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'Our passion for legality': international law and imperialism in late nineteenth-century Britain

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Abstract. This article deploys a historical analysis of the relationship between law and imperialism to highlight questions about the character and role of international law in global politics. The involvement of two British international lawyers in practices of imperialism in Africa during the late nineteenth century is critically examined: the role of Travers Twiss (1809–1897) in the creation of the Congo Free State and John Westlake's (1828–1913) support for the South African War. The analysis demonstrates the inescapably political character of international law and the dangers that follow from fusing a particular form of liberal moralism with notions of legal hierarchy. The historical cases raise ethico-political questions, the importance of which is only heightened by the character of contemporary world politics and the attention accorded to international law in recent years.

Introduction

During the last decade international law has received unprecedented levels of public and political attention. In the run-up to the 'humanitarian' war over Kosovo, before, during and after the invasions of Afghanistan and Iraq, and in the continuing debates over the treatment of prisoners of war or 'unlawful combatants', notions of legality and legitimacy have taken on a new prominence. At the same time, many observers argue that current world politics is witnessing liberal imperialism *redux*. According to one scholar, the Bush administration's war on terror 'effectively calls for a return to an imperial system of order, one in which the imperial power assumes for itself the right to invade other states and transform them for its own purposes – this, ostensibly, in the name of liberating these peoples.'[1] These developments have been facilitated, in part, by the resurgence of liberal approaches to international politics and a concomitant stress on the role of international law. In particular, liberal ideas about hierarchy in international relations which serve to delegate to

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[1] Anthony Anghie, 'On Critique and the Other', in A. Orford (ed.), *International Law and its Others* (Cambridge: Cambridge University Press, 2006), pp. 389–400, at 392. See also Michael Cox, 'Empire, Imperialism and the Bush Doctrine', *Review of International Studies*, 30 (2004), pp. 585–608.

liberal-democratic states particular privileges and responsibilities in international politics, are (to the surprise of many well-meaning liberals) highly compatible with imperial projects.[2] And in recent years, this fusion of liberal, humanitarian aspirations with the vocabulary of international law has pursued its objectives by using military force. This raises some uncomfortable questions about the dangers of a certain form of liberal moralism and about the nature and function of international law (both as a body of law and as a profession and intellectual activity) in international politics. One of the ways in which we can begin to confront such questions is by turning to history. Apart from explaining actions and events, history also extends 'understanding, comprehension and experience', which in turn can be used to re-evaluate our own predicament.[3] In this article I seek to deploy this kind of historical analysis to the relationship between liberal moralism, international law and practices of imperialism in the context of late nineteenth-century Britain.

During the second half of the nineteenth century, British international lawyers were both authors and students of their subject matter. Professors of international law formulated and interpreted law in an endless series of appeals to custom, treaties and some indispensable moral principles that few dared term by their proper name, natural law. One scholar argued in 1884 that 'those who by genius and study' were capable of mastering its principles were 'in substance although not in form the true law-givers of Nations . . .', even if they had, modestly, to refrain from taking the credit.[4] What is more, the subject was conceived within a specific, and specifically progressive, temporality that cultivated a constant expansion of *civilised* international legal relations in quantitative, qualitative and geographical terms. From this perspective, the imperial puzzles of what used to be called the Law of Nations – its Roman legacy and bounded nature that was symbolised in the popular distinction between civilisation and barbarism – were pertinent. Indeed, they became increasingly pressing and relevant as European expansion neared its climax in the partition of Africa.[5] International law literally swathed the world, but the consequences of this legal, geographical expansion were unequally distributed. This article draws on recent scholarship on this theme but also reaches beyond it by supplementing a theoretical analysis of the writings of British international lawyers with an analysis of their involvement in practices of empire and imperialism in Africa – an aspect of British legal and political thought that has so far received little attention. For a number of reasons, it is a theme well worth investigating. The confrontation with practice is, arguably, the acid test of the assumptions and aspirations of international law. The article examines two cases: the involvement of Sir Travers Twiss (1809–1897) in the Belgian King Leopold's 'private' state in the Congo and John Westlake's (1828–1913) attempt to justify the South African War (1899–1902). The arguments

[2] See, for example, Christian Reus-Smit, 'Liberal Hierarchy and the Licence to Use Force', *Review of International Studies*, 31 (2005), pp. 71–92; Helen M. Kinsella, 'Discourses of Difference: Civilians, Combatants, and Compliance with the Laws of War', *Review of International Studies*, 31 (2005), pp. 163–85; Jean Cohen, 'Whose Sovereignty? Empire versus International Law', *Ethics and International Affairs*, 18 (2004/5), pp. 1–24.

[3] Geoffrey Roberts, 'History, Theory and the Narrative Turn in IR', *Review of International Studies*, 32 (2006), pp. 703–15, at p. 704. See also Quentin Skinner, *Visions of Politics*, 3 vols (Cambridge: Cambridge University Press, 1998), vol. I, p. 6.

[4] Travers Twiss, *The Law of Nations Considered as Independent Political Communities: On the Rights and Duties of Nations in Time of Peace*, revised edn (Oxford: Clarendon Press, 1884 [1861]), p. xliii.

[5] Thomas Pakenham, *The Scramble for Africa, 1876–1912* (London: Weidenfeld and Nicholson, 1993).

provided by Twiss and Westlake fittingly represent the imperial bent of much international law in Britain at the time. Equally important, by reminding us of the political nature of international law in the face of the depoliticising nature of the notion of law, the historical examples are useful for thinking about contemporary global politics. In the first case, the law is candidly rewritten or manipulated to serve a specific cause and in the second case, legal argument is short-circuited by appealing to a higher justice *outside* the law. These practices highlight the flexibility and difficulties inherent in legal discourse and raise some fundamental normative and political questions about the current global order.

The following introductory section outlines the common assumptions and general state of British international law in the late nineteenth century. The subsequent two sections turn to the practical consequences that this legal perspective had in relation to Africa; first, the involvement of Sir Travers Twiss in the establishment of the Congo Free State is scrutinised; next, John Westlake's attempt to justify the South African War is brought under investigation. The conclusion sums up the findings of the article and sketches the contemporary relevance of the historical analysis.

International law in the late nineteenth century

During the nineteenth century, international law in Britain was increasingly professionalised, slowly securing a foothold in British universities. Moreover, the century witnessed considerable developments in the jurisprudence underlying the subject. Until at least the mid-1850s international law was often seen as originating from some agency or structure outside the law, the predominant source being a natural law authored by God. However, mounting dissatisfaction with natural law-arguments and a persistent criticism that international law was not properly law but merely a form of positive morality meant that from the 1860s legal scholars began to search for a new and more respectable way of underpinning their subject. As I have argued elsewhere, the most popular solution to this predicament was found in new notions of temporality. The increasingly popular mantra of evolution was invoked, often in a mixture of social and legal evolutionary ideas, to explain not merely the relative powerlessness of international law but also its forthcoming deliverance. International law, it was hesitantly admitted, was not yet law in the perfect sense of the word, but there were abundant signs that it was in the process of becoming so: international law was lagging behind but following a process structurally similar to that of the development of domestic law. In the late nineteenth century it was not uncommon for international lawyers in Britain to bemoan the state of international relations, while hinting that they had time on their side.[6]

If international law was progressing over time, it was also expanding spatially. And these processes were not disconnected. For many lawyers, the idea of an international society formed the basis of the existence of international law (as both symptom and cause), and as this society widened and deepened, the resilience and effectiveness of law would increase. This logic of progress and its promise of bringing

[6] See Casper Sylvest, 'International Law in Nineteenth-Century Britain', *British Yearbook of International Law 2004*, 75 (Oxford: Clarendon Press, 2005), pp. 9–70.

order and justice to international politics made international law particularly appealing to the ideology of liberal internationalism and the wider liberal reformism of which it was part.[7] But as often happens in evolutionary arguments, the full realisation of this idea was postponed almost indefinitely: few scholars projected the coming of a universal and equal society of states anytime soon and, consequently, the expansion with which they dealt was primarily imperial in nature even if it was sometimes seen as part of a larger reformist project. The relationship between the doctrines of international law emerging from the metropole and colonial practice on the ground was a two-way process (and a highly complex one at that). Theoretical arguments were important, sometimes vital, for imperial practice, but as one scholar has pointed out, colonialism itself was central to the constitution of international law in that many of its basic doctrines '. . . were forged out of the attempt to create a legal system that could account for relations between the European and non-European worlds in the colonial confrontation.'[8] Other recent research has done much to highlight the crude assumptions that informed writings about non-European territories and populations in international law, including arrogant and self-serving ideas about the (often very limited) potential and capabilities of mostly non-white peoples.[9]

That international law should provide arguments or justification for imperial expansion is, of course, no recent phenomenon. For Hugo Grotius, widely regarded as the father of modern international law, the justification of imperial expansion was a fundamental objective.[10] But what made many late nineteenth-century international lawyers 'such hopeless apologists for empire' was the assumption that their views of progressive civilisation, often based on naïve platitudes, should be projected throughout the world.[11] Justifications for territorial expansion were premised on the fundamental distinction between civilisation and barbarism, one of the master-tropes of the century. European and/or Christian civilisation was seen as a symbol of the

[7] See, for example, Duncan Bell and Casper Sylvest, 'International Society in Victorian Political Thought: T. H. Green, Herbert Spencer, and Henry Sidgwick', *Modern Intellectual History*, 3 (2006), pp. 207–38; Casper Sylvest, 'Continuity and Change in British Liberal Internationalism, c. 1900–1930', *Review of International Studies*, 31 (2005), pp. 263–83. For a wider perspective, see Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001).

[8] Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), p. 3; Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', *Harvard International Law Journal*, 40:1 (1999), pp. 1–80, at 5. But cf. also David Armitage, 'Is There a Pre-history of Globalization?', in Deborah Cohen and Maura O'Connor (eds), *Comparison and History: Europe in Cross-National Perspective* (London: Routledge, 2004), pp. 169–80.

[9] Apart from Anghie's work I am also indebted to the following: Brett Bowden, 'The Colonial Origins of International Law: European Expansion and the Classical Standard of Civilization', *Journal of the History of International Law*, 7 (2005), pp. 1–23; Gerrit W. Gong, *The Standard of 'Civilization' in International Society* (Oxford: Clarendon Press, 1984); Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics* (Cambridge: Cambridge University Press, 2002); Koskenniemi, *The Gentle Civilizer*, ch. 2; Frédéric Mégret, 'From Savages to ''Unlawful Combatants'': a Postcolonial Look at International Humanitarian Law's Other', in Orford, *International Law and its Others*, pp. 265–317; Jennifer Pitts, 'The Boundaries of International Law', in D. Bell (ed.), *Victorian Visions of Global Order: Empire and International Relations in Nineteenth Century Political Thought* (Cambridge: Cambridge University Press, 2007), pp. 67–88; Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge: Cambridge University Press, 2004).

[10] Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001), ch. 3. See also Keene, *Beyond the Anarchical Society*.

[11] Koskenniemi, *The Gentle Civilizer*, p. 169.

best way of organising human life at the national and international level. For the sake of brevity, I would like to make three points in relation to how this notion was put to work in international legal argument during the second half of the nineteenth century.

First, the story of civilisation was intimately connected to the tale of material and moral progress in which many nineteenth century writers believed, even if this belief was constantly mixed up with a good dose of *Angst*. John Stuart Mill, always alert to the side-effects of 'progress', fashioned the link between progress and civilisation by arguing that 'the present era is pre-eminently the era of civilization . . .; whether we consider what has already been achieved, or the rapid advances making towards still greater achievements.'[12] Secondly, civilisation was something that originated in Europe, and as its light beamed ever brighter it could potentially reach the darker continents. But this impending expansion was sometimes tempered by a conservative (and often religious) sentiment which insisted on a relatively tight-knitted cultural or religious element in civilisation. As an international legal scholar argued in 1879, 'International Comity, like International Law, can only exist in the lowest degree among independent States; in its next degree among Independent Civilized States, and in its highest degree among Independent Christian States'.[13] Finally, the distinction between civilisation and barbarism (and the consequences that followed for inclusion or exclusion) was never entirely fixed and for many scholars there existed intermediate categories. Some states could move from one category to another quite rapidly, as Japan was to demonstrate at the close of the century, while others appeared doomed for the foreseeable future. This indeterminacy also meant that few argued that there were no rules to be heeded in the interaction between civilised and barbarian countries or between barbarian countries. It was just a different set of rules, often reducible to some general, vague moral principles.[14]

These characteristics of international legal vocabulary were put to use in different ways depending on the political and jurisprudential outlook of the individual scholar and the national context within which he operated. The distinction between civilisation and barbarism coupled with a naturalised narrative of European supremacy and a flexible international law could be used to justify a wide range of views. Continental and American scholars voiced opposition to different forms of imperialism from these exact premises.[15] In Britain, however, most international lawyers took a fairly uncritical approach to imperialism that did little to question its underlying rationale.[16] This is not to say that they were unreflective; indeed, their

[12] John Stuart Mill, 'Civilization' [1836] reprinted in *Collected Works of John Stuart Mill*, ed. J. M. Robson, 33 vols (Toronto: University of Toronto Press, 1963–1991), XVIII, pp. 117–47, at 119.

[13] Robert Phillimore, *International Law: Inaugural Lecture* (London: Butterworths, 1879), p. 13. For a subtle analysis of the statism involved in such formulations, see Mégret, 'From Savages to ''Unlawful Combatants'' '.

[14] For a telling illustration, see John Stuart Mill, 'A Few Words on Non-intervention' [1859], reprinted in *Collected Works*, XXI, pp. 109–24, esp. pp. 118–19. For different analyses, see Beate Jahn, 'Barbarian Thoughts: Imperialism in the Philosophy of John Stuart Mill', *Review of International Studies*, 31 (2005), pp. 599–618; Jennifer Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton, NJ: Princeton University Press, 2005), ch. 5; Mark Tunick, 'Tolerant Imperialism: John Stuart Mill's Defense of British Rule in India', *The Review of Politics*, 68 (2006), pp. 586–611.

[15] For an overview, see Koskenniemi, *The Gentle Civilizer*, ch. 2.

[16] Apart from Twiss and Westlake, other British prominent scholars at the time, such as W. E. Hall and T. J. Lawrence, shared this outlook. See, for example [Annelise Riles], 'Aspiration and

endorsement of imperialism was based on liberal and humanitarian concerns and a corresponding disdain for mere expansionism as epitomised in the Spanish conquest of 'the Indies' in the early sixteenth century. Whether the imperial project was understood as an essentially European venture to transplant civilisation abroad or a projection of a British version of this privileged existence, it was its benign motives and perceived contribution to the general progress of the world that set it apart from greedy, destructive conquest. It was in the service of these ideals that Twiss and Westlake deployed international law in the cases analysed below, demonstrating the irreducibly political nature of international law.

Sir Travers Twiss and Leopold II's African adventure

Educated at University College, Oxford, in the 1820s, Travers Twiss went on to become Drummond Professor of Political Economy as well as Regius Professor of Civil Law in the same university. Between holding these positions, Twiss was Professor of International Law at King's College, London, and he later held various prestigious offices including that of Queen's Advocate (1867–1872).[17] While Twiss wrote some early books on population and political economy, he was primarily interested in international legal questions. Having delivered two introductory lectures on international law in 1856, in the early 1860s he published *The Law of Nations Considered as Independent Political Communities*.[18]

Twiss's approach to his subject was fairly typical in that he wanted to present the rules of international law as a detached scholar while, at the same time, modifying and furthering these rules in a particular direction. When he delivered his introductory lectures, the founding of the Institute of International Law (in 1873) still lay in the future, but Twiss's moralism was to sit comfortably with the aim of the Institute to act as the legal conscience of the civilised world.[19] As a lecturer, he stressed that the ends of the international jurist were to 'defend the weaker state' and 'control the spirit of war.'[20] *The Law of Nations* was a fairly unadventurous book. It dealt, in two separate volumes, with the rights and duties of nations in times of peace and in times of war. Twiss had earlier expressed the opinion that the law of nations lacked both a lawgiver and supreme judge and that '[i]ts organ and regulator is public opinion,'[21] but he now argued that the treaties of Münster and Osnabrück had established a balance of power which provided 'the Rules of Conduct which govern

Control: International Legal Rhetoric and the Essentialization of Culture', *Harvard Law Review*, 106 (1993), pp. 723–40; Koskenniemi, *The Gentle Civilizer*, p. 108.

[17] At this time the government took advice on international law from the Queen's Advocate: After Twiss's resignation in 1872 (more on which below), the system was terminated. See D. H. N. Johnson, 'The English Tradition in International Law', *International and Comparative Law Quarterly*, 11 (1962), pp. 416–45, esp. pp. 434n, 436.

[18] Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, 2 vols (Oxford: Oxford University Press, 1861–1863); Twiss, *Two Introductory Lectures on the Science of International Law* (London: Longman, 1856).

[19] For a brilliant analysis of the Institute and its rationale, See Koskenniemi, *The Gentle Civilizer of Nations*, pp. 11–97. Twiss became an active member of the Institute from 1874. He acted as vice-president in 1878, 1879, and 1885. He was an ordinary member 1874–1891 and an honorary member 1891–1897.

[20] Twiss, *Two Introductory Lectures*, p. 60.

[21] Ibid., p. 59.

the Intercourse of Nations' with the physical sanctions that were characteristic of law.[22] In such formulations, Twiss also revealed that he considered the law of nations a Christian and essentially European system of law, although he did acknowledge that 'the Ottoman Porte has steadily advanced in its practice towards the European platform of Public Law.'[23] The assumed European disposition of the law of nations also entailed a traditional argument about imperial expansion, which was, in practice, only relevant to non-European territory, although this was left unsaid:

> A nation, which by any just means enlarges its dominions by the incorporation of new Provinces with the free will of their inhabitants, or by the occupation of vacant territory to which no other Nation can lay claim, is pursuing the legitimate object of its Being, the common welfare of its members.[24]

Twiss offered no detailed explanation for this view, but the formulation implies that he subscribed to (what has become known as) the *terra nullius* doctrine: unoccupied territory could legitimately be acquired through discovery followed by occupation. In most versions, areas inhabited by (so-called) non-civilised populations were not subjects of international law and *therefore* open to occupation following the *terra nullius* doctrine. Here an unspoken and quite widely held Lockean assumption was often at play: the earth was for occupation and *use* in a civilised way.[25] The extent to which Twiss subscribed to these arguments is unclear. In his textbook, Twiss distinguished between *primitive* and *derivative* acquisition, the former being a result of discovery and settlement (according to the *terra nullius* doctrine) and the latter a result of cession through war (indirect) or through treaty (direct).[26]

In a separate article Twiss discussed the relationship between European and African states and put forward 'two cardinal principles of international intercourse' that could help avoid the humiliation of Africans and the degradation of Europe. These were, first, that European nations were not entitled to demand of African nations compliance with (European) international law with which they were unfamiliar and, secondly, that European nations were justified in demanding that African nations adhere to usage in so far as this was 'in accordance with natural right, and where the African nations cannot be ignorant of them.'[27] In practice this

[22] Twiss, *The Law of Nations*, I, pp. vii–ix.
[23] Ibid., p. 84.
[24] Ibid., p. 147. See also p. 148 and the discussion in Pitts, 'The Boundaries of International Law'.
[25] See John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1988), bk. II, ch. V, esp. §§26, 32, and Emer de Vattel, *The Law of Nations*, ed. by B. Kapossy and R. Whatmore (Indianapolis, IN: Liberty Fund, 2008), bk. I, ch. 7, esp. §81. For the broader background to the *terra nullius* doctrine, see David Boucher, 'Property and Propriety in International Relations: the Case of John Locke', in Beate Jahn (ed.), *Classical Theory in International Relations* (Cambridge: Cambridge University Press, 2006), pp. 156–77; Anthony Pagden, 'Human Rights, Natural Rights, and Europe's Imperial Legacy', *Political Theory*, 31 (2003), pp. 171–99; Jörg Fisch, 'Africa as *terra nullius*: the Berlin Conference and International Law', in Stig Förster, Wolfgang J. Mommsen and Ronald Robinson (eds), *Bismarck, Europe, and Africa: The Berlin Africa Conference 1884–1885 and the Onset of Partition* (Oxford: Oxford University Press, 1988), pp. 347–75. Politicians also exploited such arguments. For example, in 1888, Joseph Chamberlain argued that African territories inhabited by tribes were in fact unoccupied as '[t]he tribes and Chiefs that exercise domination in them cannot possibly occupy the land or develop its capacity . . .' (quoted in Iain R. Smith, *The Origins of the South African War, 1899–1902* [London: Longman, 1996] p. 59).
[26] Twiss, *Law of Nations*, I, pp. 160, 189–92.
[27] Twiss, 'Applicability of the European Law of Nations to African Slave States', *Law Magazine and Review*, 220 (1876), pp. 409–37, at 412.

led to a dual vision of international law: a developed Law of Nations (appealing to treaty and custom) was valid between civilised, European states and a minimal natural law governed relations between civilised and uncivilised states. In sum, Twiss appears a sincere and naïve supporter of imperial practices, which he saw as part of the duty of civilised states to bring progress and order to barbarians and savages beyond Europe.

In the first half of March 1872, Twiss suffered one of those harrowing personal tragedies that supplies Victorian cultural life with its image of moral tyranny and petty unpleasantness. In 1862 in Dresden, Saxony, Twiss had married Pharialde van Lynseele, a Catholic and naturalised Belgian born in Poland in 1840. Ten years later a solicitor by the name of Andrew Chaffers, possibly after trying to extort money, issued a statutory declaration to the effect that Lady Twiss's true identity was that of a Maria Gelas who had previously worked as a prostitute in London. The wording of the declaration also implicated Twiss; he was alleged to have kept Maria Gelas as his mistress and taken action to conceal her identity. This was vehemently denied by the couple, and they eventually sued for libel. The case excited much interest in court and received ample coverage in the columns of *The Times*. Disaster struck on 13 March 1872, when Lady Twiss (and with her the case of the prosecution) collapsed, in effect conceding the truth of Chaffer's statements. Twiss was forced to resign all his offices in shame.[28]

Nevertheless, Twiss continued to publish on specific questions of international law and his resignation allowed him to take on more informal, yet more practical roles in the world of international law and diplomacy.[29] One subject that caught his attention was the development of Central Africa, and in particular the immense territory that became known as the Congo. In the 1870s and early 1880s, there was a rush for territory in Central Africa. The widely publicised explorations of Britain's H. M. Stanley and France's Savorgnan de Brazza created a sense of drama and attraction which contributed to the frenzy for land.[30] The story of the origin of the Congo Free State is a long and complicated one in which a major part is played by Leopold II, the ambitiously imperialist King of the Belgians.[31] Leopold's diplomatic skills and his ability to persuade Stanley and numerous other people to act as his agents in the pursuit of colonial territory was a precondition of the events that later unfolded. Following unsuccessful attempts to buy colonies from other European states, Leopold set his sights on the Congo after reading about Stanley's discoveries. The king quickly funded a congress for explorers and geographers in Brussels, and through the establishment of the International African Association – which

[28] For very detailed descriptions of the case and the proceedings, see *The Times*, 4, 6, 8, 9 and 13 March 1872. The 'most unexpected and painful conclusion' of the case is relayed in *The Times*, 14 March 1872. Twiss's resignations were publicised a week later (*The Times*, 21 March 1872).

[29] Chaffers was unrepentant in trying to reveal this delicate case of identity fraud. In 1882 he tried to get a warrant for Lady Twiss for perjury after becoming aware that she was in England. See *The Times*, 19 May 1882.

[30] See, for instance, James L. Newman, *Imperial Footprints: Henry Morton Stanley's African Journeys* (Washington, DC: Potomac Books, 2004).

[31] On Leopold II's imperial ambitions, see Adam Hochshild, *King Leopold's Ghost: A Story of Greed, Terror and Heroism in Colonial Africa* (London: Papermac, 2000 [1998]), pp. 36–42; Pakenham, *The Scramble for Africa*, pp. 11–23; Ruth Slade, *King Leopold's Congo: Aspects of the Development of Race Relations in the Congo Independent State* (London: Oxford University Press/Institute of Race Relations, 1962), pp. 35–9; Jean Stengers, 'Leopold II and the *Association Internationale du Congo*', in Förster, *Bismarck, Europe, and Africa*, pp. 229–44.

purportedly aimed at the geographical exploration of the Congo and bestowing upon the natives the wonders of civilisation – he managed to create a presence along the shores of the river Congo.[32] Through a complicated series of manoeuvres, the International Association was joined by other organisations, such as Comité d'Études and the International Congo Association. This was deliberately confusing and allowed Leopold to clothe his political ambitions in apparently philanthropic intentions.

In some ways, the most arresting part of the story, apart from the horror of the regime that was to rule the Congo, lies in Leopold's success in convincing nearly everyone of his peaceful, philanthropic intentions. Bringing 'Christianity, Commerce and Civilization' to the Congo was to prove an incredibly bloody project claiming the lives of up to 10 million people, but this was only slowly realised at the time.[33] First, it was part of Leopold's strategy to exploit the philanthropic argument, and he continued to give the impression that he would establish free trade in what many thought would be an 'international protectorate'. Secondly, the continued existence of the slave-trade in the Congo and the country's under-developed character made these claims seem realistic and reasonable. Finally, the vastness of the Congo did for a long time make it difficult for well-meaning missionaries to discover the flipside of Leopold's civilisational coin. These factors conspired to give Leopold an extraordinary good press for a prolonged period of time.[34] Even as late as 1905 an, admittedly naïve or biased, observer claimed that due to 'the brawny men of Belgium', '[i]ndustry and order, Christianity, civilisation, and material progress have succeeded tribal wars, cannibalism, and the horrible atrocities of the slave chase'.[35] Yet by this stage, the façade was splintering; in a series of publications written by the young, energetic radical E. D. Morel, the *de facto* slave economy of the Congo as well as the atrocities of Leopold's regime were exposed.[36] Back in the early 1880s, however, few doubted Leopold's intentions and at the Berlin Conference (1884–1885) humanitarian considerations played a part in convincing the European powers that Leopold could be let loose in the Congo.[37]

Travers Twiss was an ardent opponent of slavery and the slave trade, and in tune with Leopold's proclamations, he wanted Christianity, commerce and civilisation to

[32] Hochschild, *King Leopold's Ghost*, pp. 43–5, 65.

[33] See the estimate in Hochschild, *King Leopold's Ghost*, pp. 232–3.

[34] To take just one, startling example: on 22 October 1884, *The Daily Telegraph* argued that a neutral and free state of Congo would emerge as Leopold with the help of adventurers, traders and missionaries carried 'into the interior of Africa new ideas of law, order, humanity, and protection of the natives . . . Deprived as the King by position is, of an opportunity of playing a great part in European politics, he takes his revenge nobly, applying his mind and money to a lofty end, and becoming the *Scipio Africanus* of our time'. Quoted in W. M. Roger Louis, 'The Belgian Congo Conference', in P. Gifford and W. M. Roger Louis (eds), *France and Britain in Africa: Imperial Rivalry and Colonial Rule* (New Haven, CT: Yale University Press, 1971), pp. 167–220, at 182.

[35] Henry Wellington Wack, *The Story of the Congo Free State* (London: Putnam, 1905), p. v.

[36] See, for example, E. D. Morel, *King Leopold's Rule in Africa* (London: William Heinemann, 1904). On Morel, see Hochshild, *King Leopold's Ghost*, chs 11–18; Bernard Porter, *Critics of Empire: British Radical Attitudes to Colonialism in Africa, 1895–1914* (London: Macmillan, 1968), ch. 8; Pakenham, *The Scramble for Africa*, ch. 32. For some early, tentative criticisms of Leopold's rule, see J. Scott Keltie, *The Partition of Africa* (London: Edward Stanford, 1893), pp. 218, 222. And for a poignant attack, S. L. Clemens [Mark Twain], *King Leopold's Soliloquy: A Defense of his Congo Rule*, 2nd edn (Boston, MA: Warren and Co., 1907 [1905]).

[37] See, for example, the analyses in L. H. Gann, 'The Berlin Conference and the Humanitarian Conscience', and Suzanne Miers, 'Humanitarianism at Berlin: Myth or Reality', in Förster, *Bismarck, Europe and Africa*, pp. 321–31 and 333–45, respectively.

be brought to the Congo.[38] In two articles published in 1883 under the title 'La Libre Navigation du Congo', Twiss provided legal arguments legitimating this project.[39] The first article advocated the establishment of an international protectorate for the lower Congo and appealed for a declaration by the interested powers not to seize territory in the upper Congo. This would settle many of the potential territorial conflicts (and leave intact the makeshift position of the International Association). Twiss also dealt with questions of navigation and free trade on the rivers of the Congo arguing against the proposal of the French economist and expert on primitive property Emile de Laveleye (1822–1892) to declare the Congo neutral. Neutrality meant excluding armed vessels which would frustrate attempts to abolish the slave-trade and allow 'piratical tribes' to endanger the civilising project. Instead, Twiss pointed to the Danube and pleaded for an international commission that could ensure free navigation on the Congo.[40]

A second article under the same title was more explosive. Since 1882, Leopold's men in the Upper Congo had concluded treaties with tribal chiefs that ceded sovereignty to the Association.[41] The formulation of the treaties was not unusual, but their existence gave rise to a delicate international legal problem: whether, as Twiss phrased it, 'the agent of an association which had not the political character of a State, could, by a cession of the actual Sovereign of the country, acquire and exercise the sovereignty of a territory situated outside Europe.'[42] Twiss admitted that the answer to this question had to be found in 'the unwritten law of nations' and in order to throw light on the legal status of the dark Continent he ventured into the history of the equally dark Middle Ages.[43] He found that non-state associations like the Teutonic Order and the Order of St. John of Jerusalem had exercised sovereign rights. Moreover, in modern times some of the member states of the United States owed their existence to non-state, private associations. Twiss then turned to the other

[38] This is best brought out in Travers Twiss, *An International Protectorate of the Congo River* (London: Pewtress & Co., 1883), p. 4.

[39] Travers Twiss, 'La Libre Navigation du Congo' (I), *Revue de Droit International de Législation Comparée*, 15:5 (1883), pp. 437–42; Travers Twiss, 'La libre navigation du Congo' (II), *Revue de Droit International de Législation Comparée*, 15:6 (1883), pp. 547–63. The first article was republished in French (Bruxelles: Muquardt, 1884). Twiss's arguments for an international protectorate were also published in English. See Twiss, *An International Protectorate*, from which it was also translated into Italian (Travers Twiss, *Di un protettorato internazionale del fiume Congo* [Torino: V. Bona, 1883]). This version was a reprint of an article of the same title from the *Law Magazine and Review*, 250 (1883), pp. 1–20. The article contained a short postscript on the term 'protectorate', which was not included in the pamphlet.

[40] Twiss, 'La Libre Navigation du Congo' (I) and *An International Protectorate*, p. 11. See also the discussion in Jesse Siddall Reeves, *The International Beginnings of the Congo Free State* (Baltimore, MD: Johns Hopkins University Press, 1894), pp. 60–4. These issues were later resolved, in the main, along the lines suggested by Twiss, in the General Act of the Berlin Conference, ch. IV: see the reprint of the Act and other documents concerning the Congo in *American Journal of International Law*, 3:1 (1909), Supplement: Official Documents, pp. 5–95.

[41] Stanley claimed to have 'negotiated' more than 400 such treaties before the establishment of the Congo Free State. See Henry M. Stanley, *The Congo and the Founding of its Free State: A Story of Work and Exploration*, 2 vols (London: Sampson Low, Marston, Searly & Rivington, 1885), I, p. 18 and II, p. 379.

[42] Twiss, 'La libre navigation du Congo' (II). Also translated and reprinted as 'The Free Navigation of the Congo' in Wack, *The Story of the Congo Free State*, pp. 502–15, at 504. I consider this question to be distinct from the question of cession of territory to chartered companies or regulated companies with delegated Royal powers, although it was sometimes claimed, by Twiss among others, that such companies (in particular the British North Borneo Company which was delegated a right to acquire territory) could be likened to private associations in this respect.

[43] Twiss, 'The Free Navigation of the Congo', p. 504.

side of the equation and a question with which he had previously been concerned: the native chiefs.[44] He evaded the question by rhetorically asking '[w]hy should it be forbidden to a native chief to cede his territory to an international European company, which according to the law of nations, is perfectly capable of accepting and exercising such a sovereignty?'[45] He then rounded off his arguments by stressing the philanthropic character of the International Association and how it would 'facilitate the progress of a humane civilisation and the development of a beneficent commerce' in the Congo.[46]

In sum, Twiss's article refuted the argument that the treaties were in contravention of international law and there is little doubt that it was helpful in legitimating Leopold's venture. It shifted the ground of international legal argument on these questions even if Twiss's views did not meet with universal acceptance.[47] And the article (along with another statement to practically the same effect by the Belgian Professor Arntz) had a more immediate impact: it was referred to by the Committee on Foreign Relations to the US Senate in its report supporting recognition of the International Association.[48] This statement was then used in further Congo-propaganda: for example, it was quoted in Stanley's *The Congo and the Founding of its Free State*.[49] Whether Twiss's writings on the Congo were a result of or a precursor to his association with Leopold is unclear, but in the years following the publication of the articles Twiss acted as legal consultant to the king and continued to provide legal opinion that legitimated the activities of the International Association.[50]

[44] This concerned both their status as subjects of international law and whether they understood the treaties and their implications. In 1919 Arthur Berridale Keith, the renowned Professor of Sanskrit and Comparative Philology at Edinburgh and an authority on the colonial dimension of constitutional and international law, sardonically pointed out that the terms of the treaties were often unintelligible to the natives. In particular he referred to the case of Pallaballa, 'where a new treaty of January 8, 1884, was required to explain the first treaty of January 8, 1883 . . .' Arthur Berridale Keith, *The Belgian Congo and the Berlin Act* (Oxford: Clarendon Press, 1919), p. 49n.

[45] Twiss, 'The Free Navigation of the Congo', p. 509.

[46] Ibid., p. 510. In the early seventeenth century, Grotius had advanced a similar argument in order to refute Gentili's (Protestant) view that infidels could not be trusted to abide by treaties. See Tuck, *Rights of War and Peace*, pp. 92–4.

[47] See, for example, *Sir Travers Twiss et le Congo. Reponse á la Revue de droit international et de legislation compare et au Law Magazine and Review, par un Membre de la Societé Royale de Geographie d'Anvers* (Bruxelles: Lebégue, 1884), and Karl Heimburger, *Der Erwerb des Gebietshoheit: Eine Staats- und Völkerrechtliche Studie. I. Teil* (Karlsruhe: Druck der G. Braun'schen Hofbuchdruckerei, 1888). After noting how a number of other lawyers (Delauard, Stengel, Cantellani) also referred to the Middle Ages when presenting analogous arguments about acquisition of territory, Heimburger critically dissected Twiss's arguments and exposed their fragility. Heimburger, however, wrote with a view to the standing of German colonies, and his views on territorial acquisition in Africa were hardly preferable: the power struggles leading to *de facto* sovereignty and preceding recognition by other states did not form part of international law and could not be discussed in the idiom of legitimacy. According to this logic the General Act of the Berlin Conference amounted to a Magna Carta of international colonial law and only recognition (based on *de facto* sovereignty) conferred legal sovereignty. Heimburger, *Erwerb des Gebietshoheit*, esp. pp. 4–5, 47–9, 66, 72, 75. Leopold and his associations did not have (and did not claim) effective occupation of Congo's enormous territory at the time of the Berlin conference. See Jesse S. Reeves, 'The Origin of the Congo Free State, Considered from the Standpoint of International Law', *American Journal of International Law*, 3 (1909), pp. 99–118, esp. pp. 100–2. See also Keith, *The Belgian Congo*, p. 65. For a wider analysis of the legal issues involved, M. F. Lindley, *The Acquisition and Government of Backward Territory* (London: Longmans, Green and Co., 1926) and Koskenniemi, *The Gentle Civilizer*, ch. 2.

[48] See the Report dated 26 March 1884 and the (untitled) article by Egidé Arntz, both reprinted in Wack, *The Story of the Congo Free State*, pp. 492–516.

[49] Stanley, *The Congo*, II, p. 380.

[50] Hochshild, *King Leopold's Ghost*, p. 71.

Leopold's plans for the Congo were rubberstamped by the 1884–1885 Berlin Conference held under the direction of Prince Bismarck, perhaps the high point of Western confidence in the enduring rationale of civilising paternalism. The conference dealt with several questions, but Leopold's activities and the fact that other keen imperialists had their eyes set on the Congo (including France, Portugal, Germany and the reckless Cecil Rhodes who would famously annex the planets if he could), made the status of this vast and only partially explored landmass a pressing issue. Leopold stayed in Brussels but managed to direct the work of the conference to his full satisfaction. The king sought the recognition of the International Association's flag which would, in time, mean the recognition of the association as a state. After securing the recognition of the United States, Bismarck's soon followed. From a British perspective, recognising the association would signify a departure from international law as traditionally understood. It 'grated against the conservative outlook of the Foreign Office'. Moreover, there were few reasons to be favourably disposed to Leopold and his association.[51] British civil servants had begun to perceive the true nature of Leopold's monopolistic aims in the Congo basin, a provocation to the (providentially) free-trading British self-image, and Leopold had also pulled strings in order to obstruct the recently agreed Anglo-Portuguese treaty, the failing of which was central to his plans for the Congo. Nevertheless, the association was recognised. This was partly due to external, political circumstances. Firstly, Leopold had signed a pre-emption treaty with France guaranteeing that in case Leopold sold the Congo it would be to France.[52] Secondly, Britain wanted to exempt the Niger from the international supervision system intended for the Congo River.[53] The first factor, paradoxically, made Britain want Leopold to succeed in the Congo, and in order to achieve the second objective, Britain had to pay a price and that was (orchestrated by Bismarck) set at British recognition of the *Association Internationale du Congo*.[54]

However, there were also more internal circumstances. The British delegation was relatively well disposed towards Leopold and his association. Twiss participated in the conference as an unofficial juridical adviser to the British delegation, a role for which he was praised in *The Times*.[55] Apparently, his expertise and knowledge about the Congo eventually led to his drafting the treaty by which the British government acknowledged the flag of Leopold's 'purely fictitious organization'[56] – in reality this meant recognising the Association as a state *in embryo*.[57] And Twiss's involvement in the Congo-question went further: he is reported to have drafted the constitution of the Congo Free State[58] and he acted as legal adviser in negotiations between the

[51] Louis, 'The Berlin Congo Conference', pp. 199–200.
[52] Pakenham, *The Scramble for Africa*, p. 246.
[53] This was largely achieved: see ch. V of the Berlin Act, which gave Britain and France responsibility for the lower and upper Niger respectively.
[54] For a good description of the political and diplomatic wrangling before and during the conference, see Keith, *The Belgian Congo*, chs 3 and 4.
[55] *The Times*, 19 January 1885.
[56] Stengers, 'Leopold II and the *Association Internationale du Congo*', p. 230.
[57] The treaty later formed the basis of similar treaties between the association and other countries, except the Belgian treaty which referred to the Belgian constitution's non-allowance of colonies and turned the Congo Free State into the private property of King Leopold II – not, that is, the property of Belgium or the property of Leopold as king of the Belgians, but the personal property of Leopold.
[58] This is claimed by several sources. See *The Times*, 8 November 1884 and 9 January 1885, and Louis, 'The Berlin Congo Conference', p. 200. I have not succeeded in recovering the constitution.

Congo Free State and a British railway consortium, which tried, unsuccessfully, to obtain a virtual monopoly on railway construction.[59]

Legal advice and technicalities were not, in and of themselves, the cause of the recognition of Leopold's association. The reasons that swayed the powers were, above all, political.[60] But the strengthening of Leopold's position through the use of legal arguments and (more or less complicit) agents in the policymaking circles of some of the vital powers, was a condition of possibility of the swift pace with which this recognition was finally executed.[61] Twiss was, of course, only one (and not the most important) among the moralists fooled by Leopold.[62] But it is not only his naïvety which is representative. In terms of international law he illustrates a paradox at the heart of international legal argument about territorial acquisition at this time. Like Twiss, the major powers at the Berlin conference considered most of Africa *terra nullius*, but in practice imperial expansion did not take place along the lines of this doctrine. In reality it was, to use international legal jargon, derivative acquisition through cession rather than primitive acquisition based on effective occupation that was the order of the day.[63] In textbooks of international law and in the General Act of the Berlin conference the assumption of *terra nullius* performed a basic legitimising function, proclaiming superiority and ideologically justifying colonisation.[64] Yet, in the political wrangling for territory among the European powers something different and more practical was needed. In either case judicial justification was not hard to come by.

John Westlake and the South African War

John Westlake (1828–1913) rose to prominence as Whewell Professor of International Law in the University of Cambridge from 1888–1905. He was educated at Trinity College, Cambridge, in the 1840s and first made a mark in legal studies with the publication of a treatise on private international law in 1858. Westlake was a steadfast liberal, who helped found the Working Men's College in 1854, and he even served as a Liberal MP for a short spell in 1885. His liberal attitude in politics was

[59] This would in practice have made the Congo a British sphere of influence. See Roger Anstey, *Britain and the Congo in the Nineteenth Century* (Oxford: Clarendon Press, 1962), ch. 9, especially pp. 197, 200. Stanley also took a strong interest in the railway question. See Keith, *The Belgian Congo*, pp. 70–1.

[60] Stengers, 'Leopold II and the *Association Internationale du Congo*', p. 240.

[61] As a measure of the success of this operation, it is worth noting that in the beginning of the twentieth century, Lassa Oppenheim argued that Liberia and the Congo were 'the only real and full [African] members of the Family of Nations.' Lassa Oppenheim, *International Law: A Treatise*, 2 vols (London: Longmans, Green and Co., 1905–6), vol. I, p. 156.

[62] Others included a string of Belgian international lawyers, Stanley and General H. S. Sanford in the American delegation and (perhaps) Colonel Stauch in the Belgian.

[63] The predicament of the Congo can explain Twiss's inconsistency in invoking the principle of occupation. Twiss referred to this principle when denying Portuguese claims to sovereignty over part of the West African coast (see Twiss, *An International Protectorate*, pp. 13–14), but he stuck to arguments about cession when discussing the claim of Leopold and his associations in the Congo.

[64] Fisch, 'Africa as *terra nullius*', pp. 358–60. See also Anghie ('Finding the Peripheries'), p. 62, who comments on the reversal by which treaties of cession came to be seen as a legitimate way of acquiring territory. Note, however, that later developments and the establishment of Colonial protectorates made it possible again to view African territory as *terra nullius* which, in a further reversal, denied validity to the treaties.

also demonstrated in his support for the development of international law. Westlake was co-founder of the *Revue de Droit International* (1869) and the Institute of International Law (1873), of which he became President in 1895.[65] Westlake's influence was considerable not only at the Institute but also in the British academy.[66]

On the specific issue of the legality of cession from African chiefs, Westlake argued, *pace* Twiss, that although 'a treaty with a savage' could be used (politically) to stave off European rivals, it could not be 'a serious root of a title'.[67] The reasoning behind this view was based on a sharp distinction between civilised insiders and uncivilised outsiders in international law. Westlake argued that questions of cession were 'too obscure among uncivilised populations'. This was not because those outside the international society did not have moral rights; these remained intact 'though they have not and scarcely could have been converted into legal rights.'[68] Westlake stressed that 'an uncivilised tribe can grant by treaty such rights as it understands and exercises but nothing more'.[69] He came close to ridiculing those (like Twiss) who attached legal importance to treaties with uncivilised tribes, a view that was 'more calculated to excite laughter than argument.'[70] Westlake was an unrepentant liberal imperialist who held that proper government, which he had some difficulty defining, was the test of civilisation. And the development of civilisation was both a duty that white, civilised people had towards the 'ignorant and helpless'[71] and an inevitability:

> The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out.[72]

Thus, Westlake can be said to have articulated and theorised an assumption that had been a more or less tacit in the literature on international law in the late nineteenth century: that the test of statehood (as a condition for reciprocity and therefore inclusion in the scope of international law) was the degree of civilisation attained.[73]

When in 1899 a war broke out between Britain and the two Boer republics, the South African Republic and the Orange Free State, the by now familiar avenues of legal argumentation against barbarians or semi-civilised peoples were cut off.[74] Many

[65] Westlake was a member from 1873–1898, honorary member from 1898–1913, and permanent honorary president from 1910.

[66] Lassa Oppenheim, 'Editor's Introduction' in *The Collected Papers of John Westlake on Public International Law*, ed. L. Oppenheim (Cambridge: Cambridge University Press, 1914), pp. v–xii, esp. p. x.

[67] John Westlake, 'England and France in West Africa', *Contemporary Review*, 73 (April 1898), pp. 582–92, at 589.

[68] Westlake, *Chapters on International Law*, in *Collected Papers*, pp. xix–282, at 142.

[69] Ibid., p. 151.

[70] Ibid., p. 152.

[71] Ibid., p. 143.

[72] Ibid., p. 145.

[73] See also the remarks on Japan in John Westlake, 'Introduction' in Sakuyè Takahashi, *Cases and International Law during the Chino-Japanese War* (Cambridge: Cambridge University Press, 1899), pp. xv–xxviii.

[74] The literature on the South African War is voluminous. See for example, Thomas Pakenham, *The Boer War* (London: Abacus, 1992 [1979]); Peter Warwick (ed.), *The South African War: The Anglo-Boer War 1899–1902* (London: Longman, 1980); Donal Lowry (ed.), *The South-African War Reappraised* (Manchester: Manchester University Press, 2000).

British people were prejudiced against the Boers – most thought them a dirty, unintelligent and simple people fittingly represented by their president Paul Kruger – but they were not held to be uncivilised *per se*. In fact, one of the reasons that the South African War attracted the attention it did, quite apart from the fact that it was the worst British war in terms of costs, casualties and honour between 1815 and 1914, was that it was a war between white (and therefore civilised) peoples. As the British Prime Minister and master of European *Realpolitik*, Lord Salisbury, disconsolately observed 'this is the first occasion we have gone to war with people of Teutonic race'.[75]

The immediate cause of the South African War was the expiration of a rather foolhardy ultimatum on part of the South African Republic which called for arbitration of all disputes, the removal of British troops from the borders of the two Boer republics, the removal of British reinforcements from South Africa, and the reversal of a British decision to land further troops in South Africa.[76] When the British government deemed it 'impossible to discuss' these demands, war was unavoidable.[77] However, the deeper, underlying causes of the war are more interesting, and have been the subject of much discussion.[78] The war has been understood as provoked by the Afrikaner denial of civil and democratic rights to the large section of (primarily British) Uitlanders[79] that had flowed into the Transvaal following the discovery of gold (the official British perspective); as the second war of liberation from British interference in the internal affairs of the South African Republic (the Afrikaner perspective); as a result of a capitalist-jingoist conspiracy that logically followed the discovery of natural resources in South Africa and reached an initial low in the miserably planned and even more miserably executed Jameson Raid in 1895;[80] and by modern historians as orchestrated by the Governor of Cape Colony and High Commissioner of South Africa, Sir Alfred Milner, who continued a tradition of young British imperial adventurers becoming bent on war after setting foot on South African soil.[81] There is possibly a kernel of truth in all of these explanations, but the wider historical background to the crisis – the repeated British attempts to safeguard their increasing political and financial interests in South Africa through the establishment of some kind of stable political power-base in an area where subjects with close ties to Britain were a minority – is indispensable. Although this objective remained fairly constant, British policy fluctuated wildly. Attempts to gain a strong and permanent political influence changed with varying interpretations of the culture,

[75] Lord Salisbury quoted in Andrew Roberts, *Lord Salisbury: Victorian Titan* (London: Phoenix, 2000 [1999]), p. 735.

[76] See 'Ultimatum of the South African Republic, 9 October 1899', reprinted in Hugh Williams et al., 'Selected Official Documents of the South African Republic and Great Britain: A Documentary Perspective of the Causes of the War in South Africa', *Annals of the American Academy of Political Science*, 16, supplement 14 (1900), pp. 1–72, at 57–61.

[77] 'Reply of Great Britain' in 'Selected Official Documents', p. 61.

[78] For a historiographical survey, see Smith, *The Origins of the South African War*; Smith, 'A Century of Controversy over Origins', in Lowry, *The South-African War Reappraised*, pp. 23–49. The wider historical background is presented in Leonard Thompson, *A History of South Africa*, 3rd edn (New Haven, CT: Yale University Press, 2001), esp. chs 3 and 4; Robert Ross, *A Concise History of South Africa* (Cambridge: Cambridge University Press, 1999), chs 2 and 3.

[79] Uitlanders were foreign migrants (literally: out-landers).

[80] See primarily J. A. Hobson, 'Capitalism and Imperialism in South Africa', *Contemporary Review*, LXXVII (January–June, 1900), pp. 1–17; Hobson, *The War in South Africa: Its Causes and Effects* (London: Nisbet, 1900); Hobson, *Imperialism: A Study* (London: Nisbet, 1902).

[81] See, for example, Pakenham, *The Boer War*; Roberts, *Lord Salisbury*, pp. 714–833.

financial capacity and political shrewdness of the Boers. Until the discovery of gold at the Witwatersrand in 1886, this led to anything from pushy attempts at federation to apathy towards South Africa.

In terms of international law, the conflict in South Africa raised some interesting questions. The annexation of the Transvaal in 1877 and the Anglo-Zulu War of 1879, a conflict that was precipitated by the agreement behind the consensual annexation, were heralded as examples of Disraeli's imperialist policies. Yet when Gladstone returned from his Midlothian crusade, his new policy did not encompass relinquishing sovereignty over the Transvaal. This led to a Boer rebellion and the first Transvaal War of 1880–1881, a low-intensity conflict which ended in a humiliating British defeat at Majuba Hill. The damage control strategy of the Gladstone government issued in the signing of the Pretoria Convention (August 1881), which granted the Transvaal 'complete self-government, subject to the suzerainty of Her Majesty the Queen Victoria'.[82] At the time, however, it was unclear what the concept of suzerainty should be taken to mean (which was surely one of the reasons why it found its way into the treaty). In 1882, one commentator noted how the concept had only been treated in a superficial manner by the writers on international law, and when republishing this discussion at the turn of the century, he remarked that at the time of the Pretoria Convention, suzerainty 'had an archaic and mediæval sound, and no one seemed to know quite what it meant.'[83] The problem was that although most earlier and contemporary writers on international law touched upon the possibility of 'vassalage' or 'feudal relations' obtaining between states and on concepts like 'suzerainty' and 'semi-sovereignty', the precise meanings of these terms were vague.[84] The legal muddle was accompanied by political disagreement. The man destined to become Prime Minister during the South African War, Lord Salisbury, argued that the concept was a 'diplomatic invention' that acted as a smoke-screen for Gladstone's retreat and appeasement in South Africa.[85] Lord Derby, responsible for the London Convention of 1884 that did not include a mention of suzerainty, argued that '[w]e have abstained from using the word because it is not capable of legal definition, and because it seemed to be a word which was likely to lead to misconception and misunderstanding.' However, Derby also argued that 'whatever Suzerainty meant in the Convention of Pretoria, the condition of things which it implies remains'.[86] The new convention stated that '[t]he South African Republic will conclude no treaty or engagement with any State or nation other than the Orange Free State, nor with any native tribe to the eastward or westward of the Republic, until the same has been approved by Her Majesty the Queen'.[87] This formulation left out the concept of

[82] 'The Convention of Pretoria, 3 August 1881' reprinted as appendix I in D. M. Schreuder, *Gladstone and Kruger: Liberal Government and 'Home Rule', 1880–1885* (London, Routledge & Kegan Paul, 1969), pp. 489–97, at 489. This volume also contains an excellent analysis of the suzerainty issue, esp. chs 4 and 7.

[83] Charles Stubbs, 'Suzerainty: Mediæval and Modern', *Law Magazine and Review*, 7 (1881–1882), pp. 279–318; Stubbs, 'Suzerainty: Mediæval and Modern', *Law Magazine and Review*, 25 (1899–1900), pp. 413–52, at 413. For other contemporary discussions of the concept, see for example, Malcolm McIlwraith, 'The Rights of a Suzerain', *Law Quarterly Review*, 12 (1896), pp. 113–15; Malcolm McIlwraith, 'Suzerainty: A Reply', *Law Quarterly Review*, 12 (1896), pp. 228–9; W. H. H. Kelke, 'Feudal Suzerains and Modern Suzerainty', *Law Quarterly Review*, 12 (1896), pp. 215–27; Oppenheim, *International Law*, vol. I, pp. 134–6.

[84] Cf. Westlake, *Chapters on International Law*, p. 90.

[85] Roberts, *Lord Salisbury*, pp. 247–8. See also pp. 731–3.

[86] Derby in the House of Lords, 17 March 1884, quoted in Schreuder, *Gladstone and Kruger*, p. 430.

[87] 'Convention of London, 27 February 1884', in 'Selected Documents', pp. 7–14.

suzerainty, and one of the big political and legal questions regarding the war was to be whether suzerainty had been relinquished in 1884.[88]

We might expect to find Westlake arguing in favour of the war by putting forward a specific interpretation of suzerainty or asserting that the term, despite it being left out of the London Convention, was still effective and that the Boers had failed to respect their constitutional position. But Westlake argued nothing of the sort. Instead he took a completely different and almost purely political tack which he concealed as an appeal to a 'higher justice'.[89] To what extent was this political support for the war compatible with Westlake's politics and his legal doctrine? On the one hand, Westlake, a lifelong liberal, had deserted the liberal party over the question of imperial union when it split over Irish Home Rule in 1886, and as most of Britain was swayed by war fever – fuelled by a jingoistic press – it is perhaps to be expected that he supported Britain's case. On the other hand, many liberal intellectuals were against the war. Apart from the notorious and outspoken (and incorrectly dubbed) 'pro-Boers' which included W. T. Stead, J. A. Hobson, and John Morley,[90] other liberals like James Bryce and Westlake's Cambridge colleague Henry Sidgwick, were also highly sceptical.[91] By what reasoning could an international lawyer like Westlake justify the South African War?

Westlake's starting point was simple and Manichean. South African affairs represented a conflict of ideals. On the one hand, there was (in Westlake's exceptionalist formulation) an English ideal which cherished 'a fair field for every race and every language, accompanied by a humane treatment of the native races.'[92] On the other hand, Westlake identified a 'Transvaal ideal', racially based on Dutch custom and culture and illiberal treatment of the natives. Although Westlake made little effort to conceal his prejudices against this ideal, his liberalism encouraged cultural pluralism on a global scale. The world should contain different cultural and national ideals, although these should not (as we shall see) be pursued for their own sake or in a separatist and destructive manner.[93] Here we find a good example of the late nineteenth century liberal insecurity towards the concept of the nation and its possible conciliation with empire and political order in general. Many liberals found it increasingly difficult to square the circle between these commitments. Support for the empire (although not for pure expansionism) and support for the realisation of national sentiments in self-government (although not for exclusive, aggressive variants of nationalism) slowly evolved into a liberal dilemma. Ireland became the symbol of this insecurity, but the underlying question was also present in the South African case.[94] Westlake had grappled with this problem in the late 1880s and his

[88] For a good discussion of these issues, see Schreuder, *Gladstone and Kruger*, pp. 427–35.
[89] John Westlake, 'The Transvaal War' [1899], in *Collected Papers*, pp. 419–60, at 426.
[90] See *The Pro-Boers: The Anatomy of an Antiwar Movement*, ed. Stephen Koss (Chicago, IL: University of Chicago Press, 1973). See also the remarks in J. H. Grainger, *Pariotisms: Britain 1900–1939* (London: Routledge & Kegan Paul, 1986), ch. 9.
[91] See James Bryce, *Impressions of South Africa*, 3rd edn (London: Macmillan, 1899 [1897]), pp. vii–xliv. Sidgwick's scepticism was never made public, but this option (silence or passivity) was also open to Westlake. See A. and E. M. Sidgwick, *Henry Sidgwick, A Memoir* (London: Macmillan, 1906), pp. 576–81.
[92] Westlake, 'The Transvaal War', p. 422.
[93] By 1899 Westlake included ideals based on race; after all they worked with some success in Germany and Austria. Westlake, 'The Transvaal War', p. 423.
[94] A. V. Dicey, another unionist, argued that 'I am one of the thousands of Englishmen who approved, and still approve, of the war in South Africa because it forbade secession'. A. V. Dicey,

solution was well-rehearsed. He argued that language, geography, and race were, in and of themselves, insufficient as tests for nationality and that claims to nationality could only be decided by reference to two phrases that were as mystical as they were popular: 'the character of the people' and 'civilization'.[95] Nations should ideally contribute to the peaceful and orderly progress of humanity, and in order to stifle other, revolutionary or destructive, variants of nationalism, Westlake made civilisation a condition of nationality, just as he had made it a condition of statehood. If the 'sentiment of nationality' should find its justification in 'the character and aims of the people who entertain it', Westlake's mistrust in the Transvaal ideal emerges in a clear light.[96]

Yet, apart from this imperial ambivalence towards nationalism, Westlake also seems to have sensed that the fragility of Britain's superiority, a common refrain at the time, should instil some humility in the British. Thus, he was quite sensitive towards the *way* in which the English ideal was pursued. Not only would cultural imperialism ('propagandism'), if let loose in the sphere of international politics, lead to complete anarchy, but as he rhetorically asked, 'who are we that we should take upon ourselves to say that our own ideals are not only the best, but so much the best as to make it worth while to propagate them in spite of the horrors caused by the sword?'[97] Having thus proclaimed his reluctance towards forcibly expanding the English ideal, Westlake asked what justification, if any, could be provided for the demand of Alfred Milner, that this cherished ideal be adopted in the South African Republic. Westlake's answer and analysis was based on a reading of South African history since the founding of a Dutch Colony in the mid-seventeenth century but with particular emphasis on the second half of the nineteenth century, when British interests had grown significantly. With respect to the two conventions of the early 1880s, Westlake was blunt: he conceded that suzerainty did not have an agreed, precise meaning but also held that the Transvaal State (South African Republic) was a self-governing state within the British Empire. Although the word suzerainty itself slipped out of the 1884 London Convention and although the treaty did grant the Boers greater freedoms, they still could not lay claim to an independent state. The flexibility of the vocabulary of international law in such thorny imperial matters did not always lead to clarity: according to Westlake the South African Republic was left a 'semi-sovereign', albeit 'separate and international', state under the suzerainty of the British Queen (whatever that was taken to mean)![98]

Westlake then turned to an analysis of the different questions that had ignited the conflict, including the alleged Transvaal violation of the convention and the grievances of Uitlanders. The conclusion was simple: these questions could not provide a legal case for war. They were minor disputes suitable for arbitration rather than war. In fact, Westlake was annoyed by various attempts to stretch the legal case for war. Such arguments were 'untenable' and based on 'the assumption of a vague suzerainty'. And they were damaging to Britain's image in the eyes of the

Introduction to the Study of the Law of the Constitution, 8th edn (Indianapolis, IN: Liberty Fund, 1982 [1914, 1885]), p. liv. See also Schreuder, *Gladstone and Kruger, passim*.

[95] John Westlake, 'Nationality', *Contemporary Review*, 53 (January/June, 1888), pp. 229–41, at 231, 235, 239.

[96] Ibid., p. 241.

[97] Westlake, 'The Transvaal War', p. 425.

[98] Ibid., p. 434. See also Westlake's letter to the editor of *The Times* (22 September 1899).

world.[99] After examining the immediate build-up to the war, Westlake considered unacceptable the demand for an unconditional declaration that Britain would abstain from intervening in South African affairs. He termed the Boer ultimatum on the eve of hostilities 'a conditional declaration of war'.[100] In this sense, then, war was unavoidable. But the nub of the argument did not turn on law. The demand of Alfred Milner ('a very eminent man') that the English ideal should be followed in South Africa was '*not* founded on any legal right . . .' Rather, Westlake tentatively argued:

> . . . it may have been justified, probably was justified, by one of those situations that occur in the mutual relations of nations, *soluble by no canons of legal right but for which a higher justice must be appealed to*, that larger justice which in this country is exercised not by courts of justice applying the law as it is but by parliament altering the law, and which is sometimes necessary between nations, bringing into operation demands not founded merely upon a legal position but upon the intolerable character which a certain situation has assumed.[101]

The degree to which this argument was politically motivated can easily conceal its potentially radical, destabilising implications for international law. In fact, Westlake's argument directly contradicted his liberal proclamations about humility and pluralism. In contrast to Twiss's ideal of a concerted 'international' imperialism with Leopold at the helm, Westlake effectively argued for a national imperialism that sought to project superior British civilisation in South Africa. But if British imperialism and the lawyers in its service reached a dead end, they could, according to this train of thought, *reasonably* appeal to a higher justice dictated by the force of circumstance. Westlake's patriotic blindness made him sacrifice his avowed liberal attitude in international affairs to a doctrine of reason of state dressed up as acts of humanity. How anti-liberal, radical and naïve this solution really was, can be discerned in Westlake's critique of the arguments that stretched the legal case for war:

> I believe that the bad and mischievous argumentation to which I refer has had a root in one of our national qualities which is entitled to respect when kept within due bounds, namely our passion for legality. It is no new thing in our public life to strain legal arguments to the uttermost and beyond the uttermost, rather than admit that the time has arrived when help must be found outside the law, or in what the non-existence of a legislature makes difficult in international law, a change in the law.[102]

For a liberal international legal scholar of his calibre this bordered on the mischievous. The spirit that emanated from most of Westlake's other writings was that of a confident liberal internationalist who, although anxious to reform international law, reminded his readers of the peculiarities of the international domain and the importance of slow, gradual progress. This spirit was (temporarily) abandoned in the case of the South African War. Westlake frankly admitted that 'help' had to be found outside the law, but couching his support for the war in the clothes of a higher, mystical justice was a pyrrhic victory. Westlake, inadvertently perhaps, sacrificed his liberal internationalist principles on the altar of the British Empire and was seduced by the chimera of a 'higher justice'. On closer inspection that seems little different from being a slave to the passion for legality.

[99] Ibid., p. 442.
[100] Ibid., p. 458.
[101] Ibid., p. 426 (my italics).
[102] Ibid., p. 443n. These arguments also appeared in *The Times*, 22 September 1899.

Conclusion

This article has identified some of ways in which the arrogance and prejudices of Western civilisation in the late nineteenth-century could flavour decisions and arguments with significant consequences for international law and for human life in other continents. The analysis points to the uneven effects of the globalisation of the theory and practice of international law. Due to the evolutionary understanding and posited immaturity of international law, the subject was inherently political and flexible, although this was only half-recognised by lawyers at the time. For British scholars this proved a temptation too difficult to resist. Faced with the practical problems of colonialism and imperialism, the intellectual activity of Twiss and Westlake became locked in an imperialist matrix that compromised their legal aspirations. It has become commonplace to say that law is political, but the imperial perspective presented here is particularly instructive. By scrutinising the practical implications of the arguments provided by Twiss with respect to the Congo and by Westlake in relation to the South African War, we acquire a better and more sophisticated understanding of how what was thought of as a more or less objectively discernible and rigid code of international law was, in reality, a political instrument important for conceptualising the world (of states) in hierarchical ways.

This aptitude for putting law in the service of hierarchical and imperial projects galvanised by liberal ideas and ideals takes on a new significance and should give cause for reflection at a time when the importance of international legal argument in global politics is steadily mounting. Some of the fallacies of an earlier era are discernible in contemporary world politics, not least in the most hotly debated issue of our time: the American-led invasion of Iraq in 2003. On the one hand, the British anti-war demonstrations held on 15 February 2003, the biggest demonstration in British history, provides an inverted example of the inconsistency and dangers involved in falling prey to the passion for legality. Although the demonstration and the campaign as a whole naturally encompassed a wide range of political positions in relation to the war, one of the most persistent and unifying themes was that an invasion of Iraq was unlawful under public international law without a UN Security Council resolution authorising such action. The understanding of international law underlying this position is not dissimilar to that advanced by Twiss in relation to the Congo. After a painstaking search in the sources of international law Twiss felt able to reassure his colleagues and the public that the 'international' colonisation of the Congo was lawful – a conclusion that nicely fitted his ideological orientation. In a similar vein, the official line of the anti-war protest concealed or circumvented political judgement on Iraq or intervention by focusing on the need for legality (ostensibly irrespective of the politics). In both cases, the passion for legality betrays a deeply political strategy that clings to a naïve understanding of international law as a neutral medium for deciding between right and wrong in international politics. On the other hand, the turn of American and British arguments on the eve of the invasion towards humanitarian arguments, stressing that the cruelty and suffering undeniably caused by the regime of Saddam Hussein in itself *authorised* the coalition to invade, provides a reverberating example of the dangers involved in appealing to 'a higher justice'. As is well-known, this line of argument took on a new prominence when the since much derided (and, as it turned out, false) claim about the existence of a threat from Iraqi weapons of mass destruction suffered from a lack of credibility,

but apart from questioning its sincerity we should recognise how all such claims to be pursuing a 'higher justice' carry with them allegations of expediency that can compromise and potentially erode the credibility of international law.

International law is a reflection of international order and its underlying, potentially unstable, political consensus. At the same time, because it lacks specificity and pursues several, at times conflicting, objectives, all attempts to apply the law are inescapably political, expressing a particular viewpoint. This situation requires that our use of international law must display a balance between the lure of expedient politics and the wider prospects of justice that credibly favours the latter. In short, it should be based on restraint. Yet the ideological language of liberalism, which can plausibly be seen as a historical guardian of an international law that can further peace and justice, is open to abuse and dangerous, if well-meaning, aggrandisement. In international politics, by appealing too categorically to liberal hallmarks such as the rule of law, or the fundamental rights and values that ought to underpin human social life, we risk eroding rather than strengthening the political and legal order that is fundamental for achieving liberal ends. Historical examples of bending the law or stepping outside of it in order to serve political purposes, urge us to focus on international law in its translation into practice – how it is moulded, used and abused by political actors. To most observers of international politics, the destructive and aggressive potential in the liberal humanitarianism that now dominates the global agenda appears as dangerous as it is incontrovertible. We must face this predicament responsibly without hiding behind the fantasy of a neutral, objective international law. Yet some deeper questions refuse to go away and require to be faced (yet again). They concern the desirability and consequences of reconfiguring an international order based on the legal equality of states, the future role of international law, as both a profession and a body of law, in world politics, and how to constrain the use of force when potential justifications for its use seem virtually endless. In thinking about these issues we have to move beyond the narrow-minded and self-serving visions embedded in the passion for legality and appeals to a higher justice. But apart from sound political judgment, we will certainly need both passion and a commitment to justice.