERNATIONAL LAW AND ITS OTHERS 247 (Anne Orford ed., 2006); Lauri Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19 EUR. J. INT’L L. 211 (2008); Umut Özsu, “A Subject Which Excites the Deepest Interest throughout the Civilized World”: The Greek-Turkish Population Exchange and the Craft of Diplomatic Nation-Building, 24 LEIDEN J. INT’L L. (forthcoming 2011).

⁶ Becker Lorca, *supra* note 2, at 475.

one which Becker Lorca discusses, is the “standard of civilization,” a kind of metric with which nineteenth-century international lawyers sought to gauge and evaluate competing claims to formal membership in the international legal order.⁷ Only by satisfying those attributes that happened to be associated with the standard at a given juncture could a state gain full admission into the “family of civilized nations,” winning recognition as a state in possession of the robust international legal personality requisite for the complete exercise of legitimate sovereign powers. Of course, like most criteria of its type, the standard admitted degrees. Hence, while China, Japan, and the Ottoman Empire were seldom recognized as belonging to the “family of civilized nations,” at least not without considerable controversy,⁸ even the most crudely positivist jurists felt a need to carve out an intermediate category for cases of the type they were thought to exemplify, thereby distinguishing them from “savage” regions and *terrae nullius*.⁹ Indeed, the influential classification of “civilized,” “barbarous” (or “semi-civilized”), and “savage” (or “non-civilized”) states that was offered by James Lorimer was intended to make room for precisely this type of gradation: Westerners may not have accepted judgments issued by Chinese courts, but they had to grant “partial” recognition to China as a state, given its “barbarous” rather

⁷ For prominent analyses of the “standard of civilization” on which I draw, see, for example, Georg Schwarzenberger, *The Standard of Civilization in International Law*, 8 CURRENT L. PROBS. 212 (1955); ANGHIE, *supra* note 3, at 84–87; GERRIT W. GONG, THE STANDARD OF “CIVILIZATION” IN INTERNATIONAL SOCIETY (1984).

⁸ Take the Ottoman Empire, the first non-European state to gain such admission. Even as late as 1894, Westlake could still write that

[t]he case of Turkey must . . . be left out of sight, because of the anomalous position of that empire, included on account of its geographical situation in the political system of Europe, but belonging in other respects rather to the second group of contrasted populations. She may benefit by European international law so far as it can be extended to her without ignoring plain facts, but her admission to that benefit cannot react on the statement of the law, which is what it is because it is the law of the European peoples.

JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 103 (1894).

⁹ The need to develop such classificatory schemes was felt widely at the time, and not only among lawyers. In 1859, for instance, John Stuart Mill wrote that “[t]o suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into.” John Stuart Mill, *A Few Words on Non-Intervention*, in 21 THE COLLECTED WORKS OF JOHN STUART MILL 111, 118 (John M. Robson ed., 1984) (1859). For lucid analysis of the distinction between “semi-civilized” and “non-civilized” states, crucial for organizing international legal relations and determining the kinds of politics semi-peripheral jurists could plausibly pursue, see Jörg Fisch, *Internationalizing Civilization by Dissolving International Society: The Status of Non-European Territories in Nineteenth-Century International Law*, in THE MECHANICS OF INTERNATIONALISM: CULTURE, SOCIETY, AND POLITICS FROM THE 1840S TO THE FIRST WORLD WAR 235, 252 (Martin H. Geyer & Johannes Paulmann eds., 2001).

than “savage” character.¹⁰ Though the “standard of civilization” fluctuated over time, it remained a gatekeeper to admission in the international order spawned by the European state system well into the early twentieth century.

As problematic as the “standard of civilization” obviously was, the fact that neither its content nor its parameters was ever fixed, and that it appeared in different incarnations in the hands of different jurists, allowed it to serve a number of political projects. The most ambitiously counter-hegemonic were designed to strike at the foundations of the very political and economic relations which had made it possible for a “standard of civilization” to be articulated in the first place. To take one of Becker Lorca’s examples, Japanese international lawyers of the late nineteenth century often pushed for the abrogation of the unequal treaties into which authorities in Kyoto and Tokyo had entered with Western powers by arguing that their state satisfied each of the elements of the “standard of civilization.” Among other things, a functioning court system was now in place, a professional bench was on offer, extant laws and customs had been codified, and newer, more “modern” laws had been promulgated.¹¹ Less ambitious and counter-hegemonic, but no less revealing, were those projects in which semi-peripheral jurists employed “civilizational” discourse to distinguish the polities they represented from their regional neighbors or antagonists. Becker Lorca’s strongest examples here are Etienne Carathéodory, an Ottoman lawyer and diplomat of Greek heritage who saw in the “standard of civilization” an opportunity to question pan-Islamism, and Fedor Fedorovich Martens, the famous Baltic-Russian jurist who sought to draw a sharp distinction between the international status of the Russian state and those of its southern and eastern neighbors.¹²

The “standard of civilization” was not an idiosyncratic, easily isolatable outgrowth of an international law that had been placed at the beck and call of the “Great Game” or the “Scramble for Africa,” themselves merely two of the better known examples of nineteenth-century imperialism. Rather, it was one in an assemblage of instruments with which nineteenth-century lawyers sought both to conceptualize and to intervene in an increasingly complex world—a world marked as much by non-European resistance to European expansion as by such expansion itself. It comes as no surprise, then, that Becker Lorca focuses in his article on precisely the kind of creative appropriation one sees at work in semi-peripheral lawyers’ engagement with the “standard of civilization.” On his account, international law “became universal” not through imposition, as though “the rules applicable to the relations between the West and the non-Western world . . . exclusively flowed from the former to the latter,” but through appropriation, a multifaceted process driven by “a global profession that articulated a transnational legal discourse.”¹³ Nineteenth-century semi-peripheral

¹⁰ 1 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS: A TREATISE OF THE JURAL RELATIONS OF SEPARATE POLITICAL COMMUNITIES* 444 (1883).

¹¹ Becker Lorca, *supra* note 2, at 497–98.

¹² *Id.* at 500, 542–45.

¹³ *Id.* at 508, 546.

jurists shared “a distinctive . . . legal consciousness defined by a ‘particularistic universalism’”—to such a degree, in fact, that a “common pattern of appropriation” grounded in “functional equivalences” can be traced from Russia to Latin America and from Japan to the Ottoman Empire.¹⁴ And this unique “legal consciousness,” this “common pattern of appropriation,” was one that permitted, even encouraged, innovative “reinterpretation” of “the doctrinal structure of international law.”¹⁵ Instead of simply “learning how to play by the new rules of international law that Western powers sought to impose on them,” semi-peripheral jurists also learned how to go about “changing the content of those rules.”¹⁶

II. TWO METHODOLOGICAL QUESTIONS

Clearly, an argument of this breadth may engender a number of responses. Here, I would like to focus my comments on two, tightly linked questions. The first asks whether Becker Lorca offers a genuinely cogent account of agency when mapping semi-peripheral appropriations of nineteenth-century international law. The second focuses on his notion of “universality,” asking whether it marshals an unsustainably “progressive” understanding of such appropriation. Each question is of importance not only for the thesis that Becker Lorca advances in his article but for the history and historiography of international law generally.

A. Agency

First, there is what one might term the question of agency—the question, that is, of how precisely we might understand nineteenth-century international law’s appropriation by semi-peripheral jurists. At times, Becker Lorca depicts semi-

¹⁴ *Id.* at 475, 483. *See also id.* at 503, 521. Comparisons on this scale may seem far-fetched or anachronistic, given the obvious differences that existed between the legal instruments in operation. Nevertheless, it is significant that, as late as the mid-nineteenth century, many British jurists did not draw sharp distinctions between the extraterritorial privileges British officials enjoyed over large swaths of Africa and the Pacific and the more formal extraterritorial jurisdiction they were authorized to exercise in Turkey and China. *See, e.g.,* W. ROSS JOHNSTON, SOVEREIGNTY AND PROTECTION: A STUDY OF BRITISH JURISDICTIONAL IMPERIALISM IN THE LATE NINETEENTH CENTURY 29 (1973). This would suggest that at least certain legal comparisons can legitimately be drawn between the different semi-peripheral states of the period, and also, perhaps, between semi-peripheral states on the one hand and peripheral states on the other. From a voluminous literature, see Richard S. Horowitz, *International Law and State Transformation in China, Siam, and the Ottoman Empire During the Nineteenth Century*, 15 J. WORLD HIST. 445 (2004); C. A. Bayly, *Distorted Development: The Ottoman Empire and British India, Circa 1780-1916*, 27 COMP. STUD. S. ASIA, AFR. & MIDDLE EAST 332 (2007); Melissa Macauley, *A World Made Simple: Law and Property in the Ottoman and Qing Empires*, in SHARED HISTORIES OF MODERNITY: CHINA, INDIA AND THE OTTOMAN EMPIRE 273 (Huri Islamoğlu & Peter C. Perdue eds., 2009).

¹⁵ Becker Lorca, *supra* note 2, at 477.

¹⁶ *Id.* at 482.

peripheral jurists as having simply “used” the key rules of nineteenth-century international law.¹⁷ This would suggest a fundamentally instrumentalist conception of international legal appropriation, one in which a particular doctrine is selected and, with or without adaptation, made to serve a particular purpose under a particular set of circumstances. And this, in turn, would imply a relatively wide ambit of freedom: the jurist is depicted as willing to choose from among a number of different legal options, and as able to put this choice to strategic or tactical “use.”

At other times, though, Becker Lorca claims that international legal rules were “internalized” by semi-peripheral jurists.¹⁸ Taken at face value, this would commit him to a stronger, much more ambitious theory of socialization. On this account, semi-peripheral engagement with international law would appear to be less a matter of strategic or tactical “utilization” and more a matter of being *constituted* as a bearer of a mode of legal expertise or as a guardian of a form of legal order. Such a conception would naturally imply a narrower ambit of freedom: the jurist is depicted not as a conscious actor maneuvering on the basis of *raison d'état* so much as a conduit for the more diffuse process of socialization through which he and his state are integrated into a larger international system.¹⁹

In some cases, Becker Lorca favors one approach over the other, presenting international law either as an instrument or as a constitutive force in its own right. Consider his discussions of Japanese lawyer Sakuyé Takahashi and Argentinean lawyer and historian Carlos Calvo. For Becker Lorca, the fact that Takahashi made a point of publishing works of international law in English, French, and German represents “an extraordinary example of intellectual agency and the willful appropriation of international law.”²⁰ Takahashi is a self-conscious agent deliberately setting out to make a name for himself in Europe’s leading circles and also to bring about specific changes in the way that Japan is perceived by Western international lawyers like T. E. Holland. Conversely, Becker Lorca gives a preponderantly constitutive interpretation to Calvo’s insistence that European intervention in the Americas is illegitimate, and that intervention in general can be justified only where the state in question has explicitly appealed for assistance from a foreign power. If Calvo limits the ambit of intervention, he does so as part of a much broader, much more intricate project of curbing European meddling in the domestic affairs of Latin American states—a project which not only strikes at the heart of his own professional self-understanding as an Argentinian in Europe, but also underpins the nation-building program to which these states had committed themselves in an effort to leverage themselves into greater sovereignty and independence. To a significant degree, appropriation of international

¹⁷ See, e.g., *id.* at 478, 480, 503, 540, 551.

¹⁸ See, e.g., *id.* at 478, 496, 500, 542, 550.

¹⁹ Throughout this response, I employ masculine pronouns when speaking of semi-peripheral jurists of the nineteenth century. I do so for no other reason than the rather unfortunate one that such jurists were almost exclusively men.

²⁰ Becker Lorca, *supra* note 2, at 532.

law is something that occurs behind Calvo's back, as it were, not something which grows out of a purely intentional project of his own making.²¹

In other cases, Becker Lorca fuses the two approaches. Semi-peripheral jurists, he writes, "internalized, adapted, and used the arguments advanced by Western international lawyers."²² As a consequence, it is their "use, internalization, and appropriation"²³ of international law that needs to be analyzed. They may have "internalized European legal thought," and they may have been able to do so on account of their having shared "a common professional style or legal consciousness," but this "appropriation was strategic," grounded in careerism, a keen sense of national interest, or some combination of the two.²⁴

The quandary can thus be framed sharply, as one relating specifically to the nature and scope of "appropriation," a key term in Becker Lorca's lexicon. How robust is "appropriation," really? How "far down" does it really go? In appropriating this or that element of "the public law of Europe," were semi-peripheral lawyers like Takahashi and Calvo using whichever legal tools they happened to have on hand? Or was there something more elaborate going on here, such that these jurists' very understanding of themselves, their profession, and the domestic legal regimes whose integrity they sought to preserve or augment was transformed by their appropriation of European legal science? If, in some sense, both were the case, part and parcel of the same complex phenomenon, how *exactly* was this so? Is it possible to develop a comprehensive explanation of international legal appropriation, one that would reconcile its instrumentalist with its constitutive interpretation? Or is it more realistic to aim for a series of case-specific analyses?

Becker Lorca's article offers no resources with which to answer such questions, or even to pose them as such. He does not provide any means of understanding agency, or of determining what kind of historical evidence would need to be marshaled in order to make out a case in favor of one or another account of it in a specific context.

B. "Universality"

Closely related to this first question is a further question concerning "universalism," a theme which underlies much of Becker Lorca's account. The question here is not whether certain well-known features of nineteenth-century international law—its valorization of absolute territorial sovereignty within Europe, say, or its reliance on extraterritorial consular jurisdiction throughout Asia and Africa—radiated outward from a European core toward an extra-European periphery or a quasi-European semi-periphery. Nor does it have to do with whether these features instead grew out of the mutual imbrication of core and semi-periphery that characterized so much of

²¹ For details on Calvo's arguments on the issue, see *id.* at 493–94, 525–29.

²² *Id.* at 503.

²³ *Id.* at 547.

²⁴ *Id.* at 478, 486, 496, 548.

this period. Instead, it has to do with the difficulty of determining the precise significance of “universalization” in Becker Lorca’s account. What does Becker Lorca have in mind when he speaks of international law’s “universalization” over the course of the nineteenth century? And why does he put as much stock in this term as he does? Could it be that Becker Lorca is implicitly relying on a “progress narrative” here?²⁵ Is the thesis that international law was appropriated by—and not simply imposed upon—the semi-periphery an invitation for us to rewrite the history of nineteenth-century international law as one that was less dependent upon colonialism and imperialism, both formal and informal, than is generally thought?

Turn again to Becker Lorca’s own discussion. As already mentioned, Becker Lorca’s central claim is that

semi-peripheral internationalists pursued a distinctively non-European interpretation of the classical European law of nations, in which they re-signified and redeployed its fundamental elements . . . to advocate for a change in extant rules of international law and to justify the extension of the privileges of formal equality to their own states in their interactions with Western powers.²⁶

It is in such activity, he believes, that one finds the key to international law’s transformation into a “transnational legal discourse.” In an important but underdeveloped note, Becker Lorca anticipates and attempts to meet the criticism that this claim brings with it a certain view on the merits (or lack thereof) of “universalization”: he is concerned with “surveying” semi-peripheral engagement with international law, he observes, not with offering a “positive, either political or normative, assessment” of this engagement.²⁷ Such methodological reflection is to his credit, but it is inadequate and somewhat misleading. Not only does Becker Lorca make a number of far-reaching claims, both political and normative, about international law’s “universalization,” but most of these claims are of a decidedly sanguine character. Calvo’s defense of non-intervention, for instance, is described as having been “remarkably successful.”²⁸ By upholding the sovereignty of Latin American states, Calvo is said to have “reinstated the universality that international law had lost after the demise of naturalism.”²⁹ And the point is supposed to hold generally: it was only when “semi-peripheral lawyers re-interpreted the doctrines of recognition and the standard of civilization” that international law “regained universality,” recovering

²⁵ See, e.g., THOMAS SKOUTERIS, *THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE* 1–38 (2010). Like Skouteris and others, I employ the expression “progress narrative” in reference to the assumption—common across otherwise disparate forms of international legal scholarship—that international law advances ineluctably toward ever greater levels of “fairness,” “objectivity,” and/or “inclusiveness.”

²⁶ Becker Lorca, *supra* note 2, at 482–83.

²⁷ *Id.* at 496, n.53.

²⁸ *Id.* at 526.

²⁹ *Id.* at 527.

something of what had been lost with the earlier “shift from naturalism to positivism.”³⁰ Far from being a strictly factual assessment of the historical record, Becker Lorca takes this point to be generative of a sweeping conclusion that is both political and normative: if “[i]nternational law *should* be viewed from a global standpoint,”³¹ this is at least partly because the experiences of nineteenth-century semi-peripheral jurists provide us with “lessons worth reclaiming,”³² their “progressive gains in professional and intellectual confidence”³³ betraying an “unambiguous commitment to cosmopolitanism”³⁴ which is “inspiring”³⁵ and which reveals “alternatives to reinventing the discipline . . . today.”³⁶

One may agree with Becker Lorca that it was in the nineteenth century that the international law that had been developed in successive waves to regulate inter-state relations within Europe came to be transformed into a “universal” regime. One may also grant that, on the semi-periphery, such “universalization” generally involved more in the way of appropriation (however defined) than it did in the way of imposition. But, at most, these propositions yield the conclusion that international law was “universalized” in the nineteenth century through some process of complex appropriation. They do not yield the conclusion that “universalization,” so understood, was any less brutal than the history of international law’s complicity in colonialism and imperialism—a history that is still in the process of being written—would lead us to think. Nor does any of this mean that general insights regarding the nature and feasibility of “progressive politics” can or should necessarily be gleaned from an examination of semi-peripheral engagement with nineteenth-century international law—a body of normative injunctions grounded first and foremost in the felt need to conserve the intra-European equilibrium which had been restored at the Congress of Vienna by exporting violence to the extra-European world.³⁷

III. TWO POLITICAL IMPLICATIONS

It is not hard to see that both of the questions just canvassed—the question of agency and the question of “universalism”—have significant political implications. As with

³⁰ *Id.* at 547. On the difficulties of attributing “positivism” to nineteenth-century international law, see, for example, Kennedy, *supra* note 3; Sylvest, *supra* note 3, at 12, 40–41, 48; Martti Koskenniemi, *The Legacy of the Nineteenth Century*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 141, 146–48 (David Armstrong ed., 2009).

³¹ Becker Lorca, *supra* note 2, at 548 (emphasis added).

³² *Id.*

³³ *Id.* at 550.

³⁴ *Id.*

³⁵ *Id.* at 552.

³⁶ *Id.*

³⁷ For a sharp (and also controversial) rendition of this argument, see CARL SCHMITT, *THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM* (G. L. Ulmen trans., Telos Press 2003) (1950).

the questions themselves, these implications are wide-ranging and not limited to Becker Lorca's article.

A. Analyzing Agency

To begin with, both the kind and the degree of agency that one ascribes to lawyers like Takahashi and Calvo will depend in no small part on one's aim and object of analysis—in other words, on one's politics. If, for example, one is writing a biography of an official in the employment of the Ottoman delegation to the 1878 Congress of Berlin, an official who was familiar with international legal matters and who was asked to provide his opinion on draft treaties, one would likely stress the relative weakness of his bargaining position. Defeated by Russia, unable to stem the rise of secessionist nationalism in the Balkans, and struggling with an enormous debt,³⁸ the Islamic world's "Eternal State" now discovered that it had considerably less room in which to maneuver than had been the case at earlier congresses.³⁹ Its diplomats could only do so much to resist calls to have the "principle of nationality" taken seriously. And they could not counter demands to undertake reforms in many of the predominantly Christian provinces that were to remain allied to Istanbul. The final product of the negotiations, tellingly styled a treaty "for the Settlement of Affairs in the East," reflected these pressures: Serbia, Montenegro, and Romania were carved out of the now shrunken Ottoman Balkans, Austria-Hungary was authorized to occupy and administer Bosnia and Herzegovina, a *de facto* independent Bulgaria was established, and "improvements and reforms" were mandated for (though, alas, never truly implemented in) the Empire's Armenian provinces.⁴⁰

³⁸ This debt became so onerous that it came under the management of a consortium of European creditors shortly after the Congress of Berlin, with an "Ottoman Public Debt Administration" being established in 1881. *See, e.g.,* HERBERT FEIS, *EUROPE THE WORLD'S BANKER 1870-1914: AN ACCOUNT OF EUROPEAN FOREIGN INVESTMENT AND THE CONNECTION OF WORLD FINANCE WITH DIPLOMACY BEFORE THE WAR* 332–41 (1964); ROGER OWEN, *THE MIDDLE EAST IN THE WORLD ECONOMY 1800-1914*, at 191–200 (1981).

³⁹ As Holland put it, "[t]he Congress of Berlin, unlike that of Paris, took place without its having been necessary for the Powers to prove that they had the might, as well as the right, to claim collective cognizance of the resettlement of the East." Thomas Erskine Holland, *The Execution of the Treaty of Berlin*, in *STUDIES IN INTERNATIONAL LAW* 226, 227 (1898).

⁴⁰ Treaty for the Settlement of Affairs in the East, arts. 1–12, 25–51, 61, July 13, 1878, 153 CONSOL. T.S. 171 (author trans.). Unsurprisingly, such provisions humiliated and worried Ottoman authorities and intellectuals. Saffet Paşa, Grand Vezier at the time, likened the Great Powers' stance during the negotiations to that which they had adopted in regards to the partitions of Poland, and an Istanbul newspaper wondered whether the "new science of ethnography" on which the treaty clearly relied would turn the Ottoman Empire into an unwieldy federation with loose administrative boundaries. *See* Roderic H. Davison, *The Ottoman Empire and the Congress of Berlin*, in *DER BERLINER KONGRESS VON 1878. DIE POLITIK DER GROSSMÄCHTE UND DIE PROBLEME DER MODERNISIERUNG IN SÜDOSTEUROPA IN DER ZWEITEN HÄLFTE DES 19. JAHRHUNDERTS* 205, 213 (Ralph Melville & Hans-Jürgen Schröder eds., 1982).

Yet, the inverse also holds true. If, to take an example from the tail end of the “long nineteenth century,” one is dealing with Japan in 1905, after its famous victory over Nicholas II’s troops, one would presumably be disposed to emphasize the opportunities available to its negotiators during the peace talks that followed the war. Not only had Japan inflicted a crushing defeat upon Russia, but it had done so after forty years of sustained, across-the-board modernization. The Japan that emerged from the Meiji Restoration to hand the Concert of Europe its first full-scale military defeat at the hands of a non-European power was a fundamentally different kind of state than the one which had succumbed to Commodore Perry’s gunboat diplomacy fifty years earlier, being forced to sign unequal treaties with Western powers and grant capitulatory concessions to all manner of foreigners.⁴¹ And unlike the Ottomans’ experience in 1878, it was this confidence—a confidence which had immediate ripple effects throughout the non-European world⁴²—that was reflected in the final peace treaty. Its economy and society transformed, Japan now underscored its status as a Great Power with expansionist ambitions: it possessed “paramount political, military, and economic interests” in the Korean peninsula, and the Tsar could do nothing to impede the “measures of direction, protection, and control which the Imperial Government of Japan might find necessary to take” there.⁴³

Certain conclusions in regards to the semi-periphery can be drawn from close examination of such episodes. In some circumstances, like those in which Ottoman negotiators found themselves in 1878, overstressing agency would typically be misleading. After all, if the nineteenth-century lawyer at issue were in a position of weakness, at least in relation to a particular adversary or interlocutor, prioritizing his freedom of action would more than likely be historiographically problematic and politically irresponsible. In such cases, appropriation of international law generally took place against the background of a large number of structural constraints, and is therefore best understood not as a product of free selection but as one element in a broader, more diffuse process of socialization—what Becker Lorca terms “internalization.” One must, of course, allow for competing interpretations. Yet the fact remains that, absent powerful countervailing factors, the history of such episodes is written most accurately with an eye to highlighting the constitutive force of international law—its power to shape and reshape identities, interests, and

⁴¹ See, e.g., F. C. JONES, EXTRATERRITORIALITY IN JAPAN AND THE DIPLOMATIC RELATIONS RESULTING IN ITS ABOLITION, 1853-1899 (1931); Louis G. Perez, *Revision of the Unequal Treaties and Abolition of Extraterritoriality*, in NEW DIRECTIONS IN THE STUDY OF MEIJI JAPAN 320 (Helen Hardacre & Adam L. Kern eds., 1997); MICHAEL R. AUSLIN, NEGOTIATING WITH IMPERIALISM: THE UNEQUAL TREATIES AND THE CULTURE OF JAPANESE DIPLOMACY (2004).

⁴² Cemil Aydin, *A Global Anti-Western Moment? The Russo-Japanese War, Decolonization, and Asian Modernity*, in COMPETING VISIONS OF WORLD ORDER: GLOBAL MOMENTS AND MOVEMENTS, 1880s-1930s, at 213 (Sebastian Conrad & Dominic Sachsenmaier eds., 2007).

⁴³ Peace of Portsmouth, Japan-Russ., art. 2, Sept. 5, 1905, 199 CONSOL. T.S. 144 (author trans.). For a brief overview, see R. P. ANAND, *Family of “Civilized” States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation*, in STUDIES IN INTERNATIONAL LAW AND HISTORY: AN ASIAN PERSPECTIVE 24, 59–70 (2004).

institutions. Indeed, Alexander Karatheodori, the Sublime Porte's chief negotiator at Berlin, felt compelled to narrate much of his own experience in these terms when he sat down to pen a report to his colleagues in Istanbul.⁴⁴

In other circumstances, though, like that of Japan in 1905, agency demands greater attention. The semi-peripheral lawyer in question was capable of mounting a credible resistance, and therefore appropriated international law from a position of relative strength. Though structural constraints were obviously at issue here as well, international law was generally appropriated with a significant degree of strategic or tactical awareness. Naturally, this too influences the way in which histories of such episodes tend to be written: while the actor's autonomy is usually thrust to the fore, the context within which this autonomy is asserted is frequently relegated to the background. As before, there is no absolute necessity here, and rival interpretations are possible. But as J. G. A. Pocock once put it, the history of a "political society"—a society fortunate enough to be able to boast of its successful national liberation struggle, say—will display "an almost irresistible bent towards becoming the history of its own autonomy, and towards reabsorbing the histories, and the historians, who re-narrate and diversify a history designed to control diversity itself."⁴⁵

Navigating between constitutive and instrumentalist approaches to agency is always an intensely political affair. Most matters of international legal history, be they characterized as "events" (e.g. the signature of the 1899 Hague Convention) or as part of "everyday life" (e.g. the lived experiences of a British consular official in Shanghai after the 1842 Treaty of Nanking, the first unequal treaty granting extraterritorial powers to British nationals in China),⁴⁶ do not lend themselves to exclusive classification in one or the other terms. The material and symbolic relations of international law's actual operation are messier than any hard-and-fast distinction of that sort would permit. Nevertheless, the work of international legal history requires as much methodological clarity, and as disciplined an engagement with the available evidence, as possible. The historical record needs to be mined carefully, and arguments need to be developed in a manner that is methodologically self-reflexive. The political stakes are simply too high.

⁴⁴ A case in point being his discussion of the Ottoman delegation's failed attempt to clarify (read augment) the terms of Istanbul's suzerainty over Bulgaria. See Carathéodory Pacha, *Rapport secret adressé à la Sublime-Porte par Carathéodory Pacha, plénipotentiaire turc, au Congrès de Berlin en 1879*, in *LE RAPPORT SECRET SUR LE CONGRÈS DE BERLIN ADRESSÉ À LA S. PORTE PAR KARATHÉODORY PACHA, PREMIER PLÉNIPOTENTIAIRE OTTOMAN* 61, 125–27 (Bertrand Bareilles ed., 1919). The authenticity of this report is widely accepted but has yet to be established conclusively.

⁴⁵ J. G. A. POCOCK, *The Politics of History: The Subaltern and the Subversive*, in *POLITICAL THOUGHT AND HISTORY: ESSAYS ON THEORY AND METHOD* 239, 240–41 (2009).

⁴⁶ For details, see 1 G. W. KEETON, *THE DEVELOPMENT OF EXTRATERRITORIALITY IN CHINA* 174 (1969).

B. Contesting “Universality”

Giuseppe Mazzini, hero of Italian unification, once wrote that the principle of non-intervention, a staple of the “public law of Europe” that had been strengthened to preserve European order after the Napoleonic Wars, actually stood for “[i]ntervention on the wrong side; [i]ntervention by all who choose, and are strong enough, to put down free movements of peoples against corrupt governments.”⁴⁷ Becker Lorca’s “universalism” thesis incites a similarly dialectical inversion: if it was through the activities of nineteenth-century jurists hailing from states like Japan and the Ottoman Empire that European international law came to be “universalized,” it was also through these activities that international law became that much more “particularized”—and not simply in that innocuous sense in which one might speak of international law being “situated” in a specific time and place, the sense that Becker Lorca seems to have in mind when discussing “particularistic universalism.”

Men like Takahashi and Calvo were rarely “of the people.” Trained for and employed by powerful ruling elites, they articulated and fought for political and economic interests favored by dominant forces within their states. The capitulatory regime, for instance, was not simply an infringement of Ottoman sovereignty, a technique of imperialist capitalism that rendered Turkey’s status under international law even more anomalous than it would otherwise have been.⁴⁸ It was also, and at least equally, an obstacle to the cultivation of an indigenous Turkish-Muslim bourgeoisie, favoring non-Muslim over Muslim commercial interests and thereby putting the (never entirely pacific) *pax ottomanica* under tremendous structural strain. By pressing for its abolition, Turkish-Muslim lawyers and diplomats sought not only to uphold the integrity and independence of their state, but also to limit the growing influence and prosperity of the sultan’s non-Muslim subjects.⁴⁹

Furthermore, the corpus of international legal rules mastered by semi-peripheral jurists of the period was one that generally flew in the face of the kind of progressive meta-narrative with which “universalistic” discourse is often associated. It was in the nineteenth century that international lawyers devised or refined many of the most crucial rules governing the exercise of politico-economic power on the semi-periphery—among others, those concerning the form and function of “treaty ports,” of the “standard of civilization,” and of extraterritorial jurisdiction. And it was toward the conclusion of this same century that international lawyers, including those of the

⁴⁷ Giuseppe Mazzini, *On Nonintervention*, in *A COSMOPOLITANISM OF NATIONS: GIUSEPPE MAZZINI’S WRITINGS ON DEMOCRACY, NATION BUILDING, AND INTERNATIONAL RELATIONS* 213, 217 (Stefano Recchia & Nadia Urbinati eds., 2009) (1851).

⁴⁸ Though it very obviously was that as well. *See, e.g.*, WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 457 (Michael Byers trans., Walter de Gruyter ed., 2000) (1984).

⁴⁹ For incisive analyses of the long-term dynamics, see ÇAĞLAR KEYDER, *STATE AND CLASS IN TURKEY: A STUDY IN CAPITALIST DEVELOPMENT* (1987); FATMA MÜGE GÖÇEK, *RISE OF THE BOURGEOISIE, DEMISE OF EMPIRE: OTTOMAN WESTERNIZATION AND SOCIAL CHANGE* (1996).

semi-periphery, first began to cultivate that curiously strained relationship with nationalism that would express itself with such extraordinary force after 1919.⁵⁰ Indeed, a good portion of the projects to which semi-peripheral lawyers contributed, indirectly if not always directly, are arguably best understood when situated within the complex genealogies of contemporary state-building and humanitarian intervention.⁵¹ If this was the international law that was appropriated, it is not at all easy to see how the processes of “universalization” such appropriation made possible would of necessity yield “lessons worth reclaiming” under current conditions.

Becker Lorca is not, of course, indifferent to these concerns; at one point, he notes (in passing) that the international legal regimes he analyzes “came into force in the context of the economic and political interactions that followed the formation of a world economy.”⁵² It is deeply troubling, though, that he does not pursue this line of inquiry, offering no systematic explanation of how the globalization of international law—and of the European state form with which it was organically intertwined—was both rooted in and conducive to this burgeoning world economy.⁵³ Let us be clear: semi-peripheral appropriation of international law did at times produce politically incisive strategies for securing and safeguarding sovereignty. This is a crucially important point, and it is valuable as a corrective to sweeping denunciations of international law.⁵⁴ But it should not be exaggerated. Nor should it be made to buttress a broader argument about the ongoing benefits of “vernacular cosmopolitanism.”⁵⁵ In many, perhaps even most, cases, semi-peripheral appropriation of international law betrayed not so much a “universalistic” commitment to “cosmopolitanism” as a ruthlessly “particularistic” form of realpolitik. And besides, what reason do we have to think that “universality” is, as Martti Koskenniemi once put it, anything other than “universal privilege?”⁵⁶

⁵⁰ The significance of this relationship is a point which Nathaniel Berman’s scholarship has demonstrated with devastating clarity. See, e.g., Nathaniel Berman, *Les ambivalences impériales*, in *IMPÉRIALISME ET DROIT INTERNATIONAL EN EUROPE ET AUX ÉTATS-UNIS* 131, 139–41 (Emmanuelle Jouannet & Hélène Ruiz Fabri eds., 2007) (dating the advent of this “modernist” infatuation with nationalist “passion” to 1890).

⁵¹ From a growing literature, see Anne Orford, *Jurisdiction Without Territory: From the Holy Roman Empire to the Responsibility to Protect*, 30 *MICH. J. INT’L L.* 981 (2009); Nehal Bhuta, *New Modes and Orders: The Difficulties of a Jus Post Bellum of Constitutional Transformation*, 60 *U. TORONTO L.J.* 799 (2010).

⁵² Becker Lorca, *supra* note 2, at 520.

⁵³ For an attempt to provide such an explanation of such argument, see CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* 153–293 (2006).

⁵⁴ Note, though, that it is in no way original to Becker Lorca. For an exceptionally nuanced case in point, see KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (2002).

⁵⁵ Becker Lorca, *supra* note 2, at 523, 535, 550.

⁵⁶ Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 *EUR. J. INT’L L.* 113, 115 (2005).

IV. CONCLUSION

If, as a general matter, questions of method can only rarely be distinguished from those of politics, then this is all the more so in the case of international legal scholarship. Becker Lorca's article offers much material for further research into the nineteenth century, on any account a crucial turning point in the history of international law. But it has serious shortcomings. And these, as we have seen, are at once methodological and political. On the one hand, the article suffers from an inability to offer a truly compelling explanation of the agency at work in nineteenth-century international law's appropriation. On the other hand, it falls prey to an overly cheerful interpretation of the processes of "universalization" such appropriation enabled. Future attempts to analyze nineteenth-century international law from the standpoint of the semi-periphery will need to grapple with issues of method and politics of this kind more explicitly than Becker Lorca does. That theoretically parsimonious accounts of international legal history will follow from such self-reflection is likely. That they are necessary is certain.