

## CHAPTER 36

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# COLONIALISM AND DOMINATION

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## 1. INTRODUCTION

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To speak today of the ‘colonial origins of international law’ is arguably no longer a standpoint of dissent, or of a radical revisionism, but one which is situated in the centre-ground of accounts of international legal history.<sup>1</sup> What is made of that observation is a matter upon which there remains a not insignificant divergence of opinion, but a consciousness that the emergence of the European states-system in the post-Westphalian era was not merely incidentally related to the expansion of mercantile empires and the taking of colonial possessions, but was rather intimately connected with it, is one that is widely shared. It is no longer possible to read Grotius without attending to the fact that much of his work seemed to be written as an ‘apology for the whole Dutch commercial expansion into the Indies’,<sup>2</sup> or engage with the

<sup>1</sup> See generally, A Anghie *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2004); C Mierville *Between Equal Rights: A Marxist Theory of International Law* (Brill Leiden 2005); J Fisch *Die europäische Expansion und das Völkerrecht* (Steiner Stuttgart 1984); WG Grewe *The Epochs of International Law* (M Byers trans) (De Gruyter Berlin 2000); M Koskenniemi *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (CUP Cambridge 2002).

<sup>2</sup> R Tuck *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 1999) at 79.

historic formation of notions of war, sovereignty and territory and not notice the role they assumed in the violent expansion of European empires.

At certain points of time, of course, the relationship between the development of nascent legal doctrine and the practice of colonial rule has been entirely transparent. Just as Vitoria's famous lectures from 1532—*De Indis Noviter Inventis* and *De Jure Bellis Hispanorum in Barbaros*<sup>3</sup>—addressed themselves to the titles the Spanish put forward in order to justify their domination in the New World, so also, some 360 years later, Westlake, Martitz, Hornung, and other members of the newly-formed Institut de Droit International were to debate the terms under which territory in Africa might be brought under colonial rule.<sup>4</sup> On other occasions, and far more frequently, colonialism has remained a significant background theme, providing the setting for doctrinal debates over freedom of the high seas, the use of force, title to territory, recognition, and statehood. Dealing with its legacy, of course, was also a central preoccupation in the 20th century both informing institutional initiatives (mandates and trusteeships) and emergent doctrine such as that relating to self-determination, sovereignty over natural resources, human rights, the law of armed conflict, state succession, and the boundary delimitation (*uti possidetis iuris*). There is, it might be suggested, scarcely a single area of international law that has not, in some manner or other, been informed by this history.

Yet even if there is broad concurrence in the view that the history of international law is intimately related to the history of colonial rule, there is, as I have already suggested, considerably less agreement over 'how' one may plausibly articulate, or account for, that relationship. For some, the relationship is almost an incidental one—the expansion of European empires and the development of international law being the product of an intra-European rivalry whose centre of gravity remained firmly European.<sup>5</sup> For others, the relationship is taken to be far more central, but here again the contrasts are marked. For Tony Anghie, for example, European international law not only provided a means of legitimizing imperialism, but was also profoundly shaped by that encounter, encoding within its disciplinary structures (especially sovereignty) the discriminatory features of cultural difference.<sup>6</sup> For China Mieville, by contrast, colonization was to be understood not so much in terms of its content, but in terms of the imperialism of its form:

Colonialism is in the very form, the structure of international law itself, predicated on global trade between inherently unequal polities, with unequal coercive violence implied in the very commodity form. This unequal coercion is what forces particular content into the legal form.<sup>7</sup>

<sup>3</sup> F De Victoria *De Indis et De Jure Belli relectiones* (E Nys ed) (Carnegie Institution Washington 1917).

<sup>4</sup> See *The Gentle Civiliser of Nations* (n 1) 149–52.

<sup>5</sup> Eg *The Epochs of International Law* (n 1); C Schmitt *The Nomos of the Earth* (Telos Press Publishing New York 2006).

<sup>6</sup> *Imperialism* (n 1) 6–7.

<sup>7</sup> *Between Equal Rights* (n 1) 178.

The instantiation of an international legal order governed by principles of sovereign equality and reciprocity thus formed a central facet of the emergent mercantilist, then capitalist/imperial, system in which the colony represented merely the most visible form of the accumulatory impulse that lay at its heart.

For all their differences, two particular assumptions have remained common in such accounts: one of which is reliance upon a conceptual separation between the material and ideological facets of international relations—between state practice and the (potentially oppositional) discourse of international law.<sup>8</sup> The other being a tendency to reify notions of State and sovereignty as the key architectural features of international relations, whose existence from the Peace of Westphalia onwards is taken to be both ‘given’ and historically ‘constant.’<sup>9</sup> These are obviously related—the distinction between the ideological superstructure of international legal thought and the material impulses upon which it worked finding its rationality in the pre-existence of a particular structure of power in the form of the nation-state. The difficulty, of course, is that such an account not only leaves entirely beyond the reach of theory the forms of knowledge and technologies of rule that underpinned the emergence of the process by which the idea of the state has come to be reified (at some point in time), but is also curiously incapable of explaining itself: how was it that international law came to be regarded as the servile adjunct to imperial rule? Was this not, historically, something which was generated in the same story?

The concern of this chapter thus would be to provide an outline sketch of this putative ‘relationship’ between international law and colonial practice across the 16th–19th centuries in a way that both avoids the indulgence of believing that the law of nations was somehow abstracted from the material processes of colonial rule (that it was, in that sense, purely ideological), and treats with scepticism the claim that the institutions of ‘State’ or ‘sovereignty’ can be taken as historically continuous phenomena.<sup>10</sup> This means, on one side, attempting to situate the discourses on the law of nations ‘inside’ an account of the evolving technology of government and rule rather than seeing them as a form of external critique or mode of validation. On the other hand, it also means trying to conceptualize the process of colonization not simply in terms of a straightforward ‘extension’ of a pre-formed European sovereignty to the non-European world, but one whose dynamics were shaped by, and shaped in turn, changing conceptions as to the nature and character of governmental authority.

<sup>8</sup> Eg J Fisch ‘The Role of International Law in the Territorial Expansion of Europe 16th–20th Centuries’ (2000) 3 *International Center for Comparative Law and Politics Review* 4–13; D Armitage *The Ideological Origins of the British Empire* (CUP Cambridge 2000); A Pagden *Lords of all the World: Ideologies of Empire in Spain, Britain and France, c. 1500–c. 1800* (Yale University Press New Haven 1995).

<sup>9</sup> Eg H Wheaton *History of International Law in Europe and America* (Gould New York 1842); *Between Equal Rights* (n 1) 169.

<sup>10</sup> Cf M Foucault *Security, Territory, Population: Lectures at the Collège de France, 1977–78* (M Senellart ed, G Burchell trans) (Picador New York 2007) at 277.

In concrete terms, thus, I want to draw attention to two aspects of this history: one being the slow accretive process by which ideas of sovereignty were to form and mutate during the period between 1500 and 1900—from a notion of sovereign authority centred upon the coercive authority of the monarch, to the modern imagination of the ‘nation-state’. The other being the parallel transition from a post-feudal mercantile economy to one centered (in Europe at least) upon industrial production and finance capital. In its most raw terms, the argument is that this history may be understood, albeit somewhat schematically, in terms of a shift in the conceptualization of the juridical politics of space from one marked by the notion of *dominium* to that of *imperium*. *Dominium* and *imperium* of course being seen operate here not merely as the juridical brackets that frame the ‘colony’, but also as having direct relationship to their etymological counterparts—domination on one side, and empire on the other.

## 2. DISCOVERY AND CONQUEST

For nearly a century prior to Columbus’ voyage to the Americas, the Crowns of Castile, and Portugal had been sponsoring expeditions down the West Coast of Africa to the Canary Islands, Cape Verde, and the Azores, the overt purpose of which was to locate a direct source for the gold, spices, and silk whose supply had hitherto been dominated by the Arab traders and the merchants of Venice and Genoa. In the process, they had routinely sought, in accordance with the spirit of the *reconquista*, the blessing of the pope<sup>11</sup> and had respectively been rewarded with the authorization, in accordance with the stipulations of Hostiensis, to ‘search out and conquer all pagans, enslave them and appropriate their lands and goods’.<sup>12</sup>

Columbus’ voyage in search of an alternative route to the East Indies was not, in that sense, novel. Nor indeed was the subsequent involvement of the pope who was called upon to ‘arbitrate’ between the respective Castilian and Portuguese claims to the territory subsequently ‘discovered’. Yet Pope Alexander VI’s famous *inter caetera divinae* of 4 May 1493 (the fourth of five) was significant nevertheless. According to the Bull, the Pope purported to ‘give grant and assign’ to the kings of Castile and Leon in perpetuity exclusive jurisdiction over ‘all... remote and unknown mainlands and islands... that have been discovered or hereafter may be discovered by you or your envoys’ lying west of a line running from Pole to Pole 100 leagues west of the meridian

<sup>11</sup> FG Davenport *European Treaties Bearing on the History of the United States and its Dependencies* (Carnegie Institution Washington Washington DC 1917) vol 1, at 11; E Nys *Les Origines du Droit International* (Thorin Paris 1894) at 284–6.

<sup>12</sup> ‘The Bull Romanus Pontifex (Nicholas V.), 8 January 1455’ in *European Treaties* (n 11) 9–26 at 12.

of the Azores and Cape Verde.<sup>13</sup> If the demarcation seemed clear enough, it was clouded by the fact that it excluded those territories already under the jurisdiction of other Christian powers, and was also silent on the question of Portuguese jurisdiction to the east. The two powers were thus forced to seek agreement as to their respective dominions—the subsequent Spanish-Portuguese Treaty of Tordesillas (7 June 1494)<sup>14</sup> dividing the world again along the same lines, but a little further to the West. A further treaty was also required—the Treaty of Saragossa (1529)—to identify the respective line in the Pacific in which, incidentally, the much treasured Spice Islands (the Moluccas) were effectively ‘sold’ by Spain to Portugal for 350,000 ducats.<sup>15</sup>

These events themselves were revealing enough: in the first instance, whilst the involvement of the Pope seemed to signal the residual authority of the papacy as the moral and political centre of the late-medieval *respublica Christiana*, the subsequent agreements, by contrast, not only heralded its decline as the ultimate author of claims to power and jurisdiction, but marked the increasingly disputatious character of claims to overseas dominions brought about by the expansion of long-distance mercantile trade. The formalities of the Papal grant, even if important in signifying the persistence of a latent theological structure in international legal thought, was only the beginning of the story (as the subsequent claim to the establishment of New France by Francis I amply demonstrated). Apart from anything else, any such grant was made explicitly dependent upon the symbolic appropriation of land by subsequent acts of ‘discovery’ and occupation.

In the second place, the divisional lines that were put in place (*rayas*) were not, as Schmitt points out, lines separating the realm of Papal authority from that which was beyond his sway, but were rather global lines operating as ‘internal divisions between two land-appropriating Christian princes within the framework of one and the same spatial order’.<sup>16</sup> In this sense the *Inter caetera divinae* departed from the earlier lines that had been drawn in 1443 and 1456 that extended only *usque ad indos*, and affirmed an outlook which was to bring the entirety of the globe within the contemplation of (European) political authority. Thirdly, it was to signal a good deal about the prevailing conception of political authority that was to undergird such acquisitions. That the Pope purported to ‘gift, grant, or assign’ the territories in question to the Kings of Leon and Castile was to look back in an obvious sense to a mediaeval theological universe of Papal authority, to feudal notions of investiture<sup>17</sup> and to the crusading mandate that had underpinned the *reconquista*. It also, however, looked forwards towards the emergence of a patrimonial conception of territorial sovereignty in which Roman civil law notions of property (*dominium*) came to structure notions of

<sup>13</sup> European Treaties (n 11) 64 and 68.

<sup>14</sup> *ibid* 84.

<sup>15</sup> *ibid* 146 and 169.

<sup>16</sup> *The Nomos of the Earth* (n 5) 92.

<sup>17</sup> See *The Epochs of International Law* (n 1) 231–2.

royal power for purposes of conceptualizing its expansion. Sovereignty and *dominium*, for such purposes, could be regarded as equivalent.

Each of these ideas were reflections of the broader social movements of the time. At the forefront, here, was the uneven, but nevertheless, steady decline of feudalism within Europe prompted, amongst other things, by the emergence of towns with their markets, merchants, exchanges, and guilds, the introduction of money into the agrarian economy, and a new technology of commerce (bills of exchange, joint stock companies, notaries, etc.).<sup>18</sup> Whilst the commodification of the rural economy and the associated decline in seigniorial rents was to signal the dissolution of the feudal political economy, it also stimulated the search for new sources of revenue—on one side through the centralization of governmental authority, the establishment of monopolies and systems of taxation and, on the other, the sponsorship of long-distance maritime enterprise in the hope of cutting into the existing circuits of trade for the supply of high-value, high-return, goods.<sup>19</sup>

With the era of a mercantile absolutism just around the corner, Vitoria's famous reflections on the Spanish conquest of the West Indies might best be understood to be of a transitional character.<sup>20</sup> In one direction, and following in the footsteps of Bartolomé des las Casas, he was to deny the Spanish claim to possession on the basis of Papal mandate or discovery, asserting in the process not merely the limits of Papal authority (*imperator non est totius orbis dominus*<sup>21</sup>) but the essential humanity, and thus equality, of the inhabitants of the West Indies vis-à-vis the conquistadors from Spain. His innovation, here—to imagine a world governed by uniform principles of natural law ascertained by reason—was tempered only, however, by his subsequent endorsement of the justness of the Spanish conquest as having been based upon what he saw to be a legitimate *casus belli*. His understanding of the conditions under which a just war might be pursued, however, was particularly significant. War could not be waged, in Vitoria's mind, merely for purposes of imperial expansion, for the pursuit of the personal glory of the Crown, or indeed to enable the forcible conversion of pagans to the faith.<sup>22</sup> The only effective ground was 'a wrong received', for which principles of commutative, rather than distributive, justice were applicable. What constituted a 'wrong', however, was of importance insofar as it reflected back upon those 'natural' precepts of the *ius gentium* that governed the interaction between different peoples around the globe. Here Vitoria was to lay down, as primary, principles of sociability, and commercial interaction. The Spanish had a right, he claimed, 'to travel into the lands in question and to sojourn there'.<sup>23</sup> Further to this:

<sup>18</sup> See generally, F Braudel *The Wheels of Commerce* (S Reynolds trans) (Collins London 1982).

<sup>19</sup> P Anderson *Lineages of the Absolutist State* (NLB London 1974) at 15–42.

<sup>20</sup> Between Equal Rights (n 1) 174–5.

<sup>21</sup> 'First Relectio' in De Indis (n 3) 115–62, s II–1 ('The Emperor is not lord of the whole world', translation at 337).

<sup>22</sup> 'Second Relectio' in De Indis (n 3) 163–87 at 170. <sup>23</sup> First Relectio (n 21) 151.

The Spaniards may lawfully trade among the native Indians, so long as they do no harm to their country, as for instance, by importing thither wares which the natives lack, and by exporting thence either gold or silver or other wares of which the natives have in abundance. Neither may the native princes hinder their subjects from carrying on trade with the Spanish; nor, on the other hand, may the princes of Spain prevent commerce with the natives.<sup>24</sup>

If, then, the natives were to prevent the Spanish from enjoying such rights of travel or commerce, the Spanish would be entitled to ‘defend themselves’ by force, to build fortresses and, ultimately, wage war, seize cities and provinces by way of retribution.<sup>25</sup> The same would be the case, he suggests if the Indians were to prevent the Spanish from preaching the Gospel.<sup>26</sup>

As has been suggested elsewhere, whilst Vitoria articulated these as universal principles he does not appear to have had in mind the possibility that the Indians, for their part, might avail themselves of similar rights.<sup>27</sup> Certainly as far as the preaching of the gospel goes, it was almost inconceivable that the Moors or Saracens would have the same right to wage war in defence of their faith.<sup>28</sup> Yet in some ways what is more revealing is the emphasis he places upon the institutions of commerce and property rather than those of Christianity. If faith, and the dominion of the Pope, could not serve as the governing conditions for relations with the non-Christian world, then some other framework of analysis needed to be set in its place. And Vitoria’s choice here—to imagine a world of individual and communal property rights through which one could address almost all relevant questions (from the implications of discovery to the legitimacy of conquest)—was significant in two different ways.

In the first place, Vitoria’s imagined world was not a purely hypothetical one, but in many senses reflected a pre-existent reality. The global circuits of trade which had for several centuries brought to Europe the gold, silk, and spices in search of which Columbus had crossed the Atlantic,<sup>29</sup> was only comprehensible if one started from an understanding of a global *diviso rerum* enabling the sequence of transactions and exchanges to take place.<sup>30</sup> Commerce, more than anything else, pushed attention towards the conditions under which both individuals and princes might claim to ‘own’ that which they found in their possession. And this, of course, not only challenged received precepts of Christian thought (the prohibition on usury, the belief that ‘God made everything to be owned by all’), but was a concern that was to subsequently occupy jurists and political theorists such as Grotius and Locke for another few centuries.

<sup>24</sup> *ibid* 152.      <sup>25</sup> *ibid* 154–6.      <sup>26</sup> *ibid* 157.

<sup>27</sup> See Imperialism (n 1) 26–7; The Role of International Law (n 8) 8.

<sup>28</sup> Second Relectio (n 22) 173.

<sup>29</sup> See The Wheels of Commerce (n 18) 114–34; JL Abu-Lughod *Before European Hegemony* (OUP New York 1989).

<sup>30</sup> See generally M Koskenniemi ‘Empire and International Law: The Real Spanish Contribution’ (2011) 61 *University of Toronto Law Journal* 1–36 at 16–29.

In the second place, just as Vitoria seemed to open out an entirely new imperial vision in which the emphasis was placed upon the ‘informal’ control of resources through private-law relationships of property and exchange rather than formal annexation,<sup>31</sup> it was also a vision resonant of a distinctively feudal imaginary. Whilst Vitoria understood that the conditions of political-legal coercion were centralized in the hands of the prince (in the sense that only sovereigns in his view could authorize the waging of war), and whilst the ruler was not entitled to intervene in his subjects enjoyment of private property (except for purposes of the common good), it was nevertheless not the case that political and economic power were yet entirely separated. Authority and possession remained intertwined through a conception of *dominium* that was understood to be both public and private,<sup>32</sup> encompassing matters of both jurisdiction and ownership. As he was to suggest in his Second Relectio:

[E]ven if we assume that the Indian aborigines may be true owners, yet they might have superior lords, just as inferior princes have a king and some kings have the Emperor over them. *There can in this way be many persons having dominion over the same thing*; and this accounts for the well-worn distinction drawn by the jurists between dominion high and low, dominion direct and available, dominion pure and mixed.<sup>33</sup>

It was thus possible to conceptualize the jurisdiction of the prince being exercised over his domain in a manner entirely analogous to that exercised by the lord over his manorial possessions, just as it had formerly been possible to envisage the dominions of the prince to be subordinate to the temporal ‘dominion’ of the Pope. All were, in a way, a seamless part of the same order, within which the (putatively) private institution of property remained entwined. And in the same respect, Vitoria seemed to be reflecting upon the semi-feudal character of Spanish colonial enterprise itself. The *capitulaciones* which structured the relationship between the *conquistadors* and the Spanish crown—in which the colonists were granted land, booty, and titles in return for of tax revenues and fees—envisaged, in effect, the creation of an ‘empire of tribute’<sup>34</sup> in which authority would be vested in a local landed elite who would organize the administration of their petty fiefdoms through a feudal land tenure system in which natives were assigned to estates (the *economienda*) and threatened with slavery if they failed to fulfil the conditions of the requirement.<sup>35</sup> That the Spanish Crown subsequently developed an extensive colonial bureaucracy, monopolizing transatlantic trade through the *Casa de Contratación* and regulating the *economienda* system and the trade in slaves was only, arguably, a function of the degree to which spatial disaggregation threatened to sever the ties of loyalty upon which the entire system depended.

<sup>31</sup> *ibid* 32.

<sup>32</sup> First Relectio (n 21) in *De Indis* (n 3) 128.

<sup>33</sup> *ibid* 130 (emphasis added).

<sup>34</sup> R Blackburn *The Making of New World Slavery* (Verso London 2010) at 129–34.

<sup>35</sup> E Wood *Empire of Capital* (Verso London 2003) at 42.



### 3. MERCANTILE COLONIALISM

If the declining authority of the Papacy had been signalled by Vitoria's reflections on the Spanish conquest, this was only to reflect upon the appearance of a new governmental rationality in the following century aligning itself on one side with the centralization of sovereign power (*raison d'état*) and underpinned, on the other, by a competitive mercantilism that took as its end the enrichment of the State.<sup>36</sup> The practice of mercantilism, broadly outlined in the work of those such as Montchrestien, Mun, and Serra found its expression in a variety of institutions and policies: the surveillance and control of imports and exports, the creation of free 'internal' markets (through the dismantlement of urban protectionism), the imposition of duties on foreign goods (for example, the Colbert reforms of 1664, 1667), controls over shipping (for example, the Navigation Act of 1651<sup>37</sup>), the regulation of currency exchange and controls over the export of bullion, the granting of monopolies, and the control of public finance through the establishment of central banks. At its centre, however, were two key ideas: that the accrual of wealth, particularly in the form of bullion, was dependent upon a positive balance of trade the achievement of which would become an end of government itself; and secondly that the conditions of competition necessitated a balance of power amongst European nations which would be secured, in the final measure, by means of a military-diplomatic armature.

The significance of this new rationality for purposes of colonial expansion was several. In the first instance, it took as its centre ground the problem of trade: although, as in France, one side of the equation could be addressed through the enhancement of local production and the encouragement of exports, as a whole it was to direct attention to the role of overseas commerce in the accumulation of pecuniary surpluses. And it was clear that it was long-distance trade that provided the unrivalled means 'for the rapid reproduction and increase of capital'.<sup>38</sup> Whilst, furthermore, this did not rule out the conquest or settlement of overseas territories, this was by no means a necessary measure<sup>39</sup> and, indeed, could often be seen to be an obstacle to commerce rather than its facilitator.<sup>40</sup> The French, British, and Dutch thus all joined Vitoria in disputing the competence of the Pope to divide the globe between Portugal and Spain and sought, where possible, to limit Spanish and Portuguese claims in order to break their monopoly over commerce in the West and

<sup>36</sup> Security, Territory, Population (n 10) 285–306.

<sup>37</sup> Navigation Act (9 October 1651) reprinted in H Scobell (ed) *A Collection of Several Acts of Parliament, Published in the Years 1648, 1649, 1650, and 1651* (John Field London 1653) pt 2, at 165–9.

<sup>38</sup> *The Wheels of Commerce* (n 18) 408.

<sup>39</sup> G Arrighi *The Long Twentieth Century: Money, Power, and the Origins of our Times* (Verso London 1994) at 141.

<sup>40</sup> For its significance in relation to maritime relations see GN Clark 'Grotius's East India Mission in England' (1935) 20 *Transactions of the Grotius Society* 45–84; C Alexandrowicz 'Freitas *Versus* Grotius' (1959) 35 *British Yearbook of International Law* 162–82 at 165–6.

East Indies.<sup>41</sup> The French commissioners were to emphasize this point whilst negotiating the Treaty of Cateau-Cambresis of 1559,<sup>42</sup> as did the British<sup>43</sup> and Dutch in the terms of the letters patent or Charters granted to their own explorers. The letters patent granted to Cabot by Henry VII,<sup>44</sup> and Gylberte by Elizabeth I,<sup>45</sup> as with the General Charter issued by the states-General of the United Netherlands in 1614,<sup>46</sup> merely limited the respective grants by reference to land already occupied by another Christian power. Increasingly, thus, even if Spanish dominion within parts of the West Indies had to be taken as a *fait accompli*, the grounds upon which claims to dominion might be based were increasingly narrowed. Discovery could no longer suffice in itself—particularly if it merely involved the symbolic planting of stones or the erection of flags.<sup>47</sup> Actual occupation was needed in order to justify the limitations that were otherwise being placed upon the ‘right of commerce’,<sup>48</sup> and this theme was to become central to the subsequent discourse that premised title upon the effective use of land.

In the second place, since mercantilism took as its starting point the notion of national wealth understood in aggregate terms, not only was it blind to the internal distribution of wealth, but also encouraged an association between the interests and material wealth of the merchant class and the nation as a whole. This was, indeed, to find institutional recognition in the development of the chartered trading companies (the first of which being the Muscovy Company of 1555) whose role in colonial expansion over the following two centuries would be critical. Whilst trading partnerships had long been a staple feature of overseas trade, the chartered companies were innovative politico-economic amalgams: constituted on one side as joint-stock companies<sup>49</sup> but also endowed, on the other, with public prerogatives—generally rights of monopoly, but not infrequently rights to conquer and colonize. It was arguably by means of these public prerogatives that companies such as the East India Company (1600) the London and Plymouth Companies (1606), and Dutch East India Company (1604), to name but a few, were to increase the size of the respective Dutch and British overseas possessions enormously. The apparent ‘harmony of interests’<sup>50</sup> upon which such arrangements rested, however, had certain consequences. In the first instance it was obviously to obscure the distinctions made by those such as Gentili

<sup>41</sup> A Pearce-Higgins ‘International Law and the Outer World 1480–1648’ in J Holland Rose and others (eds) *Cambridge History of the British Empire* (CUP Cambridge 1929) vol I, 183–4.

<sup>42</sup> European Treaties (n 11) 219–21.

<sup>43</sup> The Ideological Origins (n 8) 107–8.

<sup>44</sup> Letters Patent, 3 February 1498.

<sup>45</sup> Letters Patent, 11 June 1578.

<sup>46</sup> M Brumbaugh and J Walton (eds) *Inducements Offered by the States General of Holland to Settlers on the Hudson* (Christopher Sower Philadelphia 1898) at 4–5.

<sup>47</sup> The Nomos of the Earth (n 5) 131.

<sup>48</sup> The Epochs of International Law (n 1) 249–50 and 396.

<sup>49</sup> The Wheels of Commerce (n 18) 439–55.

<sup>50</sup> cf EH Carr *The Twenty Years’ Crisis 1919–39* (Macmillan London 1940) at 42–61.

between public and private war, between piracy and privateering, and between public and private property.<sup>51</sup> Just as Vitoria had imagined the conquistadors to be, at one moment, private merchants exercising rights of travel and trade, and at another, the enforcers of public right, so also Grotius was later to advocate, in his *de jure praedae*, a right on the part of individuals (and private companies of course) to resort to violence in punishment of ‘wrongs’. That this meant that private trading companies were entitled to aggressively pursue their commercial interests in the East Indies, and engage in hostilities and secure prize if they were unjustifiably prevented from doing so,<sup>52</sup> was only such as to reflect upon the fact that the distinctions in question (between public war and private enterprise) had yet to be made meaningful. That the same putative ‘harmony of interest’ was later to have the consequence of potentially bringing the entire imperial project into disrepute—most critically exemplified perhaps by the celebrated impeachment of Warren Hastings, India’s Governor-General, at the hands of Burke<sup>53</sup>—was only an indication of the subsequent movement here in which the idea of ‘public corruption’ came to signify the (advocated) separation between, on the one hand, the exercise of duties of public office and, on the other, the accrual of private wealth.

In the third place, the focus on overseas trade also directed attention towards its necessary conditions, and in particular, to the status of the high seas and the navigation routes that provided access to the new markets. Whilst there had long been disputes over the control of European maritime zones (the Adriatic, the Baltic, the Ligurian sea, or the *Oceanus Britannicus*), the Papal Bulls upon which Spain and Portugal based their claims only occasionally made mention of occupation or jurisdiction over the seas. In contrast to Nicholas V’s *Romano Pontifex* of 1455 which granted to the crown of Portugal exclusive rights in relation to the Guinea trade including the right to exercise exclusive jurisdiction in relation to both the land and sea, the *Inter Caetera* edict, had merely prohibited the undertaking of voyages to the Indies without permission of the Crown of Castile.<sup>54</sup>

The debate that was to ensue following the publication of Grotius’ *Mare Liberum* in 1609 was conducted at two different levels. On one level, and that which specifically informed the work of Selden,<sup>55</sup> his English interlocutor, the question seemed to be that of the possibility of enclosure in which rights over proximate maritime resources (principally fish) and local security were at the forefront. In Grotius’ own terms, however (and that of de Freitas<sup>56</sup> his Portuguese critic), the question was more directly

<sup>51</sup> A Gentili *De Iure Belli Libri Tres* (1612 edn JR Rolfe trans) (Clarendon Press Oxford and Milford London 1933) vol II, at iii and 15.

<sup>52</sup> *The Rights of War and Peace* (n 2) 79–90.

<sup>53</sup> See generally, NB Dirks *The Scandal of Empire: India and the Creation of Imperial Britain* (Belknap Press Cambridge MA 2006).

<sup>54</sup> *European Treaties* (n 11) 72–4.

<sup>55</sup> J Selden *Mare Clausum* (excudebat Will. Stanesbeius, pro Richardo Meighen London 1635).

<sup>56</sup> S de Freitas *De justo imperio Lusitanorum Asiatico* (1627).

concerned with long-distance navigation and trade, and the implications for the latter of claims to *dominium* over colonial possessions and the sea routes leading to them. The two sets of arguments were obviously related, however, insofar as each appeared to turn upon the question of ownership. For Grotius (who, of course, was writing at the behest of the Dutch East India Company), the sea was incapable of being subject to ownership insofar as it was not open to being consumed or transformed through possession.<sup>57</sup> Like the air, the ‘sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or fisheries.’<sup>58</sup>

Just as an individual was incapable of establishing ownership over something which was by definition limitless, so also was the *respublica* incapable of doing the same.<sup>59</sup> For Selden, by contrast, the sea was capable of enclosure through the medium of public navies and policing, much in the same way as local *dominium* was exercised over rivers and internal waters—what was in question was not ‘control of the element of water, but control over the unchanging geographic sphere.’<sup>60</sup>

Perhaps most significant here is the politico-juridical organization of this argument. The difference between Selden and Grotius seemed to be one that turned upon a differentiation between jurisdiction and ownership—between what the Romans might have referred to as *imperium* (the public powers of the magistrate) and *dominium* (private rights of ownership). That it was a distinction neither appeared to recognize fully (and indeed which Grotius momentarily explicitly denied) was only such as to confirm the continuity of an essentially feudal equation of political and economic power (‘sovereignty’, despite Bodin’s strictures, continued to be equated to ownership). At the same time, however, it was apparent that something new had appeared: as Schmitt points out, the real point was not whether the seas were *res nullius* or *res omnium*, but rather whether they represented a domain of law, or a domain of (lawless) freedom; and so far as the seas were thus to acquire particular legal status as ‘free’, was only such as to create two separate global orders each with its own related concepts of ‘enemy, war, booty and freedom’.<sup>61</sup> In one sense, Schmitt’s perception of an antithesis between the normative orders of land and sea might be associated with two distinct logics of imperialism—one expressed through a political logic of territorial expansion and colonial rule, the other through an economic logic of mercantile trade and navigational freedom.<sup>62</sup> Of course, however, they were far

<sup>57</sup> H Grotius *Mare Liberum* (1608) (JB Scott ed) (OUP New York 1916) at 22–9.

<sup>58</sup> *ibid* 28.

<sup>59</sup> Contra, H Grotius *De jure belli ac pacis* (JB Scott ed) (Clarendon Press Oxford 1925) vol II, ch iii, s iv, at 206–7 and s xiii, at 212–13.

<sup>60</sup> *The Epochs of International Law* (n 1) 268.

<sup>61</sup> *The Nomos of the Earth* (n 5) 172–84.

<sup>62</sup> For discussion of the antithesis of territorial and capitalist logics of imperialism see D Harvey *The New Imperialism* (OUP Oxford 2003) at 26–30 and 183; A Callinicos *Imperialism and Global Political Economy* (Polity Cambridge and Malden MA 2009) at 71–3.

from distinct: just as the mercantile communities saw as their enemy the monopolies and barriers to trade that ensued from (foreign) colonial rule or patrimonial claims over the seas, so also was it evident that advocacy of free navigation tended to coalesce in those places in which maritime strength would ensure eventual monopolistic control. The change in stance of the English crown in relation to the enclosure of the high seas, on that score, perfectly accords with the growing strength and size of its merchant fleet.<sup>63</sup> What was, perhaps, of more significance was the emergence of the ‘sea’ as a law-governed domain, in which absent outright ownership, the maritime powers increasingly sought to exercise powers of police—evidenced, in one direction by the subsequent enclosure of the territorial sea and, in another, by the increasing exercise of superintendent powers over the high seas whether under the Portuguese *cartaz* (a 17th-century version of the *navicert*)<sup>64</sup> or more generally in relation to piracy and slavery.<sup>65</sup>

#### 4. SETTLER COLONIALISM

If, as has been suggested, one side of mercantilist thought was largely concerned with external trade, the other side focused upon the problem of enhancing the local conditions of production—of putting the population to work (through the regulation of migration and vagrancy and the introduction of ‘poor laws’), controlling what would be produced (through subsidies and land regulation) and maximizing the productive output of land (through new agricultural techniques). This not only brought, as Foucault suggests, the population as a productive resource within the boundaries of governmental activity,<sup>66</sup> but also had its implications for the use of land. If the productive output of land itself had to be maximized it was a proposition which found its immediate expression in the long history of enclosures in England, and elsewhere in Europe, in which common land was given over to private ownership in order to be made more productive.<sup>67</sup> That the ‘improvement’ of land had impelled the dispossession of an agrarian population in England was to have particular significance for the development of settler colonialism in the 17th century—and not merely insofar as it provided the motive and means for such settlement (specifically the

<sup>63</sup> One may note, here, the critical change in position adopted by the British at the end of the 17th century. See *The Nomos of the Earth* (n 5) 177–8; *The Ideological Origins* (n 8) 100–124.

<sup>64</sup> *Freitas Versus Grotius* (n 40) 176–80.

<sup>65</sup> See generally L Benton *A Search for Sovereignty* (CUP Cambridge 2010) at 104–61.

<sup>66</sup> *Security, Territory, Population* (n 10) 67–9.

<sup>67</sup> See K Polanyi *The Great Transformation* (Beacon Press Boston 1957) at 34–8.

existence of a dispossessed ‘surplus’ agrarian population who would settle in the colonies as indentured servants), but also its intrinsic rationality.

Settler colonialism as it was to develop in the hands of the British and Dutch in the early part of the 17th century differed from the earlier mercantile colonialism of the Portuguese insofar as it was concerned not merely with the establishment of local trading stations, but with the expansion of the dominion of the State and the volume of its productive land.<sup>68</sup> Sped by the appearance of new class of colonial merchants seeking to secure control over the production of sugar or tobacco,<sup>69</sup> the new settlements and plantations in the West Indies, Virginia, New England, and New Netherlands were thus, in the first instance, stations for production and consumption: they were to be supplied with (slave) labour, equipment, and an apparatus of security,<sup>70</sup> and would contribute to the general economic prosperity both by the consumption of produce from the imperial centre, and through the supply of new materials. Their integration within the metropolitan political-economy, however, was always dependent upon the latter’s control over trade—in the case of the British, for example, through the sequence of Navigation Acts from 1651 onwards—and this increasingly became the principle source of tension as the conditions of self-government intensified. Yet if the central idea was to settle and expand the dominions of the State, the operative means for doing so was not immediately understood in terms of straightforward conquest or annexation.<sup>71</sup> Rather it was through the technology and practice of individual land appropriation (or what Marx called ‘primitive accumulation’).

The early charters granted to settlers in the Americas were, on the face of it, profoundly paradoxical. In one sense they were little more than feudal land grants faintly premised upon the idea that Christianity and civilization would be bought to the natives.<sup>72</sup> The first Charter of Virginia granted by James I, for example, authorized the settlers ‘to make habitation, plantation and deduce a colony’ on lands or islands that are ‘either appertaining to us, or which are not now actually possessed by any Christian prince or peoples’. The terms of the ‘grant’ declared that ‘they shall have all the Lands, Woods, Soil, Grounds, Havens, Ports, Rivers, Mines, Minerals, Marshes, Waters, Fishings, Commodities, and Hereditaments’<sup>73</sup> that subsist within fifty miles of each settlement, and that land was to be held under common socage with one fifth of all gold or silver ore to be paid to the Crown.<sup>74</sup> The curiosity here is not simply that

<sup>68</sup> *Empire of Capital* (n 35) 103.

<sup>69</sup> See R Brenner *Merchants and Revolution* (Princeton University Press Princeton 1993).

<sup>70</sup> See eg ‘Charter of Privileges to Patroons, 7/17 June 1629’ in W MacDonald (ed) *Select Charters and other Documents Illustrative of American History, 1606–1775* (Macmillan New York) 43–9.

<sup>71</sup> *The Rights of War and Peace* (n 2) 120–6.

<sup>72</sup> *The Rights of War and Peace* (n 2) 110.

<sup>73</sup> ‘First Charter of Virginia, 10/20 April 1606’ in select charters (n 70) 1–11 at 3.

<sup>74</sup> Select Charters (n 70) 1, 2 and 3. See also, ‘Patent of the Council for New England, 3/13 November 1620’ in select charters (n 70) 23–33 at 28 and ‘First Charter of Carolina, 24 March/3 April 1622/3’ in select charters (n 70) 120–5.

no mention was made of the native inhabitants (except by implication),<sup>75</sup> nor that there was little precision as to where the colony itself would be ‘deduced’, but that the conditions under which the grant itself was made were entirely invisible. This may have been to suggest that the grants were premised upon the idea that the territory in question was effectively *res nullius*.<sup>76</sup> Yet, insofar as *res nullius* merely signified the possibility of things being bought into personal possession through occupation,<sup>77</sup> this was clearly not an effective condition for the original grant. The grants were suggestive, in other words, of a curious inversion in which the public authority to grant land seemed to precede the conditions precedent for the establishment of that authority in the first place—a form of appropriation before the fact.

Yet this inversion was to highlight a specific facet of the process of settlement—namely that the process by which sovereignty and jurisdiction came to be claimed was largely indistinguishable from the specificity of private acts of occupation and/or purchase of land.<sup>78</sup> There were two overt reasons for this: first of all because even if the settlements were originally conceived as a project of the royal State, the agents who would carry it forward were the industrious private settlers rather than the military forces of public authority.<sup>79</sup> In the second place it was evident that even if in some cases the ‘grants’ of charter or of patent preceded the fact of settlement,<sup>80</sup> in many others they clearly followed it as a process of *ex post facto* validation.<sup>81</sup> Either way, however, the governing rationality was one conditioned by the possibility of assuming individual rights of possession of land that had yet to be brought under the jurisdiction of the colonizing power. And it was here that the theme of land-improvement was to assume particular prominence.

Whilst Vitoria had insisted upon the existence of native title to land—and thus thrust the emphasis of justification upon the possibility of conquest—Grotius was not only to develop the latter theme much more generously (allowing, amongst other things, the right to punish those ‘who act with impiety towards their parents’<sup>82</sup>), but was signal the opening out a new ground of appropriation that turned upon the conditions of its use:

[I]f within the territory of a people there is any deserted and unproductive soil, this also ought to be granted to foreigners if they ask for it. Or it is right for foreigners even to take

<sup>75</sup> In Patent of the Council for New England (n 74) 25 however, it was noted that a ‘wonderful Plague’ had brought ‘Destruction, Devastacion and Depopulacion’ to the natural inhabitants of New England, leaving it open to be possessed and enjoyed unhindered.

<sup>76</sup> Eg J Elliott *Empires of the Atlantic World: Britain and Spain in America 1492–1830* (Yale University Press New Haven 2006) at 32; Lords of all the World (n 8) 76–7.

<sup>77</sup> On which see L Benton ‘Acquiring Empire through Law’ (2010) 28 *Law and History Review* 1–38.

<sup>78</sup> Cf ‘Grant of Province of Maine, 3/13 April 1639’ in *Select Charters* (n 70) 65–7 (in which the grant was accompanied by the following: ‘Wee Doe by these Presents . . . take the same into our . . . possession’).

<sup>79</sup> EM Wood *The Origin of Capitalism: A Longer View* (Monthly Review Press New York 2002) at 164.

<sup>80</sup> Eg ‘Charter of Maryland, 20/30 June 1632’ in *Select Charters* (n 70) 53–9.

<sup>81</sup> Eg First Charter of Carolina (n 74) 120.

<sup>82</sup> *De Jure Belli ac Pacis* (n 59) vol II, ch xx, s xl, 505.

possession of such ground, for the reason that uncultivated land ought not to be considered as occupied except in respect to sovereignty [*imperium*], which remains unimpaired in favour of the original people.<sup>83</sup>

In one respect Grotius was merely drawing upon a tradition of thought that had been well established since the time of More who, in his *Utopia*, had already advocated the settlement of foreign shores where land was unused.<sup>84</sup> But in a deeper sense he was also giving expression to the overt rationality underpinning the contemporaneous Dutch settlement of Guiana and Manhattan.<sup>85</sup> In its Charter of Privileges to Patroons of 1629, for example, the Dutch West India Company had declared that private individuals were 'at liberty to take up and take possession of as much land as they shall be able properly to improve'.<sup>86</sup> Even if the same Charter went on to specify that they 'shall be obliged to satisfy the Indians for the land they shall settle upon',<sup>87</sup> this only went so far as to emphasize that what was being authorized, was the settlement of land beyond the immediate confines of Dutch jurisdiction.

Two aspects of this are noteworthy. In the first place it was to reflect back upon practice of 'symbolic' possession associated with the right of discovery. If unsettled land was open to be occupied, then that would go just as easily for territory which had simply been marked by earlier discoverers as it would for territory newly found.<sup>88</sup> Title by discovery alone was effectively ruled out. Secondly, the underlying rationality of a right to appropriate 'deserted' or 'unproductive' land was one that not merely accorded with the precepts of mercantilism (to wit the maximization of domestic production), but also had buried within it a further implication: the right to appropriate land that was not being used productively enough. This was to find explicit recognition in the subsequent work of Locke who was to remark, with America in mind, that even if land had come to be enclosed, it might nevertheless still be taken into possession by another if it were 'left to waste'.<sup>89</sup> That this rationality led, on occasion, to squatting (Plymouth) or the unauthorized purchase of land (Rhode Island and Providence)<sup>90</sup> is perhaps unsurprising. In the second place, however, in working through the distinction between the public and private aspects of occupation (what he referred to as *occupatio duplex*), and in suggesting that the taking of possession (*dominium*) might leave unimpaired the jurisdiction (*imperium*) of the original people, Grotius seemed to leave in the air the question as to how Dutch or British

<sup>83</sup> De Jure Belli ac Pacis (n 59) vol II, ch ii, s xvii. 202.

<sup>84</sup> T More *Utopia* (1516) (P Turner trans) (Penguin London 1972) at 81.

<sup>85</sup> The Rights of War and Peace (n 2) 104–8.

<sup>86</sup> Charter of Privileges (n 70) 49, s xxi.

<sup>87</sup> *ibid* 49–50, s xxvi.

<sup>88</sup> See The Epochs of International Law (n 1) 395–401.

<sup>89</sup> J Locke *Second Treatise of Government* (1690) (CB Macpherson ed) (Hackett Indianapolis 1980) at 24; see further *Empire of Capital* (n 35) 109–15 and 157–61.

<sup>90</sup> See E Keene *Beyond the Anarchical Society: Grotius Colonialism and Order in World Politics* (CUP Cambridge 2002) at 66.



sovereignty might come to be established over their respective settlements in the Americas? The answer, it seems, was to be found in Grotius' differentiation between forms of jurisdiction (*imperium*). Jurisdiction was primarily that exercisable in relation to persons, and only secondarily did it take the form of jurisdiction over territory.<sup>91</sup> This ordering of jurisdiction seemed, in some ways, to be descriptive of how he saw the settlement of the Americas: the personal jurisdiction over the Dutch and British settlers transmuting itself subtly into territorial jurisdiction as the settlements came to be established—whether by individual acts of 'occupation' or by the collective purchase of land from the original owners. Either way, however, sovereignty appeared to proceed from the fact of private appropriation rather than the other way round.

Emer de Vattel, who was later to return to the same theme almost a century later, was to fill out the sketch provided by Grotius albeit in slight amended guise:

We have already observed (§ 81) in establishing the obligation to cultivate the Earth, that these Nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their removing their habitations through these immense regions cannot be taken for a true and legal possession; and the people of Europe, too closely pent up, finding land of which these nations are in no particular want, and of which they made no actual and constant use may lawfully possess it, and establish colonies there. We have already said, that the Earth belongs to the human race in general, and was designed to furnish them with subsistence: if each nation had resolved from the beginning to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our Globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of Nature in confining the Indians within narrow limits.<sup>92</sup>

Whilst Vattel retains the same core theme, several notable shifts in the terms of debate are apparent here. In the first place, and most obviously, the discussion is now framed in terms of the rights and obligations of nations: it is no longer a matter of private appropriation, but appropriation of a public nature equivalent to, but different from, conquest. When laying claim to vacant territory, the nation acquires 'empire' or 'sovereignty' at the same time as 'dominion'—'it can have no intention' he explains elsewhere, 'in settling in a country, to leave to others the rights of command'.<sup>93</sup> But at the same time as pushing the emphasis towards the rights of sovereignty, he opens up at the same time, a gap between public and private modes of territorial acquisition, in which the question of agency was therefore to become significant: under what authority were the colonists settling the land in question? Did they possess national character or were they merely emigrants? Was the

<sup>91</sup> De Jure Belli ac Pacis (n 59) vol II, ch iii, s ix, 206–7. For this interpretation see The Rights of War and Peace (n 2) 107–8.

<sup>92</sup> E de Vattel *The Law of Nations or Principles of Nature Applied to the Conduct and Affairs of Sovereigns* (Samuel Campbell New York 1796) book I, ch xviii, s 209, at 160–1.

<sup>93</sup> *ibid* book I, ch xviii, s 205.

intention to establish a colony under the sovereignty of the imperial power, or to establish a new nation on vacant land?

In the second place, by drawing attention to such questions, Vattel was not merely to reflect upon the growing demands for self-government in the colonies, but also to a subtle transformation in the prevailing governmental rationality that was to articulate itself increasingly forcefully in a distinction being drawn between the proper realm of governmental action and that of private intercourse. Whilst, as yet, the coming separation of the economic system from general social relations was not fully apparent, Vattel's contribution may be seen as one marked by a concern not so much as to enhance the end of the State through the organization and expansion of productive circuits, but rather to limit its authority by reference to the same precepts. The issue, as he puts it, was not so much the appropriation of territory for purpose of settlement and production, but rather the prior 'usurpation' of land by those who were not in a position to use it properly. If this was to emphasize the importance of 'effective control' for purposes of claiming title, it was also to hint at an entirely new rationality for colonial government—to enable the exploitation and use of land by bringing it within the ambit of an independent, self-regulating, market economy.

## 5. IMPERIALISM, POLITICAL ECONOMY, AND THE SCRAMBLE FOR AFRICA

If the early theorists of imperialism (Hobson, Lenin, Kautsky, Luxemburg, Bukharin, and Arendt) disagreed as to what it was they were seeking to describe, they were nevertheless uniform in their perception that it was a phenomenon to be associated with the final three decades of the 19th century.<sup>94</sup> During that period the visible enthusiasm for colonial acquisitions had led to an estimated 4.5 million square miles and 66 million inhabitants being incorporated within the British Empire, France gained 3.5 million square miles and 26 million people, Germany 1 million square miles and 26 million people, and Belgium, through Leopold's Congo Free State, 900,000 square miles and a population of 8.5 million.<sup>95</sup> The precise causes of the scramble were, of course, obscure: whether it was driven by the collapse in commodity prices and under-consumption within Europe,<sup>96</sup> the unravelling of the free trade arrangements

<sup>94</sup> See A Brewer *Marxist Theories of Imperialism: A Critical Survey* (Routledge London 1980); Imperialism and Global Political Economy (n 62).

<sup>95</sup> C Hayes *A Generation of Materialism, 1871–1900* (Harper New York 1941) at 237.

<sup>96</sup> R Luxemburg *The Accumulation of Capital* (Routledge London 2003).

put in place in the aftermath of the Cobden-Chevallier agreement of 1860, or by the emergence of the trusts, cartels, and monopolies associated with the rise of ‘high finance’<sup>97</sup> were points of difference. Nevertheless, there was no doubt that the apparent over-accumulation of capital in Europe had encouraged the speculative interest in overseas investment (in trade, mining, manufacturing, railways, telegraph systems etc) which had, in turn, fed through into a self-reinforcing logic of acquisition: colonies and protectorates had to be acquired in order to ‘protect’ overseas trade and investment from the dangers posed by the monopolistic or protectionist policies of rival colonial powers.

At the centre of this account of the late 19th-century ‘turn’ towards colonial acquisition was the Berlin Conference of 1884–85 which, in many respects, appeared to stand as a symbol of this new Imperial era.<sup>98</sup> Articles 34 and 35 of the Final Act were particularly resonant here insofar as they sought to lay down the terms under which colonial powers might ‘take possession’ of land in Africa:

Article XXXIV Any Powers which henceforth takes possession of a trace of land on the coasts of the African continent outside of its present possessions, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof, addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

Article XXXV The Signatory Powers of the present Act recognize the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights, and, as the case may be, freedom of trade and transit under the conditions agreed upon.<sup>99</sup>

The limitations of those articles were made all too apparent when the members of the *Institut de Droit International* were later to discuss their implications: not only were they territorially limited (specifically to the coasts of Africa), but they did not resolve either the question as to the necessity of native consent (as the US representative at the Conference, Kasson, had insisted they should) or whether the obligation to ensure the ‘establishment of authority’ subsisted in equal measure for protectorates as it did for possessions over which sovereignty was definitively asserted. In some eyes, the provisions appeared to endorse the idea that African territory was effectively to be regarded as *territorium nullius* for purposes of colonization; in the view of others such a conclusion was implicitly denied.<sup>100</sup> In fact, when read as a whole, the final Act

<sup>97</sup> JA Hobson *Imperialism: A Study* (J Pott New York 1902); R Hilferding *Finance Capital: A Study in the Latest Phase of Capitalist Development* (M Watnick and S Gordon trans) (Routledge London 1981).

<sup>98</sup> See generally *Between Equal Rights* (n 1) 250–6; *The Gentle Civiliser of Nations* (n 1) 121–7.

<sup>99</sup> General Act of the Berlin Conference Respecting the Congo (signed 26 February 1885) (1885) 165 CTS 485.

<sup>100</sup> J Fisch ‘Africa as terra nullius: The Berlin Conference and International Law’, in S Förster, W Mommsen and R Robinson (eds) *Bismarck, Europe and Africa: The Berlin Africa Conference 1884–85 and the Onset of Partition* (OUP Oxford 1988) 347–74 at 355; A Fitzmaurice ‘The Genealogy of Terra Nullius’ (2007) 129 *Australian Historical Studies* 1–15.

assumes a thoroughly ambivalent character: whilst in part it was concerned with allowing colonization to proceed without conflict, there was also a distinctively anti-colonial thread within it.<sup>101</sup> This was true, in particular, in relation to the plans for the ‘conventional regime of the Congo’ (which spread across the entirety of the African Continent from East to West) which sought the establishment of a ‘neutral’ central African zone of free commerce over which Leopold’s Congo Free State would exercise a superintendent responsibility. That such a zone never materialized and, in fact, dissolved into one of the most brutal of colonial regimes is, perhaps, only emblematic of the general contradictions that underpinned the agreement in the first place.<sup>102</sup>

Two aspects of the story of the Berlin Conference might be usefully highlighted here. The first is the apparent confusion that the Conference sought to resolve concerning the precise modes by which colonies and protectorates might be acquired, and which, at the same time, brought into contemplation the nature and significance of ‘native sovereignty’. The second is the curious connection that seemed to exist between the two modes of colonial engagement in question—formal colonization on the one hand, and the pursuit of free trade on the other.

Before turning to these two dimensions of the international legal framework of 19th-century colonialism, two particular aspects of its environment are worth highlighting. In the first place was the decline of mercantilism as an animating philosophy, and the rise in its place, of a new rationality of government organized around the idea of the self-regulating market and the institution of free trade. In the hands of Smith, Ricardo, and Say, the spirit of *laissez-faire* government was to find a new regulating force in the natural laws of economic life which would become its ‘indispensable hypodermis’.<sup>103</sup> This presaged the gradual decline of formalized colonial monopolies, the winding up of the old charter companies (the East India Company being replaced by direct rule in 1858) and the rise of an increasingly fervent mercantile free-trade lobby.<sup>104</sup> Paradoxically enough, however, colonization proceeded apace, gaining velocity in the ‘neo-mercantilist’ decades at the end of the century.

Secondly, the industrial revolution as it was to take shape in Europe had both led to the ‘political emancipation of the bourgeoisie’ as Hannah Arendt put it,<sup>105</sup> and to the emergence of nationalism as a political ideology and practical project. Whether prompted as a palliative to the collective anomie of an increasingly urban industrialized workforce, or as a project associated with the creation of a skilled and mobile

<sup>101</sup> R Robinson ‘The Conference in Berlin and the Future in Africa 1884–1885’ in Bismarck, Europe and Africa (n 100) 1–34.

<sup>102</sup> SE Crowe *The Berlin West African Conference 1884–85* (Longmans, Green and Co London 1942) at 4–5.

<sup>103</sup> M Foucault *The Birth of Biopolitics: Lectures at the Collège de France 1978–79* (M Senellart ed, G Burchell trans) (Palgrave Macmillan New York 2008) at 16.

<sup>104</sup> See B Porter *Critics of Empire: British Radicals and the Imperial Challenge* (Macmillan London 1968).

<sup>105</sup> H Arendt ‘The Origins of Totalitarianism’ (Harcourt New York 1951).

labour force, ‘nationalism’ not only spoke about the intrinsic value of ethnic or linguistic homogeneity, but also about the desirability of government by consent (‘le plébiscite de tous les jours’ as Ernest Renan was to put it).<sup>106</sup> This placed two potential constraints on colonial expansion: in one direction it seemed to demand the consent of those who were to be subjugated by alien rule, in another it pointed to the impossibility of the full integration of colonial territories within the juridico-political conception of the nation-state.

### 5.1. Formalities of Colonial Acquisition

If, by the time of Vattel, the formal rationality of colonial acquisition had largely reduced itself to questions of conquest or occupation, the conceptual frame of territory, understood in terms of an analogy with property (organized around the primary and derivative modes of acquisition) was increasingly problematic. Political economy seemed to demand a separation between sovereign authority and private ownership to which end a differentiation between *imperium* (sovereignty or jurisdiction) and *dominium* (property) was important. The ethos of nationalism, furthermore, emphasized the relationship between the conditions of sovereignty (popular consent) and the spatial terrain over which sovereignty was exercised (who were the people?). As Arendt was to suggest, this was to pose a formidable obstacle to the expansion of empire: since a conquering power would ‘have to assimilate rather than to integrate, to enforce consent rather than justice’,<sup>107</sup> no nation-state, she was to suggest, ‘could with clear conscience ever try to conquer foreign peoples’, since the imposition of law upon others was fundamentally inconsistent with its own conception of law as ‘an outgrowth of a unique national substance’.<sup>108</sup>

This was not to say, of course, that conquest was out of the question—indeed the forcible annexation of territories such as Burma (1826), Malacca (1824), Singapore (1819), Algeria (1830), Natal (1843), Basutoland (1868), New Zealand (1840), and the Transvaal (1901) was to belie any pretension otherwise. But Arendt’s point remains: confronted by the theoretical and logistical difficulties of merging the juridico-political identity of the metropole with that of its colonial possessions (as pursued, largely unsuccessfully by France in relation to Algeria), colonial powers were encouraged to turn either to ideas of federalism, or to alternative, more flexible, modes of rule that defied any pretension of annexation. Within the sprawling British Empire at the end of the century, thus, one was to find not merely a plurality of institutional forms (protectorates, protected States, crown colonies, dominions, leased territories, con-

<sup>106</sup> E Renan *Qu’est-ce qu’une nation? Conférence faite en Sorbonne, le 11 mars 1882* (Lévy Paris 1882) at 27.

<sup>107</sup> H Arendt *The Origins of Totalitarianism* (Harcourt, Brace & World New York 1968) at 125.

<sup>108</sup> *ibid* 126–7.

dominia, suzerains, etc.) all of which had attenuated relations with the metropole, but also the emergence of the idea of an imperial ‘commonwealth’ that was at once internally divided, yet externally unitary. In reflecting upon the legal form of British India, for example, Westlake was to explain that:

[t]he colonial and other dependencies of a state are not in a personal union with it... [n]either are they in a real union with the parent or supreme state, because they do not stand side by side with it as equals.... They form with it one dominion or set of dominions, represented abroad by the parent or supreme state.<sup>109</sup>

This was, in one sense, to make relative the language of sovereignty: it assumed a different meaning depending upon whether one was focusing upon the inside, or the outside of imperial rule, looking towards the multiple forms of internal ‘dominion’ or outwards to the unity of the ‘supreme State’. One thing was clear though, just as the determination to differentiate categorically between public and private action seemed to encourage the articulation of increasingly rigid conceptions of State and sovereignty,<sup>110</sup> Empire for its part seemed to represent a resistant strain, formulating itself in terms of a loose amalgam of governmental or jurisdictional powers secured only by the privilege of exclusivity.<sup>111</sup>

That imperial expansion seemed to be managed through an increasingly diverse set of institutions was, in part, a function of the extent to which the natives themselves were brought into account. However problematic, by the time of the Berlin Conference colonial powers had increasingly sought to justify their claims to African territory on the basis of treaties of cession or protection signed by local sovereigns.<sup>112</sup> The rationality for this, of course, was not that indigenous sovereigns in Africa could be treated as possessing full legal agency as, apart from anything else, they appeared not to be ‘fit subjects for the application of legal technicalities’. It would, be absurd, as Thomas J Lawrence was to suggest ‘to expect the king of Dahomey to establish a Prize Court, or to require the dwarfs of the central African forest to receive a permanent diplomatic mission.’<sup>113</sup> Rather, they were to be assimilated to primitive societies due, or destined to be, civilized,<sup>114</sup> capable nevertheless of authorizing their own subordination. The theme of inclusion and exclusion was pervasive. Even those committed to denying native sovereigns any form of legal agency nevertheless catalogued and categorized those non-legal forms for purposes of bringing them within the field of thought and action. Some differentiated, thus, between legal relations as might exist between European States and non-legal, moral or ethical, propositions that governed rela-

<sup>109</sup> J Westlake *International Law* (CUP Cambridge 1904) vol I (Peace) at 41.

<sup>110</sup> Cf The Epochs of International Law (n 1) 467.

<sup>111</sup> Eg J Westlake *Chapters on the Principles of International Law* (CUP Cambridge 1894) at 128–33.

<sup>112</sup> M Lindley *The Acquisition and Government of Backward Territory in International Law* (Longmans London 1926).

<sup>113</sup> TJ Lawrence *The Principles of International Law* (DC Heath and Co Boston, 1895) at 58.

<sup>114</sup> See G Gong *The Standard of Civilization in International Society* (Clarendon Press Oxford 1984).

<sup>115</sup> Chapters on the Principles of International Law (n 108) 137–40.

tions with the non-civilized world,<sup>115</sup> others between the relations governing States enjoying full membership and those enjoying merely partial membership in the family of nations.<sup>116</sup>

The teleological ordering of societal forms which underpinned the liminal subjectivity of the natives was to have significance for colonial practice in two different respects. In the first place, it was to orient itself to the practice of colonial rule: if civilized States, as Westlake was to note, were those marked by the kinds of institutions of government, private law, and public administration found in Western Europe, colonial rule itself was to identify those conditions as being its objective.<sup>117</sup> If the marks of sovereignty were not pre-existent, they were to be produced. In the second place it was also to provide a new conceptual ground for colonial acquisition: this was not conquest, nor was it possession of vacant land (*res nullius*), but control premised upon the capacity to transform (civilize) the natives. What was being brought into European control was not merely land and resources (as had been the case in settler colonialism), but also, and perhaps more importantly, people and markets. From that perspective it was not the case, thus, that the native inhabitants could be regarded as inexistent, or the entirely dispensable subjects of colonial occupation, since they also seemed to occupy the role of potential producers and consumers. As John Kasson, the American delegate at Berlin was to insist:

[i]t is not sufficient for all our merchants to enjoy equally the right of buying the oil, gums and ivory of the natives... Productive labour must be seriously encouraged in the African territories, and the means of the inhabitants of acquiring the products of civilized nations be thus increased.<sup>118</sup>

When seen in this light, the otherwise apparently disconnected features of the Berlin Conference appear perfectly congruent: the concern for the problem of 'slavery' or for the well-being of the native populations being driven, neither by a purely humanitarian idealism, nor by a cynical desire to justify colonial intervention, but by the underlying logic of producing free labour as the generative condition for the market economy.

If the natives primarily came into contemplation as potential producers and consumers, it was also tolerably clear that their 'voluntary consent' was far from necessary in order to substantiate colonial rule, despite Kasson's claims other-

<sup>116</sup> H Wheaton *Elements of International Law* (Clarendon Press Oxford 1866); L Oppenheim *International Law: A Treatise* (Longmans London 1905).

<sup>117</sup> See S Humphreys *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (CUP Cambridge 2010) at 109–21.

<sup>118</sup> Berlin General Act, Annex 14, Protocol 5, in R Gavin and J Betley (eds) *The Scramble for Africa: Documents on the Berlin West African Conference and Related Subjects 1884/1885* (Ibadan University Press Ibadan 1973) at 220.

<sup>119</sup> Protocol of 31st January 1885. *ibid* 240.

wise.<sup>119</sup> The reason for this was not just the obviously questionable character of that consent, but an appreciation that the category of sovereignty qua ‘possession’ was, if anything, to be avoided. A notable illustration is to be found in the debate at Berlin over the extent to which the obligation in article 35 of ‘ensuring the establishment of authority’ was applicable to ‘protectorates’. Unlike Germany, and to a lesser extent France, Britain had not pursued a policy of seeking to colonize and administer every territory over which it enjoyed rights of protection, and in many cases, it had merely sought to monopolize trade under title of agreement, but yet only exercise, in the process, a form of consular jurisdiction over British Nationals (which, in accordance with the terms of the Foreign Jurisdiction Act of 1843,<sup>120</sup> was all that could be exercised in relation to those not subject to recognized forms of government).<sup>121</sup> Even if British practice was peculiar on this score (and of ‘doubtful legality’ as Wilhelm Grewe was to claim),<sup>122</sup> its implications were nevertheless revealing. In the first instance it was to recognize that colonial rule could, at least potentially, assume a form that neither resolved itself in a claim of ‘ownership’, nor in the active administration of territory. As Westlake was to explain, the new breed of colonial protectorates that had appeared (for example, Gambia, Sierra Leone, Uganda, North and South Nigeria, and Somaliland) were those in which the colonial power did not yet claim to be ‘internationally its territory’, but yet were designed ‘to exclude all other states from any action within it’.<sup>123</sup> If such a claim to jurisdictional exclusivity short of ownership was hard to recognize in terms of the received categories of territorial acquisition, it was perhaps only to indicate the limits of those categories as a way of conceptualizing the character of imperial rule.

A second matter signified by this practice was that it revealed an essential continuity between different forms of imperial rule. If one was to set aside the frame of *dominium* as a structuring category, and focus instead upon the question of jurisdiction, then it was immediately apparent that imperial rule could be understood as exercised through a gradated system running from, at one end, the establishment of regimes of consular jurisdiction to, at the other end, direct administration and rule over nationals, natives and foreigners alike. The essential fluidity of the idea and practice of jurisdiction, and its capacity to express itself in both territorial and non-territorial forms, was a perfect complement to an imperialism of commercial expansion that related itself, only very ambivalently, to the intensively administered structures of the colony.

<sup>120</sup> Foreign Jurisdiction Act of 1843, 6 and 7 Vict c 94.

<sup>121</sup> WE Hall *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon Press Oxford 1894).

<sup>122</sup> The Epochs of International Law (n 1) 473.

<sup>123</sup> International Law (n 109) 123–4.



## 5.2. Imperial Free Trade

The central tension that ran through discussions at the Berlin Conference, and which arguably underpinned the inchoate form of the colonial protectorate was, of course the apparent conflict between, on the one hand a commitment to the expansion of trade and commerce (which, for many, could only expand if made free), and on the other, the expansion and intensification of colonial rule. This found its institutional expression in the distinction that appeared in practice between colonial rule, on the one hand, and the regimes of extra-territorial or consular jurisdiction that were to be put in place in China, Japan, Siam, Zanzibar, Muscat, and the Ottoman empire on the other. The distinction between these two institutional forms seemed profound. In the first instance, whereas colonies were understood to be marked by the assertion of territorial authority on the part of the colonial power, regimes of consular jurisdiction were, by contrast, premised upon its absence—there was no claim to sovereignty and foreigners were merely immunized from the application of local law.<sup>124</sup> Secondly, whereas colonial rule would have seen the establishment of national preferences, prohibitive tariff barriers and de facto, if not formal, monopolies on trade, the regimes of consular jurisdiction by contrast seemed to be designed to do precisely the opposite. Thus, in case of China, in the aftermath of the first Opium War in 1842, a network of bilateral treaties were put in place all of which sought to secure the necessary conditions for the exercise of freedom of commerce. European merchants were provided security in their commercial transactions through the comforting blanket of consular jurisdiction in which all disputes, whether civil or criminal, familial or commercial, would be governed by the laws of the State of nationality and heard by a resident consul (sometimes sitting alone, sometimes in a mixed court). Tariffs on all trade were regulated by the same means, fixed by treaty and gathered by European customs agents. The replication of similar provisions in treaties with the majority of European powers (with liberal use of most-favoured-nation clauses), and their extensive application to both nationals and *protégés* (who might hail from other parts of the colonial empires), meant that a large proportion of foreign trade was conducted under the terms of such regimes.<sup>125</sup>

For all of the theoretical differences that marked this activity from the parallel processes of formal colonization, there were several obvious points of connection.<sup>126</sup> It was clear from the outset that the regimes of consular jurisdiction were not entirely incompatible with the establishment of colonies by way of lease (Port

<sup>124</sup> See F Piggott *Extraterritoriality: The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (Kelly & Walsh Hong Kong 1907); FE Hinckley *American Consular Jurisdiction in the Orient* (WH Lowdermilk and Co Washington 1906); G Keeton *The Development of Extraterritoriality in China* (Longmans London 1928).

<sup>125</sup> See PK Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (OUP Oxford 2012).

<sup>126</sup> See *The Epochs of International Law* (n 1) 474–7.

Arthur, Weiheiwei), regimes of protection (Morocco), or mere occupation (Egypt). As time progressed, furthermore, territorial divisions became more resilient resulting in the establishment, sometimes formally sometimes informally, of 'spheres of influence' in which European powers mutually recognized their respective rights of commercial preponderance within designated zones. Siam, for example, was effectively divided between the British and the French on this basis, neither of which purported to exercise anything other than consular jurisdiction, but both enjoying otherwise the privileges of colonial predominance. As Westlake was to point out, the sphere of influence was not itself 'a recognized form of aggrandisement' and had no particular effect in relation to third parties.<sup>127</sup> It was, at best, a 'shadowy form of earmarking'.<sup>128</sup> But he was also to note how spheres of influence were occasionally subtly reshaped into claims of sovereignty—his example being the 'remarkable' agreement of the 12 May 1894 in which Britain purported to grant the Congo State a lease over territory, its only claim to which being that it fell within its sphere of influence as recognized in a treaty with Germany and Italy. His conclusion that Britain, in fact, had no basis upon which to act as lessor of the territory in question, did little more than confirm a particular direction of travel: namely that spheres of influence were liable to 'harden' over time and formalize themselves in regimes of protection,<sup>129</sup> just as the latter themselves were liable to harden into a fully fledged colonies.

## 6. CONCLUSION

In the course of this chapter, I have alluded to a series of shifts in the operative rationality of governmental thought and practice: in economic terms from feudalism through mercantilism to modern political economy; in political terms from the emergence of absolutism to the territorial nation-state and the plural bracket of Empire; in legal terms from the scholasticism of Vitoria, through the natural law of the humanists to the anthropologically-informed positivism of the 19th century. Each of these shifts I take to be important in their own right, but more is disclosed, as I have sought to show, through their relationship to one another: in the way in which they shed light on the different technologies of colonial rule, shaping both its form and content at various different moments in time.

<sup>127</sup> Chapters on the Principles of International Law (n 108) 188.

<sup>128</sup> International Law (n 109) 128.

<sup>129</sup> A Treatise on the Foreign Powers (n 121) 230.

The key theme that I have sought to sketch out, is the shift from a conception of colonial rule framed in terms of *dominium*, to one structured around the idea of *imperium*. To some extent talking about a move from *dominium* to *imperium* means reading into the vocabulary of Roman law much more than is apparent in its bare terms. It was clearly not the case that late 19th century colonialism experienced a retrocession to the forms of Roman imperialism, or indeed that the vocabulary of Roman law was an indispensable adjunct to colonial rule. I find it, nevertheless, a useful expression to the extent that it reveals a shift in the discourse and practice of colonial rule from a moment at which the technology of expansion could be articulated in terms of the straightforward acquisition of property (whether original or derivative), to one in which relations of property became the active object of colonial rule rather than its precondition. Colonialism was not just about acquiring things as property, but about turning things into property. If, originally, *dominium* and *imperium* lacked a decisive point of differentiation, not only were they later to be set apart, but the rationality of *imperium* was increasingly organized around the idea of establishing the conditions for the enjoyment of private property and exchange. Understood as pure jurisdiction empire knew no boundaries, and followed ‘meekly in the train of exported money’<sup>130</sup> but yet at the same time had to reach back to neo-feudal ideas of ‘ownership’ in order to sustain the exclusivity of governmental authority that exported money demanded.

## RECOMMENDED READING

- Alexandrowicz, Charles H *An Introduction to the History of the Law of Nations in the East Indies* (Clarendon Press Oxford 1967).
- Anghie, Antony *Imperialism, Sovereignty and the Making of International Law* (CUP Cambridge 2004).
- Arendt, Hannah *The Origins of Totalitarianism* (Harcourt, Brace & World New York 1968) 123–157.
- Armitage, David *The Ideological Origins of the British Empire* (CUP Cambridge 2000).
- Benton, Lauren A *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (CUP Cambridge 2002).
- Benton, Lauren A ‘Acquiring Empire through Law’ (2010) 28 *Law and History Review* 1–38.
- Cassel, Pär K *Grounds of Judgment Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (OUP Oxford 2012)
- Fisch, Jörg *Die europäische Expansion und das Völkerrecht* (Steiner Stuttgart 1984).
- Grewe, Wilhelm G *The Epochs of International Law* (M Byers trans) (De Gruyter Berlin 2000).
- Koskenniemi, Martti *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870–1960* (CUP Cambridge 2002).

<sup>130</sup> The Origins (n 107) 135.

- Koskenniemi, Martti 'Empire and International Law: The Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1–36.
- Mieville, China *Between Equal Rights: A Marxist Theory of International Law* (Brill Leiden 2005).
- Pagden, Anthony *Lords of all the World: Ideologies of Empire in Spain, Britain and France, c. 1500–c. 1800* (Yale University Press New Haven 1995).
- Schmitt, Carl *The Nomos of the Earth* (Telos Press Publishing New York 2006).
- Tuck, Richard *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (OUP Oxford 1999).