INTERNATIONAL LAW AS PROJECT OR SYSTEM?

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Abstract

Classical authors on international law tended to understand it as an immanent system of norms, emerging from natural reason, self-interest, and/or customary state behavior. This view largely kept hold well into the Vienna System era of multilateral diplomacy, indeed becoming more conceptually clear even as the language of natural law grew increasingly marginal. By the early twentieth century, however, international law had turned into a domain for intentional legislative projects on a global scale. Ultimately, this new legislative function of international law was endowed to permanent organizations focused on norm-development in specialized areas.

With this transformation, international law's forms of legislation and, later, also of interpretation and adjudication transitioned from assuming "unwilled" to "willed," intentional norms. This Article traces the conceptual history of this shift in the self-understanding of legal actors. It also argues that the now-prevalent epistemic model of international law as a collective project necessarily raises questions, including those rooted in Third World critique, as to whose *project it is in practice. Finally, it suggests that further attention to international law's "problem of authorship" can aid in understanding the way that legal discourses—such as those concerned with norms of freedom of navigation, trade, or international human rights—produce specific forms of knowledge and political possibilities.*

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I. INTRODUCTION: TWO LEGAL EPISTEMES

Legal orders can be imagined as either projects or systems, and the choice between these epistemes has profound implications for how their norms are subsequently interpreted.[1] The legal philosopher Paul Kahn has recently suggested this dichotomy can be of use in studying "the relationship of knowledge to practice" in the historical development of U.S. law, particularly as regards the changing hermeneutics of constitutional jurisprudence.[2] The distinction between the concepts centers principally upon their relationship with the notion of the will—the question as to whether the law emerges as the product of a planned intent (a project) or rather as the byproduct of non-intentional social processes (a system).[3]

This Article proposes that the same two lenses can also be applied to the conceptual history of international law.[4] Similar to a domestic constitution, the body of international legal norms requires its interpreters

1. *See generally* PAUL KAHN, THE ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION (2019). On the notion of epistemes, see MICHEL FOUCAULT, THE ORDER OF THINGS xxiv (Routledge 2005) (1966) (suggesting that epistemes are "configurations within the space of knowledge which have given rise to the diverse forms of empirical science").

2. KAHN, *supra* note 1, at 5.

3. *Id.*

4. This Article is the first to apply the concepts of "project" and "system," in Kahn's specific sense as a dichotomy of epistemic frameworks, to the emergence of the modern international legal order. However, there have been various scholarly discussions that implicitly or explicitly rely upon one or the other of these frameworks—indeed, this Article assumes that those studying legal orders invariably must grapple with questions regarding the will, often leading to the adoption of one of the perspectives here described. Concerns over the "fragmentation" of international law, for example, are often focused upon the sense that there is no subject capable of exercising an authorial intent to provide international law as a whole with the coherency and self-consistency associated with successful legislative projects. *See* Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2003); Eyal Benvenisti and George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595 (2007); Anthony E. Cassimatis, *International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law*, 56 INT'L & COMP. L. Q. 3, 623 (2007); for a critical evaluation of "fragmentation" discourse, see Martti Koskenniemi and Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. OF INT'L L. 3, 553

to make epistemic choices that involve not only discerning the "sources of international law,"[5] but that also invoke questions as to the role (or absence) of intentional authorship in the way that those sources produce rules and mutually interact.

In relation to constitutional law, the project framework presumes "the idea of a constitution as the product of a popular will informed by political science."[6] Any project must embody the will of a consciously acting subject, which can be individual or collective. A revolution giving rise to a newly-designed government and legal system cannot occur without a revolutionary *subject* that is its agent.[7] The United States (U.S.) Constitution is frequently described as legitimate not by virtue of the inherent validity of its norms, but rather as the result of a shared notion that it embodies the "will of the People."[8] Understood in this framework, the Constitution appears as a legal project: "an intentional act [ ] to realize an idea or set of ideas."[9]

(2002). "Fragmentation" becomes a problem inasmuch as it represents a loss of the ability for a legal order to express its assumed underlying objective[s]. On the other hand, various scholars specifically celebrate the *non*-unitary character of international law, seeing this as a feature of its successful functioning as an organic social system, e.g. for the mediation of conflicts and the pluralistic expression of various actors' different normative agendas. *See, e.g.*, Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. OF INT'L L. 2, 401 (2002); Monica Hakimi, *The Work of International Law*, 58 HARV. INT'L L.J. 1 (2017). For a major critical reaction to postwar centralized international lawmaking hearkening back to international law as a "system" of order among inherently conflict-prone state and peoples, see CARL SCHMITT, THE NOMOS OF THE EARTH IN THE INTERNATIONAL LAW OF THE JUS PUBLICUM EUROPAEUM (G.L. Ulmen trans., Telos Press, 2006). For an account of "progress" as a framework of international legal imagination closely related to that of the project, *see generally* THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2009).

5. The focus on the study of international law as a question of "sources" is a defining feature of positivism, which can be summarized as the doctrine that the validity of a legal norm is based not on its evaluation by extrinsic standards of morality or justice but rather its enactment according to a recognized standard for the generation of legal norms. *See, e.g.*, Samantha Besson & Jean d'Aspremont, *The Sources of International Law*, *in* THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW 1, 1–39 (Jean d'Aspremont & Samantha Besson eds., 2017); JEAN D'ASPREMONT, FORMALISM AND THE SOURCES OF INTERNATIONAL LAW: A THEORY OF THE ASCERTAINMENT OF LEGAL RULES (2011).

6. KAHN, *supra* note 1, at 5.

7. *Id.* at 16.

8. *Id.*; *see also* PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA (1997); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605 (1998); John AG. Griffith, *The Political Constitution*, 42 THE MODERN L. REV. 1 (1979).

9. KAHN, *supra* note 1, at 16.

This view of constitutional meaning might be compared to the far more quotidian examples of small-scale "projects" to create certain binding legal norms such as the act of writing a will or a contract. In looking at such documents, courts often must seek the intent of their drafters in order to determine the meaning of the resulting norms. A "will," in particular, is quite meaningless without presuming the notion of the "will"—i.e. some intent of the testator to create rules for disposing of their property.[10] In a somewhat analogous manner, "[w]e know the popular sovereign only by the text that it leaves behind."[11] Of course, statutes are also often interpreted by courts in light of the purposes behind their enactment, especially where there are ambiguities in the texts of such instruments.[12] In the case of both statutory and constitutional interpretation, the value of discerning "purpose" has been extensively debated over decades, but it remains an essential part of the repertoire of jurisprudence.[13]

Over time, however, the notion of interpreting the entire constitutional edifice as a project defined by a unitary intent has indeed declined quite dramatically in U.S. jurisprudence. In its place, there emerged various attempts to understand U.S. law as a "system." A "system" of norms is one that can potentially operate without reference to any intentional founding act, and is a proper object of study for the social sciences "all of which share the goal of locating the immanent systems operating in human affairs."[14] Although regulating human beings, the norms of such a system need not have their origins ascribed to intentional human action. Perhaps the most immediately recognizable example would be the "laws of the market" that undergird many modern accounts of economics.[15] All of the individual transactions that make up an economy might be intentional, but the overall economic order is not willed into being by any author. A constitution can also be interpreted as the result of "system effect[s] . . . [where] the properties of an aggregate differ from the properties of its members, taken one by

10. *See, e.g.*, Scott T. Jarboe, *Interpreting a Testator's Intent from the Language of Her Will: A Descriptive Linguistics Approach*, WASH. U. L. REV. 80, 1365 (2002); Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988); Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741 (1961).

11. KAHN, *supra* note 1, at 149-150.

12. *See, e.g.*, RICHARD EKINS, THE NATURE OF LEGISLATIVE INTENT (2012).

13. John David Ohlendorf, *Purposivism Outside Statutory Interpretation*, 21 TEX. REV. L. & POL. 235 (2016).

14. KAHN, *supra* note 1, at 8.

15. *Id.* at 16 ("Revolution and economics stand to each other as project to system.").

one."[16] In such accounts, legal interpretation has little need for an inquiry into authorial intent. Though highly *au courant*, earlier forms of such claims were already at work in Blackstone's writings on the common law, and over time they exerted an increasingly dominant impact upon U.S. legal interpretation.

This same binary opposition can be usefully applied to the historical development of public international law and institutions. Here too, the categories of "project" and "system" are principally epistemological in character, as they relate to the issue of determining what can be known about the content of legal norms and their interactions. As compared with domestic U.S. constitutional law, however, in international law, the imaginative movement has been in the opposite direction. Over the same mid-nineteenth through mid-twentieth-century period when the U.S. constitutional order was transitioning from a project into a system, international law was making the reverse transition—from a paradigmatic system of immanent or customary rules among states into a consciously-directed project, led by an "invisible college" of international lawyers, developing visions for the legal transformation of global order. Today, that imaginary framework is so dominant that it often goes unexamined.[17]

This Article will first introduce the conceptual distinction between project and system in more detail. It will do so both by reference to Kahn's explication of it in *The Origins of Order* and by reference to other relevant accounts of these or closely related concepts. After establishing the basic parameters of this conceptual dichotomy and the discursive environment in which "system" and "project" each arose, this Article will then use this framework to analyze the process of international law's transformation from the quintessential domain of system-thinking

16. Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4 (2009); for a very different account of constitutional jurisprudence that nonetheless shares the "system" ethos of organic, unwilled development, see AKHIL AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY (2012).

17. There are of course exceptions, where scholars have specifically taken up one or more aspects of the "project" imaginary as a topic of critique. Martti Koskenniemi, for example, made the development of this "group consciousness" one of the main themes of MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 (2001). David Kennedy has taken the self-conception of international legal actors as a focus of critique in various works including, recently, DAVID KENNEDY, A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY (2018). Kahn has also previously taken up a critical lens on the "project" character of international law (for example its reliance upon the notion of practitioners and scholars as "norm entrepreneurs") in works including PAUL W. KAHN, SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY (2009) and PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2005).

into a project-driven legal order taken up by centralized institutions. While constitutions were once conceived as comprehensive projects of self-ordering by a popular sovereign, they have, in some respects, been displaced by institutions claiming specific mandates to legislate and apply norms on a global level.[18] Yet it is often unclear how "agents" of international projects can be identified and whether their intent can be effectively construed in a similar manner in international as in domestic legal analysis.

II. The Project / System Distinction

A. *Law as System*

Various intellectual historians have noted the rise of the notion of the "system" as a key paradigm of modern social thought, with both political and legal implications. Scholars working in various contexts, including in the German tradition of *Begriffsgeschichte* (conceptual history) have identified in the emergence of the "system" in the social sciences a set of changing assumptions regarding society's function as an order of immanent rules and principles.[19] Despite divergent evaluations of the concept in such studies, the general parameters of its emergence are largely agreed upon and consistent with Kahn's account, though they do not draw out the jurisprudential implications that he develops in *The Origins of Order* and that are also the focus of this Article.

"System" is an ancient term although its meaning has changed considerably over time and has been adapted into numerous contexts. Etymologically, the Greek word σύστημα (*systēma*) referred to things that "stand together."[20] This was interpreted broadly, and was used to

18. Global constitutionalism is perhaps the arena of international legal discourse that most explicitly self-identifies as a "project" intended to bring about a specific envisioned legal order. *See, e.g.*, Christine Schwöbel, *The Appeal of the Project of Global Constitutionalism to Public International Lawyers*, 13 Ger. L.J. 1, 1 (2012).

19. Particularly relevant is the discussion of the concept included by the editors of the conceptual history lexicon *Geschichtliche Grundbegriffe* (GG). *See* Manfred Riedel, *System / Struktur*, *in* Geschichtliche Grundbegriffe Band 6 285–322 (Otto Brunner, Werner Conze, & Reinhart Koselleck eds., 1975); *see also* Reinhart Koselleck, Futures Past: On The Semantics of Historical Time 267–76 (2004). Significant discussions of the concept also include, for example, Niklas Luhmann's use of the "system" concept to encapsulate all social phenomena, including law, while presenting it as a philosophically justified perspective upon self-contained normative orders. This view is quite distinct from the more critical perspective displayed by the GG collaborators and in Kahn's study.

20. *See "Systema" and "Systasis"*, *in* Anthony Preus, Historical Dictionary of Ancient Greek Philosophy 377 (2007).

refer to, for example, musical notes, numbers, or city-states in a defensive alliance. It could also be used in the general sense of a "structure," including to refer to the political organization of the polis (in the narrow sense of regime-type).[21] Along with the closely-related term σύστασισ (*systasis*), it was notably adopted by Aristotle in his *Generation of Animals* to describe how the different parts of an animal function as interrelated, organic elements of the whole.[22] This included, for example, references to the embryo as a *systēma* that contained in essence the features and functions of the later developed creature.[23] Later, Stoic philosophers used the words *systasis* and *systēma* to describe the relationship between the soul and body, as well as the interrelationship of logical propositions in a series.[24]

What ancient uses of the term never included, however, was the use of the concept of the system to characterize "society" as a whole, or to consider the sum of human relationships and behavior as a subject that could be researched with the same assumption of organic unity as is on display in the growth of biological organisms. Such a notion of the "social system" would not emerge until the development of the modern social sciences. This shift began during the early modern period and became considerably more pronounced by the end of the so-called *Sattelzeit* ("saddle period") of transition around 1750-1850.[25]

Incipient modern ideas regarding law and politics as "systems" were connected directly with the importation of systemic research methods and perspectives from the physical sciences into the study of society through disciplines such as economics.[26] The marked transition to a system concept is made particularly visible by comparing uses of the term by Grotius, Hobbes, and Adam Smith. Citing Strabo, Grotius only very briefly uses the term *systēma* to refer to the "closest *foedus* [pact] between polities."[27] He does not, however, make general use of the concept of the system as a category for understanding society in general. Hobbes, by contrast, devotes Chapter 22 of *Leviathan* to discuss, "De

21. RIEDEL, *supra* note 19.

22. ARISTOTLE, DE GENERATIONE ANIMALIBUS (H. Daiber & H.J. Drossart Lulofs eds., 1992) (384 B.C.E.).

23. *Id.*

24. RIEDEL, *supra* note 19.

25. This term was coined by Reinhart Koselleck, a leading conceptual historian and one of the main collaborators of the GG project.

26. RIEDEL, *supra* note 19.

27. HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. 1, ch. III, ¶ 7 (Louise R. Loomis trans., 1949) (1625).

Systematibus Civium" ("Of Systems Subject, Political, and Private").[28] There, he provides a straightforward definition of the old Greek term in its new social context: "By systems I understand any number of men joined in one interest, or one business."[29] He also, however, makes explicit the connection of such "social systems" with those of biology, drawing a contrast between "political" systems generated by the sovereign power of the commonwealth with "private" systems that may be formed by individuals without political oversight. The former kinds of systems are by definition "lawful" and can be likened to the organs of the body; the latter meanwhile risk losing their lawful character and becoming akin to cancerous growths.[30]

Already in Hobbes's thought there was apparent a tendency to presume that a social system was suited for scientific study in a manner similar to the "systems" described in the physical sciences.[31] The further development of this idea became particularly apparent in the development of economic thought, with Adam Smith referring to "systems of political economy" as the object of his study in *The Wealth of Nations*.[32] Social philosophers like Smith fully intended their ideas to be used in the study of practical government administration, including in jurisprudence. As Kahn notes, Smith was hardly just an "economist" in the modern sense of the term. Rather, "[o]ne might best describe Smith's ambition as that of founding a science of the social upon which enlightened, government regulatory interventions could be based . . . [he was] a point of origin for the social sciences well beyond the particular concerns of economics."[33] The broader scope of Smith's work is especially apparent when reading *The Wealth of Nations* along with the earlier *Theory of Moral Sentiments*.[34] Taken together, the two works demonstrate Smith's consistent use of the same perspective to describe all social phenomena, what Kahn summarizes as "a combination of individual psychology and systemic order."[35]

Smith's approach is also apparent in his specific comments on the law of nations, which he addresses in his *Lectures on Jurisprudence*

28. THOMAS HOBBES, LEVIATHAN, ch. 22 (Richard Tuck ed., 1991) (1651).

29. *Id.*; *see also* RIEDEL, *supra* note 19.

30. RIEDEL, *supra* note 19.

31. On this point, see also, for example, RICHARD TUCK, HOBBES: A VERY SHORT INTRODUCTION 7 (2002).

32. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 333 (1812) (1776).

33. KAHN, *supra* note 1, at 61.

34. *See generally* ADAM SMITH, THE THEORY OF MORAL SENTIMENTS (1759).

35. KAHN, *supra* note 1, at 61.

[*Lectures on Justice, Police, Revenue and Arms*].[36] Here, a comprehensive social system appears as the unwilled effect of private decisions. This is demonstrated in the genesis of specific rules such as the ascription to governments of a wrong committed by one or more of their subjects. Smith asks how it may come to be "that a nation should be guilty of an injury which was not in its power?" His answer is based on the aggregative effects of individual psychology: "The real cause why the whole nation is thought a reasonable object of resentment is that we do not feel for those at a distance as we do for those near us. We have been injured by France, our resentment rises against the whole nation instead of the government . . ."[37]

The origin of the commonly accepted rule regarding state responsibility for delicts is thus, in Smith's account, not in any intentional act of legislation *nor* in "natural reason," but rather reflects an emergent feature of human psychology and behavior. Smith presents a question about a rule that could obviously be contested: Why is there a customary prohibition on the pillaging of civilian property during wars on land, but no such ban on capturing prizes at sea? Instead, "[a]n admiral seizes and plunders all the merchant ships he can get. Many of the merchants have done as little harm as the peasants; why then this distinction?"[38] The answer is to be found in the motivations for individual behavior transposed to the aggregate level of system-wide effects:

> It is the interest of the general not to rob the peasants, because it would be difficult to march an army carrying all its provisions through the country of an enemy . . . . It is quite otherways in a sea war. Every ship carries its own provisions, and has no dependence for them upon the ships which it meets.[39]

Even the basic customary norms of international legal interaction, such as the various types of diplomatic personnel and the rules for their treatment, were according to Smith "occasioned by the introduction of commerce, and [have] now become absolutely necessary."[40]

That the law of nations could be considered a "system" was an idea that had become generally established by the eighteenth century. This is apparent in Jean Barbeyrac's translation of Grotius's *De Jure Belli*

36. ADAM SMITH, LECTURES ON JURISPRUDENCE (R.L. Meek et al. eds., 1978).
37. *Id.* pt. V., § II.
38. *Id.* § 2.
39. *Id.*
40. *Id.* § 4.

ac Pacis, in which he uses the "system" concept to refer to the latter's entire enterprise and approach of studying the law of nations. Though, as noted above, Grotius had indeed briefly used the word *systēma* in the context of international relations, it did not play any major role in his work. By contrast, in a key passage, Grotius's text refers to his aim of studying the law of nations by "imposing upon it the form of an art" and "collecting into an art" the laws of nature (as opposed to those established by human action).[41] The latter, human-derived laws vary from place to place and are "placed outside [the realm] of art" (*extra artem posita sunt*).[42] Barbeyrac's French translation and the subsequent 1738 English version based upon it, however, replaces some of Grotius's references to an "art" with the notion of a "system":

> Many have before this designed to reduce [the law of nations] into a System (*réduire cette science en systême*); but none has accomplished it . . . . [T]he Laws of Nature being always the same, may be easily collected into an Art; but those which proceed from Human Institution being often changed, and different in different Places, are no more susceptible of a methodical System (*susceptible de systême méthodique*), than other Ideas of particular Things are.[43]

As is evident, while Grotius conceived of describing the "law of nature and of nations" as an "art," i.e. a task relying upon the skill, humanistic erudition, and powers of observation of the scholar undertaking it, Barbeyrac a century later had already turned to the terminology of system and "science." This shift in vocabulary was matched with a shift in methods used to define the law of nations. In the general course of canonical writings from Samuel von Pufendorf,[44] through Christian Wolff,[45] and on to Vattel,[46] there is a marked diminution in the use of

41. GROTIUS, *supra* note 27.

42. *Id.*

43. HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., 2005) (1625); 2 JEAN BARBEYRAC, LE DROIT DE LA GUERRE ET DE LA PAIX (1768).

44. SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO (H. Milford ed., Oxford Univ. Press 1934) (1672).

45. *See* CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM (H. Milford ed., Oxford Univ. Press 1934) (1749). Like Barbeyrac, Wolff uses the term "science," and indeed refers to the "scientific method", as the lens through which he seeks to analyze international law.

46. EMER DE VATTEL, LE DROIT DES GENS OU, PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS (Carnegie Institute of Washington, 1916) (1758).

"humanistic" authorities drawn from classical literary sources and historical examples and a steady increase, in the importance of contemporary state practice. If the task of studying the law of nations was for Grotius still chiefly a matter of interpreting ancient and modern history to discern principles of natural justice, by the time of Vattel it was in the main a task of observing particular forms of contemporary state behavior.[47] Despite Vattel's continued references to the "law of nature" in the subtitle of his influential treatise, he, like his contemporary Smith, invariably drew his justifications for international legal rules from the qualities that he ascribed to human social behavior. Thus it was a function of the law of nations not merely to serve as a moral check on selfish state action, but also to aid in the commerce between states that helps to transform a "confused heap of detached pieces" into a unified structure suited "for the maintenance of order and liberty."[48]

The course of international law from the pre-Grotian to the post-Vattelian era is not infrequently interpreted as part of a gradual shift from "natural law" conceptions to an increasingly "positivist" view of the field.[49] Throughout this entire period, however, there were various even more empirically-oriented writers on international law including Alberico Gentili, Richard Zouche, Samuel Rachel, and Cornelius van Bynkershoek. These scholars had gone further yet in placing emphasis upon the *jus voluntarium* embodied in treaties and custom—an interpretive approach that would become dominant by the early nineteenth century. With justice, they and other like-minded figures are sometimes referred to as "early positivists."[50] It is of course very true that positivism, both as a term of self-identification by publicists and in its specific sense as a doctrine regarding the sources of international law in positive

47. While Vattel speaks of a "*société universelle*," and defines the rules of international law as deriving from the rules of that society, he also at the same time continues the longstanding tradition of maintaining that "the law of nations is originally no other than the law of nature applied to nations." *Id.* Preliminaries § 6. At the same time, he cautions that "as the application of a rule cannot be just and reasonable unless it be made in a manner suitable to the subject, we are not to imagine that the law of nations is precisely and in every case the same as the law of nature." *Id.* The upshot of this caveat is that "the same general rule, applied to two subjects, cannot produce exactly the same decisions, when the subjects are different; and a particular rule which is perfectly just with respect to one subject, is not applicable to another subject of a quite different nature," and so empirical, positivistic methods are needed. *Id.*

48. *Id.* bk. III, § 47.

49. For a classic example foundational to many later discussions, *see* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY (Oxford Univ. Press 2011) (1933).

50. *See, e.g.*, CHARLES HENRY ALEXANDROWICZ, THE LAW OF NATIONS IN GLOBAL HISTORY (David Armitage & Jennifer Pitts eds., 2017); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (Macmillan 1954) (1947).

legislative acts, became intellectually dominant from the mid-nineteenth century through the early twentieth century.[51]

Despite the importance of this shift from "natural law" to "positivism," histories of international law that focus intensively upon this transition can serve to obscure other important transformations, some of which may serve to upend or at least reframe somewhat that traditional dichotomy. The move from "system" to "project" does not map neatly onto that other pair of terms. In particular, the conception of international law as a "system" resembling that of the physical sciences or of Smith's political economy did not mean abandoning the proclivity to see legal norms at the international level as emerging "naturally" from immanent principles. Rather, even if legal norms were now said to have their origin in positive acts of will by states, those acts were themselves interpreted as part of a larger, holistic order—resembling the vast series of individual transactions that make up an economy. Just as one might "will" a particular sale or purchase but does not will the entire economy or its basic rules into being, a positivist doctrine of sources did not require the ability to "will" into being fundamental features of international legal order. The implications of this absence of any unified will corresponding to the overall design of the international legal order will be examined further below in light of the ultimate emergence, by the late nineteenth century, of the very new idea that such a collective will did indeed exist after all.

This shift from system to project requires a historical account with different emphases than those that focus on the move from natural law to positivism. Thus Vattel's continued references to "the law of nature," like those of mainstream publicists well into the nineteenth century (and even the twentieth century),[52] were not in tension with his use of a system-oriented jurisprudence that also characterized those later publicists who tended to deny any "natural" source for norms.

As Vattel notes,

> There are many cases [ ] in which the law of nature does not decide between state and state in the same manner as it would between man and man. We must therefore know how to

51. For an insightful recent account of the rise of positivism, see MÓNICA GARCÍA-SALMONES ROVIRA, THE PROJECT OF POSITIVISM IN INTERNATIONAL LAW (2013). García-Salmones's characterization of positivism as a "project" entails the deliberate construction of a legal order based on formalistic jurisprudential interpretation. This is distinct from the "project episteme" described in this Article, but could be seen as one concrete instantiation of the latter.

52. *See, e.g.*, Hersch Lauterpacht's defense of natural law in Hersch Lauterpacht, *Kelsen's Pure Science of Law*, MODERN THEORIES OF LAW 105 (1933).

> accommodate the application of it to different subjects; and it is the art of thus applying it with a precision founded on right reason, that renders the law of nations a distinct science.[53]

To study the behavior of states as a social phenomenon would reveal systemic principles that contribute to both "virtue" and "self-interest," and that shape the meaning of the resulting law.[54]

The idea of legislating anew an entire area of law in order to advance specific purposes—the idea often animating legal codes, as well as written constitutions—was only just becoming available during the period in which Vattel was writing.[55] It had not yet been applied to international law, and would not be for some years to come. This mode of conceptualizing law is referred to here, borrowing from *The Origins of Order*, as that of the "project." Kahn describes this notion as differing from the notion of the "system" chiefly in respect to their respective relationships with intentionality and the will. Next, this article will review Kahn's account of the project and its distinction from the system as a mode of imagining legal authority.

B. *Law as Project*

At least since the Axial Age,[56] there have been proposals for the reordering of society. Plato's *Republic*, and later his *Laws*, presented various outlines for the comprehensive restructuring of society's structure and

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53. VATTEL, *supra* note 46, Preliminaries § 6.

54. Vattel expands upon his version of "natural law," and its lack of any need to take into account "divine will" or the divorcing of virtue from expediency, in explicit dialogue with Jean Barbeyrac in Emer de Vattel, *Essay on the Foundation of Natural Law and on the First Principle of the Obligation Men Find Themselves Under to Observe Laws* (T. J. Hochstrasser trans.), *in* THE LAW OF NATIONS 747, 747–742 (Béla Kapossy & Richard Whatmore eds., Indianapolis Liberty Fund 2008) (1746) ("When we have a correct understanding of self-interest; when we have constituted it mainly in the perfection of the soul, a perfection that already defines our happiness in itself, and which reconciles us with the good will of the Creator, what danger is there in confusing the meaning of integrity with expediency?"). That Vattel was *not* committed to either a consistent emphasis upon natural reason or a defense of existing state behavior is the argument of Ian Hunter, "Vattel's Law of Nations: Diplomatic Casuistry for the Protestant Nation, " 31 *Grotiana* 108 (2010) (arguing that Vattel's "inconsistent principles are deployed strategically."). The interpretive mode of a "system," of course, need not actually produce a set of consistent rules.

55. On the historical development of modern legal codes in the context of European civil law, see, e.g., Martijn van der Burg, *Cultural and Legal Transfer in Napoleonic Europe: Codification of Dutch Civil Law as a Cross-National Process*, 3 COMPARATIVE LEGAL HIST. 1 (2015); JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE (Princeton Univ. Press 2014) (1990).

56. *See* Karl Jaspers, *The Axial Age of Human History*, COMMENTARY, Nov. 1948.

norms.[57] At around the same time, the various polities of China's Warring States period (c. 475–221 B.C.E.) sponsored philosophers of the "hundred schools of thought" who produced a number of different arguments regarding the proper social and political order.[58] Some of these proposals profoundly challenged existing received wisdom and the inherited regulatory structures of political, economic, and interpersonal relations. Yet, radical as they may be, none of these texts initiated "projects" in a modern sense. Rather, they relied upon, and often were explicitly addressed to, rulers of states.[59] Literature for princes could have a much broader social and cultural impact, and, at times, such texts were clearly intended to serve a more general pedagogical function rather than primarily to advise existing political authorities. However, speculation and pedagogy are not the same as political action.[60]

As utilized in *The Origins of Order*, the concept of the "project" is an essentially modern form of political and legal subjectivity. Kahn's most succinct definition of it is as follows: "a project is a *choice* [ ] informed by an idea or a theory."[61] The elements of this definition will be examined in tandem. First, the idea of choice presupposes a will: the ability to choose otherwise. In the context of ancient and medieval "wisdom literature,"[62] "mirrors for princes" (*Fürstenspiegel*),[63] and the like, even where some specific political program is explicitly advocated, the ruler who is being advised is the only notionally willing subject. This remains the case even in the major innovative political and legal writings of the early modern period. The notion that members of a society could *collectively* decide upon projects of constitutional lawmaking developed quite late in the history of Western politics.[64] To better understand it, it is

57. *Cf.* PLATO'S 'LAWS': A CRITICAL GUIDE (Christopher Bobonich ed., 2010).

58. *Cf.* YURI PINES, ENVISIONING ETERNAL EMPIRE: CHINESE POLITICAL THOUGHT OF THE WARRING STATES PERIOD (2009).

59. *Id.* On the general problem of political writing in such circumstances, see ARTHUR M. MELZER, PHILOSOPHY BETWEEN THE LINES: THE LOST HISTORY OF ESOTERIC WRITING (2014).

60. *See, e.g.*, HANNAH ARENDT, AMOR MUNDI 29–42 (James W. Bernauer ed., 1987).

61. KAHN, *supra* note 1 at xii (emphasis added).

62. Kahn notes Thomas More's *Utopia* as well as the Jewish rabbinical tradition as examples of this genre. Various points of similarity might also be found in the Neo-Confucian texts of Zhu Xi and others in China, and medieval philosophers of the Islamic world and elsewhere. None can be read as political projects in the modern sense.

63. *Cf.* Rainer A. Müller, *Die Deutschen Fürstenspiegel des 17. Jahrhunderts*, 240 HISTORISCHE ZEITSCHRIFT 571–98 (1985). For an influential English example, see JOHN OF SALISBURY, POLICRATICUS (Murray F. Markland ed., 1979).

64. However, Richard Tuck and others suggest convincingly that this notion is actually implicit in key earlier writings, particularly those of Hobbes. This does seem to be the case. It would

helpful to first look more closely at its emergence in late eighteenth century political discourse.

Martin Loughlin has noted that, even with the major innovations in political thought brought on by Hobbes, and with the subsequent birth of social contract theory, the notion of law as "command"—specifically, the power to command that is vested in a legitimate sovereign—remained essentially in place.[65] He argues that it is only with Montesquieu that an "entirely modern concept of law" was developed.[66] This "modern" view is construed as follows:

> Each type of government (democracy, aristocracy, monarchy, and despotism) has both its nature, 'that which makes it what it is,' and its driving principle, 'that which makes it act' [ ]. The power of any regime [ ] is determined by the degree to which nature and principle—the constitutive and the regulative—are united.[67]

This dichotomy in Montesquieu's account of constitutional orders emerged during the same period in which the idea of the "system" discussed in the previous section was becoming increasingly prevalent. As opposed to traditional accounts in which law is a function of commands by a sovereign whose own legitimacy is premised on some higher authority, Montesquieu explicitly views law as an expression "of the necessary relations deriving from the nature of things[.]"[68] He ties the natural factors that influence these "necessary relations" to circumstances such as "climate and geography, customs and commerce, population and religion [all of which] invariably determine the type of regime that is established."[69] A successful government will be one whose laws (and whose own constitution) are drafted in accordance with the system of rules of which it itself is an expression, including both its external circumstances and its own "type."[70]

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nonetheless not be until the eighteenth-century revolutions that the "sleeping sovereign" would be called upon to engage in new projects of constitutional founding in an explicit manner.

65. Martin Loughlin, *Politonomy*, *in* THE OXFORD HANDBOOK OF CARL SCHMITT 134–35 (Jens Meierhenrich & Oliver Simons eds., 2016).

66. *Id.* at 138.

67. *Id.* (citing Montesquieu); *see also* MONTESQUIEU, THE SPIRIT OF THE LAWS 21 (A. Cohler et al. eds., 1989).

68. Loughlin, *supra* note 65, at 138–39.

69. *Id.*

70. *Id.* Montesquieu's principles that "make [government] act" consist largely of emotional drives (such as for Virtue, for Honor, etc.) that he takes to characterize entire societies.

Later thinkers articulated the critique that Montesquieu's idea of "natural" constitutional systems left little room for free action undetermined by factors outside of human control—he neglected the fact that to study "'the principles of political right' . . . required a consideration of *agency* as well as structure[.]"[71] The phenomenon of agency is that of the capacity to exercise a will: to make "a choice [ ] informed by an idea or a theory."[72] As a matter of conceptual history, the ascription of an active choice-making capacity to "the People" emerged explicitly only in the midst of the late eighteenth century revolutions.[73] Thus, while still an advocate for constitutional monarchy, Sièyes wrote in January 1789 that "whatever a Nation may wish, it suffices that it so wish; all forms are good and its will is always the supreme law."[74]

In August of the same year, the *Declaration of the Rights of Man and the Citizen* declared likewise that "the origin of all sovereignty resides essentially in the Nation."[75] Only four years later did the Constitution of 1793 finally transpose the locus of sovereignty from the abstract structure of the "Nation" (which Sièyes in 1789 had considered as a totality but as one still somewhat ambiguously related to its various estates and institutions) to the more concrete "People" considered as a singular collective actor.[76] This is also reflected in the revised version of the Declaration adopted at the same time, which, unlike the 1789 version, now states that "sovereignty resides in the People; it is unitary and indivisible, imprescriptible and inalienable."[77]

The idea of the state that emerges among the U.S. Founders as well as in Revolutionary France is one that must be made through deliberative, collective human action. Such action must still be informed by systemic ideas (indeed, in the case of the eighteenth-century revolutions, such ideas included those of Montesquieu, for example), but it is nonetheless still not a mere outgrowth of such ideas. The idea or theory must be brought into practical effect by the willed choice to create a new order. A constitution drafted for popular ratification launches a project in a way that a political treatise does not, even if the former is informed by the latter. Specific questions about the judicial interpretation of the popular will arise in practical government design that often need not be dealt with in pure theory. Thus, for example, Alexander

71. *Id.* (citing Jean-Jacques Rousseau).

72. KAHN, *supra* note 1 at xii.

73. *See Volk, Nation*, *in* RIEDEL, *supra* note 19, at 323.

74. EMMANUEL-JOSEPH SIEYÈS, QU'EST-CE QUE LE TIERS-ÉTAT? 84 (1789).

75. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN art. 3 (1789).

76. 1793 CONST. art 7 [Fr.].

77. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN art. 23 (1793).

Hamilton in Federalist 78 must address the situation "where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution," and explicitly state that "the judges ought to be governed by the latter rather than the former."[78]

The difference between viewing a legal order as a system versus viewing it as a project thus results very concrete differences in the interpretation and application of legal norms. One possible example involves a pair of cases that are usually seen as iterations of the same principle. Edward Coke's famous ruling in *Dr. Bonham's Case* held that "when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such Act to be void."[79] With this statement of the power of judicial review, Coke was articulating an idea of the judicial role that would be taken up much later by U.S. Supreme Court Chief Justice John Marshall's majority decision in *Marbury v. Madison*—crucially, though, the latter decision relied upon very different judicial reasoning.[80]

Both decisions rely upon the notion of an act of government's "repugnancy" as the basis for its potential invalidation by a judge. Yet, contrary to the traditional view that is where their similarities end. Coke claims the power to invalidate any Parliamentary act "against common right and reason."[81] The judge, in other words, is the voice of reason and of the entire common law tradition, with its unwritten principles, and can use these to override acts of government that contravene

78. THE FEDERALIST NO. 78 (Alexander Hamilton). It is important to note that the claim that the Constitution embodies the will of the People is not in any way necessarily an endorsement of the value of direct democracy. Instead, in the context of the Federalist Papers especially, the reverse is the case. The legitimacy of the new constitutional order is premised upon its association with the popular sovereign will, and it thus serves as an alternative to an unwritten constitutionalism in which a specific body is entrusted as embodying the whole. This point is also emphasized by James Madison in The Federalist 14 , where he notes that "[while] most of the popular governments of antiquity were of the democratic species [ ] even in modern Europe, to which we owe the great principle of representation, no example is seen of a government wholly popular, and founded, at the same time, wholly on that principle." THE FEDERALIST NO. 14 (James Madison). The U.S. government would have to reconcile being "wholly popular" with its design as a republic rather than a (classical) democracy; it could do this by associating the popular will with the constitutional order as a whole and the actual business of governing with institutional forms of representation: "this great mechanical power in government, by the simple agency of which the will of the largest political body may be concentrated [sic], and its force directed to any object which the public good requires." *Id.*

79. Thomas Bonham v. College of Physicians, [1610] 8 Co. Rep. 113b, 118a (C.P.).

80. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

81. Thomas Bonham v. College of Physicians, [1610] 8 Co. Rep. 113b, 118a (C.P.).

her or his interpretations of these vague standards.[82] By contrast, Marshall claims no such expansive power in *Marbury*. What is at issue for him is only government action that is "repugnant" to the written Constitution.[83] The *Marbury* opinion does not channel centuries of common law precedent or present a theory as to what is "reasonable." Rather, it ties the judicial power to an intention-bearing document that had been written in recent memory. Where *Dr. Bonham's Case* sources its judicial authority in immanent principles of English society and legal custom, the *Marbury* Court interprets a text to find the evidence of its own authority vis-à-vis other branches of government.

Kahn points to the *Marbury* opinion as providing "the most famous account of the Constitution as a project" in the following passage:

> That the people have an original right to establish for their future government such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed, is supreme, and can seldom act, they are designed to be permanent.
>
> [. . .] Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.[84]

In this passage from *Marbury*, Kahn writes, there are "all of the elements of a project of constitutional governance[:] an actor ('the people') [,] a set of abstract norms ('such principles'), and a product that is the result of the people's exertion (the 'American fabric' of institutions and laws)."[85] The project of U.S. constitutional self-rule would not be complete if it lacked any one of these three factors, for without an actor

82. This expansive claim was already a target for critique by Hobbes in THOMAS HOBBES, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND (Joseph Cropsey ed., 1997).

83. *Marbury*, 5 U.S. at 177.

84. *Id.* at 176–77.

85. KAHN, *supra* note 1 at 99-100.

it could not be a manifestation of a *will*; without referring to a set of norms it could not be a willed choice *for* anything (as opposed to an arbitrary action lacking reasons—what Kant, Hegel, and others have labelled *Willkür*);[86] finally, if it lacked a product or a material outcome it could not be a choice to *do* something concrete and empirically observable.

The project of constitutional self-government meanwhile adds another requirement: the product of willed choice must cycle back around to affect the character of the actor that has brought it into being. As Kahn puts it, "in a democratic political order, that fabric [of which Marshall speaks] is the formation of the people themselves: the people impose law upon themselves . . . . The people, then, are both the cause and the effect of the constitutional project."[87] By the time of the Marshall Court, the public law of constitutional interpretation had emerged as such a project. Yet, international law remained firmly ensconced in the paradigm of the system and would not fully display the characteristics of the other episteme until the late nineteenth century. At the same time, however, key foundational elements of the later turn towards the project imaginary in international law were already being developed.

III. The Conceptual Transformation of the Law of Nations

A. *International Norms as Limiting Principles*

By the time Adam Smith provided his comments on the subject in the early 1760s, the major international law publicists of the seventeenth and eighteenth centuries had already chipped away significantly at the respective roles of "divine will" and of "natural reason" in defining the law of nations. Instead, there was an ever-clearer disposition among writers to classify international law as a system based on principles intrinsic to human social relations and in interactions between states. It was during this same period of time that the English common law, as well, was ever more coming to be interpreted as an organically evolving social system. Perhaps more than any other contemporary figure, this perspective on the law is associated with William Blackstone.[88]

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86. *See generally* Arto Laitinen, Erasmus Mayr, & Constantine Sandis, *Kant and Hegel on Purposive Action*, 21 Philosophical Explorations 90 (2018); *cf.* Alan Patten, Hegel's Idea of Freedom (1999).

87. Kahn, *supra* note 1 at 101.

88. *See* William Blackstone, Commentaries on the Laws of England: In Four Books 1 (George Sharswood ed., Childs & Peterson 1860) (1765); *cf.* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buff. L. Rev. 205 (1978) (Duncan Kennedy's critique). *But see The*

Blackstone shared with Smith key premises regarding the nature and function of the law of nations. This is evident in the role that international law plays in his broader doctrine regarding the origins of legal rules. In particular, the assumption that law comprises an organic system is on display in his mixing of norms from different sources—written statutes, "customs of the realm," and the law of nations—into a single body of supposedly harmonious legal rules.[89] This view of the law of nations' function in domestic law was by then shared widely throughout the legal culture of Western Europe and the Americas.

As Blackstone writes in his *Commentaries on the Laws of England*, "the law of nations . . . is here adopted in its full extent by the common law, and is held to be a part of the law of the land."[90] Just a year before he began publication of his *Commentaries* in 1765, this same sentiment had been expressed by Lord Mansfield in relation to the principle of diplomatic immunity in the case *Triquet v. Bath*.[91] Over the next few years, Lord Mansfield would rule on other relevant cases, being required to interpret Parliament's Diplomatic Privileges Act of 1708 and to define the extent of its protections.[92] This he sought to do by developing the doctrine that Parliament's Act had not been an independent positive source of legal authority, but rather had been "only declaratory of the law of nations" already in effect.[93] In *Heathfield v. Chilton*,[94] meanwhile, Mansfield is faced with a boundary-pushing case of a minor servant, of a minor official, of a very minor state (the Prince-Bishopric of Liège), who is seeking immunity to avoid his debts. Because the 1708 diplomatic immunity rule was to be viewed as part of a "system" of international customs, not as the product of Parliament's own will (or that of "the People"), Mansfield cannot have resort to any "intent" of Parliament to restrict application of the norm. Instead, he rules that a technical exception applies because the debtor has not clearly alleged when he entered into service and thus came under diplomatic protection.[95]

Structure of Blackstone's Commentaries, 97 YALE L.J. 795 (1987) (a critical response questioning Kennedy's assertions as to Blackstone's novelty in Alan Watson).

89. Watson, *supra* note 88.

90. BLACKSTONE, *supra* note 88, at 66–67.

91. Triquet v. Bath, 3 Burr. 1478, 1481 (1764) ("[t]he law of nations [is] part of the law of England").

92. *See* Lockwood v. Coysgarne, 3 Burr 1676 (1765); Heathfield v. Chilton (1767) 4 Burr 2015 (KB).

93. *Lockwood*, 3 Burr 1676. at 1678.

94. *Heathfield*, 4 Burr 2015, 2016.

95. *Id.*

In the Blackstonian conception, any outright conflict between valid sources of norms must be avoided, and the system's coherency upheld. The glue supposedly holding together this collage of authorities is the notional "artificial reason" available to judges and scholars. Study of the law and experience in its practice would, Blackstone believes, allow these professionals to reveal an underlying unity behind the apparently arbitrary. Thus, for common law judges in England, the method for judicial interpretation would be much the same whether the rule to be applied stemmed from domestic precedent or from the law of nations. In either case, the judge would be charged with providing a definition of the rule, taking into account relevant precedent and finding a way to fit its generalized prescriptions to the facts of the case (not infrequently adapting them in order to smuggle in desired outcomes, as in *Heathfield v. Chilton*).[96]

In such jurisprudence, the explicit terms of an international norm would serve to limit the possible range of acceptable interpretations of the law as applied to particular cases; they would not, however, serve as a domain for judicial inquiry into legislative intent or for the intentional or explicit articulation of new standards. Mansfield's celebrated ruling in *Somerset v Stewart*,[97] declaring the illegality of slavery in England, is a case in point. Reflecting the changing ethical assessment of slavery in the English social milieu, Mansfield uses the absence of any positive domestic legal authority authorizing the practice as the basis for articulating a general ban.[98] This is applicable only on English soil, however. As between states, or even throughout the British colonies, it is still the case that slavery is permissible under the customary law of nations.[99] Even where a judge might seek to (subtly) innovate within the system of the common law, such innovation would be notionally limited by its inability to change underlying norms at the interstate level.

The same dynamic was also at work in the U.S. approach to the domestic and international law distinction. In a book chapter contributed to the edited volume *International Law and Religion*, Kahn provides a discussion titled "The Law of Nations at the Origin of American Law"[100] that complements the Constitution-focused account in *The*

96. *Id.*

97. Somerset v. Stewart, (1772) 98 Eng. Rep. 499.

98. *Id.*

99. *Id.*

100. Paul W. Kahn, *The Law of Nations at the Origin of American Law*, *in* INTERNATIONAL LAW AND RELIGION: HISTORICAL AND CONTEMPORARY PERSPECTIVES 414 (Martti Koskenniemi, Mónica Garcia Salmones Rovira & Paolo Amorosa eds., 2017).

Origins of Order. There, he discusses how, although the early Supreme Court reasserted the view that the law of nations was indeed still "part of the law of the land," the Marshall Court had nonetheless already identified a "puzzle [that] emerges directly from the two faces of sovereignty: one, a *project* of law creation taken up by a self-governing community; the other, participation in a *system* of law among independent states."[101] Outside of the Anglo-American context, in the German academic tradition of *Staatsrechtslehre*, reconciling this "dualism" would later come to be treated as a central problem of positivist legal theory.[102] Yet as a practical problem of applied jurisprudence, it was already present from the very beginnings of the post-revolutionary order.

The post-revolutionary state was a project that often laid claim to the support of general principles, including those comprising the recognized rules of the law of nations. In particular cases, the law of nations could even usefully supplement the legitimacy of "a democratic regime that cannot reconcile its simultaneous commitments to equality and liberty."[103] As Kahn notes, this is particularly apparent in cases dealing with the rights of Native Americans who had come under U.S. jurisdiction as the result of a history of conquests. Such groups could retain a "natural" right of occupancy under the law of nations. Yet that same law would endow the United States with the title to all property, as per the rights of conquest. Once independent peoples could be reduced to the status of "domestic dependent nations,"[104] and this would be justified—*not* by the constitutional project of the American people, but rather by the background of legal rules comprising something close to Smith's system of "natural" inter-state relations.[105] Hobbes too had written of the sovereign rights conferred after "[d]ominion acquired by conquest."[106] Those conquered would become subjects of the state after surrendering and making a "covenant" to support the new sovereign. Yet no honest observer could call this submission an act of "self-rule" by a participant in constituent power.

This model of the law of nations—as a source of rules justifying rights and powers that are difficult to reconcile with the revolutionary project of self-government—closely resembles the theological sub-discipline of

101. *Id.* at 414.

102. *See generally* Jochen von Bernstorff, *Georg Jellinek and the Origins of Liberal Constitutionalism in International Law*, 4 GOETTINGEN J. INT'L L. 659 (2012).

103. Kahn, *supra* note 100, at 429.

104. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

105. *Id.*

106. Kahn, *supra* note 100, at 427 n.55 (citing THOMAS HOBBES, LEVIATHAN 130–31 (Edwin Curley ed., 1994) (1651)).

theodicy.[107] Rather than focusing on the nature of the divine will or God's plan for the world in general, theodicy instead focuses specifically upon explaining the reasons lying behind apparently evil or irrational phenomena. The Marshall Court's justification of the subjugated status of Native Americans, as well as its understanding of the legality of slavery,[108] was based on the system of legal obligations arising from the law of nations. The collectively willed constitutional project was conditioned and limited at its "margins" by these unwilled institutions and norms that were part of the system of the world.[109]

The interstate domain was a realm of systems *par excellence*. Not only the rules governing acquisition of land by conquest and the legality of slavery, but also a wide range of other matters with international components were interpreted by courts in line with the view that the norms governing them were produced by organically-developing custom, rather than any deliberate legislation. Maritime law and private international law were, as noted, particularly significant in this regard. In terms of the latter, conflict of laws doctrine is a clear example.

In 1689, when the Frisian jurist Ulric Huber sought to present in a simple fashion the rules governing choice of law, he abstracted from current state practice as well as the principles of Roman law to present a set of basic formulae. In his *De Conflictu Legum*, he sets forth the axioms that: "first, the laws of a state (*imperii*) apply within its territory, binding all those subject thereto, and not without; second, that all persons, permanently or temporarily [residing] within the territory of a state, are to be deemed subject to its laws; third, that the rights of each nation exercised within its territory, are by comity recognized as having their effect everywhere, insofar as the power or law of another state and its citizens is not prejudiced."[110] These were not rules based on logical syllogisms, nor were they legislated by any deliberate political act. Rather, they were organic outgrowths of the European state system in which sovereigns and subjects had developed customary rules of interaction in pursuit of their own rational interests.[111]

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107. *Id.* at 420–22.

108. *See generally* Note, *International Norms and Politics in the Marshall Court's Slave Trade Cases*, 128 HARV. L. REV. 1184 (2015).

109. Naturally, looking back today we do not see the subjugation of Native Americans or the institution of slavery as "marginal" to the early United States or its legal system. Yet an attempt to assert that marginal character is clearly at work in the Marshall Court's reasoning claiming the limited scope of the constitutional project.

110. Ulric Huber, *De Conflictu Legum Diversarum in Diversis Imperiis*, *in* ERNEST G. LORENZEN, SELECTED ARTICLES ON THE CONFLICT OF LAWS 162, 162–180 (1947) (1689).

111. Ernest Lorenzen, *Huber's De Conflictu Legum*, 13 ILL. L. REV. 375 (1919).

This view had become dominant in the early part of the nineteenth century. When Supreme Court Justice Joseph Story sought to present his own systematic account of the latter field in his *Commentaries on the Conflict of Laws*,[112] he strongly endorsed Huber's model of customary norms between sovereigns while suggesting that "'comity of nations' [ ] is the most appropriate phrase to express the true foundation and extent of the obligation of the laws of one nation within the territories of another."[113] Comity demanded that sovereigns recognize each other's laws, regardless of any inquiry into the "will" that had legislated them, popular or otherwise. Story's conception of comity, and his channeling of Huber, would exert great influence on the ever-more-important field of private international law. Embodying the systematizing spirit of international law writing at the time, he viewed recognition of the principle of comity as an important step "towards the establishment of a general system of international jurisprudence."[114] As with territorial conquest, slavery, and maritime law, the conflict of laws was dominated by systemic legal interpretation. Originally, none of these domains were seen as susceptible to becoming anyone's project, though this would gradually change in a piecemeal fashion.

A new pressure being exerted upon the "system" perspective on the law of nations by a nascent "project" consciousness is however especially apparent in relation to the slave-trade. In 1825, for example, Marshall in *The Antelope* pointed to the longstanding natural law justifications of slavery in the rights of the conqueror that had been recognized by numerous treatise writers as part of the system of the law of nations.[115] Already a few years earlier, Justice Story had claimed the *illegality* of slavery under emerging norms following the recent British-led efforts to eradicate the practice. However, he had nonetheless issued a ruling returning a seized slave-ship property to King Louis XVIII of France based on international comity—the general systemic principle that he advocated as the basis for deference to foreign law in conflict of laws cases.[116] Story's "general system of international jurisprudence" would continue to require the recognition of slaves as property under the laws of a foreign state. The norms of the system could evolve, but they could not retroactively annul already-vested property rights.

112. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38, at 37 (1834).

113. *Id.* § 645, at 532.

114. *Id.* § 38, at 37.

115. The Antelope, 23 U.S. (10 Wheat.) 66, 120-121 (1825).

116. United States v. La Jeune Eugenie, 26 F. Cas. 832, 851 (C.C.D. Mass. 1822).

The nineteenth century abolition of the slave trade would indeed serve as one important arena for the developing "project" consciousness of international law. However, in its initial, largely *unilateral* form abolition lacked key defining features of the "project" as defined in this Article:[117] the presence of a consistently identifiable "actor"; a definite set of "principles" informing the legislative act; and a legislative "product" of that act in the form of enduring, institutional norms. By the end of the nineteenth century, there would indeed be international legal projects that met all three criteria. The process by which they emerged displays how genealogically related legal norms and institutions can take on significantly different stakes, jurisprudential assumptions, and practical outcomes depending on whether or not they are conceived as intentional acts of a communal will. The following section will discuss this transition period, particularly in reference to the newly emerging possibility in post-Napoleonic Europe of imagining a collective subject capable of acts of international legislation.

B. *Constituting an International Legal Community*

Either a project or a system-based model can be seen as capable of innovation. In some of the system-oriented treatises of the late eighteenth century, international law publicists and theorists had already begun to take progress as a central problem of the field. Johann Jakob Moser had already considered international legal norms as increasingly binding Europe into "a great state body" (*ein*[] *groß*[ ] *Staatskörper*).[118] Later, Georg Friedrich von Martens observed the turn to norm legislation within Europe.[119] His highly-influential *Précis du Droit des Gens Moderne de l'Europe fondé sur les Traités et l'Usage* of 1789 put new emphasis upon the progressive development of new norms within this state-like body. However, he did not conceptualize such developments as a deliberate exercise of collective "will" by the states thus united. Instead, in keeping with the system perspective advanced by Vattel and other predecessors, he identified innovation with the organic growth of norms within a spatially constrained interstate order.[120]

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117. *See* KAHN, *supra* note 1 at 99-100.

118. *Id. See also* Johann Jakob Moser, *Versuch des neuesten Europäischen Völker-Rechts in Friedens- und Kriegszeiten*, 10 Teile, (Frankfurt 1777–1780).

119. GEORG FRIEDRICH VON MARTENS, PRÉCIS DU DROIT DES GENS MODERNE DE L'EUROPE: FONDÉ SUR LES TRAITÉS ET L'USAGE. TROISIÈME EDITION REVUE ET AUGMENTÉE (Dieterich, 1821) [1789] [original Latin version 1785].

120. *See, e.g.*, Martti Koskenniemi, *Into Positivism: Georg Friedrich von Martens (1756–1821) and Modern International Law*, 15 CONSTELLATIONS 2, 189 (2008).

As Martens was writing his *Précis* in the 1780s, in Britain, Blackstone's former student Jeremy Bentham was criticizing the common law (or "judiciary law") ideal of a unified system as a "fictitious composition which has no known person for its author, no known assemblage of words for its substance."[121] To associate law with a set of rational principles somehow uniquely comprehensible to judges was to reduce it to a fanciful "ether" taking the place of real, "sensible matter."[122] By contrast, he argued, whoever "wants an example of a complete body of law to refer to, must begin with making one."[123] Bentham's positivism was an explicit call for law to be made into a project, and it was one that he would also extend into the international sphere.[124]

Already, in early writings of the 1770s, Bentham had made critical references to the Blackstonian conception of the law of nations. However these were passing comments and did not display familiarity with the subject or the various areas of case law with which they were connected.[125] It was not until his *Introduction to the Principles of Morals and Legislation* (only widely published in 1789, though completed earlier in the decade)[126] that Bentham would begin to provide extensive commentary on the law of nations, or rather "international law," the new term that he introduced to describe this field as part of "plan of a body of law, complete in all its branches."[127]

Bentham did not publish or widely disseminate such a "plan" for a reorganization of international law. However, he did write several pieces on the subject in the late 1780s, in particular essays entitled "Objects of International Law" and "A Plan for an Universal and Perpetual Peace" that would not be published until decades later.[128] In his writings, he extended his philosophy of utility as the source of principles for projects of legislation to the international sphere: "If a citizen of the world had to prepare an universal international code, what

121. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION xi (1823) (1789).

122. *Id.*

123. *Id.*

124. *See generally* M. W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405 (1984); David Armitage, *Globalizing Jeremy Bentham*, 32 HIST. OF POL. THOUGHT 63 (2011).

125. *See* Janis, *supra* note 124, at 408.

126. BENTHAM, *supra* note 121.

127. *Id.*

128. These writings were first published posthumously in 2 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM, PUBLISHED UNDER THE SUPERINTENDENCE OF HIS EXECUTOR, JOHN BOWRING (John Bowring ed., 1843).

would he propose to himself as his object? It would be the common and equal utility of all nations: this would be his inclination and his duty."[129] He also called for the creation of "a common court of judicature" that could oversee the resolution of transnational disputes.[130] It is clear that Bentham, among others, was already *envisioning* international law as a field for projects. However, that does not mean that a project of international law had actually come into being as a social or institutional (or jurisprudential) reality.[131] Bentham's writings could of course influence public opinion, but his specific proposals did not initiate actual deliberate legislative action.

Meanwhile, in the very different context of Revolutionary France, the new emphasis upon the collective will as a source for legislation was also being extended into the international sphere. Of course, the *Déclaration des droits de l'homme et du citoyen*, which Sièyes had played a leading role in drafting, was explicitly universal in the enunciation of its norms—as were the wars and diplomacy of "liberation" undertaken during the 1790s.[132] However, this universality was not expressed in the form of specific judiciable legal norms regulating affairs between states. In the main, references to a collective legislative will remained limited to the framework of the "Nation" (and, later, the "People") so important in the writings of Sièyes and other ideological leaders.

Some however, such as Abbé Henri Grégoire, actively sought to extend the Revolution's remaking of political and legal institutions into the realm of interstate affairs. In particular, between 1793 and 1795, Grégoire sought to advance his *projet* [legislative proposal] for a Declaration of the Law of Nations.[133] In assembly meetings of June 18, 1793, and April 23, 1795, Grégoire proposed a new codification of international legal principles, including general norms such as that "the particular interest of each people is subordinated to the general interest of the human family" to specific rules regarding the inviolability of territory, the sanctity of treaties, the common ownership of the sea, etc.[134] All nations should be ensured "juridical equality" regardless of

129. *Id.* at 537.

130. *Id.* at 547.

131. *Cf.* KAHN, *supra* note 1 at 99-100.

132. DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN, *supra* note 75; *see also Volk, Nation*, *in* RIEDEL, *supra* note 19.

133. *See* L. Chevalley, LA DÉCLARATION DU DROIT DES GENS DE L'ABBÉ GRÉGOIRE, 1793–1795: ÉTUDE SUR LE DROIT INTERNATIONAL PUBLIC INTERMÉDIAIRE (1912); *see also* Vladimir-Djuro Degan, *L'affirmation des principes du Droit naturel par la Révolution française: Le projet de Déclaration du Droit des Gens de l'abbé Grégoire*, 35 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 99 (1989) (Fr.).

134. GAZETTE NATIONALE, OU LE MONITEUR UNIVERSEL (Paris), Apr. 26, 1795.

size, all peoples should be able to change their governments, and all "free" states should be recognized as legitimate.[135] Neither of Grégoire's attempts resulted in an agreement to put the declaration to vote, with delegate Philippe-Antoine Merlin de Douai arguing that such a proposal would rather be fit "for a general congress of the powers of Europe."[136] Neither the Directory nor the subsequent Consulate, however, pursued this idea, though it did generate considerable engagement.

Among those responding to Grégoire's *projet* was Martens, who devoted the preface of his 1796 edition of his *Précis* to thoroughly critiquing the suggestion that "all the peoples of Europe could unite sometime to adopt general positive stipulations as to the entirety of the law of nations . . . according to a *code of positive international law.*"[137] Dismissing this notion as "unrealistic" and as too closely resembling "a project of perpetual peace,"[138] Martens instead defended the systemic idea that it was perhaps possible "that on the occasion of some future peace many powers would convene expressly or tacitly on various individual points, and thus influence a more general change in the manner of treating affairs . . . of which the Peace of Westphalia serves as an example[.]"[139] By contrast, to attempt to legislate for mankind on the basis of universal principles was no better than "a beautiful dream that one could indulge in during moments of leisure."[140] In his conclusion, Martens asks if he is not perhaps giving too little credence to the idea of a "new law of nations," and whether this might not be self-deception on account of his "predilection for a science which one now predicts will undergo a total revolution to the sound of fanfares,"[141] but these comments are clearly sardonic.

Neither Grégoire's proposed declaration nor Kant's more speculative philosophical sketch *Zum ewigen Frieden*,[142] published the same

135. *Id.*

136. *Id.*

137. Georg Friedrich von Martens, *Extrait de la Préface à l'Édition Allemande de 1796*, *in* MARTENS, *supra* note 119, at xvii.

138. *Id.* at xviii.

139. *Id.* at xvii.

140. *Id.* at xviii.

141. *Id.* at xxix.

142. IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY (Pauline Kleingeld ed., David L. Colclasure trans., Yale Univ. Press 2006) (1795); *see also, e.g.*, Allen Wood, *Kant's Project for Perpetual Peace*, PROCEEDINGS OF THE EIGHTH INTERNATIONAL KANT CONGRESS (1995).

year,[143] seemed to Martens to introduce any novel potentiality for the establishment of an international law code. This is despite the fact that he admitted that it would be useful if the states of Europe could meet to agree upon a ban on "pernicious" but not currently prohibited practices such as privateering.[144] However, he very much doubted that such a ban would be possible—the "crossing interests" of European states made any such general agreement highly unlikely. This theodicy of naval warfare was the same in essence as Smith's—rules emerged systematically from the self-interested behavior of states, not from a deliberate plan of legislation to achieve specific goals.[145]

Martens's interested engagement with but ultimate rejection of the *projets* for perpetual peace demonstrates the power of the "system" conception of the field by its leading publicists and interpreters. In the preface to his subsequent 1801 edition of his *Précis*, he notes the continued applicability of the basic principles of the law of nations that had been the subject of his earlier work, despite the significant "developments" brought on during the Napoleonic Wars.[146] However, by the time he added a new preface to the edition of his *Précis* published twenty-five years later (the year of his death), Martens was forced to recognize that "since the beginning of the 19th century, events have rapidly succeeded that . . . raise questions whose practical utility had until now seemed doubtful," including major questions concerning "the positive law of nations after the reorganization of Europe."[147]

This "reorganization of Europe" to which Martens refers is that which took place at the Congress of Vienna between late 1814 and mid-1815, with the new establishment by treaty of an interstate order that would come to be referred to as the "Vienna System."[148] Prince Klemens von Metternich, who was a primary architect of the "system" of orderly rules for interstate conduct on the Continent that it produced, paired a vocal commitment to the *droit des gens* with an interpretation of that law centered upon the legitimacy of recognized states and governments (thus opposing

143. *Id.*; Kant's essay would also be translated and republished throughout Western Europe. A summary and translation of key points of Kant's "*projet de paix perpetuelle*" even appeared in the GAZETTE NATIONALE, OU LE MONITEUR UNIVERSEL (Paris), Jan. 3, 1796, at 410.

144. MARTENS, *supra* note 119, at xxiv.

145. SMITH, *supra* note 36 § 4.

146. MARTENS, *supra* note 119, at xxx-xxxiv.

147. MARTENS, *supra* note 119, at xxxv.

148. *Cf.* Wolf D. Gruner, *Was There a Reformed Balance of Power System or Cooperative Great Power Hegemony?*, 97 AM. HIST. REV. 725, 725–26 (1992).

the Revolutionary justifications of insurrection and liberation).[149] After the Congress of Vienna, it indeed became possible to speak of a "public law of Europe."[150] The promulgation of norms took on new meaning when placed into the context of a concrete institutional framework for the coordination of recognized positive legal authorities, as well as a remaking of the constitutional arrangement of the states of Central Europe.[151]

The post-Congress diplomatic landscape began to appear like a domain in which it was possible to undertake genuine projects of international legislation. However, both the conservative motivations underlying the new framework and the ongoing commitment of publicists to some of their traditional concepts prevented this faculty for collective legislation from becoming immediately realized. Indeed, Martens remained insistent that even the monumental "changes" introduced at Vienna had not "change[d] the immutable principles of natural law that serve as the basis for the rights of nations."[152]

The continued prevalence of the interpretation of international law as a system and its only gradual transition into the model of an intentional project is apparent in reference to the development of specific norms. Of these, the abolition of the slave trade is a significant example. These efforts began in Britain. At the same time that Bentham was writing about the need to treat international law as part of a "plan of a body of law[ ]complete in all its branches,"[153] the Society for Effecting the Abolition of the Slave Trade was forming and beginning its advocacy for a change to the applicable norms of national as well as international law. It would achieve a domestic ban in 1807, in the midst of the Napoleonic Wars, and this was very quickly associated with an international dimension. British naval forces seized and searched foreign vessels for military purposes but also, in line with the statute of 1807, to

149. *See, e.g.*, James R. Sofka, *Metternich's Theory of European Order: A Political Agenda for "Perpetual Peace"*, 60 REV. POL. 115, 147 (1998).

150. *See* discussion in *Völkerrecht*, GESCHICHTLICHE GRUNDBEGRIFFE, *supra* note 19.

151. *See, e.g.*, General Treaty of the Final Act of the Congress of Vienna art. XLVI, June 9, 1815 ("The city of Frankfort, with its territory, such as it was in 1803, is declared free, and shall constitute a part of the Germanic League. Its institutions shall be founded upon the principle of a perfect equality of rights for the different sects of the Christian religion. This equality of rights shall extend to all civil and political rights, and shall be observed in all matters of government and administration. The disputes which may arise, whether in regard to the establishment of the Constitution, or in regard to its maintenance, shall be referred to the Germanic Diet, and can only be decided by the same.").

152. MARTENS, *supra* note 119, at xxxv.

153. BENTHAM, *supra* note 121 at ix.

suppress the slave trade.[154] The United States initiated its own ban the next year, reflecting Anglo-American exchanges of ideas on the issue. However, general international legal norms permitting the slave trade were still recognized by courts.[155] To challenge these, Britain signed bilateral and multilateral agreements prohibiting the trade—although, significantly, only the former were associated with mechanisms for binding enforcement or created norm-applying institutions (mixed courts).[156]

It is highly debatable whether the slave trade ban should be seen as part of the "origins of international human rights law."[157] The institutional background of the modern human rights system is of course radically different from that of early abolitionism.[158] However, abolition did indeed comprise one of the earliest internationally-directed legislative efforts, with abolitionists and the Parliamentary majorities they influenced taking it upon themselves to actively shape the global norms concerning this area of law.[159] This certainly represented an *attempt* at initiating an international legislative "project." Yet even so it was still operating in an international legal "system," and exhibited the resulting limitations regarding the possibility for legislative intent to revise systemic norms. From a separate article between Britain and France appended to the multilateral Treaty of Paris of 1814, it was elevated to the Europe-wide level via the Final Act of the Congress of Vienna the following year.[160] Act XV of the latter notes that the slave trade is "repugnant to the principles of humanity and universal morality," and unites the states parties in pledging to eliminate it—but only on their own chosen schedules.[161] In a sign that the ban on the slave trade had not yet reached a stage of international "legislation," it was paired in the Act with a recognition that "determining the period when this trade is to cease universally, must be a subject of negotiation between the Powers[.][162]

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154. JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW 24–25 (2011).

155. *Id.* at 25–31.

156. *Id.* at 78–81.

157. *Id.* at 148–49.

158. Philip Alston, *Does the Past Matter?: On the Origins of Human Rights*, 126 HARV. L. REV. 2043, 2050 (2012).

159. MARTINEZ, *supra* note 154, at 21–22.

160. *Cf.* Robert Rie, *The Origins of Public Law and the Congress of Vienna*, 36 TRANSACTIONS OF THE GROTIUS SOCIETY 209, 227 (1950).

161. Final Act of the Congress of Vienna, Act XV, Feb. 8, 1815.

162. *Id.*

Like modern multilateral agreements that function as joint declarations of "principles," Act XV did not commit the signing states to immediately prohibit the slave trade, or even establish a timetable for doing so, nor did it create any accountability mechanisms. In light of the three-part definition of a legal project used in this article, it comes up short, at minimum, with regards to the third prong requiring the forming and empowering of definite institutions.[163]

Martens in 1821 could clearly conceive of the law of nations as a domain for intentional projects, and even invites his reader to see it as such, but jurisprudentially he declines to make "will" or intent an independent factor in interpreting its norms. In his specific comments on the slave trade, he says that the abolition of this "shameful traffic . . . that makes humanity cry out" became "a serious object" of the Congress of Vienna, as it had been the "object" of the previous British bilateral treaties.[164] While indicating the "agreement" of the other Congress powers to the British proposal, however, he also notes that the "time fixed for abolition is not uniform."[165]

On the one hand, Martens thus recognizes an "intent" of this multilateral legal agreement that goes beyond the strict letter of its effectively enforceable articles. Yet he explicitly refrains from making the argument that the Act should be read in light of this underlying "intent" to have *already* universally prohibited slavery or the slave trade. This is clear by examining his later comments on slavery in relation to the enslavement of prisoners of war. As he notes, "there is no longer any question of enslavement among the Christian powers of Europe today[,] however as barbaric states have not yet generally renounced this ferocious practice, it may be employed against them still by right of reprisal."[166]

International law publicists like Martens took careful note of the various Continental statements and domestic enactments after 1815. However, it was not until the Treaty of London of December 20, 1841, that the Congress powers would formally agree upon an effective international ban on the slave-trade, including such provisions as setting specific rules for ship searches and seizure and criminalizing as akin to "pirates" any of their own citizens found to be engaged in the slave

163. *See* Randall Lesaffer, *Vienna and the Abolition of the Slave Trade*, *in* OXFORD PUBLIC INTERNATIONAL LAW ONLINE (2015) (describing Congress's declaration as lacking "concrete obligations" and as a "disappointment" to abolitionists), available at: https://opil.ouplaw.com/page/498; *Cf.* KAHN, *supra* note 1, at 99-100.

164. *See* MARTENS, *supra* note 119, bk. IV, ch. III, at 277.

165. *Id.* at 278.

166. *Id.* bk. VII, ch. IV, at 472–73.

trade.[167] From the British perspective, 1841 would clearly seem to mark the triumph of a "project" of abolition that borne fruit in ever more decisive acts of international legislation.[168] However, for Continental states, it was still possible to take the opposite view: The new treaty had instead established a set of clear rules for handling slave trading cases that were in line with customary norms and the presumption, so important to the Congress system, of mutual respect for sovereignty in place of the former British attempts at unilateral enforcement. As with a constitution, a treaty regime can be interpreted in light of either framework of imagination. To argue that the ban on the slave trade marked the beginning of "international human rights law," or that it was a precursor to Nuremberg and the birth of international criminal law, makes sense if (and only if) legal scholars imagine a shared intent underlying these very different exercises in the articulation of international norms.[169]

C. *An Agent Emerges?*

The multilateral legislative function that developed in post-Congress Europe was certainly not clearly associated with any one normative agenda. It was employed in various different domains, often exhibiting a dense admixture of idealized values and realpolitik. This is particularly apparent in an area that was one of the most significant sites for multilateral norm-setting: the "neutralization" or "internationalization" of territory. This joint commercial appropriation of space was much more clearly a collective project than was the contemporaneous slave trade ban.

In particular, this area comprised the related categories of freedom of navigation and international territorial administration.[170] These two

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167. Lesaffer, *supra* note 163; *see also* Lawrence C. Jennings, *France, Great Britain and the Repression of the Slave Trade, 1841–1845*, 10 FR. HIST. STUD. 101, 101, 105, 123 (1977) (demonstrating that even after the multilateral agreement in 1841, states continued to pursue highly divergent strategies and norms in its execution).

168. *See* MARTINEZ, *supra* note 154, at 137 (quoting a Parliamentary exchange in which a questioner asks Lord Palmerston if "[s]upposing one nation abolished the punishment of death, would it not be a legitimate effort of that government to interfere with other nations, which had not done so, to induce them to follow the example?" with Palmerston replying to the effect that "it would be legitimate for a nation to pursue that goal, 'or any other measure tending to the interests of humanity,' in the same way England had pursued the abolition of the slave trade." (citing House of Commons, *First Report from the Select Committee on Slave Trade*, *in* BRITISH PARLIAMENTARY PAPERS, vol. 4, at 19 (1847–48; photo. repr., Shannon: Irish Univ. Press, 1968) (testimony of Viscount Palmerston)).

169. *See, e.g.*, MARTINEZ, *supra* note 154, at 156–65.

170. *See generally* Ruth Lapidoth, *Freedom of Navigation-Its Legal History and its Normative Basis*, 19 J. MAR. L. & COM. 259, 281–89 (1974) (providing more information on the development of the "freedom of navigation" norm). For accounts of international territorial administration as an

categories of norms overlapped in particular in the emergence of river commissions.[171] As with the ban on the slave trade, freedom of navigation on major rivers had already been a subject of various bilateral treaties before the emergence of the Vienna System.[172] Again, these early bilateral dealings produced no general institutions separate from the treaty-signing powers. Moreover, the basis for opening up rivers to foreign ships was often presented in analogy to Roman property law concepts such as the servitude the owner of one parcel might hold on that of another to obtain access to a thoroughfare.[173] Here as elsewhere, the Roman law was an ideal source of "systemic" principles. So too, though, were the emerging ideas of political economy favoring free maritime and fluvial trade as a "natural" aid in promoting the wealth of nations.[174] Either could be drawn upon without reference to any act of willed legislation giving rise to institutionalized norms.

However, the Final Act of the Congress of Vienna, in its sixth section, once again took an existing norm of recent treaty practice and legislated it on a Europe-wide scale. Following the Act, every interstate river in Europe was to be free for foreign navigation.[175] Rivers crossing two signatory states would, they mutually engaged, be subject to further bi- or multilateral initiatives of regulation. To these ends, the Central Commission for Navigation on the Rhine, which is still in existence and today comprises Germany, Belgium, France, the Netherlands, and Switzerland, was established after the Congress as the first "international organization."[176]

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institutional practice of international law since the late nineteenth century, see, e.g., Finn Seyersted, *Chapter Six. Extended Jurisdiction of Some Organizations in Substantive Matters (Delegated Powers) in* COMMON LAW OF INTERNATIONAL ORGANIZATIONS 184–207 (2008); Ralph Wilde, *From Danzig to East Timor and Beyond: The Role of International Territorial Administration*, 95 AM. J. INT'L. L. 583, 583–606 (2001); SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE-BUILDING 11–47 (2004).

171. *See* Edouard Engelhardt, *Histoire de Droit Fluvial Conventionnel, Nouvelle Revue Historique de Droit Français et Etranger* (1889); H. Fortuin, *Two Questions Concerning Freedom of Navigation on International Rivers*, 16 NETH. INT'L. L. REV. 257, 257–70 (1969).

172. Bela Vitanyi, *The Regime of Navigation on International Waterways; Part. I: The Beneficiaries of the Right of Navigation*, 5 NETH. Y.B. INT'L L. 111 (1974).

173. These roots in the Roman law are commonly mentioned in late 19th and early 20th century discussions of the freedom of navigation. *See, e.g.* EDUARD ENGELHARDT, DU REGIME CONVENTIONNEL DES FLEUVES INTERNATIONAUX 3, 89 (1879).

174. *Id.* at 214.

175. General Treaty of the Final Act of the Congress of Vienna, *supra* note 151, art. CVIII-CXVII.

176. Andrea K. Gerlak & Susanne Schmeier, *Cooperation for the Sustainable Governance of International Watercourses: The Role of River Basin Organisations*, 15 GLOBAL DIALOGUE (ONLINE) 54, 57 (2013).

The one significant exception to the new regime was the Danube. Crossing the zone of contention between the Russian and Ottoman Empires, navigation on the Danube was a matter of compact between those two states and had been left restricted from the rest of Europe. This would finally change with the culmination of the Crimean War and the multilateral Treaty of Paris of 1856. A defeated Russia (but also a subordinated Ottoman Empire only tenuously accepted by its European allies) was then forced to accept the "internationalization" of the Danube.[177] Free navigation on this river was, according to the 1856 treaty, to be considered "from now on a part of the public law of Europe (*désormais, partie du droit public de l'Europe*)."[178] Such an explicit reference to a new norm being legislated as part of an identifiable and consistent body of "public law" would have meant little before the Vienna era. No longer was it necessary for norms to emerge "organically" via gradual shifts in custom: they could now be brought about via coordinated acts of will by likeminded sovereigns operating upon the basis of similar underlying principles.

The first Commission of the Danube River—which resembled that established for the Rhine in 1815 but exercised much more extensive regulatory activities (beginning in some respects to resemble those of a state)[179]—was created in order to ensure the administration of the Danube in line with the standards of the rest of continental Europe. The creation of this "international river" was a turning point in the history of both international territorial administration and in multilateral norm legislation.[180] Rivers, straits, lighthouses, and other maritime or land territories would henceforth be subject to legislation as zones for collaborative management and, in many cases, the creation of dedicated multilateral institutions with their own bureaucracies, hierarchies, and practices of norm-interpretation relative to their founding mandates.[181]

177. Louis B. Wehle, *International Administration of European Inland Waterways*, 40 AM. J. INT'L L. 1, 100 (1946).

178. Treaty of Paris art. 15, Mar. 30, 1856.

179. *See* Gerlak & Schmeier, *supra* note 176; Wehle, *supra* note 177.

180. *See* Vitanyi, *supra* note 172 (noting that "[t]he term 'international river' *(fleuve international)* was introduced into international law by the French jurist Ed. Engelhardt. It was quickly adopted and commonly used by writers, whilst the adjective 'international' for waterways to which the regime of free navigation applied was not employed in treaties until the Peace Treaties of 1919–1920.").

181. *See* Ralph Wilde, *Representing International Territorial Administrations: A Critique of Some Approaches*, 15 EUR. J. INT'L L. 1 (2004).

If the Vienna Congress marked a decisive shift in the direction of multilateral legislation, the Congress of Paris confirmed that this would henceforth serve as a model for the development of legal norms. Progress in the direction of "institutionalization" was evident in many respects. Aside from creating the unprecedentedly state-like Danube Commission, for example, the Congress also served to initiate the international protection of minorities in the form of guarantees for the autonomy and protection of the Ottoman Sultan's Christian subjects.

Meanwhile, it even handled one of the areas of desirable legislation that Martens had identified as intractable: a general ban on privateering.[182] This new ban was issued in the context of the Declaration of Paris, a separate instrument to the peace treaty, focusing on maritime issues.[183] About a decade earlier, the Scottish judge and legal scholar James Reddie had written of how an abolition of privateering would be a mark of progress akin to ending "the [former] barbarous practice of putting prisoners of war to death[]or reducing them to slavery."[184] However, similar to earlier system-oriented treatise writers' comments on the theodicy of naval warfare, he viewed privateering as "a right emanating directly from the natural and primary law of nations."[185] Like the targeting of civilian vessels and the capture of prizes, the norm permitting privateering was a product of the system of immanent norms arising from human "nature," and it would not easily be reversed.

In the event, the ban on privateering articulated in the 1856 Declaration of Paris was pushed forward by Lord Palmerston in part as a quid-pro-quo following a U.S. initiative to apply stricter rules governing the capture of prizes and the protection of neutral commerce.[186] Such idiosyncratic interests of particular powers were often in play during the process of compromise and negotiation over international agreements, as they continue to be today. It was only because of the adoption of such projects by an interstate order premised on mutual recognition, non-interference, and the legitimacy of already-existing governments that they could make the transition from being the idiosyncratic policies of individual powers into valid subjects for Europe-wide consensus. This (incremental) movement in the direction of multilateral legal norms was also reflected in Article VIII of the Treaty

182. *See* MARTENS, *supra* note 119, at xxiv.

183. For an overview of the agreements signed at Paris, see, e.g., Harold Temperley, *The Treaty of Paris of 1856 and its Execution*, 4 J. MOD. HIS. 387, 412 (1932).

184. James Reddie, *Researches, Historical and Critical*, *in* MARITIME INTERNATIONAL LAW xix (1844).

185. *Id.*

186. Temperley, *supra* note 183.

of Paris, which held that "in case of differences between the Porte [Ottoman Empire] and one or more of the other signing Powers, recourse should be had to the mediation of a friendly State before resorting to force."[187] An attempt by the British delegate George Villiers to extend this mediation rule to all parties generally was deflected by skepticism among the other victorious powers.

If the definition of a "project" requires 1) an identifiable "willing" legislating actor; 2) an acknowledged set of principles serving as the normative basis for the legislative act; and 3) a set of enduring, concrete products of the legislation carrying forth its underlying aims, then norm innovation post-Vienna could for the first time be seen in this light. Yet it could only function in this manner if its underlying ontology of recognized states and governments as legislating actors (and as carriers of all legislated rights and duties) was taken for granted. In a balance of power system, new norms could only be based on common interests among the leading powers at any given point in time. Often, moreover, the appearance of common "European" interests was only really apparent with regards to non-European bodies or spaces. "Humanity" as such was neither the subject nor the object of international law innovations during this period, and this was evident in the kinds of legal projects that were envisioned and produced in subsequent decades.

D. *The Project Ethos Is "Elevated" to the International Plane*

From the mid-1850s, the legal imaginary of the international plane begins to switch places with that of the (above all U.S.) domestic constitutional project. By this point, as we have seen, European conferences had become a space for multilateral legislation of new norms in order to promote the progressive development of certain shared aims: elimination of "detestable" practices, promotion of free trade and navigation, bolstering of state legitimacy, etc. Among other norms, slavery and the slave-trade increasingly looked like institutions to which intent had to be applied—they could no longer be justified (as they had been even in recent decades) as emerging immanently from the system of international rights and duties.

Returning to the U.S. context, this is reflected clearly in the *Dred Scott* case.[188] There, the justification for a claim that former slaves could not become full citizens could only be adapted into the narrative of the

187. Treaty of Paris art. 8, Mar. 30, 1856.

188. Scott v. Sanford, 60 U.S. (19 How.) 393 (1857).

project. Justice Taney could not point to any rule of the law of nations, but only assign a lack of intent among the Founders to ascribe equal citizenship to African-descended individuals. No higher or more generally applicable systemic norm was available. However, this turn to the project was a failure in its claim to speak for a common will of the popular sovereign—the *Dred Scott* decision set off a wave of radical abolitionist protest in the short term and also contributed to the impending Civil War. *Dred Scott* exemplifies a crisis in the discourse of the "project," which, despite attempts at its revival in the form of the Constitution's Civil War Amendments and political rhetoric of refounding and reconstruction, was to continue its decline in subsequent years. The post-war decades, indeed, coincided with the rise of a new theorization of U.S. constitutional government as emerging from unwritten, systemic norms either stemming from or at least similar to those of the common law.[189]

By the time of *Plessy v. Ferguson*[190] the Court was ruling that the racial segregation issues that had been the basis of the Fourteenth Amendment should be seen as emerging from the "natural affinities" of individuals in society. No longer is there an issue of judging the rationality and intent of the Louisiana statute by measure of the rationality and intent of the Equal Protection Clause. Instead, the Court now believes that "race relations are not subject to the politics of projects. . . . [t]hey are, rather, evidence of an immanent order of the social that must develop according to its own laws."[191] This is the same approach to imagining legal order that would still be on display, after another decade, in *Lochner*.[192] In both, a supposedly immanent norm of social organization, either racial "affinities" or the freedom of contract, was found to predate and preempt any attempt at government regulation of that sphere of social activity. The framework of "project" was subsiding, the popular will and the "intent" or design of the Constitution growing less salient.

By contrast, during the same period the project imagination came to achieve ever greater prominence in international law. In the sphere of the law of war, for example, the U.S. promulgation of the Lieber Code marked an act of codification that did much to inaugurate a new era of positive law norms regulating *jus in bello*.[193] The year after the Lieber

189. *See* KAHN, *supra* note 1 at 109, 244-245.

190. Plessy v. Ferguson, 163 U.S. 537 (1896).

191. KAHN, *supra* note 1 at 244-245.

192. Lochner v. New York, 198 U.S. 45 (1905).

193. *See, e.g.*, James F. Childress, *Francis Lieber's Interpretation of the Laws of War: General Order No. 100 in the Context of His Life and Thought*, AM. J. JURIS. 21 (1976).

Code was issued, the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field (the First Geneva Convention) was signed.[194] Figures active in the developments of international law such as Francis Lieber, Henry Dunant, or Johann Caspar Bluntschli all saw in the efforts of codification the opportunity to further the cause of "civilization" and the promotion of a peaceful, organic unity among "civilized" states.[195]

For all three figures, these ideas were tied to a notion of civilizational superiority for the Christian or "Aryan" West, though they and others differed over the exact extent to which non-Western or non-Christian peoples might be included.[196] In this vision of civilizational progress, the actions of any given state to elaborate upon customary rules of international law became understandable as promoting a common initiative shared by *all* like-minded peoples. This was an alternative to (or perhaps a sublation of) the Vienna Congress model of a developing interstate normative order that had been informed by the juridical thought of Martens and the balance of power politics of Metternich, among others. Neither had embraced an open-ended and global legislation of new norms—but this did indeed become a key operating assumption of the new "civilizational" international lawyers.

Wilhelm Grewe writes in his *Epochs of International Law* that the concept of civilization "embodied an attempt to place the global political supremacy and colonial mission of the white man on a new basis of legitimacy corresponding to the changed conditions of the nineteenth century."[197] This "civilizational" perspective on international law as a Western project was reflected across Western societies, as seen in the

194. For a basic overview of the events surrounding these early developments in international humanitarian law, see Danièle Bujard, *The Geneva Convention of 1864 and the Brussels Conference of 1874*, 14 INT'L REV. OF THE RED CROSS ARCHIVE 163 (1974).

195. Bluntschli, for example, titled his major work on international law *Das moderne Völkerrecht der civilisirten Staten als Rechtsbuch dargestellt* [The Modern International Law of Civilized States Represented as a Law Code]. JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN ALS RECHTSBUCH DARGESTELLT (1868).

196. *See, e.g.*, JOHANN CASPAR BLUNTSCHLI, LEHRE VOM MODERNEN STAAT 89 (1875) (discussing "the claim of these Aryan nations of Europe to become, by their ideas and institutions, the political leaders of the other nations of the earth, and so to perfect the organization of mankind."); *compare with* FRANCIS LIEBER, FRAGMENTS OF POLITICAL SCIENCE ON NATIONALISM AND INTERNATIONALISM 22 (1868) ("The civilized nations have come to constitute a community, and are daily forming more and more a commonwealth of nations, under the restrain and protection of the law of nations, which has begun to make its way even to countries not belonging to the Christian community[.]").

197. WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW 455 (2013).

works of John Stuart Mill, Friedrich [Fyodor] von Martens, and various others, though not without significant early critique.[198] Grewe notes, however, the paradox of attempting to base a special legislative authority of some nations over others upon a narrative of progress suggesting that the latter should at some point attain the same status as the former.[199]

In practice, such internal inconsistencies did not detract from the notion that the community of leading states could undertake to legislate universally. As Edwin Maxey's 1906 treatise on international law notes, citing a maritime case a century earlier, "[w]hen Louis XIV published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law as then understood and received in France."[200] By the time that Lincoln's administration codified the laws of war, however, few would think to deny that this ought to be understood as prospective legislation for the Western world taken as a whole. While the eighteenth century systematizers of the law of nations had written extensively about "sociability,"[201] it was only in the mid-nineteenth century that a concrete form of social intercourse was made operative as an intentional legislative endeavor, in the form of regular international conferences to bring together legal experts and diplomats from throughout the community of "Western civilization."

The Civil War and its aftermath were to generate yet more innovative developments in international law, not least contributing to the rise of international arbitration. More generally, the period from the 1860s–1890s was characterized across the Western world (and on its colonial frontiers) by the transposition of the project ethos from the national plane to that of global ordering. With the *Alabama* arbitration in 1871, the norm was developed that international arbitrators once appointed would be able to define the extent of their own jurisdiction.[202] This step marked a profound new commitment to the idea that international legal *practice* would henceforth be considered as a field for the

198. *Id.*

199. *Id.*

200. EDWIN MAXEY, INTERNATIONAL LAW WITH ILLUSTRATIVE CASES (1906) (citing *Kindersley & others v. Chase & others at the Cockpit*, July, 22 1801).

201. For the *locus classicus* of a notion of international law focused on sociability, see Samuel Freiherr von Pufendorf, *De jure naturae et gentium* (*On the Law of Nature and of Nations*) in SAMUEL PUFENDORF. GESAMMELTE WERKE, VOLUME 4.3: MATERIALEN UND KOMMENTAR (W. Schmidt-Biggemann ed., Gruyter 2014) (1672).

202. Nottebohm (Liech. v. Guat.), Judgment, 1953 I.C.J. 111, ¶ 119 (Nov. 18).

expansion of legal norms and their compulsory enforcement, not merely a systematic reflection of the positions held by governments. Similarly far-reaching was the holding that a state could not be excused from international legal obligations on the basis of lacking a relevant provision in its domestic law (or having a contrary provision).[203] The Treaty of Washington signed by Great Britain and the United States in the same year served to underscore the commitment to this new worldview in which the laws of the individual sovereign state would be reduced in status (at least in the eyes of international lawyers and internationalist statesmen) vis-à-vis the ever-expanding project of international law, with its implicit associated goods of peace (or at least reduced brutality in war) and prosperity.

That, at least, was how the leading participants in that project interpreted these developments. The following year, the Swiss jurist Gustave Moynier proposed an international criminal court to enforce the First Geneva Convention, drawing explicit inspiration from the *Alabama* tribunal in terms of the composition and jurisdiction of the proposed institution.[204] The *Institut de Droit International*, which he, Gustave Rolin-Jaequemyns, Bluntschli, and other leading international law specialists founded in Ghent devoted much of its efforts to promoting (or at least discussing the feasibility of) such initiatives.[205] The pages of the *Institut*'s journal, the *Revue de Droit International et de Législation Comparée*, abound with commentary on the path forward for international law as a means of regulating relations among the civilized powers of the West, as well as between those powers and the "Others" left outside the project.

In the 1873 essay in the *Revue* explaining the necessity for a dedicated institution to promote the "study and progress of international law," Gustave Rolin-Jaequemyns writes of the need to "transform the *society of fact* that exists between nations into a true *society of law*."[206] Such efforts were to involve propositions like Moynier's hypothetical criminal court,

203. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, ¶ 181 (Dec. 18).

204. GUSTAVE MOYNIER, NOTE SUR LA CRÉATION D'UNE INSTITUTION JUDICIAIRE INTERNATIONALE PROPRE À PRÉVENIR ET À RÉPRIMER LES INFRACTIONS À LA CONVENTION DE GENÈVE (1872).

205. Martti Koskenniemi, *Gustave Rolin-Jaequemyns and the establishment of the Institut de Droit International (1873)*, 2004 REVUE BELGE DE DROIT INTERNATIONAL [BELG. J. INT'L L.] 37, 5–11 (2004); André Durand, *The role of Gustave Moynier in the founding of the Institute of International Law (1873)—The War in the Balkans (1857–1878) The Manual of the Laws of War* (1880), 34 INT'L REV. OF THE RED CROSS ARCHIVE 303 (1994).

206. Gustave Rolin-Jaequemyns, *La nécessité d'organiser une institution scientifique permanente pour favoriser l'étude et les progrès du Droit international*, *in* REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 463 (1873).

as well as, especially, attempts to promote the spread of international arbitration. Both the *Institut* and its members played a significant role in the discourse leading from Geneva in 1864 to the Hague Conferences of 1899 and 1907. Major states and their leaders came to see the field of international legislation as a space in which to promote their own international status and repute. Czar Alexander II, for example, sponsored the November 1868 meetings and declaration that issued a ban on explosive projectiles and declared a limit on the acceptable objectives of war.[207] In 1874, the government of Czar Alexander II again led a conference at Brussels, which the members of the European state system attended in order to consider a draft declaration for the further codification of the law of war.[208] Although this conference resulted in agreement upon the proposed draft, with only minor modifications, not all states were prepared to ratify the resulting instrument. Notably, this resulted in the "project" of codification being handed over to the *Institut*, where Moynier, Rolin-Jaequemyns, and the rest appointed a committee for the study of the Brussels Declaration and development of further proposals. The *Manual of the Laws and Customs of War*, which was drafted at the *Institut*'s session at Oxford in 1880 and in which Moynier took a leading role, was the result of these efforts.[209] In turn, the laws of war incorporated into the Manual provided the template for rules that would come under consideration at the first Hague Conference in 1899.

More than ever before, it was now possible for an initiative of legislation to be taken up by a cosmopolitan group operating outside of the framework of the sovereign state. This process demonstrated all of the necessary hallmarks of a "project" of legislation conceived along the lines that had animated Marshall and others writing in the contexts of early domestic constitutional jurisprudence. The *Institut* members had a determinate collective identity rooted in their shared professional background and socialization; they had a set of shared principles based on their discourse of principles of "civilization"; and, via the increasingly important phenomenon of international conferences, they had concrete institutional embodiments for the products of their legislation. The Preface to the 1880 Manual thus argues that, even as

207. Danièle Bujard, *The Geneva Convention of 1864 and the Brussels Conference of 1874*, INT'L REV. OF THE RED CROSS ARCHIVE 14.163, 527–37 (1974).

208. *Id.*; Tracey Leigh Dowdeswell, *The Brussels Peace Conference of 1874 and the Modern Laws of Belligerent Qualification*, 54 OSGOODE HALL L.J. 805 (2016).

209. INSTITUTE OF INTERNATIONAL LAW, MANUAL OF THE LAWS AND CUSTOMS OF WAR (1880).

compared with six years earlier, "it seems less difficult than it did then to trace rules which would be acceptable to all peoples.[210]

The innovations in international law arising from this professional community and increasingly embraced by leading states and statesmen were often ascribed to notions of "progress."[211] Yet progress by itself does not necessarily indicate any concrete distribution of legislative authority or the relevance of any particular willed acts by specific actors. National legal systems were just as, if not more, apt locations for ideas of progress rooted in the gradual improvement of legislative frameworks reflecting the systemic principles of social organization (the idea of legal development at work in Martens' *Précis*, for example). Progress thus did not entail the imaginative horizon of law as a project of *self-rule* via the creation of new fundamental standards and interpreting/adjudicating institutions. For a group like the *Institut* to be able to actualize its claim to speak for "all peoples," it had to (along with other like-minded actors) deliberately will into existence new acts of norm-legislation at the international level.

As was noted above, the *Institut de Droit International* was one of the first institutional embodiments of the new legal ethos at the international level. Though its stated mission and many of its activities were clothed in the language of the project—indeed of the sort of projects that Martti Koskenniemi has labeled as embodying the "utopian"-aspect of international law—they also demonstrated a keen awareness of international law's "apologetic" function as an instrument by particular states to excuse or justify actions in pursuit of their own interests.[212] At times, this went hand in hand with its notions of universal humanitarianism. In particular the category of "civilization" continuously supported a teleological narrative of historical development that justified Western appropriation of colonies inhabited by "uncivilized" groups.[213]

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210. JAMES BROWN SCOTT (ED.), RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW DEALING WITH THE LAW OF NATIONS, WITH AN HISTORICAL INTRODUCTION AND EXPLANATORY NOTES 26 (1916).

211. For a critical perspective on "progress" narratives in international law, see, e.g., Matthew Craven, *Theorizing the Turn to History in International Law, in* THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW (Anne Orford & Florian Hoffmann ed., 2016).

212. *See generally* MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2006).

213. *See, e.g.*, FRIEDRICH MARTENS, RUSSIE ET L'ANGLETERRE DANS L'ASIE CENTRALE (1879).

IV. Project and System in the Imagination of Global Institutions

A. *Extending Europe's Collective Will*

One of the important new venues in which European states acted together to legislate norms in the name of a unified "civilization" was the Berlin West Africa Conference of 1884-1885. There, an "aristocracy" of Western states[214] planned a joint approach to managing the newly-opened African interior, intended to promote free trade, the suppression of the slave trade, and other principles now commonly accepted as part of the common intent of civilized peoples. Emerging from a joint French-German initiative to forestall British "informal" domination of Africa, the Conference was also animated by a concern, widely shared by most Western European states and commercial interests, to ensure the free navigability of the Congo and Niger Rivers and the opportunities for economic expansion into the African interior they provided (especially by the former).[215] The Congo, like the Danube, was a fluvial space to be appropriated for Europe.

The burgeoning activities of the Belgian King Leopold II's *Association internationale du Congo* (AIC), with its ambiguous claim to sovereign status, also had to be resolved.[216] The Conference provided legal resolutions to these problems emerging from the task of managing the appropriation of as-yet unexploited African landmass, also specifying, for example, the legal rules surrounding effective occupation as the prerequisite for asserting acquisition of new territory.[217] Gustave Moynier, while engaged in his work with the International Committee of the Red Cross and the *Institut*, also attended King Leopold II's early conferences on the Congo from 1877,[218] founded in 1879 a publication devoted to "exploring and civilizing" Africa,[219] and continually wrote in

214. *See* Grewe, *supra* note 197, at 455 (discussing Ferdinand von Martitz's notion that the Conference reflected how "the leading of modern global policy is vested in an aristocracy of nations[,]" and citing Ferdinand Martitz, *Das internationale System zur Unterdrückung des afrikanischen Sklavenhandels in seinem heutigen Bestande*, 1 Archive des öffentlichen Rechts 16 (1885)).

215. Matthew Craven, *Between Law and History: The Berlin Conference of 1884–1885 and the Logic of Free Trade*, 3 London Rev. Int'l L. 1 (2015).

216. *See, e.g.*, Andrew Fitzmaurice, *The Justification of King Leopold II's Congo Enterprise by Sir Travers Twiss*, *in* Law and Politics in British Colonial Thought: Transpositions of Empire 116-117 (2011).

217. *Id.*

218. Gustave Moynier, Mes Heures de Travail (1907).

219. Gustave Moynier, *Preface: A nos lecteurs*, 1 L'Afrique explorée et civilisée 1 (1879).

defense of this project over the subsequent decades.[220] Moynier, a guiding force for the new transnational college of innovating international lawyers, especially those of the *Institut*, strongly supported their participation in the Berlin Conference.

In regard to its stated purpose, the Berlin Conference initially appeared to establish a highly promising legal project. Aside from resolving on a multilateral and pacific basis the specific questions that had been posed, the resulting General Act also provided a powerful precedent "from which could be deduced the general rules governing colonial transactions around the world."[221] These rules concerned the two aforementioned "systemic" dimensions of economic principles, based on a commitment to free markets, and civilization, based on European states' "committing themselves to improving the conditions of the moral and material well-being of the native population."[222] In a century that had seen the gradual rise of efforts at "internationalized" territorial administration,[223] the effort in the Congo was the most ambitious project yet to move beyond the primacy of the sovereign state and towards a form of appropriation suitable to the community of civilized Western states as a "society of law."

In the end, this project was a practical failure as the internationalized space, intended to be administered in line with free market principles such as tariff restrictions, and with "civilized" and humane methods of rule, proved disastrous on both grounds.[224] Belgian sovereignty was, ironically, ultimately deployed as a panacea intended to solve the financial and humanitarian crisis into which the "internationalized" colony had descended. Nonetheless, as an expression of general principles regulating colonial affairs, the Berlin Conference continued to prove a source of inspiration. Indeed, it continued to be positively cited as precedent for the norms of free commerce well into the era of the Permanent Court of International Justice.[225] Noting this continued influence, Matthew Craven has suggested that the Berlin Conference is best viewed, despite all its hypocrisy and failure, as successfully helping to

220. *See, e.g.*, GUSTAVE MOYNIER, LA FONDATION DE L'ÉTAT INDÉPENDANT DU CONGO AU POINT DE VUE JURIDIQUE (1887).

221. Craven, *supra* note 215 at 42.

222. *Id.* at 38.

223. For an overview of subsequent developments of this notion, see Wilde, *supra* note 181.

224. *See* Craven, *supra* note 215.

225. *Id.* (citing *Oscar Chinn* (*U.K. v. Bel.*), Judgment, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12)).

advance, validate, and entrench "a systemic logic associated with the putative implementation of the envisaged regime of free trade."[226]

Does the accurate ascription of a "systemic logic" to the Berlin Conference and the international legal profession's role there weigh against the notion that these events formed a watershed in the turn away from the system imaginary and towards that of the project? To the contrary, a shared economic ideology was precisely what made this joint act of legislation possible. As should be clear from Section I, where the distinctions between the "system" and "project" were introduced, legal projects themselves must have a "systemic" quality: the second prong that they require is that of a set of acknowledged, consistent principles to inform the framing and enactment (and future development in practice) of the collective legislative intent.[227] As Craven's over-all account suggests, the "systemic logic" of free trade was not simply assumed by the Berlin Conference attendees to be at work as a set of immanent principles—rather, its advancement and application to particular spaces was a concrete goal shared by those framing the Congo Act of 1885. Freedom of navigation, for example, was again made the subjective of positive legislation in Article 13 of the Act, which proclaimed this norm "from now on part of public international law" (*désormais partie du droit public international*).[228] The language of the Vienna Act, which had made this a positive norm of *European* public law, was now sublated to the global scale.

Free trade principles might be assumed as inherently valid, but they also had to be positively enacted as binding norms via concrete acts of legislation and the creation of new (often "international") institutions. This notion was not only at work in Berlin, but can also be seen throughout the efforts of the international legal field during the late nineteenth century. Tariff controls in China, Egypt, and elsewhere were similarly imposed as multilateral, pan-European projects serving to promote the joint expansion of Western commerce and civilization into exterior zones.[229] The Yangtze and Danube rivers were also (militarily) "liberated" and internationalized in the name of these values even before the same was undertaken in the Congo.[230] The space of civilizational "Others" was an ideal zone for a common legislative will.

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226. *Id.*

227. *See* KAHN, *supra* note 1 at 99-100.

228. General Act of the Berlin Conference on West Africa, art. 13 (Feb. 26, 1885).

229. The arguments of Moynier's journal on African exploration serve ably to illustrate this mentality. *See* Moynier, *supra* note 219.

230. *See, e.g.*, Stephen Gorove, *Internationalization of the Danube: A Lesson in History*, J. PUB. L. 8, 125 (1959); ÉDOUARD ENGELHARDT, DU RÉGIME CONVENTIONNEL DES FLEUVES INTERNATIONAUX (1879).

Such systemic logics would shape all manner of initiatives. As an 1898 *Revue* essay on "Migration from the Point of View of International Law" puts it, "migration is not essentially a legal institution; it is before all else an economic phenomenon, and, consequently, a social phenomenon that enters only in a secondary fashion into the domain of law."[231] Migration, like other economic issues, would have to be considered in light of the idea that "the State is not solely an organism of public powers, but also the natural representative of the national community and so of all the moral and material interests grouped into the nation."[232] The ideal way to handle such an issue, which reached across jurisdictions and beyond individual states into the economic and social lives of their populations, would be via "a unique convention introduced and accepted by all States, or at least by the States of our civilization."[233]

Just as such conventions had been introduced to regulate "currency . . . monetary questions . . . the postal and telegraph services, and . . . literary property," not to mention the laws of war, so too should a convention be introduced to regulate migration.[234] The proper content of such a convention had been discussed at the 1897 Copenhagen meeting of the *Institut*.[235] Though there was in principle a "natural" liberty to emigrate, and this should be defended to the extent possible, states could indeed limit this right for reasons "moral, juridical, hygienic, [or] economic," as well as political or tied to, for example, treason or anarchism.[236] To be successful, a convention would have to encode these rights of states as well as attempt to establish the rights of individuals.

In general, while international law had by this point indeed become a space for projects, they were projects rather more constrained in scope and character than those of revolutionary governments had been. When states can point to their own valid rights in matters "moral, juridical, hygienic, economic, or political,"[237] they are thus able to impose limits on the progress of internationalization. Yet the limits work in the other direction as well. Where states pose a threat to the accepted immanent principles of free commerce and civilized

231. Louis Olvi, *L'Émigration au Point du Vue Juridique Internationale*, REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 414 (1898).

232. *Id.*

233. *Id.*

234. *Id.* at 421.

235. *Id.*

236. *Id.* at 427.

237. *Id.* at 427.

intercourse, they are to be punished. Though this principle would eventually be extended to Western states themselves following World War I, it was originally applied primarily outside the pale of "civilization."

Even more than fully externalized spaces such as the Congo region, however, it is perhaps marginal zones like China (which by the end of the century would be officially classed as "half-civilized" in many international law textbooks)[238] that best demonstrate this trend. The Chinese experience of international law in the nineteenth century embodied the way the international legal project consciousness came to define an "exterior" with increasing specificity. European states had long tolerated (if begrudgingly) Chinese restrictions on commercial access, in part because these were largely seen as within the pale of positivist international legal norms of the seventeenth and eighteenth centuries. By the 1830s, however, many British merchants and politicians saw China's restrictions as aberrant deviations from international trade norms and, more relevantly, as obstacles to the exploitation of the world's largest potential market.

The First Opium War of 1839 came after two decades of intensive domestic political and legal debate in the United Kingdom regarding the principles of free trade following the 1820 Merchants' Petition to the House of Commons over the protectionist corn laws.[239] The push for liberalization of the domestic economy did not always go hand-in-hand with support for the imposed opening-up of other states' economies (members of the Anti-Corn Law League, for example, tended to be highly critical of the First Opium War).[240] However, the normative presumption that trade should be liberalized united these two sometimes overlapping agendas. By the 1850s, statesmen such as the fourth Governor of Hong Kong, John Bowring, who played a major role in provoking the Second Opium War over an initially minor international offense (Guangzhou officials' mishandling of a British-flagged Chinese sailing ship and its local crew), combined a policy of military pressure with a commitment to "opening [ ] markets to English industry."[241]

By 1900, the Boxer Intervention in China—the most internationalized use of force in history up to that point—took shape as an innovative act of "collective reprisal" rather than war (which was never

238. *See, e.g.*, FRANZ VON LISZT, DAS VÖLKERRECHT SYSTEMATISCH DARGESTELLT (1898).

239. Richard Francis Spall Jr, *Free trade, foreign relations, and the Anti-Corn-Law League*, 10 THE INT'L HIST. REV. 3, 405–32 (1988).

240. *Id.*

241. DAVID TODD, FREE TRADE AND ITS ENEMIES IN FRANCE, 1814–1851 99 (2015).

declared). Members of the international legal project framed this violent intervention as an act of punishment against a state that had failed to abide by compulsory global norms.[242] The multilateral Boxer Protocol ending the conflict even included provisions for what is likely the first "international criminal tribunal," for the punishment of Qing officials.[243] An attempt at repeating this new practice of international criminal adjudication of enemy guilt was soon undertaken in the Boer War—there, however, it failed over concerns that such a move could entrench feelings of enmity among the local (European-descended) populace.[244] The specific sub-project of an international criminal law thus stalled after tentative efforts at the turn of the century. However, the idea of a punitive application of "civilized" norms against marginal actors considered to violate them continued to be a major feature of legal discourse.

The conceptual paradigms of international law and political economy of the *Institut* members were no longer those of Adam Smith a century before—despite the genealogical relations between them. The main difference, both in terms of internal logic and practical consequences, was the new conviction that international norms could be proposed as objects of legislation by transnational elites, and then transposed into legal effect via the coordination of the European "family of civilized nations." The organicist family metaphor, however, is (while very common at the time) not very apt. Rather than a "family," the late nineteenth century community of European states functioned far more like a club or guild. To write about norms of international law in this context was to propose both action items—such as plans for the demarcation of space, regulation of goods or persons, and joint administration of rivers, canals, or other such common thoroughfares—and to suggest or imply rules for membership in the legislative coalition.

This might be expected for the theorists and practitioners of a legal system that only purported to constitute the "public law of Europe." However, it would remain the case as this same system was formally transposed to the global (or universal) level. Practices of legislation and subsequent interpretation of legal norms would retain a Eurocentric bias in no small part owing to presumptions regarding "legislative

242. For an articulation and defense of this exclusionary view by a leading pioneer of liberal internationalist legal thought, see Georg Jellinek, *China und das Völkerrecht*, DEUTSCHE JURISTEN-ZEITUNG 19, 401 (1900).

243. Michael Akehurst, *Reprisals by Third States*, 44 BRIT. Y.B. INT'L L. 1 (1970).

244. Discussed in JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 81 (1982).

intent" and the means by which it could be ascertained. This has remained the case ever since, but the relevant trends were already established during the key period of late nineteenth and early twentieth century transition from ad hoc practices of arbitration to formalized systems of (notionally) compulsory international adjudication.

B. *The Emerging Project of International Adjudication*

The transition from system to project as the dominant episteme of international law would have a direct impact upon international jurisprudence. As in the U.S. domestic context, where the *Marbury* decision could not have come about without an institutional basis in the form of the U.S. judicial branch and its Supreme Court, the transformation of international jurisprudence required establishing its own institutional basis. Despite precedents for the expansion of arbitrators' interpretive authority such as the *Alabama* judgment, a strong form of "project-jurisprudence"—one focused on the elaboration of the collective intent underlying treaties or other sources of law—was not compatible with the traditional, ad hoc and consent-based form of arbitration that existed in the nineteenth century. It was not until the post-1920 jurisprudence of the Permanent Court of International Justice that it would firmly take hold as an increasingly ubiquitous framework for international adjudication.

This can be illustrated by comparing cases falling at different points in this process. Even before the rise of international tribunals, the notable *Bering Sea* arbitration of 1893 indicated early signs of coming transformations in jurisprudential thinking.[245] This was a dispute that arose over the U.S. opposition to destructive British open-sea seal hunting practices in an area of Alaskan waters that the United States claimed as its own *mare clausum*, among other "subtle and ingenious" arguments for a property interest in this area of open waters and its fur seals.[246] U.S. Supreme Court Justice John Marshall Harlan, who had been part of the Court's unanimous majority for the *Yick Wo* case and would later write celebrated dissents in both *Plessy* and *Lochner* (among many other cases), was one of the United States' two chosen arbitrators. Unlike his American colleague Senator Morgan, Harlan joined the majority's

245. *Bering Sea Arbitration*, U.S.-U.K., Feb. 29, 1982, 27 Stat. 947. (1893). For commentary on the case and the novelty of the arguments presented, see Theodore S. Woolsey, *Bering Sea Award*, 3 YALE L.J. 45 (1893); JAMES CLARKE WELLING, THE BERING SEA ARBITRATION: OR, "PELAGIC SEALING" JURIDICALLY CONSIDERED ACCORDING TO A PARTICULAR ANALOGY OF MUNICIPAL LAW (1893).

246. Woolsey, *supra* note 245 at 48.

finding that the United States had no right to claim ownership of a *mare clausum* inherited from Russia. However, in a separately published dissenting opinion—rare for international arbitration but characteristic of "the Great Dissenter" Harlan—he provided his reasons for accepting the alternative U.S. argument for a property interest in the threatened Alaskan fur seal populations founded on principles of natural law.[247]

As Harlan notes, in the case at hand there was not only a dispute over the interpretation of particular international norms, but also over fundamental jurisprudential questions. For lack of a clear rule of law to defend its position, the United States had turned to an argument based on "principles of right reason, justice, humanity, and morality which have their foundation in the law of nature as applied to the institution of property."[248] Great Britain, by contrast, insisted that the dispute could only be decided "upon grounds of positive law, resting in the affirmative assent of [ ] nations."[249] In rejecting this British position, Harlan turned to the many statements of influential international law treatises and various of their modern interpreters (including Justices Marshall and Story) to the effect that "[c]onventional law may abrogate the law of custom, but it loses its character as a law if it establishes provisions at variance with natural law."[250]

It was true that, as the British contended and as the majority of arbitrators determined, there was no existing positive legal authority that would confer on the United States the right to control its seal population while the latter was in open seas. As *ferae naturae*, there was no general property right in the seals aside from when they were in immediate possession. However, there were reasons to recognize a U.S. right to prevent other states' destructive uses of the seal population that were based on "the law of nature, that is, by the principles of justice, sound reason, morality, and equity, as recognized and approved by civilized peoples."[251] In particular, the fur seals would be "destroyed" but for U.S. protection.[252]

It was legitimate for arbitrators (who, as had been recognized in the *Alabama* arbitration, decided in any case upon the scope of their own adjudicative mandate) to turn to the shared principles of "civilized

247. John Marshall Harlan, *Bering Sea Tribunal of Arbitration*, *in* OPINIONS OF MR. JUSTICE HARLAN AT THE CONFERENCE IN PARIS OF THE BERING SEA TRIBUNAL OF ARBITRATION (1893).

248. *Id.* at 133

249. *Id.*

250. *Id.* at 140

251. *Id.*

252. *Id.*

peoples" when needed to fill a gap in the law. In a summary of the American position by Yale's Theodore S. Woolsey, "[t]he freedom of the seas for most purposes of course exists; but when in conflict with a case like the present, the laws of humanity, of self-defense, [and] of State necessity, must be paramount."[253] Despite appreciating this "ingenious" argument, however, Woolsey ultimately condemned it as "[un]sound" in the face of "other and better established principles" including immunity of civilian vessels from search in times of peace, as well as the "broad principle of a free high sea," against which a U.S. victory would have been a "regrettable" transgression.[254]

Woolsey thus criticizes the U.S. argument in part for its incompatibility with central aims of the international legal project and in part for its overreach into unilateralism. By contrast, Harlan's vision of international legal interpretation permits much greater potential for reinvention of legal rules in line with the law's (and each arbitral tribunal's) underlying "objects":

> [Just as] a court sitting under municipal authority would be bound, in the absence of precedent, to give judgment according to the principles of right derived from the whole body of the law to which it may properly refer, so this Tribunal, constituted for the determination of questions depending upon the law of nations, may, and if it fulfills the objects for which it was constituted, must, look into the recognized sources of that law and seek in the domain of general jurisprudence for the rule of decision in the case before it.[255]

Both the U.S. side's argument and Harlan's lengthy and detailed attempt to provide it with a theoretical justification engage directly with the same notions of immanent economic principles, above all a "natural" social norm concerning respect for property rights, that would soon be validated in the separate domain of Fourteenth Amendment jurisprudence during the *Lochner* era. However, these same notions played an *opposite* role in the context of international law as opposed to domestic. Whereas in the former an "immanent" property right was used to focus interpretation *away* from constitutional intent and towards the idea of immanent restraints on possible state action, in the case of the *Bering Sea* arbitration the immanent economic principle was

253. Woolsey, *supra* note 245 at 48.

254. *Id.*

255. HARLAN, *supra* note 247 at 133–134.

being cited for the notion that a panel of arbitrators could look beyond positive sources of law in order to "*fulfill[ ] the objects* for which it [i.e., that tribunal, as well as the law it applied] was constituted."[256] That is to say, natural law was here functioning as a proxy for interpreting the "intent" underlying positive sources of law such as treaties or custom.

Just as with the long-term initiatives of members of the *Institut*, so too in the context of particular arbitrations could notionally "universal" systemic principles be invoked to bolster the powers of international institutions and, in this case, what would amount to de facto authority to legislate a new norm relating to property rights over vulnerable animal populations. However, as noted, Harlan was here in the minority. In the event, his proposed rule failed to take hold in the *Bering Sea* judgment—but the same rule was in fact adopted less than two decades later in the North Pacific Fur Seal Convention of 1911.[257] It was not yet possible for arbitrators to explicitly act as the Delphic voice of the international legal "project," announcing norms notionally based on the collective will, but they could already guide that will towards specific acts of legislation.

The 1899 and 1907 Hague Conferences did not, in themselves, radically accelerate a transition from system to project. Efforts by statesmen, diplomats, and international jurists to further the momentum of international legal organization by, for example, creating permanent international tribunals or making arbitration a compulsory norm largely failed to take hold except in the form of aspirational plans. Nonetheless, on a discursive level, these two conferences did greatly reinforce the presumption of legitimacy attached to grandiose legislative initiatives, and for the first time fully extended these to the global level.

The first Hague Conference, convened in 1899, in which the community of the *Institut* figured heavily, saw the confluence of many different projects of law and the attempt—if an often stymied one—to adapt jurists' proposed codes into constitutionalized rules for the world community (one still very much conceptualized along the lines of "Western civilization").[258] Many of the humanitarian law rules of 1899, for

256. *Id.* (emphasis added).

257. Alvin C. Gluek Jr., *Canada's Splendid Bargain: the North Pacific Fur Seal Convention of 1911*, 63 CAN. HIST. REV. 2, 179 (1982).

258. *Cf.* GREWE, *supra* note 197. Grewe and other historians of international law have noted the basic contradiction between the continued Eurocentrism of lawmaking at the Hague and its newly universal ambitions. However, more detailed scholarship is needed on how these phenomena intertwined in the thought of key figures such as Friedrich Fromhold Martens, who was a leading force behind Hague-era developments and who also explicitly "postulated that

example, were drawn directly from the *Institut*'s existing work on the laws of war. It also, in the Convention for the Pacific Settlement of International Disputes, created a new framework for states to pursue mediation (Title II), establish Commissions of Inquiry (Title III), or arbitration of their disputes (Title IV).[259] Towards these ends, the Convention created the Permanent Court of Arbitration (PCA), which, despite its ambitious name and the even more ambitious references to it by peace activists as the "World Court," on the whole failed to meaningfully institutionalize international legal arbitration.[260] Opposition by the United States and German delegates in 1899, and then again by Germany in 1907, sank the possibility of realizing a truly compulsory jurisdiction for the PCA (or even its status as an actual "court," as it is erroneously titled, rather than a mere roster of arbiters).

The realities of Great Power politics profoundly limited the possible applications of the new institution to the resolution of interstate disputes.[261] The early arbitrations of the PCA thus did not follow up on the jurisprudential approach on view in Harlan's *Bering Sea* dissent, in which the arbitrator could comb the sources of international legal history as well as the shared principles of "Western civilization" in order to assert newly judiciable rights. Early arbitrations such as the *Pious Fund* case (1902) between Mexico and the United States and the *Japanese House Tax* case (1905) between Germany, France, the United Kingdom, and Japan brought about results closely aligned with the relative geopolitical power and standing of the disputing states.[262] Jurisprudentially, these arbitrations often turned not on legal arguments but rather on interpretations of fact.[263] This meant that the mostly extra-legal process

international law was applicable only between the 'civilized' (i.e., Christian and European /Western) nations, and 'non-civilized' countries like Turkey, Japan, and China could not invoke it." Lauri Mälksoo, *FF Martens and His Time: When Russia Was an Integral Part of the European Tradition of International Law*, 25 EUR. J. OF INT'L L. 3, 811, 824 (2014).

259. *See, e.g.*, George H. Aldrich & Christine M. Chinkin, *Symposium: The Hague Peace Conferences: Introduction*, 94 AM. J. INT'L L. 1 (2000); Martha Finnemore & Michelle Jurkovich, *Getting a Seat at the Table: The Origins of Universal Participation and Modern Multilateral Conferences*, GLOBAL GOVERNANCE, 361–73 (2014).

260. *Cf.* Andrei Mamolea, *Saving Face: The Political Work of the Permanent Court of Arbitration (1902–1914)*, *in* EXPERIMENTS IN INTERNATIONAL ADJUDICATION: HISTORICAL ACCOUNTS 196 (Rasilla & Viñuales eds., 2019).

261. *See* CALVIN D. DAVIS, THE UNITED STATES AND THE SECOND HAGUE CONFERENCE 32-33 (1975) ("Few statesmen saw the conference as an event with large meaning for the future . . . The Permanent Court of Arbitration could have no more importance than the signatory powers would voluntarily assign to it.").

262. Mamolea, *supra* note 260, at 197.

263. *Id.*

of developing the *compromis* between the disputants continued to be the factor of paramount importance.

Many then involved in international law were indeed, like the octogenarian diplomat and experienced arbitrator Edward Fry, the lead British delegate to the Second Hague Conference in 1907, "struck by the greatness of the idea of really constituting a Court above all national courts, thus making a great stride forward in the conquest of law over force."[264] In this particular instance, Fry's comments were about the specific project of an International Prize Court for deciding upon disputes over incidents of capture during naval warfare. Yet even within that limited domain, it proved impossible to effectively constitute an international tribunal given states' (especially non-Great Powers') concerns as to their lack of control over the way it would interpret norms.

It was not until the post-World War One establishment of the League of Nations and the Permanent Court of International Jurisdiction (PCIJ) that such a tribunal would be established—but the potential contradictions inherent to construing international law as a collective legislative project did not evaporate. The League era demonstrated these contradictions, including perennial disagreements about who should legislate norms, how they should be interpreted, and the degree to which they could approximate the compulsory legal norms of domestic jurisdictions.

C. *The New Jurisprudence of Purpose*

When the PCIJ was created following the First World War, it embodied the longstanding hopes of many jurists, diplomats, and pacifists for a truly centralized global tribunal. Unlike the PCA, the PCIJ would feature a full-time bench, would interpret law based on its own doctrine of sources, and would be able to develop a substantial body of case law and advisory opinions. Its jurisdiction and functions were specified in its own statute and, crucially, were tied to the larger administrative structure of the League of Nations, forming a de facto "judicial branch" of the latter.[265] Though the Court was in principle still based on the positivist notion of state consent, its jurisdiction over disputes became a central feature of the interwar order and marked a crucial stage in the development of an international legal profession with its own distinct community identity. That community, of course, was formed among the elite jurists of (mostly) great colonial powers.

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264. EDWARD FRY, A MEMOIR OF THE RIGHT HONOURABLE SIR EDWARD FRY, G.C.B. 196 (1921).

265. *See, e.g.*, the characterization of the PCIJ and ICJ in David D. Caron, *International Courts and Tribunals: Their Roles amidst a World of Court*, ICSID FOREIGN INVESTMENT LAW JOURNAL 1–13 (2011).

It was in fact recognized by many participants in the emerging projects of international law that enabling a true legislative function equated to extending European norms to non-European bodies and spaces. The German legal scholar and pacifist Walther Schücking,[266] for example, explicitly drew the connection between the trend of increased international organization and the articulation of a collective European will. In his pathbreaking 1912 book on *The International Union of the Hague Conferences*, Schücking argued that recent legal developments necessitated the analogy between global law and domestic constitutionalism. He cited the Swiss international lawyer Max Huber's view that states' shared interests in regulating matters of common concern had now made clear the necessity:

> not merely of establishing unity by creating appropriate legal institutions . . . but of strengthening this unity and agreement by means of a separate and independent organization and of blending to this end the concurrent wills of the states into *a new collective will*.[267]

Agreeing with this prophetic notion, Schücking also took care to emphasize that the "new collective will" could not be conceived of as one limited to any specific group or region. It must characterize itself as global and universal, for "the leading states of Europe have far too many interests outside of [it] to make it possible to bring about a federation in Europe without at the same organizing the world."[268] That is: the "global" character of the new legal order was not based on representing all of the peoples of the globe, but rather all of the European interests permeating it.[269] The premise of a Western community of interests underwrote the new project of developing an international legal profession as the interpreters and guardians of that community's norms. This logic was always at work, even where relatively

266. For sympathetic accounts of Schücking's life and work, focused on his PCIJ jurisprudence, see, e.g., Ole Spiermann, *Professor Walther Schücking at the Permanent Court of International Justice*, 22 EUR. J. OF INT'L L. 3, 783 (2011); Mónica García-Salmones Rovira, *Walther Schücking and the Pacifist Traditions of International Law*, 22 EUR. J. OF INT'L L. 3, 755 (2011).

267. WALTHER SCHÜCKING, THE INTERNATIONAL UNION OF THE HAGUE CONFERENCES 19–20 (Charles G. Fenwick, trans., Oxford: Clarendon Press 1918) (1912) (emphasis added) (citing Max Huber, *Beiträge zur Kenntnis der soziologischen Grundlagen der Staatengesellschaft*, 4 JAHRBUCH DES ÖFFENTLICHEN RECHTS 56, 72 (1910).

268. *Id.* at 243 n. 1.

269. Huber, *supra* note 267 ("communal law is the expression of preexisting communal interests of the society of states.").

cosmopolitan jurists were willing to "admit" new members. Huber, for instance, thought that some Muslim states, along with China and Siam, had now to be seen as members of the *Gemeinschaft*—although for "Abyssinia, Morocco, Liberia, Afghanistan," and perhaps a few others, this was still "in question."[270]

These understandings of the legal community and the nature of its project were at work throughout the jurisprudence of the PCIJ, not only for Huber (who became the President of the Court) and Schücking (its first German judge), but among its jurists more generally. Important early cases demonstrated the turn to an understanding of international legal authorities as embodiments of a collective (primarily European) will. These included the cases of *Wimbledon*[271] and *Lotus*.[272] In the latter, a highly divided PCIJ imposed some limits on their own authority, stating for the first time the now-canonical rule that states are to be presumed capable of taking any action not explicitly prohibited by a rule of international law (in this case, asserting jurisdiction over an incident occurring on the high seas). The global "project" would not by default preempt the law of the nation-state, however it *could* claim to do so where such preemption was explicitly posited.[273]

As in *Marbury*, the judicial self-imposition of limits served primarily to define the judges' own role as interpreters of the collective will. In *Wimbledon*, for example, a more united court had ruled that Germany violated its duties under Article 380 of the Treaty of Versailles, requiring that it keep the Kiel Canal open to seafaring "on terms of entire equality." Germany's restriction of traffic on the canal during the war between Poland and Russia had affected a British steamship (the S.S. Wimbledon), which was transporting war materiel. In the German view, the traditional duties of neutral states prohibited allowing the ship passage to aide Poland in its war.[274]

The contrasting views in the majority and dissenting opinions of the *Wimbledon* case demonstrate the extent to which international law in the era of the League and PCIJ had already become, at least for many of its leading interpreters, a "constitutionalized" order. The majority focused its analysis upon the intent of the drafters of the Treaty of Versailles, who had "contemplated the contingency of Germany being

270. *Id.* at 63.

271. Britain v. Germany, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

272. France v. Turkey, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

273. *Id.*

274. Britain v. Germany, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

in the position of a belligerent."[275] Unlike arbitrations of the pre-League era in which customary norms could be invoked as checks upon the scope of acceptable treaty practice, this post-League jurisprudence treated the collective will expressed in the Treaty and Covenant texts as dispositive of the legal issues—even in the face of the longstanding (systemic) rights and duties of neutral states. Collective intent was now the dominant factor: "[i]f the conditions of access to the Canal were also to be modified in the event of a conflict between two Powers remaining at peace with Germany, the Treaty would not have failed to say so. But it has not said so and this omission was no doubt intentional[.]"[276]

This methodology is echoed in the dissent of Walther Schücking. Unlike the other eleven judges on the panel (including fellow dissenters Huber and Anzilotti), Schücking was less willing to base his decision on the underlying intent behind the provisions of the Treaty (which he, like other German jurists, even his fellow pacifists, often condemned as illegitimate victor's justice).[277] Although Schücking *was* committed to viewing the League Covenant as a "constituting statute" for the legal "organization of the world," he denied the ability of the Treaty of Versailles to do the same. Still, despite at first trying to base his opinion on traditional rules of international law, he ultimately turns instead to his own account of a hierarchy of authority based on collective intent.

In his effort to draw distinctions between the Treaty and the Covenant, Schücking initially reaches for systemic principles of the Roman law, which had for centuries been received into the private law of European civil jurisdictions. Specifically, he presents the argument that the rights of passage that Germany had afforded to other states via Article 380 of the Treaty of Versailles were not simply a *sui generis* creation of the treaty text, but instead were an adaptation into international law of the civil law institution of servitudes: a *servitus juris publici*

275. *Id.*

276. *Id.* It is important to note that this focus on treaty text is also strongly suggested by the precedential order of authorities provided for in PCIJ Statute Article 38 (the predecessor of ICJ Statute Article 38).

277. Schücking was, with Hans Wehberg, the author of one of the first detailed accounts of the League of Nations Covenant as a constitution-esque piece of international legislation. At the same time, however, they openly acknowledged and criticized the way that the Covenant, and even more so the Treaty of Versailles, had been "imposed" rather than produced via a genuine, non-coerced process of open deliberation and agreement. WALTHER SCHÜCKING & HANS WEHBERG. DIE SATZUNG DES VÖLKERBUNDES (F. Vahlen, 1931) (1921).

voluntaria.[278] Such an international servitude constituted "an exceptional right resting upon the territory of a foreign State, [which] should limit as little as possible the [latter's] sovereignty[.]"[279] The servitude remained subject to more general principles of the civil law such as the obligation *civiliter uti*—"that the vital interests of the State under servitude must in all circumstances be respected."[280]

Despite his decades of advocacy for pacifism and internationalism, and his prescient description of the Hague Conferences as steps on the way towards a constitutionalized international legal order, Schücking now sought to balance this new vision with elements of the older system of principles growing organically out of the tradition of European public law. By then, however, this was very much a minority position, and not a single other judge agreed that the interpretation of a treaty norm establishing freedom of navigation should be informed by the venerable civil law institution of the servitude. At the very end of Schücking's dissent, he thus turned to a different strategy, invoking the collective will embodied in the Treaty, of which he posited that "it cannot be the intention of the victorious States to bind Germany, by means of the Versailles Treaty, to commit offences against third States."[281]

Schücking's argument here demonstrates the extent to which jurisprudential arguments in the PCIJ era had been subsumed by the notion of intent. Non-willed positive authorities could no longer be independently dispositive when a treaty regime was under discussion. Instead, judges had to increasingly adopt the discourse of instrumental (or "purposive") rationality (*Zweckrationalität*).[282] It was not enough to derive the international servitude from its origins in preexisting practice—such evidence had to be used in order to advance claims about the shared intention of the contracting states vis-à-vis the treaty constitutive of the present dispute.[283] The discourse of the collective will had come to colonize even leading jurists' own attempts to limit that will.

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278. Britain v. Germany, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17) (separate dissenting opinion of *ad hoc* Judge Walther Schücking). This is the same orthodox view on the origins of such rights that had been expressed by Engelhardt and other commentators on the issue in the leading nineteenth century works on international waterways. *See* ENGELHARDT, *supra* note 173, at 749.

279. ENGELHARDT, *supra* note 173, at 751.

280. ENGELHARDT, *supra* note 173, at 757.

281. ENGELHARDT, *supra* note 173, at 757.

282. *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY (University of California Press, 1978) (1922); Jürgen Habermas, *Aspects of the Rationality of Action*, RATIONALITY TODAY, 185–212 (1979).

283. Adam Smith and others, of course, had already fully displayed the interpretation of international legal norms in terms of choices reflecting instrumental rationality / *Zweckrationalität*

Another, related major feature of PCIJ jurisprudence was the empowerment of international organizations (IOs). This was embodied in, e.g., the 1927 Advisory Opinion on the *Jurisdiction of the European Commission of the Danube Between Galatz and Braila*.[284] The Court first reviewed Romanian objections to the exercise of powers by the European Commission of the Danube over areas of river territory that the former state had not explicitly agreed to. It then advised that "an international institution with a special purpose . . . only has the functions bestowed upon it by the Definitive Statute with a view to the fulfilment of [its given] purpose, but it has power to exercise those functions to their full extent, in so far as the Statute does not impose restrictions on it."[285] In other words, as the principle would be described by Dapo Akande seven decades later: "where it can be shown that the power claimed [by an IO] relates to and is directed at achieving the purposes and functions given to the Organization by its constituent instrument," that IO's claimed power is valid.[286]

The ongoing rise of the project imaginary in international jurisprudence was closely tied to this new category of "constituent instruments," aka "constituting statutes," etc. As the terms suggest, these are international legal authorities analogized to "constitutions" of certain IOs or, at times, internationally administrated territories. The "domestic analogy" of international law that undergirded the turn to a project imaginary was most clearly on display in relation to such sources of law. This was especially apparent in the *Oscar Chinn* case, for example.[287]

Oscar Chinn was a case that arose as a result of claims by the United Kingdom on behalf of a British subject operating a river transport service in the Belgian Congo. Belgium had introduced subsidies to favor its own national operators in a manner prejudicial to foreigners, which the United Kingdom claimed was a breach of the freedom of navigation and internationalization norms that had been promulgated by all major European powers in the 1885 Congo Act.[288] Belgium, meanwhile, pointed to the post-World War I Treaty of Saint-Germain as

by particular actors. The key difference in the PCIJ era was that now had to be a *shared* aim that the court could characterize as the basis of the common will.

284. *European Commission of the Danube*, 1927 P.C.I.J. (ser. B) No. 14 (8 December).

285. *Id.*

286. Dapo Akande, *The Competence of International Organizations and the Advisory Jurisdiction of the International Court of Justice*, 9 EUR. J. OF INT'L L. 3, 437, 445 (1998). Akande first attributes this range of authority to the powers of the UN as interpreted in ICJ jurisprudence, then analogizes this to the powers of the European Commission of the Danube as defined by the PCIJ in its 1927 Advisory Opinion.

287. Oscar Chinn, U.K. v. Bel., 1934 P.C.I.J. (ser. A/B), No. 63 (Dec. 12).

288. *See supra* notes 238–242 and accompanying text.

establishing a new set of navigation norms that superseded those of the earlier agreement. The latter treaty was signed by some, but not all of the parties to the former Congo Act. The question thus arose as to whether the latter could be modified on this partial basis, and as to the relative status of the competing instruments.

The majority was inclined to view the recent Treaty of Saint-Germain as a dispositive articulation of the collective will of the international community. However, the four dissenting judges, including Schücking, argued that the "the will of the States which drew up the Congo Act . . . was to create a Statute of the Congo which should not be liable to be altered by some only of its authors."[289] The PCIJ's internal debates again turned on questions of intent, and, specifically, on which legal authorities had been deliberately constituted as "higher" law. In the longest of the dissents, Judge Jonkheer Van Eysinga described the passage of the Congo Act as "a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty."[290]

The idea that the Congo Act served as the "constitution" for the Belgian Congo suggested that it existed on a higher plane of legal authority than a subsequent treaty by only some signatories. The appropriate jurisprudential approach would be one closely approximating the project imaginary of domestic constitutional jurisprudence such as *Marbury v. Madison* and its progeny. Will and intent were dispositive. "The antecedents of the Berlin Conference show that the intention was to set aside all treaties concluded between certain Powers [ ] in regard to their interests in the Congo Basin," and so where parties do later create such a treaty in contravention of the Act, it "remains null and void, because it transgresses the bounds which the authors of the Berlin Act established for themselves[.]"[291] The later treaty was "repugnant" to the earlier and higher one.[292]

A special, normative status was to be accorded to such "a highly internationalized statute[s]," which "have been established also in other

289. Oscar Chinn, U.K. v. Bel., 1934 P.C.I.J. (ser. A/B), No. 63 (Dec. 12) (separate dissenting opinion of Judge Walther Schücking). The other dissenting judges were Cecil Hurst, Rafael Altamira y Crevea, Dionisio Anzilotti, and Jonkheer Van Eysinga.

290. Oscar Chinn, U.K. v. Bel., 1934 P.C.I.J. (ser. A/B), No. 63 (Dec. 12) (separate dissenting opinion of Judge Jonkheer Van Eysinga).

291. Oscar Chinn, U.K. v. Bel., 1934 P.C.I.J. (ser. A/B), No. 63 (Dec. 12) (separate dissenting opinion of Judge Walther Schücking).

292. *Id.*

parts of the world."[293] Finally, there must be an ability for judges to distinguish between the mundane intent of particular interstate treaties and the "higher" intent encoded into foundational, constitution-approximating legal instruments:

> Our Court has been set up by the Covenant as the custodian of international law. It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid. There is nothing to show that it was intended to disregard that legal principle when this Court was instituted, or that it was to be obliged to found its decisions on the ideas of the parties - which may be entirely wrong - as to the law to be applied in a given case.[294]

Schücking's separate opinion in *Oscar Chinn* is today mainly remembered by international lawyers as something of a mission statement for global constitutionalism.[295] It does indeed emphasize the role of international judges as akin to those of judges on a domestic constitutional court. However at the same time it is emblematic of the problems of authorship endemic to all legal discourse of "projects"—any claim to speak on behalf of the collective will may be met with an alternative and incompatible claim, or with a subsequent rejection by those in whose name the claim was articulated. After all: despite lawyers' ongoing enthusiasm for PCIJ judges' views on "higher law," the specific claims that the Congo Act was "a constitution established by treaty" that "most satisfactorily guaranteed . . . the interests of peace, those of 'all nations' as well as those of the natives,"[296] would likely seem little more persuasive for many today than the reasoning of of *Dred Scott*.

That this legal *Weltanschauung* raises troubling prospects for the colonial and exclusionary legacy of international law is immediately obvious, even in contexts far removed from the colonial appropriation

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293. *Id.*

294. *Id.* On the notion of the court as "custodian [or guardian] of international law," *cf.* the "guardian controversy" between Hans Kelsen and Carl Schmitt. *See generally* LARS VINX, THE GUARDIAN OF THE CONSTITUTION (2015).

295. *See, e.g.*, EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 80 (2016) (describing the *Oscar Chinn* dissents, among other PCIJ jurisprudence, as "affirm[ing] the existence of peremptory norms in international law . . . that certain norms are of such importance that they supersede conflicting consensual agreements between states.").

296. Oscar Chinn, U.K. v. Bel., 1934 P.C.I.J. (ser. A/B), No. 63 (Dec. 12) (separate dissenting opinion of Judge Jonkheer Van Eysinga).

and division of spoils at work in the Congo Act. Scholars associated with the Third World Approaches to International Law (TWAIL) movement, among others, have sought to illustrate the degree to which unequal relations of power and colonial structures have rendered many "universal" legal norms unfavorable to decolonizing states.[297] Often, they have focused such critique on international economic norms and institutions, such as the IMF and World Bank, pointing out how the financial norms and distribution of loans stemming from these organizations were decided without significant involvement by those whose national fortunes and policy options they would later go on to determine.[298] Meanwhile, this authorship-based critique of international institutions has also been extended to various other areas, including international criminal law.[299]

Going forward, taking the notions of system and project as key epistemic categories of international legal history may aid in conducting more detailed investigations into ascriptions of agency, or its lack, to those involved in specific events and agreements.[300] At any given point in time, certain behaviors or norms may seem to constitute immanent standards emerging naturally from human social organization; while others appear as domains for possible willed action and change. From the mid-19th to the early 20th centuries the slave trade, privateering, riverine navigation, the laws of war, and finally the adjudication of interstate disputes all moved from the former category to the latter. Yet underlying ideas regarding the immanence of Western legal principles,

297. *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2007).

298. *See, e.g.*, Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3(1) TRADE L. & DEV. 103 (2011).

299. Antony Anghie & Bhupinder S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE JOURNAL OF INTERNATIONAL LAW 1, 77–103 (2003).

300. In this sense, continued application of the project/system framework of analysis may contribute significantly to ongoing discussions of issues such as the *a priori* Eurocentrism of much international legal history. Martti Koskenniemi notes that his own work in international legal history has at times sought "to bring international law down from epochal or conceptual abstractions and think of it in human terms, as a set of legal initiatives by men who defined themselves as authorities in the field and therefore had much to gain if indeed they might succeed." Martti Koskenniemi, *Histories of International Law: Significance and Problems for a Critical View*, TEMP. INT'L & COMP. L.J. 27 (2013). Questions of authorship and agency can also help to contextualize claims for, or against, the "contingency" of certain international legal developments. *See, e.g.*, Genevieve Renard Painter, *Contingency in International Legal History: Why Now?*, *in* SITUATING CONTINGENCY IN THE COURSE OF INTERNATIONAL LAW (Kevin Jon Heller & Ingo Venzke eds., forthcoming 2020).

and the locus of agency in the Western community of states, went largely unchallenged.

Even today, many international legal projects' drafters and interpreters still tend to come from the ranks of former colonizers—whether in terms of their personal backgrounds (which have grown more diverse over time) or their professional formation (which remains dominated by a few elite Western institutions). The populations governed by international institutions, however, consist in large part of those living in formerly colonized states. International lawyers today might pause before attributing "higher" status to legal authorities that, like the Congo Act, can serve to reify underlying situations of exploitation or entrenched inequality. In some cases, adjudicators might better defend perceptions as to their own legitimacy by adopting a Vienna-esque "system" perspective on jurisprudence that prioritizes the rights of states to pursue divergent practices, rather than a hermeneutics of collective intent designed to relativize that autonomy.

V. Conclusion: The Problem of Authorship

The 19th century transition from an earlier, more universalist conception of the law of nations to one more rigidly defined as the emanation of a specific, European-Christian community has been remarked upon by many legal historians. C.H. Alexandrowicz, among others, ascribed this transformation to a shift from a "natural law" framework to one of "positivism."[301] However, as this Article has argued, it was not the long-standing emphasis upon positive legal authorities in itself, but rather the new phenomenon of collective legislative projects, that radically reframed notions of agency in international law.

A system, too, could certainly change over time. Yet this did not have to reflect a common "will" or a capacity for universal adherence to unitary legislative and judicial institutions. Ironically, this is perhaps most obvious in the prohibition of the slave trade, where major revision was effected by means of domestic legal reform, unilateral action, and bilateral diplomacy—and *not* collective legislative efforts or enforcement by centralized international tribunals.[302] By contrast, the freedom of navigation norm, specifically in its "move inland" via the joint appropriation of rivers and canals to promote the common interests of Western European commercial empires, came to be legislated as a truly centralized set of global rules and administrative institutions, from the

301. *See, e.g.*, Charles Henry Alexandrowicz, *G. F. de Martens on Treaty Practice* in The Law of Nations in Global History 184–185, 191 (David Armitage & Jennifer Pitts eds., 2017).

302. Alston, *supra* note 158.

Danube to the Yangzi, the Suez, the Congo, et al. The great taking of extra-European space for Western European commerce became a genuine collective legal project in a way that humanitarian law would only subsequently aspire to at the Hague Conferences, to rather less decisive results.

It should not be surprising, then, that international lawyers of later eras at times find themselves compelled to turn to sources such as the dissenting opinions in *Oscar Chinn*, on the Congo Act as "higher law," as an ersatz analogue to recent visions of global constitutionalism.[303] The search for a noble genealogy is a perennial obsession of those orphaned by political reality. Theorists of international human rights law, in particular, not infrequently identify themselves as participants in a project with grand origins—perhaps one beginning with Kant, the banning of the slave trade, the First Geneva Convention, the Hague Conferences, the Nuremberg and Tokyo Tribunals, or the Universal Declaration of Human Rights (UDHR), et al.[304] Indeed, while systemic notions of state consent and limited jurisdiction typify many areas of international law practice even today, the "norm entrepreneurship" of human rights is a project discourse *par excellence*.[305]

The imagining of international law as the emanation of a collective will also has concrete (if paradoxical) manifestations among institutional interpreters of human rights and humanitarian law. International criminal tribunals, for example, have seen in both customary law and *jus cogens* doctrine a potent embodiment of "higher

303. *See, e.g.*, CRIDDLE & EVAN FOX-DECENT, *supra* note 291; Nicholas Tsagourias, *The Constitutional Role of General Principles of Law in International and European Jurisprudence*, in NICHOLAS TSAGOURIAS (ED.) TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN PERSPECTIVES 94 (2007); Jan Klabbers, *Lawmaking and Constitutionalism*, in JAN KLABBERS, ANNE PETERS, AND GEIR ULFSTEIN (EDS.), THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW 121 (2011) ("[t]hree quarters of a century ago, Van Eysinga was ahead of his time (yet, curiously perhaps, came across as conservative); in a global constitutional order, though, his approach makes some sense: it should not be possible to change constitutional norms too easily, not even by new constitutional norms.").

304. SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD 315 (2018) (noting the critique that "scholars 'ransack the past for early expressions of familiar-sounding political concepts'"); see also the critique in Alston, *supra* note 158 at 2403 ("How far back can we trace the genealogy of today's international human rights system? And does it matter where we come out on such an arcane academic question? Historians, international lawyers, and human rights activists have recently suggested that there is, in fact, much at stake here. But there the consensus ends.").

305. *See, e.g.*, Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1998) (describing central actors in human rights law as including "'transnational norm entrepreneurs,' private transnational organizations or individuals who mobilize popular opinion and political support within their host country and abroad.").

law" that might be used to override state immunities. Such norms are often depicted as immanently valid, even as a "new natural law,"[306] and thus seemingly part of a legal *system* that needs no central legislator. Yet the problem of authorship surfaces immediately, as there remains little consensus as to exactly what is the process by which an intuitive sentiment about justice can be translated into "a norm accepted and recognized by the international community of States as a whole as [one] from which no derogation is permitted."[307]

The most recent authoritative attempts to grapple with these topics have tended to leave the question of agency unexplored. The International Law Commission's Special Rapporteur Dire Tladi suggests, for example, that "some rules, like [those] relating to the environment, have the status of *jus cogens* which *has yet* to be accepted and recognized by the international community of States as a whole."[308] Only a more developed notion of the collective will involved in international legislation would render sensible the claim that a norm might thus constitute "*jus cogens*-in-waiting." Any distinguishing of "higher" vis-à-vis "lower" norms must tend to move into the project register, as it becomes necessary to identify an agent for whom that superiority was posited as a willed choice. By themselves, the existing interpretive tools of customary international law do not resolve such questions, for in looking to state practice and *opinio juris*, courts must always decide *whose* custom is to be treated as dispositive, and whose disregarded.[309]

Closely related questions about legislative agency were at issue in embattled attempts at subaltern international legal reform initiatives such as the New International Economic Order.[310] Third World lawyers have at times sought to reclaim notions such as human rights or *jus cogens*, and use them as the basis for their own projects of norm legislation. Yet the question as to whether international law should be the site for collective forms of intentional action or a mere "systemic" reflection of principles derived from patterns of cooperation among states is an open one in insurgent contexts as well. Project-conceptions of the

306. Mark Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 CONN. J. INT'L L. 370 (1988).

307. Vienna Convention on the Law of Treaties, Art. 53 (1961).

308. Special Rapporteur Dire Tladi, Fourth Report on Peremptory Norms of General International Law (Jus Cogens), ILC 71st session, A/CN.4/727 (April 2019).

309. B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1 (2018).

310. Umut Özsu, *'In the Interests of Mankind as a Whole': Mohammed Bedjaoui's New International Economic Order*, 6 HUMANITY: AN INT'L J. OF HUM. RTS., HUMANITARIANISM, & DEV. 1, 129–143 (2015).

international legal order, like those implied in Schücking's jurisprudence or Tladi's study on *jus cogens*, suggest its analogy to a constitutional order able to embody a kind of collective constituent power. Yet it may also prove to be the case that "[n]o interpretive strategy succeeds in overcoming the dilemma of a constitution that at once embodies and impedes democratic sovereignty"[311] at the international level, as well as the domestic. Subjects that lack meaningful agency in writing global law are unlikely to see in it their own will. The problem of authorship in international law is also the problem of creating an order in which historically oppressed or excluded peoples can come to view themselves as its authors not as the objects of a Eurocentric *Nomos*.

When new initiatives within international law are pursued, such as, e.g., the development of norms to confront global patterns of entrenched economic inequality, those conceptualizing them may benefit from reflecting as to whether they would be best articulated via (1) claims regarding the unfolding of notionally *immanent* universal norms, such as *jus cogens*;[312] (2) as instead being based on an intent that might be located within the "purposes" of existing positive legal authorities and made use of by modern (re)interpreters;[313] or, (3) in a third alternative, as collective acts of will to be made the focus of a political mobilization that acknowledges its own novelty on the historical stage.[314] International law scholars can perhaps lead the way in combing the depths of these different imaginative possibilities even while engaging in reflection as to what it means (and has meant historically) to claim an ability to articulate the will of all mankind.

311. David Singh Grewal and Jedediah S. Britton-Purdy, *The Original Theory of Constitutionalism*, 127 YALE L.J. 1 (2018).

312. *See* Mohammed Bedjaoui, *The Right to Development and the Jus Cogens*, 2 LESOTHO L.J. 2, 93–129 (1986).

313. Sandra Liebenberg, *Between Sovereignty and Accountability: The Emerging Jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights Under the Optional Protocol*, 42 HUM. RTS. Q. 1 (2020). *Cf.* Julia Dehm, *Righting Inequality: Human Rights Responses to Economic Inequality in the United Nations*, 10 HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM, & DEV. 3 (2019).

314. *See* MOYN, *supra* note 304, at 8–9 ("The attempt to mobilize economic and social rights has remained unimpressive since the end of the Cold War allowed such mobilization to begin, especially when constitutional judges and international nongovernmental pressure groups strove to enforce these rights . . . As egalitarian ideals and practices died, the idea of human rights accommodated itself to the reigning political economy, which it could humanize but not overthrow.").