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ETHNIC 'OTHERNESS' IN INTERNATIONAL LAW: AN ALTERNATIVE HISTORY OF INTERNATIONAL LAW FROM PRE-MODERNITY TO THE NINETEENTH CENTURY

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1. Introduction

The key argument of this article is that international law has always been applied as a 'language' to deal with the ethnic 'other' defined by the dominant cultural group of each epoch. At the same time, while defining the pejorative 'other' along ethnic lines, international law has conceived the very notion 'ethnicity', understood here as socio-historically constructed primordial ties, in terms of primitiveness that is associated with the non-dominant cultures alone.

As the etymology of the term 'ethnicity' demonstrates, its Greek root *ethno* happened to be used to refer to the 'other', the non-Greek, in a derogatory sense.[1] In later uses, in New Testament Greek, *ethnos* appeared as a religious indicator to refer to non-Christian and non-Jewish. At that stage, the derived adjective *ethnikos* was very nearly synonymous with *barbaros* – those who spoke unintelligible languages, and wanted for civilization, who were beyond the bounds of meaning, order and decency.[2] For throughout the Middle Ages it was the Church Latin that dominated literacy in Europe, the term *gentile* – a grouping for religious 'otherness' – succeeded *ethnos*.[3] In public Roman law, *jus gentium* represented a body of rules for Romans in maintaining relations with foreigners, while *jus civile* governed interactions between citizens. The term 'law of nations,' the synonym for the present day phrase 'international law,' is the literal translation of the Latin term *jus gentium* into English.[4]

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1 For an account of such derogatory reference to the 'other', see Elizabeth Tonkin, Maryon McDonald, and Malcolm Chapman, *History and Ethnicity* (London: Routledge, 1989), 12–20.

2 Ibid., 13.

3 Ibid.

4 Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947), 19.

In this article, we explore how this 'otherness' in 'ethnicity' has been incorporated in the understanding of international law as well as its response to various non-dominant cultural groups throughout the history. However, dealing with history in relation to international law and its ethnic 'other' is complicated for a number of methodological issues: when did international law first come into being; should the pre-nineteenth century inter-State practices be considered as international law; how to deal with the Eurocentrism in the standard narrative of the history of international law; and so on. Nevertheless, as we shall see shortly, irrespective of the debate about the origin of international law, the phenomenon of identifying the ethnic 'other' in derogatory terms was well-exhibited even in the ancient international law – a fact that substantiates our proposition.

The following sections are designed to address these methodological issues first, and then, demonstrate how the ethnic notion was consistently incorporated and used in international law in different phases of its development. To this end, in this article we focused on three broadly drawn phases. First, we presented a brief account of ethnic phenomenon in the pre-modern international law in section 3, which is followed by a critical examination of the naturalist writings of Francisco de Vitoria and Hugo Grotius, the founding fathers of modern international law, to demonstrate how a universal claim of natural law doctrines justified the early colonial missions in the sixteenth and the seventeenth centuries. However, with the emergence of sovereignty as a dominant political philosophy in the nineteenth century Europe, natural law experienced a gradual decline and legal positivism took its place, although it remained difficult to draw any such line of distinction. While the naturalists endeavoured to bring the 'savages' and the 'barbarians' within the ambit of international law to legitimize European colonialism, the acclaimed Jurists of the nineteenth century – Henry Wheaton, James Lorimer, William E. Hall, Thomas Lawrence, and John Westlake – adopted the reverse technique of excluding the non-European 'barbarians' from the sphere of international law to pursue the same objective. The 'standard of civilization' constructed along ethno-

cultural lines then served as an efficient device to exclude the 'other'. Section 5 tried to grasp this phenomenon of ethnic otherness in the writings of the nineteenth century positivists.

As each section of this article demonstrates, the notion of ethnic 'otherness' is an omnipresent phenomenon in international law, though in different epochs, it was expressed through different legal techniques and vocabularies. Although the present article sketches this trend in international law up to the nineteenth century, the continuity of the process of identifying and dealing with 'the other' along ethno-cultural lines remains relevant even in the post-colonial international law in the forms of mandate system, minority protection, war on terror, human rights, development, good governance, to take few examples. While such a study is nothing short of essential for a holistic understanding of the dynamics of 'ethnicity' in international law, it is beyond the scope of the present work, and we leave it for future research.

2. Dealing with History in Relation to International Law and its Ethnic 'Other'

The task of dealing with history in the context of international law is a complicated one for a number of reasons. First, although the relationship between international law and history may be understood in terms of "history of international law" (a narrative of its origins, development, progress or renewal), "history in international law" (the role that the historical events or persona play in discussions and arguments about law), or "international law in history" (the way international law and its proponents involved in creating history), Craven notes, it turns out that practically it is difficult to maintain such categorization of this relationship, for "each type of engagement with history and international law will interweave various different types of historical narrative".[5] However, this categorisation remains useful to point "to the typically multi-layered nature of international lawyers' engagement with the past".[6]

5 Matt Craven, "Introduction: International Law and Its Histories," in *Time, History and International Law*, ed. Matthew Craven, M. Fitzmaurice, and Maria Vogiatzi (Leiden; Boston: Martinus Nijhoff, 2007), 7.

6 Ibid., 8.

Second, while dealing with the history of international law, Onuma observes, international lawyers inevitably had to face the question of the definition of international law, which they answered "according to their methods, approaches to international law, sense for 'others', and other factors".[7] Oppenheim, for example, claims that "[I]nternational law as a law between Sovereign and equal states based on the common consent of these States is a product of modern Christian civilization".[8] Tracing the necessity of international law in the face of the eruption of independent states in Europe, Oppenheim saw the emergence of this discipline in the seventeenth century; thus, he had no hesitation to enthusiastically recognize the Dutch diplomat Hugo Grotius as the "Father of Law of Nations," for the "system of Grotius supplied a legal basis to most of those international relations which were at the time considered as wanting such basis".[9] This claim is not beyond controversy, however. Some influential publicists after the end of the nineteenth century, such as James Brown Scott, argued that those of the late Spanish school such as Francisco de Vitoria were the true founders of international law, while there were others who emphasize the importance of Vattel, pointing out modern, liberal features in his writing.[10] Onuma thus concludes: "In any event, the very question whether Grotius, Vitoria, or Vittel should be regarded as the father of international law assumes that international law was born in modern Europe, and is confined within the perspective of Eurocentric modernity."[11]

Now, problem remains with this Eurocentric assumption. Nussbaum maintains that the phenomena of international law are conspicuous even in a treaty of approximately 3100 BC, which was concluded between Eannatum, the victorious ruler of the Mesopotamian city-state of Lagash, and the men

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7 Yasuaki Onuma, "When Was the Law of International Society Born? : An Inquiry of the History of International Law from an Intercivilizational Perspective," *Journal of the History of International Law* 2(2000): 3.

8 Lassa Oppenheim, *International Law* (London: Longmans, Green and Co., 1905), 44.

9 Ibid., 58.

10 Onuma, "When Was the Law of International Society Born?" 5.

11 Ibid.

of Umma, another Mesopotamian city-state.[12] A good number of treaties were also concluded by Egyptian and Hittite rulers around 2000 BC covering a wide range of issues, such as peace, alliances, boundary lines, establishment of vassal states, and so on.[13] Similarly, in ancient China and India, there were traces of norms dealing with foreigners in matters of war and peace. Thus, the proposition that international law is the creation of the seventeenth century European jurists is confusing. As Butkevych stresses,

> the Eurocentric approach in describing the history of international law led to the negation of international law of earlier epochs and nations, which virtually excluded from research whole layers of international legal developments of ancient States of the Middle East, India, China, etc.[14]

On the other hand, to what extent these ancient instances of the treaty regulation of inter-'state' relations are comparable with modern international law, and, therefore, be called 'international law', leads to the third complicacy involved in the study of the relationship between history and international law. Assuming that international law requires a universal application, Onuma claims that before the emergence of any universal international system until the nineteenth century, many independent human groups whose members shared the egocentric world image, e.g. the Islamocentric *Siyar*, the Sinocentric tribute system, or Eurocentric law of nations, coexisted in various regions of the globe.[15] Given that these systems were applied in only a limited area of the earth and lasted for a limited period of time, Onuma refuses to call them universal systems; instead, claims that it is only around the end of the nineteenth century that the European international law actually became valid as universal law of the world in the geographical sense.[16]

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12 Nussbaum, *A Concise History of the Law of Nations*, 8.

13 Ibid.

14 Olga V. Butkevych, "History of Ancient International Law: Challenges and Prospects," *Journal of the History of International Law* 5(2003): 217.

15 Onuma, "When Was the Law of International Society Born?" 8.

16 Ibid., 7.

Drawing upon an inter-civilizational approach, Onuma then holds the view that even the very terms used to express these co-existing regional units, are related to the prevalent notions through which dominant actors in a certain region at a particular time see and understand the world or the cosmos, and to the criteria through which they distinguish the self-group from the other-group.[17] This claim is substantiated by the fact that the term 'international' used in such analytical notions as 'international orders,' 'international systems' or 'international societies' is identical to the coexistence of sovereign nation States in modern Europe, whereas it appears inconsistent if applied to other regional civilizations "whose prevalent notions on cosmology and for distinguishing the self and the other are different from those in modern Europe".[18] Arguing that from the tenth century onward, the fundamental framework of distinguishing the 'self' and the 'other' was not one's belonging to a political or national community, but one's belonging to a religious community, Onuma thus concludes that "the notion *international* is not appropriate either as a notion to express the relations between the Muslim dynasties or as a notion to express the relations between the Muslim dynasties or groups and non-Muslim dynasties or groups."[19]

The same analogy is applied in the field of international relations by Stephen Ryan, who relies on the claim of established schools of anthropology that the conventional concept of the nation-state fits only one-quarter of the members of the global state system, and takes the view that for the rest of the world, the term 'nation-state' is a misnomer.[20] Thus, in the present day use of the terms – the United *Nations,* inter*national* law, the *national* interest, among others – actually refers to States, not nations. "This hijacking of the term 'nation' by States has meant that true nations have to be described as something else; usually as sub-nations or as tribes."[21] In this sense, 'international law' as a term remains a misnomer in its present day use, but certainly demonstrates its European origin.

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17 Ibid., 9.

18 Ibid.

19 Ibid., 10.

20 Stephen Ryan, *Ethnic Conflict and International Relations* (London: Dartmouth Publishing Company, 1995), 3.

21 Ibid.

While discussing history and international law, we, therefore, encounter a number of issues: the ways of approaching history in relation to international law, the problem of deciding when international law did start from, and as a corollary, the difficulty of deciding when international law did gain universality. However, so far as our focus on tracing the ethnic otherness embedded in international law is concerned, in this article we took the approach of dealing with both the history of international law, i.e. the narrative of different phases of its development as well as the history in international law, especially, the roles that individuals played in shaping up this discipline. Apropos the specific period of the 'creation' of international law, the purpose of the present work would be best served by avoiding this debate altogether. Instead, we argue that the phenomenon of 'ethnic differentiation' has always been there in the relationship between and among socio-political units since the antiquity, no matter we term the then mechanisms to regulate such relations 'international law' or not.

3. Ethnic 'Otherness' in the Pre-Modern International Law

When the King of Hitties – Suppiluliuma – conquered the country of Izuva in 1350 BC, he explained the conquest by the fact that the latter had belonged to the Hitties' kingdom age-long, as he was seeking to *liberate* people that were Izuva's subjects. [22] For this reason, Suppiluliuma did not 'conquer,' but 'liberated' the countries that used to be under the jurisdiction of Izuva. In his words: "the countries I had occupied I liberated, and their people remained in their places; the people I had made free returned to their folk."[23] On this point, it is, therefore, argued that

> a precursor of the institute of aggression manifest itself, which is justified by the purpose of liberation of foreign population and which will be shaped in the Middle Ages doctrine to be named later a humanitarian intervention. Justification of crusades by 'liberation' of local people from government that is not submitted to 'liberator' is by no means less typical of international military relations in the 20th and 21st centuries.[24]

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[22] Butkevych, "History of Ancient International Law," 205.

[23] James B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament*, 2nd ed. (Princeton, NJ: Princeton University Press, 1955), 318.

[24] Butkevych, "History of Ancient International Law," 206.

In international relations, ancient Greece used to consider the non-Greeks as 'barbarians' and hold the view that these barbarians are the born enemies designated by nature to serve the Geeks as slaves, whereas one Greek State held a strong feeling of 'all-Greek kinship' for the other – a feeling that they belonged to the same racial, cultural, lingual and religious community – despite their political segregation and discord.[25] In the case of warfare, Socrates famously proposed to limit the concept of war to fights with the barbarians, while he called fights among Greeks 'disease and discord'.[26]

Although Nussbaum holds the view that unlike the Greeks, the Romans did not discriminate extensively against barbarians or against others racially foreign, in his writing it is quite evident how the Romans too used their municipal legal techniques for expanding their empire.[27] Unilateralism is another characteristic of ancient Roman relations with others. In the era of Kings, which ended in 509 BC, it was the *fetiales* – a special group of priests – to decide whether a foreign nation had violated its duties towards the Romans; in the days of the Republic, the *fetiales*'s role changed into certifying to the senate the existence of 'just' cause of war.[28] To the field of international legal terminology, ancient Roman legal traditions made substantive contributions to provide with a 'European origin'. As Nussbaum shows, up to the nineteenth century, the writers on international law in variably adopted Roman legal learning not only as an incomparable tool of juristic precision, but also as an assimilative vocabulary for all over the Western Europe.[29] For example, Roman rules on private ownership (*dominium*) were relied on for tenets on territorial sovereignty, rules on private contracts were adduced for treaties, rules on *mandatum* for the functions of diplomatic agents, and so on.[30] Even the very phrase 'Law of Nations' is a literal translation from *jus gentium*.

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25 Nussbaum, *A Concise History of the Law of Nations*, 11.
26 Ibid., 15.
27 Ibid., 17.
28 Ibid., 16–17.
29 Ibid., 18.
30 Ibid.

Following the fall of Roman Empire, Christianity dominated Europe in the Middle Ages wherein popes claimed and sometimes enforced an ultimate supremacy over emperors. Equipped with formidable spiritual and worldly powers, e.g. the authority to excommunicate, the pope became in the latter part of the Middle Ages the foremost representative of unitary rule in Western civilization.[31] Pope Innocent IV (1243 – 1254), for example, even put forward the claim that his power extended over infidels too, and if the infidels did not obey the pope's licit commands, "they ought to be compelled by the secular arm and war may be declared upon them by the pope and not by anyone else".[32] Moreover, Pope Innocent IV continues, "if [the] infidels prohibit preachers [of Christianity] from preaching, they sin and so they out to be punished".[33] In the conflict with the Saracens, the role of the Church was most prominent as the recognized political leaders of Christendom in the Middle Ages. The Popes prohibited the selling to the Saracens of arms, ships, lumber for ship construction, and other goods useful in warfare as well as the conclusion of treaties with non-Christian rulers.[34]

However, in the Eastern Europe, the highest authority was with the Byzantine emperor, who considered himself as the true successor of the Roman emperors and as called upon to rule over the world as well as the sovereign master of the Orthodox Church. From this sway over the Church, Nussbaum argues, the Byzantine emperor derived the claim of to be the protector of Christians, particularly the Orthodox, even outside the empire, which exemplifies another Christian 'universalist' ideology and consequently, presumptuous and interventionist policies.[35] Another difference between the East and the West appeared regarding the conception of just war in the Middle Ages. In the Western Europe, the Roman doctrine

31 Ibid., 23.

32 Pope Innocent IV, "Document 40: Commentaria Doctissima in Quinque Libros Decretalium," cited in Brett Bowden, "The Colonial Origin of International Law. European Expansion and the Classical Standard of Civilization," *Journal of the History of International Law* 7 (2005): 5.

33 Ibid., 4.

34 Nussbaum, *A Concise History of the Law of Nations*, 26–27.

35 Ibid., 27.

of just war was revived in Christian spirit. However, this doctrine served as an ideology to justify certain kinds of wars, rather than as a rule to prohibit or restrict wars. Moreover, the restrictive function of the just war doctrine was applicable only among the Christians.

> 'Pagans', who were regarded to be, or sometimes actually, hostile to the Christians were viewed as an agent of evil. To convert them to Christianity even by force was believed by many Europeans as sacred mission Christians.[36]

In the East, on the other hand, the Orthodox Church has never received the just-war doctrine. "The emperor of Byzantium considered himself God's vicegerent; to be brought under his domination, albeit by force of arms, was rather considered a blessing to the vanquished."[37] Thus, in both the eastern and western Europe, just war doctrine had no meaning for the non-Christian world.

The conception of natural law, like the just-war doctrine, was also adopted and remodelled in the Christian spirit during the Middle Ages. In the matter of law of war too, the necessity of protection of Christians played a key role. In this process, religious differentiation was also demonstrated. Although savagery in warfare during and after the battle persisted to a great extent during the Middle Ages, some progress was achieved during the later Middle Ages when the killing or enslavement of Christian prisoners of war was gradually abandoned. However, protection was not extended to non-Christian prisoners of war; centuries later such prisoners still found as slaves in Italy and elsewhere.[38]

In the interaction between Christian Europe and Muslim Orient, the latter too relied on religious norms in its inter-state relations. Thus, though citizens and diplomats of Italian city states were granted concessions by the Oriental ruler in the familiar form of franchises or diplomas, the Moslem rulers were

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36 Onuma, "When Was the Law of International Society Born?" 24.
37 Nussbaum, *A Concise History of the Law of Nations*, 44.
38 Ibid., 35.

little interested in obtaining for their subjects reciprocal treatment in the respective European countries, for the Mohammedan law forbade the believers to sojourn for any length of time in the lands of the infidels.[39] Similarly, the non-Muslim settlers in Muslim states were allowed to preserve their own law given that "the Moslem law as set forth in the Koran was exclusively designed for the Moslem, who consequently did not care to regulate relations among infidels".[40] However, as Onuma shows, *Sharia* deals with non-Muslims as well under the dichotomy of 'believers' and 'unbelievers'. Thus, in the eighth century, the Abbasid dynasty expanded its territory "with a high profile based on the egocentric sense of superiority" to bring the 'unbelievers' within the influence of Islam.[41]

In Nussbaum's account of the works of the jurists of this period too, we trace a notion of 'international law for Christians'. For example, Bartolus (1314–1357), distinguished jurist of the Middle Ages and a Professor in Perugia, strongly objected on legal grounds to the servitude of Christian prisoners of war, thereby aiding the efforts of the Church.[42] French lawyer Pierre Dubois (1250–1321) in a pamphlet *On the Recovery of the Holy Land* (1306) postulated, as a prerequisite of a new crusade, the establishment of universal peace throughout Christendom. This goal he proposed to attain by a general council of all prelates and secular Christian princes, to be convoked and presided over by the pope.[43] Independently of Dubois, in later centuries others conceived the notion of, and proposed in actual politics, a federation or coalition of Christian states designated to fight against the Turks.[44]

While until the late eighteenth century European colonizing mission was legalized by identifying the non-Europeans as uncivilized barbarians, and then, by bringing these barbarians within the ambit of law of nature by founding fathers of international law such as Vitoria and Grotius, and later

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[39] Ibid., 38.
[40] Ibid., 39.
[41] Onuma, "When Was the Law of International Society Born?" 20.
[42] Nussbaum, *A Concise History of the Law of Nations*, 46.
[43] Ibid., 49.
[44] Ibid., 50.

by their followers, in two other parts of the world, two different systems – Sinocentric tribute system and Islamocentric *Siyar* system – similarly claimed ethnic superiority by depicting the *other* as barbarian. In Onuma's description, the fundamental philosophy underlying the tribute system under the Chinese empire was the rule by virtue, i.e. the emperor should embody the virtue and spread it throughout under Heaven. Under this belief system, also the rulers beyond the immediate influence of Chinese civilization, i.e. non-East Asians, must obey the Emperor, who is the only supreme authority under Heaven. As a general rule, even those uncivilized people were expected to understand the virtue of the emperor, and send a tributary mission to the 'emperor' in order to share in his virtuous rule.[45] Similarly, in Onuma's description of the Islamocentric *Siyar*[46] system, it appears that until the seventeenth century, a sense of superiority guided Muslim rulers' relationship with non-Muslims. Based on the dichotomy of 'believers' and 'unbelievers', thus, the world was divided into "*dar al-Islam* (abode of Islam), the territory under Muslim rule and *dar al-harb* (abode of war), the territory under the rule of unbelievers". Under this system, the very essence of Islamic rule was believed to bring the non-Muslim within the purview of Islamic rule. The powerful Ottoman Empire imposed its rule of world ordering on the non-Muslim neighbours including the European nations by adopting a unilateral diplomacy by applying the rules of *Syar*, which were based on the egocentric and universalistic Islamic image of world order. However, with the decline of the relative strength, the Ottoman Empire had to have recourse to European principle of 'sovereign equality' vis-à-vis the European powers, which the latter very often refused to accept; consequently, from the seventeenth century on, Muslim rulers had to sign a number of unequal treaties that determined their relationship with the European powers.[47]

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[45] Onuma, "When Was the Law of International Society Born?" 12–18.

[46] Based on Islamic scholarship, Onuma defines *Siyar* as the "norms that regulates the relationship of the Muslims with the non-Muslims".

[47] See generally Onuma, "When Was the Law of International Society Born?" 18–22.

Thus, irrespective of the origin of international law or to put more correctly, the debate about the origin of international law, it is evident that the notion of international law has always been used to identify the inferior *other* along ethno-cultural lines and consequently, regulate the relationship with *them* in the international sphere. The trend has been the same in every epoch of history and in every region where the dominant cultural group desired to define its relationship with the assumed culturally substandard *others* around it. Difference lies, however, in the language that each group used in this process. As the preceding discussion demonstrates, different regimes in different parts used different languages to accomplish the same imperial mission. However, at the dawn of the nineteenth century, this diversity ceased to exist; instead, now it is the dominant language of the European civilization that the imperial mission speaks.

The international law that we experience today verily has its root in the European international law of the sixteenth century and onward. Among different regional systems of international law in the antiquity and the Middle Ages, which were limited in their application, European international law emerged dominant in subsequent phases of its development as a universal norm of inter-State relations. In the following sections, we demonstrate how innovative European legal techniques such as natural law and legal positivism were applied to justify and legalize colonialism on the basis of ethnic 'otherness'.

4. Ethicising Colonialism and the Role of the Natural Law Jurists

Colonialism and international law went on hand in hand. On the one hand, international law justified colonialism, and on the other, as Anghie argues, international law was constituted in the process of colonial confrontation.[48] This two-way relationship between international law and colonialism got legal expressions first by natural law jurist Francisco de Vitoria in the

[48] See generally, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

sixteenth century. In the following century, Hugo Grotius clearly exhibited the influence of Vitoria's doctrines on his writing. This section provides with a critical perspective of their works in relation to ethicising the colonial projects.

4.1. Vitoria and the Colonization of the Amerindians

In 1494, Spain and Portugal signed the Treaty of Tordesillas under which these two Catholic European powers decided to regulate the distribution of the newly discovered or to be discovered countries without papal assistance or interference. The Treaty of Saragossa, concluded in 1529 between Charles V of Spain and John III of Portugal elaborated the provision restricting papal dispensation. With these treaties, the practice of papal grants vanished; instead, sovereignty over newly discovered territory was acquired by a symbolic act performed in the territory, e.g. the erection of a cross or of a monument bearing the arms of the conquering sovereign.[49] In such a context, Francisco de Vitoria – a professor of theology at the University of Salamanca – gave his famous lectures on "The Indians Recently Discovered" and on "The Law of War Made by the Spaniards on the Barbarians" in 1532. For centuries, these lectures had repercussions in the development of as well as discourse on international law. Vitoria doctrines, on the one hand, brought Spanish colonization of Amerindians under legal regulations, and on the other hand, justified the very act of colonization using the same legal language. Vitoria's legal language, like the practices in the ancient international and the Middle Ages, incorporated the same cultural differentiation to justify Spain's hegemonic rule over the Indians.

In the first place, Vitoria demonstrates humanitarianism by claiming that the Indian aborigines (called as barbarians) were true owners in both private and public law before the arrival of the Spaniards, and their ownership cannot be lost by reason of unbelief. He further asserts that titles based on universal imperial jurisdiction, papal grant, discovery, moral sin on the part of these Barbarians, and other titles claimed by many in those days could not justify

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[49] Onuma, "When Was the Law of International Society Born?" 53–54.

denying the ownership of the Indians over their property. Vitoria refuses to preclude Indians from being true owners on the pretext of unsoundness of mind; moreover, he reminds the Spaniards that among their peasants many are not better than beasts.[50] Nevertheless, beneath this humanitarian gesture, Vitoria justifies the expropriation of resources by the fellow Spaniards using legal techniques.

Refuting the claims of unlawful titles by European scholars over Indian territory, Vitoria then presents a series of 'lawful titles' to establish Spanish dominance. First, he claims that under the law of nations (*jus gentium*), which either is natural law or is derived from natural law, the Spaniards have a right to travel into the lands in question and to sojourn there, provided they do no harm to the natives, and the natives may not prevent them. Therefore, to keep the Spaniards away from Indian territory would amount to an act of war.[51]

Moreover, Vitoria argues that by natural law running water and the sea are common to all, so are rivers and harbours, and by the law of nations ships from all parts may be moored there; and on the same principle they are public things. Therefore, it is not lawful to keep any one from them. "Hence it follows that the aborigines would be doing a wrong to the Spaniards, if they were to keep them from their territories."[52] Given that freedom of navigation is actually meant for smooth functioning of trade, Vitoria ensures the right to trade for the Spaniards by claiming that they must not be prevented from participation in opportunities considered by the natives themselves as common to citizens and guests alike, so long as they do no harm to their country. As a matter of fact, here Vitoria assumes "a kind of one-sided national-treatment prerogative with no treaty required".[53] Thus, neither may the native princes hinder their subjects from carrying on trade

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[50] See generally, Franciscus de Vitoria, *De Indis Reflectio Prior*, trans. J. P. Bate (Washington, DC: Carnegie Institution of Washington, 1917)., sec. II.

[51] Ibid., sec. III, 151.

[52] Ibid., 152.

[53] Nussbaum, *A Concise History of the Law of Nations*, 62.

with Spanish, nor may the princes of Spain prevent commerce with the Natives.[54] Here, the expression of reciprocity is nothing short of legal camouflage. Onuma rightly comments:

> It should be noted that Vitoria made these arguments when the Spaniards were already in America but no Americans were in Europe, and when the Spaniards were in the process of conquering the Amerindians. In such an asymmetrical context, Vitoria's egalitarian theory and the Spanish military supremacy and ruthlessness, i.e., the critical elements of modern European civilization, realized and legitimized European domination over the non-Europeans.[55]

From these rights advocated by Vitoria follow the remedy for the Spaniards in case of violation of their lawful entitlements by the Indians. Thus, Vitoria prescribes: If the Indian natives wish to prevent the Spaniards from enjoying any of their above-mentioned rights under the law of nations, the Spaniards ought in the first place to use reason and persuasion to show that they do not come to the hurt of the natives, but wish to sojourn as peaceful guests and to travel without doing the natives any harm. But if, after this recourse to reason, the barbarians decline to agree and propose to use force, the Spaniards can defend themselves and do all that consists with their own safety, it being lawful to repel force by force. Even they should go to war, if it be necessary and lawful, in order to preserve their right.[56] Thus, Vitoria arrives at "the theory of a violated 'freedom' of the invaders".[57]

Alongside natural law, Virotia's claim of lawful titles for Spaniards rests on their sacred duty to propagate Christianity. Thus, holding the view that the Spaniards are the ambassadors of Christian people, he asserts that they have a right as well as obligation to preach and declare the Gospel in barbarian lands, for the Indians are all not only in sin, but outside the pale of salvation.[58] And like in other cases, if the Indians prevent the Spaniards from freely preaching the Gospel, the Spaniards ultimately acquires the right to

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54 Vitoria, *De Indis Reflectio Prior*, 152.
55 Onuma, "When Was the Law of International Society Born?" 25.
56 Vitoria, *De Indis Reflectio Prior*, 154.
57 Nussbaum, *A Concise History of the Law of Nations*, 62.
58 Vitoria, *De Indis Reflectio Prior*, 156.

make war and seize lands and territory of the natives and set up new lords there and put down the old lords until they succeed in obtaining facilities and safety for preaching the Gospel.[59] Thus, "Vitoria injects the religious element in the objective aspect of the just-war conception, inasmuch as he considers interference with the preaching of the gospel as a just cause of war".[60] It is also worth noting that here Vitoria simply echoes the pronouncement of Pope Innocent IV made three centuries earlier in the context of preaching Christianity among the infidels. In other words, Vitoria maintains the century old practice of justifying Christian dominance over non-Christians using the natural law language.

The most explicit expression of ethnic differentiation in Vitoria's work appears in the eighth lawful title he prescribed, of which he is doubtful but which he does not entirely condemn. Claiming that the aborigines are little short of unintelligent, he finds them unfit to found or administer a lawful State up to the standard required by human and civil claims. 'Proofs' are abundant in his support: they have neither proper laws nor magistrates; they are not capable of controlling their family affairs; they are without any literature or arts, not only the liberal arts, but the mechanical arts also; they have no careful agriculture and no artisans; and they lack many other conveniences, necessaries, of human life.[61]

> It might, therefore, be maintained that in their own interests the sovereigns of Spain might undertake the administration of their country, providing them with prefects and governors for their towns, and might even give them new lords, so long as this was clearly for their benefit. If they were all wanting in intelligence, there is no doubt that this would not only be a permissible, but also a highly proper, course to take; nay our sovereigns would be bound to take it, just as if the natives were infants. The same principle seems to apply here to them as to people of defective intelligence; and indeed they are no whit or little better than such so far as self-government is concerned, or even than the wild beasts, for their food is no more pleasant and hardly better than of beasts. Therefore their governance should in the same way be entrusted with to people of intelligence.[62]

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[59] Ibid., 157–158.
[60] Nussbaum, *A Concise History of the Law of Nations*, 61.
[61] Vitoria, *De Indis Reflectio Prior*, 161.
[62] Ibid.

And most interestingly, for Vitoria such act of taking responsibility of the 'people of defective intelligence' by the 'people of intelligence' surely might be founded on the precept of charity.[63] His phrase – "*they* be *our* neighbours and *we* being bound to look after *their* welfare" – unequivocally presents a cultural dichotomy, wherein Vitoria as a representative of the 'intelligent' *us* is advocating a better future for the barbarian *other* by legitimizing Spanish rule over *them*. Remember, Hitties King Suppiluliuma used the similar rhetoric to justify his acts of invasion in 1350 BC.

Regarding the law of war, Vitoria again maintains differential treatment. Thus, in a war with pagans in which the indiscriminate spoliation of all enemy-subjects alike and the seizure of all their goods are justifiable, Vitoria argues, it is indubitably lawful to carry off both the children and the women of the Saracens into captivity and slavery, for the animosity is perpetual and that the pagans can never make amends for the wrongs and damages they have wrought. But on the other hand, he claims that by the law of nations, it is a received rule of Christendom that Christians do not become slaves in right of war; thus, similar enslaving is not lawful in a war between Christians.[64]

Another Catholic theologian of the sixteenth century – Francisco Suarez – further elaborated the doctrine of just war along the lines laid down by Thomas Aquinas and Vitoria. And Suarez too propagated different rule of war to be applied for non-Christians. Thus, for infidels Suarez suggests compulsion, i.e., armed intervention, in case they interfere with the free preaching of the Gospel; he further suggests that Christian princes, at the expense of the infidels, may establish fortifications in the infidels' country in order to secure ingress and egress of the missionaries.[65] Similarly, Alberico Gentili, despite his Protestant faith, looks upon the Saracens as potential enemies and allows treaties with infidels only on terms which would render them tributary to the Christian power, or else in commercial matters.[66]

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[63] Ibid.

[64] Franciscus de Vitoria, *De Indis Et De Ivre Belli Reflectiones*, trans. J. P. Bate (Washington, DC.: Carnegie Institution of Washington, 1917), 181.

[65] Nussbaum, *A Concise History of the Law of Nations*, 70.

[66] Ibid., 79.

Thus, Vitoria's doctrinal position on Spaniard-Indian relations had profound influence on successive scholars of international law. Most importantly, in Vitoria's writing, as Anghie observes, "particular cultural practices of the Spanish assume the guise of universality as a result of appearing to derive from the sphere of natural law".[67] These 'universal norms', constructed by the sophisticated use of natural law techniques, are then put as a 'standard' on the basis of which peoples outside Europe would be assigned with an inferior image of 'barbarian' or 'uncivilized' in the future development of international law in succeeding centuries. To that we turn now.

4.2. Grotius and the Dutch Interest in the East Indies

In a letter dated the 28th of November 1606 to Don Martin Alphonse de Castro, the Councillor and Viceroy for the East Indies, the King of Spain – Philip III declaring prohibited all commerce of foreigners in India itself and in all other regions across the sea commanded the Viceroy to take all necessary measures to enforce such prohibition with the full power of his authority and without any exception. In another letter to the same recipient on the 27th of January 1607, the King clearly stated that the Dutch were the enemies of Spain who had received a welcome reception from the natives in the Eastern regions to the apparent dissatisfaction of the King. Under this circumstance, he expressed confidence that the Viceroy would punish both the Dutch and the natives so thoroughly that neither the one nor the other would ever dare such practices in future. Couple of years later, in 1609, Dutch scholar and diplomat Hugo Grotius published his famous writing *Mare Liberum* (The Freedom o the Seas). *Mare liberum* is actually the Chapter XII of the study – *De Jure Praedae* (On the law of Prize and Booty) – prepared by Grotius in 1604 and 1605 upon the request of Dutch East India Company upon the seizure of Portuguese-flagged vessel *Sta. Catarina* by the Dutch.[68] For centuries, *Mare Liberum* has been reverentially referred to as a milestone in the development of international law for expanding its horizon.

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[67] Antony Anghie, "Francisco De Vitoria and the Colonial Origins of International Law," *Social and Legal Studies* 5, no. 3 (1996): 326.

[68] Nussbaum, *A Concise History of the Law of Nations*, 97.

In *Mare Liberum*, to refute the claim of Portugal, which at that time was a Spanish dominium, Grotius relied on the inviolable maxim of the law of nations – every nation is free to travel to every other nation, and to trade with it – which has its root in the law of nature. This is a right, Grotius claims, which according to the Law of Human Society ought in all justice to have been allowed. Thus, those "who deny this law, destroy this most praiseworthy bond of human fellowship, remove the opportunities for doing mutual service, in a word do violence to nature herself".[69] Grotius has numerous convincing evidence in his support: the Israelites *justly* smote with the edge of the sword the Amorites because they had denied the Israelites an innocent passage through their territory; when the Christians made crusades against the Saracens, no other pretext was so plausible as that they were denied by the infidels free access to the Holy Land; so on. Then he concludes that "the Portuguese, even if they had been sovereigns in those parts to which the Dutch make voyages, would nevertheless be doing them an injury if they should forbid them access to those places and from trading there".[70] However, subsequently Grotius proves that the Portuguese have no right to sovereignty by title of discovery or by virtue of title based on the papal donation or by title of war over the East Indies to which the Dutch make voyage. Consequently, neither the Indian Ocean nor the right of navigation thereon can be claimed by the Portuguese on the similar grounds.

In molding his argument, Grotius exhibits profound influence of Vitoria's views in relation to the colonization of the American Indians. For example, Grotius relies on Vitoria's claim that the Spaniards have no more legal right over the East Indians because of their religion, than the East Indians would have had over the Spaniards if they had happened to be the first foreigners to come to Spain.[71] In another place, he endorses Vitoria's opinion that Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels,

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69 Hugo Grotius, *Mare Liberum*, trans. Ralph Van Deman Magoffin (New York: Oxford University Press, 1916), 53.

70 Ibid., 54.

71 Ibid., 56.

unless some other wrong has been done by him.[72] This qualifying phrase demands a critical examination.

As we have discussed in the preceding section, having claimed that moral sin is not a valid excuse for evicting Amerindians from their property, Vitoria then justified Spanish domination in that region by having recourse to the right to free navigation and the right to trade guaranteed under natural law. For Vitoria, violation of these rights is a valid reason for declaring war against the barbarians. In a similar vein, Grotius too, first asserts that though some of the Indians of the East were idolators and some Mohammedans, and therefore sunk in grievous sin, had none the less perfect public and private ownership of their goods and possessions, from which they could not be dispossessed without just cause. And then, Grotius finds a 'just cause' in the fact that the right to free navigation and to trade has been refused to the Dutch, which ultimately legitimizes war against the Portuguese. Thus, following the legacy of past naturalists, Grotius argues:

> If many writers, Augustine himself among them, believed it was right to take up arms because innocent passage was refused across foreign territory, how much more justly will arms be taken up against those from whom the demand is made of the common and innocent use of the sea, which by the law of nature is common to all? If those nations which interdicted others from trade on their own soil are justly attacked, what of those nations which separate by force and interrupt the mutual intercourse of peoples over whom they have no rights at all?[73]

While Vitoria made his legal argument against the Indian natives, Grotius here finds the Portuguese the subject of his verdict. And in this feud between two great European powers, the East Indians remain silent bystanders. Grotius' otherwise sophisticated articulation of the doctrines of natural law does not accommodate the East Indians in this process, whose fate would be re-written in the following centuries by the European powers. Like Vitoria, Grotius also uses the same legal language, i.e. natural law as well as divine

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[72] Ibid.
[73] Ibid., 85.

mandate to serve the national interest when he says: "there need not be the slightest fear that God will prosper the efforts of those who violate that most stable law of nature which He himself has instituted, or that even men will allow those to go unpunished who for the sake alone of private gain oppose a common benefit of the human race".[74] For Grotius here, common benefit equates European, and more specifically, Dutch interests. Moreover, his claim of universality of natural law unequivocally emanates from the assumed superiority of Christianity as a universal faith. Thus, he convinces his Christian European audiences that *their* God endorses such a war. Although, Goritus is generally believed to have secularized natural law, given the anti-Islamic political spirit among Christian Rulers in Europe of his time, he endeavoured to justify Christian powers' alliance with non-Christians with reference to Biblical history, the church fathers and the medieval doctors.[75]

Grotius is widely celebrated for his humanist attitude towards the non-European rulers; he was the one to recognize the full sovereignty of the individual Asian monarchs. For example, Wheaton noting that Grotius makes no distinction between different types of nations – civilized or uncivilized – appreciates Grotius's cosmopolitism.[76] However, as Borschberg argues, Grotius as well as the Dutch East India Company had ulterior motive behind such recognition of full sovereignty for East Indian rulers back in the seventeenth century. It was the blue print of securing for themselves "'a legal monopoly' directed not against Spain and Portugal alone, but against other European traders as well, especially the English".[77] Thus, Grotius played the role of a legal agent to facilitate colonization of the East Indies by the Dutch.

[74] Ibid., 86.
[75] Peter Borschberg, "Hugo Grotius, East India Trade and the King of Johor," *Journal of Southeast Asian Studies* 30, no. 2 (1999): 233.
[76] Henry Wheaton, *Elements of International Law*, 8th ed. (Boston: Little, Brown, and Company, 1866), 10.
[77] Borschberg, "Hugo Grotius, East India Trade and the King of Johor," 243.

In the face of continuous war with the Portuguese, declining profit from the Dutch East India trade, and increased competition from the English two conferences were convened in 1613 and 1615 to settle on-going disputes between the Dutch and the British – two great naval powers – over the colonial enterprise in Asia.[78] Grotius was deputized to the conferences. To pursue the English delegation with the Dutch proposal of merging the English and Dutch East India Company to maintain an armed presence in the East, Grotius in his opening speech states: "neither peace among the peoples without arms, nor arms without funds, and no funds without tributes".[79] Here, Grotius quite unambiguously expresses his loyalty to the Company. However, the English were not sufficiently persuaded.

During this time, Grotius demonstrated a changed attitude towards the Asian peoples. Just six year after the publication of the Freedom of the Sea, the same enlightened jurist and the 'father of international law' – Hugo Grotius – now declares, in the words of Borschberg, that

> if the Asian peoples are reluctant to fulfil their contracts of trade with the Dutch, this does not at all show that the contracts are invalid as the English delegates argued, but simply that the Asians are *perfidious*. It is thus legitimate for the Dutch to compel the Asians to honour their contracts and to prevent them from trading with the English or any other party, Asian or European.[80]

This reflects Grotius' consciousness of political realities. As Pound claims, Grotius' jurisprudence "grew out of and grew up with the political facts of the time and its fundamental conception was an accurate reflection of an existing political system which was developing as the law was doing and at the same time".[81]

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[78] Ibid., 226.
[79] See ibid., 229.
[80] Ibid., 247.
[81] Roscoe Pound, "Philosophical Theory and International Law," *Biblioteca Visseriana Dissertationum Ius Internationale Illustratium* 1 (1923): 71–90, quoted in Anghie, *Imperialism, Sovereignty and the Making of International Law*, 129.

Thus, Grotius followed Vitoria in using the natural law vocabulary to legitimize the national interests of his country. Therefore, beneath the claim of sovereign equality remains the motive of establishing trade monopoly. The rhetoric of the universality of 'law of nature' disguises its sense of Christianity as a superior value. And the whole notion of 'law of nature' is structured, defined, and propagated to provide the European colonial powers with a legal mechanism to advance imperialism to the non-European world.

This trend of ethnic differentiation within natural law doctrine is also found in the writings of the eighteenth-century German professor Christian Wolff. In his work *Jus Gentium* published in 1749 he presents the dichotomy of 'barbarous' and 'cultured and civilized' nations on the basis of their reliance on law, again understood in a European sense. Given the little care for intellectual virtues and neglect for perfecting of the intellect, Wolff asserts, the barbarous nations follow the leadership of their natural inclinations and aversions in determining their actions, whereas cultured and civilized nations "cultivates intellectual virtues," "desires to perfect the intellect," "develop the mind by training," and possess "civilized usages or usages which conform to the standard of reason and politeness".[82] Thus, it sounds logical that the civilized should take the responsibility of training the barbarians so that they can join the civilized world. Despite his acknowledgement that by nature all nations are equal, he is, nonetheless, of the opinion that "what has been approved by the more civilized nations is the law of nations".[83]

However, from the nineteenth century onward, the same task of European imperialism was carried out with another dominant legal vocabulary – positivism, but using the same technique of constructing the backward and the uncivilized *other*. The following section briefly sketches the intellectual contributions of the nineteenth century jurists to this project.

5. Ethnicity in Legal Positivism, and the Standard of Civilization

Writings of Vitoria and Grotius remained salient for the understanding of international law and its relationship with the barbarian world until the late

[82] Christian Wolff, *Jus Gentium Methods Scientifica Pertractatum*, (NY: Oceania Publications for Carnegie Institution, 1964 [1749]), 33, cited in Bowden, "The Colonial Origin of International Law," 14.

[83] Wolff, 15–17, cited in ibid., 14.

eighteenth century, from when the supremacy of natural law gradually faded into insignificance with the rise of sovereignty as a political doctrine. In the nineteenth century, legal positivism emerged as dominant legal language for dealing with colonialism through the writings of jurists such as Henry Wheaton, James Lorimer, William E. Hall, John Westlake, and Thomas Lawrence. The following is a brief sketch of how colonialism is expressed as well as justified as a phenomenon of ethno-cultural hierarchy in the authoritative writings of the positivists.

While the naturalists used a universal language of law of nature to bring the non-Europeans within the ambit of international law, the nineteenth century jurists used the technique of excluding them from the international society in determining the relationship of international law with the non-European world. To this end, they generally relied on the cultural notion of civilization, which without being properly defined remained a standard for acquiring the membership of international society. The foundational assumption of this system was that the Europeans are the civilized nations and the 'other' rests outside the pale of civilization; therefore, for becoming the member of international society, the latter needs to attain some degree of civilization. Designing the criterion for membership in this way, various human groups are actually assigned with different positions in the civilizational progress, wherein European civilization is portrayed as the finishing point of this race towards civilization. In the writing of Scottish jurist James Lorimer, such categorization is clear: "As a political phenomenon, humanity, in its present condition, divides itself into three concentric zones or spheres – that of civilized humanity, that of barbarous humanity, and that of savage humanity."[84] The relevance of ethnicity in such categorization is evident from his appreciation of the emergence of a new field of study – ethnology – in the very opening statement of his work: "No modern contribution to science seems destined to influence international politics and jurisprudence to so great an extent as that which is known as ethnology, or the science of races."[85]

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[84] James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (Edin.: Blackwood, 1883), 101.

[85] Ibid., 93.

The influence of ethnology on international law got best expression in the evolutionary framework that "suggested that non-European communities were not only different but inferior in the sense of being more primitive".[86] The evolutionary theories offered, as Burrow notes, a way of reformulating the essential unity of mankind by arguing that the differences represented different stages in the process of progress.[87] Thus, in this theory of progress, "the 'otherness' of the non-Europeans could be seen as backwardness, a lagging behind in the chain of evolution".[88] Koskenniemi argues that such a framework was necessary to justify not only the colonizing mission, but also the injustices involved in it.[89]

Having identified the uncivilized 'other', the nineteenth century jurists then devised a system of international law that sounded more like a system of the European, by the European and for the European. And the uncivilized other automatically fell outside this system. Lawrence, thus, defines international law "as the rules which determine the conduct of the general body of civilized states in their dealings with one another".[90] For him, "civilization not only provides men with many interests in common; but it also tends to remove man's suspicion of his brother man", among countless others, and thereby, civilization tends "to knit states together in a social bond somewhat analogous to the bond between the individual man and his fellows".[91] Similarly, according to Hall, "[I]nternational law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement."[92] Here, a civilized state is comparable to a civilized citizen of a civilized European State who is guided by the conscience in abiding by laws. This conscience is an indication of civilization which the non-Europeans essentially lack. For Wheaton too, "[I]nternational law, as

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86 Koskenniemi, *The Gentle Civilizer of Nations*, 75.

87 J. W. Burrow, *Evolution and Society. A Study of Victorian Social Theory* (Cambridge: Cambridge University Press, 1966), 98–99, cited in ibid., 74.

88 Henry Sidgwick, *Philosophy. Its Scope and Relations. An Introductory Course Lectures* (London: Macmillan, reprinted by Theommes, 1998 [1902]), 174–211, cited in Koskenniemi, *The Gentle Civilizer of Nations*, 74.

89 Koskenniemi, *The Gentle Civilizer of Nations*, 74.

90 Lawrence, *The Principles of International Law*, 1.

91 Ibid., 3.

92 William E. Hall, *A Treatise on International Law*, 8th ed. (Oxford: Clarendon Press, 1924), 1.

understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent."[93] He finds the supremacy of international law of Christian civilized nations in the fact that the Mohammedan and Pagan nations of Asia and Africa in their interaction with the Europeans renounce their peculiar international usages and adopt those of Christendom.[94] In the same vein, Henri Bonfils and Paul Fauchille explain in their text book that the foundation of international law resides "in the undeniable and necessary fact of the existence of a durable and legally recognized community among States that have attained or exceeded a certain level of civilization".[95] For Westlake, "the general rules of international law apply in their fullness only to sovereign States like France or the United Kingdom"[96] and sovereignty is an attribute of European civilization alone. This is how the nineteenth century jurists perceived international law as a European regime and automatically exclude the non-European world from its sphere.

Thus, the whole concept of international law is ethnicized by the creation of the dichotomy of civilized Europe and uncivilized non-Europe. The uncivilized non-Europe conceived as an ethnic other is outside the realm of international law, for such rules are meant for regulating the mutual interaction among the civilized European nations. As Anghie notes:

> [o]nly the practice of European states was decisive and could create international law. Only European law counted as law. Non-European states were excluded from the realm of law, now identified as being the exclusive preserve of European states, as a result of which the former were deprived of membership and the ability to assert any rights cognizable as legal.[97]

On the other hand, in their interaction with the non-European uncivilized, the Europeans are put in a superior position to decide the rules of the game. The nineteenth century positivists paid a great service to this effect by defining and qualifying the concepts of State and sovereignty that proved crucial in securing a dominant position for the Europeans in such interactions. They explained law, society, State and sovereignty in a way that

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[93] Wheaton, *Elements of International Law*, 20.

[94] Ibid., 18.

[95] Bonfils-Fauchille, *Manuel*, 5, cited in Koskenniemi, *The Gentle Civilizer of Nations*, 73.

[96] John Westlake, *Chapters on the Principles of International Law* (Cambridge: The University Press, 1894), 86.

[97] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 54.

excluded the non-European others from international society, but at the same time, applied the same positivist international law with a view to justifying the colonization of the uncivilized.

Hegel, for example, having claimed that international law springs from the relations between autonomous States, asserts that it is essential that the authority of a State should receive its full and final legitimation through its recognition by other States. And then he finds it questionable how far a nomadic people or "any people on a low level of civilization" can be regarded as a State.[98] Along the line of Hegelian thoughts, Lawrence notes that only sovereign States are the subjects of international law, but qualifies the notion of sovereignty with the view that before a sovereign State can become a subject of international law it must possess a certain degree of civilization despite the fact that this degree is never ascertained.[99] Therefore, he concludes that

> [A] body politic completely supreme over all its members, and subject to no external authority, *must have reached a certain degree of civilization*, have ceased to be nomadic and become owner of a fixed territory, have provided for the continuity of its existence, and have attained a certain size and importance, before it can be regarded as one of those Sovereign States which are Subjects of International Law.[100] (Emphasis added)

However, Lawrence assures that there are nations who will never be able to exhibit this mark of civilization: "It would, for instance, be absurd 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".[101] Thus, on the one hand, Lawrence sets the requirement for being the subject of international law in conformity with the European standard of civilization, and on the other hand, by putting this standard along civilizational line, predicts permanent exclusion of some ethnic groups from the realm of international law.

Wheaton, in the same vein, emphasizes the recognition by the civilized nations as a mode of acquiring sovereignty for the uncivilized ones. For him, the terms State and sovereign are synonyms, but the nature of sovereignty – internal or external – determines the fate of the State in international

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[98] Georg E. F. Hegel, *Philosophy of Rights*, trans. T. M. Knox (Oxford: Clarendon Press, 1942), 212–213.

[99] Lawrence, *The Principles of International Law*, 58.

[100] Ibid., 60.

[101] Ibid., 58.

relations. While the internal sovereignty of a State may be acquired by the fact of mere existence, the external sovereignty of any State requires recognition by other States in order to render it perfect and complete.[102] In his words,

> if [a new State] desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfill, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society.[103]

Thus, unless such recognition is granted, uncivilized remains uncivilized and does not exist in the international plane, though it may well exist as a sovereign so far as its internal affairs are concerned. Classifying sovereignty as internal and external, therefore, Wheaton reinforces the image of a world composed of a family of civilized nations as well as a group of states who lack necessary external sovereignty to be a part of the civilized family. In this ambivalence of positivist legal doctrine, the latter exist as a State in relation to their internal affairs, but at the same time, they cease to exist in relation to international law.

And so far as the right of recognizing the new State as a member of international society is concerned, it lies without the least fear of contradiction with the civilized world. Lawrence provides with the rationale behind such privilege for the civilized nations when he asserts that operating areas of the law of nations and civilization are supposed to coincide.[104] Presenting his claim that international law is what the civilized nations practice among themselves in this way, he then asserts that for a new State to be admitted to this common sphere of international law as well as civilization is to obtain a kind of "international testimonial of good conduct and respectability," which the European nations developed over centuries.[105]

> Modern [I]nternational [L]aw grew up among them. There never was a time when they were outside its pale. Their influence helped to mould it. Many of them existed before the great majority of its rules came into being. There was no need for them to be formally received among its subjects.[106]

[102] Wheaton, *Elements of International Law*, 28.
[103] Ibid., 28.
[104] Lawrence, *The Principles of International Law*, 59.
[105] Ibid., 59.
[106] Ibid., 84.

But whenever other nations desire to join this European group, they must have the approval from the latter. Therefore, it is fully justified that the European nations possess the right to decide on the membership of the civilized family of nations.

Again, the treatment of new States desiring access to this society is not supposed to be uniform; instead, cases should be determined on the basis of ethnic character of the nations seeking admission. In other words, civilized Europe is entrusted with not only the monopolized right to recognize the uncivilized 'other'; in this process it is also allowed to classify the 'other' on the basis of the position of the aspirant in the scale of civilization, which is again defined along ethnic lines. Thus, Lorimer holds the view that as of right, civilized nations may grant three stages of recognition: first, plenary political recognition for the 'civilized humanity', i.e. all the existing States of Europe with their colonial dependencies, *in so far as these are peopled by persons of European birth or descent* and to the States of America, second, partial political recognition for the 'barbarous humanity' comprising Turkey, China, Japan, and Siam, and finally, natural or mere human recognition for the 'savage humanity' covering rest of the mankind.[107] On the other hand, Lawrence differentiates between the admission of States hitherto barbarous (e.g., Turkey, Japan, and Persia) and the admission of States formed by civilized men in hitherto uncivilized States (e.g., the Transvaal, the Congo Free State, and Liberia). For the first category of States, it is required that the State to be admitted shall be to some extent civilized after the European model. Since the exact amount of civilization required cannot be defined beforehand, Lawrence prescribes that each case must be judged on its own merits by the powers who deal with it.[108] Although Lawrence does not provide any specific mechanism for the admission of the States in the second category, it seems obvious from this categorization that these States have already attained certain degree of civilization. More specifically, these hitherto uncivilized States have transformed themselves with the help of the civilized men who have taken the responsibility of civilizing the uncivilized out of philanthropic zeal. Thus, Lawrence appreciates the philanthropic venture of the International Association of the Congo under the direction of the King Leopold II of Belgium, "who for some years provided from his private resources the funds necessary to carry on its operations. These were directed towards the formation of civilized settlements in the vast area of the

[107] Lorimer, *The Institutes of the Law of Nations*, 101–102.
[108] Lawrence, *The Principles of International Law*, 85.

Congo basin, for the purpose of combating the slave-trade and opening up the country to legitimate and peaceful commerce."[109] However, the later history of Congo as a matter of fact stands in sharp contradiction with King Leopold's projected benevolence.

Hall too understands civilization in ethnic terms. His claim that international law is a product of special civilization of modern Europe, and therefore, only such states can be presumed to be subject to it as are 'inheritors' of that civilization assumes an ethnic underpinning of European civilization. Thus, the non-European world automatically falls outside the sphere of civilization first, and then, as a consequence, of international law. To be a part of international law then, Hall argues, they must progress with the acquiescence of the Europeans.[110] Accordingly, his conclusion follows like this:

> If by its origin a new state inherits European civilization, the presumption is so high that it intends to conform to law that the first act purporting to be a state act which is done by it, unaccompanied by warning of intention not to conform, must be taken as indicating an intention to conform, and brings it consequently within the sphere of law. If on the other hand it falls by its origin into the class of states outside European civilization, it can of course only leave them by a formal act of the kind already mentioned.[111]

Here, presumption follows the ethnic 'origin' of a nation, and admission to international legal system is determined on that basis. Thus, a State outside the pale of European civilization to be a member of this system must act to exhibit to the satisfaction of the elite members of the civilized international society that it has attained certain degree of civilization in line with the European civilization. And given that there is no such defined standard of civilization, their admission remains at the mercy of the civilized European nations. Koskenniemi presents this paradox in the most lucid manner:

> [i]f there is was no external standard for civilization, then everything depended on what Europeans approved. What Europeans approves, again, depended on the degree to which aspirant communities were ready to play by European rules. But the more eagerly the non-Europeans wished to prove that they played by European rules, the more suspect they became: had not Bluntschli argued that only 'non-Aryans' bowed down in front of their masters? In order to attain equality, the non-European community must accept Europe as its master – but to accept a master was proof that one was not equal.[112]

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[109] Ibid., 86.

[110] Hall, *A Treatise on International Law*, 47.

[111] Ibid., 48.

[112] Koskenniemi, *The Gentle Civilizer of Nations*, 135–136.

Within this positivist dichotomy of civilized and uncivilized, colonization is justified as a mission to civilize the uncivilized. And it is also legitimate since there is no 'government' – understood as an attribute of civilization – in the native lands to prevent colonization. Thus, Westlake concludes that "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," for they cannot be kept out in the absence of any government.[113] But at the same, since international law is perceived as a set of rules applicable among European nations, the native communities – the uncivilized and hence colonized – has no claim under international law; instead, the interrelations of the colonizers are regulated by this set of civilized norms. And the fate of the colonized is left with the conscience of the colonizers who are civilizers as well.[114] The nineteenth century positivists thus created a legal regime of right without duty for the Europeans in their relationship with the colonized. As Hall uphold, under international law the colonizers are duty-bound towards other colonizers only. Westlake expresses this role of international law most explicitly: "[i]nternational law has to treat such natives as uncivilized. It regulates, for the mutual benefit of civilized states, the claims which they make to sovereignty over the region, and leaves the treatment of the natives to the conscience of state to which the sovereignty is awarded."[115] German jurist Heimburger maintains in 1888 that the State's quest for territory is a justified "expression of its life-energy" under international law, and is "protected as long as it does not conflict with the legal spheres of the other European States".[116] The use of the term 'legal sphere' categorically underscores the legal character of colonial missions. In this lawful process of colonization, the colonized remains outside the discourse. They are assigned the role of an unlucky consumer in a highly monopolised market where they are left with no other option other than consuming the commodity of 'civilization' manufactured in the West; this situation is in fact analogous to the very structure of the colonial economy. And international law is there only to regulate as well as to legitimize the scramble of the colonizers to set up their own domain of monopoly in the vast uncivilized world around them.[117]

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113 Westlake, *Chapters on the Principles of International Law*, 142–143.

114 Koskenniemi, *The Gentle Civilizer of Nations*, 108.

115 Westlake, *Chapters on the Principles of International Law*, 142.

116 Cited in Koskenniemi, *The Gentle Civilizer of Nations*, 109.

117 The role of the colonized as passive bystanders is well substantiated in the Berlin West African Conference of 1884 and 1885. Without the consent or participation of the African people, dominant European powers of that time demarcated the whole of

The nineteenth century as a particular period in history contains more than what we have sketched so far in relation to the creation and domination of ethnic other in the forms of colonization. However, the thrust of the preceding discussion was to demonstrate how the nineteenth century positivists carried out the mission of furthering European dominance over the rest of the world using legal positivism. The nineteenth century legal scholarship had its own characteristics as the natural law scholarship had in the preceding centuries; yet, its contributions had perhaps constituted the most significant epoch in the history of international law by providing with juristic basis for concepts such as State, sovereignty, and civilization in relation to international law and its other. Nevertheless, despite its unique approach to international law, the nineteenth century legal positivism is not much different from earlier efforts to legitimize colonizing mission by identifying the backward and uncivilized ethnic other. The nineteenth century jurist Wheaton, who also followed this trail, appreciated their contribution as the foremost source of international law: "they are generally impartial in their judgment. They are witnesses of the sentiments arid usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles."[118] For Wheaton, thus, the 'impartiality' of European international law jurists appeared as a philanthropic connotation. In this way, international law was guided by the ethnic 'otherness' embedded in it on the one hand, but on the other hand, applied various innovative techniques to camouflage this biasness as a philanthropic venture of civilizing the uncivilized 'other'.

6. Concluding Remarks

Although in each phase of its development, different legal principles dominated the plane of international law, the notions of the 'self' and its 'other' always remained the core of this discipline. In other words, the history of international law all through history is marked by the phenomenon of creating and dominating the ethnic 'other' by the dominant cultural group of each epoch, European domination being the obvious characteristic of international law in the modern history. Different legal techniques and vocabularies have been employed to accomplish this task, but the

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Africa into colonies or spheres of influence in such a way that they came under two or three European powers.

[118] Wheaton, *Elements of International Law*, 20.

phenomenon remained unchanged. While the sixteenth and seventeenth century jurists, such as Vitoria and Grotius, used the vocabulary of natural law to legitimize European control over the 'barbarians' and also to legalize colonization of vast territories outside Europe, the nineteenth century jurists such as Wheaton, Lawrence, Westlake, Lorimer, and Hall, applied the language of legal positivism to keep the 'barbarians' outside the domain of European international law. But at the same time, the positivists advanced European imperialism by using the 'standard of civilization', again determined along ethnic lines.

The foregoing discussion, in one way, sketches the meaning of 'ethnicity' in international law by exploring their historical relationship. Throughout history, human groups have been reduced to barbarians or savages for not being 'Greek', 'Roman', 'Muslim', 'Christian', 'Chinese', 'European', 'civilized', and so on. As a discipline, international law has always been used in dealing with these barbarians and savages. Unlike many other disciplines, even the very creation and development of international law relied on ethnic otherness at different points of time. However, in the international law of modern time, this continuous process of defining and dealing with the ethnic 'other' reinforces the supremacy of the 'West' constructed as a civilized cultural group, and consequently, the need for transplanting its cultural attributes to the non-Western world. In this sense, the relationship between 'ethnicity' and international law is to be understood in historical continuity; it should be conceived as an incessant 'process' that goes much beyond the nineteenth century international jurisprudence. While the present article grasps a segment of this process, much is left to be explored in the future.