

Sovereign Trusteeship and Empire

*Andrew Fitzmaurice**

This Article examines the concept of sovereign trusteeship in the context of the history of empire. Many accounts of sovereign trusteeship and the responsibility to protect explain the development of those concepts in terms of seventeenth century natural law theories, which argued that the origins of the social contract were in subjects seeking self-preservation. The state, accordingly, was based upon its duty to protect its subjects, while also having a secondary responsibility for subjects beyond its borders arising from human interdependence. I shall show that the concepts underlying sovereign trusteeship — human fellowship, self-preservation and the protection of others' interests — were as entangled with the expansion of early modern states as they were with the justification of those states themselves. The legacy of that history is that arguments employed to justify sovereign trusteeship and the responsibility to protect remain highly ambiguous and subject to rhetorical manipulation. On the one hand, they can be represented as underpinning a new liberal international order in which states and international organizations are accountable to the human community, not only to their own subjects. On the other, these same terms can be deployed to justify expansionism in the name of humanitarianism, as they have done for hundreds of years. Only by paying careful attention to the contexts in which these claims are made can we discriminate the intentions behind the rhetoric.

INTRODUCTION

Scholars of international relations and law are paying increasing attention to questions of sovereign trusteeship and the Responsibility to Protect (or R2P),

* An earlier version of this Article was presented at the Sovereignty as Trusteeship for Humanity conference, Tel Aviv, June 16-17, 2014. I would like to thank the participants for their feedback, and particularly Alexander Kedar for his extensive rejoinder and Doreen Lustig for her useful commentary. I would also like to thank Saliha Belmessous for extensive feedback on the manuscript.

which they perceive to be new perspectives on international relations arising from the post-Cold War order.¹ Certainly, since at least the Balkan wars of the 1990s, a number of conflicts have been marked by interventions by the international community to protect civilian populations. Those interventions are justified by appeal to the principle that states are established by a contract to preserve their citizens, as well as by appealing to the responsibilities of global organizations and the cosmopolitan responsibilities of the member states of the global community. The notion that sovereigns have responsibilities beyond their own boundaries has received further support in recent decades in response to the challenges of climate change, environmental crises, including pollution, and resource issues such as water-sharing.² There certainly does, therefore, appear to be a sense in which states' extraterritorial responsibilities are more topical than ever before.

Those responsibilities, however, are based upon a set of principles that, as I will argue, have been part of the international order for at least five hundred years.³ The principles that underpin the doctrines of responsibility to protect and sovereignty as trusteeship are: (1) human fellowship, or the

-
- 1 On state recognition of the R2P, see INT'L COALITION FOR THE RESPONSIBILITY TO PROTECT, <http://www.responsibilitytoprotect.org/> (last visited Jan. 9, 2015); and *Office of the Special Adviser on the Prevention of Genocide*, UNITED NATIONS, <http://www.un.org/en/preventgenocide/adviser/responsibility.shtml> (last visited Jan. 9, 2015). For legal scholars' reaction to R2P, see, for example, LUKE GLANVILLE, *SOVEREIGNTY AND THE RESPONSIBILITY TO PROTECT* (2014); ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT'L L. 295 (2013); and Ryan Goodman, *Humanitarian Intervention and the Pretexts for War*, 100 AM. J. INT'L L. 107 (2006). For a skeptical perspective on humanitarian intervention, see JEAN BRICMONT, *HUMANITARIAN IMPERIALISM: USING HUMAN RIGHTS TO SELL WAR* (2006); DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2006); and Jean Richard Drayton, *Beyond Humanitarian Imperialism: The Dubious Origins of "Humanitarian Intervention" and Some Rules for Its Future*, in *THE HISTORY AND PRACTICE OF HUMANITARIAN INTERVENTION AND AID IN AFRICA* 217 (Bronwen Everill & Josiah Kaplan eds., 2013). For further debate in an online symposium held by the *American Journal of International Law* on the article by Benvenisti and the question of sovereign trusteeship in international law, see Chris Borgen, *American Journal of International Law Symposium Starts Today*, OPINIO JURIS (July 22, 2013), <http://opiniojuris.org/2013/07/22/american-journal-of-international-law-on-line-symposium-starts-today/>.
 - 2 EYAL BENVENISTI, *SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE* (2002).
 - 3 A similar point is made by GLANVILLE, *supra* note 1.

notion of the equal moral worth of all individuals; (2) need, the efficient use of resources, and the necessity of self-preservation; and (3) the protection of others' interests.⁴ These principles were used to justify modern European empires and they were partly developed for that purpose. A number of studies have placed the development of the responsibility to protect and sovereign trusteeship in the context of seventeenth century natural law arguments regarding self-preservation. The focus of those accounts has been upon how the R2P arose from contracts between early modern states and their subjects, rather than from the expansionist policies of those states.⁵ They have accordingly underestimated the degree to which claims of human fellowship, self-preservation and protection were used to justify territorial expansion beyond the state, just as much as they were used to think about the responsibilities of states to their subjects.

Indeed, the use of rights arguments in this expansionist context reminds us that the creation of states and empires was, from one perspective, a connected, or even a single, process. Both states and empires required the establishment of *imperium*, or authority, over territory. To create a state in medieval and early-modern Europe meant establishing authority over peoples previously outside the *imperium* of the sovereign, so that the early-modern English state, for example, was itself understood to be an empire.⁶ Similarly, those entities in the sixteenth and seventeenth centuries that we now, somewhat anachronistically, call empires required extensions of sovereignty over peoples previously outside the sovereign's *imperium*. Thus the process of establishing many early-modern European states was the first step in a further extension of sovereignty beyond the borders of the state. It should, therefore, come as no surprise that the language of rights — including concepts of human fellowship, self-preservation, and the obligation to consider others' interests — was drawn into justifying the broader extensions of *imperium*, those entities that were increasingly called empires by the eighteenth century, just as it was employed to understand the relationships between states and their subjects.

While the sovereigns of modern European states haven't always respected the obligations implied by this language of rights, modern European history can be understood, in part, in terms of a struggle to establish that respect. The language of rights was also used to understand the relations between sovereigns and subjects in the projections of sovereignty beyond the boundaries of European states. In those broader contexts, however, the struggle to have

4 The central role of these three assumptions with regard to sovereign trusteeship are outlined in Benvenisti, *supra* note 1.

5 See, e.g., ORFORD, *supra* note 1 (focusing in particular on Hobbes).

6 DAVID ARMITAGE, *THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE* (2000).

rights respected proved less successful and the language of rights — of fellowship, self-preservation, and protection — was often manipulated to justify expansionist goals. Indeed, the relative failure of rights discourses in these broader contexts has given rise to the postcolonial understanding of the term “empire,” implying political authority without a social contract. In this Article, I will examine the entanglement of the arguments of human fellowship (Part I), self-preservation (Part II) and the obligation to take others’ interests into account (Part III) in the extensions of European sovereignty, considering each of the principles in that order. In the Conclusion, I will turn to the question whether the current revival of sovereign trusteeship and the responsibility to protect is inextricable from the history of empire.

I. HUMAN FELLOWSHIP

One of the most fundamental premises underlying the notion of sovereign trusteeship is the existence of an international community, a common human fellowship, which recognizes “the equal moral worth of all individuals.”⁷ Such ideas of global community were also one of the most important justifications for extensions of European sovereignty from the sixteenth century through to the twentieth. Human fellowship, and human sociability, was a fundamental assumption of natural law theories from Aristotle through to the twentieth century, although the understanding of the characteristics that made humans sociable changed greatly, with pre-seventeenth century accounts claiming bonds of mutual affection and love, while many post-seventeenth century accounts emphasized selfish reasons for sociability and even mutual fear.

If all humans belonged to a common community, then certain common rights must exist. In the first half of the sixteenth century, the Thomist theologian Francisco de Vitoria explored such ideas in the context of examining the justice of the Spanish conquests in the Americas.⁸ Vitoria dismissed a series of justifications for conquest, including the ungodliness of the peoples conquered, but he notoriously argued that the Spaniards could claim a right to travel and mix with the Americans. For Vitoria, human fellowship included both a right of communication and the right of sanctuary. Communication was the means by which sociability would be achieved. Language was a distinguishing feature of humans, which fitted them for sociability. The granting of sanctuary was necessitated by the mutual bonds of affection and, as we shall see, self-preservation.

7 Benvenisti, *supra* note 1, at 301-02.

8 FRANCISCO DE VITORIA, *On the American Indians*, in VITORIA: POLITICAL WRITINGS 231 (Anthony Pagden & Jeremy Lawrence eds., 1991).

For many modern scholars, Vitoria's concession on the right of communication was a cynical manipulation of the law of nations in order to provide a sanitized justification for the conquests.⁹ Such readings diminish the seriousness with which Vitoria, a Thomist, took the idea of sociability and the instruments of fellowship, including communication, that were necessary to it. Recent scholars' readings of Vitoria, however, are shaped by the fact that human fellowship and the right of communication were, as I shall show, subsequently used by European conquerors to justify their appropriations. Thus Vitoria has been read from the perspective of what later generations did with his writings.

The English promoters of the Virginia Company were amongst the first European colonizers to transform Vitoria's arguments from a defense of the rights of non-Europeans into a case for conquest. In 1612, approximately five years after the foundation of the first permanent English colony in North America, William Strachey, the Virginia Company's secretary in the colony who had been resident two years in the Chesapeake, asked "What Iniury can yt be to people of any Nation for *Christians* to come unto their Portes, Havens, or Territoryes, when the Law of Nations (which is the law of god and man) doth privedge all men to doe so?"¹⁰ He expanded upon this theme by declaring that "the Salvages themselves may not impugne, or forbid the same [i.e., trade] in respect of Common fellowship and Community betwixt man and man."¹¹ Here Strachey bases the rights of travel and communication upon human sociability and the consequent universal human community, or "common fellowship." He explained that this right of community extended to the right of commerce and trade, which were important expressions of fellowship, and that such relations would continue in

all love and friendship, until . . . we shall fynd them practize vyolence, or treason against us (as they have done to our other colony at Roanoke) when then I would gladly knowe (of such who presume to know all thinges) whether we may stand upon our owne Innoncency or no, or hold

9 See, e.g., ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); ROBERT A. WILLIAMS, *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT* (1990); cf. ANNABEL S. BRETT, *CHANGES OF STATE: NATURE AND THE LIMITS OF THE CITY IN EARLY MODERN NATURAL LAW* 14-15 n.19 (2011); Martti Koskenniemi, *Empire and International Law: The Real Spanish Contribution*, 61 U. TORONTO L.J. 1 (2011).

10 WILLIAM STRACHEY, *THE HISTORIE OF TRAVELL INTO VIRGINIA BRITANNIA* 22 (Louis B. Wright & Virginia Freund eds., 1953) (1612).

11 *Id.*

it a scruple in humanity, or make it any breach of Charity (to prevent our throats from the cutting), to draw our swordes, *et vim vi repellere*.¹²

Here he draws the conclusion that a failure to respect the rights based upon universal community can be sanctioned by the resort to force and he specifically cites the Roman law regarding the right to repel violence with violence — *et vim vi repellere* — reflecting the close accord that many medieval and early modern authors assumed between Roman law and natural law.

Strachey was following a carefully prepared script. In a private meeting of the Virginia Company sometime between 1607 and 1609, its members debated whether or not they should publish “some forme of writinge in way of Iustification of our plantation.”¹³ In this debate, it was noted that such public discussions of the justice of colonizing by the “Casuists and Confessors” of Salamanca had won for the Spanish king “no tittle of Dominion or property, but only a Magistracy and Empire.” The meeting concluded, therefore, that it was better to “abstain” from producing a similarly weak title and “reserve ourselves to ye defensive part, when they shall offer anything against us: wch will more easily and satisfactorily be donne, and we are like enough to be too soone putt to yt by them, when they see the proportion and forwardness of this present supply.”¹⁴ The meaning here is not immediately apparent, but it becomes clearer with Strachey’s retrospective contribution on the right to repel violence with violence. What the Virginia Company minutes reveal is a decision to avoid a public discussion of the justice of colonizing until such a moment as the Powhatans, the Native Americans of the Chesapeake region, “offer anything against us.” Such violence, the minutes note, was likely to be provoked by the “proportion” of the “present supply”: that is, by the fleet of resupply ships the Virginia Company sent to the Chesapeake in 1609.¹⁵

By 1609, the Virginia Company had decided to embark upon the campaign justifying its colony from which it had earlier abstained. It may have done so because by this time it was hoping to provoke war with the Powhatans. What is clear, however, is that the company expected that their provocation of the Powhatans would enable them to undertake a “defensive” war of conquest, while appealing to a breach of the rights of fellowship and communication derived from the law of nations. English colonizers repeated this argumentative

12 *Id.* at 26.

13 *A Justification for Planting in Virginia*, in 1 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON vol. 3 (Susan Myra Kingsbury ed., 1933).

14 *Id.* at 3.

15 *Id.*

strategy throughout the seventeenth and eighteenth centuries in order to legitimize their appropriations of Native Americans' lands.¹⁶

Sanctuary, including the rights of refugees and hospitality to strangers, is another species of the rights of human fellowship that underpin human sociability. At the time the Virginia Company was establishing its colony, Grotius wrote on the "sacred law of hospitality," reprising a passage from Vitoria in which Vitoria, in turn, cited Virgil's *Aeneid*, asking "What men, what monsters, what inhuman race . . . Shut up a desert shore to drowning men,/ And drive us to the cruel seas again?"¹⁷ "It is a law of nature to welcome strangers," Vitoria argued, and this right of harbor was "decreed amongst all men."¹⁸ The "Indians" could not, therefore, deny harbor to the Spanish if they came to their shores, no more than the Spanish or French could deny the same rights to each other.¹⁹ The denial of such rights was a violation of the laws of nature and nations and a just cause for war. Grotius declared: "We know also that wars began for this cause, as with the Magarensians against the Athenians, and the Bonians against the Venetians, and that these also were just causes of war to the Castilians against the Americans."²⁰ Again, for recent scholars, Vitoria provided a sanitized justification for conquest in his discussion of the rights of refuge. According to Vitoria, though, the "Indians" had not denied these rights to the Spanish, and it was the Spanish who violated laws of hospitality.²¹ The probable reason why scholars have come to read Vitoria in this way, however, is because subsequent European colonizers exploited the ideas of harbor, the rights of strangers and refuge in order to justify their appropriations of others' lands.

Seventeenth and eighteenth century English colonizers again exemplified this effort. One of the tracts commissioned as part of the Virginia Company's decision to justify its venture, the anonymous *A True Declaration of the Estate of Virginia*, posed a series of questions on the justice of the colony, including: "Is it unlawfull because wee come to them?" to which the author responded: "Is it not against the lawe of nations, to violate a peaceable stranger, or to denie him harbour? The Ethiopians, Egyptians, and men of China, are branded with a foule marke of sanguinarie and barbarous inhumanity, for blessing

16 See ANDREW FITZMAURICE, *SOVEREIGNTY, PROPERTY AND EMPIRE, 1500-2000* (2014).

17 HUGO GROTIUS, *THE FREE SEA* 11 (David Armitage ed., Richard Hakluyt trans., 2004); VITORIA, *supra* note 8, at 278; see also VIRGIL, *AENEID* 94 (John Dryden trans., 1909).

18 VITORIA, *supra* note 8, at 279.

19 *Id.* at 280.

20 GROTIUS, *supra* note 17, at 12.

21 FRANCISCO DE VITORIA, *Letter to Miguel de Arcos on November 8, 1534*, in VITORIA: *POLITICAL WRITINGS*, *supra* note 8, at 331.

their Idols, with the blood of strangers.”²² The author portrays the colonizer as the refugee, seeking harbor and sanctuary. The people being colonized will be inhumane if they oppose this right. Rejection of that right was a violation of the law of nations and a just cause, again, for war. The author of the *True Declaration* warned that for anyone who had compunctions about such a war, “Let him know that *Plato* defineth it to be no iniustice, to take a sword out the hand of a mad man; That *Austen* [i.e., *Augustine*] hath allowed it for a lawful offensive war, *quod ulcitor injurias* that revengeth bloudie injuries.”²³

Recent scholars have not been the first to cast doubt upon the integrity of conventions in the law of nations concerning rights of communication and hospitality, nor have they been the first to see Vitoria as an apologist for Spanish expansionism rather than a critic. Writing in 1672, in *De jure naturae et gentium*, or *On the Law of Nature and Nations*, Samuel Pufendorf critiqued Vitoria in these terms, albeit with the hindsight of the previous two hundred years of expansionist practice.²⁴ According to Pufendorf, “Franciscus a Victoria, *Relectiones de Indis*, Pt. V, § 3, does not win many to his position when he discusses the adequate grounds on which the Spaniards felt themselves entitled to subdue the Indians.”²⁵ He continued:

It is crude indeed to try to give others so indefinite a right to journey and live among us, with no thought of the number in which they come, their purpose in coming, as well as the question of whether . . . they propose to stay but a short time or settle among us permanently.²⁶

For Pufendorf, ideas of common humanity, and the concomitant rights of natural communication and fellowship, all central for Vitoria, were subordinate to his own conviction that sociability is driven by the universal rule of self-interest and self-preservation.

Writing in 1795, in his *Third Definitive Article for Perpetual Peace*, Immanuel Kant entered into this debate, firmly taking the position that “universal hospitality” was a “cosmopolitan right,” and he accordingly rejected Pufendorf’s position on the issue. For Kant, the possibility of seeking commerce with

22 A TRUE DECLARATION OF THE ESTATE OF THE COLONIE IN VIRGINIA 9 (printed for William Barret, 1610).

23 *Id.*

24 2 SAMUEL PUFENDORF, DE JURE NATURAE ET GENTIUM [ON THE LAW OF NATURE AND NATIONS] 364 (C.H. Oldfather & W.A. Oldfather trans., 1934) (1672); see also RICHARD TUCK, RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT 155-65 (1999) (discussing Pufendorf’s critique of empire).

25 PUFENDORE, *supra* note 24, at 364-65.

26 *Id.*

others provided the opportunity for peoples to “enter peaceably into relations with one another” and so bring “the human race ever closer to a cosmopolitan constitution.”²⁷ Importantly, however, and in agreement with Pufendorf, Kant was able to reflect on the fact that the right to communicate with other peoples had been grossly abused by European colonizers: “the injustice they show in *visiting* foreign lands and peoples (which with them is tantamount to *conquering* them) goes to horrifying lengths.”²⁸ In the hundred years separating Pufendorf and Kant, and against a background of long and highly costly wars driven by European imperial rivalries, European philosophers and jurists had become increasingly skeptical of the legal arguments used to justify colonization and Kant’s arguments in *Perpetual Peace* reflected those concerns.²⁹

Despite the skepticism of Kant and his contemporaries, including William Blackstone, Adam Ferguson, and David Hume, regarding the use of human fellowship, communication and the right of refuge to justify empire, these arguments continued to play an important role in expansionism through to the twentieth century.³⁰ Indeed, as I shall discuss below, a new wave of European empires in the nineteenth century was built upon humanitarian arguments. It is difficult to separate the history of humanitarianism from the history of expansionism and recent appeals for a responsibility to protect must address that imperial past.

II. NEED AND SELF-PRESERVATION

The second category of assumptions that underpin the notion of sovereignty as trusteeship and the responsibility to protect concern questions of need and self-preservation. According to these assumptions, sovereigns are obliged “toward humankind to use the resources under their control efficiently and sustainably.”³¹ Moreover, sovereigns cannot exclude others from the use of resources necessary to their own survival and flourishing, particularly when it comes at little cost to them. These assumptions, in common with those based upon sociability, have deep roots in natural law theories. Sixteenth and seventeenth century natural law theorists argued that our first duty is to our

27 IMMANEUL KANT, *Toward Perpetual Peace*, in KANT: PRACTICAL PHILOSOPHY 329 (Mary Gregor ed., Mary Gregor trans., 1996).

28 *Id.* at 329.

29 FITZMAURICE, *supra* note 16; SANKAR MUTHU, ENLIGHTENMENT AGAINST EMPIRE (2003).

30 For William Blackstone, Adam Ferguson, and David Hume’s skepticism of empires, see FITZMAURICE, *supra* note 16.

31 Benvenisti, *supra* note 1, at 309.

own preservation. This principle held true for individuals and also for states, which, as Thomas Hobbes observed, were modeled upon the self-preserving individual in the state of nature.³² However, because our own preservation depends upon others — no person can survive alone — we are bound in mutually obliging relationships in which we must consider the needs of others when doing so does not compromise our interests, just as they must consider what is necessary to our own survival.

When we consider such ideas in relation to the justification of expansionism, we must again begin with Vitoria. Vitoria agreed with the broader implications of the Roman law of occupation, namely, that where a people inhabit a territory without exploiting it that territory should be open to the use of others, so that “[a]ll things which are unoccupied or deserted become the property of the occupier by natural law and the law of nations, according to the law *ferae bestiae*” (Institutions II.1.12).³³ He hastened to argue, however, that such was not the case with the territories of the peoples the Spaniards had conquered. Those peoples were exploiting the potential in nature: “they have some order (*ordo*) in their affairs: they have properly organised cities, proper marriages, magistrates and overlords (*domini*), laws, industries, and commerce, all of which require the use of reason.”³⁴ Nevertheless, in his typically ambivalent discussion, Vitoria left the door open to the justification of trade and occupation: “the barbarians have a surplus of many things which the Spaniards might exchange for things which they lack. Likewise, they have many possessions which they regard as uninhabited, which are open to anyone who wishes to occupy.”³⁵

While Vitoria argued that the peoples the Spanish had encountered were efficiently employing their resources, and so could not be occupied or conquered, he had created a potentially powerful justification for expansion: that is, through a simple trope, a people could be re-described from being exploiters of natural resources to not having realized the potential in nature and thus open to occupation. This argument could apply equally to the exploitation of natural resources and to the exploitation of the moral and political laws of nature. As Vitoria said, the existence of laws, conventions and certain social and political systems were as much, or even more, the test of a legitimate society as the instances of material exploitation such as buildings, roads and bridges, which were the outward signs of such moral development. A society,

32 THOMAS HOBBS, *LEVIATHAN* 90 (Richard Tuck ed., 1991); *see also* Tuck, *supra* note 24, at 13-15.

33 VITORIA, *supra* note 8, at 264.

34 *Id.* at 250.

35 *Id.* at 291.

for example, that had not developed the concept of individual property could not exercise the rights of property over material things, including land and resources, and would therefore be failing to exploit the gifts of nature. The description of non-European peoples' lands and social and political systems as having not sufficiently exploited resources became one of the dominant justifications of occupation and conquest from the sixteenth century to the twentieth.³⁶ Indeed, it was an argument that became fundamental to the kinds of empire that were established.

In contrast to the Spanish, English plans for colonization were slow to take hold and the English were accordingly slow to engage with Vitoria's writings on the Americas. However, when they established a foothold in Virginia in the first decade of the seventeenth century, Vitoria's thought became central to the justification of their enterprise. One of their promoters was the Dean of St Paul's, John Donne, who, writing more than eighty years after Vitoria, eloquently praised the idea of a common humanity. In his *Meditation 17*, from *Devotions upon Emergent Occasions*, he wrote: "Any man's death diminishes me, Because I am involved in mankind." Indeed, he began this poem on the theme of (im)perfectibility by pointing out that none of us is complete and we are therefore in need of others: "No man is an island/ Entire of itself/ Each is a piece of the continent,/ A part of the main."³⁷ It comes as little surprise therefore that, preaching a year earlier in his sermon to the Virginia Company, on November 13, 1622, Donne declared that all peoples must take care to use the resources of the world efficiently because they are bound in webs of mutual obligation and mutual need. He argued that the rule in the "municipal" law in "particular States" that "*The State must take order; that every man improve that which he hath, for the best advantage of that State*, passes also through the Law of Nations, which is to all the world, as the *Municipall* law is to a particular State."³⁸ The conclusion for the law of nations, therefore, was that "The whole world, all Mankinde, must take care, that all places be improved, as far as may be, to the best advantage of Mankind in general."³⁹ He continued:

In the law of Nature and Nations, a land never inhabited, by any, or utterly derelicted and immemorially abandoned by the former Inhabitants, becomes theirs that will possesse it. So also is it, if the inhabitants do

36 FITZMAURICE, *supra* note 16.

37 JOHN DONNE, *Meditation 17*, in *DEVOTIONS UPON EMERGENT OCCASIONS* 98 (John Sparrow ed., 1923) (1624).

38 JOHN DONNE, *A SERMON PREACHED TO THE HONOURABLE COMPANY OF THE VIRGINIA PLANTATION* 26-27 (London, Thomas Jones 1622).

39 *Id.* at 27.

not in some measure fill the Land, so as the Land may bring forth her increase for the use of men.⁴⁰

In this passage, Donne reveals how Vitoria's assumptions regarding our obligation to exploit the resources of the earth could be easily turned into a justification of the appropriation of foreign lands if the people who inhabit those lands can be shown to have failed to address the necessity of pursuing their own self-preservation as well as that of others.

Donne, who probably met Grotius, made an apparent gloss on Grotius's *Mare liberum*, when he concluded: "a man does not become proprietary of the Sea, because he hath two or three Boats, fishing in it, so neither does a man become Lorde of a maine continent, because he hath two or three Cottages in the skirtes thereof."⁴¹ The American Indians, as far as Donne was concerned, were not living up to this responsibility to humanity, they did not "fill the Land," and their territory could accordingly be occupied. The stakes were the preservation of all humanity and, therefore, any resistance on the part of the American Indians could once again be met with force. These claims were repeated throughout justifications of English colonization: "Who will think," Strachey demanded, "it is an unlawful act, to fortifye, and strengthen our selves (as Nature requires) . . . in the wast and vast, unhabited groundes of their[s]" which, he added, they do not "use or know how to turne to any benefit?"⁴² Similarly, Strachey's contemporary, the London preacher and Virginia Company promoter Robert Gray, claimed that

these Savages have no particular proprietie in any part or parcell of that Countrey, but onely a general residencie there, as wilde beasts have in the forest, for they range up and downe like wilde beasts in the forest, without law or government . . . there is not *meum* or *tuum* amongst them.⁴³

In these declarations we see that the principle of use, employed by Vitoria in defense of the rights of indigenous Americans, was easily reversed to undermine the rights of other peoples. English colonists quickly seized upon the malleability of these philosophical and rhetorical terms.

John Locke notoriously brought the arguments in these colonizing tracts that the resources of the world should be exploited for the benefit of all into

40 *Id.* at 26.

41 *Id.* at 27.

42 STRACHEY, *supra* note 10, at 25.

43 ROBERT GRAY, A GOOD SPEED TO VIRGINIA, at C3v-[C4]r (William Welbie ed., 1610).

his theory of property in the *Two Treatises of Government*.⁴⁴ Many of the assumptions of Locke's understanding of property — the necessity of exploiting nature, the difference made by labor — were already apparent in the tracts on colonization published in the first decades of the seventeenth century. Conscious of this colonial context, Locke explained his theory of property by analyzing the contrast between the English exploitation of resources and that of American Indians. Locke's own engagement in the colonization of Carolina deepened these ties. Given Locke's place in the liberal canon, for many historians the colonial context of Locke's theory of property points to a structural tendency within liberalism towards expansionism and empire.⁴⁵

For Locke, as for most seventeenth century natural lawyers, self-preservation was a primary natural law. "Natural reason," he argued, "tells us, that Men, being once born, have a right to their Preservation."⁴⁶ They have a right, therefore, to such things "as Nature affords for their Subsistence."⁴⁷ This meant that the boundaries of states or nations had little importance if questions of need were at stake, particularly given that "God gave the world to men in common."⁴⁸ No man, he argued, should have more resources than "he can make use of," although this was clearly the case in America where an abundance of land lay waste or, rather, underutilized.⁴⁹ The cost of this underutilization was both to the English, who could flourish on the same land, but also, he pointed out, to the "wretched inhabitants" of the Americas who were ignorant of how to act in the interests of their own self-preservation. In tones reminiscent of Donne,

44 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 285 (Peter Laslett ed., Cambridge University Press 1960) (1689).

45 See BARBARA ARNEIL, *JOHN LOCKE AND AMERICA: THE DEFENCE OF ENGLISH COLONIALISM* (1996); UDAY SINGH MEHTA, *LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT* 46-76 (1999); JAMES TULLY, *AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS* (1993); David Armitage, *John Locke, Carolina and the Two Treatises of Government*, 32 *POL. THEORY* 602 (2004); Duncan Ivison, *The Nature of Rights and the History of Empire*, in *BRITISH POLITICAL THOUGHT IN HISTORY AND LITERATURE, 1500-1800*, at 191 (David Armitage ed., 2006). For skepticism on this scholarship, see DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT* 114-31 (2014); and Paul Corcoran, *John Locke on the Possession of Land: Native Title vs. the 'Principle' of Vacuum Domicilium*, Paper Presented at Australian Political Studies Association Annual Conference (Monash Univ., Melbourne, Austl., Sept. 24-26, 2007).

46 LOCKE, *supra* note 44, at 285.

47 *Id.*

48 *Id.* at 291.

49 *Id.* at 293-94.

Gray and Strachey, Locke declared that “in the wild woods and uncultivated wast of America left to Nature,” a thousand acres of land yielded the “needy” inhabitants less of the “conveniences of life” than ten acres of cultivated land in Devonshire.⁵⁰

Implicit in Donne’s and Locke’s analyses of human needs was the assumption that we are not born in possession of all that we require for our preservation and flourishing. Indeed, for Grotius, human imperfection underlay the necessity for commerce and freedom of the sea. Nature, he argued, gave “all things to all men, but seeing they were barred from the use of many things whereof a man’s life standeth in need . . . it was needful to pass from place to place.”⁵¹ In Enlightenment thought, these assumptions were developed into a full theory of human perfectibility of which Christian Wolff was one of the earliest exponents.⁵² The central concern of Wolff’s political philosophy was human perfectibility. According to Wolff, natural law commands all humans to use their natural abilities to achieve the highest state of happiness and harmony with others.⁵³ Emer de Vattel agreed with Wolff that in addition to pursuing self-preservation and self-perfection, all persons and thus all states, which are fictional persons, should seek the preservation and perfection of others.⁵⁴ Just as the seventeenth century natural law theorists had shown that self-preservation needed others in order to succeed, self-perfection similarly needed the help of others because nobody is born with all that they need in order to perfect themselves. For nations, this meant that they must pursue commerce and society with other nations, not out of mutual love, as Vitoria had argued, but out of the need to survive.

Wolff’s concern with human perfectibility led him to embrace historical progress and enthusiastically endorse the virtues of civilization. “It is plain,” he argued, “because it has to be admitted, that what has been approved by the more civilized nations is the law of nations.”⁵⁵ At the same time, he argued that the pursuit of human perfectibility meant that nations should respect the

50 *Id.* at 294.

51 GROTIUS, *supra* note 17, at 49.

52 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* [THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD] 20-25 (Joseph H. Drake trans., 1934) (1764).

53 *Id.* at 28-29; *see also* Knud Haakonssen, *German Natural Law*, in *CAMBRIDGE HISTORY OF EIGHTEENTH CENTURY POLITICAL THOUGHT* 270 (Mark Goldie & Robert Wokler eds., 2006).

54 EMER DE VATTEL, *THE LAW OF NATIONS* 73 (Bela Kapossy & Richard Whatmore eds., 2008) (1758).

55 WOLFF, *supra* note 52, at 17; *see also* BRETT BOWDEN, *THE EMPIRE OF CIVILIZATION: THE EVOLUTION OF AN IMPERIAL IDEA* 118-19 (2009); TUCK, *supra* note 24, at 188.

different choices others have made. We are obliged to make our own decisions about how to govern ourselves and restrain our passionate nature, and for this reason each society has to be left to itself to make decisions about how to achieve these goals.⁵⁶ According to Wolff, therefore, there is an obligation not only to respect the choice each society makes about its own organization, but also to respect its pursuit of the perfectibility of human nature. These principles whereby each people determined their own internal concerns were vital to post-Westphalian European states, which defined themselves in contrast to the horrors of the wars of religion.

The tolerance implicit in Wolff's understanding of human perfectibility was not, however, sustained in all uses of the concept. The pursuit of perfection, the pursuit of union with others in order to become complete, could be interpreted as a robust form of expansionism in the embrace of other peoples through commerce. It could also lead to the crushing of any peoples who impeded such a right and necessity. Vattel agreed to some degree with Wolff's acceptance of the different paths to perfection, but for Vattel the same pursuit of perfection meant that no people could deny the resources necessary to another people's flourishing. Like Locke, he stipulated that a "nation" may not "appropriate to itself" a country "which it does not really occupy."⁵⁷ All humans are under an "obligation to cultivate the earth" and, as with colonizing powers, no nation can appropriate more land than they can "settle and cultivate."⁵⁸ His now notorious conclusion from these premises was that peoples like the "ancient Germans" and "modern Tartars" who "disdain to cultivate their lands," living instead by "plunder," "deserve to be extirpated as savage and pernicious beasts."⁵⁹ War, and even the extermination of a people, was justified in cases where they impeded others' self-preservation and pursuit of perfection. For Vattel, these conclusions applied to people in the present, not just the historical past, as he ominously concluded at a time of rapid westward expansion in North America: "the Indians of North America had no right to appropriate all that vast continent to themselves."⁶⁰

A final species of the argument concerning need and self-preservation as platforms for sovereign trusteeship and the responsibility to protect is the

56 WOLFF, *supra* note 52, at 17; *see also* Haakonssen, *supra* note 53, at 272-73.

57 VATTEL, *supra* note 54, at 214.

58 *Id.* at 216.

59 *Id.* at 129.

60 *Id.* at 234. For nineteenth century jurists' endorsement of human perfectibility, *see* HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 3 (Paul Fauchille rev., 3d ed. 1901) ("[I]nternational law has its roots in the nature of man, in the instincts and needs of sociability and in perfectibility.").

claim that resources should be shared when sharing comes at no cost to the giver. Borrowing from economic theory, this has been described as a form of Pareto optimality.⁶¹ This idea that resources should be shared has a deep history and one again that is entangled in justifications of empire. While seventeenth century natural jurisprudence generally insisted on the primacy of the right of self-preservation, most jurists also pointed out that, because we are born incomplete and in need of others, when we have done what is necessary for our preservation we should seek the good of others. This means sharing with others those things of which we have plenty, or more than enough. Such claims were made again with regard to colonized peoples. In his 1622 sermon to the Virginia Company, Donne explicitly grounded the necessity for one people to share with another in the natural law of self-preservation and the law of nations:

[I]f the Land be peopled, and cultivated by the people, and that Land produce in abundance such things, for want whereof their neighbors, or others (being not enemies) perish, the Law of Nations may justify some force, in seeking, by permutation of other commodities which they need, to come to some of theirs.⁶²

In such cases, “Plantations in lands, not formerly, our owne, may be lawfull.”⁶³ This was a different kind of claim from that made by Locke, or by Vattel for that matter, when he discussed a land that was not fully occupied. For Donne, of course, the people who must share what was spare were not the English but the American Indians, and force, as he argued, was justified on the part of the English in the exercise of this right of self-preservation in pursuit of the surplus of the American Indians. For Locke, a failure to use the land to produce a surplus meant that the natural law of self-preservation justified the appropriation of that land by people in need. Donne elsewhere, as we have seen, used a very similar argument to that used by Locke, but here, by contrast, he suggests that if other peoples’ land produces a surplus, that surplus may be appropriated by recourse to the argument of sharing with those who are in need. Similarly, preaching before the Virginia Company thirteen years earlier, William Crashaw had argued that “[i]t is most lawful to exchange with other Nations, for that which they may spare.”⁶⁴ He hastened to add that nothing would be taken by “power nor pillage,” but only

61 Benvenisti, *supra* note 1, at 321.

62 DONNE, *supra* note 37, at 27.

63 *Id.*

64 WILLIAM CRASHAW, A SERMON PREACHED BEFORE THE RIGHT HONOURABLE THE LORD LAWARRE, at [D3]v-[D4]v (London, William Welby, 1610).

what they may spare: first, land and roome for us to plante in. . . . Again, they may spare us Timber, Masts, Crystal (if not better stones), Wine, Copper, Iron, Pitch, Tar, Sassafras, Sope ashes (for all these and more we are sure the Countrey yeeldes in great abundance) These things they have, these they may spare, these we neede, these we will take of them.⁶⁵

As in the case of the notion of sanctuary, whereby English colonizers claimed to be seeking sanctuary, in the law of nations the question of who is in need is often a matter of perspective. The argument of need, or necessity, and the maxim “*necessitas non habet legem*,” or necessity knows no law, was a central pillar of the early modern reason of state tradition.⁶⁶ As such, necessity was notoriously an argument that could be rhetorically manipulated. What, the critics asked, constitutes necessity? Who decides cases of necessity? Similarly, and as Donne’s and Crashaw’s arguments reveal, cases of need or necessity beyond the state were equally, if not more, open to manipulation.

III. THE OBLIGATION TO TAKE OTHERS’ INTERESTS INTO ACCOUNT

One of the most important assumptions underlying sovereign trusteeship is the notion that, as trustees of humanity and not just of national interests, sovereigns have an obligation to take the interests of peoples outside their sovereignty into account.⁶⁷ The obligation of sovereigns to take others’ interests into account was derived from a conception of human interdependency, so the interests of citizens of the sovereign may be bound up with the interests of non-citizens (diseases, for example, know no borders), and from these ties is derived a responsibility of the sovereign to protect non-citizens. This idea has a long historical genealogy. It is a history, once again, that has been closely bound with European expansion and empire.

The English conquest of North America was justified precisely as a venture undertaken, above all, for the benefit of the Native Americans. Citing Augustine and Justice Lipsius, Robert Gray argued “that warre is lawfull which is undertaken, not for covetousnesse and crueltie, but for peace and unities sake: so that lewde and wicked men may thereby be suppressed and good

65 *Id.*

66 ISTVAN HONT, JEALOUSY OF TRADE: INTERNATIONAL COMPETITION AND THE NATION-STATE IN HISTORICAL PERSPECTIVE 11 (2005).

67 Benvenisti, *supra* note 1, at 314-18.

men maintained and relieved.”⁶⁸ Applying this principle of intervention to support the virtuous and punish the wicked to Virginia, he argued: “The warre be undertaken to this ende, to reclaime and reduce those Savages from their barbarous kinde of life, and from their brutish and ferine manners to humanitie, pietie, and honestie.”⁶⁹ He was therefore able to conclude: “Those people are vanquished to their unspeakable profite and gaine.”⁷⁰ The interests served were those of the colonized rather than the colonizer. The idea that colonization was undertaken for the benefit of the colonized was a standard claim of seventeenth and eighteenth century empires.

Sir William Blackstone cast a skeptical eye over that history when he observed:

But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenceless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in colour; how far such a conduct was consonant to nature, to reason, or to christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.⁷¹

Blackstone was writing at a time, just after the Seven Years’ War and more than one hundred and fifty years after Robert Gray, when skepticism of European empires and the wars they generated was high. Nevertheless, the civilizing mission, undertaken to further the interests of non-European peoples, had not even reached its peak. That came in the second half of the nineteenth century in the so-called “scramble for Africa” and in Western states’ extension of extraterritorial powers over large parts of the globe. In July 1885, Jules Ferry declared in the French chamber of deputies: “the superior races have a right because they have a duty. They have a duty to civilise the inferior races.”⁷²

This civilizing mission was embraced by many international lawyers, even those who shared some of Blackstone’s concerns about its unintended consequences. While many jurists understood that humanitarian sentiments had been used to justify plunder, appropriation, and massacres in the past,

68 GRAY, *supra* note 43, at [C4]v.

69 *Id.* at [C4]r-[C4]v.

70 *Id.* at [C4]v.

71 2 WILLIAM BLACKSTONE, *THE COMMENTARIES ON THE LAWS OF ENGLAND* 7 (1765-1769).

72 Jules Ferry, *Speech Given Before the House of Representatives* (July 28, 1885), *printed in* 5 *DISCOURS ET OPINIONS DE JULES FERRY* [*DISCOURSES AND OPINIONS OF JULES FERRY*] 210 (Paul Robiquet ed., Armand Colin & Cie 1897).

they believed that they had learned from those mistakes and were inaugurating an epoch of liberal intervention. Robert Joseph Phillimore, Admiralty Court judge and probably Britain's most senior international lawyer in the 1870s and 1880s, conceded that even Britain "is not without her share of the guilt in forcibly dispossessing and exterminating unoffending inhabitants of countries with whom she had no just cause of war."⁷³ But at the same time, he was in no doubt that "the cultivation of the soil is an obligation imposed upon man."⁷⁴ He insisted the "practice of nations in both hemispheres . . . is in favour of any civilized nation making settlement of an uncivilized country."⁷⁵ Similarly, Phillimore's Scottish contemporary, James Lorimer, Regius Professor of Public Law and the Law of Nature and Nations at the University of Edinburgh, was strongly in agreement on this question. Lorimer argued that Europeans were bound by an obligation of "guardianship" to races who suffered from "nonage" or imbecility.⁷⁶

In France, Frantz Despagnet echoed anxieties about the injustices inflicted by the pursuit of others' interests, claiming that "the true end of the occupation of territories is the enrichment of the strong to the detriment of the weak."⁷⁷ The "pretended right to spread civilisation" had been used to "despoil savage peoples of their sovereignty."⁷⁸ "We know," he said, "with what casualness the powers have treated . . . the rights of indigenous peoples: neither their institutions, their property, their goods, nor, most of all, has their sovereignty as states been respected."⁷⁹ He continued: "publicists, in favour of respect for their right of sovereignty, such as Francisco de Vitoria, Dominique de Soto, Diego Covarrubias and Francisco Suarez were without effect in stopping the monstrous abuses of force against the weakest races."⁸⁰ This "lamentable history" was well known, he observed, and it would seem "that the series of horrors observed in the past have not completely ended."⁸¹ He concluded, therefore, that the "propaganda of civilisation" could only justify the nourishment of pacific relations with barbarian countries, including the right of communication

73 ROBERT JOSEPH PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW 210 (Butterworths 1854-1861).

74 *Id.* at 209.

75 *Id.*

76 1 JAMES LORIMER, THE INSTITUTES OF THE LAW OF NATIONS 157 (William Blackwood & Sons 1884).

77 FRANTS DESPAGNET, COURS DE DROIT INTERNATIONAL PUBLIC 433 (Larose & Forcel, 2d ed. 1899).

78 *Id.*

79 FRANTZ DESPAGNET, ESSAI SUR LES PROTECTORATS 241 (Larose & Forcel 1896).

80 *Id.* at 242.

81 *Id.*

and trade.⁸² “An absolute respect,” he declared, “was due to all sovereignty, even barbarian.”⁸³ Despagnet’s absolute respect for sovereignty meant that any peoples who were not perceived to live in sovereign political systems could have the sovereignty of their territory occupied, albeit not their property. We can, he argued,

consider as susceptible to occupation a land inhabited by groups without appreciable political organisation, who don’t even have a conception of sovereignty and who cannot, as a consequence, make a claim to that right. We can, in the same manner, recognise a right of property or at least an anterior possession, but of sovereignty there is no question.⁸⁴

It was on these principles that in his later work on the diplomacy of the French Third Republic, Despagnet argued forcefully to justify French occupations, or “protectorates,” in Africa, including Tunisia and Brazza’s civilizing mission in the Congo.⁸⁵ Like Philimore, despite his warnings and his strong consciousness of the miserable history of European interventions in the interests of non-European peoples, Despagnet was able to justify further actions taken in the name of an obligation to others, for example in the Congo, that would come at a terrible human cost.

The context for Despagnet’s observations was the Berlin Conference of 1884-1885, also known as the Congo Conference (although it was concerned with rules governing imperial occupation around the globe). From December 1884 through to February 1885, ambassadors and other representatives of the great powers met in conference in Berlin, at the invitation of Prince Bismarck, to debate the future of Africa, the principles of occupation, and the destiny of European empires more generally. One of the principal stated aims of that conference was to take the interests of non-European peoples into account. Indeed, the General Act of Berlin Conference, signed by the plenipotentiaries on February 26, 1885, declared that the aim of the conference was to discover “the means of furthering the moral and material well-being of the native populations [of Africa].”⁸⁶ This objective included a *Declaration Relative to*

82 DESPAGNET, *supra* note 77, at 434.

83 *Id.*

84 *Id.*

85 See DESPAGNET, *LA DIPLOMATIE DA LA TROISIÈME RÉPUBLIQUE* [THE DIPLOMACY OF THE THIRD REPUBLIC] (1904); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS* 272-73 (2001).

86 Henry Wellington Wack, *General Act of the Berlin Conference, in THE STORY OF THE CONGO FREE STATE* 531 (1905).

the Slave Trade, which forbade the trade of slaves in Africa “in conformity with the principles of international law.”⁸⁷

According to the delegates at the conference, one of the reasons why the slave trade continued to flourish in Africa in the second half of the nineteenth century was that the Congo Basin was a semi-anarchic territory, void of effective sovereignty.⁸⁸ A further cause for concern to the Powers was that this supposedly anarchical state left the traders of different nations operating in the Congo in a situation where conflicts easily arose and could not easily be adjudicated. In the years leading up to the conference, the eminent British jurist Travers Twiss argued in the *Law Magazine and Review* that while the tribes of the Congo exercised a form of sovereignty comparable with the personal sovereignty of medieval European princes, the territory lacked any form of territorial sovereignty characteristic of a modern state: “The organisation of the native races on the banks of the Congo is still *tribal*, and *territorial* Sovereignty in the sense in which it has superseded *personal* Sovereignty in Europe, is still unknown.”⁸⁹ According to Twiss, it was possible for the Europeans to occupy such vacuums in territorial sovereignty, while bringing the benefits of order to the inhabitants of those territories, without violating the existing rights of property and personal sovereignty. Such territories, Twiss argued, using a term he imported from ecclesiastical law into international law, were “*nullius territorium*” or “*territorium nullius*.” In the debates amongst jurists in the *Institut de droit international* concerning the principles established at the Berlin Conference, the term *territorium nullius* came to be used to describe peoples who lacked a form of territorial sovereignty (to be distinguished from the later use of “*terra nullius*” to describe the absence of property as well as sovereignty, and also to be distinguished from the term “*res nullius*” in civil law).⁹⁰

87 *Declaration Relative to the Slave Trade*, in THE STORY OF THE CONGO FREE STATE, *supra* note 86, at 531, 535.

88 See FITZMAURICE, *supra* note 16, ch. 9.

89 TRAVERS TWISS, AN INTERNATIONAL PROTECTORATE OF THE CONGO RIVER 17 (1883), reprinted in Travers Twiss, *An International Protectorate of the Congo River*, 250 LAW MAG. & REV. 1 (1883); see also Travers Twiss, *La libre navigation du Congo* [*The Free Navigation of the Congo River*], 15 REVUE DE DROIT INTERNATIONAL [REV. INT’L L.] 437 (1883); Travers Twiss, *La libre navigation du Congo. Deuxième article* [*The Free Navigation of the Congo River. Second Article*], 15 REVUE DE DROIT INTERNATIONAL [REV. INT’L L.] 547 (1883).

90 EDOUARD ENGLEHARDT, ETUDE SUR LA DÉCLARATION DE LA CONFÉRENCE DE BERLIN RELATIVE AUX OCCUPATIONS AFRICAINES SUIVIE D’UN PROJET DE DÉCLARATION GÉNÉRALE SUR LES OCCUPATIONS EN PAYS SAUVAGES [STUDY OF THE DECLARATION OF THE BERLIN CONFERENCE CONCERNING AFRICAN OCCUPATION FOLLOWING A PROJECT FOR A GENERAL

Although it was not publicly acknowledged or stated in his publications, Twiss was working for King Leopold II of Belgium on the elevation of Leopold's International Association of the Congo to recognition as a state in international law. Leopold and Twiss would achieve this objective at the Berlin Conference, which Twiss attended with the British delegation, even as he wrote the constitution of the Congo Free State.⁹¹ Leopold's Congo Free State certainly curtailed the slave *trade* in the Congo Basin even as it effectively enslaved and decimated the population of the territories at a cost in lives estimated at several millions. The idea of *territorium nullius* flourished while protectorates continued to be employed as instruments of the civilizing mission, but it almost vanished from international law in the period following decolonization. The history of the idea of *territorium nullius* serves as a reminder of how the codification in international law of conventions enabling states to take the interests of others into account can have devastating consequences, sometimes unintended.

CONCLUSION

When modern European empires declined in the twentieth century, the arguments of human fellowship, self-preservation and the protection of others were translated to the new international order, along with much of the vocabulary of Western political thought, including the understandings of sovereignty, property and international law itself.⁹² That transformation should give us cause to be optimistic about the malleability of political ideas. It suggests that we are not prisoners of our intellectual landscape, that political concepts can be turned to different ends. Many contemporary scholars of the history of international law, and historians and social scientists more generally, argue that the instruments of Western political and legal thought cannot easily

DECLARATION OF OCCUPATION IN SAVAGE COUNTRIES] (Bruxelles 1887); Ferdinand Martitz, *Occupation des territoires: Rapport et projet de résolutions présentés à l'Institut de droit international* [*Occupation of Territory: Report of the Project and Resolutions Presented at the Institute of International Law*], 19 REVUE DE DROIT INTERNATIONAL [REV. INT'L L.] 373 (1887); see also FITZMAURICE, *supra* note 16, ch. 9.

91 Andrew Fitzmaurice, *Liberalism and Empire in Nineteenth Century International Law*, 117 AM. HIST. REV. 122 (2012).

92 I say "much of" because certain political vocabularies specific to empire, such as the vocabulary of occupation, including *territorium nullius*, were significantly diminished in the postcolonial political environment. See FITZMAURICE, *supra* note 16.

transcend the historical circumstances of their emergence.⁹³ Given that those conditions include the use of those tools over centuries to justify European empire, expansion and hegemony, these scholars speculate on whether the ties are not merely accidental but causal. In light of the history of arguments concerning a common humanity, self-preservation and consideration of the interests of others, it is hard to conclude otherwise.

Nevertheless, the conventions of political thought, I would argue, are just tools: the conditions of their production should not determine the ends to which they are put. They certainly should be capable of being transported into different historical circumstances albeit while changing their meaning at the same time. Such conventions are not, that is, trans-historical unit ideas of the kind that A.O Lovejoy believed should be the subject of the history of ideas.⁹⁴ Sometimes changes in the conventions of political thought are subtle and difficult to identify, so that it may look like we are dealing with the same thing. Nevertheless, what is true of material tools should be true of abstract tools. We do not regard with the same suspicion the ideological baggage of material tools transferred between cultures, whether that would be gunpowder, paper, or antibiotics. There is often a failure in what might be called the postcolonial scholarship on political thought to recognize that changes in the context of the terms of political discourse will lead to changes in the meaning of those terms.

The problem is not, as many such historians have argued, the degree to which political languages are extricable from their contexts; it is, rather, one of knowing which contexts we are looking at. The circumstances of the return of sovereign trusteeship and the responsibility to protect can be interpreted in contrasting ways. One account of the “turn to protection” ties it to a post-Cold War international order reacting against liberal economic ideas.⁹⁵ From this perspective, the responsibility to protect is a rejection of the idea that international institutions should be indifferent to questions of representation and an attempt to harness the authority that those organizations have exercised in

93 For international law, see ANGHIE, *supra* note 9. For Western political thought, see, for example, MEHTA, *supra* note 45; TUCK, *supra* note 24; JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN THE AGE OF DIVERSITY* (1995); WILLIAMS, *supra* note 9; and B. Parekh, *Liberalism and Colonialism: A Critique of Locke and Mill*, in *THE DECOLONIZATION OF THE IMAGINATION: CULTURE, KNOWLEDGE AND POWER* 81 (J.N. Pieterse & B. Parekh eds., 1995).

94 On Lovejoy and unit ideas, see QUENTIN SKINNER, *VISIONS OF POLITICS: REGARDING METHOD* 83 (2002).

95 ORFORD, *supra* note 1.

the decolonized world.⁹⁶ At the same time, many recent appeals to trusteeship address problems concerning the sharing of resources and the environment which cannot be resolved with an atomized view of state sovereignty.⁹⁷ With the return, however, in recent times to what many scholars believe is a new period of, if not empire, at least hegemony, domination and dependence in international relations, it is important to recall the strong historical ties to expansionism of the central ideas underpinning sovereign trusteeship.⁹⁸ History does not determine how concepts can be used, but it does provide us with an understanding of what may be possible. The “turn” to sovereign trusteeship can be interpreted either in terms of a new and more positive view of international relations, or in terms of the projection of sovereignty and the resurgence of empire, or both.

The key question is how we can tell which it is. As the examples given above show, we cannot know from the simple statement of a concept, such as trusteeship, protection, or rights, what the meaning of that concept is. One of the most striking characteristics of this political vocabulary, as I have attempted to show, is that its terms are susceptible to rhetorical manipulation. To understand what is meant by the utterance of those terms in a particular case, we need to examine them in their contexts. Only from context can we understand what somebody is doing in appealing to a particular concept. In a recent article, Anne Orford has criticized the so-called Cambridge school of the history of political thought and defended anachronism.⁹⁹ She argues that

96 Anne Orford, *Global Responsibility to Protect? The Legal Significance of the Responsibility to Protect Concept*, 3 GLOBAL RESP. PROTECT 400 (2011).

97 Benvenisti, *supra* note 1, at 331.

98 On the perceived return to empire, see ANGHIE, *supra* note 9, at 292; LESSONS OF EMPIRE: IMPERIAL HISTORIES AND AMERICAN POWER (C.J. Calhoun, Frederick Cooper & K.W. Moore eds., 2006); and Jennifer Pitts, *Political Theory of Empire and Imperialism*, 13 ANN. REV. POL. SCI. 211 (2010).

99 Anne Orford, *On International Legal Method*, 1 LONDON REV. INT'L L. 166, 170-77 (2013). Orford is responding to critiques of anachronism in the history of international law. See, e.g., Georg Cavallar, *Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?*, 10 J. HIST. INT'L L. 181 (2008); Ian Hunter, *The Figure of Man and the Territorialisation of Justice in “Enlightenment” Natural Law: Pufendorf and Vattel*, 23 INTELL. HIST. REV. 289, (2012); Randall Lesaffer, *International Law and Its History: The Story of an Unrequited Love*, in TIME, HISTORY AND INTERNATIONAL LAW 27 (M. Craven, M. Fitzmaurice & M. Vogiatzi eds., 2007). These critiques draw upon the methodology outlined in Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 HIST. & THEORY 3 (1969).

“legal scholarship is necessarily anachronistic” because it is concerned with the operation of past concepts in the present.¹⁰⁰ The concern with anachronism in contextualist methodology, which is prominent in the “Cambridge School” methodology, is based upon a Wittgensteinian theory of the creation of meaning.¹⁰¹ Orford argues that international law, by contrast, must also be concerned with the “movement of meaning” over time.¹⁰²

However, problems of time are not the only reason why we need to understand concepts in context. Above all, meaning is created by the operation of terms within particular linguistic fields. If we ignore those linguistic contexts, it becomes possible not only to impose meanings from other times, but also to impose alternative meanings that could belong to the same time. Thus the meanings of fellowship, self-preservation, and protection differ radically between situations in which they are used to understand relations between sovereigns and subjects in the context of the state, on the one hand, and between sovereigns and non-state subjects, on the other.¹⁰³ In other words, when a concept is not understood in terms of what its utterance is doing in context, its meaning becomes susceptible to rhetorical manipulation. Such manipulation should be a concern not only to historians but also from the perspectives of law or politics. Sovereign trusteeship and the responsibility to protect are good examples of terms that are easily rhetorically manipulated. If we abandon contextualism, we open ourselves to the danger that sovereigns may, for example, hide expansionist politics behind claims to protect the rights of others without being subject to critical scrutiny. Understanding the history of the imperial context of the arguments of human fellowship, self-preservation and the protection of others should at least alert us to the possible manipulation of those concepts to justify expansionism.¹⁰⁴

100 Orford, *supra* note 99, at 175.

101 See Skinner, *supra* note 99.

102 Orford, *supra* note 99, at 175.

103 As the complex history of European expansion reveals, however, for example in the cases of eighteenth century British America or mid-twentieth century Algeria, who is to say when a subject belongs to the state or to an empire? For citizenship in pre-independence Algeria, see SALIHA BELMESSOUS, *ASSIMILATION AND EMPIRE* (2013).

104 See ANGHIE, *supra* note 9, at 320 for a similar argument.

