POPULAR WILL AND INTERNATIONAL LAW: THE EXPANSION OF CAPITALISM, THE QUESTION OF LEGITIMATE AUTHORITY, AND THE UNIVERSALISATION OF THE NATION-STATE

By

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Declaration

I declare that this thesis has been submitted to the University of Kent for the degree of PhD and has not been submitted in any capacity for any other degree or certification. I similarly declare that all work appearing in this thesis is my own unless otherwise explicitly stated through reference or acknowledgement.

Acknowledgments

If this acknowledgements section were truly accurate it would be longer than the thesis itself. Yet, given the limits of space, the price of official binding, and my general state of post-final draft exhaustion, I have not included everyone who is deserving of inclusion. I have every confidence that those unlisted by name know who they are.

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Abstract

The idea of 'popular will', or a people's ability to freely choose its preferred mode of political authority over any outside objection, forms the basis for domestic authority under international law. Such an outcome is the conclusion of consistently adhering to international law's presumptions of sovereign equality and nonintervention most iconically encapsulated in the Charter of the United Nations. However, while popular will theoretically allows the people of a sovereign state to pursue any governmental system, applying a methodology I deem 'world-historical context' reveals the limits of what can be substantively attained.

Formed as an interdisciplinary synthesis of critical international legal history and the historical sociology of international relations, my analysis reveals how the globalization of popular will, and its vesting of sovereignty in the abstraction of a territory's underlying political community as opposed to the person of a dynastic monarch, is inseparable from the expansion of capitalism. On this basis, the material success of achieving popular will depends on the degree to which it facilitates global capitalism. The construction of this arrangement places radical political leaders and movements in a dilemma whereby claiming popular will is the only means of gaining international legal recognition, yet doing so comes at the expense of pursuing experimental alternatives to capitalist social relations.

In this situation, 'effective control' has emerged as the default 'non-ideological' standard for externally evaluating international legal standing when competing domestic factions are claiming sovereign authority and, therefore, the representation of popular will. In working from this premise that *de facto* 'effective control' is generally sufficient evidence of 'popular will', I historicize this framework as first appearing as a natural law counterfactual in Emer de Vattel's 1758 treatise The Law of Nations. Given the contradictions that emerged with capitalism and the crises of legitimate authority it produced in the late eighteenth and early nineteenth centuries, the world proved highly receptive to Vattel's framework. This manifested, in compounding measures, through the American Revolution, French Revolution, and formation of the modern European states-system, and the independence of Latin

American states. While these formative eruptions of popular will were subject to a century of limitation and qualification through various legal regimes of colonialism and exclusion, the idea of a global legal order of absolute sovereigns representing popular will returned with the end of the Second World War and rise of the UN system. Yet, despite this achievement of a ‘world of popular will’, the marginalization of alternative political economic models persists. Attempt to identify the place of international law when developing greater projects of popular emancipation cannot, therefore, ignore the ‘world-historical context’ presented by this thesis.

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INTRODUCTION

Popular Will, International Law, and World-Historical Context

1. Why Popular Will?

In this thesis, I present a critique of 'popular will', defined as the location of sovereign authority in the abstraction of 'the people', as opposed to any physical human person, dynastic lineage, or otherworldly force. Broadly stated, while popular will (also known as 'popular sovereignty' or 'self-determination'[1]) is typically portrayed as a timeless *enabler* of political possibility, I argue that it is better understood as a historically contingent *constraint* on political possibility. Adopting a materialist lens, my analysis accounts for why popular will attained its status as the sole basis for domestic authority under international law. Detailing this process reveals numerous interconnections regarding the character of legal thought, the conditions of political expression, the particular features of the nation-state, and the expansionist reproduction of capitalism as a distinct mode of social relations. In sum, the belief in popular will as transcendent normative presumption amounts to an ideological cover for the fact that, at a material level, it is a tangled mass of historically-compounded contradictions upholding a deeply unequal global order. Exposing these dynamics is a vital step for those working to achieve popular will's underlying emancipatory promises in the actually-existing world.

In setting the stage for the thesis, Part 2 of this Introduction situates my argument within critical international legal discourse regarding the questionable division between the 'domestic' and the 'international.' Part 3 then examines the contemporary

[1] As a matter of terminology, due to the technical meanings attached to the terms 'sovereignty' and 'self-determination' within international legal discourse, unless otherwise noted, the term 'popular will' describes authority rooted in the people as a general phenomenon.

presumptions of the popular will-international law relationship as they are embodied in a phenomenon deemed the 'effective control doctrine.' Following this, Part 4 turns to the issue of methodology where I outline my synthesis of historical sociology, as developed within the field of international relations, and the unique international legal view of the past deemed 'juridical thinking.' Finally, Part 5 maps out the subsequent unfolding of my chapters.

2. Whose International, Whose Domestic?

While the relationship between popular will and international law must be carefully deconstructed, I first situate my argument through a critical evaluation of the foundational premise that 'the domestic' and 'the international' are separate and distinct spheres of authority.[2] Traditionally understood, popular will was the sole province of the domestic sphere that, in its current form, is encapsulated in the sovereign state.[3] Conversely, the international sphere is empowered and conditioned solely by the consent of these individual sovereign states. On this basis, international lawyers rarely need to confront popular will at all.[4] When this need does arise, popular will, as an international legal ideal, acts as a fundamentally empty concept whose

[2] Such an ontology of the 'domestic' versus the 'international' is easy to conflate with a timeless narrative of the 'inner' versus the 'outer.' According to one prominent philosopher of history, '[n]o unit of human social activity ever comes into being without the ability to delimit itself inwardly and outwardly.' Koselleck 1989, 651.

[3] According to the influential account of Martin Wight, while legal and political theory allows use to conceptualise the good life within the boundaries of a domestic polity, the same type of normative imagination cannot apply to the international. On this basis, '[i]nternational theory is the theory of survival.' Wight 1960, 48.

[4] Most frequently, theoretical discourse on the relationship between the 'international' and the 'domestic' in international law revolves around the 'dualism' versus 'monism' debate where the former views international and domestic law as separate systems, while the latter views them as a singular system. For studies, see e.g. Starke 1936; O'Connell 1960; Slaughter and Burke-White 2006. However, this analysis is fundamentally limited if we consider popular will as the expression of the sovereign political community that is not beholden to any particular domestic legal system and can change it for any reason and by any means, see Roth 2015a, 217.

substantive content can only be filled by domestic political communities unaccountable to outsiders within their bounded spheres of authority.[5] Thus, so long as a domestic order is not the product of external coercion, it is presumably justified by internal popular will. So long as popular will is present, the ability of a sovereign political community to choose its system of government is presumptively unlimited.

However, according to the standard narrative, in the first half of the twentieth century, increased international interdependence required a greater delegation of national authority to supranational institutions, even though this limited the sovereign autonomy of individual states.[6] While limiting sovereignty arguably undermines popular will, it could also be argued that this 'move to institutions' was needed to uphold the national popular will that would otherwise be suppressed by the harshness of unconstrained interstate rivalry.[7] From this premise, there emerges a dichotomy between traditional and progressive arguments; each can support the foundational premise of popular will, while leaving the base level domestic-international binary largely intact.[8]

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[5] Perhaps the single most iconic encapsulation of this sentiment was presented in General Assembly Resolution 2625's pronouncement that: 'Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.' *Friendly Relations Declaration* 1970.

[6] For an influentially account of how this post-First World War 'move to institutions' as a means of qualifying state sovereignty in the name of international order, see Kennedy 1987.

[7] According to one formulation of how international competition diminished the possibilities of domestic political expression: 'If a nation must put itself upon a totalitarian basis in order to fight a war, it must for that purpose surrender many of its purposes and beliefs; and if war is to continue in the world, then nations must remain upon a totalitarian basis in order to be prepared for the next war.' Eagleton 1942, 232.

[8] This speaks to a tendency within international legal thinking where the prospect of change has the effect of solidifying the background structures tasked with accommodating this change. This was readily apparent in James Crawford's 2000 reflection on the question of whether, and to what extent, the imperative of democratization was changing international law. For Crawford, '[t]he difficulty is to envision appropriate forms of change, and at the same time to hold to those aspects of international law which embody the stable outcomes of the interaction between peoples, societies, and their governments over many years.' Crawford 2000, 113.

One of the most important innovations within critical international legal scholarship over past two decades has involved questioning standard views of the domestic-international relationship. This has been applied to both progressive and traditionalist sensibilities. Regarding the critique of the progressive accounts, a landmark text is Susan Marks's *The Riddle of All Constitutions*. Here, Marks mobilizes the Marxian tradition's tools of ideology critique to evaluate post-Cold War claims that international law was capable of rectifying domestic deficiencies by promoting liberal democratic governance as the sole legitimate measure of popular will.[9] Through this analysis, Marks shows how, despite the genuine optimism it elicited, 'democracy' in this context was both 'low-intensity' in its reduction of political participation to periodic elections between substantial similar factions, and 'pan-national' in its fixation on state-centric agency and blindness to the ways international/transnational forces shape democratic possibilities.[10] Thus, rather than supporting domestic systems in their quests for democratic expression, international legalism actively constrained the consciousness of what democracy can be.[11] As such, *Riddle* delivered a serious blow to progressive accounts of a virtuous 'international' aiding a distressed 'domestic' in the advancement of popular will.[12]

Regarding the critique of traditional accounts of the domestic-international relationship (and its situating of popular will), international law's 'turn to history' provides a vast array of alternative framings. While diverse in its manifestations, a key

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[9] Marks 2000, 30-33.

[10] Ibid. 60-61, 83.

[11] Ibid. 149.

[12] In subsequent work, Marks confronts the discourse of 'state-centrism' in international law and shows how attempts to transcend the former's pathology through the latter's virtue reveals their foundational co-constitution. As a result, 'when we treat international law as a redemptive force that could save the world if only it were properly respected and enforced, we obscure the possibility that international legal norms may themselves have contributed to creating or sustaining the ills from which we are now to be saved.' Marks 2006, 347.

feature of this 'turn' has been exposing how international law's stated mission of creating a just order amongst states is inseparable from its historical facilitation of the colonial domination by a Western 'family of nations' at the expense of all other peoples.[13] Vitally, this 'turn' has included wide-ranging narratives from the Third World Approaches to International Law (TWAIL) movement, especially Antony Anghie's 2004 *Imperialism, Sovereignty, and the Making of International Law*, that situate international law from the perspective of its marginalized and, consequently, dispense with any notion that popular will was historically connected to universal equality.[14] This history seriously complicates the reigning ontology of the 'domestic'/'international' binary through its refashioning of the 'international' into a complex interplay of equality amongst some and hierarchy amongst others. Here, in the name of transcendent standards, hierarchically differentiated localities (and their expressions of popular will) were subject to radically disparate sets of rules.[15] Thus, as Luis Eslava and Sundhya Pahuja have recently shown, the current equality-based order of sovereign states presumed by international law is the compounded legacy

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[13] Important illustrations of this turn include Martti Koskenniemi's *The Gentle Civilizer of Nations* (2001) as well as Gerry Simpson's *Great Powers and Outlaw States* (2004). Moreover, it should be noted that, in a relatively short amount of time, this acknowledgment of colonial origins and legacies has become a staple of mainstream knowledge in the field as demonstrated by its inclusion in prominent textbooks and handbooks, Kendall 2016, 623. For an important account of colonial history's exclusion from narratives of international legal origins 'properly understood', see Kennedy 1996.

[14] Anghie 2004. On this point, a major recent compilation of TWAIL scholarship makes the case that if we wish to truly locate the first moment where sovereign aspirations within the international system were imagined as truly universal and anti-hierarchical, our attention must turn to the 1955 Bandung Conference that formed the first summit of newly independent Asian and African states. Eslava, Fakhri, and Nessiah 2017, 15-17.

[15] According to Edward Keene's account, the origins of the modern international system is broadly conceivable as 'Two Patterns of World Order.' Within the first pattern, sovereignty was indivisible and only states, as opposed to individuals, were rights-holders at the international level. This was the foundation of the anarchic, sovereign equality-based international order. Within the second patter, sovereignty was divisible and individuals possessed rights (especially property rights) were recognized at the international level. This was the foundation of the colonial, hierarchy-based international order. Despite centuries of diverging development, the two patterns merged in the twentieth century, and many ongoing issues throughout the world can be understood as the legacy of this divergence, Keene 2002, 143-144.

of colonization and unequal encounter.[16] Here, the 'international' fashioned the boundaries of the 'domestic' just as much as the multiplicity of 'domestic' orders gave rise to an overarching 'international.'[17]

When expanding critical consciousness of popular will's place against the backdrop of a questionable domestic-international binary, the materialist critique of progress narratives and the historicist critique of traditional narratives are in no way mutually exclusive. Recently, Rose Parfitt's *The Process of International Legal Reproduction* has masterfully demonstrated the imperative of linking these discourses.[18] According to Parfitt, in the historical ideal of international legal personality, a hierarchical understanding of individuals shaped a hierarchy between sovereign states and non-sovereign colonies. Here free and equal individuals were contrasted against slaves and natives, and only collective systems that matched the ideal of the first category could be uncontestably recognised as sovereign, while all others could be legitimately colonised (i.e. subject to domination analogous to that visited upon slaves and natives).[19] On this basis, the success of an appeal to existing sovereigns as an equal was largely determined by the adoption of a legal system premised on

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[16] Eslava and Pahuja forthcoming. This critical reading of the state can be located in the larger projects of both Eslava and Pahuja. For Eslava, this has been an effort to imagine international law 'from the bottom' by accounting for the impact of global-level implementations on everyday life, Eslava 2015. For Pahuja, this has taken the form of examining how international legal projects that embody emancipatory hope are susceptible to being co-opted across a broad variety of contexts, Pahuja 2011.

[17] According to a recent formulation by Adom Getachew, the evolutionary process of international society should be understood not as a system of 'exclusion', but rather one of unequal inclusion. Thus many of those who resisted this process deeply recognized this quality and, as such, were not seeking 'inclusion' within this this order, but rather non-domination in the face of it. Getachew 2019.

[18] Parfitt 2019.

[19] Each of these human categories was imbricated within a larger system of capitalist social relations: the free and equal individuals provided the grounding for a system premised on formal market-based exchanges, the slaves could be commodities within these exchanges, and the rights of natives that were largely conditioned by their ability to facilitate the interests of their colonisers (for example the right to alienate their lands). In this way, a hierarchical view of the individual mediated the contrast between a 'state' and a 'colony.' Ibid. 91.

capitalism-facilitating individual rights.[20] As a legacy of this history, the test for inclusion is the presence of a 'government' that 'effectively' guarantees the operation of a legal system that protects the equal rights of outsiders holding property and conducting commercial activity within the state's jurisdiction.[21]

Thus, in addition to the suppression of traditional practices necessitated by recognition-enabling reforms, the attempt to use sovereign discretion to rectify local social ills is subordinated to fulfilling the conditions of external inclusion.[22] In this way, the validation of sovereign equality (and its promise of the unimpeded pursuit of popular will) is conditioned upon the internalization of hierarchical mechanisms that are hostile to the pursuit of substantive equality as a legitimate political end.[23] In sum, historical experience and ongoing practices reveal that the purpose of the 'international' is to reproduce formally equal 'domestic' entities of a very specific type that are limited in their ability to contest substantive inequalities both within and between nations. Ironically, it is the false promise of progressively escaping inequality that motivates the ideological internalizations essential to maintaining this process.

Building upon this premise that international law is a unique and indispensable attribute of capitalist social relations; there is great promise in an account that centrally situates popular will within this 'process of international legal reproduction.'

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[20] Ibid. 85.

[21] For a contextual discussion on 'effectiveness' within the international legal doctrine, namely the 1928 *Island of Palmas Case*, see Ibid. 87-90.

[22] For a contrast of the rights international law has and has not prioritized in the context of state creation, see Ibid. 7.

[23] In anticipating critiques of her 'international legal reproduction' theory, Parfitt notes that the twentieth century witnessed a range of state births, particularly in the postwar context of decolonisation, where the traditional 'effective' government criteria scarcely applied. However, this receding of the 'effectiveness' requirement was quickly followed a range of sovereignty-qualifying innovations (namely structural adjustment, 'earned sovereignty', and the responsibility to protect) often directed at former colonies, Ibid. 392-397.

Beyond the 'domestic' and 'international', as this thesis shows, popular will helps to organize numerous other capitalism-constituting binaries including the 'public/private', the 'political/economic', and the 'legal/extra-legal.'[24] In exposing its place within this reproductive process, my analysis is important given that popular will is a concept without a definitive history. While it is unsurprising that international lawyers have not taken up this task, it is surprising that political theorists and historians of political thought who are far less equipped to avoid the centrality of popular will share this trepidation. Highlighting this paradoxical dearth in a recent collection on historical manifestations of popular will, Richard Bourke states in the opening line of the Introduction that: 'Popular sovereignty is a key component of modern political thinking, yet a history of this concept has not previously been attempted.'[25] In light of this absence, while this thesis in no way purports to be the missing definitive history of popular will, it may very be one of the most comprehensive historicizations attempted thus far.

Embarking upon this inquiry entails clarifying which methodologies and subject choices are suited to this task. While methodological justification is necessary for all foundational concepts (especially uncharted ones), popular will's status as a discourse of normative contestation adds an additional layer of complexity. On this point, whatever role popular will may have in the shaping of the global order, it is most renowned as a basis for condemning external predation (expressed in interna-

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[24] While the 'public/private' distinction, in one form or another, dates back to antiquity (for a genealogical study reaching back to these origins, see Agamben 2011), unless otherwise specified, my deployment of this dichotomy centres on the way it was absorbed into capitalist social relations whereby the 'public' was attached to the abstracted sovereignty of the modern state while the 'private' became attached to the interests constituting economic production and exchange. For more on how this understanding informs by methodological understanding of the relationship between popular will and international law as indicative of capitalist social relations, see Introduction, Part 4.2.1.

[25] Bourke 2016, 1.

tional discourse through assertions of sovereign equality and non-intervention), typically by small states against powerful ones.[26] However, just because popular will has proven able to confront one form of injustice, we should be sceptical of its ability to confront all, or even most, forms of injustice. For instance, extending the international legal condemnation of military and political intervention in the name of popular will to include unequal mechanisms of distribution is not an obvious conclusion.[27] After all, the international legal order that has banned war, condemns colonial rule, and declares self-determination a fundamental human right is the same international legal order where, according to Oxfam's latest report, the world's twenty-six wealthiest individuals are able to maintain as much wealth as its poorest 3.8 billion.[28] To what extent is the international legal construction of popular will, despite its emancipatory connotations, not only failing to prevent this outcome, but also actively enabling it?[29]

Given this rejection of popular will as discourse of limitless normative possibility, its contradictions can be viewed through the lens of 'false contingency' that, according to Marks, '…considers phenomena not in discrete, monadic or free-floating terms…but relationally, as elements within larger social systems.'[30] Since popular will has become so ubiquitous, analysis of the temporal and spatial scope of the

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[26] On this basis, it can be said that by continually affirming sovereignty as anathema to intervention, the new states born out of Afro-Asian decolonisation were forcing old states to develop new mechanism of international law given that it was no longer legitimate to rely on old mechanisms (i.e. forcible intervention in the name of 'self-help') when guaranteeing interests and obligations, see Anand 1962, 383-406.

[27] According to one in-depth doctrinal account, while it might be highly desirable, in the actually-existing international legal order there exists no fundamental right of a state to be free of economic coercion. Tzanakopoulos 2015.

[28] Elliot 2019.

[29] As will be discussed below, while effectiveness typically is its own source of legitimacy in the domain of political expression under international law, this same prioritization of effectiveness over legitimacy renders international law deeply complicit in the production of global poverty, Beckett 2016, 990.

[30] Marks 2009a, 15.

'larger social systems' that shape its contingencies must be corresponding vast enough to include, in the words of Parfitt:

> ….the transformation of the world from an expanse of land and sea inhabited by many different species, of which humans (organized in a huge variety of ways) were only one, into an 'international community' of 'sovereign states' dedicated to subordinating the needs of the majority of humans and non-human species to the needs and desires of a small minority of humans.[31]

In capturing this scale and depth of this orientation, I deem my approach to be one of 'world-historical context.'

By conceptualizing popular will against this backdrop, we are well-positioned to uncover the material conditions that shape its successes, failures, and transformations beyond the intentions of those invoking it. Such a grounding is especially important when considering how the very flexibility that allows popular will to express so many different political desires also renders it particularly susceptible to being co-opted.[32] This enables a vantage point where popular will is simultaneously

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[31] Parfitt 2019, 391.

[32] To provide just one example here, there was the attempt by Asian, African, and Latin American states to reorder the global economy as a means of overcoming their structural disadvantage through a New International Economic Order (NIEO) in the 1970s. While this was an attempt to achieve 'economic self-determination' as a necessarily corollary to 'political self-determination', the NIEO project was derailed in a manner that preserved its ethical critique while neutralizing its political challenge. As Getachew has shown, the NIEO's focus on inequality between nations led many to chastise it as a failure to acknowledge the problem of inequality within nations. The response by Western scholars was a liberal philosophical discourse whereby poverty was understood in terms of absolute deprivation and policies were justified by their ability to improve the 'worst off' as measured on a global scale. This helped to legitimize 'technical' policy solutions that sought to manage such issues in a manner removed from the realm of political contestation, Getachew 2019, 173-175. For an account of how these discourses are intertwined with the understandings of international human rights in a way that contributes to diverting attention away from international law's complicity in sustaining deprivation and inequality by virtue of its intended operation, see Marks 2009b; see also Beckett 2016, 998-1008. For an assertion that the mainstreams theories of global justice that

the ability to translate localized assertions into matters of universal significance *and* the multiple mechanisms of co-optation these assertions are exposed to through this process of translation. By confronting popular will's particular dynamic of hope and constraint in this material capacity, this thesis directly contributes to a defining discourse in critical international legal theory: the view that international law is simultaneously a system of domination and source of emancipation.[33]

3. Popular Will As We Know It

3.1. Controversy and Non-Controversy

As a doctrinal matter, the relationship between popular will and domestic authority is simultaneously one of the least controversial and most controversial aspects of public international law. Regarding popular will's non-controversy, one need only consider the likely failure of any international legal argument invoking a pre-modern 'divine right of kings' that locates sovereignty in the 'person' of a monarch as opposed to the 'people' of the state. Given that modern international law is rooted in relations between sovereign states as opposed to sovereign individuals, some presumption of 'popular will' is at work in sustaining this system.[34] Thus, any claim

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emerged in this context are fundamentally incompatible with the Marxist characterization of global inequality, see Davenport 2018.

[33] This has been particularly prominent in TWAIL, see e.g. Chmini 2005; Pahuja 2011; Fakhri 2018. Additionally, within Marxist international legal theory, while generally more pessimistic than TWAIL, there has been much skepticism towards sweeping dismissals of international law's potential. This has been especially true of responses to China Mieville's claim in *Between Equal Rights* that international law is devoid any emancipatory content, Mieville 2005, 319. For arguments that the character of hope in international law is deserving of more nuanced analysis than Mieville suggests, see e.g. Marks 2007; Knox 2009. Regarding the frontiers of this analysis of domination and emancipation, for a number perspectives looking at these dynamics through the lens of queer approaches to international law, see Otto 2017.

[34] An apt summation of this ubiquitous, but deeply undertheorized, point was presented in the conclusion of Heather Wilson's study of how the potentially legitimate use of force by non-state na-

of authority on a radically different basis would either have to somehow appropriate the discourse of 'popular will' or reject the legitimacy of the existing international legal order.

While the centrality of popular will within international law is largely uncontroversial, delineating the nature and scope of this concept produces an endless amount of controversy. What are the limits international law places on the expression of popular will? What is international law's best method for determining who represents popular will when multiple factions are claiming recognition on this basis? How does popular will shape the boundaries between the 'domestic' and the 'international'? Can a universal definition of popular will ever be translated into a binding international legal obligation? Such controversies pit multiple normative considerations against one another, especially when they involve the violence that often accompany struggles over popular will through revolution, secession, civil war, and *coup d'état*. What conceptual tools are available to international legal scholars seeking to make sense of all this?

In approaching this situation through the lens of its world-historical context, if we wish to understand why international legal conceptions of popular will can be so controversial today, we need to first understand how international law's core presumption of popular will became so uncontroversial in the first place. After all, the notion of rulership by divine and otherworldly forces has captivated the human imagination for millennia and its (incomplete) disavowal in modernity is very recent in the grand scheme of existence.[35] Understanding how international law rejected these modes of authority and embraced the notion of popular will means theorising

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tional liberation movements prompted a re-evaluation of core international legal principles. According to Wilson: 'the acceptance of these movements by a large number of States…challenges traditional ideas about the nature of international society. It implies that 'the authority of *the prince'* is not synonymous with the 'authority of *a sovereign State*'', Wilson 1988, 187 (emphasis mine).

[35] On the captivating force of such authority structures across human cultures, see Graeber and Sahlins 2017.

the modern nation-state as a distinct political entity, and the capitalist political economy that sustains it as a distinct mode of social relations. Identifying this formative nexus between international law, the nation-state, and capitalism paves the way for an account of how these co-constituting structures globalised to the point where today nearly every human being is now the member of a sovereign political community justified by popular will.[36] However, there is nothing inherently natural or teleological about this transformation of the world.

Before a world-historical analysis can take place, we must delineate the depths of international law's doctrinal engagement with popular will with some degree of precision. Here, one set of examples that reveals the tensions and logical endpoints of consistently applying relevant international legal doctrine to domestic political contestations concerns relatively recent events in Syria and Ukraine. In both situations, Russian President Vladimir Putin provided military intervention at the request of foreign leaders in the face of civil strife. The first situation involved President Victor Yanukovych of Ukraine in March 2014.[37] The second situation involved President Bashir al-Assad of Syria in September 2015.[38] Any analysis of this issue invokes the reality that Putin's involvement in the Ukraine and Syria has largely been viewed in the West as part of an ideological/geopolitical grand strategy to contest Western liberal hegemony.[39]

However, this perceived scheme should not obscure the fact that there is a key international legal distinction between Putin's two affirmative responses by Yanukovych and Assad respectively. The first situation was generally viewed as a clear-

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[36] Jackson 2000, 14.

[37] For a variety perspectives on the legal dimensions of the Ukraine Crisis, see the contributions in Oklopcic 2015.

[38] For a study of Putin's actions in the context of larger debates on humanitarianism and the use of force, see Averre and Davies 2015.

[39] For an account of Putin's strategy of mobilizing alliances in a bid to disrupt Western hegemony, see Salzman 2019.

cut instance of blatant illegality even amongst committed critical theorists of international law.[40] Concerning the second situation, while undeniably controversial on political, ethical, and humanitarian grounds, condemning it as an unequivocal international legal violation is deeply questionable.[41] Why is it that, to put it bluntly, Putin's intervention in support of Yanukovych was more illegal than his intervention in support of Assad? In order to explain this divergence, we must account for a particular international legal doctrine that makes all the difference: the effective control doctrine.

3.2. The Effective Control Doctrine: A Primer

When confronting the tension between domestic sovereignty and international order, and its ultimate relationship with popular will, the effective control doctrine is a foundational, yet obscure, international legal principle. Under this doctrine, as it applies to the creation of new states and the legitimacy of governments in existing states, in situations of internal contestation over sovereign authority, external actors are (subject to a narrow range of exceptions) generally obligated to refrain from acting on normative and ideological judgments.[42] Thus, the outcome of local contestations can only be judged through objective 'facts on the ground' whereby international legal standing is attributed to the local faction maintaining *de facto* territorial authority *relative* to all local competitors as measured by the obedience of the local population.[43] As such, the effective control doctrine's non-interventionists stance highlights the international legal order's core premise of sovereignty as absolute autonomy within a territorially bounded setting. As such, it rests upon the

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[40] See e.g. Özsu 2014.

[41] See Visser 2015.

[42] Roth 2010.

[43] Ibid. 394.

understanding that a power structure cannot exist without substantial popular support and this creates the presumption that maintaining effective control is the best available evidence of 'popular will.'[44]

When considering the violence legitimized through this doctrine, we can observe a harsh logic of 'might makes right.' After all, the violence witnessed in civil strife is seemingly contrary to 'rule of law' sensibilities whereby principle and procedure should resolve disputes without resorting to raw force.[45] This unease is bolstered by the long-standing view that conflicts within bounded political communities are especially tragic given their hosting of violence between individuals historically perceived to possess the closest social bonds.[46] The persistence of this violence, coupled with a steadfast belief in international law's progressive ability to uplift the human condition, motivated efforts to remove the tolerance of violence from the acceptable determination of popular will under international law. In its most prominent manifestation, this took the form of declaring life under a liberal democratic government (minimally defined as periodic, competitive, and elections) as an 'emerging' human right.[47] Such a development demanded a new international legal standard for measuring popular will whereby electoral results took priority over 'facts on the ground.'[48]

While these efforts generated much enthusiasm, they also resulted in greater clarification of the technical and normative parameters of the effective control doctrine.

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[44] Ibid. 396.

[45] Ibid. 395.

[46] Armitage 2017, 12.

[47] For the two more prominent works towards this end where Thomas Franck's 'The Emerging Right to Democratic Governance' that introduced this idea, and his student Gregory Fox's 'The Right to Political Participation in International Law' that documented the doctrinal support for this proposition. Franck 1992; Fox 1992.

[48] Amongst many other, one of Roth's objections to this premise was its failure '….to appreciate the distinct types of political progress that do not entail democracy.' Roth 2000a, 515.

Here Brad Roth emerged as its leading theorist and defender. Like Marks, Roth was notable for being less than enthusiastic about the ways in which international lawyers where actively invoking liberal democracy while ignoring the many critiques that have accompanied this discourse. However, unlike Marks who approached the turn to democracy in international law by critiquing its promises against its realities in the hopes of bringing radical democratic consciousness into international legal analysis, Roth questioned the very point of incorporating democracy discourse into the international legal cannon.[49] From this premise, he offers a defence of the existing international legal order organized around the effective control doctrine. For Roth, irreducible disagreement over the substantive ends democracy legitimizes an international legal order where bounded political communities possess the sovereign right to define these ends on their own terms.[50] This framing upholds a pragmatic stance towards international law that, in contrast to invoking the discipline as pure principle or pure progress, actively confronts the deeply entrenched relevance of sovereignty's typically bloody origins. According to Roth:

> International legal standing has traditionally been established by victory in a trial by ordeal: a region initially integral to an existing state successfully establishes itself as an independent sovereign unit only where its secession movement creates - usually by decisive victory in an armed struggle - facts on the ground that appear irreversible; an insurgent faction successfully establishes itself as a government where it overthrows an existing constitutional structure and secures - even if at bayonet-point - widespread popular acquiescence.[51]

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[49] Roth expressed as much in a review of Mark's *The Riddle of All Constitutions*, Roth 2001, 412.

[50] Here it is noteworthy that, in addition to his defence of the effective control doctrine, has offered concerted defences of substantive equality of the type deeply odds with the liberalism that accompanied the discourse of the 'Emerging Right to Democratic Governance.' This included the claim that those advocating for human rights are well-advised to use Marxism as a means of confronting the contradictions that inhabit even the most egalitarian formulations of liberalism, Roth 2008, 250. For an attempt to develop a constitutional theory premised on substantive equality, see Roth 1993.

[51] Roth 2010, 394.

However, from this harsh premise there emerges an elaborate multi-layered justification for the effective control doctrine.

At the doctrinal level, the effective control doctrine is a logical outcome of consistent adherence to the Charter of the United Nations provisions regarding sovereign equality (Art. 2(1)), non-intervention (Art. 2(4)), and non-interference in domestic affairs (Art. 2(7)).[52] As clarified by the International Court of Justice's 1986 *Nicaragua* case, a sovereign state possesses an inherent right to choose its political system and licensing external interference would render this right devoid of substance.[53] At the normative level, the effective control doctrine fills the gap between two foundational commitments: a) the presumption that existing arrangements of sovereign authority are the products of the underlying political community's popular will and b) the toleration of ideological pluralism whereby outside observers are deemed ill-suited to judge foreign societies.[54] As such, the maintenance, alteration, or overthrow of an existing sovereign order can only be legitimately decided upon by the local population itself. Thus, the same sovereign dynamic that legitimizes violence and repression correspondingly empowers the underlying political community to rectify these issues as it alone sees fit.[55] Finally, at the level of international peace and security, in conjunction with the general ban on the use of force, the effective control doctrine constrains ideological difference as a justification for war.[56] Reflecting this sentiment is the UN's opening of membership to 'peace-loving states,' 'where this qualification of 'peace-loving' refers to the state's (pacific)

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[52] Ibid. 396.

[53] *ICJ Nicaragua Case* 1986, 263.

[54] Roth 2010, 396.

[55] Cunliffe 2010, 91.

[56] Roth 2010, 409.

international conduct rather than its internal politics.'[57] This juridical shield from external intervention, at least in theory, provides a modicum of leverage for weak/unpopular sates and, most importantly for my analysis, regimes attempting to pursue experimental political projects that conflict with the interests of the powerful.[58]

3.3. The Effective Control Doctrine Applied

In applying the effective control doctrine to the facts surrounding Yanukovych's and Assad's invitations to Putin the diverging legality of these cases is clarified. In Ukraine, Yanukovych had already been internally ousted from power in the wake of mass unrest at the time of his invitation for Putin's intervention. This removal from power amounted to a lack of the *de facto* territorial authority needed to satisfy the effective control doctrine. As such, Putin's presence in the Ukraine's Crimea region, at least to the extent it relied on Yanukovych's invitation, is exceedingly difficult to defend as lawful.[59] Moreover, while Yanukovych's ouster violated the Ukrainian Constitution, this fact is irrelevant to determining whether he possessed effective control. In the words of Roth, '[c]ontrary to what is sometimes imagined, the international legal order is not a legal order of legal orders; it is a legal order of sovereign political communities, each of which bears an "inalienable" capacity….to overthrow any existing order by any means.'[60]

Moving to the Syrian situation, very different facts were present in that Assad retained his status of sovereign authority at the time of his invitation of Putin's intervention. While Assad's authority was hotly contested, the opposition against him

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[57] Buchan, 2008, 12.

[58] Kingsbury 1998, 618.

[59] Grant 2015, 54.

[60] Roth 2015a, 217.

was deeply fragmented due to the generally irreconcilable goals/ideologies amongst the various factions challenging him. Despite external pronouncements of rebel legitimacy as a political matter, when determining Syrian sovereign authority under international law, there was no coherent alternative to Assad.[61] That said, his leadership, however violent, was consistent with the effective control doctrine. This maintenance of *de facto* territorial authority had tremendous implications as to whether Assad was entitled to invite external forces to solidify his position. It is difficult to overstate the seriousness of this issue given that intervention by invitation deeply complicates the effective control doctrine's legitimizing presumption that local political contestations should be locally resolved.[62] However, despite this justificatory complication, when leaders possess effective control, regardless of their means, they retain wide discretion when appealing to foreign assistance.[63]

In contrasting Syria and Ukraine, the defining legal difference between these two cases of invitation of Putin's intervention was that Assad maintained 'effective control' while Yanukovych did not. On this basis, it is easy to see just how disturbing, arbitrary and frustrating the effective control doctrine can be. One need look no further than a simple comparison of the two examples presented above. While the situation in Ukraine is certainly violent and destabilizing, in terms of the sheer scale of suffering, it is dwarfed by the Syrian Civil War. Thus, despite its logical cohesion as a doctrinal abstraction, on a deeper normative level, there is something profoundly unsatisfying about the fact that the effective control doctrine provides a basis for condemning Russian action in Ukraine while also providing a basis for legitimizing Russian action in Syria.

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[61] Talmon 2013.

[62] Roth 1999, 188.

[63] It is has been argued that this persistence of intervention by invitation (justified in effective control) will remain until an effectively centralised system of collective security is developed. Le Mon 2003, 792. For a analysis claiming that intervention by invitation falls outside the category of 'use of force', see Visser 2019.

On this reading, the doctrine forms a quintessential case study in law's complicity in human suffering whereby imposing responsibility in certain areas has the corollary effect of legitimizing irresponsibility elsewhere.[64] Thus, as a repository of unavoidable trade-offs, the effective control doctrine sits uncomfortably with the progressive ethos of international law where a universality-inclined belief in ever-increasing improvement has animated the field in its modern form.[65] It is perhaps for this reason that (Roth aside) the effective control doctrine, in and of itself, has been subject to little comprehensive analysis.[66] Rather, it typically mentioned as secondary consideration to be discussed alongside one envisioned progressive development or another.[67] However, (re)locating the centrality of popular will within the effective control doctrine opens up new analytical pathways that move us beyond the competing dynamics of optimism and pessimism that reflexively manifest within international legal discourse.

3.4. Popular Will Revisited

[64] For a multi-layered study of law and irresponsibility in this capacity, see Veitch 2007.

[65] For an elaborate discourse analysis of the status of 'progress' as a defining trope in modern international law, see Skouteris 2010.

[66] One of the few analyses here has been from Elizabeth Wilson. Motivated by a revulsion to both the violence legitimized by the effective control doctrine and the disastrous paternalism of liberal cosmopolitan alternatives, Wilson poses the question as to whether international law can be mobilized to support non-violent social uprisings, Wilson 2015, 590 ('A "privilege of nonviolence" might be given to those who engage in nonviolent conflict and successfully maintain nonviolent discipline'). However, her ultimate hope in such measures remains linked to the progress within existing international institutions, see Ibid. 594. As such, she does not confront the contradictions regarding the ways in which international law's inability to support non-violent political action is more than simply a flaw with the system.

[67] This includes the possibility of requiring democratic institution as a requirement for state creation, (see Vidmar 2013a), the clarification of standards for legitimate intervention in civil strife (see Lieblich 2013), and the international legal support of nonviolent movements (see Wilson 2015).

The defence of the effective control doctrine centres on an understanding of popular will as an all-important precept of legitimacy that can only be adequately defined in unique, specific contexts. To quote Roth once again:

> the effective control doctrine can be interpreted to embody respect for the self-determination of diverse political communities as to which empirical investigation to ascertain public opinion is most often impracticable. Moreover, given that 'popular will' itself is a complex and normatively-loaded concept, any imposition from abroad of procedures calculated to appropriately measure popular will might be seen as at best presumptuous, and at worst an usurpation.[68]

As we can see in this passage, given the innate difficulties of formulating a universal standard for externally judging local political expression, this doctrine at least provides consistency and coherence when approaching the popular will-international law relationship. The effective control doctrine reminds us that the intense passions arising abroad in response to domestic struggles do not dispense, and in many ways affirms, international law's fundamental commitment to non-intervention.[69] But how are we to reconcile this pluralistic, non-interventionist vision with the fact that Assad can arguably be legitimized by Syrian popular will in a manner that allows him to invite external military assistance to crush the formation of any alternative to his rule? Could a doctrinal international legal argument condemn this occurrence without threatening to erode the foundational norms of sovereign equality and non-intervention?

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[68] Roth 2010, 426.

[69] For a study of how the discourse of self-determination in no way undermines, and in many ways strengthens, nonintervention as a core structuring principle of the international legal order, see Werner 2001.

Answering this question is especially important in our current global moment of rising powers and aggressive nationalism where the possibility of major armed conflict between sovereign states now seems more likely than it has been in decades.[70] It is not difficult to imagine how the claim of aiding a people in pursuit of their 'popular will' can serve as a pretext for powerful states and interests to undermine the ban on the use of force and risk escalating tensions that ultimately result in a major global war.[71] This type of conflagration is precisely what the UN Charter system seeks to avoid, even if it means tolerating widespread internal violence and repression legitimized through a profoundly limited understanding of popular will.

Caught between the Scylla of interstate conflict and Charybdis of intrastate conflict, my purpose in this thesis is to ask how we reached this particular juncture, one where we must accept the 'lesser evil' of two already troubling options. In addressing this question, as outlined in Part 1, I build on analyses that raise larger questions of why the view of popular will, delineated through the effective control doctrine, has failed to uplift conditions for so many despite offering national communities presumptively limitless autonomy in pursing their own destinies. In confronting this issue from a Third World Approaches to International Law (TWAIL) perspective, James Gathii identifies the central flaw of the effective control doctrine, as presented by Roth, as a failure to account for ongoing colonial legacies.[72]

According to Gathii, by fixating on the illegality of political and military coercion, Roth situates colonialism as 'a rare and aberrational feature of international law'

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[70] For an account of the various erosions on the ban on the use of force that could easily enable an outbreak of violence in this context, see Terry 2019.

[71] While this has been much remarked upon in relation to Putin's actions undertaken in the name of aiding Russian speaking population of Ukraine's Crimea region (see Roth 2015b), it has also presented itself through the Trump Administration's bellicose rhetoric against the Maduro government in Venezuela where appeals to the 'freedom' of the Venezuelan people are commonplace. However, the rhetoric of US intervention has been roundly condemned by other members of the Security Council, see *Security Council Press Release* 2019.

[72] Gathii 2000.

and this obscures other sources of inequity intimately linked to the question of international legal standing.[73] These include the coercive realities of developmentalist reforms facilitated by international institutions that harken back to imperial practices,[74] as well as the possibility of economic interventions being just as devastating as military interventions despite being comparatively less illegal.[75] Furthermore, Gathii invokes the history of the Eurocentric nation-state form, and its 'effective control' over lands, peoples and nature, being foisted upon all societies through violent colonization only to be retrospectively legitimized via suspect invocations of universal morality and ideological neutrality.[76] While sympathetic to many of Gathii's points, Roth's general response has been that such critiques must be judged by their ability to offer a practical alternative.[77] Bearing this contention in mind, I now shift to the question of what an account of the popular will-international law relationship capable of making a strong methodological intervention into this debate might actually look like?

4. Methodology: Towards a World-Historical Context

4.1. Popular Will and the 'Politics of Sovereignty-in-Anarchy'

In addressing Roth's 'what is your alternative?' challenge to Gathii's critique, I argue that the present relationship between popular will, international law, and the nation-state form must be understood in world-historical context. In articulating this context, my analysis is normative in the weak sense in that I acknowledge the need for fundamental systemic change in order to achieve greater human emancipation on a global scale. However, I do not present a programmatic alternative of my own.

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[73] Ibid. 2020.

[74] Ibid. 2026-2027.

[75] Ibid. 2028-2030.

[76] Ibid. 2040-2048.

[77] Roth 2000b.

Rather my purpose is to account for an interconnected array of historically formed structural considerations that must inform any alternative to the current order. Thus, my intervention is diagnostic as opposed to prescriptive. Additionally, while such an important pursuit cannot be limited to any one discipline, the field of international law forms my primary orientation in making this diagnosis. The incorporation of all other disciplinary insights are ancillary to this central focus.

As an entry point, a key issue is the inadequacy of rigid doctrinal international legal analysis to confront the normative puzzles generated by the popular will-domestic authority relationship that is only now being comprehensively confronted by critical international lawyers. This inadequacy is reflected in the Roth-Gathii debate, which is remarkable for the sheer multitude of interdisciplinary engagements being invoked to resolve ostensibly 'international legal' issues. For Roth, the normative defence of a positive international legal order premised on sovereign equality, non-intervention, and ideological pluralism is accomplished through an application of political theory and comparative politics.[78] For Gathii, mobilizing insights from history, anthropology, and political economy exposes the problematic character of Roth's defence. In intervening in this debate, I introduce another discipline into the analysis of the popular will-domestic authority-international law continuum: international relations ('IR'). While adding yet another discipline to this already complex discourse may seem superfluous, I argue that insights from IR can integrate many of the issues raised by the Roth-Gathii debate within a comprehensive framework. Moreover, incorporating insights from this field allows for an entirely new means of situating the many insights generated by critical studies of international legal history.

Of vital importance when theorising one society's standing to judge another within the confines of international system, IR contributes the foundational premise that

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[78] Roth's interdisciplinary defence of the moral standing of the positive international legal order stems directly from a rejection of the first principles-based methods of most international political theorists including Charles Beitz, Fernando Teson, and John Rawls, Roth 1999, 33.

the global order is anarchic in that it lacks a singular universal structure of authority.[79] It was the emergence of this 'Realist' discourse immediately following the Second World War, and its positing of 'the international' as a 'purely political' sphere of actors struggling for survival without shared legal or moral presumptions, that questioned the ability of international lawyers to explain 'how the world actually works.'[80] Through this rise of IR Realism, the response by many international lawyers was a concerted campaign to show how order and obligation *do* exist at the international level despite the lack of an overarching sovereign enforcer.[81] For these theorists, it was possible to transcend the base impulse of survival through the progressive development of international institutions whereby states surrender portions of sovereignty in exchange for the mutual benefits of cooperation.[82] However, this rigid, long-standing division between anarchy and law as mutually exclusive visions of international order has created a generalized analytical absence of the reality that sovereign states are ultimately juridical forms with no inherent existence beyond their status as fictitious legal persons.[83] According to China Mieville's appraisal: '[t]here is no separation of these juridical forms from 'pure politics' because

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[79] For the classical formulation of this idea, see Morgenthau 1948.

[80] See Koskenniemi 2001, 474-478. Of particular note here was the way in which many formative IR theorists were German-Jewish refugees from Nazism, often with law backgrounds, who often analogized the international legal order to the constitutional order of Weimar Germany, i.e. a fragile structure that promised order and justice, yet was utterly impotent in the face of raw force. Ibid. 450; see also Lebow 2011. One particularly interesting German-Jewish IR theorist was John Herz whose Realist theories stemmed from earlier work on how the Nazi conception of international law exposed the weakness of the existing international order, see Herz 1939.

[81] One of the leading voices was Sir Hersch Lauterpacht whose visions of the transformative power of international law was driven by sustained dialogue with IR Realists, see Jeffery 2006.

[82] This view has formed the basis for liberal attempts at international law-IR synthesis, see Slaughter 1993.

[83] Interesting enough, there was a high degree of focus on the juridical character of the state by political scientists in the pre-Second World War era (see e.g. Willoughby 1918), that was also the same timeframe when the new field of International Relations, at least in its influential American version, was fixated on hierarchal relations between races as opposed to anarchical relations between states, see Vitalis 2015.

there is no pure politics: there are instead the politics of sovereignty-in-anarchy, which are the politics of juridical units.'[84]

Yet, if popular will is the legitimation of the domestic authority of sovereign nation-states, then what is its role within this 'politics of sovereignty-in-anarchy'? Here popular will in the context of an international legal order premised on an ideologically plural understanding of sovereign equality is an empty concept that only gains substantive content, as explained above, through the assertions of a local population. Thus, under conditions of anarchy, this local expression of popular will can theoretically emerge through any conceivable system. On this basis, judgments by outsiders are exclusively restricted to determining the presence or absence of *de facto* 'effective control' when determining who represents popular will. In this capacity, the possibility of a territorially-bounded political community pursuing its destiny in a pluralist world is protected by the legal value of sovereignty, yet, any establishment of a non-consensual hierarchy (i.e. a standard for determining sovereign legitimacy other than 'effective control') directly undermines this possibility.[85] On this basis, the expression of popular will through the juridical nation-state form, understood as an empty vessel containing limitless possibilities, represents the normative dimension of international anarchy.

If the possibility of popular will legitimizes anarchy, then what else does this system of anarchy legitimize? Is it possible that this anarchy is linked to a larger system of global political economy that bolsters certain formulations of popular will while

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[84] Mieville 2005, 284.

[85] What is noteworthy here is that while Realists assume that war and conquest are always possibilities within the anarchic international order premised upon base survival, this theoretical framing only emerged as sovereign equality, non-intervention, and the outlawry of war and conquest emerged as core ordering international principle. According to one recent depiction that implicitly invokes this co-evolution between Realist discourse and the modern international law: 'Outlawing war only seems ridiculous to us because ours is a world in which war has already been outlawed.' Hathaway and Shapiro 2017, xiv.

being fundamentally anathema to others? If there is any truth to this, then it is possible that the very system of anarchy that allows for the possibility of a nation achieving any form of popular will in theory actually undermines these possibilities in practice. This is the position of Mieville who views the 'sovereignty-in-anarchy'-based order as fundamentally coercive in that the juridical abstraction of formal independence (and thus peoples' right to develop popular will-expressing systems) legitimizes the deep substantive inequalities between sovereigns.[86]

However, while Mieville does much to orient us towards the indispensable material dimensions of the international legal order, his account's rigidity hardly does justice to the captivating force so many have historically ascribed to achieving popular will through international legal assertion.[87] Thus explaining this phenomenon in world-historical context must consider agency in addition to structure by directly confronting the 'public-cultural dimensions of international law' that Susan Marks has identified as lacking in Mieville's theory.[88] In developing an account from this premise, I ask: *What* framework of international law and IR is up to this task? *When* did the most important historical events informing these developments take place? *How* does this contribute to addressing current gaps in international legal understanding?

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[86] Mieville 2005, 133-141.

[87] It can thus be argued that Mieville's reduction of international law to a brutal calculus of power and domination is characteristic of a larger pitfall of Marxist attempts to theorise 'the international' whereby Realist presumptions regarding the timelessness of political contestation persistently manifest as a default presumption. According to Andrew Davenport, this is rooted in the fact that '…the orthodox tradition of Marxism at no stage posed the existence of political multiplicity and, correlatively, the delimited form of the political as themselves worthy of, or demanding, theoretical reflection.' Davenport 2011, 29.

[88] According to Marks, Mieville's disavowal of international law as tool of political contestation is at odds with his overarching assertion that international law is irreducibly political in character, Marks 2006, 207.

4.2. Synthesising Parallel 'Turns to History'

On the question of developing an international law-IR interdisciplinary approach capable of giving due consideration to both structure and agency, a starting point is to consider the way in which both fields have recently experienced 'turns to history.' While the differences between international law and IR have long been highlighted (with some influential scholars going as far as to explicitly disavow interdisciplinarity on this basis[89]) the motivations of these parallel 'turns to history' are remarkably similar in both fields. After all, both international law and IR are haunted by similar problematic origins which, in the words of Jennifer Pitts:

> … include aspirations to the status of a science, a dependence on stylised histories populated by founding fathers and origins myths, a reliance on sovereignty as a foundational principle, a tendency to regard empires and imperialism as historically superseded and also 'incidental to the discipline proper', and a blindness to their own participation in structures and discourses of racialized hierarchy.[90]

When applying the theoretical tools that emerged through the confrontation of these legacies in both disciplines, my methodological framework synthesizes the turn to historical sociology in IR with the turn to 'juridical thinking' in international law. What historical sociology offers is an opportunity to understand the structure of international anarchy not as a timeless feature, but rather as a historically contingent

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[89] According to Martti Koskenniemi, the international law-IR relationship is one of counterdisciplinarily whereby the former's teleological quality of envisioning a better world is fundamentally at odds with the latter's attempt to 'scientifically' measure and evaluate the world, Koskenniemi 2011. Interestingly enough, while he speaks of the international legal imagination of agency as something damaged by interdisciplinary engagement with IR, in this same article he mentions Susan Mark's 'false contingency' concept, and its calls for a critique of ungrounded agency claims, as a missing feature of critical international legal analysis, Ibid. 33. This leaves open the possibility that a theory of IR might help serve an account of international law that takes the question of 'false contingency' seriously.

[90] Pitts 2017, 283.

process that emerged as a byproduct of capitalist social relations.[91] What 'juridical thinking' offers is the ability to understand the unique force of phrasing popular will-based assertions in terms of 'legal' demands, especially as it concerns the ability of law to link past and present within a broader system of meaning.

4.2.1 The Prospect of Historical Sociology

In broad terms, historical sociology as an approach in IR is premised on the idea that the modern sovereign state is a historically contingent mode of socio-political organization as opposed to a temporally stable 'unit of analysis.' That said, it is analytically defective to conflate the modern state with any trans-historic definition of a 'polity' (which might encompass empires, city-states, and decentralized tribal formations) whose accumulated interactive patterns can be synthesized into generalizable 'scientific' claims.[92] Rather, for the theorist of historical sociology, focus must turn to the patterns of human interaction across time and space that gave rise to the assumed features of 'the state' and 'the international' as we have come to know them.[93] Thus, questions of technological change, natural environment, and social class formation are essential considerations. On this basis, the approach of historical sociology has proven remarkably successful at integrating the insights of economic history, imperial history, and global history into the explanatory narrative of IR.[94] A particularly noteworthy aspect of this turn has been its integration of

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[91] Despite Koskenniemi's sceptical position towards international law-IR interdisciplinary engagement, in his critique of histories of international law that claim to account for political events, he claims that such efforts pay insufficient attention to the historical sociology of international relations and, on this basis, are weak in justifying their methodological choices, Koskenniemi 2012, 961-963.

[92] On this basis, the historical sociologist must be aware of the actual dynamic of global history and cannot retreat into the abstractions that have hitherto defined the ontologies of IR and international law. On the fundamental synergy of historical sociology and global history, see Osterhammel 2016.

[93] See Hobson, Lawson, and Rosenberg 2010.

[94] See e.g. Buzan and Lawson 2015.

Marxian analysis that, due to Cold War anxiety and post-Cold War triumphalism, had been largely maligned by attempts to theorise the international order.[95]

While the possibilities for new interpretations through this rubric of historical sociology are vast, in this thesis I narrow my analysis to the question of international anarchy. As discussed above, this proposition plays a profound, yet under-theorized role, in shaping our understanding of popular will as it is determined through the 'effective control doctrine.' This being the case, much insight is gained from Justin Rosenberg's *Empire of Civil Society* whereby Realist theories of anarchy are critiqued for failing to historicize political economy and the distinct social relations it produces.[96] For Rosenberg, the condition of anarchy, or formally equal absolute sovereigns existing without any overarching authority, is not a transhistorical phenomenon applicable to all situations where a multiplicity of polities exists.[97] Rather, it is historically contingent upon capitalism's *particular* separation of a territorially-bounded sphere of 'public' political authority from a territorially-transcendent

[95] For a portrayal of the work within the Trotskyite tradition as constituting a 'lost history' of IR, see Rosenberg 1996. On the lack of rigorous engagement with the Marxist tradition as source of impoverishment in Western postwar thought, see Meister 1990.

[96] Rosenberg 1994, 3-5.

[97] Ibid. 131.

sphere of 'private' economic interests.[98] As such, 'popular will' legitimatises the former while severing it from the later.[99]

Despite this ideological separation, these features of 'public and private' are nonetheless co-constituted through the structure of the modern capitalist state. This structure represents political authority in the name of an abstract 'public' while acting as a necessary force for protecting private economic interests.[100] According to Onur Ince, this structure 'necessarily relies on the uses of politico-juridical force that is categorically excluded from the definition of the economy as an autonomous system of interdependence mediated by self-regulating markets.'[101] Taking this particular view seriously requires a similar emphasis on the contingency of modern international law as the necessary regime governing relations between the depersonalized state forms within this formal equality-based anarchical order.[102] Thus, approaching 'anarchy' through historical sociology allows for a materially-grounded explanation of how the modern state, and its accompanying system of

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[98] This is not say that capitalism invented the distinction between public and private in any ontological sense. As Rosenberg notes, dating back to the Greek city-states of antiquity, there existed modes of order where 'the opening of a public sphere rests upon a formal political equality among the citizen body…the condition of this formal equality is the exclusion from the mutual relations of the citizenry of political mechanisms of surplus appropriation.' Ibid. 84-85. Under capitalism, the difference is that the accumulation of surplus is not an explicitly political activity, but rather takes place in an ideologically-differentiated sphere running parallel to politics. According to Rosenberg: 'In capitalism the domain of formal political equality does not need to be a segregated realm of privilege resting upon surplus extraction elsewhere in the wider social formation. Or, at any rate, this 'elsewhere' is but another dimension of the lives of the same individuals.' Ibid. 85.

[99] On this basis, the attempt to rechannelled 'private' wealth in the name of a 'public' purpose is susceptible to critique as 'politicisation' of that which is 'apolitical.' It is for this reason that sovereignty as the condition of political autonomy has historically never been a guarantee of economic self-sufficiency, Ibid. 126-128, 131-135.

[100] For an account of how traditions of political thought frequently ignore economic dimensions, while theories of economic analysis, including Marxism, ignore political dimensions (and how a synthesis of Marx and Arendt offers the prospect of resolution), see Ince 2016a.

[101] Ince 2018a, 895.

[102] On personalized dynastic rule as a very different material basis for 'public international law', see Teschke 2003, 227-229.

international law, emerged in the first instance and subsequently transformed, displaced, or absorbed other socio-political forms. Through this lens, while the presence of 'effective control' as evidence of popular will (or the potential of popular will) is legitimized on the basis of objectivity, this presumed 'objectivity' is not a natural truth but the culmination of a centuries-long political project that reproduces specific institutional forms and social relations.

4.2.2. The Prospect of 'Juridical Thinking'

While historical sociology is uniquely adept at exposing material contingencies, the concept of 'juridical thinking' forms a vital corollary through its ability to minimize or exclude these same material contingencies.[103] Coined by Anne Orford, the invocation of 'juridical thinking' arose in response to claims by intellectual historians that critical international lawyers were methodologically misguided in their focus on the prejudices of the field's formative thinkers. In the assessment of these critics, largely associated with the 'Cambridge School' and its emphasis on understanding ideas in context, by relating historical prejudice to current inequities, critical international lawyers were judging the past through the lens of contemporary ethical standards and this constituted a serious anachronistic distortion.[104] According to Orford, however, while contextualist history is one way of interpreting prior events and their current significance, it is by no means the only way. Additionally, there is much insight to be gained from the distinct, yet undertheorized, methodology through which lawyers give meaning to the past.

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[103] Confronting this phenomenon allows us to uncover the constitutive political dimensions of the juridical that are missed by historical sociology. In the words of Davenport, '[i]t is necessary…for Marxism in IR to extend its reach beyond the prevailing interest in historical-sociological studies of processes of development and to critically with the tradition of political theory: above all, with such central categories of *sovereignty* and *legal order*.' Davenport 2011, 42 (notes omitted, emphasis mine).

[104] Orford 2013.

For Orford, a unique characteristic of legal method (i.e. 'juridical thinking') is its genealogical construction of patterns of meanings that connects historical events through a seamless narrative regardless of the immediate understandings of the parties to these events.[105] As a result, while 'juridical thinking' may be inherently anachronistic,[106] it must be understood as a view of the past that articulates the movement of meaning through time, as opposed to the contextualist historian's task of articulating, or even disarticulating, change over time.[107] In this sense, the force of 'juridical thinking' is its ability to assert the validity of concepts and structures despite their existence as pure abstractions completely ungrounded in material reality. By excluding material social relations from its consideration, the great danger of juridical thinking is its ability to invoke timeless, abstract ideas as a means of legitimizing domination.[108]

However, this danger can be rechannelled into a powerful analytical tool by consciously acknowledging juridical thinking as a distinct form of historicisation. A first step to realizing this potential is to acknowledge that, so long as lawyers exist, this particular mode of approaching the past will always be relevant. As a result, no contextual history, however detailed and comprehensive, will ever overcome 'juridical thinking' as an influential producer of a distinct temporal consciousness.[109]

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[105] Ibid. 174-175.

[106] Ibid. 175.

[107] Orford 2012a, 9.

[108] This quality of abstraction through international law is substantially similar to Mark's engagement with concept of ideology as it manifested through the 'Emerging Right to Democratic Governance', see Marks 2000, 6-7.

[109] In this way Orford's articulation of 'juridical thinking' opens door to exploring earlier articulations of the distinct ways lawyers and historians approach the past. One articulation of this divergence was put forth in an 1888 lecture by the renown English legal historian Frederick William Maitland, according to whom:

> That process by which old principles and old phrases are charged with a new context, is from the lawyer's point of view an evolution of the true intent and meaning of the old law; from the historian's point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to

To believe otherwise carries serious drawbacks in the domains of both analytical precision and political praxis. In Orford's assessment:

> It is not plausible to instruct a lawyer to think about a concept purely in the present tense. Lawyers work by invoking the history of meaning that has accrued to legal concepts, principles and doctrines over time. The legal operation of relating past and present will continue whether or not critical scholars engage with it….Critical work in law tries to recover that process and reanimate the political potential embedded in all legal fictions. The attack on anachronism will not shut down the movement of law, but it threatens to shut down the ways in which critical legal scholarship seeks to challenge that movement when it produces authoritarian or exploitative effects.[110]

Despite this unavoidability, an analysis that acknowledges the force of 'juridical thinking' is nonetheless compatible with an engagement of parallel modes of historical explanations. By acknowledging this dynamic of law being one means of conceptualizing the past amongst many, the theorist is forced to confront the issue of how multiple historical registers (and their political consequences) bear upon larger theoretical efforts. This opens up the door to incorporating the above-discussed insights of history sociology into international legal history/theory, despite the fact that their aversion to state-centrism seemingly contradicts international law's foundational premise of a multiplicity of sovereign states as its analytical starting point.[111] However, if this foundational state-centric premise is understood

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> mix up the two different logics, the logics of authority and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better.

Maitland 1911, 491.

[110] Orford 2017, 305-306.

[111] On the absence of historical sociology-based engagement with international law for this reason see Koskenniemi 2016a, 106. Even amongst Marxist approaches that have emerged within the field of international law, while methods broadly describable as 'the commodity-form theory', 'ideology critique', and 'international law and the Third World' have gained a degree of traction, the historical

as a juridical narrative (and thus abstracted from its material foundation), this necessarily raises the question of which material social relations are responsible for forming and sustaining this particular arrangement.[112] In other words, who does the state-centric abstraction serve and why?

In addressing this question, the explanatory forces of materiality represented by historical sociology and the explanatory forces of abstraction represented by 'juridical thinking' coexist in a relational capacity.[113] After all, the initial motivations for juridically articulating abstractions are themselves rooted in material interests. As such, the identification of these interests provides profound insights into why competing actors formulate their particular legal arguments.[114] Through this lens, we can confront a problem, identified by Marks, whereby the commonplace fetishization of international law as an autonomous, self-contained 'thing' distorts our consciousness of how it is actually a 'process' grounded in a complex interplay of social and interpretive dynamics.[115]

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sociology of international law has yet to be theorised in detail. Such a pursuit is highly worthwhile given that, as it currently stands, 'the question of the relationship between law and social change on broader level—what we might dub *the* question of Marxist legal theory—remains unanswered.' Knox 2016a, 326 (emphasis in original). However, it worth noting that there are ongoing attempts to theorise the historical sociology of international law from within the field of international relations. Of particular importance here is Maïa Pal's theory of 'jurisdictional accumulation', see Pal 2013

[112] This invokes the deep connection between sovereignty and modern historical consciousness (i.e. the view of the future as radical possibility unlimited by any cyclical inevitability), in that both arose in roughly the same early modern timeframe. Here, while modern sovereignty's spatial dimension of territory is almost universally assumed, what is less remarked upon (yet perhaps even more obvious) is the temporality of sovereignty as a presumptively eternal claim that is inconsistent with future limitations as a condition of its existence Davenport 2016, 260-261.

[113] On the supplementary nature of internal and external perspectives on the political force of legal argument, see Werner 2010; Desautels-Stein 2016a, 213-216.

[114] On Russian and Ukrainian assertions of the 'right to self-determination' as extension of material interests regarding Crimea, see Özsu 2015.

[115] Marks 2008, 6.

4.2.3. The Historical Sociology-'Juridical Thinking' Interaction

In combining the presumptions of historical sociology and 'juridical thinking' detailed above, what emerges is a framework of 'world-historical context' uniquely suited to mapping the complexities of how popular will became globalized as international law's basis for domestic authority. This framework reveals how popular will, despite being a justification for presumptively limitless plurality in contemporary international law, originally emerged as part of a broader array of abstractions that upheld very specific modes of government and political economy. However, by virtue of its status as a juridical abstraction capable of taking any form, and thus fulfilling any political end, popular will has proven to be a source of captivation so strong that it has built a world in its image. In accomplishing this, by calling for the autonomy of a particular political community in a manner that affirms the overarching system of international law, popular will acts as a means of pursuing parochial (and materially-grounded) interests through a universalist vocabulary centred on the modern nation-state form. Those who claim alternative vessels for collective expression are incomprehensible to the international legal order as it currently is.[116]

This uniformity of juridical assertion coexists alongside deeply entrenched systems of uneven material distribution. Viewed through the lens of 'world-historical context', the seeming disjuncture between the freedom to pursue emancipation on one's own terms and realities of structured inequality can be understood as entwined through a common meta-process. Against this formative presumption, our task is to explain why assertions of popular will delivered a higher degree of material success to some populations compared to others despite their existence within a shared international legal order. Here we must consider how the reception, dissemination,

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[116] According to Parfitt's account, such alternatives as they have been asserted by indigenous scholars throughout the world, form perhaps the best available means of resisting the 'process of international legal reproduction' and its multi-layered entrenchment of hierarchy under the veneer of equality, see Parfitt 2019, 411-446.

and adaptation of innovations, including modes of legal argument, necessarily turns our attention to the greater world-system.

It is through the disavowal of state-centrism that historical sociology has proven highly adept at theorizing such innovations, especially through the framework of Uneven and Combined Development pioneered by Leon Trotsky.[117] Subject to numerous interpretations, this framework's core features are that: a) there is an inherent multiplicity of societies, b) developments occurring within one society exert pressures on other societies, and c) the configurations/innovations developed through this process can manifest in a local contexts in a variety of ways.[118] According to Barry Buzan and George Lawson's account of these manifestations:

> Each social order that encounters…[a] new configuration has its own way of adapting to it…inter-societal dynamics have taken the form of emulation. Some societies do not take on the new configuration at all, either because of internal resistance to the changes it required, or because of attempts by leading-edge polities to maintain inequalities between them by denying access to elements of transformation. Others succeed in developing indigenous versions of the new configuration. These 'late' developers are not carbon copies of the original adopters, but develop their own characteristics.[119]

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[117] For Trotsky, this theory was prompted by the need to explain why anti-capitalist revolution broke out in the feudal-agrarian and thus relatively 'backwards' Tsarist Russian Empire as opposed to the most advanced industrial capitalist economies, namely England, as envisioned by Marx. According to Trotsky, this disjuncture had its explanation in the fact that 'domestic' political developments were not purely internal events reducible to developmental stages, but rather shaped by external pressures and adaptations on a global scale, see Trotsky 2013, 3-12.

[118] Ibid. For various accounts of Uneven and Combined Development ('UCD') as it has been developed in IR, see Rosenberg 2006; Anievas and Allinson 2009; Glenn 2012; Rosenberg 2013. For a pioneering account of how UCD is applicable in the context of legal analysis, see Brophy 2017.

[119] Buzan and Lawson, 2015, 20.

The specific interpretations of international law by actors claiming independence on the grounds of popular will can certainly be understood as configurations/innovations according to this framework. However, viewing them in this light requires attention to certain issues. Here we must take seriously the way 'juridical thinking' weaves together concepts and events across a number of contexts into a transcendent web of rules and principles. Given this formation, actors strategically affirming certain aspect of the international legal order may inadvertently commit themselves to additional presumptions embedded within this system that are not immediately visible, but can be incredibly disadvantageous in the long-term.[120] That said, the material success or failure of those asserting popular will for any number of ends will, in large part, be determined by the context of the international legal order at the time these assertion are made.

Here, actors seeking international legal subjectivity at times when the international legal order is open to redefinition maintain a high degree of agency in their strategic adaptation of its principles (which may even include translating their own parochial interests into universal standards). Correspondingly, actors making assertions at times when the international legal order is in a state of greater rigidity are far more constrained when it comes to the ability of the larger system to accommodate their localized assertions. Firmly adhering to the notion that asserting popular will in an anarchic, sovereignty-based order presents limitless possibilities for plural expression systematically diverts our attention away from these material considerations. As such, it proves all too easy to miss the structural inequality created between societies that were 'standard setters' and societies that were 'standard takers' when it came to their formative receptions and assertions of materially-consequential international legal innovations.[121]

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[120] To give just one example, colonies that asserted independence via the right to self-determination in the 1960s subjected themselves to an overarching order that also contained the rules of state responsibility that obligated these new states to compensate former colonial powers for nationalizing old colonial assets that now fell under the rubric of 'foreign-owned property,' Chimni 2008, 84-85.

[121] Parfitt 2012, 1185.

4.3. Locating a Timeframe

Given the broad applicability of this historical sociology-'juridical thinking' synthesis, narrowing the temporal scope is essential when accounting for the globalisation of popular will through international law. While my analytical entry point and endpoint is the UN Charter system, the main historical engagement presented as the explanation for this current system takes place in the late-eighteenth and early-nineteenth centuries. Focus on this general era as a turning point continues to be rare within international legal scholarship despite the critical 'turn to history.' According to Jennifer Pitt's appraisal of this situation in *Boundaries of the International*, one of the few works to centre this timeframe: '[w]hile there has been much recent scholarship on Vitoria and Grotius, as well as on the later nineteenth century, the predisciplinary eighteenth and early nineteenth centuries have been relatively neglected.'[122] In building upon this engagement, I take the position that attention to this timeframe is vital for overcoming serious substantive and methodological issues that accompany the analysis of popular will within contemporary international legal scholarship.

Substantively, my intervention pre-empts misconceptions that the status of popular will as the basis for domestic authority emerged with the 1648 Peace of Westphalia settlement ending the Thirty-Years Wars. Though a historical myth, this event is widely believed to be the origin point of the modern international order.[123] Such a misconception is certainly understandable given that Westphalia has traditionally been assumed to mark the end of a hierarchical, heterogeneous order comprised of

[122] Pitts 2018, 16.

[123] For a historical sketch of the conflation between the peace of Westphalia and an international order premised on sovereign equality, see Stirk 2012.

divinity-empowered actors by replacing it with a secular-anarchic order of sovereign states.[124] According to this narrative, given that these post-Westphalian sovereign entities were bound to no higher authority, it is not a difficult step to assume that the popular will of the underlying communities animating these entities were the ultimate sources of political empowerment. However, while this account may create a coherent basis for theorizing the modern international system, the factual accuracy of this orthodox conception of Westphalia has been subject to sustained critique by historians and international relations scholars, if not international lawyers.[125] Thus, while Westphalia's endurance as a source of normative and symbolic power is a grand testament to the force of 'juridical thinking' and its ability to entrench timeless narratives detached from material reality historical sociology forces us to rethink our approach to this event.

In revisionist accounts of Westphalia, a major point made is that this event was a preservation of existing modalities of divinity-sourced dynastic power as opposed to any move to secularism. If this assertion contains even a small degree of truth, such an occurrence is fundamentally inconsistent with the materialist view of anarchy discussed above. After all, dynastic legitimacy vests sovereignty in the persons of rulers as opposed to the abstraction of a distinct political community expressing its popular will in a territorially-bounded setting. Relatedly, in contrast to the emptiness of popular will, and its consequent presentation of infinite possibilities (in theory), dynastic legitimacy was grounded in very specific practices and traditions.[126] Modification of these by any individual dynastic actor came at the risk of disavowing their authority. All of that said, I take the position that, while the change represented by Westphalia was consequential within the dynastic order, this does not (on its own) trigger any linear transition of these dynastic kingdoms into modern

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[124] For perhaps the most influential modern account of this narrative, see Gross 1948.

[125] For such critiques of the Westphalia narrative, see e.g. Croxton 1999; Osiander 2001; Teschke 2003; Craven 2012b, 232-633; Kayaoglu 2010b.

[126] For an anthropological perspective on these rites of monarchic rule across numerous contexts, see Graeber and Sahlins 2017.

sovereign states.[127] Thus, in explaining the rise of a world of sovereign states legitimized on the basis of poplar will, I focus on the interlinked rupturing force of the rise of capitalism and the outbreak, and later containment, of the Enlightenment era revolutions when squaring the Westphalian circle.

As will be explained in greater detail, it is my premise that the modern capitalist state first institutionally consolidated in seventeenth century England, albeit as a result of a much broader pattern of inter-societal interactions.[128] Yet, the social changes that came with this transformation were, in great part, managed through a process of North American settler colonization that furthered the expansion of British capitalism.[129] This eventually led to a settler revolt in the form of the American Revolution where achieving *de facto* authority in the name of popular will ultimately provided a successful basis for sovereign independence.[130] This upheaval reached the heart of the European dynastic order in the form of the French Revolution where absolutist contradictions could no longer coexist with Enlightenment sensibilities and the material interests they generated.[131] Following this rupture, the consolidation of the 1815 Concert of Europe that hosted a tense alliance between a liberal Britain and a reactionary dynastic Russia, Prussia, and Austria laid the foundations for the Eurocentric 'family of nations.'[132] The consolidation of this new state-centric order was furthered by the independence of Latin American states where assertions of dynastic legitimacy proved unable to block external recognition on the basis of *de facto* authority.[133]

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[127] On the longstanding assumption that the order absolutist kingdoms formed a direct link to the modern order of sovereign states, see Rosenberg 1994, 130-131.

[128] See Chapter III, Part 3.3.2.

[129] Ibid. Part 3.4.

[130] Ibid. Part 3.5.

[131] See Chapter IV.

[132] See Chapter V.

[133] See Chapter VI.

Through this alternative substantive account of the rise and diffusion of popular will, international law, and the modern nation-state, this thesis provides a multifaceted, materially-grounded account of why certain juridical innovations relating to legitimate authority became unquestioned presumptions. Against this backdrop, I offer insights into how larger systemic features, namely the rise of capitalist political economy and its attendant juridical forms, provided certain actors with a vast degree of agency, forced others to rapidly adapt, and completely marginalized others. Thus, I expose the ways in which the theoretically limitless range of local governmental systems represented by the possibility of sovereign popular will was, in reality, deeply constrained by the demands of capital accumulation and those willing to further it through violence.

Given this reality of structural coercion, affirming the ultimately empty possibility of popular will was in many instances the only avenue for certain actors to attain a modicum of leverage in a rapidly transforming world-system. This was true even when expressing this affirmation destroyed the possibility of developing alternative modes of socio-political organization better suited to local conditions. By identifying a series of interconnected events in the late eighteenth and early nineteenth-centuries as a confluence that ultimately entrenched a specific understanding of popular will on a global scale, I directly address what David Armitage has identified as a glaring explanatory gap whereby:

> the receptivity of the world to the contagion of sovereignty which almost universally effected it *still demands explanation*, especially by attending to the domestic determinants and conditions of its reception and domestication. Only then can we fully understand the energetic coproduction of the national and the international around the globe in the nineteenth and twentieth centuries.[134]

Confronting these late eighteenth- and early nineteenth-century events through an interdisciplinary (but predominantly international legal) lens presents challenges,

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[134] Armitage 2013, 28 (notes omitted, emphasis mine).

but also opportunities, when confronting entrenched methodological standards. A key issue is that, despite their indispensable role in turning an order of personalized dynastic monarchs into an order of depersonalized sovereign states, the Enlightenment revolutions are rarely acknowledged as such by international lawyers. This is unsurprising given that, while of profound world-historical significance, these revolutions produced very few materials traditionally viewed as authoritative sources in the international legal field. According to Stephen Neff:

> The striking thing was how little, rather than how much, impact the [revolutionary] upheavals had on the law of nations. It was one of history's most dramatic demonstrations of how much it is that the doctrines and structures of international law are more deeply rooted - and correspondingly slower to evolve - than the surface events that claimed the attentions of journalists and some historians. The period produced no revolutionary international legal theorist comparable to William Godwin or Thomas Paine, no monumental treatise on 'Revolutionary International Law.'[135]

However, this paradox is eminently consistent with a persistent methodological shortcoming in the production of international legal history. As Rose Parfitt has shown, reliance on the works of classical doctrinal publicists (Vitoria, Grotius, Vattel, etc.) '…offers the international legal historian a ready-made methodology, amounting in effect to an inbuilt disciplinary historiography' that if abandoned, risks 'dissolving the specifically international legal character of the historical undertaking.'[136] While recourse to this trope allows a scholar to claim a distinctly 'international legal' approach, it also contributes to a deeply Eurocentric conception of what international law is and what it can be.[137] The great problem this presents is that while international law claims legitimacy on the basis of 'universality', so

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[135] Neff 2003, 93.

[136] Parfitt 2014, 299.

[137] Ibid.

long as Eurocentric methods remains dominant, there cannot be a truly 'global history of international law' that includes an ever-expanding multiplicity of perspectives; something that might critically confront the ideals posed by the discourse of 'universality.'[138] While these methodological orthodoxies have long excluded the West's Others as producers of international legal knowledge, the case of the Enlightenment revolutions shows that they are also adept at preventing the West from coming to terms with the world-historical realities of its own objects of mythologisation.

Regarding political economy, while this mode of analysis has become increasingly prevalent across various legal regimes,[139] it is not yet fully entrenched within the areas of international law that directly bear on popular will, namely statehood, recognition, and self-determination.[140] As Umut Ozsu has observed, while agendas of resource control may trivialise normative assertions of absolute rights (and thus disincentive the rhetoric of political economy in these contexts), contestations over popular will possess unavoidable material dimensions that have yet to be comprehensively analysed.[141] What then would a political economy of the historical relationship between popular will and domestic authority actually look like in light of international law's contemporary approach to political economy?

Unlike its 'turn to history', international law's 'turn to political economy' has been less concerned with the interdisciplinary incorporation of new sources and methodologies. Rather, according to John Haskell and Akbar Rasulov's recent assessment,

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[138] Ibid. 306.

[139] See Kennedy 2013.

[140] Özsu 2015, 439.

[141] Ibid.

the later ‘turn’ has functioned as a concerted normative condemnation of ‘mainstream’ international law’s facilitation of global capitalism and its inequities.[142] Despite the divergences between these respective ‘turns' in international law, there is no reason way the normative issues raised by discourses of political economy cannot be incorporated into the task of building a global history of international law.[143] By using the historical sociology-‘juridical thinking’ framework to materially ground the ways in which international law shaped and disseminated popular will, and the corollary abstractions that defined it, the analysis in this thesis aims to serve the ends of both political economy-based and history-based critical discourses within contemporary international law.

Beyond these contemporary debates, this general interdisciplinary ethos is more reflective of how many individuals in this late-eighteenth and early-nineteenth century timeframe viewed the law of nations. Although largely neglected in the narratives of international lawyers, prior to the disciplinary consolidation of the field in the second half of the nineteenth century, the radical theorization of legal relations between peoples was far more common. As Jennifer Pitts has shown in the first major study of this forgotten phenomenon, while one should not underestimate longstanding presence of cultural superiority sensibilities throughout European history, the eighteenth century actually did witness an unprecedented degree of critical and anti-colonial formulations of the law of nations.[144] It was only by later jurists declaring international law specific to ‘European civilization’ that these formulations fell outside the appropriate scope of disciplinary analysis.[145] For Pitts, critical

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[142] Haskell and Rasulov 2018.

[143] As Martin Clark has noted, the debate over historical methodology in international law has largely focused on assertions and critiques of the Cambridge School and its contextual emphasis on intellectual history. What is lost in the process is the possibility of international legal engagement with other modes of historiography, including those that focus on global history, economic history, and, for that matter, historical sociology, see Clark 2018b, 757.

[144] For a comprehensive account see Pitts 2018, 92-117.

[145] See Ibid, 161-177.

engagement with, and inclusive approaches towards, international law in the contemporary era is, in some sense, a revival of the critical ethos of the eighteenth century. Accordingly:

> the current historicising moment has brought scholars of international law into conversation with those of other disciplines including history, anthropology, international relations, and political theory. This may make possible something like a return to the predisciplinary status of the law of nations as a discourse available to a wider array of writers, thinkers, and publics.[146]

In taking this revivalist prospect seriously, theorising the place of popular will within the law of nations is critical. As discussed above, the inability of narrow disciplinarily understandings of international law to produce compelling explanations of the operation of popular will within the global order, has lead theorists of this question, including myself, to seek more comprehensive insights through interdisciplinary engagement. While being cognizant of the reality that disciplinarily rigid understandings of international law have left an irreversible legacy, an alternative approach is needed. Being true to the ethos of the Enlightenment's more radical aspects, I embrace the methodological orientation that accounting for the popular will-international law relationship must proceed with a default scepticism towards rigid disciplinary boundaries.

5. The Road Ahead

Chapter I provides an overview of the doctrinal and policy issues raised by questions of popular will in contemporary international law. Here I account for the 'effective control doctrine' within the UN Charter and its subsequent manifestation against the backdrop of the Cold War and decolonization. From here, I assess post-Cold War challenges to the effective control doctrine in the realms of state creation

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[146] Ibid. 16 (notes omitted).

and governmental legitimacy. It was through these projects that international law's traditional tolerance of varied domestic political orders was subject to critique on the basis that liberal democracy represented the only true measures of popular will. Given the failure of these projects to succeed on their own terms, the effective control doctrine remains a highly relevant feature of international law applicable to domestic political conflicts/contestations the world over.

In locating where the component elements of the effective control doctrine first emerged, Chapter II argues that the great turning point was the Swiss jurist Emer de Vattel's 1758 treatise *The Law of Nations*. Here I examine earlier classical publicists (in particular Francisco de Vitoria) to show how our modern conception of popular will did not exist in the earliest international legal sources that are generally viewed as authoritative within the field. I thus showcase Vattel's responsibility for this rupture, through a reading of his domestic political theory in conjunction with his theory of international order. This textual engagement is then coupled with a contextual analysis of Vattel's position in world history. Here, I show how 'popular will' as the unifying rubric of Vattel's theory explains how his designation of the various classes of actors was informed by his immediate context as it related to the European states system, the Ottoman Empire, indigenous peoples in the non-European world, and Britain/the British Empire.

While Chapter II is undoubtedly rooted in history, Chapter III begins the main world-historical narrative by accounting for the rise of colonial capitalism and the modern nation-state form. Following engagements with the debates on the rise of Britain as the first modern state in global context, I account for the emergence of the US as the first new international legal subject where popular will evidenced by 'facts on the ground' sufficiently repudiated a parent state's claims of dynastic legitimacy. Here I examine how the impetus to raise the justification of popular will in this context was taken from numerous features of British thought that where specially adapted to the material context of a slave-holding 'settler empire' that exemplified capitalist political economy both materially and ideologically. Here Vattel's *The Law of Nations* functioned as the ultimate guide to legitimizing the American

Revolution under the law of nations, especially when it came to appealing to outsiders in a universalistic capacity.

Chapter IV examines the transformation of '*Ancien Regime'* in Europe between the 1648 Peace of Westphalia and the 1815 Congress of Vienna. This entails an examination of the rise of rationalised territorial administration under consolidation of absolutism that generated profound contradictions regarding the legitimate authority and ultimately resulted in the French Revolution. Here I examine the various international legal innovations that arose in the crucible of the Revolution as they relate to nationalist and republication challenges to dynastic legitimacy expressed under the banner of popular will. In this capacity, I discuss the enduring impact of this 'popular will' concept that remained even after the defeat of Napoleon when victorious anti-Revolutionary forces sought to restore order.

Chapter V then analyses the Concert of Europe system that arose from the Congress of Vienna in the early-nineteenth century whereby post-Napoleonic reconstruction was subject to hegemonic control by great powers. Here I focus on the ideological and geopolitical tensions between liberal Britain and the reactionary-dynastic Holy Alliance of Russia, Prussia, and Austria with each bloc harbouring very different visions of what 'restoring order' meant. Managing these tensions lead to core international legal developments including modern sovereign equality, the replacement of territorial conquest by belligerent occupation, and an entirely new generation of treaty-making. Furthermore, I show how this process was facilitated by understandings of popular will that arose as critiques of Revolutionary liberalism/universalism and asserted formulations of racial hierarchy and ethno-nationalist particularity that facilitated expansion of colonial capitalism.

In Chapter VI, I turn to the phenomenon of peripheral popular will through an exploration of the independence of Latin American states. Here, the region's formation through feudal dynastic colonization was very different from the British settlement of North America. Against this socio-historical backdrop, I examine how commitments by Europe's dynastic powers to deny recognition to Latin American independence leaders led the British and US Americans to articulate popular will-

based arguments that de facto authority constitutes international legal standing over a parent state's objection. This process further enmeshed Latin America deeply within the structures of global capitalism. The resulting pressures led to robust arguments concerning sovereign equality, nonintervention, and absolute independence as a necessary to protecting the popular will of weak/marginalized states hoping to improve through 'development.'

Finally, in Chapter VII, I return to the context of the formation of the United Nations that gives rise to the 'effective control doctrine' by virtue of its entrenchment of commitments to sovereign equality, non-intervention, and ideological pluralism. In rereading this transformative event in light of the historical analysis presented in this thesis, it is my argument that following countless projects to limit or qualify sovereign autonomy through various colonial rationales, by 1945 such efforts could no longer be justified. After all, fascism had demonstrated the genocidal (and spatially uncontainable) potentiality of racialized colonial violence, while Soviet and anticolonial challenges to the legal architecture of Western empires were now unavoidable forces in world politics. Thus, while colonialism still existed throughout the world, the UN Charter provided the seeds of a vision where popular will was applicable on a global scale and every human being should be a member of a sovereign political community. This development mobilized numerous lineages of the Enlightenment revolutions amongst a diverse array of actors who navigated the inherited structures of popular will, international law, and the nation-state as both vessels of hope and sources of constraint. In the Conclusion, I return to the formative vision presented in Vattel's *The Law of Nations* and restate how this thesis has exposed the process through which an abstract theory produced by a peripheral actor ultimately shaped the identity of every person on earth.

CHAPTER I

The Contemporary International Law of Popular Will: The Effective Control Doctrine and Its Discontents

1.1. Introduction

The purpose of this chapter is to provide an overview of popular will's status within the contemporary international legal order. Here I focus upon the ongoing debates over the effective control doctrine as deeply flawed, but nonetheless most commonly accepted means of determining popular will under international law in most situations. In addition to accounting for the doctrine's origins and function, this analysis also highlights attempts at devising alternative means of determining popular will and the limits of those proposed alternatives. While resolving the effective control doctrine's difficulties remains elusive, this foundational analysis sets the stage for a 'turn to history' whereby excavating the past resituates the intractabilities of the present.

In undertaking this foundational analysis, Part 1.2. provides a high-altitude overview of how the effective control doctrine exists at the intersection of varied and contradictory normative and doctrinal considerations present within international legal discourse. This provides grounding for Part 1.3.'s account of the effective control doctrine's development within the UN system where the acceptance of violence within states acted as the price to be paid for limiting violence between states against the tumultuous ideological backdrop of decolonization and the Cold War. Building directly on this, Part 1.4. recounts the proposed alternatives to the effective control doctrine that arose in the immediate wake of the Cold War. Here, the perceived post-Cold War triumph of liberal democracy lead many international lawyers to question the field's longstanding agnosticism towards domestic systems of government. This being the case, the pluralist ethos of the effective control doctrine

were subject to liberal democratic critique when applied to international legal questions concerning both the creation of new states and the legitimacy of governments within existing states. However, in evaluating the success of these proposed alternatives, and their focus on liberal conceptions of democracy, human rights, and the rule of law, Part 1.5. shows how core features of the effective control doctrine nonetheless persisted at a structural level. Coupled with recent political realities, the failure of alternatives to displace these structural features has resulted in an overarching situation where the 'effective control doctrine', and the limited understanding of popular will it embodies, continues to be a core reality of the international legal order.

Having established the presence of deeply embedded flaws within contemporary international legal doctrine, Chapter II's begins historicizing the present moment. Here I show how transformed understandings of popular will within the classical law of nations gave rise to the core, structuring features of the 'effective control doctrine' as its logical by-products. On this grounding, the analyses presented in Chapters III-VI show, through a series of interlinked historical events, why key influential actors throughout the world were receptive to the particular vision of popular will intertwined with the nation-state form detailed in Chapter II. With this record established, Chapter VII returns to this chapter's problem of the effective control doctrine within the postwar order. Here I offer an account of why the popular will-embodying state was able to attain a monopoly over political subjectivity on a global level through the rise of the United Nations system.

1.2. The Effective Control Doctrine as Anchor

In showing why a world-historical excavation of popular will's emergence as the universal international legal standard for evaluating domestic authority is worthwhile, the purpose of this first chapter is to provide an overview of the contemporary doctrinal and policy landscape surrounding these issues. Here, my primary focus is on the phenomenon deemed the effective control doctrine outlined in the introduction, as well as some of the prominent challenges and alternatives offered

in response to the harsh outcomes this doctrine is capable of legitimizing. Such an exercise is important given that, despite its many flaws, the effective control doctrine stands for a pluralist formulation of popular will that has produced a higher degree of consensus than any other formulation produced thus far. After all, attempts to overcome the effective control doctrine's harshness only ended up demonstrating just how central a pluralist conception of popular will is within our current understanding of international law. Accounting for these contemporary doctrinal and policy issues highlights the particular way this specific configuration of popular will shapes the relationship between international law and domestic legal/political orders. This presents a vital compass for orienting our exploration of how these overarching structures arose in world-historical context.

Given that international law is premised on both universality *and* the sovereign autonomy of it subjects, attempts by international lawyers to set precise, timeless standards for membership in this system have, at least traditionally, been minimal. Even the 1932 Montevideo Convention's reigning definition of a state as consisting of the four elements of i) territory, ii) permanent population, iii) government, and iv) foreign relations capacity,[1] is a product of the specific setting in which it was promulgated and faces limitations as a criteria when applied to fundamentally different international circumstances.[2] There are compelling reasons for not pursuing a project of rigidly defining such standards, namely that flexibility allows both local and external actors to develop creative and appropriately tailored solutions to complex disputes.

However, my purpose here is to account for situations of contested international legal standing where peaceful means of negotiation and resolution fail to provide an answer and the broader international community must take a decisive position

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[1] *Monteviedo Convention* 1933.

[2] See Grant 1998. Yet, despite this context, the Montevideo Convention has nonetheless produced an imagined genealogy of a unified and coherent international law of statehood. d'Aspremont 2018.

on whether a self-proclaimed sovereign authority actually exists as a new state or the legitimate government of an existing state. In particular, I focus on the effective control doctrine and its default standard that objective, *de facto*, and presumptively durable territorial authority evidenced by an obedient population is the benchmark for recognizing international legal standing.[3] While this effective control doctrine can be understood in a narrow-procedural sense applicable to a limited range of situations, any attempt to provide a comprehensive analysis of this phenomenon must also approach it at a broad-substantive level as well.

In its narrow-procedural sense, the effective control doctrine is most prominently applicable to situations of secession from an existing state and extra-constitutional governmental change through force (revolutions, civil wars, coups, etc.). Against this backdrop, while directly answering questions of state creation and governmental legitimacy typically exceeds the jurisdictional capacity of courts, lawyers are faced with numerous potential catalysts that trigger the question of 'who possesses effective control?' After all, a blindingly vast array of legal controversies can result in dramatically different outcomes depending on which proclaimed sovereign authority is internationally recognized. According to Sean Murphy:

> It is through those legal relations that the State can lawfully request military support from other States; can lawfully refuse entry to foreign military forces; can lawfully negotiate and conclude international agreements; can avail itself of other rights accorded to sovereigns under international law and vindicate those rights before international fora; and can demand respect by other States of sovereign acts exercised within its territory, including the enactment and enforcement of civil and criminal laws.[4]

However, while the effective control doctrine provides a default criterion for addressing the contested sovereignty that may arise in a number of situations, it has

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[3] Lauterpacht 1947, 28-29, 98-102.

[4] Murphy 2000, 123-124.

not gone unchallenged. This is primarily due to the violent realities that have historically accompanied struggles to establish a state or governmental order deviating from the internationally recognized status quo.

On this reading, the great problem with the effective control doctrine is its bolstering of a state-centric morality where violence within a territorially setting, whether it involves contesting or maintaining sovereign authority, is beyond the substantive judgment of the international community. The persistence of this justification has been deemed inconsistent with postwar changes in the international legal order where the emergence of universal human rights presented an alternative to the complacent tolerance of localized cruelty and suffering.[5] From this premise, according to Anne Peters, state sovereignty is nothing more than an abstraction that only gains its substance from the human communities it serves.[6] It would therefore be perverse to allow abusive regimes to invoke the shield of sovereignty to continue in their abuse of the very populations that sovereignty is itself contingent upon.[7] Furthermore, in contrast to early views that tolerated internal discretion in the name of preventing interstate strife, this particular interpretation of international legal transformation characterized locally executed gross human rights violations as threats to international peace and security. Under this justification, especially as depicted by Michael Reisman, breeches of UN Charter rules on the use of force to uphold democracy or prevent abuse might be justified as a fulfilment of the Charter's ideals

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[5] According to Ruti Teitel, this core view, buttressed by intertwined institutional developments in the fields of human rights, international humanitarian law, and international criminal law, has led to an integrated order of 'humanity law' poses a serious normative challenge to the state-centric legal order, Teitel 2011.

[6] Peters 2009.

[7] In anticipating this humanitarian configuration's potential conflict with the doctrine of sovereign equality, Peters claims that '…states' entitlement to formally legal treatment may be curtailed by countervailing considerations and must be balanced against other concerns. A state's respect for the most basic human rights is a legitimate criterion for legal distinctions between states which would leave proportionate equality intact.' Ibid. 529 (notes omitted).

and, relatedly, a safeguard for 'world order.'[8] Viewing these developments in the aggregate, a defining theme of international legal discourse fixated upon the legitimate restriction of traditional sovereign power in the name of human rights and/or democratic 'popular will.'

It is in the face of such challenges that the broad-substantive conception of the effective control doctrine is prompted to assert itself. Here the doctrine is presented as tool for preserving the self-rule of sovereign territories and their underlying political communities against well-intended, but short-sighted or overly optimistic, progressive ambitions.[9] At a structural level, in an international legal order premised upon the trust, faith, and voluntary consent of diverse members acting without an overarching enforcement mechanism, the normative value of a standard seeking to maximize domestic autonomy and minimize interference cannot be causally dismissed.[10] Thus, it can be said that solidifying this base level of agreement is essential if incremental cooperation in a diverse and unequal world is ever going to be possible.[11]

However, this in turn raises the question of how exactly do we locate the threshold for tolerating domestically-constituted violence given that the international legal order is also premised on some degree of shared values?[12] Turning away from the 'sovereignty' vs. 'humanity' debate in its abstract form, my purpose is to address the question of how did the international legal order arrive at this particular juncture.

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[8] See especially Reisman 1990.

[9] Roth 1999, 420-428.

[10] See generally Roth 2011.

[11] The reality of this arrangement creates a conundrum for reformers. As Jure Vidmar notes, while governmental abuses against their populations may be patently inconsistent with many of the underlying rationales of international law, the system's juridical architecture nonetheless remains highly protective of state sovereignty, Vidmar 2014.

[12] For one such attempt, see Fletcher and Ohlin 2008.

This means asking the questions of how and why the effective control doctrine became a uniform standard that has attained global applicability despite the particularity of its origins.

1.3. Effective Control in the UN Charter System

In the aftermath of the Second World War, the formation of the UN Charter system directly confronted the contradictory meanings of sovereignty that historically included both the prerogative to wage war and the assertion of freedom from external interference.[13] Through this confrontation, the former aspect was deeply subordinated to the later through the novel elevation of sovereignty to a protected status that 'once achieved is entrenched.'[14] This emphasis is made clear in Article 2(1)'s commitment to sovereign equality as fundamental precept, Article 2(4)'s prohibition on the use or threat of force against a state's territorial integrity or political independence, and Article 2(7)'s pronouncement of non-interference by the United Nations in domestic affairs.

In accounting for the spaces between these core provisions, '[t]he [effective control] doctrine fills a void inherent in a decentralized legal order founded on arbitrarily-drawn territorial boundaries and beset by continuing clashes of interests and values.'[15] On this account, it forms a point of reconciliation between the Charter's dual commitment to 1) a presumption that existing states and governments are the legitimate manifestations of their peoples' popular sovereignty, and 2) a system that respects pluralism among different political, economic, and cultural ideals as means

[13] For an account of this shift as originating in campaigns to outlaw war during the interwar period, see Hathaway and Shapiro 2017.

[14] Crawford 2012, 120.

[15] Roth 2010, 395.

of achieving peaceful coexistence.[16] This is unsurprising given that the formation of the United Nations was far from a harmonious affair and represented a diverse array of interests, ideologies, and visions of world order.[17] Thus, if curtailing the scourge of interstate violence formed the common denominator amongst the new system's disagreement-prone architects, then acceptance of potential intrastate violence was a necessary concession.[18]

These principles of sovereign equality, nonintervention, and ideological pluralism became entrenched through the Cold War and decolonization. Here, such international legal ideals became a medium of coexistence between a Western bloc seeking to contain the advantages of global capitalism, an Eastern bloc seeking to build a socialist alternative, and the Nonaligned Movement, amongst other Third World formations, seeking to carve independent paths for colonial/postcolonial peoples.[19] While symmetrical attempts were made by the superpowers to justify intervention in domestic affairs in support of allied leadership via the respective Brezhnev and Johnson/Reagan Doctrines, such justifications cannot be said to have achieved international legal validity.[20]

This environment of contestation, coupled with the massive infusion of new states emerging from decolonization within international organizations, lead to the promulgation of commitments to nonintervention and national autonomy over political,

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[16] Ibid. 395-396.

[17] See Mazower 2009.

[18] See Hathaway and Shapiro 2017, 366-368.

[19] See Roth 2012, 29.

[20] Roth 1999, 136. For studies of the Brezhnev and Johnson/Reagan Doctrines, see e.g. Franck and Weisband 1970; Dore 1980; Reisman 1988; Ouimet 2003.

economic, social and cultural systems under the 1970 *Friendly Relations Declaration*.[21] Furthermore, this commitment to ideological pluralism was strongly reiterated in 1986 by the International Court of Justice in the *Nicaragua* case where, in rejecting the legality of US claim of suppressing the emergence of a 'totalitarian Communist dictatorship', the Court stated that: 'adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests…'[22]

Yet, for this system to be premised under a rationale of 'effective control' the plain meaning of this term must be qualified by other considerations so that international law can operate in conformity with its core ideals. These considerations, including the Stimson Doctrine; the rule against 'premature' recognition; and the self-determination of peoples, circumscribe effective control by guaranteeing the independence of '…territorially-based political communit[ies] that existing states collectively decide *ought* to be self-governing, whether based on existing, remembered, or foreseen patterns of governance within [them]….'[23] Announced in 1932 by US Secretary of State Henry L. Stimson, this doctrine was a refusal to recognise the 'State of Manchukuo' created as a result of Japan's conquest of China's Manchuria region.[24] Upon acquiring a high degree of both state practice and *opinion juris*, it stands for proposition that forceful annexation does not grant valid title and 'puppet' states created through the unlawful interference of an external power cannot be recognized as valid international legal subjects.[25] Furthermore, this understanding that

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[21] *Friendly Relations Declaration* 1970.

[22] *ICJ Nicaragua* 1986, p. 263.

[23] Roth 2010, 400.

[24] For early scholarly reactions to the Stimson Doctrine as it was developing, see Williams 1932; McNair 1933; Yokota 1935; Wright 1935.

[25] Article 2(4) of the UN Charter's protection of territorial integrity and political independence can be viewed as a codification of this, Turns 2003, 130. On the Stimson's Doctrine's grounding in the multilateral effort to outlaw aggression and conquest through the 1928 Kellogg-Briand Pact, see

wrongdoers should not be able to enjoy the rewards of their unlawful conduct has been applied to situations of complete territorial conquest where afflicted states' 'governments in exile' retained international legal standing despite lacking *de facto* authority.[26]

In a similar vein, the rule against 'premature' recognition declares that the external recognition of a secessionist and/or insurgent movement amounts to an undue intervention in the domestic affairs of a sovereign state and such a recognition can only be made once it is highly likely that the opposition will prevail against the sovereign.[27] While speculations regarding the likelihood of success in such circumstances are typically open to a wide-range of interpretations, one relatively settled matter is that established authorities receive a high degree of deference. Here, the presumption of effective control by an incumbent can appear fictitious in that it often coexists alongside a substantial lack of actual territorial authority. On this basis, the general understanding is that an established sovereign loses the ability to invoke the rule against premature recognition only when it is unable or unwilling to reassert control over lost territories.[28] According to Roth's assessment of when control cannot reasonably be regained, while legally insignificant in and of itself,

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Hathaway and Shapiro 2017, 166-171. For a detailed documentation of state practice relating to the effect of the Stimson Doctrine in the lead up to, conduct of, and aftermath of the Second World War, see Langer 1947.

[26] For an in-depth study of the law and practice surrounding 'governments in exile', see Talmon 1995.

[27] See Lauterpacht 1947, 9-12, 93-95.

[28] In Hersch Lauterpacht's assessment: 'When the struggle for independence has reached a tangible measure of success accompanied by reasonable prospect of permanency, international law authorizes third States to declare by means of recognition of the nascent community that the sovereignty of the parent State is extinct.' Lauterpacht 1944, 395. For observations on how this traditional rule against premature recognition was challenged in some ways, and affirmed in others, in the context of decolonisation and assertions of international legitimacy by non-state actors, see Wilson 1988, 105-117.

as a factual matter the faction that can almost always claim sovereign authority via effective control is the one that holds the capital city.[29]

The third qualification occurred with the advent of decolonization via the principle of national self-determination as promulgated by the UN General Assembly's 1960 *Anti-Colonial Declaration*.[30] This established an entirely new category of independent statehood where effective control in and of itself was no longer presumptively valid.[31] This presented Europe's 'saltwater colonies' with the options of independent statehood, free association with an independent state, or integration with an independent state.[32] Following a decade of state practice on this basis, the scope of self-determination was extended to include situations of settler minority rule as made explicit in the 1970 *Friendly Relations Declaration's* mandate for '…government[s] representing the whole people belonging to the territory without distinction as to race, creed or colour.'[33] Thus, after a unilateral declaration of independence in 1965 the racially discriminatory Republic of Rhodesia failed to gain international

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[29] Roth 1999, 183-184. This is certainly consistent with the view that, as the typical hub of infrastructure, communications and diplomatic activity, the capital city can be understood as the link between a state's internal structure and the international order, Jackson 1992, 8. However, at least traditionally, this continued standing of a weak sovereign authority was qualified by the recognition of a state of belligerency. Here an opposition force's attainment of a high degree of *de facto* territorial authority would: raise civil strife to the level of international armed conflict, invoke the laws of neutrality, and relieve the host state of its international obligations in relation to activities taking place in opposition-held territory, Lauterpacht 1947, 175-176. In this way the issue of belligerency was fundamentally entwined with effective control in that showcased how internally constituted 'facts on the ground' compromised the standing of an existing sovereign and impose specially obligations on outsiders to respect the outcomes of localized contestation, Roth 1999, 177. However, it is highly doubtful that the doctrine of belligerency continued to exist after the formation of the UN Charter in 1945. This being the case, the presumption in favour of an established government cannot be overcome on this basis, Le Mon 2003, 753-754.

[30] *Anticolonial Declaration* 1960.

[31] Roth 1999, 198-199. For a comprehensive doctrinal study on the relationship between the law of self-determination and the law of statehood, see Raic 2002.

[32] *GA Res 1541* 1960, Principle VI.

[33] *Friendly Relations Declaration* (1970); See Roth 1999, 13, 234-236.

recognition despite exercising a high degree of effective control, and apartheid South Africa was subject to international condemnation for its purely domestic practices.[34]

However, while the right to self-determination may have carved out an important exception to the effective control, it was nonetheless accompanied by other constraints from the state-centric international legal order. This was particularly true of the *uti possidetis juris* doctrine whereby pre-existing colonial frontiers where inflexibly solidified as the borders of newly decolonized states.[35] Justified as a measure for preventing disorder, fragmentation, and potentially violent territorial disputes, this principle deeply entrenched arbitrary colonial-era divisions typically made with minimal regard for the conditions of colonized populations.[36] The rigid entrenchment of these divisions coupled with the general irrelevance of effective control as prerequisite to independence[37] has led some to comment that many post-colonial nations, especially in Sub-Saharan Africa, are *de facto* 'quasi-states' existing exclusively through the ongoing efforts of the international community.[38] As

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[34] On the unprecedented condemnation of South Africa, see Simpson 2003, 300. On Rhodesia's consistency with the traditionally understood view that 'facts on the ground', even when contrary to the existing order, validate lawful authority, see Kumar 2016. According to Roth, the situation of Southern Africa's white minority regimes form an important exception to the general rule that de facto authority is evidence of popular. In situations of racialized minority rule over an overwhelming majority there is no way this could be legitimized by even the most pluralistic interpretation of popular will regardless of the degree to which the regime maintains effective control, see Roth 1999, 234-251. For an important analyses of the international legal standing of Rhodesia and apartheid South Africa, see McDougal and Reisman 1968; Richardson 1978; Dugard 1980; Richardson 1987.

[35] For an illustration of this, see *ICJ Burkina Faso v. Mali* 1986; see also Shaw 1997.

[36] For an important critique of *uti posideitis juris* in relation to its colonial context and legacies, see Mutua 1995.

[37] This can be viewed as a necessarily absolutist rejection of the League of Nations Mandate System and the UN Trustee schemes where 'unpreparedness' was always an available pretext for denying independence, see *Anticolonial Declaration* 1960, § 3 ('Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.').

[38] See Jackson 1990; Jackson 1991.

such, a build-in contestation of sovereignty is readily available to those seeking to legitimize interventions in these nations.[39]

1.4. Post-Cold War Challenges to Effective Control

The conclusion of the Cold War in 1989, and the 'end' of ideological contestation with liberal democracy its proclaimed victor,[40] presented an opportunity for re-thinking the underlying justifications of the effective control doctrine. After all, much of Cold War international legal doctrine was produced in the name of preventing nuclear war between the superpowers. Therefore, condemning ideologically-based interventions in domestic political contestations served to eliminate pretexts for potentially apocalyptic military escalations.[41] With the post-1989 decline of this dreaded outcome, there was no longer the same imperative to tolerate revolutionary violence within recognized boundaries in the name of allowing political communities to resolve their issues and develop their national identities.

Rather, unquestionably accepting internal strife on this basis became increasing seen as fuelling ongoing cycles of violent resentment. This necessitated a move beyond the old ideological agnosticism towards a values-laden 'human rights discourse' aimed at breaking these violent cycles.[42] With this, a new influential strand of international legal thinking sought to suppress the noninterventionist 'Charter liberalism' animating the effective control doctrine and replace it with a new 'liberal antipluralism' that was clear in its rejection of an ideological neutrality as a virtue of international law.[43] For this later group, the hope was that recourse to

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[39] According to one influential formulation, sovereignty in this context is nothing more than 'organised hypocrisy', Krasner 2000. On the justification for intervention and divided sovereignty in the name of building democracy on this basis, see Krasner 2005.

[40] Fukuyama, 2012 [1992]).

[41] Martineau 2016, 108-109.

[42] Meister 2011, 69-70.

[43] On the 'Charter liberalism' versus 'liberal anti-pluralism' divide, see Simpson, 2001.

shared values could provide peaceful alternatives to situations that would otherwise be determined through force, even if this meant new means of legitimising force to further these values.

1.3.1. States

In applying this newfound sensibility to the law of statehood, by this point, virtually all territories entitled to an independent state under the principle of self-determination, and acted upon this entitlement, had achieved this result. As such, there were only a handful of notable anomalies including East Timor, which became independent in 2002,[44] as well as Western Sahara and Palestine, which remain unresolved to this day.[45] This being the case, any secessionist movement aimed at attaining a sovereign state must do so against the virtually irrefutable presumption of the host state's entitlement to its territorial integrity.[46] Furthermore, some have speculated that a right to 'remedial secession' by a subnational population subject to grave human rights abuses may actually exist based the *Friendly Relations Declaration's* pronouncement that a government must represent the whole of its population without distinction.[47] In addition to these issues, the international community witnessed a large-scale infusion of new states with the dissolutions of the Soviet Union and

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[44] On the ICJ's acknowledgment of East Timor's right to self-determination, see *ICJ East Timor* 1990. For an account of East Timor's independence and the questions it raised surrounding the nature and content of self-determination under international law, see Drew 2001.

[45] See *ICJ Western Sahara* 1975; *ICJ Construction of a Wall in the Occupied Palestinian Territories* 2004. On other locations where more legally controversial questions of self-determination persist, see Trinidad 2018.

[46] It should be noted that secession itself is not illegal (as a result, states that emerged in violation of the parent state's territorial integrity are afforded all the international legal privileges and protections that accompany the status of sovereign statehood). However, while a would-be secessionist '….entity may or may not become a State,…it is not a State if the parent State's counterclaim to territorial integrity continues to apply and is not internationally disregarded.' Vidmar 2012a, 709.

[47] On remedial secession and its international legal status, see Vidmar 2010; Del Mar 2013.

Yugoslavia.[48] Against this backdrop, various nationalities, ethnicities, and minority groups no longer accommodated and managed by socialist institutions articulated claims to autonomy and independence in the language of the right to self-determination.[49] In this context, self-determination, as an international legal issue, is acknowledged to exist beyond the decolonization context in some form. However, due to the foundational status of territorial integrity, for groups asserting self-determination, independent statehood, or even regional autonomy, was in no way guaranteed. As such, the processes for realizing this right are of a fundamentally indeterminate and *ad hoc* character.[50]

Reflecting on everything discussed thus far, in the immediate post-Cold War moment, two major intertwined issues defined the law of statehood, and by extension the effective control doctrine. On the one hand, there was a massive surge in the desire for independence accompanied by claims of self-determination that fell outside the scope of this doctrine's category of eligible statehood claimants.[51] As such, the effective control doctrine's emphasis on 'facts on the ground' as the source of sovereign autonomy reasserted itself as international law's default standard for non-consensual state creation.[52] Simultaneously, the validity of alleged states created on

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[48] For an analysis of whether the new states created on this basis were solidifying a new international legal norm of 'democratic statehood' see Vidmar 2013a.

[49] For a wide-ranging overview of nationalist political assertions in the former Soviet sphere, see Bremmer and Taras 1993.

[50] See Koskenniemi 1994, 260-264.

[51] For an argument that larger system changes in the post-1945 incentivized assertions of independent statehood, regardless of whether or not the claimants possessed a recognized right to self-determination, see Fazal and Griffiths 2014.

[52] In the 2006 second edition of his extensive treatise on state creation in international law, James Crawford shows how, while state creation on the basis of unilateral secession has little support, there remains the distinct question of state dissolution. Here: 'If it becomes clear that the process of dissolution of the State as a whole is irreversible, the consent of the government of the predecessor State may cease to be required for the separation of its constituent parts. In such a case that government will itself be in the process of dissolution, and may have ceased to represent the former State.' Crawford 2006, 418. When assessing state creation on this basis, nothing about this process suggests any displacement of the general principle of effectiveness Crawford views as touchstone of state

the basis of effective control could be challenged by parent states' assertions of territorial integrity, a principle that solidified immensely in the postwar era.[53] Integrating these understandings of effective control and territorial integrity, the logical outcome is that, in order to succeed, a secessionist movement has to force the parent state to relinquish its sovereign claims. Thus, at a structural level, the reigning law of statehood incentivizes both secessionist movements and parent states to behave as ruthlessly as possible in their respective agendas for state creation and state preservation.

On the other hand, following the end of the Cold War, triumphant liberal humanitarian critics of the effective control doctrine viewed lingering statehood questions as a profound opportunity to implement their preferred solutions. Given the violent nature of secessionist conflict, coupled with the contradictory effective control-territorial integrity interplay, these proposals found a receptive audience. From this perspective, an international legal order no longer bound by the robust conceptions of ideological pluralism needed to manage Cold War tensions was now free to pursue explicitly normative solutions.[54] At an institutional level, a key understanding was that a newfound freedom from Cold War-era gridlock would allow international organizations to settle issues of disputed state creation in conformity with the evolving values of the international community, as opposed to the narrow interests of the great powers.[55]

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existence under international law, see Ibid 37-95. This logics speaks to a larger international legal issue where, as an ontological matter, it is arguable that state existence is ultimately a matter of 'fact' as opposed to 'right', see Vidmar 2015.

[53] On the entrenchment of the territorial integrity norm through the rejection of acquisition of valid title by conquest after 1945, see Korman 1996, 249-308; see also Zacher 2001.

[54] For a depiction of the changing international law of recognition representative of this ethos, see Grant 1999.

[55] See Grant 2009.

At a theoretical level, a discourse emerged whereby 'earned sovereignty' would be the new normative grounding for determining which claims of statehood were legitimate. According to this idea, factions engaged in independence struggles could be incentivized though a potential grant of recognition as a reward for acting in conformity with liberal principles of 'democracy' and 'human rights.'[56] It was only through the dismissal of international law's longstanding commitment to ideological pluralism that such a discourse gained traction.[57] A test site for this new approach to statehood occurred with the non-consensual dissolution of the former Yugoslavia. Here the Badinter Arbitration Commission called for creation of new sovereign states on the basis of Yugoslavia's federal divisions and this provided an example as to how self-determination might be managed in the new international order.[58]

1.3.2. Governments

On the question of governments and their legitimacy, perhaps the most significant challenge to the effective control doctrine was the proposed 'emerging right to democratic governance' whereby life under a liberal democratic system was consolidating into a fundamental human right. From this premise, international law should no longer be rigidly bound to respect ideological pluralism and actively promote lib-

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[56] See Scharf 2003; Williams and Pecci 2004.

[57] An early attempt at enforcing these types of commitments could be found in admission to regional organizations as exemplified by the European Commission's 1992 declaration that membership amongst the new states created from the collapse of the Soviet Union and Yugoslavia was conditional upon fulfilling specified liberal requirements relating to law and governance, see *Guidelines on the Recognition of New States* 1991.

[58] Badinter Arbitration Commission's actions regarding the partition of Yugoslavia, for a highly influential account, see Pellet 1992; For an in-depth analysis, see Craven 1996. For a study of how the commission's approach influenced future practice regarding self-determination claims, see Navari 2014.

eral democracy, defined as minimally consisting of periodic, competitive multi-party elections preferably subject to international monitoring.[59] According to this line of reasoning, which dates back to the early twentieth century[60] and was made prominent by influential international lawyers (especially those associated with the 'Manhattan School),'[61] popular will can be made ascertainable in a way that avoids the effective control doctrine's legitimation of violence. Such an idea comported with the larger post-Cold War emphasis on the 'liberal democratic peace hypothesis' where it was asserted that liberal democracies do not wage war against one another. By this logic, transforming 'illiberal' regimes into liberal democracies possessed the power to eliminate the threat of 'rouge states' and thus construct a peaceful law-governed world order.[62]

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[59] Franck 1992; Fox 1992.

[60] On the democratic legitimation of governments through periodic elections as the ideal telos of Hersch Lauterpacht's views on recognition under international law, see Lauterpacht 1945, 862-863. An even earlier line of advocacy for the democratic legitimation of international law can be traced to the American international lawyer Jackson Harvey Ralston, according to whom:

> In the present condition of the world's progress in the science of government, we have accepted the democratic principle as, for the present at least, the last word in government. We point out how it benefits the common man. Up till now, however, the principles of democracy have not been applied to the international field. Nations are autocratic, brooking no superior. The result has vitiated largely the good we had a right to expect to come from the growth of the democratic principle. If we would progress, therefore, internationally, conditions must be reversed. Instead of allowing aristocratic and autocratic law to vitiate democracy, democracy must be given its clear chance to purify the domain of what erroneously today is called International Law. Democracy can only accomplish this purification by sternly thrusting aside the suggestions of the old International Law and forming its own Law of Nations based upon those fundamental principles of right and wrong which democracy recognizes as existing and as appropriate between man and man.

Ralston 1922, 164-165

[61] See Kennedy 2003, 433-435.

[62] See Slaughter 1995.

These proposals for 'democratic legitimacy' were frequently accompanied by arguments for expanding the exceptions to the UN Charter's principles regarding nonintervention and the ban on the use of force. This has included promoting multilateral, and for some unilateral, military actions against regimes for purely domestic activities, including large-scale human rights abuses or the seizure of power through coup d'états.[63] Even Roth, despite his concerted defence of sovereign equality/nonintervention and scepticism towards 'democratic legitimacy,'[64] nonetheless asserted the existence of a category of 'governmental illegitimacy' in circumstances where the entity exercising effective control is clearly unsupported by the popular will of the political community it rules.[65]

Moreover, while it does not make explicit reference to any particular form of government, another category of 'governmental illegitimacy,' purportedly capable of overcoming the nonintervention presumption, concerns the 'emerging norm' of the Responsibility to Protect ('R2P').[66] In Anne Orford's assessment of this 'emerging norm', 'the legitimacy of authority is determinable by reference to the *fact* of protection.'[67] Such a factual reduction separates questions of territorial authority from

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[63] See e.g. Reisman 1995.

[64] Roth 1999, 361-362.

[65] Here Roth points to the 1992 Security Council intervention to Haiti to uphold the government of President Jean-Bertrand Aristide. According to Roth, given that the coup took place in the clear disregard of an electoral result, it was not plausible to claim that the holders of *de facto* control who executed the coup were supported by Haiti's popular will, even on the generous interpretation, Ibid. 383-387.

[66] According to the dictates of its three part structure, as detailed by *International Commission on Intervention and State Sovereignty*, R2P: 1) places a duty on states to prevent humanitarian crises, 2) calls for international capacity building efforts, and 3) licenses external intervention by the international community if a host state is unable or unwilling to rectify localized crises, Evans and Sohnoun 2001.

[67] Orford 2012b, 249.

the normative questions of self-determination and popular sovereignty.[68] With this standard, we can observe a reversal of the normative underpinnings of effective control, at least in its pre-end of Cold War version. For under the effective control doctrine the more a situation of domestic authority deteriorates the stronger the presumption of nonintervention becomes. After all, by the effective control doctrine's logic, such factual circumstances reveal a shifting of localized authority that can only be legitimately settled by the will of the bounded political community itself.[69] By contrast, through the lens of R2P, the greater a domestic situation deteriorates the more likely the fact of protection is unfulfilled by local actors. The longer this remains unrectified, the greater the legitimacy of external intervention by forces claiming to be humanitarian agents.[70]

However, the development marked by R2P should be viewed as a departure from the 1990s debates on 'humanitarian intervention' (that often accompanied 'use force to restore democracy' arguments) which were marked by their invocation of an 'exceptionalism' determined by ethics that nonetheless preserved the existing international legal order.[71] In contrast to attempt at purely ethical framing, R2P foregrounds issues of lawful authority in a distinctly political way through it posing of comprehensive questions relating to prevention, rebuilding, and the justification

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[68] For Orford's further development of this basic premise into an extensive narrative, see Orford 2011.

[69] Mullerson 1991, 133.

[70] The 2011 NATO intervention in Libya illustrated the intimate relationship be-tween R2P's commitments and governmental (il)legitimacy as a contested interna-tional legal issue. Here, the narrow mandate of providing protection via Security Council Resolution 1973 quickly raised broader questions of whether Libyan Pres-ident Mumar Qadaffi's government should be allowed to continue exercising power. On the relationship between this action and traditional rules of international legal standing, see Talmon 2011. On the R2P's usage as tool for furthering the geopolitical/geoeconomic interests of the interveners in this context see, Acharya 2013, 961-968.

[71] Orford 2012b, 249.

of international presence in 'zones of protection.'[72] In this way, many of the political questions regarding the legitimate authority that the effective control doctrine locates within territorially-bounded political communities are displaced into a nebulous realm of 'international authority' that echoes the transcendent forms of dominion that pre-existed modern state sovereignty.[73]

1.5. The Continued Relevance of Effective Control

1.5.1. The Statehood Riddle

Despite these challenges to the effective control doctrine on moral and humanitarian grounds, the myriad of proposed solutions are fundamentally *ad hoc* in nature. In other words, no comprehensive alternative to effective control has yet emerged.[74] In the realm of state formation, we need only consider how the approach of the Badinter Commission to the former Yugoslavia has limited replication potential and is jurisprudentially problematic in nature. This is especially true regarding its usage of decolonisation-era principle of *uti possidetis* to declare that the old federal borders of Yugoslavia's constituent republics should continue as the new international borders of resulting sovereign states.[75] As Roth has observed, by applying *uti possidetis* in this way, the Commission drew a distinction between federal and unitary states that is without international legal significance, explicitly rejected by the Montevideo Convention, and conflates a domestic constitutional structure with the underlying will of the people of a sovereign state who are empowered to change this structure by any means.[76] Such an outcome exposes how post-Cold War triumphalism's lofty rhetoric on settling disputed issues of state creation faced major

[72] Ibid. 267.

[73] See Orford 2009.

[74] Roth 2010, 440.

[75] Ibid. 411; See Radan 1999.

[76] Roth 2010, 411-412.

limits when delivering the novel, comprehensive solutions it promised. According to Scott Newton's assessment of this situation: '[a]t one stroke, international law found itself hamstrung in responding flexibly and creatively to vexing post-socialist self-determination claims and conflicts and accorded posthumous honour to socialist federalism, which had been derided in life.'[77]

A related situation of contested state creation in this context is Kosovo, a special status Serbian region placed under UN trusteeship in 1999 following a sectarian conflict that ended with a NATO intervention in Serbia. In 2008 Kosovo announced a unilateral declaration of independence in opposition to its parent state despite no plausible claim of having established effective control.[78] This being the case, Kosovo garnered much speculation as whether it would act as a precedent for 'remedial secession' whereby a subnational group's experience of violence and repression justifies its independence.[79] Faced with this situation, the International Court of Justice ultimately rendered a (non-)decision ruling that both the legality of Kosovo's declaration of independence and Kosovo's status as a sovereign state exceeded the Court's jurisdiction.[80] Thus, the ICJ finds itself within the ranks of those whose anxious treatment of the 'remedial secession' question suggested by the *Friendly Relations Declaration* avoids taking a position on either the presence or absence of this alleged right.[81]

Additional issues falling within this ambit of contestation include situations in so-called 'failed' and/or 'fragile' states deemed to be without functional authority. Here

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[77] Newton 2011, 111.

[78] 'Since the Security Council has disabled Serbia's forcible response, thereby relieving the Kosovo authorities of that risk, one cannot argue that Kosovo has established statehood in accordance with the effective control doctrine.' Roth 2010, 419.

[79] On speculative analyses regarding the potential impact of Kosovo, see e.g. Muharremi 2008; Kemoklidze 2009; Hilpold 2009.

[80] *ICJ Kosovo* 2010, p. 84.

[81] Summers 2007, 347.

the fear is that recognizing the independence of sub-regions within these states that attained effective control may dissolve the entire structure of their parent state and create a precedent for fragmentation with potential dire consequences.[82] By showcasing the international law's interest in upholding state existing regardless of internal conditions, this dynamic once again reveals the deep tension between claims of effective control and the maintenance of territorial integrity. However, despite this difficulty, nothing has fundamentally supplanted the assertion of a coherent and internally formulated political order for groups seeking international legal standing.[83] On this point, while *de facto* territorial authority may not be sufficient to achieve independence, there remains a strong argument that it is necessary. Thus, effective control remains a relevant, yet elusive, consideration regarding the question of statehood.

1.5.2. Governmental Woes

While questions of effective control's relation to contested statehood remain profoundly confused in practice, questions of governmental legitimacy can viewed as more certain, if not less troubling. As a starting point, the 'emerging right to democratic governance,' at least as it was intended a criterion for determining international legal standing, has failed to bring about the transformation many had hoped.[84] A wide-range of explanations have been offered on this point. According to Jean d'Aspremont, this 'emerging right' was short-sighted in that it failed to distinguish

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[82] Somaliland represents the quintessential example of this phenomenon. Roth 2010, 421. For studies on the question of Somaliland's independence, see e.g. Carrol and Rajagopal 1992; Adam 1994; Pijovic 2014.

[83] Fabry 2010, 12-14.

[84] However, it can be said that the 'emerging right to democratic governance' nevertheless has enjoyed a successful afterlife as a discourse of international legalistic morality apparent in the domains of development policy and the building of regional organisations, see Marks 2011; see also Charlesworth 2017.

between democratic 'legitimacy in origin' and 'legitimacy in exercise' thus empowering illiberal democracies who undermined its core values.[85] According to Susan Marks, by only providing a 'low-intensity' and 'pan-national' version of democracy this 'emerging right' could not provide meaningful change for the people it was ostensibly intended to empower.[86] According to Tarak Barkawi and Mark Laffey, defining 'democracy' in this context, especially as it applied to the 'liberal democratic peace hypothesis,' required the actual structures of power in the world to be fundamentally misrepresented and thus could not succeed on its own terms.[87] While there is much to be said for all of these explanations, one doctrinal point remains largely uncontroversial: the 'emerging right to democratic government' failed to displace, or even substantially qualify, the effective control doctrine.[88]

In observing contemporary (and politically consequential) situations where effective control remains the determining rationale the examples are numerous. One example would be the ongoing civil war in Syria where, despite widespread condemnation of the violence committed by the Assad Regime, any attempt to recognise an insurgent group as the rightful authority is open to substantial international legal challenge because Assad maintained a degree of effective control unmatched by any opposing faction.[89] Moving over to Egypt, another example is the 2013 coup

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[85] d'Aspremont 2006.

[86] On respective analyses of 'low-intensity' and 'pan-national' democracy, see Marks 2000, Chapters 3 & 4.

[87] Barkawi and Laffey 1999.

[88] However, this general failure of the 'democratic legitimacy' project should not be seen as a complete reversion to the effective control standard at its most traditional. Here it can be argued that a new class of cases is emerging where multiple factors that have gained attention within the 'international community' including repression of democratic process, systematic human rights abuses and support for 'terrorism' reduce a sitting government's generally broad, and often fictitious, claim to maintaining effective control when its de facto territorial authority is under actual contestation. On the Taliban and Qaddafi in this context, see Vidamar 2013b, 362-366.

[89] On failure of any opposition group to achieve international legal recognition in the Syrian Civil War on the basis that no better claim to effective control relative to Assad's had been attained, see Talmon 2013.

against Muhammad Morsi, a leader democratically elected in the aftermath of the popular uprising against Hosni Mubarak. Similar issues were raised by the 2014 ouster of the Ukraine's President Victor Yanukovych in violation of the national constitution. As discussed above, given the absence of effective control by Yanukovych, his post-ouster invitation for Russian intervention likely lacked any international legal validity.[90] Turning to Sub-Saharan Africa, an expanding regional organisation-based system of intervention by invitation has sought to promote democracy, protect human rights, and oppose coup regimes.[91] However, in actual practice, effective control remains the overarching standard for such interventions despite these aspirations.[92] This tension between principle and practice as it relates to regional governance and domestic popular will in Africa was recently illustrated by the 2017 overthrow of Zimbabwe's Robert Mugabe.[93] While there have been episodes, such as the Gambia and Cote d'Ivoire, where regional organizations have removed rulers exercising effective control in violation of local constitutions, it can be argued that these were exceptional cases in that said rulers lacked widespread support.[94] As such, they can be deemed the exceptions proving the rule that in a pluralist international legal order, effective control doctrine remains the best available mechanism for determining popular will in the vast majority of cases.[95]

This continued relevance of the effective control doctrine is further demonstrated by the reality of recent political events in the nations that would have seemingly been the most dedicated to disseminating the 'emerging right to democratic gov-

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[90] On the illegality of Russian intervention on this basis, see Grant 2015, 54.

[91] On these innovations, and their lack of attention from the West, see Levitt 2006.

[92] De Wet 2015, 998.

[93] For analysis of these tensions, see Aral 2017.

[94] See Roth 2015a, 215.

[95] Ibid.

ernance.' While just part of a much larger turn to right-wing authoritarian throughout the world broadly (and problematically) labelled 'populism', the UK's 2015 popular referenda to exit the European Union and the 2016 US Presidential election of Donald Trump represent a stark rejection of earlier cosmopolitan visions in the very heartlands of Western liberalism.[96] In light of this turn, the more pressing task for the defenders of the norms/institutions of international law and human rights that became prominent in the 1990s is basic survival, not the grandiose universalization of a political system.[97] Ironically enough, many of those challenging liberal internationalist norms throughout the world are doing so by consciously depicting the democratic will of the people as that which is under assault from the corrosive forces of cosmopolitanism.[98] This stands in stark contrast to the view held by many liberal international lawyers that they are the would-be guardians of democracy against local despots who flout popular yearnings from behind the shield of sovereignty.[99]

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[96] Amidst widespread concerns over election tampering (especially in the latter case), in retrospect, perhaps Tom Franck's suggestion that, in a showing of good faith, established Western democracies open their own electoral procedures to international observers was not the worst idea anyone has ever had, Franck 1992, 90 ('…the older democracies should be among the first to volunteer to be monitored in the hope that this will lead the way to near-universal voluntary compliance, thus gradually transforming a sovereign option into a customary legal obligation.')

[97] For an example of the rhetoric of 'survival' being invoked in this context, see Helfer forthcoming.

[98] According to one assessment:

> The greatest paradox of the current populist wave is that democracy is being subverted by leaders promising more, not less, democracy—but it is a democracy of a different kind. Populists embrace the "form" of democracy and claim to speak for the people themselves. At the same time, however, by undermining its liberal constitutional foundations, they erode the substance of democracy, and gradually transform it into various forms of illiberal and authoritarian regimes.

Bugarič 2018, 79

[99] While the current 'populist' moment has led to a concerted defence of existing norms and institutions by many international lawyers, other have viewed it as an exposure of the existing order's contradictions. This cannot be solved by international lawyers doubling-down on familiar attitudes and tropes. For the leading account from the latter perspective, see Schwöbel forthcoming.

Relatedly, a very real concern is the ways in which the turn to aggressive nationalist rhetoric may ultimately result in the degradation of international law's general ban on the use of force. This is a particular concern in relation to the US, the world's greatest military power, where open resentment of numerous international legal norms has included the return of devise individuals, namely John Bolton, with a long history of justifying unilateral policies.[100] Responding to this trend (and in stark contrast to earlier interventionist arguments) a new liberal internationalist project is now placing the ban on war within a law-based progress narrative.[101] With this turn, scholars once open to the idea of external intervention as a guarantor of local popular will have implicitly embraced the effective control doctrine, and its furnishing of sovereign legitimacy to the holder of *de facto* authority during internal strife, out of a commitment to condemning interstate war as the greater evil.[102] At this particular juncture, it may be realistically asked what exactly the various post-Cold War liberal cosmopolitan legal innovations amounted to given the persistence of the 'Charter liberalism' animating the effective control doctrine; at least for now.

1.6. Conclusion

[100] For a Bush Administration-era analysis of how the influence John Bolton represented a dramatic reconfiguration of the US's relationship to its international legal obligations that is more relevant now than ever, see Mansell and Haslam 2005.

[101] The key representative of this trend is Oona Hathaway and Scott Shapiro's *The Internationalists* that claims efforts by American activists to outlaw war through the Kellogg-Briand Pact in the 1920s lead to a series of cascading legal innovations (including the Stimson Doctrine, the Atlantic Charter, the UN Charter, and the Nuremberg Judgment), that built the current world order premised on the general ban on war as a matter of national policy. This system is situated as under assault in the contemporary global moment, and according to this narrative, must be defended, Hathaway and Shapiro 2017. For critiques of this work as failing to confront the way in which this progressive narrative on the outlawing of war legitimizes uncritical attitudes towards deeply problematic practices and institutions beyond interstate war, including: economic sanctions, free trade, and the global dominance of the US, see Peevers 2018; Barkawi 2018; Wertheim 2018; Mulder 2019.

[102] For instance *The Internationalists* co-author Oona Hathaway was previously much more open to the idea of justifying interventions in support of localized political struggles, see Hathaway et al 2013.

Through the high-altitude overview presented above, we observed how the effective control doctrine provides an ordering principle for a world where popular will forms the basis for domestic authority within an anarchic system of formally equal sovereigns. In light of both present disappointment and future uncertainty, the remainder of this thesis excavates the past as a means of explaining how we reached this present junction. Considering this thesis's methodology, if we are to take 'juridical thinking' as the force ascribed to law's production of transcendent abstractions, then the effective control doctrine acts as a lynchpin allowing its component juridical ideals of sovereign equality, non-intervention, and, most importantly, popular will to coexist within a coherent structure. However, this production of abstraction remains rooted in material conditions. Thus, the effective control doctrine, through its emphasis on 'facts on the ground', exists as an umbilicus between the abstract and the material.

It is certainly possible to analyse how the material nexus between international law, models of domestic government, and global political economy shaped the effective control doctrine's consolidation, critique, and reconsolidation during the postwar era. [103] However, my purpose is to delve deeper. Towards this end, the next chapter will trace the emergence of the modern effective control doctrine's core-constituting features of sovereign equality, non-intervention, and ideological pluralism within the cannons of the classical law of nations. This sets the stage for this thesis's historical analysis of why this argumentative formulation held so much appeal across numerous contexts in the eighteenth, nineteenth, and twentieth centuries. The culmination of this variegated process is the present configuration of doctrinal and normative justifications detailed in this chapter as the 'effective control doctrine.' Performing such a task allows us to observe how juridical thinking was not only a direct product of material conditions, but also how juridical thinking was also a direct producer of these conditions.

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[103] For an important study of the political economy of the shifting rhetoric of 'democracy'-promotion, see Robinson 1996.

CHAPTER II

Popular Will and the Classical Law of Nations: The Force of Emer de Vattel's *Le Droit des Gens*

2.1. Introduction

Chapter I provided an overview of how the contemporary nexus between popular will, domestic authority, and international law is anchored through the 'effective control doctrine.' In tracing the lineage of this doctrine, Chapter II accounts for the emergence of its constituent parts within the classical law of nations. The great figure of interest here is the Swiss jurist Emer de Vattel (1714-1767) whose 1758 treatise *The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns* comprehensively introduced the modern framing of the modern standard. He did so through a pluralist critique of the premise that teleological global unity was a demand of the natural law. Here, by challenging prevailing naturalist theories that all states were under an ultimate duty to unify as one, Vattel stressed that states' had no higher duty than their own individual self-perfection. He thus presented a universal legal theory that, in contrast to his forbearers, enhanced the diversity of (and popular access to) legitimate claims for political autonomy. However, access to this argumentative mode was limited by Vattel's construction of 'Others.' Viewing these innovations in the aggregate, his treatise was well suited to an international order where pluralism was intensified within Europe (and settler offshoots), yet reduced, when applied to Non-European peoples.

Establishing the foundations of Vattel's argument is crucial to this thesis's subsequent account of the material conditions that lead to its reception, its modification, and, ultimately, its globalization. In Chapter III, I show how the proponents of the American Revolution would invoke the Vattel's treatise as a text perfectly suited

for legitimatizing an independence movement by a settler colony seeking to simultaneously affirm its similarities to and differences from the European colonial metropole. Chapter IV then shows how the transformation of Europe that lead to the French Revolution exposed a deep ambiguity in Vattel's theory regarding the promotion of natural rights as a justification for war and intervention. In detailing the resolution of this ambiguity, Chapter V explains how this interventionist justification was curbed by the post-Napoleonic merger of Vattel's universalist vision of the state and government with particularistic theories of organic community that rendered popular will as irreducibly local in character. Returning to the Western Hemisphere, Chapter VI reveals the parochial character of the Vattelian framework by explaining how the nation-state as popular will's sole expressive vessel stunted the possibility of alternative social relations in Latin America that were better adapted to local conditions. This sets the stage for Chapter VII's account how various aspects rooted in these historical episodes detailed in Chapters III-VI all merged in the mid-twentieth century to produce the world order depicted in Chapter I.

Establishing the foundation for this broader account requires consciousness of just how powerful the rupture of Vattel's formulation actually was. In Part 2.2. I provide a broad overview of Vattel's conceptualization of the international states-system with the aim of pre-empting common mischaracterizations of his work. Part 2.3. then examines how earlier conceptions of the law of nations presented a very different view of the relationship between local political community and transcendent authority. In showcasing the weight of Vattel's contribution, the purpose of this section is illustrative as opposed to comprehensive in its engagement with the broader cannon of thinkers who shaped the classical law of nations. Towards this end, the primary theorist I detail as a contrast to Vattel is Francisco de Vitoria.[1] In turning to Vattel's text, Part 2.4. provides an account of his domestic political theory and its depiction of duty and authority within individual nations as separate, bounded entities within the larger global system. Part 2.5. then shows how Vattel's

[1] My justification for choosing Vitoria stems from the fact that he is largely considered 'the first international lawyer' within contemporary disciplinary orthodoxy.

particular view of nation-based popular will informed his well-known pronouncements regarding sovereign equality and non-intervention under the law of nations. By viewing this relationship between the 'domestic' and the 'international' comprehensively, we can observe how the 'effective control doctrine' is the logical outcome of Vattel's theory. Finally Part 2.6. offers an explanation for the material context that lead Vattel to formulate this particular theory. Such an exercise provides us with insight into the forces he respectively venerated, feared, and excluded in his understanding of the world. These formative presumptions carried profound consequences for both those invoking Vattel's theories and those who were on the receiving end of them.

2.2. Pre-empting Vattellian Misconceptions

Vattel's treatise presented the first mutually-reinforcing configuration of sovereign equality, nonintervention, and a people's right to choose its preferred system of authority; the base components animating today's 'effective control doctrine.' Thus, to locate the contemporary relationship between popular will and international law within the classical law of nations we must look to Vattel. However, before undertaking the textual analysis in support of this proposition, it is important to highlight key features of Vattel's place within the development of international legal and political thought. Such an exercise allows us to appreciate the force of Vattel's transformative impact.

A first step in this analysis is acknowledging Vattel's pivotal role in shaping our modern conceptual divide between international and domestic spheres of authority. Such a delineation is highly consequential to our contemporary understanding of what constitutes a binding legal source of obligation. For Vattel, the world was organized according to an ontology of self-contained sovereign states, each being bound by a 'necessary law' to develop in accordance with its own unique character.[2]

[2] De Montorency 1909, 29-30; Beaulac 2005, 268-273

Outside this rarefied domain of 'necessary law', relations between these self-interested sovereign entities only amounted to a 'voluntary law' that could be further parsed into consensual interactions, convention-based agreements, and adherence to customary practices.[3] Here Vattel weaved together previous natural law concepts resulting in a theory of decentralized, law-defined relations amongst self-interested, yet socialization-prone, sovereign entities.[4] While not the first publicist to identify states as inherently self-interested, conceive of inter-sovereign relations as occurring in some 'society,' or define voluntary agreement as the basis for international order, '…Vattel was the first author systematically to combine all three perspectives within the ambit of a single book.'[5]

In light of this particular formulation of the law of nations, Vattel has been depicted as a forerunner to international legal positivism whereby the morally-neutral process of ascertaining state consent replaced the articulation of transcendent morality as the grounding of lawful authority.[6] This depiction appears consistent with the reality that unlike earlier naturalists, Vattel was more interested in providing practical advice to statesmen and diplomats than systematically developing a universal theory as a justification in and of itself.[7] This notion is further supported by Vattel's method of illustrating the principles of the law of nations through examples from modern European statecraft rather than primarily drawing on examples from mythology, antiquity, or religious scripture as was the case with earlier publicists.[8] On this basis, it is easy to conflate his efforts with the documenting of state practice that international legal positivists use to proclaim what the law 'actually is.'

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[3] Onuf 1994, 300.

[4] This general premise would be reflected centuries later in Hedley Bull's proclamation of the international states-system as an 'Anarchical Society,' Bull 2012.

[5] Holland 2011, 445.

[6] See e.g. Chesterman 2002, 18-19.

[7] Onuf 1994, 296.

[8] Pitts 2018, 72.

However, if we take historical context seriously, it is exceedingly difficult to situate Vattel as a link between the classical law of nature and nations and international legal positivism. While he portrayed a sovereign equality-based anarchical order (that ultimately formed the baseline presumption for the modern fields of international law and international relations), imperial relations of hierarchy rather than equality defined Vattel's actual world.[9] Thus, it is a serious distortion to claim that Vattel simply documented sovereign practice in a manner divorced from, or even moving away from, the normative demands of the natural law. Rather, Vattel's depiction of sovereign equality in a world beset by juridical inequalities was very much within the natural law tradition and its belief that, like individuals, collective political entities enjoyed inherent rights independent of fact.[10] As Part 2.6. shows, Vattel was very much aware of the inequalities and vulnerabilities that defined his historical backdrop. As a result, his fear for the survival of small states (namely his own), resulted in a defensive manoeuvre via the particular juridical narrative that asserted sovereign equality, non-intervention, and an ideologically plural conception of popular will as mutually-reinforcing first principles of a legitimate international legal order.

Connected to his position within the natural law-legal positivism divide, another important issue is how to situate Vattel within the evolution of Western political thought. When placing Vattel, we find that his proclamations were rooted in both medieval scholasticism and liberal social contract theory.[11] On this accord, he emphasized the teleological process of entities perfecting themselves, while simultaneously assuming that individual and collective (i.e. state) persons are complete,

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[9] Pitts 2017, 285-289.

[10] Here, by claiming the inherent equality of all nations as autonomous sovereign communities, Vattel posited counterfactual reading of the existing order rooted in an analogy to the natural law first principle that all individuals possessed an inherent right of self-defence, Stirk 2011, 648.

[11] Fenwick 1913, 397.

equal units capable of providing valid consent in relation to one another.[12] The co-existence of these two theoretical modalities in Vattel thus complicates the common view that the hierarchical premise of scholastic teleology was progressively superseded by anti-teleological liberal equality.[13] Accounting for the coexistence of these two presumptions within a common theoretical framing produces some puzzling discontinuities.

On the one hand, Vattel's view of states as persons invokes medieval organic analogies of collective human associations (i.e. 'bodies politic') that have been repeatedly ignored, disavowed, or neglected by modernist theorists.[14] On the other hand, Vattel's modernist liberal ethos vests ultimate sovereign ownership in a nation's underlying political community and this could never be fully alienated to a ruler.[15] Consequently, this denial of absolute ownership beyond the nation's popular will rejected the view of dynastic authority that legitimized the foundational medieval organic analogy of the 'King's Two Bodies' whereby the territory of a realm was owned by a ruler as an extension of his physical person.[16] Thus, while Vattel can be interpreted as either a medieval critic of modernity or a modern critic of medievalism, to view him as a conclusive proponent of one view over the other is to miss the point of his theory's distinctly hybrid character.[17] Rather this ambiguity was a

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[12] Thus, Vattel's hybrid framing did not account for entities whose proclaimed lower position impaired their ability to provide valid sovereign consent thus rendering them 'semi-sovereigns.' However, this logic of compromised consent found its way into later international legal practice where relations, particularly between Europeans and Non-Europeans, began on the presumption of legal equality gave way to impositions of hierarchy, see e.g. Benton 2008; Keene 2007, 323-329.

[13] On teleology's suppression by liberal equality within the modern structure of international legal argument, see Desuatels-Stein 2016b, 690-691.

[14] Whelan 1989, 77.

[15] Ibid. 71-75.

[16] Ibid. 70; see also Kantorowicz 2016.

[17] In this way, Vattel's hybridity highlights how the intellectual transition from medieval to modern cannot be characterised by any straightforward narrative of linear progress. Rather, '[t]he more one delves into the conceptual vocabulary of the early modern period for thinking about the nature of

source of durability within his theory in that it could pre-empt the shortcomings of medievalism through an invocation of modernity, and vice-versa, thus precluding any definitive resolution.

In light of this chimera of medievalism and modernity, the coexistence of these seemingly incompatible premises proves indispensable when understanding Vattel's delineation of domestic versus international spheres of authority. On this basis, Vattel's pluralist notion that individual states were bounded, self-perfecting political communities through a medieval organic-analogy lead him to reject the premise that teleological consolidation at a higher level than the sovereign state was a necessary demand of the natural law.[18] This being the case, since integration at a level higher than the nation-state could disrupt a given community's unique character, such an integration (even if minor) would have to be exclusively voluntary. While this view of the 'international' may have posited a domain of liberal equality in a manner that paradoxically preserved domestic political authority as a vestige of scholastic teleology,[19] for Vattel, this did not render liberal modernist considerations irrelevant to the characterization of domestic political expression.

Rather, liberalism filled an important gap in Vattel's theory given that his pluralism rendered it impossible to substantively judge the teleological perfection process of a foreign political community.[20] Thus, Vattel's best option was to presume that

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political community, the more it resembles the 'tangle' of different and overlapping forms of political community that so many commentators observe in the Middle Ages.' Keene 2005, 106. For a wide-ranging account of the multi-layered shaping of the medieval/modern divide in the development of European political thought, see Nederman 2013.

[18] See Part 2.4.1.

[19] On the presumption of perfected teleological statehood as an overlooked feature within numerous 'anti-teleological' political theories, see Levy 2017.

[20] In this way Vattel's premise of ideological premise of ideological pluralism made a major intervention in the disputes over the nature of legitimacy in legal and political authority that existed in the early modern era. As Rose Parfitt has recently shown, formative attempts to define the relationship between the individual and the collective sovereign state entity led to fundamental different formations especially in relation to the republicanism, that largely, and the Hobbesian natural law

'facts on the ground' are expressions of local popular will expressed through consent to an existing authority and determined by an obedient population.[21] This is precisely what the present 'effective control doctrine' presumes. Yet, this raises the question of what existed before Vattel and how did his particular approach represent both a novel rupture and a reconciliation of earlier views of popular will within the classical law of nations.[22]

2.3. Before Vattel

2.3.1. Francisco de Vitoria's Pre-Popular Will

In highlighting the novelty of Vattel's popular will-international law formulation, I turn back two centuries to the sixteenth century Spanish theologian Francisco de Vitoria, arguably the first 'international lawyer.'[23] This characterization of Vitoria

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tradition. While the former viewed the preservation of liberties as a legitimizing condition of state power, the latter viewed individual submission to the sovereign as a legitimizing condition for state power. On these differencing theories and their tensions, see Parfitt 2019, 91-104. The brilliance of Vattel's theory is that it vitiated the need for these conflicting theories to confront each other at any level beyond the bounded state itself. Under this framing, the question of whether a bounded political community should be theoretically justified on republican or natural law grounds could only be legitimately determined by the political community itself.

[21] This formed a major point of Vattel's critique of his Swiss contemporary Jean-Jacque Rousseau who viewed popular sovereignty as compromised if authority were delegated in a manner that undermined the general will. For Vattel, in contrast to Rousseau's substantive formulation, since popular will could be expressed in a plurality of ways, delegation of governmental functions was perfectly acceptable in any form so long as it could command mass obedience. On Vattel's engagement with Rousseau, see Christov 2013.

[22] For a more general account of the coevolution of political thought and the law of nations, see Covell 2009.

[23] For an early explication of Vitoria occupying this status, see Scott 1932. For a critical account of Scott's invocation of Vitoria, see Orford 2012a. For more on the reception of Vitoria in modern international legal scholarship, see De La Rasilla Del Moral 2013. Moreover, it must be noted that characterization the status of Vitoria has been a flashpoint showcasing the differing perspectives and

is largely attributed to his view that the requirements of the natural law, universally applicable as the 'law of nations', were discoverable through the exercise of human reason alone, and, as such, not parochially confined to any particular faith. While frequently celebrated for this innovation, the many hagiographic readings of Vitoria have been subject to concerted critique by contemporary international legal theorists. A key point of focus within these critical readings concerns Vitoria's proclamation that different human communities were obliged to engage in peaceful trade relationships.[24] By applying this obligation to the encounter between the Spaniards and the indigenous inhabitants of the 'New World' that the latter's nonfulfillment of this 'universal' duty to trade gave the former grounds for waging a just war of conquest.[25] However, in approaching Vitoria, while his contribution to modern international law is a vocabulary for claiming rights of property; commerce and accommodation that transcend boundaries,[26] it must be remembered that Vitoria was writing before modern conceptions of territorial sovereignty was solidified.[27] Thus, as will be discussed below, the contradictions present in Vitoria's handling of the

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methodological priorities of international lawyers and intellectual historians. For a careful examination on how it is that lawyers and historians generate radically different interpretations of Vitoria, see Desautels-Stein 2016a, 225-227.

[24] Vitoria 1991 [1539a], 279-280.

[25] Ibid. 283. For a highly influential critique of Vitoria on this point, see Anghie 1996. For a recent contextualisation of Vitoria's justification of Spanish presence in the New World, see Pagden 2018.

[26] According to Martti Koskenniemi's account of why these formative justifications centred on 'private' rights as opposed to 'public' authority:

> Wherever authority was being exercised, it could now be assessed in light of universal rights of property, self-defence, travel, trade, taking of possession of ownerless things, and so on. This was an inevitable consequence of the fact that Vitoria and Soto dealt with *dominium* in the context of commutative and not distributive justice; that is, relationships among subjects themselves, excluding ideas about the intervention of public power.

Koskenniemi 2011, 28 (emphasis in original).

[27] On this basis, while Vitoria is typically associated with colonialism in contemporary critical, given the modes of political authority that existed in his day, it is difficult to characterise his actions taking place on behalf of a Spanish Empire, see Pagden 2012, 30.

relationship between transcendent legal principles and localised authority are familiar in some measures, yet fundamentally alien in others. On this point, comparing Vitoria's account of sovereign authority to Vattel's exposes just how much the latter's treatise represented a monumental departure reading the conceptualization of popular will amongst the canonical publicists of the classical law of nations.

2.3.2. Commonwealth as Universal Authority

While most remembered for his theological writings, his application of (pre-)international law to the Spanish-New World encounter, and his contributions to the just war tradition, Vitoria also produced an elaborate theory of public authority. Thus, in the interests of contextualizing the modern international law-domestic relationship in light of its authoritative articulators, it is worth revisiting his 1528 lecture 'On Civil Power.' While Vitoria's insights here were certainly influenced by his view of the Catholic Church and its legitimization of princely authority, his broader account of civil power was not reducible to the Church as the all-encompassing source of authority. This is made clear by his pronouncement that non-believers '…have legitimate rulers and masters…' and '…neither Christian sovereigns nor the Church may deprive non-Christians of their kinship or power on the grounds of their unbelief, unless they have committed some other injustice.'[28]

Having disavowed ecclesiastical parochialism, in his application of the natural law tradition (where truth is discoverable solely through reason), Vitoria located the basis for civil power in mankind's innate reason and sociability that obliges it '…to give up the solitary nomadic life of animals and to live life in partnerships…'[29] For Vitoria, this meant that idealized form of society must revolve around life in cities for, given humans' social character, this is '…the most natural community, the one

[28] Vitoria 1991 [1528], 18.

[29] Ibid. 7.

which is most comfortable to nature.'[30] It is from this premise that authority is legitimate, for:

> …[i]f assemblies and associations of men are necessary for the safety of mankind, it is equally true that such partnerships cannot exist without some overseeing power or governing force. Hence, the purpose and utility of public power are identical to those of human society itself. If all members of society were equal and subject to no higher power, each man would pull in his own direction as opinion or whim, dictated, and the commonwealth would necessarily be torn apart.[31]

Against this backdrop, Vitoria asserts that the power to make positive law is vested in the commonwealth itself whose law-making function must exist *a priori* by virtue of an all-encompassing system of natural law.[32] Correspondingly, in the interests of the orderly functioning of the society, material power must held by a government.[33] From this basic premise, Vitoria draws upon the natural law principle of self-defence to make the argument that this government must preserve itself '…against violent attack from its enemies, either within or from without…'[34] Here Vitoria provides a far-reaching extrapolation detailing the extent of this analogy where, even if the entire populace of the commonwealth were to rise up against rulers who were empowered by the natural right of self-defence, '…their argument would be null and void as contrary to natural law, which the commonwealth itself cannot abolish.'[35]

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[30] Ibid. 9.

[31] Ibid.

[32] Ibid. 12.

[33] Ibid. 14.

[34] Ibid. 18-19

[35] Ibid. 19.

In practice, this amounts to a denial of any right of revolution. This complete lack of consideration for the circumstances of the populace, alongside an absolute right of the rulers to use force to defend their position, reveals the force of dynastic legitimacy, and its location of sovereign authority in royal bloodlines as opposed to underlying political communities. Such a view is supported by Vitoria's claim that monarchy was superior to all other forms of government. While it may be coercive, monarchy preserves peace unlike rule by the masses, which presented the dangers of chaos in addition to coercion.[36]

This narrative is vastly complicated by another pronouncement Vitoria makes regarding the status of rulers in relation to their subjects. On the question of whether or not a populace may be collectively punished for the sins of its monarch (i.e. said monarch has waged war without just cause, etc), Vitoria answers in the affirmative and provides supporting justification that seemingly reverses his prior reasoning regarding the nature of public authority. Here Vitoria defends collective punishment in instances of a ruler's transgressions:

> ….for once a sovereign has been duly constituted by the commonwealth, if he permits any injustice in the exercise of his office the blames lies with the commonwealth, since the commonwealth is held responsible for entrusting its power only to a man who will justly exercise any authority or executive power he may be given; in other words, it delegates power at its own risk…anyone may lawfully be condemned for the wrong doings of his appointed agent.[37]

This passage is extraordinary in that it recognizes the populace as the fundamental source of public power, yet, as previously discussed, this recognition is devoid of any corresponding right to revolution. In other words, the very populace that supplies the basis for civil power is without any agency regarding its governing authority. Herein lies the great contradiction of Vitoria's theory of popular will. After all,

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[36] Ibid. 20.

[37] Ibid. 21.

how is it possible for a political community that is utterly passive to engage in any affirmative act of entrustment, delegation, or appointment that would impute liability for the misdeeds of the empowered authority to the people? Moreover, if Vitoria were to retreat into the particularism of divine sanction to justify this contradiction, he would sacrifice the ability of his natural law scheme to include the pagans whose authority he previously recognized. This would undo the ability of his framework to proclaim universal law through reason alone.

2.3.3. The Question of Tyranny

Despite his overarching view, Vitoria does make a concession to the shortcomings of his natural law theory. On the issue of the laws of a 'tyrant' he states that: 'it seems clear that the laws which serves the commonwealth's purpose are binding, even when passed by a tyrant; not…because they are passed by the tyrant, but because they have the commonwealth's consent, since utility and respect are better served by obedience to a tyrant's law than by disobedience to all law.'[38] From here, Vitoria goes on to describe the various civic functions that would cease to exist if this 'tyrant's law' was not binding on society.[39] For without legal efficiency, Vitoria's presumptions about life organised around cities as the highest form of rational human existence cannot be sustained. In other words, civilizational regression would be the price to pay for sacrificing law's hyper-rigidity.

Yet who exactly who would fall under the category of 'tyrant?' Would this be the term for the leadership of the popular uprising against the monarch that Vitoria explicitly denied a right to revolution? While this passage certainly justifies actions done in opposition to an established scheme of legitimacy, we should not go too far in viewing this as some forerunner to the 'effective control doctrine.' For within the

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[38] Ibid. 42.

[39] Ibid.

logic of 'effective control', the touchstone is the reality that an existing constitutional order can be completely replaced by a new one through an internal exertion of popular will. However, under Vitoria's scheme, there was the law of nations (*ius gentium*) which, in this time before the crystallisation of the modern sovereign state, the entire world was an imagined as a commonwealth of sorts.[40] Here it is said '…that those who break the law of nations…are committing mortal crimes…No kingdom may choose to ignore this law of nations, because it has the sanction of the whole world.'[41]

If this is the case, it is difficult to imagine the 'tyrant' who emerged from a successful popular revolt being able to assert any rights against external intervention intended to restore the monarchical order. Such an interpretation is supported by Vitoria's just war principles where he states that '[t]he commonwealth…has the authority to not only to defend itself, but also to avenge and punish the injuries done to its members…'[42] With 'the commonwealth' being the entire world bound together under the law of nations,[43] there is no shortage of ways in which just war might be invoked to provide a basis for intervening to restore a popularly deposed monarch. Since revolution is outlawed, then any successful overthrow of a monarch would likely qualify as an injury to be avenged in the name of the commonwealth. Correspondingly, since the entire world fell under this 'commonwealth' designation, then to uphold the universal legal order a just intervention, presumptively, could be mounted from anywhere.[44]

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[40] Ibid. 40.

[41] Ibid.

[42] Vitoria 1991 [1539b], 300.

[43] Vitoria, 1991 [1528], 40.

[44] '…it is lawful to avenge injury done by the enemy, and to teach the enemy a lesson…' for '…the prince has the authority not only over his own people but also over foreigners….this is his right by the law of nations and the authority of the whole world.' Vitoria 1991 [1539b], 305.

Despite everything, this scheme should not be seen as some simplified account of dynastic legitimacy given that considerations of 'the people' remained an ever-present qualification of monarchical action for Vitoria. One notable qualification that links back to the question of the populace's role is the pronouncement that personal glory and/or convenience did not provide cause for just war since such an undertaken can only be done for the good of the commonwealth.[45] Yet, if the localised populaces are responsible for constituting monarchical authority, how is external intervention in the name of universal duty a furtherance of the local will? This raises the issue of where exactly is the line to be drawn between internal and external in determining what exactly are the boundaries of the 'commonwealth' or 'commonwealths.'

Taken as whole, Vitoria presents a number of conundrums regarding territorial authority as it relates to a universal system of natural law. First and foremost, 'the people' formed the basis for localized exertions of civic power, yet, were without agency when it came to changing the system through which this power was exercised. Furthermore, while there is a recognition of the efficiency of 'facts on the ground' being their own source of validity, there is also a mechanism for preventing the crystallization of purely fact-based power via just war-based intervention. This matter of interventions links back to the issue of who are the 'people' and this in turn raises the questions of scale when locating the authority to enforce universal standards. The presence of such ambiguities, and the divergent interpretive paths they open, only furthers Vitoria's status as a figure that some celebrated and others by some condemn when accounting for his influence in the contemporary era.

2.3.4. Hobbes as Vitorian Continuity

Vitoria was a theologian seeking to expand the universal membership of Christendom in the context of the Spanish-New World colonial encounter. It is thus unsurprising that he presented a theory of a boundary-transcending commonwealth that

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[45] Ibid. 303.

gave Spaniards a 'universal' basis for justifying parochial interests. However, what is surprising is that a similar mode of theoretical justification exists within the work of a figure synonymous with a rigid and absolute understanding of state sovereignty: Thomas Hobbes (1588-1679). As is well, known Hobbes's infamous theory presented in his landmark 1651 text *Leviathan* is that the original 'state of nature' is a 'war of all against all' where life is 'nasty, brutish, and short.'[46] Against this foundational backdrop, the only escape from the 'state of nature', and consequently the only means of enabling of civil interaction beyond base survival, is the empowerment of an absolute sovereignty authority for whom no act, no matter how harsh, is illegal.[47]

In other words, the tolerance for supreme accountable power is the price to be paid for the order that enables higher human endeavours. While such unreviewable authority has long-been conceived as the opposite of a rule of law-based system that safeguards popular will, following Kinch Hoekstra's observations, Hobbes's very premise of indivisible sovereignty deeply informs the modern tradition of liberal constitutionalism.[48] However, while Hobbes is a foundational figure in our understanding of popular will, his theory is generally associated with the realm of domestic politics. This creates challenges for an analytical agenda such as mine that positions the division between 'domestic' and 'international' as a historically contingent formulation susceptible to being mischaracterized as a timeless truth.

Reifying a rigid 'domestic' versus 'international' binary, the traditional approach to Hobbes in international theory has been to invoke the 'domestic analogy' where

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[46] Hobbes 1991 [1651].

[47] Ibid.

[48] Much of this derives from the methodological way in which Hobbesian absolutist theory provided the type of abstraction present in modern liberal constitutionalism that was absent in the tradition of constitutionalism that preceded Hobbes. Here: 'roughly speaking, the theories of medieval constitutionalists were embedded in historical and institutional contexts, whereas absolutists worked to abstract from such contingent features a universal political philosophy that proceeded from logical analysis of the meaning of supremacy.' Hoekstra 2013, 1080.

the anarchical status of individuals existing in the 'state of nature' is mirrored by sovereign states existing under similar conditions of anarchy.[49] Importantly, such 'domestic analogy' inquiries have rested on the assumption that creating a unified order under the authority of a sovereign, while possible on the domestic level, is impossible at the international level.[50] However, according to recent scholarship, imputing this framework of international anarchy is anachronistic and, correspondingly, there is nothing within Hobbes's theory that prevented sovereign power from gradually expanding to the point that it creates a global commonwealth.[51] On this reading, the logical conclusion of Hobbes's theory is remarkably similar to Vitoria's regarding the universal commonwealth as a mechanism for ordering public authority in the context of flexible boundaries between the 'domestic' and the 'international.' Thus, on the issue of popular will, arguably, the great difference between Vitoria and Hobbes on this point was not so much the substance of their theories, but the historically delineated purposes they arose in response to. Vitoria was concerned with imperial expansion and Hobbes was concerned with preventing civil war.[52]

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[49] See Boucher 1998, 145-162; As a historical matter, much of this can be attributed to invocations of Hobbes in the nineteenth-century where theories of absolute dominion in the domestic sphere were placed against the backdrop of a geopolitical order premised on the irreducibility of sovereign will, see Francis 1980.

[50] Amongst critical accounts of international law, by far the most iconic Hobbesian engagement occurs through Martti Koskenniemi's *From Apology to Utopia* where the Hobbesian ontology of the 'state of nature' where no one has a right to anything. This premise informs the anarchic order of sovereign states (Apology) that international legal argument must accept as a base premise, but cannot fully surrender to, thus motivating an impetus to conceive of a more harmonious global community (Utopia), see Koskenniemi 2006, 80-86.

[51] On the invocation of Hobbes within the tradition of Realism, see Covell 2006. For recent alternative theorizations of Hobbes and his purpose, see Christov 2015; Grewall 2016. For a particularly interesting reading of Hobbes, based on Hobbes's own methodology, that views his agenda as a radically democratic one, see Martel 2007.

[52] On civil war prevention as Hobbes animating purpose, see Armitage 2017, 106-109. For many subsequent theorists of Hobbesian civil war, namely Carl Schmitt, the boundary between 'the domestic' and 'the international' was far more stark than in Hobbes time. On the instability of this civil vs. international war categorization, see Bartelsen 2017. Additionally, it has been argued that, while it was not his key area of focus, Hobbes was deeply influenced by the emerging context of extra-European encounter and colonization. Thus, it is a reasonable assumption is that Hobbes's focus on

On an intimately related note, for Hobbes (like Vitoria before him), local popular will was not an inherent barrier against incorporating multiple communities under an expanding domain of sovereignty. According to Hobbes's theory, the ultimate premium was on a sovereign's ability to protect its subjects. Therefore a sovereign ousted by an invading force that was objectively better able to provide this fact of protection furnished no grounds for the displaced sovereign to lodge a legitimate grievance.[53] It is for this reason that contemporary projects such as the 'Responsibility to Protect' seeking to qualify the sovereignty of those failing to meet standard of humanitarian protection can be easily understood in Hobbesian terms.[54] Yet, this leaves open the question of why reducing sovereignty to protection is controversial at all as an international legal matter. In other words, what changed the Hobbesian premise? When an answering this question, it is difficult to overstate the importance of Vattel's post-Hobbes location of local popular will within the international order. Through the Vattelian theory, flexible boundaries of authority became rigid and sovereignty became more than the fact of protection.

2.4. Vattel's Domestic

2.4.1 Rejecting Global Teleology

Accounting for the magnitude of Vattel's contribution to modern international law requires a close examination of his re-imagination of the 'local' versus the 'global.' As an entry point, Vattel presented a fundamental critique of Hobbes regarding the differential application of the law of nature. Specifically, he takes issue with Hobbes's claim that the same order of natural law applies to both sovereigns and

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the brutality of sovereign power was influenced by the discourses of non-European 'savagery', see Moloney 2011.

[53] Bull 1987, 725.

[54] Orford 2012, 112-125.

individuals, albeit in a different capacity in light of the former's extraordinary task of providing protection.[55] For Vattel, the nature of sovereigns and individuals differed to such a degree that entirely different bodies of law applied to these respective classes of actors.[56]

While this premise opens up space for juridically distinguishing domestic orders from the international order, Vattel's great deployment in this capacity came not through Hobbes, but Christian Wolf. In this capacity, Vattel's *The Law of Nations* was largely an adaptation of Wolf's monumental treatise, *Jus Gentium Methodo Scientifica Pertractatum.*[57] When appreciating the divergences made by this reformulation, we must remembered that Vattel was practically minded diplomat, not a systematic philosopher/theologian like Wolf.[58] It is for this reason Vattel lamented the loss of practical utility generated by the deep complexity of Wolf's exposition and sought to streamline his principles into a practical guide for statesmen.[59]

Since almost all of Wolf's substantive provisions were accepted by Vattel,[60] the true significance of the latter's contribution came not from rewriting the rules, but re-framing the meta-context the rules operated within. This re-framing took the form of an outright rejection of the principle of *civitas maxima,* '…the idea of a

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[55] Vattel 1852 [1758], ix-x.

[56] According to Vattel on the laws governing individuals versus the laws governing states, Hobbes 'was mistaken in the idea that the law of nature does not suffer any necessary change in that application, an idea, from which he concluded that the maxims of the law of nature and those of the law of nations are precisely the same.' Ibid.

[57] Onuf 1994, 296-297

[58] Ibid. 296.

[59] According to Vattel's account Wolf's complexities, '[t]hese circumstances present obstacles which render it nearly useless to those very persons in whom the knowledge and taste of the true principles of the law of nations are most important and most desirable.' Vattel, 1852 [1758], xii

[60] A notable exception here was Vattel's rejection of the legality of using poisoned weapons in war. Ibid. xiii.

great republic…instituted by nature herself, and of which all nations of the world are members.'[61] This formed Wolf's basis for deducing '…the *voluntary* law of nations…as….the civil law of that great republic.'[62] Through this organizational framework, Wolf preserved the ontological primacy of the *necessary* law while acknowledging the origins of law '…in the will of nations and states.'[63] From this premise, the resulting regime of *voluntary* law was ultimately a product of the *necessary* law. As such, the process of *voluntary* association between peoples was rooted in a *necessary* imperative.[64] Thus, through positing *civitas maxima* as a worldwide republic to come, Wolf presented a teleological theory of eventual global unity as the ultimate end of the natural law.

In rejecting *civitas maxima*, Vattel states that '[t]his idea does not satisfy me; nor do I think the fiction of such a republic either admissible in itself, or capable of affording sufficiently solid grounds on which to build the rules of the universal law of nations, which shall necessarily claim the obedient acquiesce of sovereign states.'[65] For Vattel, independent sovereign states are universally bound by nothing but the law of nature (i.e. the necessary law) and have no inherent duty to form any voluntary union with one another. In this way, states in the international order relate to one another as individuals do in the 'state of nature.' While escaping the 'state of nature' was an imperative for individuals that gave rise to an elaborate regime of natural law obligations, the same logic did not apply to states. Put simply, the reason for this divergence was that states are self-sufficient entities whereas individuals are not. In detailing this distinction, while nonetheless acknowledging the fundamentally intertwined relationship between individuals and states, Vattel proclaimed that:

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[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Covell, 2006, 127.

[65] Vattel, 1852 [1758], xiii.

> [i]ndividuals…are capable of doing so little by themselves, that they can scarcely subsist without the aid and the laws of the civil society. But as soon as a considerable number of them have united under the same government, they become able to supply most of their wants; and the assistance of other political societies is not so necessary to them as that of the individual to individuals.[66]

Moreover, this distinction between individuals and states contains important normative, as well as an empirical, dimensions. Here, according to Vattel, '…independence is even necessary to each state, in order to enable her properly to discharge the duties she owes to herself and to her citizens, and to govern herself in a manner best suited to her circumstances.'[67] From this pluralist understanding, Vattel proclaims his theory of the sovereign equality encapsulated in his famous quote that 'A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.'[68] Thus, by rejecting *civitas maxima* and emphasizing voluntary sovereign discretion as the basis of the global legal order, Vattel makes great advancements when resolving Vitoria's contradictions surrounding territorial authority, constituent power, and the 'international' as sphere of infinite enforcement. This resolution was the formation of what we today call the 'effective control doctrine' that emerged as a by-product of Vattel's reformulation of the local-international relationship. In order to account for this development, we must detail how exactly Vattel conceptualised the 'sovereign state.'

2.4.2. Locating the Sovereign

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[66] Ibid. xiv.

[67] Ibid.

[68] Vattel 1852 [1758], Preliminaries § 18.

Book I of the *Law of Nations*, entitled 'Of Nations Considered in Themselves,' is dedicated to setting the parameters of the state, the nation, and the means of determining governmental legitimacy. In Vattel's definition: '[a] nation or a state is….a body politic, or a society of men united to promote their safety and advantage by means of their union.'[69] This necessarily entails establishing a *Public Authority* that is *Sovereignty* '…and he or they who are invested with it are the *Sovereign*.'[70] Regarding the source of this Sovereignty:

> by the very act of the civil or political association, each citizen subjects himself to the authority of the entire body. The authority of each member, therefore essentially belongs to the body politic, or states; but the exercise of that authority may be placed in different hands, according as the society may have ordained.[71]

This understanding provides the premise that 'the body of the nation' forms the basis of popular will and is vested with the authority to choose its particular form of government.[72] Here Vattel refrains from any specific discussion of differing governmental forms by stating that 'this subject belongs to the *public universal law*.'[73]

In setting the requirements of sovereignty, he states that a nation must be 'without any dependence on foreign power' and 'must govern itself by its own authority and laws.'[74] Keeping to his view that even small states existing alongside powerful ones

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[69] Ibid. Book I, Chapter I, § 1

[70] Ibid. (emphasis in original).

[71] Ibid. § 2

[72] Ibid.

[73] In a footnote he extends this lack of scrutiny to the relative merits of different forms of government. Ibid.

[74] Ibid. § 4.

maintain their sovereign status, Vattel is highly generous in proclaiming that substantial burdens do not necessarily render a state 'dependent on foreign power.' Thus states presumptively maintain their sovereignty even when: partners in an unequal alliance,[75] subject to protection treaties,[76] in a tributary relationship with a foreign power,[77] paying homage as part of a feudatory relationship with a foreign power,[78] are two states under the same prince,[79] or when they 'unite themselves together by perpetual confederacy.'[80] In defining those who lack sovereignty, Vattel claims that even when a people controls its own internal legal order, it cannot be sovereign if conquest or alliance leaves it without the ability to engage in external relations.[81] Vattel thus highlights the crucial distinction between internal and external sovereignty.

Regarding the purpose of a nation, Vattel explains in Chapter II of Book I that this consists of the 'end' of civil society which, through the duty of 'perfection,' it procures '…for the citizens whatever their necessities require…with the peaceful possession of property, a method of obtaining justice with security; and, in short, a mutual defence against violence from without.'[82] The precise means of attaining this perfection are particular to every individual nation[83], and this may even include the nation dissolving itself (but only for '…just and weighty reasons.')[84] Moreover,

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[75] Ibid. § 5.

[76] Ibid. § 6.

[77] Ibid. § 7.

[78] Ibid. § 8.

[79] Ibid. § 9.

[80] Ibid. § 10.

[81] Ibid. § 11.

[82] Ibid. Chapter II, § 15.

[83] Ibid. § 13.

[84] Ibid. § 16.

while Vattel conflates the 'nation' and the 'state' in Chapter I of Book I, here he differentiates between the two entities, only to intertwine them again by proclaiming that 'the second general duty of a nation towards itself is to endeavour after its perfection and that of the state. It is this *double perfection* that renders a nation capable of attaining the end of civil society.'[85]

On this basis, while the *nation* consists of the body of citizens united in common interest, the *state* forms the administrative structure tasked with implementing these interests in a manner that renders it indispensable for the nation. This necessitates the need for a public authority grounded in a constitutional order to take the form that is appropriate to its particular society.[86] Regarding changes to the constitutional order itself, this cannot be undertaken by just any governmental authority empowered by the existing system order and, while Vattel warns that these decisions should not be taken lightly,[87] the power to render change ultimately rests with the nation itself.[88] As to how these changes actually occur, 'all these affairs being solely a national concern, no foreign power has a right to interfere in them…'[89]

Yet, what happens if the nation seeks to change a constitutional order, but the governmental authority has no interest in being deposed? Here Vattel makes clear that while sovereignty remains with the populace even when delegated to a ruling body,[90] the actual power held by this ruling body should never be underestimated. The possibility of political contestations devolving into protracted inter-communal

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[85] Ibid. § 20 (emphasis mine).

[86] Ibid. § 27.

[87] Ibid. § 35.

[88] Ibid. § 36.

[89] Ibid. § 37.

[90] Ibid. Chapter IV, § 39.

violence is the implied consequence of this arrangement. On the one hand, if a sovereign acts as '…an insupportable tyrant…' then the nation is justified in withdrawing its obedience to him. Here Vattel states that any delegation, even to an absolute ruler, necessarily includes '…a tacit reserve, that the sovereign should use….[its power] for the safety of the people, and not for their ruin.'[91] In the interests of furthering the nation and the state's duty of 'double perfection' this right of resistance '…flows from the end of political society, the safety of the nation, which is the supreme law.'[92] However, one the other hand, this possibility of justified resistance coexists alongside a recognition of the vital role of the ruler in preserving social order for:

> The nature of sovereignty, and the welfare of the state, will not permit citizens to oppose a prince whenever his commands appear to them unjust or prejudicial. This would be to fall again into the state of nature, and to render government impossible. A subject out to suffer with patience, from the prince, acts of injury that are doubtful and supportable.[93]

Connected to this imperative of preserving stability, the ruler's entitlement to the benefit of the doubt when controversially exerting authority is buttressed by the acknowledgment that, as a practical matter, resistance is likely to be an extremely violent affair. After all, princes nearly always have the backing of influential actors within a society and, on this basis, '…[i]t is therefore always difficult for a nation to resist a prince…without exposing the state to dangerous troubles.'[94] Coupled with the virtue of maintaining order, this risk solidifies a general duty of obedience

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[91] Ibid. § 51.

[92] Ibid.

[93] Ibid. § 54.

[94] Ibid. § 52.

to the sovereign by the populace.[95] However, if the actions of the sovereign would severely violate the nations' natural right of self-preservation, he '…divests himself of his character, and is no longer to be considered any other than that of an unjust and outrageous enemy, against whom his people are allowed to defend themselves.'[96] Taken as a whole, the legitimacy of resistance hinges on whether a sovereign's actions are 'supportable' or 'insupportable.' The answer to this question can only be determined by the nation itself.

2.5. Vattel's International

2.5.1. Proto-Effective Control

When examining the international legal system Vattel detailed in Book II, it becomes apparent that his well-known proclamations on sovereign equality and non-intervention are fundamentally rooted his theory of the popular will-based nation-state discussed above. According to Vattel, like individuals, nations inherently pursue mutually beneficial interactions which one each, yet, as discussed above, since nations are exceedingly more self-reliant than individuals, their duties to one another are far less demanding.[97] Thus, a nation's primary concern must be its own preservation/perfection and, while any obligation a nation may have towards another that compromises this fundamental duty cannot be valid.[98] However, it is also

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[95] Ibid. § 53.

[96] Ibid. § 54.

[97] Ibid. Book II, Chapter I, § 3.

[98] This obligation to refrain from obligations that would impede the perfection of the nation was eminently to the domain of commerce. Thus, Vattel did not fall into the proclamations of earlier publicists, including Vitoria, that engaging in trade was a universal duty under the natural law. According to Vattel, while international commerce was a source of mutual benefit, 'a nation ought to decline a commerce which is disadvantageous or dangerous.' Furthermore, a nation may '…either embrace or reject any commercial proposals from foreign nations, without affording them any just grounds to accuse her of injustice, or demand a reason for such refusal, much less to make use of

possible that a nation's assistance to another can bolster its own security (and by extension its perfection).[99] Furthermore, while a nation may assist others in their own perfection, this cannot be used as a justification for the use military force for this would violate the natural liberty of the people of the victim nation.[100] On these grounds, Vattel condemns the Spanish missionary justifications for the conquest of the New World as well as the right to punish foreign transgressor of the law of nature (as advocated by Hugo Grotius) for it '…opens a door to all ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts…'[101]

Furthermore, in Book III on War, Vattel consistently extends this principle to cover non-intervention in a nation's civil war given that, from an outsider's perspective, both belligerent parties are '…equally foreigners to them, and equally independent of their authority.'[102] This non-interventionist position finds its corollary in the concept of sovereign equality whereby '…none can naturally lay claim to any superior prerogative: for, whatever privileges any one of them derives from freedom and sovereignty, the others equally derive from the same source.'[103] This presumption of equality renders a nation's internal governmental order irrelevant to its conduct of international relations.[104] Undergirding this is Vattel's general pronouncement '…that no state has the smallest right to interfere in the government of another.'[105]

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compulsion.' Ibid. Chapter II, § 25. For an account of the role of commerce in Vattel theory of international relations, see Nakhimovsky 2007.

[99] Ibid. Chapter I, § 4.

[100] Ibid. § 7.

[101] Ibid.

[102] Ibid. Book III, Chapter XVIII § 296.

[103] Ibid. Book II, Chapter III, § 36.

[104] Ibid. § 38.

[105] Ibid. Chapter IV, § 54. Here it warrants noting that Vattel's proclamations against intervention should not be conflated with a general ban on war. On this point, Vattel was clear that war, while illegitimate as a means of, was an essential means of vindicating sovereign rights, resolving disputes,

While Vattel acknowledges the normative desirability of the world as a unified political entity, he expresses resignation for '…disorderly passions, private and mistaken interest, will never allow this reality.'[106] Given this absence of utopian possibility, preserving autonomous spaces for nation to express popular will, even when unpopular elsewhere within the global community, was essential for the law of nations to maintain itself. Thus, when applying this theory of international law to the previously discussed question of internal political contestation we are left with all the elements of today's effective control doctrine. To summarize Vattel's framework:

> - domestic autonomous perfection requires both a nation and its state acting in concert,
> - when there is widespread domestic consensus, a nation is empowered to change the fundamental legal order from which the state's ruler derives its power,
> - if there is no other agreement, the seated ruler will likely violently defend its position, and,
> - while this violence may offend sensibilities of justice held by outside observers, licensing of external intervention could lead to instability that may undermine the very foundation of a system premised on diverse, yet formally, equal sovereign states each pursuing their own unique conception of the good life.

Against this presumption, there was only one standard outsiders could apply without imposing their own particular values on a political community distinct from their own, whether or not the claimant of sovereignty possessed objective *de facto* authority, i.e. effective control.

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or even maintaining the balance of power. For studies on Vattel and the justifications for using force, see Zurbuchen 2010; Pitts 2013; Cello 2017.

[106] Vattel 1852 [1758]. Chapter I, § 16.

In appreciating the deviation Vattel's framework in relation to earlier theories of the law of nations, a return to Vitoria is in order. Recalling Part 2.3.1. of this chapter, we observed a very different understanding of public authority where, while popular will was implied on some level, only one form of government (monarchy) was acceptable. Relatedly, in the event it was deposed, a legitimate external intervention to bring about restoration could be staged from anywhere. The logical consequence of this arrangement was that the people were the source of authority presumptively served by the sovereign monarch, yet, where unable to change this mode of ordering, even when expressing the highest degree of discontent. Viewing Hobbes as a Vitorian continuity, we observed how an analogous, albeit more popular will-based, rationale for external intervention could have been justified given his pronouncement of civil war was the supreme evil. Thus, a competent outsider could legitimately replace a sovereign failing to provide adequate protection.[107] All of that said, Vattel's theory can be interpreted as emerging through a crack in Vitoria's argument whereby a tyrant wielding effective power must nonetheless be obeyed (with the people presumably being made to sit patient until a restoration could be staged from without).

Under Vattel's scheme, the underlying power of the people was expanded to a place unanticipated by Vitoria; the idea that one people's tyrant could be another people's rightful sovereign. Only those directly impacted could legitimately make this judgment. Dissatisfied outsiders had to accept the higher normativity represented by non-intervention. As such, Vattel rejected the organizing principle of *Civitas Maxima* prosed by his direct influence Christian Wolf which, analogous to Vitoria's (and possibly Hobbes's) organizing frame, was a vision of a global commonwealth. The necessary by-product of this re-imagination was the understanding that 'facts on the ground' are an outsider's best available evidence of local popular will, if we are to assume a meaningful separation between domestic and international spheres as Vattel delineated them.

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[107] Bull 1981, 725.

2.5.2. Popular Intervention?

However, there was a tension in Vattel's argument regarding the mutually-reinforcing relationship between popular will, the bounded nation-state, and nonintervention. This concerned whether or not an outsider could support a people rebelling against a tyrant in the name of popular will? On this point, Vattel gives the example of 1688 Glorious Revolution where he declares that the Dutch Prince William of Orange was justified in affirmatively responding to a request for support by Englishmen in their rebellion against King James II.[108] According to Vattel, 'when a people, from good reasons take up arms against an oppressor, it is but an act of justice and generosity to assist brave men in the defence of their liberties. Whenever, therefore, matters are carried so far as to produce a civil war, foreign powers may assist the party which appears to have justice on its side.'[109] While this passage from Book II plainly appears to contradict Book III's pronouncement on nonintervention in civil wars, it must be read in conjunction with the caveat that seemingly affirms Vattel's overall theory on local popular will within the international order. Here Vattel claims that '…we ought not to abuse this maxim, and make a handle of it to authorize odious machinations against the internal tranquility of states. It is a violation of the law of nations to invite those subjects to revolt who actually pay obedience to their sovereign, though they complain of his government.'[110]

In considering Vattel's example of the Glorious Revolution, a serious ambiguity presents itself. As a contextual matter, King James II was a Scottish monarch who assumed the thrones of both Scotland and England through dynastic inheritance in an era before the merger of the two kingdoms under a common parliamentary sovereignty via the 1707 Act of Union. On this basis, could he have been declared a

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[108] Vattel 1852 [1758], Book II, Chapter IV, § 56.

[109] Ibid.

[110] Ibid.

foreign invader once his English subjects expressly withdrew their obedience?[111] Had the ruler been unquestionable local in origin, there would be serious doubts as to whether this justification for intervention would have been legitimate. This especially is true if we are to consider Vattel's immediate caveat, his pronouncement on nonintervention in civil wars made elsewhere, and his general view that only a local population could truly determine its system of government in accordance with the national duty of self-perfection. As discussed in Chapter VI, the outbreak of the French Revolution would severely test this question of intervention in the name of popular will.

2.6. Vattel's World

2.6.1. The Place of Small European States

In contextualizing Vattel, three considerations are vital: increased geopolitical accumulation in continental Europe, new patterns of European exclusion of non-Europeans, and the rise of Britain as a new type of power. On the first point, changes in European feudalism lead to an increasing intensive modes of absolutist consolidation. This turn of events was rooted in a major class conflict pitting the decentralized feudal nobility against increasingly centralizing modes of absolutist authority supported by complex bureaucratic structures.[112] This entailed endless wars for the direct geopolitical appropriation of feudal holdings to finance increasingly centralised states.[113] Against this backdrop, heterogeneous formations of social organ-

[111] Vattel did state that nations maintain their sovereignty despite a monarchical union, Ibid. Book I, Chapter I, § 5.

[112] See Chapter IV, Part 4.3. for a more in-depth discussion of this context.

[113] On geopolitical accumulation in this context, see Teschke 2003, 220-222.

ization/political authority developed in medieval Europe where gradually being extinguished by the overwhelming military force of absolutism.[114] This transformation added a new dimension to longstanding realities of survival-focused diplomacy in Europe's small kingdoms in their relations with its powerful ones.[115]

In the face of these challenges, the Swiss canton system that provided Vattel's formative context was one of the political formations seeking to preserve traditional institutions against the insatiable forces of absolutist geopolitical accumulation. Given their limited ability to compete militarily, small Swiss polities became highly skilled in the survival tactic of articulating arguments that opposed war and channelled competition into the realms of commerce and diplomacy.[116] While the idea that such moralistic arguments could successfully divert war and conquest is at odds with contemporary Realist sensibilities regarding survival within the international system, it must be remembered that early modern European warfare was not reducible to brute force and cloaked in elaborate discourses of custom and legality, particularly as it related to interests and obligations in property.[117] However, as Richard Whatmore has shown, simply aligning with the forces of commerce was not enough for a small state. On a long enough timescale, commercial openness ultimately invited the devastating impact of commercial downturn.[118] Thus, a stronger line of argument asserting the legitimacy of small sate independence was required. That said, we could observe the strategic value of Vattel's arguments that a large

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[114] For a study of these early heterogeneous political forms, see Spruyt 1994.

[115] According to one depiction of the longstanding plight of small states: '[f]riendship had to be balanced against the necessary distance associated with continued sovereignty. The tightrope walk of small state politics always gave way sooner or later, with no small state maintaining its independence in Europe in perpetuity after the fall of Rome.' Whatmore 2010, 89.

[116] For an elaborate intellectual history of such arguments emanating from Geneva in this capacity, see Whatmore 2012.

[117] See Whitman 2012.

[118] The decline once powerful trade-monopolising Italian city-states provided a stark example of this outcome, see Whatmore 2010, 92-94.

kingdom forcibly undermining the popular will of a small one was a gross violation of the law of nations.[119]

2.6.2. Two Concepts of Otherness

However, while highlighting Vattel's context may explain his views on the heightened tolerance of ideological pluralism amongst Europeans, there remains the issue of how Europe's Others were excluded from these purported universal standards. Here, perhaps Vattel's most infamous statement regarding non-European societies came from his proclamation that the cultivation of land was a primary obligation under the law of nature. Towards this end, Vattel characterizes two broad forms of human society that are in violation of this fundamental duty; plunderers and hunter-gatherers. Accordingly:

> The cultivation of the soil deserves the attention of the government, not only on account of the invaluable advantages that flow from it, but from its being an obligation imposed by the nature of mankind. The whole earth is destined to feed its inhabitants; but this would be incapable of doing if it were uncultivated. Every nation is then obliged by the law of nature to cultivate the land that has fallen to its share….Those nations….who inhabit fertile countries, but disdain to cultivate their lands, and choose rather to live by plunder, are wanting to themselves, are injurious to all their neighbours, and deserve to be extirpated as savage and pernicious beasts.'
>
> There are, others, who, to avoid labour, chose to live only by hunting, and their flocks…Those who still pursue this idle mode of life, usurp more extensive territory than, with a reasonable share of labour, they would have occasion for, and have, therefore, no reason to complain, if

[119] On the place of Vattel's (and his Canton's) Protestantism amidst power Catholic militaries, as a factor motivating his theoretical efforts, see Hunter 2010.

> other nations, more industrious and too closely confined, come to take possession of a part of these lands.[120]

Through this passage on cultivation, we can discern two varieties of Other within Vattel's theory: the former were illegitimate because they were conquerors, the later could legitimately be conquered.

While critical international lawyers often understand this proclamation as a quintessential example of colonial justification under the classical law of nations,[121] this position has been challenged by contextualist historians. For Ian Hunter, unlike nineteenth century international lawyers, Vattel was far more concerned with preserving peace between Europeans than justifying colonialism.[122] Here he points to the fact that, for Vattel, violation of the duty to cultivate also applied to certain Europeans, including Catholics monks.[123] Yet, the problem with Hunter's characterization is the implicit assumption that there was minimal co-evolution between the project of promoting peace between Europeans and project of proclaiming superiority over non-Europeans. He thus characterises the Vattelian justifications for violence against non-Europeans to simply be an application of practices already developed in Europe.[124]

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[120] Vattel 1852 [1758], Book I, Chapter VII § 81.

[121] See e.g. Anghie 2011; Craven 2012a, 878-879.

[122] Hunter 2012a.

[123] On Hunter's account:

> Vattel is equally prepared to impair the civil rights of European groups who refuse to engage in the virtuous activities required for membership in the republican 'body of the nation'. It is on this basis that Vattel argues that the members of (Catholic) religious orders who dwell in the patrie without cultivating its agricultural, commercial or military virtues should be denied the rights of citizenship.

Ibid. 300.

[124] Ibid. 307.

However, considering Vattel's vision of popular will and the international order that upheld it provides us with a new understanding of how his justifications for violence and domination applied more harshly to those (non-Europeans) that did not conform to his ideal. Here, by viewing the collective body of the nation-state (justified by popular will) as the lynchpin of Vattel's entire theory, it possible to draw a distinction between discrete groups within an otherwise 'well-ordered' society that violated the natural law and entire societies that violated the natural law collectively. On this reading, Hunter's claim that Vattel's condemnation of non-European practices also applied to Europeans loses much of its persuasive edge. To support this assertion, we must consider the text and context surrounding the two particular non-Europeans groups discussed in *The Law of Nations,* the Ottomans and the indigenous peoples of the New World.

2.6.2.1. The Ottoman Empire

In beginning with the Ottomans, Vattel stated that 'when the Turks were successfully pursuing their victorious career….all Christian nations ought, independent of every bigoted consideration, to have considered them as them as enemies', and all '…would have been justifiable in breaking off all commerce with a people who made it their profession to subdue by force of arms all who would not acknowledge the authority of their prophet.'[125] This characterization of Islam as a pathology also coloured Vattel's condemnation of using force in the name of vindicating moral offences on the grounds that such conduct 'opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts…'[126] In departing from the rationale of the School of Salamanca and Hugo Grotius, for Vattel,

[125] Vattel 1852 [1758], Book II, Chapter I, § 16 (2).

[126] Ibid. § 7.

engaging in such punitive practices would render Europeans no better than Muslims.[127] Such a warning was rooted in a characterization of the Islamic world whereby: 'Mohammed and his successors have desolated and subdued Asia, to avenge the indignity done to the unity of the Godhead; all whom they termed associators or idolators fell victims to their devout fury.'[128]

Such statements are deeply consistent with the notion that Europe, imagined as a family of connected yet unique sovereign nation-states, arose in self-defined contrast to a distinct Other in the form of a rapacious, all-consuming Ottoman Empire.[129] Here an emerging belief was that, unlike the European system where military confrontation was consigned to resolving the limited disputes of sovereigns, war between Muslims and non-Muslims risked a fanatical unification of the entirety of Islam with catastrophically violent results.[130] Thus, Vattel's counterfactual of a normative European order rooted in sovereign equality can be read as a stark contrast to the menacing Ottomans. That said, given both the statements in his text and his immediate backdrop of real and imagined geopolitics, it is hard to accept that Vattel's condemnation of those who 'live by plunder' was primarily directed towards his fellow Europeans given the presence of contemporary Ottomans.

2.6.2.2. The Non-Cultivators

Vattel's characterization of the Ottomans, and Islam more broadly, certainly reveals the consistency between envisioning peaceful relations between Europeans while pathologising non-Europeans. However, there is an additional layer complexity

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[127] For a study of the place of Islam within Vattel's general theoretical framework, see Pitts 2018, 80-86.

[128] Vattel 1852 [1758], Book II, Chapter I, § 7.

[129] See Neuman and Welsh 1991. For a multifaceted overview of the discourses of Ottoman 'Oriental Despotism' in the shaping of the early modern European legal order, see Pitts 2018, 28-67.

[130] Bennison 2002, 81, 84.

when we consider indigenous peoples within this frame. Regarding the second part of his passage on cultivation, through raising the question of hunter-gathers, his reference to the New World is explicit. Here, while Vattel lamented the Spanish conquest of Andean and Mesoamerican empires as a 'notorious usurpation', he qualifies this position by stating that 'the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful.'[131] When thinking through this mode of justification, contrary to any overly broad claim that Vattel was merely applying the morality of day, it is noteworthy that the Vattelian denial of indigenous land rights was far more brutal than many of his contemporaries, including Christian Wolff.[132]

In accounting for this enhanced brutality, an important shard of context can found in the observations of Jean-Pierre Purry (1675-1736), an affiliate of the Dutch East India Company from Vattel's home canton of Neuchâtel who devised elaborate plans for the settler colonization of Australia, Southern Africa, and South Carolina.[133] What is exceptionally striking about Purry was that his moral justifications for these colonial projects were virtually identical to Vattel's proclamation that dispossessing hunter-gatherers is in perfect accord with the natural law. For Purry, who eventually served as the director of the French East India Company,[134] the morality of colonialism was not obvious course of action but demanded an elaborate line of justification.

According to Purry's anticipation of counter-claims by hypothetical opponents: 'It will be objected that….justice and equality will bar us from setting ourselves up in [Western Australia]…and lording it over those who have been there, father and son,

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[131] Vattel 1852 [1758], Book I, Chapter VII, § 81.

[132] On Wolf's critique of European dispossession of non-Europeans, and its natural law justifications, see Fitzmaurice 2014, 134-135; see also Keller 2006.

[133] Ginzburg 2005.

[134] Ibid. 677.

for as long as several thousand years, and will also bar us from evicting from their land people who have never done us any harm.'[135] In responding to this, in a manner directly echoing John Locke's *Second Treatise of Government*, Purry claims that in God's ownership of the Earth, 'he does not assign a portion [of land] to each, but rather that which each fairly seizes for himself belongs to him.'[136] That said, 'it does not seem reasonable that the simple state of possession, albeit thousands of years old, should privilege the claims of any individual over the others, without their consent.'[137] However, Purry does not finish here and asserts an additional justification for colonization on the grounds that:

> savage and rustic people love above all things a lazy existence and.…the countries inhabited by these sorts of savage and lazy people are never very populous. Thus one has every reason to believe that far from harming the inhabitants of [these lands]…the establishment of a good European colony would provide for them all sorts of benefits and advantages, as much because theirs would be a civilized life as because of the arts and sciences they would be taught.[138]

In turning back to Vattel's passage on cultivation, these elements of native idleness, sparse populations, and productive land usage as a common good for all mankind are all manifest in Vattel's denial of the legitimacy of hunter-gather societies.[139] Moreover, in complete consistency with Vattel's condemnations of the conquest of Latin America, Purry's formulation of colonisation was intended to be far more

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[135] Quoted in Ibid. 671.

[136] Quoted in Ibid.

[137] Quoted in Ibid. 672.

[138] Quoted in Ibid. 673.

[139] Vattel 1852 [1758], Book I, Chapter VII, § 81.

benevolent than the practices of the Spaniards and the Portuguese.[140] While forging a direct between Purry and Vattel would require archival research that exceeds the scope of this thesis, in this particular instance, fact that Purry and Vattel were such close contemporaries complicates the contextualist critique, at least as it applies to this situation, that critical international legal histories anachronistically impose alien ethics on historical figures. After all, Purry, and by extension Vattel, were certainly in a position to understand the normative counter-arguments to the colonial justifications they embraced.[141] On a broader scale, this treatment of indigenous land rights held vast implications for Vattel's theory of popular will as the legitimation of domestic sovereignty and, by extension, international order. Through denying sovereign personality to those who breached the necessary duty of cultivation, the 'popular will' that allowed a society to denounce the illegitimacy of external intervention was not a quality possessed by all human communities.

2.6.3. Britian as Saviour and Exemplar

In reviewing Vattel's depiction of the world, centring his theory of popular will as the basis for sovereignty exposes a stratified range of actors that constitute his vision of global order. As detailed above, there was the (counterfactual) European state-system where all sovereign polities great and small were formally equal entities legitimized by popular will, there was the Ottoman Empire that stood out as the archetypal destroyer of popular will, and there were 'primitive' communities precluded from claiming popular will. However, there was another actor that Vattel idolized as a guarantor of the independence of Europe's small states who feared extinguishment by absolutist monarchies, especially France where the excesses of dynastic accumulation vastly expanded under the reign of King Louis XIV. Against

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[140] Ginzburg 2005, 674.

[141] On this basis it cannot be said that the critique of colonialization existed outside the scope of Vattel's pool of available intellectual resources.

this backdrop, Vattel placed a great deal of hope in Britain, for his '…significant claim with respect to the balance of power was that Britain was the only state capable of playing the role of peacekeeper, aligning with other powers when necessary to combat France.'[142]

Contrary to any notion that placing hope in Britain embodied timeless truths regarding 'the international' as a sphere of struggle beyond domestic political difference, Vattel's geopolitical formulations were deeply informed by the way Britain approached popular will. In Book I of *The Law of Nations* Britain is described as an exemplary model of domestic government. According to Vattel:

> That illustrious nation distinguishes itself in a glorious manner by its application to everything that can render a state more flourishing. An admirable constitution there places every citizen in a position that enables him to contribute to this great end, and everywhere diffuses the spirit of genuine patriotism which zealously asserts itself for the public welfare. We there see private citizens form considerable enterprises, in order to promote the glory and welfare of the nation. And while a bad prince would find his hands tied up, a wise and moderate king finds the most powerful aids to give success to his glorious designs. The nobles and the representatives of the people form a link of confidence between the monarch and the nation, and concurring with him in every thing that tends to promote the public welfare, partly ease him of the burdens of government, give stability to his power, and procure him an obedience the more perfect, as it is voluntary. Every good citizen sees that the strength of the state is really the advantage of all, and not that of a single person.[143]

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[142] Whatmore 2010, 100.

[143] Vattel 1852 [1758], Book I, Chapter II, § 24.

While Vattel is clear that achieving this harmonious order historically '…cost rivers of blood',[144] and his overly sanguine view is difficult to reconcile with continued civil strife in Britain,[145] a distinct set of interests motivated his faith.

From Vattel's perspective, Britain constituted a system whose interests in foreign commerce provided it with little incentive to interfere in the governments of Europe's same small states, who often functioned as the type of commercial partner Britain desired.[146] Moreover, it presented a Protestant counterweight to the practice of Catholic imperialism whereby kingdoms such as France viewed the authoritative powers of their monarchies as the proper inheritors of the universal church.[147] As such, for Vattel, according to Richard Whatmore, '[t]he combination of the structure of Britain's government and its interest in commerce made it the kind of state that would fulfil its duties towards fellow states.'[148]

While Vattel was correct that Britain was a different kind of empire that was certainly more conducive to the continued sovereign autonomy of Europe's small commerce-oriented states, this occurred largely because Britain's endeavours primarily entailed colonising the non-European world. For Vattel, this could be viewed, not as undermining hypocrisy, but yet another example of British virtue. That is if we consider his advocacy of cultivating the world's uncultivated spaces as a universal human good, even if this entailed dispossessing indigenous populations. This was strangely consistent with Vattel's condemnation of those who conquer Europe's small polities. Here the emerging view of 'primitive' populations was their lack of

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[144] Ibid.

[145] According to one important early-twentieth century commentary on the Vattelian influence: 'one has only to turn a dozen pages of the history of the reform movement in England to find how far [Vattel's characterizations]…. were from describing the real state of things.' Fenwick 1913, 400.

[146] Whatmore 2010, 101.

[147] On the centrality of Protestantism for Vattel, see Hunter 2010.

[148] Whatmore 2010, 102.

productive land usage, judged by European standards, meant that their lands could not be ‘conquered’ in the strict sense because they never owned them in the first instance.[149]

Against this backdrop, various strands of Vattel’s theory reached their logical conclusion within a group of English-speaking settlers on the continent of North America. This population developed a conception of liberty based on dispossession and asserted their sovereign independence from a British metropole they charged with ‘insupportable tyranny', to use the Vattelian terminology[150] As will be discussed in the next chapter, Vattel’s *The Law of Nations* was the ideal playbook for those seeking independence through the American Revolution. The result was the first new international legal subject where popular will would be validated through ‘facts on the ground’ in direct repudiation of dynastic legitimacy claims. Thus, Vattel’s work was invoked to validate a harmonious merger of three meta-phenomenon he personally venerated: settler colonialism, an Anglocentric conception of political legitimacy, and an international legal order premised on popular will as the basis for domestic authority. This began a process where Vattel’s counterfactual assertion of a world of sovereign states ultimately reached the status of near-universal consensus.

2.7. Conclusion

The foundational emergence of Vattel’s theory of the popular will-international law relationship demonstrates what is possible if we merge the insights of ‘juridical thinking’ with historical sociology. Juridical thinking is the ability to weave strands of meaning into an overarching abstract narrative that travels across time and space, and this is precisely what Vattel accomplished. This was demonstrated by the absence of any need to account for actual material conditions in the process of lodging

[149] Carty 1996, 6.

[150] On Vattel’s theory of tyranny and popular uprising in this regard, see Part 2.3.3.

his critique of global consolidation as a fundamental demand of the natural law. However, material context should in no way be excluded from the account of why Vattel presented his juridical fiction of a horizontal world of sovereign states where each member expressed the unique self-perfecting will of its underlying political community. Delineating the interests at play in this context is aided immensely by the way historical sociology de-fetishizes the modern sovereign nation-state through situating it as one contingent political formation amongst many. When considering Vattel as the patriotic representative of a small Swiss Canton at the risk of annihilation by expanding land empires, we can observe his material interest in lodging the juridical assertion of a pluralist order of inviolable sovereign states as a demand of natural law. Thus, while a particular formulation of juridical thinking was the outcome, a distinct historical-sociological content motivated this assertion in the first place.

Despite its parochial origins, this juridical ontology of a world of formally-equal, popular will-based sovereign states bore consequences that Vattel himself would likely never have imagined. What made Vattel's theory so useful for certain actors was its accommodation of a vast range of political possibilities for societies organized around the ideal of the nation-state form, while simultaneously excluding those that did not adhere to this form. As the next chapter will show, this dynamic was exemplified through the American Revolution where Vattel's treatise emboldened a settler population seeking sovereign independence from an imperial metropole aligned with indigenous communities. Here, a particular historical sociological configuration gave rise to a juridical narrative profoundly supplemented by Vattel's juridical narrative despite the fact that it arose an ocean away to explain very different material circumstances. However, while they may have manifested in unique ways, the differing contexts that shaped the formation of Vattel's treatise and its pivotal influence elsewhere were very much a part of the same expanding order of global capitalism. Understanding this multi-faceted transformation of social relations in the *longue duree* of Vattel's reception is crucial for telling the story of why popular will is today the sole basis for domestic authority under international law.

CHAPTER III

The Rise of Popular Will: European Expansion, the American Revolution, and Settler Colonial Liberty

3.1. Introduction

While Chapter I detailed the contemporary relationship between popular will and international law, and Chapter II traced this general formulation back to Emer de Vattel's 1758 treatise *The Law of Nations*, the present Chapter begins this thesis's world-historical account of how these two moments are materially connected. My central argument here is that the American Revolution, resulting in US independence from the British Empire, formed a watershed moment in the rise of popular will as international law's basis for domestic authority. It did so by demonstrating that it was possible for a popular will-based political movement to attain independence against the wishes of an established sovereign. Here the *de facto* authority asserted by the American colonists was recognized as superior to any *de jure* claim by the British imperial monarchy. Yet, if dynastic legitimacy was the dominant mode of international legal standing during this timeframe, what material and ideological circumstances allowed for this reigning standard to be successfully challenged by a 'people' who deliberately refused the authority of a crown?

In this Chapter, I situate this outcome as the culmination of compounded contradictions that manifested through the intertwined expansions of European overseas colonialism and the rise of capitalism. Positioned amongst an array of colonial projects, a unified American settler political imaginary arose as the by-product of the British imperial metropole's efforts at expanding capital accumulation while managing its resulting surplus population. This ultimately produced popular will-based demands that the New World settler society was entitled to independence because

it was fundamentally different from its Old World rulers. However, in a rather counterintuitive capacity, this separation in the name of difference was justified because America was similar enough to the Old World to fall within the ambit of its rules regarding sovereign autonomy.

Given this quandary, Vattel's treatise and its emphasis on ideological pluralism as the legitimation of popular will proved invaluable in navigating the balancing act of difference and similarity that was the forceful American assertion of sovereign independence. The consequence of American inclusion as a sovereign equal was the international legal entrenchment of an exception to dynastic legitimacy. Put broadly, rebellious anti-dynastic assertions of popular will could be recognized through a demonstration of overwhelming *de facto* authority, despite the objections of an incumbent (dynastic) sovereign. Moreover '*de facto* authority' in this context was substantively geared towards reproducing capitalist social relations at an ideological level. Paradoxically, this parochial *de facto* authority became universalised as 'objectivity/ideologically-neutrality.' As a result, the concealed entrenchment of capitalist-reproduction under the banner of 'objectivity' carried broad implications for subsequent claimants of independence in the name of popular will.

In relation to the thesis's overall structure, this chapter shows how extra-European expansion resulted in a legitimacy crisis that changed the very character of sovereignty under international law. Through detailing this meta-development, I set the stage for an account of a quasi-parallel transformation that happened within Europe. This takes the form of Chapter IV's account of how the French Revolution was the result of feudal absolutism's attempt to navigate contradictions produced by the subtle, yet pervasive, pressures of capitalist encroachment on an increasingly global scale. With this ensuing rupture, analogous assertions of popular will raised additional questions of international legal order. However, unlike the peripheral American Revolution, French assertions occurred within the very heartlands of European dynastic power. The aftermath of this rupture forms the subject matter of Chapter V. Here I show how the modern European state-system emerged through a synthesis of the radical challenge of popular will with the notion that organic identity embodied the timeless uniqueness of distinct political communities. This synthesis

proved pivotal in justifying international legal arguments that separated Europe (and its settler offshoots) from the rest of the world while legitimizing its dominion over non-European societies.

Chapter VI returns us to the Western Hemisphere where, in stark contrast to the US, Latin America independence demonstrated how even inclusion as sovereign equals proved limited to those marginalized by global capitalism, regardless of their creativity in making assertions of popular will suited to their local conditions. Finally, Chapter VII shows how the impact of the American Revolution, particularly the reconfiguration of the independent settler state-British metropole relationship, became universalized as the liberal baseline for a UN Charter-based world order that consolidated in the mid-twentieth century. With this occurrence, all territories were presumed to (ideally) embody the popular will of their underlying populations in a manner juridically, but by no means materially, analogous to the American justification for independence from the British Crown.

In moving forward, Part 3.2. confronts the challenges of accounting for the American Revolution through a critical interpretation of international law given the pervasive, intertwined mythos of the Peace of Westphalia and American Exceptionalism. In staging this confrontation, I argue for a materialist interpretation of the rise of American sovereignty that accounts for settler colonialism, capital accumulation, and their placement within the overarching rubric of colonial capitalism. Following this, Part 3.3. situates these considerations through engagement with key works of international historical sociology that provide comprehensive materialist accounts of the modern international order that can deeply enrich the insights of international lawyers. Part 3.4. then builds on the previous section through a material exploration of the emergence of an English-speaking settler society in what is now the United States, and attainment of a freedom and affluence at the expense of enslaved Africans and dispossessed indigenous peoples. After showcasing the threats to continuous settler privilege, Part 3.5. turns to the construction of an American argument for independence premised on the novel view that *de facto* authority vindicates the international legal subjectivity of an entity legitimized on the basis of popular will.

Finally, Part 3.6. examines the material-juridical consolidation of the early American republic and shows how the 'facts on the ground'-popular will-international law continuum that justified American sovereignty in a parochial context was translated into a universal precept.

3.2. American Revolutionary Popular Will in Context

3.2.1. From 'American Exceptionalism' to 'Settler Empire'

While the global impact of the American assertion of popular will via its July 4th, 1776 Declaration of Independence, is well documented,[1] its influence has yet to be comprehensively addressed within international legal scholarship despite the field's 'turn to history.' A possible reason for this relative absence is the contested status of declarations of independences within contemporary international law.[2] Yet, when accounting for the international legal impact of the American Revolution, beyond the ease of entanglement with intractable doctrinal questions of statehood, recognition, and self-determination attached to 'declarations of independence', a larger historiographic barrier is present. This barrier is constructed through the way a mythic narrative of the Peace of Westphalia is compounded by another myth, American Exceptionalism.

While subject to numerous interpretations, the core of 'American Exceptionalism', at least in relation to international law, is that the US's unique character, destiny,

[1] For the leading study of the global impact of the Declaration of Independence, see Armitage 2007.

[2] Here the strong presumption in favor of upholding territorial integrity renders attempts to declare independence far from sufficient for attaining international legal standing. For confrontations of this issue, see e.g. Vidmar 2012b; Anderson 2015; Kassoti 2016.

and mission of exporting 'freedom' globally translates into a differentiated relationship with the rules of the Westphalian international order.[3] From this basis, arguments emerge that there is a distinctly 'American approach to international law' whereby the US Constitution, i.e. the 'supreme law of the land', triumphs over any conflicting international legal interpretation.[4] Such a view has been invoked as justifications for American international legal breaches whereby Constitutional supremacy is coupled with assertions of US power as an indispensable enforcer of global order and *any* legal constraint perceived to empower America's enemies is illegitimate.[5] However, these breaches, particularly as they relate to the use of force and the law of armed conflict, have also be contested within the same confines of American Exceptionalism by those invoking longstanding traditions of US international legal commitments that portray recent departures (especially during the Cold War and later the post-9/11 'War on Terror') as tragic betrayals.[6] There is a great deal of history such a challenger can draw upon given that, in the words of Mark Janis, '[p]robably the most exceptional aspect of American international law is the belief long held by many Americans that the discipline embraces a utopian mission to substitute law and the courtroom for war and the battlefield.'[7] Moreover, this legalist antiwar tradition is accompanied by numerous, and frequently overlapping, assertions of anti-imperialism as a deeply American value.[8]

Through its many variations, American Exceptionalism acts as a quintessential case study in 'juridical thinking' in that it lodges its central argument through a highly

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[3] On the self-perception of the US as being a 'civilisational' tier above the Westphalian 'family of nations', see Cha 2015, 759.

[4] For such an account of 'American international law', see Cohen 2003.

[5] See e.g. Rabkin 2004.

[6] Witt 2012, 897-898.

[7] Janis 2012, 533.

[8] On the manifestations of 'anti-imperial' discourse within the history of American foreign policy, see Cha 2017.

discretionary assemblage of historical events in the name of constructing a compelling narrative. While 'juridical thinking' is an indispensable connector of otherwise disparate strands of meaning, as this thesis argues, it is limited in that it abstracts historical events from their material contexts while nonetheless generating material effects that it cannot explain outside the confines of its narrow projects of political justification. This is especially problematic when American Exceptionalist narratives make sweeping historical claims about international law while failing to acknowledge how their political myopias expose them to critique through a contextual expansion of the histories they purport to 'neutrally' describe.[9] Thus, in line with this thesis's methodology, the limits of this approach are tempered with the insights of historical sociology as means of materially situating the origins, appeals, receptions, and adaptations of the narratives constructed through the distinct technique of 'juridical thinking.'

Against this presumption, when facing the distorting rubric of 'American Exceptionalism' (regardless of the political purpose it serves), a first step is to confront its naturalization of the anti-materialist Westphalia myth. This naturalization is accomplished by positioning the US as the virtuous other to the European state-system that was allegedly formed according to this myth, leaving the myth intact as a base presumption. Thus, claiming that the US is either unbound by external norms or

[9] This is rife in both Neoconservative and liberal American Exceptionalist histories of international law. An example from the former is the claim that the United Nations' 'terrorism-enabling' commitments to sovereign equality and non-intervention necessitates a return to the early nineteenth-century Concert of Europe model of great power interventionism, see Yoo 2014. (For an application of international legal structuralism to expose the fallacious, and, nature of this narrative, see Desautels-Stein 2016b.) Another Neoconservative example is the critique of condemnations of US breaches of the law of armed conflict, monolithically understood, by pointing to histories of differing Anglo-American vs. continental interpretations to show there is no singular 'law of war,' see Rabkin 2014. (However, this fails to account for the ways in which the law of armed conflict in its current manifestation was, in great part, shaped to directly serve American interests, see Barsalou 2018.) On the liberal end, a prominent example is Oona Hathaway and Scott Shapiro's claim that the successful ban on aggression and conquest emerged through the distinctly American creation of the 1928 Paris Peace Pact (aka the Kellogg-Briand Pact) that lead to series of legal innovations resulting in a 'New World Order,' Hathaway and Shaprio, 2017. However, this narrative both ignores alternative agencies that contributed to this result, namely the Third World (see Barkawi 2018) and is premised on the morality of American hegemony over the rest of the world (see Wertheim 2018).

represents an unparalleled perfection of those same norms, presumes it was spawned from a Westphalian world order where sovereign equality, non-intervention, and the toleration of ideological pluralism were well-established principles. In other words, 'American Exceptionalism' in international legal discourse only receives its animating impetus by reference to an ahistorical presumption regarding the origins of the international states-system.

My alternative approach is to view the US's emergence not as an exceptional sovereign state within a world of ordinary sovereign states, but to highlight the contingent nature of the 'sovereign state.' This allows me to depict the US as a novel political form generated through the contradictory interactions of variegated hierarchical empires on a global scale. Against this backdrop, the foundational American assertion of popular will as a basis for sovereign authority challenged some forms of colonial domination, while simultaneously venerated others. This realization provides grounding for a materialist account that can explain why both Westphalia and American Exceptionalism ultimately gained their purchase as standard abstractions despite the greater explanatory potential of a more materialist account. Thus, while popular will exists at the heart of American Exceptionalist discourse, uncovering the true impact of how American popular will transformed the international legal order means abandoning (or at minimum deeply provincializing) American Exceptionalism as a useful analytical category.

As an entry point into a more materially grounded explanation of the American Revolution and its international legal impact, we must confront the ways in which this event challenges our definition of 'revolution' conventionally understood. This is especially pronounced when considering how a colony seeking independence from a metropole via a war of liberation differs from a revolution against an internal social order. Comparing the American Revolution and the French Revolution starkly highlights this comparison in that, according to Thomas Barrow:

> A French Revolution is the product of unbearable tension within a society. The purpose of such a revolution is to destroy society as it exists,

> or at least destroy its most objectionable aspects, and to replace something old with something new. In contrast, a colonial "revolution" or war of liberation has as its purpose the achievement of self-determination, the "completion" or fulfilment of an existing society, rather than its destruction.[10]

However, this distinction raises the question of what social ends American settlers were aiming to fulfil through their recourse to armed struggle against the colonial metropole. Confronting this question presents an opportunity to take seriously the reality that American revolutionary 'anti-colonialism' was inseparable from its unimpeded pursuit of another form of colonialism.

A dynamic of overwhelming relevance towards this end is the distinction between 'colonialism' and 'settler colonialism.' While the former is concerned with establishing relations of domination and exploitation over a discrete population to further external interests, the latter functions according to a logic of replacement whereby an external population/social order systematically extinguishes the previous one.[11] In other words, the creation of a new settler society is premised on the elimination of the native society.[12] Although settler colonialism is often part of larger colonial schemes, it is entirely possible that a settler society breaks away from the metropole and persists as an independent entity while retaining its animating structural logic.[13] On this basis, while attaining formal independence is often depicted as the advent of 'decolonization', this narrative hardly accounts for remaining indigenous populations within a settler colony whose experience of conquest persists as long as the

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[10] Barrow 1968, 463.

[11] '…settler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base.' Wolfe 2006, 388.

[12] Ibid.

[13] On the differentiation between colonialism as a general phenomenon and settler colonialism as often connected, but nonetheless distinct, set of relations, see Vercini 2014.

settler society does.[14] In Patrick Wolfe's iconic depiction, 'invasion is a structure not an event.'[15]

In grounding my analysis in the chapter, much insight draws from Aziz Rana's *Two Faces of American Freedom* where the settler colonialism paradigm provides a striking revision of American legal and political development. When expounding upon this notion of 'two faces', Rana argues that the *liberty* of a foundational egalitarian American political community of white male Protestant property-owners was premised on the *suppression* of those falling outside of this ideal.[16] By viewing these two features, not as an aberration, but as a mutually-reinforcing structure, a link is forged between '…the emancipatory and oppressive features of the American experience.'[17] Here '[s]ettler society's ethnic basis flattens internal inequalities while justifying the construction of dependent external communities.'[18] This focus on the US as a 'settler empire' delivers a serious blow to 'American Exceptionalism' narratives for 'American commentators and citizens often view aspects of national history to be uniquely homegrown, when in fact they are present to a degree in numerous settler societies.'[19] From this premise, Rana historicizes 'American Exceptionalism' as a discursive ethos that arose in the late-nineteenth/early-twentieth

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[14] The need for this particular explanatory frame stems from the fact that many formative theories of anti-colonialism, particularly those of Franz Fanon and Amilicar Cabral, appealed to the injustice of a vast colonial majority being ruled by a small minority of colonisers. Such a rallying call scarcely applied to the plights of indigenous peoples who were rendered minorities in their ancestral homelands, Wolf 1999, 1-3.

[15] Wolfe 2006, 388.

[16] This is especially true of the indigenous societies whose disappearance was a precondition to this ideal community. As such, their treatment became the template for dealings with a wide array of excluded populations including Catholics, African Americans, Mexican Americans, and 'non-white' immigrants. Rana 2010.

[17] Ibid. 10.

[18] Ibid.

[19] Ibid. 11.

centuries and was anachronistically conflated with the eighteenth century American founding.[20]

3.2.2. The Political Economy of Juridical Dispossession

Although, the settler colonial framework dismantles 'exceptionalism' narratives, there remains the connected issue of how American independence as a settler empire resulted in an impossible standard for judging future independence movements. On this basis, while the American Revolution furthered *de facto* authority as an 'objective' barometer of popular will, the settler colonization-based material conditions that enabled these 'facts on the ground' were by no means present in all, or even most, societies. Thus, although the US technically emerged through an 'anti-colonial war of liberation' that would serve as a template for the Global South, this in no way eliminates its deep similarities with other settler colonial societies such as those of Australia, New Zealand, and South Africa.[21] Acknowledging this raises extensive questions of how to explain the world-historical formation and influence of the American settler empire as milestone in the globalization of popular will as international law's exclusive basis for domestic authority. My purpose in this chapter is to account for the intertwined features of global political economy and international legal argument as a means of expanding upon Rana's path-breaking account.

On the general framework of settler colonialism, one issue has been that while it aspires to explaining social relations across a vast array of temporal and spatial contexts, according to Rachel Busbridge 'in practice there is a particularly strong emphasis on white European settler colonialisms in Australia and the America where the logic of elimination – as opposed to the logic of exploitation – features

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[20] Rana 2015, 273-277.

[21] Ibid. 267-268.

most heavily.'[22] This raises the question of whether or not settler colonial studies forms a universal or limited analytical vantage point.[23] In taking this contextual point seriously (while also limiting my methodological engagement with the settler colonial studies paradigm), my purpose is to examine the phenomena of Anglo-American settler colonization as a localized manifestation of globally-constituted material and ideological forces. From this premise, I follow *The Two Faces of American Freedom*'s usage of settler colonial studies to introduce critical transnationally-focused historical considerations that confront the limitations of a 'methodological nationalism' deeply complicit in the production of simplified, moralistic narratives of American institutional development.[24] As the next logical next step in building this transnational contextualization, I incorporating the influences of global political economy (and its attendant mechanisms of juridical ordering) into the narrative. This is especially important given that the emergence of the American settler state was only part of a broader phenomenon of white English-speaking colonial settlement that was foundational in shaping of the modern capitalist global system.[25]

However, in viewing the emergence of this system as the (re)production of contingent regimes of social relations, as opposed to the fulfilment of any 'natural order', the insights of Karl Marx's *Capital* provides an invaluable starting point. As Marx famously concluded in his account of capitalism as a mode of economic production premised on free exchange between formally equal juridical persons, this system is

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[22] Busbridge 2018, 97.

[23] As Bushbridge notes, despite the broad ambitions of theorists of settler colonialism, the only setting the framework has been applied to in any great depth beyond North America and Australasia has been Israel-Palestine. For Busbridge, while it shares certain features with other accounts of settler colonization, there are also aspect of the Israeli-Palestinian situation that are incredibly different from this framework, at least to the extent North America and Australasia form the template for comparison, see Ibid. 106-110.

[24] For an account of how the narratives of exceptionalism and expansionism are deeply rooted in American history, see Chaplin 2003.

[25] See Belich 2009.

ultimately rooted some source of coercion whereby value is extracted without compensation.[26] Deeming this phenomenon 'primitive accumulation' in that it represents an essential pre-condition for capital accumulation, Marx turns our attention to the forcible destruction of the English peasantry's modes of self-sufficiency as landowners invoked private property rights to exclude access to traditionally communal sources of sustenance.[27] With this loss of sustenance, these peasant populations had no choice but to sell their labour power as formally equal individual subjects within a competitive labour market thus providing the necessary labour component of capitalist industrialization.[28]

However, the concept of privative accumulation has raised substantial questions for those seeking to apply it beyond the context of capitalism's emergence in Europe and meaningfully account for colonial, postcolonial, and settler colonial situations.[29] One set of challenges revolves around the temporal question of whether direct coercion exists as an embedded feature of capitalism even after the initial conditions of capitalist reproduction have already been established through an earlier episode of primitive accumulation.[30] Another set of challenges concerns the Eurocentric character of the 'primitive accumulation' narrative that implies a 'normative developmentalism' whereby white male workers gaining agency through

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[26] For Marx, theorizing primitive accumulation was the way out of accepting capitalist social relations as a timeless or inevitable phenomenon. On his account: 'The whole movement…seems to turn in a vicious circle out of which we can only get by supposing…an accumulation not the result of the capitalist mode of production, but its starting point.' Marx 1970, 667.

[27] Ibid. 671-685.

[28] Ibid. 668-669.

[29] While Marx does speak of the colonial dimensions of primitive accumulation, his depiction is Capital can hardly be said to centre the perspective of those on the receiving end of colonialism. In concluding Volume I of Capital he states that: 'we are not concerned here with the condition of the colonies. The only thing that interests us is the secret discovered in the new world by the Political Economy of the old world…that the capitalist mode of production and accumulation…the expropriation of the labourer.' Ibid. 724

[30] Clouthard 2014, 11.

industrial transformation.[31] This raises questions what such a theory offers to those outside of this mould. While contemporary scholars, in varying measures, have addressed these challenges, the situating of these 'primitive accumulation' debates within a grand synthesis has only recently emerged through the efforts of Onur Ulas Ince.[32]

According to Ince, primitive accumulation must be conceived as necessarily entailing a) the imposition of 'politco-juridical force', and b) the need to go beyond the nation-state centrism and comprehensively account for colonialism within the broader process of capitalism's emergence.[33] Under this formulation, 'politico-juridical force' is the presence of coercive impositions '…categorically excluded from the determination of the economy as an autonomous system of interdependence mediated by self-regulating markets' that can manifest in a vast variety of ways.[34] Such force is necessary for while 'primitive accumulation' separates individuals from their means of sustenance and conscripts them into the capital accumulation process, 'this separation-mediation relationship involves not only the assimilation (i.e., destruction and reconstitution) of non-capitalist relations of social reproduction but also their subordinate articulation to circuits of capital.'[35] However, while the deployment of capitalism's formative violence may have led to the creation of a formally equal labor force in the Europe, this manifestation is only a small part of a larger process given that capitalism entails 'the subsumption of labor and land on a planetary scale.'[36]

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[31] Ibid.

[32] Ince 2018a.

[33] Ibid. 886-887.

[34] Ibid. 894.

[35] Ibid. 893.

[36] Ibid. 895.

In adopting this global lens, we must '…detect the networks of commodity and capital that link what seems to be local, diverse, and disconnected articulations of land and labor' and this means turning attention to the formally unequal practices.[37] When viewed in the aggregate, 'the political-constitutive position and the global-colonial expanse of primitive accumulation…enable one to grasp coercive colonial structures, such as slavery, commercial imperialism, and settler colonialism, as properly belonging to the history of capital.'[38] Moreover, Ince also resolves 'primitive accumulation's' temporality issue through his delineation of 'capital-positing violence' (the original destruction of non-capitalist social relations) versus 'capital-preserving violence' (the force needed to maintain these new social relations) as two distinguishable moments that are nonetheless inseparable features of a larger systemic logic.[39]

While interlinked episodes from this broad expanse of colonial capitalism will be visited throughout this chapter, in framing the American Revolution as a watershed in the ultimate globalization of popular will, it is worth articulating how settler colonialism and primitive accumulation are fused in this context. As Patrick Wolfe has made clear, settler colonialism is not simply the replacement of one set of landowners with another, but the replacement of an entire system of landownership with another.[40] What is particularly relevant here is the precise nature of the commonly invoked, but rarely theorized, assertion of 'dispossession' in this context. According to Robert Nichol's confrontation of this concept, 'dispossession' operates according to a recursive logic where, under capital social relations, any alleged dep-

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[37] Ibid.

[38] Ibid. 887.

[39] This framing dichotomy is drawn from Walter Benjamin's 'A Critique of Violence' that outlines the distinction, co-constitution, of 'law-creating' and 'law-preserving', and applied to the dynamics of capitalist social relations, Ibid. 900.

[40] Wolfe 2016, 34.

rivation of property can only be contested, and remedied, through invoking the categories that capitalism is willing to recognize.[41] Against this presumption, for indigenous peoples challenging dispossession, the very act of seeking redress means sacrificing the ability to maintain alternative conceptions of the human relationship with lands and nature.[42] That said, dispossession is not simply the disruption of property relations, but generative of a very specific understanding of what property rights are, and what they can never be.[43] This is a distinct technology of power whereby concrete practices are reduced to juridical abstraction that, in turn, legitimize violence against those failing to conform to the dictates of this abstraction.[44]

As will be discussed in detail below, the settler community that ultimately gained independence through the American Revolution did so in the name of an individualistic conception of property geared towards capital accumulation. While numerous acts of settler acquisition were undertaken under quasi-legal/extra-legal circumstances, the very fact that adjudication was undertaken to rectify such dubious situations ultimately empowered settler modes of ownership while denigrating indigenous modes.[45] To apply Ince's categories, while an initial act of forcible appropriation of land by a settler would be 'capital-positing violence', defining the rights

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[41] This has included recognizing indigenous land rights as a legitimizing precondition for their acquisition. Nichols 2018, 14 ('Historically, settlers have routinely affirmed certain forms of Indigenous property rights because they have recognized that, in a consolidating colonial context, Indigenous peoples can only actualize their property rights through alienation.')

[42] Ibid. 15.

[43] This situation is possible because 'Indigenous propertied interests are only rendered cognizable in a retrospective moment, viewed backward and refracted through the process of generating a distinct form of "structurally negated" property right in land…possession does not precede dispossession but is its effect.' Ibid.

[44] Bhandar 2014, 211-213; see also Bhandar 2018.

[45] On the continuity of this dispossession-based expansion beyond American independence, see Nichols 2018, 15-21.

and wrongs of this occurrence through categories of settler legality would be 'capital-preserving violence.'[46]

It is at this juncture that the broad international legal dimension of this settler colonialism-capital accumulation continuum can be identified. After all, the fact that the socio-political reality they created on this basis attained independence on the grounds of *de facto* authority is deeply revealing of the types of property-based social relations international law would view as objectively 'effective' and thus worthy of sovereignty (despite the presumption that sovereignty and property are two distinct spheres). In this formative context, the emptiness of popular will that could, in theory, support any 'effective' system of authority was an abstraction from the material reality that here 'effective control' was premised on American '…national (constitutional) identity…[being] practically indistinguishable from the purest ideological expression of capitalist relations of production.'[47] When considering the universalization of this particular understanding of popular will, the American Revolution was truly a milestone in building our current international order where formally equal states under anarchy is a corollary to formally equal individuals under capitalism.[48]

3.2.3. The Vattelian Umbilicus to 'Old Europe'

By centring settler colonialism and primitive accumulation, we can now see why Vattel's treatise was so uniquely beneficial in making an international legal case for American revolutionary popular will. Vattel's influence on the American Founders is well documented, with the latest study dating his treatise's reception

[46] Ince 2018a, 900-901.

[47] Rosenberg 1994, 166.

[48] Ibid. 144-146.

back to 1762 (only four years after its first publication).[49] Such influence is iconically encapsulated in the much-quoted remark of Benjamin Franklin who, upon receiving the most recent copy of *The Law of Nations* from a friend in Amsterdam stated that: 'I am much obliged by the kind present you have made of us of your new edition of Vattel. It came to us in good season, when the circumstances of a rising state made it necessary frequently to consult the law of nations.'[50] While Vattel's impact was in no way limited to colonial America, its veneration there stood in contrast to the scepticism it invoked amongst various Europeans.[51] In the words of Vincent Chetail: 'one can assert without too much exaggeration that the praise for his work in the United States was inversely proportioned to the criticism it received in Europe.'[52] Moreover, Vattel's American reception was not simply a matter of random availability. The American founders were certainly familiar with other canonical publicists, especially Grotius and Pufendorf.[53]

When accounting for Vattel's reception in the American colonies, one set of explanations focuses on how *The Law of Nations* was both intended as a practical guide for statesmen and presented a pluralistic view of popular will that was deeply compatible with the ideals of the American founders.[54] On the first point, the many possible applications rooted in the sheer ambiguity of Vattel's treatise allowed the American founders to render their iconoclastic republican agenda more or less legible to existing sovereigns who continued to adhere to dynastic legitimacy.[55] On the second point, unlike other publicists, Vattel explicitly claimed that 'the people'

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[49] Oppispow and Gerber 2017.

[50] Quoted in Chetail 2014, 254.

[51] See Pitts 2018, 120-121.

[52] Ibid. 252.

[53] On the revelation of this point through archival research, see Richardson 2012, 549-550.

[54] Chetail 2014, 266.

[55] On ambiguity as the great strength of Vattel, see Ibid 267-269.

were the ultimate source of sovereign authority.[56] Thus, by disavowing any remnant of dynastic legitimacy, Vattel's ideologically plural, popular will-based law of nations allowed for procedural intercourse amongst those who nevertheless maintained substantively opposing views on the nature of legal and political authority.[57] On this basis, it played an indispensable role in allowing the novel American experiment in republican self-rule to assume its place 'among the powers of the earth.'[58] Applied to the American Revolution's long-term transformative impact on international legal order's approach to domestic authority, *The Law of Nations* can be viewed as the umbilicus between 'Old Europe' and a grand reconstruction of the world in the image of the United States.

While there is a great deal of truth to this line of explanation, failure to account for the deeper material realities surrounding it reproduces the ahistorical 'American Exceptionalism' narrative. This in turn distorts the American Revolution's role in materially entrenching popular will as the international legal basis for domestic authority. In recalling how the interlinked phenomena of settler colonialism and primitive accumulation expand our analytical horizons, we find a new framework for understanding Vattel's treatise as the ideal manual for those asserting a conception of revolutionary liberty inseparable from colonial capitalism. As discussed in Chapter 2, Vattel was notable for denying land rights to those who did not engage in his preferred mode of agriculture. Far from simply being a 'product of its time,' *The Law of Nations* was unapologetic in its delivery of a definitive answer to questions of colonial ownership, despite the moral struggles of many of Vattel's contemporaries regarding the justice of these practices.[59] Given the imperative of indigenous

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[56] Grotius, Pufendorf, and Wolf, were far more ambivalent on this issue, see Reeves 1909, 552-553.

[57] As discussed in Chapter II, Vattel did not condemn monarchies as illegitimate, but rather reconfigured their basis of authority as an attenuated expression of popular will made evident by the tangible fact of their existence without contestation.

[58] See Gould 2012a.

[59] See Chapter II, Part 2.6.2.2.

dispossession in the political economy of American settler expansion, Vattel's treatise was consistent with the material aims of the American founders in a manner unshared by other canonical texts. Most importantly, while Vattel was not the only normative theorist of settler colonialization to influence the American revolutionary context (John Locke was preeminent in this capacity), he was able to uniquely situate these particular social relations within a pragmatic theory of international legal justification.[60]

In working from the premise that colonial capitalism was integral to emergence of modern popular will, and a major milestone was the American reception of Vattel's treatise, questions are raised regarding the world-historical context of this development. After all, the material processes discussed above were constituted on a spatial and temporal scale that far-exceeded the immediate scope of the American Revolution. Coming to term with this requires nothing short of an account of the *longue durée* of European overseas expansion where rival modes of political economy clashed, new opportunities for colonization emerged, and shifting international legal justifications were present at every step of the way. The popular will-based transformation of the international legal order through the American revolutionary invocation of Vattel did not emerge in a void. It erupted as the resolution to numerous contradictions of legal and political authority that were interconnected by-products of colonial capitalism. Understanding this dynamic requires us to account for the intertwined material contexts of the pre-existing order of dynastic feudalism that the American Revolution challenged, as well as the emerging colonial capitalist order the American Revolution helped to fulfil.

3.3. The Insights of International Historical Sociology

[60] See below Part 3.5.3.

3.3.1 Provincializing 'the International'

Working from the premise that then Peace of Westphalia narrative is a historical myth enabled by compounded misreadings of Vattel, an alternative explanation is required.[61] In undertaking this task, we are aided immensely by two materialist articulations of the historical sociology of the modern international order, Benno Teschke's *The Myth of 1648* and Alexander Anievas and Kerem Nicancioglu's *How the West Came to Rule*. Beginning with the first work, Teschke argues that the internal development of England capitalism resulted in the birth of the modern sovereign state as a unique entity that generated geopolitical pressures so great that other systems had to either adapt or perished.[62] However, Anievas and Nicancioglu critique the notion that this transformation was purely internal to England, and declare such accounts to be methodological nationalist and Eurocentric distortions.[63] From this premise, *How the West Came to Rule* details the inter-societal connections that shaped the modern capitalist order through the global trans-historic dynamic of Uneven and Combined Development.[64] However, the sheer grandiosity of this effort has opened Anievas and Nicancioglu to the critique that their totalizing scale limits our ability to understand the significance and agency of small-scale social practices.[65]

In confronting popular will's emergence as international law's basis for domestic authority in the context of capitalist expansion, I propose a synthesis of Teschke's emphasis on English uniqueness with Anievas and Nicancioglu's emphasis on inter-societal interaction. On the matter of English uniqueness, while other societies

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[61] On the Vattelian role in entrenching the 'classical' of Westphalian sovereign equality, see Beaulac 2005.

[62] Teschke 2003.

[63] See Anievas and Nicancioglu 2015, 22-27.

[64] For a detailing of this framework, see Ibid. 44-53.

[65] See Pal 2018.

with capitalist features may have independently developed, it was England that first experienced the complete institutional consolidation of the modern sovereign state that forms the base unit of the present anarchic international order. As will be discussed further, this was a key adaptation when it came to allowing capitalist societies to break free of premodern modes of dynastic authority.[66]

However, in underscoring the importance of Anievas and Niscancioglu's contribution, the material conditions that enabled England to develop in this way were inseparable from inter-societal interactions occurring at an increasingly global level. This point is illustrated by the success of the American Revolution where English efforts to continuously control patterns of global connection eventually led to a unifying revolt in a number of its North Atlantic settler colonies. Through this revolt, the key institutional and ideological features of English political authority were readapted in the name of achieving sovereign autonomy based on popular will vindicated by the overarching legal order of inter-sovereign relations. The successful end product was the independent United States, whose birth revealed that the will of a dynastic sovereign could be overcome by the will of a 'people' who achieved 'facts on the ground.'

On this basis, the American Revolution proved that the capitalist nation-state was not simply an English anomaly but could be spontaneously reproduced under a distinct array of circumstances. Consequently, international law's criteria for membership had to adapt to accommodate this reproduction process. The weight of this development is inseparable from its deeply-rooted material and juridical origins. In tracing this genesis, what is revealed is the way modern England's formation was inseparable from its extra-territorial conditions of social reproduction through settler colonialization. It was against this backdrop that these colonists could present the case that they were different enough to warrant separation from the mother country, yet, similar enough to warrant equality with this same mother country.

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[66] On the case of the Low Countries as an alternative site of capitalist social relations that was constrained by the underdevelopment of the modern nation-state form, see Chapter IV, Part 4.4.1.

When thinking through this process, we cannot overstated the role of variable juridical narratives in constructing English settler-metropolitan relations in their broader contexts. It was through these narratives that the linkages, analogies, distinctions, and ruptures ultimately justified American separation from the British metropole and ultimately formed a universal standard for modern international legal subjectivity.

3.3.2. Westphalia Otherwise

In beginning with Teschke, the core of his argument is that while the shift from a concentration of power in a decentralized nobility to a centralized absolutist state is typically associated with international modernity, this was in reality a continuation of mediaeval feudalism.[67] Here the rise of absolutism in Western Europe, with France as the key exemplar, created a class of administrators personally connected to monarchs with class interests aligned against those the old feudal nobility.[68] In furtherance of these interests, this administrator class aligned with the peasantry through centralized tax regimes that replaced the feudal tributary system and granted peasants a reliable means of subsistence.[69] Within this particular social property configuration, relationships between dynastic monarchs centred upon a land-/heredity-based system of geopolitical accumulation where contested claims of territorial inheritance triggered perpetual military competition via wars of succession.[70] Furthermore, this system had a highly detrimental effect on the territorial authority of the old feudal nobility whose lands were susceptible to partition by allied dynastic monarchies when they refused to consent to projects of absolutist

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[67] Teschke 2003, 151-152.

[68] Ibid. 171-172.

[69] Ibid. 172.

[70] See Ibid. 225-227.

centralisation.[71] Moreover, the rights and obligations incurred in the wake of these territorial reconfigurations were accounted for through an elaborate practice of dynastic peace agreements of which the Treaties of Munster and Osnabruck, together constituting the 'Peace of Westphalia,' exemplified rather than ruptured.[72]

However, a competitor to this system emerged through England's seventeenth century transition to capitalism that resulted in it becoming the first 'modern state' with an administrative apparatus stripped of personalised authority. According to this theory, the transition occurred through a new formation of class alliances between feudal lords and the monarchy-linked administrator class against the peasantry.[73] This alliance between the two ruling classes resulted in the assertion of direct productive ownership over land (the infamous enclosures) which eliminated peasants' traditional subsistence practices and forced them to reproduce themselves by selling their labour in the market as wage-earners.[74] This social transformation precipitated a move to modernity whereby the division between 'public' and 'private' spheres of activity characterized a constitutional-parliamentary state. What operated this state was a rational bureaucracy with administrators pledged to an abstracted governmental entity rather than bound to an absolute monarch or feudal lord through personal loyalty and debt.[75] Freed of such burdens and instabilities, this state could guarantee public debts through a central banking system that was absent in absolutist systems where debts were held by monarchs in their personal capacity.[76] Moreover, this allowed for the public financing of a unified professional military instead

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[71] This was the fate of the Kingdom of Poland, see Ibid. 236-238.

[72] Ibid. 239-242.

[73] Ibid. 251-252.

[74] Ibid. 253.

[75] Ibid. 254-255.

[76] Ibid. 258.

of one held together though precarious bonds of personal loyalty.[77] Taken together, Britain's novel achievement of modern statehood produced an unparalleled geopolitical competitiveness that other actors either imitated or were conquered by.[78] What ultimately resulted was a world of legally equal entities more or less approximating this modern state form.

In explaining the American Revolution within this frame, we must first engage substantial critiques of this 'Myth of 1648' theory of international modernity. First and foremost, the above raised issue of Eurocentrism is certainly applicable to the Brenner hypothesis informing Teschke's theory in that it imagines the development of capitalism as purely internal to rural England.[79] In addressing this issue, through a deliberately anti-Eurocentric account of the origins of Western dominance Anievas and Nisancioglu's *How the West Came to Rule* confronts much that *The Myth of 1648* leaves out.[80] In contrast to Teschke, Anievas and Nisancioglu theorize the origins of capitalist modernity by linking numerous developmental strands inside and outside Europe that imposed pressures to adapt but also transmitted opportunities for innovation.[81] From this view, the specific configuration of class conflict and social property relations in seventeenth-century England emphasized by Brenner/Teschke is only one developmental strand amongst many that contributed to the transition to capitalist modernity.

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[77] Ibid.

[78] See Ibid. 256-262.

[79] See Brenner 1985.

[80] In making this critique, Anievas and Nicancioglu confront the 'Political Marxism' of Robert Brenner that places overwhelming emphasis on internal class struggle as the core source of socio-political agency and transformation. When developing a theory of 'the international', for Anievas and Nicancioglu the problem with this approach is that 'Brenner neglects the determinations and conditions that arose from the social interactions between societies, since 'political communities', in his conception, is subordinated to 'class', while classes themselves are conceptualized within the spatial limits of the political community in question.' Anievas and Nicancioglu 2015, 25 (emphasis in original).

[81] On this critique of Teschke's Political Marxism, see Ibid. 30-32.

However, a notable gap in Anievas and Nisancioglu's account is the American Revolution. This must be rectified for the significance of this event is difficult to overstate when theorizing the origins of modern sovereignty in the systemic context of inter-sovereign relations. As the 'first new nation', the US provided a template for modern state creation made in deliberate rejection of the old regime of dynastic rights and customs that governed territorial authority amongst its European forebears.[82] It is this very ideal of popular will-based international legal standing that allows modern actors to raise sovereign equality, nonintervention, and territorial integrity as a means of resisting the impositions that defined medieval forms of territorial authority. Thus, explaining the transition to the modern international system of formally equal sovereign states necessitates an understanding of what standards are applicable when determining membership within this system. Relatedly, this requires attention to the fact that the advent of the American Revolution was precipitated by a long process of defining identity/ideology in relations between the British metropole and its privileged settler colonial subjects. This raises the questions as to how England's transition to 'modern statehood' can be attributed to its process of overseas expansion and, consequently, how the American case for sovereign independence was an outgrowth of this process.

3.3.3. The Weight of the Atlantic Vector

In addressing this question, I shall focus on two levels of material and ideological connection that formed the preconditions for the ultimate independence of the United States. The first level account for the larger global context of European expansion and its accompanying international legal developments. In particular, I focus on the 'Atlantic Vector' (i.e. the patterns of socio-economic connection between Europe, Africa, and the Americas) and ways in which it prompted change on a global scale. The second level narrows the analytical scope by focus on the shifting and contested legal relationships between the English metropole and the North

[82] On this characterization, see Lipset 1979.

American settler populations. I argue that it was through this process that the substantive concept of American freedom and the conditions of its possibility were consolidated. Furthermore, while deeply co-constitutive, these two operational levels ultimately produced a contradiction in the legitimacy of political authority as understood between the settlers and the metropole that was ultimately resolved through an assertion of independence under the law of nations. It was under these conditions that Vattel's *The Law of Nations*, and its ideological pluralist, settler colonialism-friendly orientation provided an unparalleled guide for doing so.

The common narrative is that the origin of the law of nations is traceable to the sixteenth century 'School of Salamanca' theologians, including Francisco de Vitoria and Federico Suarez, whose theories of a universal natural law extending beyond Christian subjects became hallmarks of the Spanish-'New World' encounter.[83] Although the imperative of missionary conversion was certainly present, in detailing the imperialist nature of this encounter, Martti Koskenniemi famously observed that this 'Real Spanish Contribution' counterintuitively revolved around discourses of private rights of trade, property, and access as opposed to the right of conquest typically associated with empire-building.[84] However, while Koskenniemi is correct in his observation that such justifications for colonization certainly resemble contemporary private rights claims far more than sovereignty-invoking impositions, this raises the question as to what extent the modern 'public'/'private' distinction, and its separation of political and economic power, even existed in the minds of sixteenth century Spanish colonisers. As detailed in the previous chapter, Vitoria portrays a world of hierarchical political formations completely incompatible with the norms of exclusive authority and bounded territoriality that constitute international law in its modern form.[85]

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[83] See Chapter II, Part 2.3.1.

[84] See Koskenniemi 2011.

[85] See Chapter II, Part 2.3.2.

Approaching this problem through a historical sociological lens forces the question of what type of territorial authority was actually being exercised in this context? Here, Anievas and Nisancioglu point to the implementation of the *encomienda* system where conquering Spaniards claimed land on behalf of the crown, yet individual *conquistadores* did not gain direct control of the land. Rather, they were assigned as trustees tasked with extracting resources produced through indigenous tributary practices only in a more exploitative capacity.[86] To grant the *encomienderos* direct territorial authority would have been an extension of feudal land ownership and this would have undermined the interests of the Spanish Monarchy given the ongoing class conflict between feudal aristocracy and the consolidating forces of absolutism that defined Europe during this period.[87] Instead, 'the feudal institutions that the Spaniards brought with them were superimposed and grafted onto existing indigenous social relations of production, leading to a combination of feudal and Amerindian modes of production.'[88] However, the *encomienda* system proved highly unstable for the indigenous labour supply it depended upon was subject to large-scale depletion due to wars, massacres, introduced diseases, and escape.[89] This need to constantly adapt for crisis conditions, which included the replacement of indigenous labour with enslaved Africans, subjected the system to severe indebtedness.[90] To manage this burden, the Spaniards engaged in an increasingly intensifying plunder of the New World's mineral resources to satisfy their creditors.[91]

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[86] Anievas and Nisancioglu 2015, 129-134.

[87] Ibid. 130.

[88] Ibid. 129.

[89] Ibid. 131-133.

[90] See Ibid. 142-143.

[91] Ibid. 145.

However, the instability and indebtedness experienced by feudal-absolutist Spain visa-as-vie its New World expansion produced profound opportunities for comparatively underdeveloped actors in Northwestern Europe, primarily the Dutch and later the English.[92] In the process of developing their overseas trading systems, the precious metals forcibly extracted by the Spaniards provided an exchange medium for commercial activity in the Far East.[93] Furthermore, in addition to these tangible resources there also emerged a body of theoretical resources. This mode of innovation centred on the ways in which encounters between Europe and the rest of the world, especially the Americas, necessitated the understanding of territorial sovereignty as an abstract concept.[94] Here territorial authority could not be specifically determined through recourse to recognized dynastic and customary rights, something more or less possible in Europe. This opened questions as to what principles should dictate the acquisition, loss, or claim of territory, and under what conditions should they apply.[95] On this basis, principles concerning territorial sovereignty were simultaneously of vital importance on the one hand, yet radically indeterminate on the other.

Given the existence of flexible juridical discourses emphasizing the sanctity of trade and property rights, creative opportunists had tremendous latitude when articulating arguments aligned with accumulation-based interests. This was especially important in that this was the context where the distinction between modern 'public' and 'private' spheres was still entrenching itself. In connecting this scheme to the Dutch merchants and officials taking advantage of their 'privilege of backwardness', one only need consider how the onetime Dutch East India Company legal counsel Hugo Grotius was influenced by the legal arguments developed in the crucible of

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[92] Ibid. 146.

[93] Ibid. 145-146.

[94] See Ibid. 137, 139; see also Branch 2010.

[95] Ibid.

Spain's imperial expansion.[96] This reception is of grave importance given that Grotius's theoretical formulations proved exceedingly efficient in justifying colonial expansion.[97] To give just one example, Grotius's rebuttal of Portuguese 'high seas sovereignty' claims in the name of maintaining open trade channels for the 'common good of mankind.' Here we can observe the strategic logic of proclaiming a public/private distinction given its furthering Dutch commercial endeavours in the East Indies by rebuking Portuguese attempts to establish exclusive rights over waterways.[98]

Turning to England (which in 1707 became 'Britain' through the Act of Union with Scotland); this inter-societal lens expands the explanation for its transition to modernity that the Brenner hypothesis views as an internalized process. In this context, the peasantry's loss of subsistence created a surplus of wage labour that migrated to urban areas.[99] However, this concentration of disposed individuals produced radical movements, namely the Diggers and the Levellers, who challenged the ruling class structures responsible for their dispossession.[100]

In the face of this challenge from below, the Atlantic Vector offered a dual means of absorbing this surplus wage labour and, as a result, diverting its accompanying social unrest. This took the form of a) employment in the shipbuilding/maritime industry that fuelled commercial/colonial expansion and b) opportunities for this new precarious class of wage-seeking dispossessed peasants in overseas colonies as settlers and/or indentured servants.[101] Furthermore, applying these expansionist

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[96] On Grotius's Spanish influences, see Koskenniemi 2011, 32-35.

[97] For analyses, see Keene 2002; Van Ittersum 2006; Wilson 2008.

[98] See Mieville 2005, 208-214.

[99] Anievas and Nisancioglu 2015, 150.

[100] Ibid.

[101] Ibid. 151-152.

solutions to the problem of dispossession as a precondition to capital accumulation triggered the need for continued international legal innovation given its operation within a sphere of territorial rights and obligations still in the process of being defined.[102] The various confluences of identity and ideology that emerged from this matrix of dispossession, servitude, and settlement proved immensely consequential in co-generating the material conditions and normative arguments that led to American separation from the British Empire.[103]

Yet, this ultimate result cannot be reduced to European-New World interactions and must account for Africa and the transatlantic slave trade. In entering this trade, the British were engaging with pre-existing structures, yet they maintained a high degree of latitude in developing new methods.[104] The result was the novel slave plantation system that hybridized different productive forms. On the one hand, slave responsibility for producing their own subsistence (a 'pre-modern' practice compared to the wage labour) allowed the system to better withstand market disruptions.[105] On the other hand, specialist integration within the rapidly developing capitalist market provided the system with highly reliable channels for replenishing its labour supply and disseminating its products.[106] Furthermore, this specialist production of commodities such as sugar, coffee, and tobacco created both reliable consumer demand and increased labour productivity in Britain, and this helped set

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[102] '…the key categories through which enclosures came to be justified legally were key categories of bourgeois ideology and political economy, and that *these same categories were central to international law*.' Neocleous 2012, 952 (emphasis in original).

[103] On the Atlantic as a breeding ground for ideological radicalism in this context, see Limbaugh and Reddiker 2012.

[104] Here, they differed immensely from the Spaniards who sought slaves as replacements for indigenous labour within a crisis-prone system that nonetheless had to maintain production within the confines of said system.

[105] Anievas and Nisancioglu 2015, 160.

[106] Ibid. 160-161.

the conditions for the Industrial Revolution.[107] While this turn to industrialization periodically produced labour surpluses during economic downturns, the attendant social tensions could be resolved by overseas migration, which in turn furthered the colonial production of raw materials that could be exported back to the industrial metropole, thus repeating the cycle.[108]

Moreover, the practice of slavery provided a process of racialisation that gave settlers a basis for continual identification with the European metropole and by extension superiority over all peoples in the region.[109] However, as will be discussed in greater detail below, the differences in settler-native and settler-slave relations that ultimately resulted in diverging assimilationist and segregationist polices.[110] Given that Europeans were reluctant to categorically deny indigenous land rights in the Americas, the figure of the enslaved African provided a basis for binary opposition revolving around the poles of 'black' and 'white' through which settlers populations could define their freedom.[111] As such, according to Robbie Shilliam:

> A Creole identity that would successfully justify political autonomy from the Old World by reference to its New World nativity *and* distinguish its singular claim to such freedom from other 'natives' by reference to its Old World cultural heritage only succeeded *definitively* when the 'white' Creole was placed in racial categorical opposition, culturally and politically, to the black slave.[112]

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[107] Ibid. 164.

[108] See Belich 2009.

[109] Shilliam 2009a, 78-79.

[110] Ibid. 79.

[111] Ibid. 79-81.

[112] Ibid. 79 (emphasis in original).

In conceptualizing the Atlantic Vector as a vast productive sphere of social identity and social relations, we gain access to the deeper material and ideological connections that lead to formation of modern international legal argument and consciousness. Having confronted this vastness, we are now in a position to observe how these forces consolidated on a small scale in a manner that lead to a major systemic development. It is through this lens that we can account for how Britain's settler colonization of North America erupted into the American Revolution, an event that transformed international law by legitimizing forceful assertions of popular will as a validation of local sovereign autonomy.

3.4. The Great Socio-Juridical Settler Experiment

3.4.1. England's Empire of Property

Moving from the vast 'Atlantic Vector' and its role in stimulating international legal developments, I now turn to a much narrower 'sub-vector' concerning legal relations between the British metropole and its settler subjects who ultimately formed the sovereign United States of America. As a contextual matter, England found itself advantaged by a 'privilege of backwardness' whereby innovations (including legal interpretations) developed elsewhere could inform its own practices, yet could also bypass the need for consistency with the traditions of the society that produced the original innovation. This was demonstrated through the ways in which Englishmen were able to legitimize their own colonial venture through invoking arguments formulated by Spaniards in the New World. However, when it came to the material social-relations that shaped colonial ventures, using Spanish arguments did not bind the British to Spanish practices, and the limitations that accompanied them. As discussed above, the Spanish mode of colonial authority was highly centralized in that the King maintained ultimate title over New World lands due to fears that governors becoming feudal lords would undermine absolutist authority. The result was an ever-increasing need for direct extraction of mineral resources that stifled other modes of innovation.

By stark contrast, England's New World colonization was more decentralized and principally enabled through the issuance of a diverse array of company charters where the monarch granted the charter-holder authority over a claimed territory for the purpose of fulfilling the charter's terms.[113] While issuance was rooted in a source of dynastic authority, the actual process of colonial administration was the responsibility of the named charter-holder resulting in a flexible hybrid synthesis of public and private authority.[114] Within this plurality of colonial projects, decentralization allowed for multiple sites of innovation, the results of which were transferable to other sites of colonisation. This culminated in an aggregate process of innovative circulation unavailable in centralized colonial projects. However, any effort to account for innovation in this context must confront the deeper social realities that enabled it. Considering England's above discussed capitalist consolidation, and its production of high (and potentially redistribution-oriented) concentrations of dispossessed peasants, the question of manpower provision for these overseas ventures was largely settled.[115] This is to say nothing of how assertions by the indigenous peoples impacted by these colonial projects were consistently undermined.

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[113] For a study of these various charter-based colonisation projects and the modes of legality generated from them, see Tomlins 2001. For a placement of these charters within the evolution of European legal thought over centuries, see Cavanagh 2017b.

[114] On this point, one particularly interesting feature of the royal charters issued by the English Crown is that subject to a few exceptions (namely) the territories were described as the 'Manor of East Greenwich in the County of Kent' and, on the question of land rights, their holders received '…an extremely unencumbered tenure…in free and common soccage.' Keene 2002, 65. Curiously, there is little evidence that this so-described manor ever actually existed as an actual estate in land. For studies, see Cheyney 1905; McPherson 1998. A possible interpretation of why various North American lands where labelled as non-existent English manor is to view this formula as a hybrid artifact of the transition from feudalism to capitalism. On this reading, the 'Manor of East Greenwich in the County of Kent' designation played fealty to feudal rituals of land transfer, while at the same time used a standardized fungible labeling system as a means of legitimizing capitalism's production of fictitious juridical rights-bearers abstracted from their material social conditions.

[115] This labour surplus was supplemented by the introduction of harshly putative legislation against vagrancy and indebtedness. The result was a great deal of coercion in the making of a colonial work force whereby indentured servitude as criminal penalty or debt repayment acted as additional means of providing labour for overseas expansionist projects, see Neocleous 2012, 949-952.

To understand these colonial structures and their consequences, our attention must turn to a mode of English property ownership that was absent in the Spanish colonial context. While the Spanish colonial dilemma centred on the threat of feudal land ownership potentially extending beyond Europe, this complication was sidestepped in England through an innovation deemed 'allodial title.'[116] Developed to determine the status of vacant English (and Dutch) wetlands made amenable to agriculture and habitation by deliberate efforts, the label 'allodial title' characterized these lands as belonging to those who exerted the labour that transformed them.[117] Moreover, title attained in this capacity was free and clear of feudal encumbrances or obligations due to a lack of any prior ownership.[118]

On this basis, analogies were drawn between the results of land reclamation projects in Europe and lands transformed through colonial settlements outside Europe on the grounds that the latter also existed outside the accumulated body of interests and obligations in land that defined feudalism (and its attendant social relations).[119] Through this means of determining rights to colonial land, the English avoided the king versus lord ownership debate that was an extension of the late-feudal intra-ruling conflict between centralizing absolutism and the decentralized nobility so prominent in continental Europe. Linked to this broader transition from feudalism

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[116] Here it must be noted that it was in the seventeenth century that English common law's conflation of 'land' as a tangible object with 'property' as an abstract right became fundamentally entrenched. This transition can be observed in the writings of the highly influential English jurist Edward Coke whereby: 'Coke's *Reports*, published from 1600-1615, treat property in goods as separate to ownership of land [yet] Coke's *Institutes*, from 1628, use the terms more interchangeably, and generalise land and goods as property.' Jones 2019, 195.

[117] Keene 2002, 62-64.

[118] Ibid 64-65.

[119] Ibid 65-66. On the continued legacies of feudalism/allodial title in the frustrating of indigenous land rights claims in areas subject to colonization, see e.g. Bennet 1978; Edgeworth 1994; Hepburn 2005.

to capitalism (especially in its colonial contexts), allodial title is particularly noteworthy in two respects, both of which were tremendously consequential in bringing about the American Revolution.

Firstly, lands not subject to feudal encumbrances could have their ownership transferred with a substantially greater degree of ease since there were no interests vested in feudal stakeholders able to contest alienation.[120] Thus, allodial title, and its colonial applications, immensely contributed to the capitalist ideal of free property transactions between juridically equal parties conducted in a rational, legible manner unbound by adherence to pre-existing hierarchies and traditions.[121] Such influence was readily apparent in the broader context of extra-European acquisition where post-feudal practices of centrally registering enclosed property occurred in England's colonies long before they were comprehensively entrenched in England itself.[122] This process, and its situating of virtuous property-ownership in contrast to racialized notions of savagery, necessitated a substantial amount of theoretical justification. Amongst the most influential of these formulations was John Locke's 1689 *Second Treatise on Government* and its grounds for dispossessing indigenous peoples.[123] Through invoking this text's moral ontology of land improvement as essential for the satisfaction of human needs, absolute property rights could be claimed by those who productively exerted their labour over land at the expense of those who occupied the same land, yet did not 'improve' it.[124]

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[120] On the various ways in which feudal encumbrances could impact the free alienability of property in land, see Gray 1883; Throne 1959.

[121] As Henry Jones has recently argued: 'Colonialism was a necessary condition for private property to be possible, both in material practice and conceptually.' Jones 2019, 202.

[122] Ibid. 190-191.

[123] See Ibid. 199-201.

[124] According to Locke's classical account of the creation of property:

> The *labour* of his body, and the work of the work of his hands, we may say, are properly his. Whatsover then he removes out of the state of nature not provided, and left it in, he hath mixed his *labour* with, and joined to it something that is own, and thereby makes it his *property*. It being by him removed from

Turning to how English colonialization was able to draw upon earlier Spanish justifications, a synergistic link can be forged between Locke's theories and those of the famed 'School of Salamanca' jurist Francisco de Vitoria.[125] By invoking Vitoria's claim that all peoples were under a universal duty to permit entry to those seeking the establishment of peaceful commercial relations, the English could legitimize their presence in the New World.[126] Building on this initial justification of physical presence, they could then invoke Locke's theory of property to deny that indigenous peoples actually owned the lands they inhabited.[127] Through this Vitoria-Locke framing, the English could situate their parochial material interests within the presumptively universal sphere of the law of nations. At the same time, they escaped Vitorian discourse's feudal backdrop by invoking a capitalism-friendly notion of land acquisition through actual occupation that fit within a progressive conception of history alien to earlier medieval reasoning.[128] This stood in stark contrast to the earlier justifications of discovery and conquest relied upon by the Spaniards in their colonization of the New World.[129]

> the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men.

Locke 1764 [1689], 216-217 (emphasis in original). On the inability of an idle individual to complain of this arrangement, see Ibid, 221. On the application of this frame to the uncultivated spaces of America, see Ibid. 226.

[125] For analysis of Vitoria's thought, see Chapter II, Part 2.3.

[126] On the influence of Vitoria and the School of Salamanca in England, see Fitzmaurice 2014, 59-84.

[127] See Arneil 1996; On the way in which Locke's theory of property was uniquely edifying of capitalist expansion through commodification of land via his theory of money, see Ince 2018b, 38-73.

[128] On the progressive historiography of occupation in contrast to other modes of territorial acquisition (and thus differentiating Locke from Vitoria), see Fitzmaurice 2012, 853.

[129] By this medieval versus modern modes of thought, there long-term issues entailed by maintaining authority on the basis conquest in the context of inter-societal relations that demanded a delicate balance between the submission and the accommodation of the vanquished, see Benton 2018. Here it can be argued that an important site for England's general abandonment of the traditional doctrine of conquest was its colonial experience in Ireland in the late sixteenth century. Here, traditional

Secondly, allodial title contributed to affirming capitalism's foundational ideological distinction between political sovereignty and private economic rights. This was readily observable in seventeenth century England where the individualistic, enclosure-focused exercise of land rights coincided with the demilitarization of the old feudal aristocracy and consequent transfer of property-protection responsibility to a depersonalized constitutional-parliamentary state that maintained the monopoly on legitimate coercive force.[130] Furthermore, this dynamic was strongly imbricated in the process of colonial expansion. Here the consolidating doctrine of *public* sovereign prerogative over foreign relations was tempered by the need to resolve questions of *private* rights emerging at common law as they related to individual claimants involved in colonial endeavours.[131]

While contradictory at one level, addressing the issues of state authority versus individual rights raised by the intertwined processes of capitalist transition and overseas colonization was a source of innovation in and of itself. Relatedly, the modes of colonial legality that proliferated in this context, when viewed through a modern lens, constituted a variable hybrid of the regime of legal relations between independent sovereigns (i.e. the laws of nations) and the extraterritorial extension of domestic law.[132] It was through the production of these innovations that the ideological fault lines between public-private, political-economic, and national-international began consolidating into their modern forms.

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claims to Ireland by conquest that extended back to 1171, but lapsed due to local reclamation in all territories beyond Dublin and its surrounding eras. This prompted the colonial governor Sir John Davies to claim that such practices were inapplicable to the 'barbarous' Irish Catholic tribes whose decentralized authority structure rendered conquest impractical given that there was no one centralized source of authority to submit to the terms of the conquest. Carty 1996, 32-33; see Davies 1988 [1612]. For further studies of Davies's impositions in Ireland, see Pawlisch 1985; Orr 2014.

[130] For the leading historical study of this institutional transformation, see Brewer 1990.

[131] Koskenniemi 2017, 357.

[132] See Koskenniemi 2016b, 251.

3.4.2. Boundaries of Belonging

The English 'privilege of backwardness' certainly generated a vast array of legal innovations that shaped an empire more resilient than its Continental European competitors. However, they became victims of their own success regarding the thirteen colonies (Connecticut, Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and Virginia) that ultimately formed the United States of America. In this context, self-asserted political communities created out of English settler projects proved that they too could lodge arguments that merged 'venerable tradition' with 'timeless principle' as a means of advancing core material interests. Uprooted from their formative contexts, these settler populations maintained a vast degree of interpretive latitude when readapting legal, political, and cultural concepts without the fear of contradicting longstanding social traditions.[133]

As such, the settler community formed out of a wide array of backgrounds was bestowed with a 'privilege of backwardness' that far exceeded the English metropole. Through forcefully asserting these intertwined settler innovations, the colonies ultimately broke from their parent sovereign to form an independent US. While varied in its lineage, this result hinged upon a unifying rubric that would fundamentally reshape the world. This was none other than the premise that *de facto* authority as a demonstration of popular will justifies sovereign independence under international law. Accounting for this outcome raises numerous questions as to what material conditions were relevant and how their impact was managed, and generated, through juridical formulations.

In grounding this inquiry, a matter of profound importance is Lord Edward Coke's 1608 decision in *Calvin's Case*. Narrowly concerned with whether Robert Calvin,

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[133] This is not to say that many of these traditions and customs were not maintained. For a study on how the regional identities of England shaped the future regional identities of the US, see Fischer 1992.

a Scotsman born after the 1603 monarchical union of England and Scotland under James I, could bring suit in English courts to claim inherited property located in England, this case bore great impact concerning the boundaries of inclusion within the greater British imperial sphere.[134] Ruling that Calvin could sue given that his place of birth connected his allegiance to the King (and thus was not an alien), Coke went on elucidate the distinction between the 'alien friend' and the 'alien' along with their corresponding rights within the realm of England.[135] While an 'alien friend' had the rights to acquire and bring suit in relation to moveable property (but not land beyond that which is necessary for habitation), should they become an 'alien enemy' through a state of war they are '…utterly disabled to maintain any action, or get anything within this realm.'[136] However, beyond this variable divide, there existed a more permeant category in the form of the 'perpetual enemy.' According to Coke's delineation of this status and those falling within it:

> …a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get anything within this realm. All infidels are in law….perpetual enemies….for between them, as with the devils, whose subjects they be, and the Christian, there is hostility, and can be no…peace.[137]

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[134] For varying perspectives on *Calvin's Case*, see Kim 1996; Price 1997; Hulsebosch 2003; Loughton 2004.

[135] *Calvin's Case* [1608], 397

[136] Ibid.

[137] Ibid.

Coke extended this 'Christian' and 'infidel' distinction into the domain of conquest and declared that in the former category existing laws were maintained, albeit subject to discretionary transformation, yet in the latter category 'the laws of the infidel are abrogated' as violations of the law of nature.[138]

When considering the force of *Calvin's Case* in relation to what later became the popular will-based American Revolution the significance is twofold, yet ultimately intertwined. On the one hand, a strong argument can be made that Coke's pronouncement on the absolute subjugation of infidels through conquest was directly made to legitimize colonization, in particular regarding the Virginia Company that had just established the first permeant English settlement at Jamestown in 1604.[139] On the other hand, there is the way in which *Calvin's Case*, despite its overwhelming reference to kingly allegiance, furthered the notion of rights based on free citizenship that could be applicable far beyond the immediate subject matter of the case. For the earliest American settlers, such abstract arguments was a matter of basic material interest. As Aziz Rana has shown '[e]arly Anglo settlers did not necessarily enjoy a unique plethora of ancestral rights and privileges; rather, they were often treated legally and politically as no different than any other conquered population, confronted by martial law and coercive forms of labor discipline.'[140] Thus, while the first dimension can be read as serving both metropolitan and settler interests, the second dimension planted the seeds for the settlers to challenge the metropole as the true inheritors of its ideals.

Regarding the second dimension, while *Calvin's Case* supported the harsh treatment of colonial labour because settlers were outside the protective jurisdictional bounds of England and its common law, key points of dicta ultimately transformed

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[138] Ibid. 398. For an in-depth study of 'conquest' as common law concept in the context of *Calvin's Case* based on England's, largely fictionalised, historical justification of its domination of Wales and Ireland, see Loughton 2004.

[139] For such a reading of *Calvin's Case,* see Williams 1990, 201-203.

[140] Rana 2010, 37.

this entire scheme. According to Rana's analysis, a consequential crack in *Calvin's Case* was that in establishing the parameters of the English subject, it left open the question of what rights accompanied the Englishman when he travelled and, on this point, the right to property held a place of prominence.[141] This mobility of English rights worked in conjunction with the erasure of the laws of conquered infidels proclaimed in *Calvin's Case* and thus resulting in a two-track system whereby 'Anglo settlers enjoyed the core liberties and common law protections, while indigenous subjects were governed by whatever means the Crown viewed as necessary for maintaining authority and gaining native tribute.'[142] On a broader scale, the boundaries juridically organized on the basis of *Calvin's Case* are deeply consistent with the distinction between bounded political sovereignty and transcendent private rights that is a hallmark of the capitalist social relations consolidating in this context of Anglo-American settler colonization. Through these intertwined material, racial, and juridical processes, the stage was set for settler expressions of a property-venerating conceptions of popular will that condemned both metropolitan authority and the political subjectivity of indigenous peoples.

Beyond, the singular juridical artefact that is *Calvin's Case*, there remains the issue of how the presumptions guiding Coke's reasoning in this decision provided an enduring well-spring of legal innovation for American settlers. Beyond its utility in indigenous dispossession, the discourse of conquest in Coke's context was strongly informed by the King James I's attempt to impose a continental type absolutism in England, which for many of his critics was tantamount to a 'conquest.'[143] A prominent voice in this capacity, Coke took a proactive role in asserting the principles of common law as a means of frustrating monarchical invocations of absolutist prerogative and *Calvin's Case* was deeply consistent with this line of strategy.[144] In

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[141] Ibid. 46.

[142] Ibid. 47.

[143] Cavanagh 2017, 7-8.

[144] See Usher 1903; Berman 1994, 1673-1694.

grounding these efforts within a broader scheme of legal meaning, Coke was a strong proponent of the idea that England possessed an 'Ancient Constitution' whereby the Anglo-Saxons' customary rights and liberties survived the imposition of feudalism following the 1066 Norman Conquest.[145] Thus, through embodying of these customs, the common law remained a source of resistance to absolutism.[146]

As Daniel Hulsebosch has shown, such a strategy held great appeal amongst American settlers, for: 'Coke's notion of dynamic custom offered early modern English speakers a way to resist new ideas of unitary sovereignty. If nothing else, Anglo-American lawyers learned from him that legal complexity was itself a barrier not just against absolutism but against any distant government.'[147] With this colonial adaptation, the common law maintained its symbolic force, yet was substantively transformed from a paternalist body of *jurisdictional* proclamations to a discourse of *jurisprudential* proclamations of popular liberty.[148] While the latter justified submission to an existing political order, the former established the basis for justifying a new political order.

3.4.3. A Settler Law of Slavery

Form a materialist perspective, this 'jurisdictional to jurisprudential' transformation of the common law is deeply interesting in the way it allowed for legal manoeuvres in the American colonies that were previously unknown in England. On this basis, we can observe how novel justifications developed in response to very specific material conditions, yet proved remarkably able to draw upon existing common law vocabularies in doing so. An incredibly important illustration of this was the bourgeoning colonial society's embrace of race-based chattel slavery as a successor to

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[145] For a leading study of the 'Ancient Constitution' as an ahistorical normative discourse in Early Modern England, see Pocock 1987.

[146] Hulsebosch 2003, 465.

[147] Ibid. 461.

[148] See Ibid. 467-470.

indentured servitude when satisfying its demands for coerced labour. Accounting for the material grounding of this phenomenon is deeply important given the way slavery highlights how the formative American experiment in popular will was deeply contradictory as an unprecedented experiment in human liberty that tolerated, and even celebrated, exceptionally harsh institutions of human bondage.

Regarding the American law of slavery, according to George Frederickson's account, in projects of concentrated accumulation, coerced labour is more efficient than formally equal wage-labour in circumstances where labour is scarce and land is plentiful.[149] Here, if nothing restricts wage-labourers from acquiring cheap land, this provides them with an independent base of sustenance that functions as a powerful bargaining chip when negotiating the sale of their labour-power.[150] Thus, from the perspective of capitalism's beneficiaries, metropolitan England was highly successful with its wage-labour model given the scarcity of land resulting from enclosures and the surplus of labour resulting from the peasant dispossession accompanying said enclosures.[151] However, these same conditions were fundamentally absent in the American colonies.

While indentured servitude was the immediate mechanism for confronting this colonial labour problem, its sustainability was limited. Once indentured servants (many of whom were of African origin) were released from their obligations they formed a landless mass of surplus labour prone to lodging claims of wealth redistribution.[152] Such an arrangement, threatened elite interests with the prospect of a trans-racial alliance between indentured labour and free, yet landless, labour.[153] Thus by converting temporary, race-neutral indentured servitude into permeant,

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[149] Fredrickson 1981, 55.

[150] Ibid.

[151] Ibid.

[152] Rana 2010, 42-43.

[153] Ibid.

race-based, and intergenerational chattel slavery, popular challenges to elite interests were divided along racial lines. Through this turn to immutability, chattel slavery later provided a durable solution to the colonial labour problem thus enabling high profit ventures in the form of cash crop plantations that enriched the larger sphere of empire.[154]

Yet what exactly was the legal justification for this? In the earlier sites of British plantation slavery, namely the Caribbean, such practices were legitimized based on sovereign prerogative over conquered territories.[155] However, very different juridical circumstances were presented by the American settler colonies where, in the name of resisting the metropolitan prerogative defended in *Calvin's Case*, an array of 'ancient' common law liberties were being progressively asserted as the basis for lawful authority.[156] For those seeking to implement slavery, the problem was that not only was slavery unrecognized within the English common law, but this system's mode of reasoning was fundamentally adverse to owning human beings as chattel property.[157] In overcoming this barrier, while playing fidelity to proclaimed legal tradition, the American law of slavery pieced together various diverse common law provisions along with discourses from within the law of nature and nations.[158]

According to Christopher Tomlins this resulting legal regime was '…consistent with the whole intellectual thrust of English colonizing —the law of nature and

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[154] For the classical study of the historical relationship between slavery and capitalism originally published in 1944, see Williams, 1994; see also Drayton 2002.

[155] Bush 1993, 457-459.

[156] Here North American colonists rejected the prerogative over '…by denying that their respective colonies had in fact been conquered or by asserting that the territory was conquered, but by them and their ancestors, English settlers who brought their rights with them.' Ibid. 464.

[157] Tomlins 2009, 392.

[158] For in-depth studies of this particular synthesis in the context of imperial legalism, see Tomlins 2009; Gould 2012a.

nations served precisely to explain and justify the larger colonizing enterprise of which mainland slavery regimes were subsystems.'[159] With this distinct justification, the law of slavery forms a case study of the way in which settler colonial adaption of the common law removed it from the sphere of England's jurisdictional paternalism and placed it within the jurisprudential sphere of America as a unique experiment in liberty. Here, American colonies were released from communal traditions whereby permitting slavery would directly undermine the communal foundations of patriarchy and paternalism constituting the English common law.[160] Directly linking the development of American popular will with the expansion of capitalism, what emerged was an absolute freedom defined by the presence of absolute servitude that materially contributed to capital accumulation through its ability to commodify and profit from the trade of human beings.

As racialized chattel slavery operated as a distinct means of stratifying the demands of colonial labour (and by extension social order), a corresponding racialization took place in relation to acquiring the lands of indigenous peoples. Here, the 'blackness' that legally attached to slavery was considered so highly transmissible through heredity that 'one drop' of African blood rendered an individual 'black.'[161] By contrast, indigenous ancestry was deemed exceptionally prone to dilution.[162] As Patrick Wolfe has shown, the logic here was that increasing the pool of slave-based wealth provided incentive to label as many individuals 'black' as possible, while the desire for indigenous land incentivized the denial of indigenous ancestry amongst those claiming ancestral land rights.[163] While these two modes of racialization operated very differently, at a broader contextual level, it is easy to see how

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[159] Ibid. 392.

[160] Shilliam 2012, 599-600.

[161] Wolfe 2006, 388

[162] Ibid.

[163] Ibid; see also Wolfe 2001.

their conjunctive operation bolstered an overarching expansion of colonial capitalism whereby the forceful appropriation of land and labour created a system ostensibly premised on formal equality and self-regulating market exchange.

3.4.4. A Settler Law of Expansion

In using this frame to further analyse juridical consolidation of this 'settler empire' what deserves deep attention is the nexus between the right to acquire property and the ideology of substantive liberty that sparked the American Revolution. Within this context, ownership of property emerged as tantamount to self-sufficiency and self-rule in a manner that was being justified by an increasing array of theories and theorists. This included further explications of the common law (especially William Blackstone's 1756 *Commentaries on the Law of England*), Protestant theology, the republican political theory of John Harrington and Algernon Sydney, and, perhaps most prominently, John Locke on property acquisition through labour-based improvement.[164] However, this model of the independent individual deriving sustenance from his own property holding was far more an ideal than a reality. As Richard Drayton has shown, the success of these small estate-holders depended upon selling the proceeds of their lands to slave plantations in the Caribbean, thus rendering their 'self-sufficiency' contingent upon the broader sphere of imperial relations.[165] Despite its fictitious nature, this ideology of American settler freedom carried tremendous material impact in that it was dependent on presumptively endless frontier expansion that necessarily entailed the dispossession of indigenous communities.[166]

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[164] See Rana 2010, 45-62. For a classical study of the influences central to justifying the American Revolution, see Baylin 1992. For a portrayal of the 'radicalism' present in the intellectual lineage, if not the social dynamics, of American Revolution, see Wood 1992. Here it should be noted that Rana's critical effort has been to account for the social dynamics generally missing from these narratives of political novelty, Rana 2010, 21-22.

[165] Drayton 2002, 109-110.

[166] Rana 2010, 46-47.

Much like slavery, this land-accumulation process drew upon the common law as a discourse of legitimation while simultaneously applying it in ways never before witnessed in England. As a preliminary matter, these extra-European lands arguably fell under the category of 'allodial title' and, as such, existed outside the regime of feudal encumbrance. This link between feudal absence and the right to property as an inherent liberty attached to free English subjects was evident in the ways American colonists successfully resisted the impositions of property burdens that would bind them to the metropole.[167] From this foundation, the colonies hosted an unprecedented number of legal mechanisms enabling the alienability of land.[168] Prominent amongst these innovations was the use of land as a loan collateral in the form of a mortgage that could compel sale through foreclosure in the event of a borrower's default on a loan repayment.[169]

Although long described as a means of allowing land to essentially function as money in the American colonies, most scholarship on this topic has focused on intra-settler relations and thus neglected the role of mortgages as a tool as indigenous dispossession.[170] According to K-Sue Park's rectification of this gap, settlers-indigenous interaction in this context constituted a 'contact economy' where, although settlers adopted indigenous currency mediums, culturally disparate understanding of money and land resulted in deeply unequal exchanges orchestrated through settler exploitation of this epistemic asymmetry.[171] In turning to Park's explanation of these practices:

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[167] On the triumph of allodial title over countervailing feudal claims, see Vance 1924, 70-71.

[168] For a comprehensive study, see Priest 2006.

[169] This represented a radical shift from pre-existing English mortgages where borrower default might give a creditor rights to the productive proceeds of the land, or even inhabit part it, but almost never could it allow an individual to be stripped of their land through foreclosure sale, Park 2016, 1011.

[170] Ibid. 1008.

[171] Ibid. 1008-1009.

> Colonists extended credit to indigenous people to draw them into debt, inducing them to take out 'mortgages' on which they would later foreclose. However, when colonists used the imported mortgage to foreclose, they not only insisted on the English conception of land, ignoring understandings of belonging to a place, but they widened the existing breach between English and indigenous conceptions of land by abandoning age-old English hesitation about treating land in the manner of chattel, thus creating a brand-new American commodity.[172]

These practices of deception and misdirection further expose capital accumulation's structural dependence on extra-economic means of coercion. The contradictions here are particularly sharp when uncovered within societies such as the American settlers who placed such a high ideological premium on free, informed transactions and certainty in ownership rights. However, while there is much to be said for colonialization as accomplished through the 'possessive individualism' of settler claims to property in land, from a materialist perspective, there is more to this story. As Allan Greer has shown, in contrast to the strict Lockean view of 'individualistic' settler rights versus 'communal' indigenous traditions, the outcome of dispossession was simultaneously effected by European practices of common property being applied in the New World.[173] Such practices were especially prevalent in the ranging and pasturing of livestock, including hogs and cattle, where property rights attached to individual animals, yet, the lands they were set upon fell under the rubric of common usage.[174] Counterintuitively, these common property practices of open-ranging actually overcame some traditional common law principles that rigidly protected individuals' exclusive use and enjoyment of their land. For instance, 'the new

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[172] Ibid. 1024-1025.

[173] Greer 2012. For more on the role livestock played in the transformation of the North American colonies into hospitable spaces for European settlement, see Anderson 2004.

[174] Greer 2012, 382.

colonies quickly passed legislation that overthrew a longstanding English legal tradition governing liability for crop damage due to livestock depredation.'[175]

As a matter of profound importance, these common land-based livestock practices severely disrupted indigenous cultures, and thus furthered the structure of settler colonization. This impact included the disruption of indigenous agricultural practices, not to mention the ways in which livestock acted as vectors for infectious Old World microbes that indigenous populations, and the native wildlife they depended upon, were without immunity.[176] Furthermore, these common property practices directly enabled private property accumulation in that the release of livestock and the transformation of nature it entailed made North American lands amenable to European practices and thus rendered them prime subjects of enclosure claims.[177] While some indigenous people did undertake settler agricultural practices, the process of doing so necessitated entry into a wide array of legal relations that exposed them to exploitation.[178] Taking all of this into account, we can see how the settler ideology of private property ownership was inseparable from its direct material impact on the indigenous communities it sought to replace.

3.4.5. The Empire Strikes Back

While common law-centred settler adaptations proved highly success in transforming North America into a space of great freedom and affluence (for an elect population), the events of 1763 reminded these colonists of just how closely their fate was tied to the greater British imperial order. In this year Britain decisively defeated France in the transcontinental conflict deemed the Seven Years' War (1756-1763)

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[175] Ibid. 381.

[176] Ibid.

[177] On the interplay of European disease, livestock, and crops in the transformation of non-European temperate regions into environments mirroring Europe, see Crosby 2004.

[178] This included the predatory mortgages documented by Park.

and vastly increased its empire through a new array of territorial gains.[179] Through this mass infusion of new subjects from so many cultural, linguistic, and religious backgrounds, white American settlers faced questions of how their privileged position might be undermined in light of Britain's need to accommodate its multi-ethic empire.[180] Britain had already been moving towards this type of pluralism as shown by the gradual abandonment of its harsh position of abrogation regarding the laws of conquered territories expressed in *Calvin's Case*.[181] This can be taken as evidence that the British had learned that preserving local laws, albeit in a deeply paternalist fashion, had tremendous potential in governing subject populations.[182] From this premise, a corollary question arose as to whether the adaptions that gave rise to the distinct phenomenon of American freedom might be limited, either *de jure* or *de facto*, by the British imperial attempt to accommodate peoples the American settlers considered fundamentally inferior.[183]

The 1763 Royal Proclamation the settlers' worst fears. Prompted by efforts to establish good relations with indigenous communities in territories newly acquired from France, this edict forbad frontier settlement west of the Appalachian Mountains without express permission from British authorities.[184] Thus, the Royal Proclamation cut off the presumptively unlimited ability to acquire property in land through expansion and, as such, threatened the material basis of American settler

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[179] For comprehensive accounts of the Seven Years War in its global contexts, see e.g. Baugh 2011; Danley and Speelman 2012.

[180] Rana 2010, 62.

[181] Cavanagh 2017a, 19.

[182] On Quebec as an important milestone in this capacity, see Korman 1996, 33-36; see also Neatby 1966.

[183] Here the inclusion of Catholic French-speaking Quebecois as equal subjects proved particularly odious to many American settlers whose Protestant republicanism led them to believe that loyalty to the papacy was fundamental incompatible with self-rule, Rana 2010, 76-78.

[184] For studies on the Proclamation's origins and impacts, see e.g. Humphreys 1934; De Papa 1975; Calloway 2006.

liberty.[185] To make matters even more dire, this limitation of frontier accumulation was coupled with a limitation on overseas trade in the form of British restrictions on the continental European trade in goods with the North American consumer market.[186] Additionally, the strengthening of the 'red race' at the expense of settler interests was coupled with another threat to settler supremacy emanating from the 'black race.' Here, if Anglo settlers would no longer provide the loyalty and support needed to advance British imperial interests in North America, a fear existed that Britain's black subjects might be called upon as enforcers of order.[187] The ultimate result of this was a widespread 'black scare' whereby colonists feared a British invasion of North America with an army of African and Caribbean troops would instigate a general slave revolt and enact vengeance upon white society.[188]

While the immediate impact of the Seven Years' War was perceived as a disaster for the proponents of American settler liberty, when viewed on a broader scale, this event can be understood as the source of their ultimate success. As Richard Devetak and Emily Tannock have recently shown, this war was a milestone in the evolution of the modern international system by demonstrating the ability of inter-imperial rivalry to link previously autonomous, if not isolated, regional sub-systems into more globally integrated regimes.[189] While this conflict began with skirmishes between British and French North American settler projects in the Ohio Valley, it expanded to the Caribbean, South America, West Africa, India, and Europe.[190] This included clashes amongst continental Europe's great powers whereby a British-backed Prussia squared off against an unprecedented 'triple alliance' of France,

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[185] Rana 2010, 67-68.

[186] For a study of Britain's restrictions of trade between the continent and the colonies in this context, see Conway 2015.

[187] Horne 2014.

[188] Ibid. 225-227.

[189] Devetak and Tannock 2017.

[190] Ibid. 137.

Austria, and Russia.[191] Importantly, '[u]nlike the wars of succession that dominated [European] diplomacy and international relations of the eighteenth century, the Seven Years' War was comparatively bereft of religious and dynastic interests.'[192]

In assessing the legacies of this first truly global conflict, British victory vastly enhanced the importance of its imperial model of global trade and this necessitated far greater European interest in the rest of the world.[193] Furthermore, it played a profound role in the development of the modern military-fiscal state, especially in the conservative dynastic kingdoms of continental Europe who now realized that their seemingly localized interests could be impacted by events in far-flung colonies.[194] Moreover, as a matter of particular interest for this chapter (and thesis more broadly) there was the way in which these changing concepts of trade, statehood, and overseas expansion prompted by this war directly impacted the transformation of what constituted legitimate political authority. With traditional conceptions of empire being questioned (in both its European dynastic and non-European variants), the stage was set for new forms of assertion where: '[t]he novelty lay not just in the emergence of popular sovereignty as a legitimate rival to dynastic sovereignty, but in the equally significant idea that sovereign states are free independent and equal.'[195] Given this context of reception, what was the exact nature of the American case for sovereign independence and how did it translate the above-detailed parochial interests of a private property-based settler empire into a universal standard? It is to these questions that this thesis now turns.

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[191] Ibid.

[192] Ibid. 138

[193] Ibid. 138-139.

[194] According to the Prussian King Frederick II's remarks on this need for a change in perception: 'This war was so far removed from the possessions of the German princes that it is difficult to see how the conflagration can reach from one part of the world to another that seemingly has no connections to it. Thanks to the statecraft of our century there is no current conflict in the world….that cannot reach into and divide all of Christendom in a short time.' Quoted in Ibid. 140. On the enhanced military-fiscal reformation of Europe's absolutist dynastic powers as a response to the war, see Scott 2011.

[195] Devetak and Tannock 2017, 142.

3.5. An American Case for International Legal Standing

3.5.1. Justifying a Lockean Republic

With the advent of the 1763 Royal Proclamation, and the unravelling of bonds that ensued, the only way to maintain the uniquely American conception of property-based liberty premised on endless territorial expansion was establishing absolute sovereign autonomy. While this dynamic was not conclusively apparent at the moment this proclamation was made, subsequent efforts to reconcile this fundamental contradiction of settler-metropole interests ultimately failed. The point of no return was made unambiguous clear with the British Parliament's 1775 *Prohibitory Act* that placed the American colonies outside the protection of the British Crown.[196] In the face of this unavoidable pressure, formulations of freedom, legal order, political community, and human hierarchy spawned by the uneven and combined maelstrom of colonial capitalism meshed together to form a multi-layered juridical framework that perfectly served the American cause. This was none other than the proposition that the production and maintenance of incontestable 'facts on the ground' demonstrated popular will and this consequently legitimized sovereign independence. This is the same vanishing point between 'might' and 'right' that exists at the heart of the contemporary 'effective control doctrine.'

On the question of what constituted 'facts on the ground' in this context, our attention must turn to a specific understanding of how the literal 'ground' was the grand arbiter of relevant 'facts.' This took the form of private property-protection as a first principle that determined the shape the second-order consideration of sovereignty needed to take. On this basis, the character of sovereignty was imputed from the profoundly influential Lockean premise that protecting property interests was

[196] Ossipow and Gerber 2017, 535

the sole legitimate end of government. Through this lens, for American colonists, alternative claims to ownership, be they royal or indigenous, undermined this premise and could be justifiably resisted.[197] In staging this resistance, the foundational conception of purity in property-ownership formulated a necessary corollary through an equally pure conception of sovereignty derived directly from the will of the underlying political community. While there was certainly much disagreement on which legal-institutional configuration best encapsulated this abstraction of popular will-derived sovereignty, the sanctity of property as a base presumption was largely beyond contestation. The general shape of legal evolution in the American Revolutionary context demonstrated this dynamic. Here the rules of public law were subject to a broad array of controversies, yet, the underlying private law rules concerning property rights and commercial interests remained almost entirely intact.[198]

Taking all of this account, if popular will was a necessary articulation for those safeguarding a property-based conception of liberty, this necessarily raises the question of who were subjects that supplied this popular will? As discussed above, this was the white male property-owning subject whose maintenance of liberty was premised upon the suppression of those outside of this category as a fundamental condition of possibility. Such a logic fed back into the justification that this particular stratum of individuals should maintain a monopoly on representative authority. After all, to include those without property would mean including those who faced no direct consequences from collectively-made distributional decisions and thus had no stake in the system.[199] This configuration implicated both the abstraction-based and materiality-based character of capitalist social relations in that it fundamentally intertwined the idealized quality of the property-worthy subject (whiteness and masculinity) and the persistence of concrete patterns of domination (the

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[197] See Meister 2011, 127.

[198] Ewald 1994, 13.

[199] Rana 2010, 54.

actual possession of property and its exclusion from others). The former legitimized the later, and vice versa, in a circular capacity.

3.5.2. Thomas Jefferson, International Legal Publicist

While it is not difficult to see how this particular property-sovereignty continuum functioned as a rallying cry for many American settlers, there remained the question of how outsiders might be convinced of the legitimacy the American cause. In assessing how this parochial case for independence could be promoted in universal terms under the aegis of the 'law of nations', a profoundly important individual is Thomas Jefferson, the author of the American Declaration of Independence. While Jefferson's sophisticated knowledge of the law of nations is well-documented, most studies have focused on his handling of discrete legal issues in his official service as a statesman within the early American republic.[200] What has yet to be confronted is how his political theory of the American cause shaped the modern popular will-international law relationship whereby 'facts on the ground' produce a default presumption that a sovereign political community is legitimate. In undertaking such a confrontation, it becomes clear that Jefferson's theory collapses the distinction between right and might as a justification for sovereign authority, the key feature of today's 'effective control doctrine.'

In offering this interpretation of Jefferson, a few inter-related points are of great significance. First of all, he is often remembered as deeply contradictory figure due to the fact that he owned one of America's largest slave plantations *and* wrote eloquently of the natural liberty of all men.[201] However, taken as a matter of context, such a position was eminently consistent with the particular property-sovereignty

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[200] Much of this attention has been motivated by the fact that Jefferson served as the US Secretary of State under the in the Administration of George Washington, the first US President. For studies of Jefferson in this capacity, see e.g. Sears 1919; Wiltse 1935; Dumbould 1976.

[201] For studies on connection between Jefferson and slavery in this regard, see e.g. Cohen 1969; Schwabach 1997; Helo and Onuf 2003.

continuum discussed above. Through this lens, it makes a great deal of sense that, despite many apparent paradoxes, the right to property is nevertheless identifiable as the irreducible core of legal, political, and ethical thought in the Jeffersonian cannon.[202]

Secondly, when justifying this ultimate position, his masterful synthesis of a vast array of texts into incredibly concise prose exemplified the phenomenon of 'juridical thinking' whereby the lawyer's task is to genealogically connect disparate points as an articulation of timeless principle.[203] However, Jefferson's abilities in this capacity should not be overly attributed to individual genius independent of context. As discussed above, the lack compounded, long-term social practices in the American settler colonial context provided this population a vast array of interpretative discretion in rejecting, adapting, or inventing traditions when expounding the parameters of legal and political justification. Thus, Jefferson was arguably the single greatest practitioner of 'juridical thinking' against the backdrop of material conditions that actively cultivated this skill. Given that these material conditions where inexorably shaped by capitalist social-relations, it is unsurprising that the right to property occupied the core of Jefferson's normative ontology.

Through grounding this right to property, Jefferson can be understood as positioning the externally-focused case for American independence by first locating American uniqueness in its global context. According to Andrew Fitzmaurice's reading, this took the form of delineating two different situations where diametrically-opposed approaches to lawful order could each be social destructive in the own distinct ways. On the one hand, there were situations where the deficiency of law lead to anarchic 'savagery' whereby no orderly social foundations were secure.[204] On

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[202] Katz 1976.

[203] On Jefferson's writing technique as one of 'intertextual mastery' that is deeply in line with this art of synthesizing meaning as it flows through time as concisely as possible, see Ossipow and Greber 2017, 543-545.

[204] Fitzmaurice 2014, 203.

the other hand, there were situations of excessive law whereby tyranny persisted in that all freedom was subject to unaccountable authority.[205] While the former depicted non-European societies and later depicted Europe's absolutist regimes (and even its commercial societies), the American colonies occupied a virtuous middle-ground.[206] In Jefferson's ideal of America, the excesses of both chaos and despotism were avoided through the consignment of law to the delineated spheres of property acquisition, maintenance, and alienation, as a well as a limited government that protected these rights.[207]

However, situating American uniqueness still left open the question of why outsiders should recognize American independence. When answering to this question in light of Jefferson's overarching contributions, we can acquire much insight from mapping the international legal implications of his famous 1774 pamphlet 'A Summary View of the Rights of British America.' Through this text, Jefferson combines a depiction of the legal basis for American independence with an account of how British improprieties in relation to American property-based interests forced an ominous clarification of the nature of American sovereignty. Here he claimed that American lands were 'allodial' (held free and clear of any feudal encumbrances) in a manner characteristic of the pre-Norman Conquest Anglo-Saxons who were the ancestors of the current American settler community.[208] Since 'America was not conquered by William the Norman, nor its lands surrendered to any of his successors', the allodial character of its lands held firm.[209] Thus, it was only through misrepresenting the truths of property law that the colonists had ever believed that the

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[205] Ibid.

[206] Ibid.

[207] Ibid.

[208] Jefferson 1999 [1774], 77.

[209] Ibid. 78.

British Crown held any valid interests in their lands.[210] Under the ubiquitous rubric of common law authority, Jefferson seamlessly connected the discourse of an Anglo-Saxon 'Ancient Constitution' that resisted absolutism with the discourse of 'allodial title' that enabled colonialism capitalism

This grounding of rights can be connected back to the text's previous claim that British interference in the colonies' trade-based property interests, and their attendant consequences, were unjustifiable legal breach as opposed to an acceptable exercise of Britain's imperial political discretion.[211] In a recital of grievances, Jefferson condemned British depredations against '…the exercise of free trade with all parts of the world, possessed by the American colonists, as of natural right, and which no law of their own had taken away or abridged.'[212] For Jefferson, such actions were sufficient to raise the point that the settlement of America and its formation of a unique society made it just as much a nation as Britain which was formed through the analogous pattern of Anglo-Saxon settlement centuries before.[213] That said, while the metropole-settler ties were an acknowledged source of mutual benefit, as a fundamental reality, the Americans exercised control over their society to a greater extent than the British ever could, and if this was not respected, these ties could be severed as a matter of right.[214]

'Summary' was thus a masterwork of 'juridical thinking' whereby America's unique property-sovereignty continuum was invoked to support the general presumption that objective 'facts on the ground' warranted sovereign independence,

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[210] 'Our ancestors…who emigrated hither were farmers, not lawyers. The fictitious principle that all lands belong to the king, they were early persuaded to believe real; and accordingly took grants of their own lands from the crown.' Ibid.

[211] Ibid. 66.

[212] Ibid. 67.

[213] Ibid. 64-65.

[214] Ibid. 65-66.

even for an entity whose emphasis on popular will led it to reject dynastic sovereignty. Popular will here was inseparable from a trans-temporal narrative of property rights where upholding distinct social relations in the present legitimized a mythologized narrative of past that could be mobilized to make claims upon the future. Through this tapestry of meaning, the veneration of a pure, apolitical conception of property politically justified the autonomy of a popular will-based sovereign entity. If this entity suffered an unjustifiable interference with its foundationally important property rights/interests, an appropriate remedy was to dissolve all bonds with those responsible for the interference and this warranted the entire world's recognition. Thus, as a matter of universally applicable logic, the British could not deny this dynamic without denying their own legitimacy as a nation. In this way, Jefferson passionately depicted the uniqueness of the American experiment, but did so in by situating its case for independence as deserving outside support, even from those unable or unwilling to understand its plight on a substantive level. This hinged on the implication that if sovereignty was lacking in the America colonies, it was questionable whether sovereignty could be truly present anywhere.

3.5.3. Bringing Vattel Back In

While Jefferson's formulation provides insight into how a case for sovereign independence was formulated as an extension of American settler interests, we must not forget the place of Vattel's treatise in this process. It bears recalling that *The Law of Nations* is a deeply indeterminate text and, thus, its contextual interpretations reveal much about the material realities that animated its reception. Two interlinked considerations are key in this capacity: Vattel's facilitation of the foundational Lockean conception of the property-sovereignty continuum and Vattel's translation of the American cause into the language of European war and diplomacy. Highlighting these considerations allows us to grasp the larger context of Jefferson's Declaration of Independence and its broader impact on the law of nations.

On Vattel's facilitation of Lockean ideals, as an initial matter, the two theorists are often compared. Both demanded cultivation as an essential precondition for land rights (with the consequence invalidating claims by indigenous peoples against

agrarian colonizers).[215] However, this overlap should not obscure the fact that Locke dealt with the rights of individuals against sovereigns while Vattel dealt with the rights of sovereigns that maintained ultimate discretion over the rights of individuals.[216] This difference nonetheless allowed a space for harmonization in that Locke and Vattel could be invoked on distinct, yet inter-connected, levels. According to William Ossipow and Dominik Gerber's assessment of the founders' mutually reinforcing usage of these two figures:

> In Locke's work they found a powerful set of political arguments….In Vattel's law of Nations they found a remarkable articulation of those very same arguments, transposed from the language of philosophy into the concise, fluent, and clear language of law. With the Swiss jurist, Locke's Whig political philosophy migrated into another textual genre: a treatise on the law of nations.[217]

In other words, Vattel offered the necessary externally-focused juridical infrastructure for supporting a Lockean mode of internally-focused political justification. At a material level, it was the settler expansionist project of reproducing a property-based conception of liberty that forged an essential unification of the two thinkers.

A point of vital importance here is that Vattel's theory did not simply transpose Locke onto the international level. Such a 'domestic analogy'-based association of interactions between individuals in a domestic society with interactions between states within an international society directly contradicted Vattel's unprecedented view that states, as entities that facilitate the perfection of collectives of individuals,

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[215] Fitzmaurice 2014, 141-142.

[216] Ibid. 142.

[217] Ossipow and Gerber 2017, 535

are fundamentally different from individuals.[218] On this premise, the 'domestic analogy' was far more supportive of the prevailing dynastic view that sovereignty was vested in the bodies of individual monarchs, a formulation the American revolutionaries explicitly rejected.[219] Thus Vattel represented an alternative legitimation of state personality aligned to the interests of American settlers at the level of form (the law of nations could support the legitimacy of a political project that premised popular sovereignty on private property ownership) in addition to substance (private property-based settler accumulation was a moral act in and of itself).

Moreover, this Vattelian view of the subject of the law of nations as a collective of individuals based on popular will could support acts of secession in a manner unavailable to international legal personality theories depicting the sovereign as an indivisible body directly analogous to an individual. This provides a great of explanation as to why Vattel was amongst the first theorists to proclaim that the creation of an entirely new international legal entity was an acceptable outcome in the event of an internal conflict where the de facto reality demonstrated no possibility of political reconciliation.[220] This stood in contrast to previous thinkers, such as Hobbes, whose adherence to the 'domestic analogy' lead them to portray political dismemberment as the death of a sovereign that must be avoided at all cost.[221] An illustration of a more Vattelian line of thought in the American revolutionary context can be located in the writings of James Wilson (1742-1798), one of the most knowledgeable jurists amongst the founding fathers.[222] According to Wilson's view that a nation's secession in the name of popular will was *not* analogous to human death:

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[218] On Vattel as an early critic of the domestic analogy, see Dickinson 1917, 575-576.

[219] For an analysis on founding views on sovereign prerogative, see Nelson 2016.

[220] Armitage 2017, 131-132.

[221] See Chapter II, Part 2.3.4.

[222] Reeves 1909, 552-553.

> A Nation has a right to assign to its existence a voluntary termination: a man has not….By the voluntary act of the individuals forming the nation, the nation was called in existence; they who bind can also untie; by the voluntary act, therefore, of the individuals forming the nation, the nation may be reduced to its original nothing. But it was not by his own voluntary act that the man made his appearance upon the theatre of life; he cannot, therefore, plead the right of the nation by his own voluntary act to make his exist. He did not make; therefore, he has no right to destroy himself.[223]

While Vattel's theory of popular will-based sovereignty furthered the American revolutionaries' political project by articulating a basis for secession whereby 'facts on the ground' vindicated popular will, questions of external legitimation persisted. After all, since the powers of the world remained overwhelmingly committed to dynastic legitimacy, an entity claiming sovereign autonomy based on popular will (even if supported by *de facto* territory) might profoundly undermine the authority claims of dynastic actors. While Vattel's treatise reconciled this conundrum, it did so not through its theory of sovereign legitimacy, but rather through its pronouncements on war. On this point, while Ossipow and Gerber are correct in their claim that the founders' revolutionary strategy included efforts to act '…in accord with the classical theory of Just War formulated by Gentili, Grotius, and Vattel', these figures must be disaggregated.[224] In contrast to earlier thinks, Vattel (largely through adaptations from his chief influence Christian Wolf) represented a dramatic transformation of the Just War tradition.

While scholars dating back to St. Augustine depicted Just War as the resort to force in the name of a 'just cause', this justification could only have one true possessor.[225]

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[223] Wilson 1804 [1790], 157.

[224] Ossipow and Greber 2017, 545.

[225] For a broad overview of the Just War tradition within the historical evolution of the legal regulation of war see Neff 2003, 45-82.

This dynamic infamously enabled the prolonging of violent conflict when two or more parties each claimed to have justice on their side and thus had no incentive to relinquish their claims. By contrast, Vattel marked a turning away from the dogmatic character of Just War by replacing it with the more pluralist doctrine of 'regular war', whereby more than one party could possess 'just cause' to use force (or at least be sincere in the belief that they did).[226] This ethos of pluralism was refined through the Vattelian ontology of multiple nation-states, where each possessed the final sovereign discretion on questions of justice and morality in relation to its distinct self-perfecting political community. Such an ordering premise can be linked to Vattel's emphasis on furthering practical diplomacy more concerned with self-preservation than articulating universal values for a world where moral consensus was presumptively unachievable.[227]

Through the Vattelian discourse of regular war and its pluralization of 'just cause', the American agenda of solidifying a popular will-based sovereign entity could rebut claims that its recourse to force breached the Just War tradition by undermining dynastic legitimacy. Such a legitimation of war deeply resonated with the Jeffersonian view that *de facto* authority justified American independence. This sentiment featured prominently in Jefferson's 'Declaration (…) Setting Forth the Causes and Necessity of Their Taking Up Arms', a Vattel-influenced argument for waging war against the British adopted by the Second Continental Congress on July 6th, 1775.[228] To quote Ossipow and Gerber once again: '[t]his document represents a significant turning point in Vattel's reception in the American colonies since, for the first time, his authority is no longer confined to theoretical debates or pamphlets, but came to

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[226] For a detailed account of this shift from Just War to regular war through the writings of Wolff and later Vattel, see Kalmanovitz 2018.

[227] According to one account: '[i]n the Vattelian law of nations the diplomat's ethical persona is formed on the basis of the mutual neutralization of cosmopolitan justice and raison d'etat. The formation presupposes the territorialization of justice and presumes the transition from just war theory to the doctrine of regular war.' Hunter 2012b, 192-193

[228] For an identification of this text's incorporation of provisions on the declaration of war from Book III, Chapter IV, §§ 51-52, see Ossipow and Gerber 2017, 532.

influence a political message issued by the highest body of the colonies.'[229] In exemplifying 'facts on the ground' as the justification of sovereign autonomy in the name of popular will, Jefferson's proclaimed that:

> Our cause is just. Our union is perfect. Our internal Resources great, and, if necessary, foreign Assistance is undoubtedly attainable. We gratefully acknowledge, as signal Instances of the Divine Favour towards us, that his Providence would not permit us to call into this severe Controversy, until we were grown up to our present strength, had previously exercised in warlike Preparation, and possessed the means of defending ourselves.[230]

Through this passage, Jefferson, aided immensely by Vattel, conflated might with right within the confines of coherent theory where an experimental political assertion nonetheless affirmed the rules of the existing international order.

3.5.4. A Material Declaration

Against this backdrop, we can uncover a more materially-grounded understanding of the fabled July 4th, 1776 American Declaration of Independence ('Declaration'), that accounts for Jefferson's strategic logic in authoring this document. This entails reconfiguring the view that the Declaration, as a demand for sovereign independence via natural right, was fundamentally contradictory. This contradiction being its assertion that a non-existent entity can declare itself into existence.[231] As identified by David Armitage, the international legal dimension of this conundrum stemmed from the fact that the Declaration was a grievance claim that could not be

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[229] Ibid. 533.

[230] Jefferson 1999 [1775], 86.

[231] For an account of this issue as it was struggled with in the theories of Derrida and Arendt, see Honig 1991.

effective unless the US already possessed the positive international legal recognition that granted it standing to make such claims.[232] This logical shortfall was not lost on the British opponents of the American case for sovereign independence. Prominent among them was Jeremy Bentham, renowned natural rights critic and coiner of the very term 'international law,' whose 'Short Review of the Declaration' '…exposed the logical fallacies of the principles on which the Americans claimed their independence, judged them to be tautologous, redundant, inconsistent, and hypocritical.'[233]

In taking the view that material reality (not abstract consistency) is the touchstone for historicizing the popular will-international law relationship, Jefferson's larger contextual situating of the Declaration turned Bentham's logic against itself. On this reading, to presume that the Declaration was intended as a self-executing vindication of natural rights meant falling directly into Jefferson's trap. As his earlier writings have shown, he was confident in the ability of the American colonies to maintain *de facto* authority in the face of any attempted suppression by the British metropole. Thus, in a move that was inseparable from his material backdrop, Jefferson cast a gauntlet whereby British failure to deny the assertions of American settlers would vindicate the sovereignty of American popular will once and for all. By positioning the Declaration's claim as 'Facts…submitted to a candid world', and encasing them in the universalist language of natural rights, the successful bid for independence linked the internal legitimation of the American Revolution to the broader law of nations; itself transformed by acknowledging a new entity whose sovereignty derived exclusively from 'the people.'[234] In an intimately related capacity, many of the Declaration's natural rights-based grievances involved the very material conditions of American settler liberty's private property-based mode of

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[232] Armitage 2002, 46.

[233] Ibid. 53. On the way the label of 'international law', in deliberate opposition to the 'law of nations', fit within Bentham's project of stripping legal analysis of its 'irrational' qualities, see Janis 1984.

[234] *American Declaration of Independence*, quoted in Armitage 2007, 166.

reproduction. Specific offences in this capacity included Britain's King George III's: interference with global trade,[235] discontinuation of unrestricted settler expansion on the frontier,[236] and alliances with indigenous nations against settler interests.[237] Recalling Part 3.4. of this chapter, it was the threatened compromise of these conditions that motivated the American Revolution in the first instance.

Emphasis on the American settlers' *de facto* authority as triumphing over any British claim as incumbent sovereign formed the crux of the American revolutionary campaign for support from abroad. The success of this effort is perhaps best demonstrated by the case of France that in 1778 entered into a treaty of alliance with the self-declared American republic.[238] This development followed the decisive American victory at the 1777 Battle of Saratoga, an event that proved the irreversibility of 'facts on the ground', and thus warranted alliance against a common British enemy (despite the fundamental ideological difference between the republican US and absolutist monarchical France).[239] On one level, this Franco-American alliance exemplified the Vattelian view that ideological difference held limited relevance in the actual practices of diplomacy and statecraft.

However, there exists an additional layer to this if we take seriously the Jeffersonian strategy of invoking natural rights as a means of vindicating material reality. Here,

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[235] Ibid. 168 ('For cutting off our trade with all Parts of the World.').

[236] Ibid. 167 ('He has endeavoured to prevent the population of these States; for that Purpose…refusing…to encourage migration hither, and raising the conditions of New Appropriations.')

[237] Ibid. 169 ('He has…endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian savages, whose known Rule of Warfare is an undistinguished Destruction, of all Ages, sexes and conditions.')

[238] In this treaty, France stated its explicit purpose was 'to maintain effectually the liberty, Sovereignty and independence absolute and unlimited of the said United States', quoted in Armitage 2007, 83.

[239] See Fabry 2010, 29.

while the British may have claimed that supporting the Declaration-based American cause was an illegitimate embrace of the absurd proposition that abstract naturalist claims had binding force, identifying the source of these claims forced an observer to consider the material capabilities of those asserting them.[240] Through this turn, positions shifted in that the British claim became an abstract invocation of sovereign rights while American settlers revealed themselves as capable of actually holding their territory in the face of forcible deployments by the invokers of abstraction.[241] In the face of this reinforcing structure of legitimacy correlated to material success, the militarily and diplomatically defeated British eventually relinquished their sovereign claims and recognized an independent US through the Treaty of Paris signed in the September of 1783.[242]

3.6. Trials of the Early American Republic

3.6.1. Postcolonial Tensions, Frontier Diffusion

While the argumentative linkage of *de facto* authority, sovereign autonomy, and popular will may have secured the US as an independent international legal entity, the story does not end here. We must also consider the consolidation of the early American republic if we are to truly understand this event's place in the intertwined globalization of international law, the nation-state form, and capitalist political economy. Since 'popular will' grounds this thesis's understanding of this particular intersection, numerous insights can be gained through exploring the formative trials and tribulations of this first sovereign born under the justification of popular will

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[240] Here the British arguably undermined their own position in that by disseminating numerous copies of the Declaration (far more than the American revolutionaries themselves) for the purposes of discrediting it, they ended up exposing this contradiction to otherwise uninformed external audience. On British dissemination efforts, see Armtiage 2007, 87.

[241] On de facto authority as the anchor-point of the American revolutionary campaign for external support, see Fabry 2010, 29-33.

[242] Ibid. 34.

effected through a forceful separation from its parent. Against a backdrop of multiple tensions, the nascent US continually balanced adhering to the customs and practices of established sovereigns with asserting polices derived from its unique identity as an experiment in republican self-rule.[243] In this capacity, the law of nations formed a key discursive medium of navigating these contradictions.[244] As such, creative applications of Vattel's highly flexible treatise maintained their position of paramount importance.[245]

While accounts of these formative engagements are extensive, what is less remarked upon are the ways in which the law of nations was supremely important in relation to the questions of internal class consolidation and social identity construction that allow for a substantive analysis of 'popular will' in this context. Such considerations are of great importance as a matter of contemporary international law; for if, popular will is the basis for domestic authority within this system, then we must understand the presumptions of popular will through their formative context. After all, through the trans-temporal abstraction-generating quality of juridical thinking, this formative context was subject to universalization and thus made applicable to situations hosting fundamentally different material conditions. By uncovering the material conditions that made assertions of popular will successful on their own terms in the American context, we gain a newfound understanding of 'failures' involving popular will's application to situations lacking the material foundations of American success. Paradoxically, delineating the material success of American popular will entails comparing the early American republic with later situations where similarly passionate assertions were subject to far greater degrees of frustration.

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[243] See Gould 2012a, 145-218

[244] For various studies see e.g. Dickinson 1952; Onuf and Onuf 1994; Sylvester 1999; Cleveland 2006; Golove and Hulsebosch 2010; Oosterveld 2016.

[245] For a case citation inventory exposing the vast influence relative to all other classical publicists within the earlier American judiciary, see Dickinson 1932, 259.

According to Aziz Rana, the social upheaval of postcolonial America bore many striking similarities to the general socio-political landscape of post-independence Asia and Africa nearly two centuries later.[246] This took the form of assertions by 'small farmers, artisans, and Western yeomen [who] found themselves embolden by a discourse of republicanism and the liberating potential of popular politics…[that] contradicted the basic tenants of republicanism understood by colonial elites.'[247] These movements garnered a substantial degree of intellectual support through arguments that presented the possibility of applying the ethos of anti-tyranny to the rectification of social inequalities in the post-independence era.[248] Interestingly enough, this line of argument had a substantial degree of support in Jefferson's thinking.

Although much of his theory bent towards a Lockean interpretation of the property-sovereignty relationship (to the extent he formulated an international legal case for independence on this basis), in some important respects, his theory of American society was deeply at odds with Locke. While Locke placed foundational emphasis on the consolidation of a civil society that forms a government for the mutual defence of property, Jefferson was deeply concerned with the ways in which such a concerted association of interests could produce a tyrannical outcome of its own.[249] Taking this view seriously, while the original American conception of republican liberty centred on the limitless acquisition and maintenance of property, might a

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[246] Rana 2010, 103.

[247] Ibid. 120-121.

[248] For an overview of these theories as expressed by Thomas Paine and William Manning, see Ibid, 125-129.

[249] See Fitzmaurice 201-203. For more on the dilemma of liberty versus accumulation within Locke's theory, see Ince 2018b.

renewed conception of republican liberty actively call for the equitable redistribution of property?[250] Such an outcome would be consistent with Jefferson's proclamation that each successive generation must define the meaning of liberty for its own time and place lest ruling authorities become decadent and complacent.[251]

When it came to addressing this popular challenge, postcolonial American elites possessed an option unavailable to their later counterparts in post-independence Asia and Africa (and to a certain extent Latin America), frontier settlement.[252] Here, by facilitating property-based accumulation as a promise of accessible material sustenance, elites could draw upon the ideological legitimation of the original revolution while simultaneously diffusing new post-revolutionary tensions. However, the newfound absence of the British imperial authority administering this process raised questions as to how the emerging Federal Union-based constitutional order might handle these issues.[253] Motivated by fears of frontier settlers falling under foreign influence, the federal government took a proactive role in asserting its sovereign prerogative over the frontier while placing indigenous communities under

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[250] While the eighteenth century theory of republicanism as non-domination has undergone something of a revival in modern political and legal thought, what has been far less remarked upon in this contemporary incarnation is republicanism's transmission into the nineteenth century where went beyond earlier aristocratic presumptions and was applied to the domain of labour. On such republican applications in the post-Civil War US, see Gourevitch 2015. For the case that Karl Marx's *Capital* should be understood as a work of republican political theory, see Roberts 2016. For an exploration of how the classical republican notion of nondomination provides a new lens for understanding projects of postcolonial worldmaking, see Getachew 2019.

[251] The iconic Jefferson statement in capacity was: 'What country can preserve it's liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?...The Tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is it's natural manure.' Jefferson 1999 [1787], 110.

[252] The possibility of any analogous territorial solution for Asia and Africa was pre-empted by the doctrine of *uti possiedtis juris* whereby established colonial territorial boundaries served as the borders of new states. Originally rooted in the Roman law, this doctrine arose in its modern form with the independence of Latin American states, see Chapter VI for an account of this process.

[253] On the larger context of American legal transformation in this context, see Pearson 2005; Tomlins 2013.

protective regimes of qualified autonomy strikingly similar to later practices of 'indirect rule.'[254]

In this context, a peculiar balance was struck between federal authority over frontier expansion and the role of frontier property acquisition as a technology of redirecting popular energies away from more direct political representation and possible wealth distribution. This took the form of a generalized scheme of 'quasi-legality' whereby the federal government's authoritative positioning as protector of indigenous populations was frequently undermined by varied settler acquisitions of indigenous land, by consensual agreement or otherwise.[255] Although illegal on its face, these transfers of land were often subsequently recognized as having legal effect despite the dubious circumstances of their formation.[256] Though this would appear a direct contradiction, if considered in relation to the idea of the American frontier as a site of capital accumulation, this arrangement is highly logical. makes a great deal of sense. Recalling Ince's frame, we find an exemplification of how the original impositions of capitalist social relations is never 'purely economic', but rather necessarily rooted in a particular configuration of jurido-political force that quells resistance against non-capitalist ways of being.[257]

3.6.2. American Integration versus American Uniqueness

While these processes certainly raised numerous questions surrounding the nature of the new American constitutional order, scholars often miss their profound international legal significance. This significance can be located in debates over the nature of the new American nation between those calling for consolidation within its

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[254] Rana 2010, 109-112.

[255] See Nichols 2018, 15-21.

[256] Additionally in this context, there emerged an elaborate system through which settlement ventures could be compensated for losses by the US government through an elaborate scheme that blurred the boundaries between public and private. For an analysis, see Park 2018.

[257] See Ince 2018a as discussed in Part 3.2.2.

current range of territorial settlement, most prominently represented by Alexander Hamilton, and those calling for greater expansion, most prominently represented by Jefferson. Although documenting the full extent of this divergence exceeds the scope of the present analysis, a vital encapsulation is the way Hamilton and Jefferson's differing approaches to international legality were deeply relevant to the question of frontier settlement. As a matter of foundational difference, while the former position placed great emphasis on American conformity and integration within a Europe-focused legal-diplomatic order, the later emphasized the new US as a unique and exceptional entity whose presence in the world must be correspondingly unique and exceptional.[258]

When it came to the frontier, Hamilton was content to sell vast tracts of land to foreign interests as a means of repaying debts incurred by the Revolution.[259] Jefferson, by contrast, was steadfast in his emphasis that frontier lands be settled as a means of further building a national political community premised on liberty through property ownership.[260] In relating this contention back to the logic of capital accumulation, Hamilton's approach offered the prospect of a short-term solution to a narrow problem; on the other hand, Jefferson's approach was far more long-term when it came to entrenching a particular mode of social relations. That said, much of the success of the US as a capitalist power can be attributed to the Jeffersonian (and latter Jacksonian) emphasis on continuing presumptively endless

[258] Cha 2015, 750-751; see also Bowman 1956; Golove 2018.

[259] Keene 2002, 71.

[260] Ibid. This basic premise was subsequently stripped of much of its idealist dressings tak-en in a more explicitly chauvinist direction by Andrew Jackson. On the Jacksonian deviation from Jeffersonianism regarding the US's unique place in the world, see Cha 2015, 758. On the general 'Jeffersonian'/'Jacksonian' differentiation, and its limitations, see Pessen 1981.

frontier settlement in the name of popular will.[261] It thus furthered the nexus between popular will, indigenous dispossession, and the limitless accumulation of property as a condition of liberty in the American cannon.

However, despite the apparent divergences between these two approaches, their material manifestations in the continuation of American frontier settlement was one of synthesis. A pivotal development here was the 1823 US Supreme Court case of *Johnson v. M'Intosh* where Chief Justice John Marshall declared that American authority over indigenous communities stemmed from the law of nations' 'doctrine of discovery.'[262] Under this ruling, with the independence of the US, the British Empire's juridical capacity in this domain of indigenous relations passed to the US federal government.[263] While this decision enabled continuing frontier expansion, it did so in a centralized manner. Thus, as an intervention into ongoing post-Revolution controversies, it represented a direct blow to the Revolution-motivating Lockean view that property rights generate sovereignty and affirmed the countervailing Vattelian view that sovereignty generates property rights.[264] Moreover, in a manner emblematic of Hamilton's foreign policy strategy, the case's reasoning can be read as an effort to further link American practices with the European law of nations as opposed to furthering a uniquely American jurisprudence.[265] As Jedidiah Purdy has observed, *M'Intosh* turned on a highly European discourse of indigenous peoples as 'semi-sovereigns' that had minimal authority in leading American proclamations on the law of nations existing at this time.[266]

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[261] For an account of American frontier expansion's significance on a global scale when it came to developing modern structures of production and distribution, see Belich 2009, 57.

[262] *Johnson v. M'Intosh* 1823, 570-577.

[263] Ibid. 584.

[264] On this context more generally, see Fitzmaurice 2014, 203-214.

[265] For a situating of *M'Intosh* within the *long duree* of European/colonial legal practices regarding sovereign transfer through charters, see Cavanagh 2017b, 293-294.

[266] The key American treatise in this general timeframe was James Kent's *Commentaries on American Law* that stressed the absolute equality of nations under international law, Purdy 2010, 78.

However, while the standard set in *M'Intosh* might seem a triumph of the Hamiltonian emphasis on enhanced federal power and integration within the European 'family of nations', its scope of operation was nonetheless conditioned by a Jeffersonian/Jacksonian expansionist ethos centred on limited federal power and American uniqueness. A foundational point in this development is the Supreme Court case of *Worcester v. Georgia*, the third foundational case in the 'Marshall Trilogy' that began with *M'Intosh*.[267] Here the Court denied any jurisdictional claims of state governments over indigenous communities and declared these relations to be the sole domain of the federal government.[268] While this might appear consistent with the attempted federal centralization of the American expansionist project, it implicated core controversies over the apportioning of powers between the federal government and individual states that questioned the unique American experiment in popular will.[269] These controversies were especially sharp in relation to the frontier territories that sought admission into the Federal Union as states. In remarking on how resolving these questions exemplified European-American difference, Edward Keene has depicted this process as:

> an egalitarian rejection of the European practice of colonialism: Congress was to assume responsibility for and authority over the territories;

Interestingly enough, Kent did defend Marshall's *M'Intosh* decision on the grounds that no other alternative was possible, Ibid. 78-79.

[267] The intervening second case in the Marshall trilogy that began with *M'Intosh* and concluded with *Worcester* was the 1831 case of *Cherokee Nation v. Georgia* whereby the Cherokee Nation's argument for having their case heard under the original jurisdiction of the US Supreme Court under Article III, Section 2 of the US Constitution on the grounds that they were a foreign state was rejected and indigenous communities where deemed 'domestic dependent nations' within the American constitutional order.

[268] *Worcester v. Georgia* 1832, 594-595.

[269] This ideological quandary manifested materially regarding the federal government's limited ability to prevent settlers from violating treaties concluded with indigenous communities and even launch privately-funded armed expeditions (deemed 'filibusters') in foreign states, Deudney 1995, 204.

> not exploit the territory as a colony but to oversee the process of state-formation, determining the moment at which the territory could be accepted into the Union as an equal state.[270]

However, this 'anti-colonial' accommodation of settler interests through transforming territories into states came at the expense of indigenous peoples. Here, enabling settler pursuit of property-based liberty fundamentally conflicted with the mandate of protecting indigenous populations from more localized units of governments, a point explicit raised through the *Worcester* decision. However, the management of this contradiction came through enhanced federal impositions in indigenous communities justified under the banner of providing protection from local settlers.[271] In the process of doing so, federal actions had the effect of expanding the frontier by opening ever-increasing spaces to settler colonization. With this enhanced opening came the quasi-legal acquisition of land frequently ratified in favour of settlers, even when this was in breach of treaties concluded between indigenous nations and the federal government.[272] While largely decentralized matters of small-scale application, these actions nevertheless culminated in a broader cultural and political phenomenon deemed 'Manifest Destiny' whereby continuous frontier settlement to the Pacific Ocean became a dominant animating ethos of the early American republic.[273] In sum, these juridical contradictions laid the foundations for a phenomenon that was deeply consistent in its unifying purpose: the elimination the indigenous nations as the fundamental precondition of American popular will and the mode of property-based capital accumulation it relied upon.

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[270] Keene 2002, 73. For a tracing of the historical lineage of this differentiation of a 'colony' from a 'territory' in early American thought, see Onuf 1982.

[271] See Williams 1996.

[272] Nichols 2018, 18-19.

[273] On the ways in which 'Manifest Destiny' consolidated and further developed the US's exclusionist racial identity, see Horsman 1986. On the broader ways in which this process of expansion shaped American institutional development, see Hahn 2016.

3.6.3. Jefferson Universalized

Yet, what do these formative grounding of the early American republic mean for this thesis's larger point regarding the consolidation of popular will as the universal basis for domestic authority under international law? In answering this question, a return to the words of Jefferson is in order. While he lodged his formulation of the *de facto* authority-popular will-international legal standing relationship for the explicit purpose of American independence, the question of its universal applicability remained wide open. In his role as the first American Secretary of State under the Presidential Administration of George Washington, Jefferson possessed a platform to set the parameters of its application.[274] A vital opportunity for clarification in this domain came with the 1789 outbreak of the French Revolution and its far reaching repercussions. In articulating a position conforming to his earlier justification for American independence, in 1793 Jefferson delivered the following message to his minister in France:

> We surely can not deny to any nation that right whereon our own government is founded — that everyone may govern itself according to whatever form it pleases, and change these forms at its own will; and that it may transact business with foreign nations through whatever organs it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing to be regarded.[275]

While there may certainly have been great practical benefit in taking such an approach to recognition in an age of revolutions, this should not obscure the normative dimensions of this position, something we can assume Jefferson was very much aware. As this section has shown, while shared presumptions did exist, the process

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[274] For an account of the development of the American law of nations under the Washington Administration, see Reinstein 2011.

[275] Quoted in Dickinson 1931, 183.

of determining the precise meaning and institutional facilitation of American popular will was deeply controversial and invited all manner of contestation.[276] On this basis, what gave the US any right to make legitimate judgements on issues of national identity formation as they manifested in foreign political communities? Within the US experience, the process of consolidating its unique experiment in popular will was enabled by an understanding that objectively incontestable *de facto* authority was ultimately the sole legitimate determinate of sovereignty. This was beyond the ability of outside observers to interfere with.[277] All of that said, when it came to the articulation of an American position on these matters, on what grounds could this same opportunity be legitimately denied to others?

While a compelling narrative, a great price was to be paid for the universalizing the US as the formative template for the modern relationship between international law, *de facto* authority, and popular will. As this chapter has shown, when accounting for the emergence and consolidation of the US, even a cursory exploration of 'popular will's' material conditions of possibility reveals inseparable complicity with modes of violent dispossession in the service of capitalist social relations. However, rigorously uncovering these material and ideological realities is arguably inconsistent with contemporary international law's 'effective control doctrine.' After all, this doctrine stresses ideological neutrality in the assessment of whether or not a would-be sovereign objectively possesses the greatest claim of *de facto* authority relative to all local competitors. Consequently, analyses of material conditions, especially through a lens that is critical of the very concept of 'ideological neutrality', can be construed (and contested) as undue interference by outsiders in localized situations they are fundamentally ill-suited to judge.

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[276] After all, the different visions of the American Republic that sprang from the Revolution generated tensions that ultimately erupted in the American Civil War (1861-1864).

[277] This sentiment was apparent in early depictions of international law that situated the US as clear break from European histories of fanatical violence justified by intolerance. For an exploration of this sentiment through early American theorists of international law, see Janis 1992.

By casting substantive evaluation as illegitimate judgment in the domain of sovereign political communities, the links between assertions of popular will and the material realities that animate these assertions can be concealed forever. Thus, the great American contribution to the modern international legal construction of domestic political communities amounted to a veneration of popular will that generated a universalized standard for evaluating claims of contested sovereignty. Yet, through emphasizing '*de facto* authority' and 'ideological neutrality' as objective metrics of analysis (and thus not complicit in the political project of legitimizing capitalist social relations), this standard is structurally averse to uncovering the material conditions of this formative American manifestation of 'popular will'.

In this chapter, I sought to undercover the American Revolutionary contribution to the premise of popular will as international law's basis for domestic authority by resituating it in the contexts of colonial capitalism. A fitting endpoint is to show how denying the link between colonial domination and American popular will is traceable to the very first analysis of international law made in the independent US, William John Duane's 1809 *The Law of Nations, Investigated in a Popular Manner Addressed to the Farmers of the United States*. This account is notable for possessing acute awareness of the colonial origins and applications of international law that (absent its archaic spelling and grammar) would not be out of place in the contemporary Third World Approaches to International Law movement.[278] In a passage worth quoting at length, he states that:

> In the discovery of new and immeasurable seas and continents [sic] might have been anticipated, the extinction of wars for maritime dominion; that almost boundless cupidity would now be satiated, and force give way to the dictates of justice and sound policy. The reverse, however, has, in every view, been deplorably experienced: the colonial system arose upon a spirit of monopoly in proportion to the magnitude of the objects presented; the greediness for ships, commerce, and colonies encreased; contests for supremacy in the petty seas known to the

[278] See e.g. Anghie 2004.

> ancients, and those between the Italian states for the monopoly of the Levant trade, were abandoned for the more daring purpose of usurping the sovereignty of the Atlantic, the Pacific, and Indian oceans. Avarice here too assumed the cloak of religion, to cover the foulest murders and robberies, the enslavement and plunder of millions of innocent Indians, in the East and West; while fanaticism rewarded the infuriate zeal of its emissaries, by confirming by Papal Bulls, the sovereignty of territories wrested from the rightful owners by the perpetration of every crime…[279]

However, in describing these depredations as emerging with overseas expansion and facilitated through the law of nations he posed a contrasting vision of law as it governs territorial settings. What amounted was an unmistakably Lockean depiction of the property-based origins of government and political economy that motivated the assertion of American independence and, by extension, its accompanying case for sovereignty under the law of nations. According to Duane, in direct contrast to law's applicability to the seas, and the modes of human interaction it furthered:

> Property in land originated in the necessities of man; before lands were parceled out for cultivation they did not furnish adequate sustenance; since the distribution, they have not only furnished abundance but superfluity, creating the calls for barter and exchange. Dominion on land originated in the necessities of society, men, for their safety, giving a control to government over their lives and fortunes.[280]

This chapter showed how the depiction in Duane's second quote would have been fundamentally inconceivable without the material conditions aptly depicted in the first quote from his book. However, this link is obscured by the fact that Duane was followed by a long line of writers and theorists who reproduced his depiction of a

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[279] Duane 1809, 10.

[280] Ibid. 45.

virtuous ideal of American nationhood as outside, and above, the violence that accompanied European overseas expansion. My purpose has been to reforge this disavowed connection by showing how the international legal order emerged in its modern form as a result of both new colonial hierarchies *and* the emergence of the US as a new species of international legal subject. Historicizing the material origins of popular will and its structuring presumptions allows this connective account to make sense.

3.6. Conclusion

In showing how European overseas colonization gave rise to the American Revolution, and transformed the relationship between international law and domestic authority in the process, this chapter exemplified my methodological merging of 'juridical thinking' with historical sociology. This began by approaching the issue of 'American exceptionalism', which I identified as a distinct array of 'juridical thinking' exercises that link disparate historical events and concepts to affirm a mythologized narrative. In confronting the distorting effects of this phenomenon, I turned attention to social considerations largely disavowed by American exceptionalism in order to materially ground my account of the evolution of the independent US as a distinct legal entity. I then situated these considerations in the broader scheme of historical-sociological accounts of the material formation of the modern international order.

It was from this grounding that I accounted for the generative force of the juridical narratives that served the material interests of the American settler society born from early modern European colonial capitalist expansion. In these settler colonies, great wealth and autonomy emerged as a retooled English common law justified practices of enslavement and dispossession anathema in England itself. From this premise, there emerged an ideology of substantive liberty rooted in the presumptively endless accumulation of property. When this mode of life was threatened, American settlers launched an armed uprising against the British Empire backed by a Vattelian juridical argument for independence claiming that the settlers' *de facto* authority vindicated their popular will-based claim for independence. As the new

American republic consolidated through frontier expansion, it continued to position its original argument for independence as a universal principle under the law of nations that implicitly set its own experience as the criteria for external judgment. Thus, the juridical narrative of *de facto* authority justifying popular will under international law was completely abstracted from its formative context of material social relations. It was this lack of firm grounding that allowed other groups to apply this line of argument to their own (very different) material conditions.

CHAPTER IV

The Rupture of Popular Will: The Contradictions of Absolutism, the French Revolution, and the End of the *Ancien Regime*

4.1. Introduction

This chapter provides a parallel historicizing of events depicted in Chapter III. While I previous dealt with developments that emerged through the process of European overseas expansion, here I shift my focus to the events occurring within Europe during this same early modern timeframe. Thus, in conjunction with Chapter III, I provide a globally contextualized analysis of the protracted crises of European absolutism as it manifested itself on intersecting material and ideological levels. This process culminated in the French Revolution that sparked numerous crises of legal and political authority and entrenched a popular will-based challenge from which Europe's dynastic powers never fully recovered. As such, this world-historical episode forges a pivotal link between the earliest formulations of modern popular will within the classical law of nations (detailed in Chapters II & III) and the current international legal order (detailed in Chapter I) where this particular understanding of popular will is the sole basis for domestic authority.

Part 4.2. situates the French Revolution within contemporary international legal thought and shows how this event's significance is distorted by a fixation on 'state sovereignty' versus 'individual human rights' as a point of foundational opposition. I use this impasse as an opportunity to advance a materially grounded view of international law by shifting attention to the protracted contradictions of absolutist authority that shaped the backdrop of the French Revolution. On the one hand, the rise of rationalized territorial authority progressively undermined the modes of personalized rule that characterized absolutism. On the other hand, there was the emer-

gence of capitalist non-absolutist juridico-political forms that placed external pressure on the absolutist *Ancien Regime*. Part 4.3. confronts the first issue by situating it within the changing global context of knowledge production, namely the impact of the 'discovery' of New World, and traces its broad effects in the domains of bureaucracy, war, and lawful authority. Correspondingly, Part 4.4. accounts for the provincialisation of dynastic power with the rise of capitalist social relations in the Netherlands and England.

Part 4.5. explores the multifaceted juridical transformation that placed tremendous amounts of geopolitical and social pressure on France, the most powerful actor within Europe's dynastic order. These pressures resulted in compounding contradictions that ultimately sparked the French Revolution. With this occurrence, expansionist assertions of popular will by French revolutionary proponents, and the responses to them, uprooted existing legal understandings regarding justifications for war, political community, and sovereign authority. Part 4.6. then examines the aftermath of the French Revolution and the impossibility of any comprehensive return to the pre-existing dynastic order. In addition to absolute contradictions reaching their breaking point, the assertions of popular will that fuelled the Revolution could not be extinguished. Thus, the stage was set for a new synthesis in configuring the relationship between popular will, international law, and the nation-state form.

From this foundation, Chapter V's accounts for how, following the end of the French revolutionary wars in 1815, the shards of revolutionary popular will merged with anti-revolutionist conservatism to create Europe's bounded system of nation-states. This formed the base presumption of international law as it emerged as a self-aware disciplinary project. From here, Chapter VI returns to the Western Hemisphere to show how the emergence of new states in Latin America showcased both the global forces that gave rise to the French Revolution and its consequential aftermath. Finally, Chapter VII considers the French revolutionary legacy in relation to later attempts to radically challenge existing systems and what this means for the relationship between popular will and international law. Here I turn away from France itself and focus on Marxist attempts to pursue revolutionary emancipation

through structural transformation. However, as a matter of material distinction, the popular will-based legal order the Marxists revolutionaries revolted against proved far more durable than the dynastic legal order the French revolutionaries revolted against.

4.2. Rupturing the *Ancien Regime*

As Eric Hobsbawm famously noted in *The Age of Revolutions*, the 1789 overthrow of the Bourbon monarchy in France became the model for political transformation universalized across numerous historical and cultural contexts far different from its original setting.[1] Ironically, the profound and complicated nature of this event has received minimal systemic treatment within international legal theory.[2] This conceptual deficiency is largely attributable to the narrative of a secular international modernity arising through the 1648 Peace of Westphalia. Under this reigning narrative, the French Revolution is easily conceivable as a domestic political shift within a bounded sovereign state that only generated international legal issues when borders were crossed as a result of expansionist/interventionist activities.[3] Moreover, when the French Revolution is viewed as an event of international legal significance it is typically in reference to international human rights where the 1793 *Declaration of the Rights of Man and the Citizen* serves as a key formative source.[4] Thus, theorizing French Revolution's role concerning international law's foundational premises of sovereign statehood can easily invite a response from the human

[1] See Hobsbawm 1975, 74-75.

[2] For a rare exception, albeit from the perspective of a historian as opposed to a lawyer, see Kolla, 2017.

[3] Even then such activities were well within the sovereign prerogative to wage war given their occurrence prior to the UN Charter's general ban on the use of force in international relations.

[4] See e.g. Marks 1998.

rights narrative where the extension of individual liberty correlates to the decline of state sovereignty.[5]

However, in continuing with the premise that Westphalia dealt with the dynastic sovereignty of individual monarchs as opposed to popular sovereignty of underlying political communities, a more nuanced account of the French Revolution and its aftermath is needed. After all, while the reigning image of 'liberal messianic' international legal consciousness involves the steadfast adherence to an 'anti-sovereign' worldview,[6] an uncritical acceptance of this dichotomy fails to account for the more complex reality whereby the 'liberal messianic' actions and motivations of the French revolutionaries played a fundamental role in constructing our modern imagination of the sovereign state. A starting point for theoretically reconciling that which contemporary international legal discourse has labelled contradictory is the account of this event in Wilhelm Grewe's vast international legal history, according to which:

> [t]he [French] Revolution shook the foundations of the international legal community, anchored as they were in the European-Christian communitarian consciousness and the dynastic solidarity of princes. It sought to replace the particular community of Christian Europe with the abstract idea of mankind…The most important result of the Revolution in terms of the law of nations was the *full emancipation of the sovereign nation state*, which occurred over this process of dissolution. It amounted to a sharpening and extension of the concept of sovereignty to include the principle of nationality.[7]

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[5] See e.g., Donnelley 1998; Franck 1999; Peters 2009. On the challenge of these assertions to traditional international legal theory, see Simpson 2001.

[6] On this characterization within contemporary discourses, see Roth 2003.

[7] Grewe 2000, 414 (emphasis added).

The important point here is that the absolutist realm justified by personalized dynastic power and the modern nation-state justified by depersonalized 'popular will' are two distinct species of political authority. It was through the French Revolutionary crucible that these two irreconcilable forms of authority clashed head-on. This is especially relevant when accounting for the development of modern international legal standing, its universalizing trajectory, and its equation of 'sovereignty' with '*popular* sovereignty.'[8] To account for this development, we must first demystify any notion that socially transformative assertions of popular will in Europe were unique to France. Additionally, we also must account for the unique material conditions that caused the French Revolution to shatter the foundations of the same international legal order that certain previous popular sovereignty expressions were more or less incorporated into.[9] The French Revolution thus challenged the reigning assumption that only small actors, such as Swiss Cantons and Italian city-states, could possess a republican or otherwise popular will-based, form of government.[10] According to prevailing views, such an arrangement was inappropriate for the dynastic great powers whose monarchic institutions were deemed vital to maintaining order within the systemic context of absolutist military competition.[11]

In providing such an account, we must consider the factors that made the European dynastic balance of power system so weak as to allow the rupture of the French Revolution to occur. It was because of these weaknesses that the victorious architects of the Concert of Europe could not simply return to the pre-Revolutionary

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[8] Gathii 1996, 2006-2007. The profound character of this universalization can be observed by the reality that even avowedly non/anti-liberal regimes are nonetheless presumed to be empowered by the will of their people, see Roth 2012.

[9] While a comprehensive analysis of these revolutionary movements exceeds the scope of this argument, for an in-depth account, see Palmer 2014.

[10] Bukovansky 1999, 205.

[11] Ibid.

order despite occupying positions of hegemonic political authority.[12] As such, understanding them is crucial for theorizing the overall evolution of the modern international legal order where *de facto* authority legitimizes sovereignty in the name of popular will. According to Edward Keene, the two main factors that progressively generated these points of vulnerability within the old European system were the development of: 1) rationalistic modes territorial authority/administration and 2) the emergence of new governmental forms that challenged the methods of labelling so crucial to a system premised on inter-dynastic rights and privileges.[13]

With the first factor, the rise of statistical quantification of '…the populations, territory, military forces, and commercial activity of various states…' emerged as a rival form of political knowledge that competed with earlier practices of dynastic statecraft and diplomacy (especially the discourse of compounded dynastic rivalry and alliance deemed the 'balance of power').[14] Such methods augmented the rationalistic modes of liberal Enlightenment thinking while deeply challenging the conservative worldview that formed the core of balance of power-oriented discourses.[15] As for the second factor, the emergence of new and hybrid forms of political authority reflected the deeper transformations occurring within the global system whereby existing modalities of power became stagnant while new political formations were provided with unparalleled opportunities.[16]

4.3. Origins of Rationalized Territorial Authority

[12] See Keene 2013a, 1087.

[13] Ibid. 1087-1089.

[14] Ibid. 1088-1089. For a study of early modern European competition based on these presumptions, see Nexon 2009.

[15] Vagts and Vagts 1979, 565.

[16] Keene provides the example of the Dutch United Provinces in this capacity, Keene 2013a, 1087.

4.3.1. What Westphalia Actually Did

To theorize the 'rationalized turn,' we must account for the conditions that made the rational administration of European territory an imperative in the first instance. In addressing this point, we can articulate a link between the material transformations spurred by the European-New World encounter detailed in the previous chapter and the ideological transformation of Europe itself. According to Jennifer Beard's genealogy of the Christian theological origins of 'development,' the disciplinary functions of confessing sin in exchange for redemptive membership within a universal scheme of divinity was inexorably altered by this encounter.[17] For in defining the 'New World' as a space of unredeemed souls in need of salvation, European Christendom was able to fashion itself as an 'Old World' discharged from the debt of original sin and tasked with its infamous 'civilizing mission.'[18] The need to accumulate knowledge in furtherance of this mission paved the way for a greater rationalistic turn in Christian theology.[19]

However, this conceptual reorientation lead to the schisms of the Protestant Reformation and the ensuing spiritual crisis, characterized by religious wars of unprecedented violence, brought about by the Catholic Church's loss of its monopoly on truth.[20] Against this backdrop of a hierarchical church faltering in its provision of an ever-expanding source of universally legitimate order perfecting all in its wake, the concept of the nation-state emerged as an alternative structure of authority where the achievement of perfection was already presumed.[21] These issues of violence, political organization, and missionary civilization reached their apex through the conclusion of the Thirty-Years War via the 1648 Peace of Westphalia whereby

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[17] Beard 2007.

[18] Ibid. 55-57.

[19] Ibid. 77.

[20] Ibid. 38-39.

[21] See Ibid. 89-123.

a plurality of perfect, inviolable sovereigns were tasked with the divine (anti-pluralist) mandate of 'developing' the rest of the world.[22] Thus, in the words of Peter Fitzpatrick, '[e]ven as that rupture serves to found a diversity of sites of power, these operate as an imperium attuned to uniform effect. The dictates of 'development'…are not attuned to diversity.'[23]

While deeply conceptual, Beard's account nonetheless possesses a high degree of synergy with materialist theories. For in a capacity analogous to Benno Teschke's above-discussed portrayal of the Westphalian origins of secular international modernity as a myth, Beard shows how the settlement of 1648 was in no way an abandonment of divinity as a basis for authority but rather its reconfiguration into the territorialized form of the sovereign nation-state embodied in the person of its ruler.[24] After all, the notion of 'religious freedom' celebrated as progress by the articulators of the orthodox Westphalian narrative concerned the religious expression of monarchs existing in an established order of dynastic legitimacy as opposed to individual subjects.[25] Here the inadmissibility of divergent Christian practices as a basis for waging war may have limited the scope of geopolitical accumulation on the basis of dynastic rights, but it in no way transcended them.[26] As such, despite repeated conflations, Westphalian sovereignty was readily distinct from secular liberal notions of equality as they applied to both subjects within a sovereign entity and sovereign entities within an international system.

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[22] Ibid. 125-126.

[23] Fitzpatrick 2016, 14.

[24] This scheme was the 'King's Two Bodies' whereby the physical person of the monarch and the physical space of the realm construct one co-extensive mode of territorial authority, see Kantorowicz 1998.

[25] Teschke 2003, 240-241.

[26] See Ibid. 241-243.

Furthermore, by emphasizing the 'New World' as a catalyst for this ideological transformation, Beard's account addresses the critique of theories that locate international modernity's emerging internally and exclusively within Europe.[27] Her,e in manner very much in line with Beard's argument that the European-New World encounter radically necessitated new forms of knowledge while maintaining its self-centring claims to truth, Alex Anievas and Kerem Nisacioglu have shown that this encounter lead to the modern concept of bounded territorial sovereignty as a means of colonizers to strengthen their claims.[28] Given the ever-shifting boundaries of Europe's territorial polities due to the vindication of dynastic right via wars of geopolitical accumulation, the novelty of territorial coherence is difficult to overstate.[29] As such, while revisionist theological concepts of perfected order provided substance to the ideology of the nation-state, territoriality provided its form.[30] This revisionist account of Westphalia as a reconfiguration of existing systems, as opposed to a rupturing transformation, necessarily raises the question as to how this changed relationships of territorial authority on the ground.

Through it limited transcendent justifications as a basis for action by dynastic princes, the legal science linking authority, territoriality, and divinity took an in-

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[27] See Anievas and Nisancioglu 2015, 30-32.

[28] Ibid. 134-139.

[29] See Ibid. 137-140.

[30] However it is important to note that here 'territoriality' should not be conflated with 'bounded territoriality' through rigidly delineated borders. According to one apt description of this context:

> Political units were constituted based both on personal feudal bonds between actors and on territorial notions of control. Yet the form of territoriality in this system was very different from the exclusive, linearly bounded territorial authority of the modern world. Instead, territory was understood as a series of places, with authority radiating outward from centers rather than inward from linear boundaries.

Branch 2010, 282; see also Grewe 2000, 64-67.

ward turn that corresponded to the Westphalian reconfiguration. This became evident in the German principalities of the Holy Roman Empire where the need to develop juridical arguments viewed as mutually legitimate amongst princes of different faiths lead to the institutional enunciation of natural law principles universally determinable through the exercise of reason.[31] In this context, a key development was the revival of Roman law in Western Europe.[32] Through this merger of the natural law and Roman law ethos, knowledge of 'nature' became linked to a prince's political authority and this methodologically entailed '…reading Roman law historically and using its scientific form and vocabulary to organize indigenous laws for the purpose of effective territorial government.'[33]

However, this Roman law revival was in no way a full-scale displacement of theological influence. After all, the very concepts of Roman law invoked by these natural jurists bore the ingrained influence of the Christian scholastic legacy.[34] According to Randall Lesaffer: '[t]he merging of Roman law and canon law in medieval jurisprudence had above all served to liberate Roman law of its casuistic technicalities by imbedding them in the more general precepts and principles that radiated from moral theology and canon law.'[35] As such, Roman law in the immediate post-Westphalian context was essentially a 'gap-filler' mechanism that allowed legal innovations to facilitate the shift from the conception of a unified and expanding Christendom to a plurality of bounded sovereigns that nonetheless affirmed Christian notions of perfection, under the banner of *jus publicum Europeaum*.[36] Thus, the Roman law revival forged the synthesis identified by Perry Anderson whereby

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[31] Koskenniemi 2009, 48.

[32] For a broader contextual study of the Roman law in the context of European history, see Stein 1999.

[33] Ibid. 50.

[34] See Lesaffer 2005, 35-37.

[35] Ibid. 37.

[36] On this influence, see Lesaffer 2016, 52-57; see also Greenwood 2014.

the modes of supreme juridical authority that defined the ancient world were remobilized to legitimize the continuity of feudal social relations in the form of 'absolutism.'[37]

4.3.2. Territorial Knowledge as Princely Obligation

In accounting for the ways in which this shift in legal justification contributed to the re-imagination of territorial authority, a useful endeavour is to historicize Michel Foucault's critique of sovereign power. According to this critique, the fixation upon a ruling authority embodied in the person of the sovereign obscures the larger structures that construct identity and direct life-functions through categories such as 'territory,' 'population,' and 'security.'[38] As such, to view power and control as attributable to the rules and decrees directly advanced by an organized government directs attention away from the process of 'governmentality' whereby individuals self-impose standards as a means of conforming with an idealized conceptions of 'normal' subjectivity.[39]

While Foucault called for modes of analysis that decentred orthodox conceptions of sovereignty, post-Westphalian conceptions of the natural law and its relation to

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[37] Anderson 2013, 24-29; Teschke has critiqued Anderson's notion that the Roman law contributed by to the rise of capitalism by enabling commercial transactions. For Teschke, such a move to capitalism could not arise within the old absolutist structures and this necessitated the formation of the modern capitalist state in England, see Teschke 2003, 158-165. However, this critique speaks to a larger issue within Teschke's account where his attempt to account for the specifics material facts and distinctions that define capitalist social relations detracts from the ways in which modes of ideological, and especially juridical, modes of abstraction provides answers to the questions he poses, see Mieville 2005, 214-224. It is for this reason that the historical sociological analysis of the type Teschke undertakes needs to be coupled with an understanding of the specific function of 'juridical thinking' as a uniquely powerful mode of abstraction.

[38] See Foucault 2004.

[39] Ibid.

territory actively address the close relationship between 'government' and 'governmentality.' This was especially true in the theories of Emer de Vattel's chief influence Christian Wolff (1679-1754), one of the first jurists to theorize the nation as an entity distinct from either the individual ruler or state apparatus, through an analysis strikingly similar Foucault's.[40] For Wolff, the nation's duties were to perfect itself in a manner that required knowledge of the realm's material existence as a necessary condition for the accomplishment of these duties.[41] Thus, according to Wolff:

> It is plainly evident that for this knowledge is required an accurate geographical map of the whole territory and of the several parts, under whatsoever name they may come, an entire natural history of the whole territory, perfectly accurate measurement of all the fields, meadows, woods, cities, towns, villages, and so on, finally a trustworthy description of the inhabitants of all places and of those which concerns them in any manner. When this knowledge of the territory and its inhabitants is prepared for the use of the ruler of the state and consequently of those whose advice and services he uses in administering the state, statecraft will readily tell what can be communicated safely to the public, and what ought to be concealed, least it betray the country to others.[42]

While applications of Wolff's call to rationally define the social world did not typically result in the just outcomes he envisioned, we cannot deny the force of the new modalities of power that emerged from this rationalist conception of territorial administration/authority. Thus, while Wolff anticipated the confluence of 'government' and 'governmentality' to be a virtuous exercise in the mutual recognition of universal reason, Foucault had the benefit of centuries of hindsight regarding the failure of grandiose schemes when articulating his critical stance towards attempts

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[40] Craven 2012b, 636.

[41] Ibid. 636-637.

[42] Quoted in Ibid. 637.

to unify the will of a population with an all-encompassing scheme of perfection.[43] Moreover, the fact that grand conceptions of a world run according to natural law in the form of Wolff's global republic (c*ivitas maxima*) failed to materialize,[44] his theoretical presumption regarding rationally ordered territorial authority persisted as a largely naturalized background assumption (thus concealing the view that such rationality is a deliberate project of ordering life through contingent regimes of truth).[45]

The entrenchment this naturalization arguably emanated from Vattel's rejection of *civitas maxima* in exchange for the view that a no natural justice existed between individual nations.[46] This was accompanied by an epistemic shift whereby economics, as opposed to law, ultimately becoming the new medium for determining the rules of natural order that harmoniously bound peoples on a global scale.[47] With the triumph of capitalism and its foundational ideological distinction between 'public' practices of politics/government and 'private' practices of economic accumulation, there became minimal incentive to question this assumption.[48] This mystification was furthered by the eventual emergence of what Paul Kahn identified as a dual-specialization of the modern state whereby land was simultaneous governed under a regime of 'property' rationally justified by the rule of law, and a regime of 'territory' whose very existence constitutes an act of *a priori* justification asserted against the rest of the world.[49] However, while this discourse of territorialized rationality is important, to situate its impact within a materialist analysis, we must

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[43] After all, numerous projects seeking mass-scale social transformation inspired by an ethos of 'high modernity' have resulted in untold amounts of human suffering, see Scott 1998.

[44] On this concept see Onuf 1994.

[45] See Elden 2013.

[46] Vattel 1852 [1758], xiii.

[47] Koskenniemi 2009, 65-66.

[48] See Rosenberg 1994.

[49] See Kahn 2013, 202-204.

understand these ideological developments as they were shaped in conjunction with prevailing mode of social reproduction. In this context, that meant perpetually shifting patterns of geopolitical accumulation through war.

4.3.3. Geopolitical Accumulation and Contingent War

In theorizing the ends of the all-pervading turn to rational territorial administration, the pre-capitalist practice of warfare-based geopolitical accumulation amongst competing dynastic factions forms a vital consideration.[50] On this subject of international law and early modern warfare, a deeply influential account within critical international theory is Carl Schmitt's *The Nomos of the Earth* where it is argued that the Peace of Westphalia ushered in a 'Golden Age of War' amongst European sovereigns.[51] Here, the absolute prerogative exercised by sovereigns had a limiting effect on the duration and brutality of war for the parties mutually respected one another as a 'just enemies' which in turn limited martial engagements to narrow resolvable disputes.[52] On Schmitt's account, this 'Golden Age' ended with the introduction of humanitarian considerations into the legal and ethical practices of warfare.[53] For Schmitt, such normative judgements imperilled the concept of the 'just enemy' by creating a normatively loaded 'discriminatory concept of war' whereby those who violated humanitarian rules existed outside the protection of

[50] As a historical matter, these conflicts were often triggered when established customs surrounding dynastic succession either failed to resolve an issue or were otherwise contested within this epistemic framework. It is for this reason that so many of the wars that occurred in this immediate led-up to the French Revolution were 'wars of succession' including: the War of Spanish Succession (1702-1713/1714), the War of Polish Succession (1733-1738), the War of Austrian Succession (1740-1748), and the War of Bavarian Succession (1778-1789), Teschke 2003, 225-227; see also Liu 2019, 17-27.

[51] Schmitt 2003.

[52] Ibid. 143-147.

[53] Ibid. 170-171.

those rules.[54] Once this view gained traction, the traditional constraints on European inter-sovereign war were unmade; enemies now became 'enemies of humanity' whose absolute destruction was warranted as if they were pirates, criminals, or non-European 'savages.'[55]

However, the problem with Schmitt's analysis of war, and international legal and political theory more generally, is that it is disconnect from the historical sociological realities of the events it seeks to explain.[56] As such, his portray of 'Golden Age' warfare is plainly contradicted by the escalating frequency and intensity of fighting that occurred within the timeframe he declares to be relatively 'humane.'[57] In seeking an alternative theory better able to account for these realities, a promising starting point is Tarak Barkawi and Shane Brighton's endeavour to theorize 'war' as a centralized object of inquiry.[58] For Barkawi and Brighton, the central distinguishing feature of war is its reality of radical contingency given that battlefield conditions exposes its participants to vast range of possibilities and risks that no amount of advantage or preparation can entirely eliminate.[59] This constructs a concept deemed War/Truth whereby the reality of radical contingency makes all claims that speculate on the outcome of warfare inherently contestable.[60] Thus, authoritative proclamations on war are a technology of discursive power that, in and of itself, does not possess any inherently natural justification.[61] As such, claims about society and/or culture bound to practices of war struggle to maintain coherence when

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[54] Ibid. 142.

[55] Ibid.

[56] See Koskenniemi 2004, 496; Teschke 2011, 182.

[57] Ibid. 203-207.

[58] The argument advanced here is that 'war' should be analysed as central concept similar to studies of 'economy,' 'society,' or 'politics,' Barkawi and Brighton 2011, 130.

[59] Ibid. 138.

[60] Ibid. 140.

[61] Ibid.

battlefield events fail to conform to established expectations.[62] War then acts as a catalyst for radical shifts in identity and understanding in a manner rivalled by few other human activities.[63]

In applying this insight to the Westphalian reconfiguration of sovereignty, what the 1648 settlement did was eliminate the pursuit of an expanding universal Christendom as a justification for war between Europe's dynastic actors. Thus, the loss of transcendent truth as a self-contained justification for war meant a significant change to the particular War/Truth paradigm that evolved through centuries of intra-European fighting.[64] In this post-Westphalian context, the shift in the War/Truth paradigm was intimately connected to the above-discussed rise of rationalized territorial authority in service of the *a priori* perfect nation-state administered by a ruler with an obligation to accumulate and maintain knowledge in fulfilment of the national ends of self-preservation and self-perfection under the natural law.

It was against this backdrop that warfare became legalized on a widespread scale, but not in the contemporary senses of vastly narrowing the justifications for resorting to war (*jus ad bellum*) or regulating the conduct of hostilities to achieve humanitarian ends (*jus in bello*). Rather, warfare in this early modern era became increasingly subject to regimes of *jus post bellum*, or the 'Law of Victory,' that governed

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[62] Ibid.

[63] See Barkawi 2004.

[64] It was in this shifting context that standardised labelling of hierarchically-ranked European dynastic developed new dimensions of significance. According to Keene's study of this 'naming of powers' as a formalisation of early modern diplomacy:

> By bringing several different actors together under a single undifferentiated category, terms such as prince and potentate emphasised similar characteristics, permitting the analysis at the more general level of their rights or behaviour as a group. A likely reason for the growing popularity of such generic terms was that they suited a world where the differences between kings and emperors were gradually being broken down.

Keene 2013b, 270.

the distribution of property, rights, and obligations amongst the victors and vanquished in a capacity mutually recognized as legitimate amongst dynastic actors.[65] As such, it functioned as a renewed legal basis for delineating what was acceptable under dynastic practices of geopolitical accumulation. This form of legalization functioned to curb the divinity motivated religious animosity that characterized the Wars of Religion and their lack of any upward limitation on the escalation of violence.[66] However, this development should not be conflated with a unidirectional move towards secularization. Rather, the source of these legal innovations was the religious just war tradition that was only formally displaced by modern regimes of codification first introduced in the nineteenth century.[67] As such, the legalization of warfare facilitated the social reproduction of dynastic actors who justified their authority through feudal, personalized, and divine invocations. This explanation is eminently consistent with the notion that Westphalia was a consequential shift that territorialized divinity, but in no way displaced it.

Thus, such the legal regime governing the disposition of post-conflict rights and obligations served to develop, entrench, and transmit the conceptions of rationalized territorial authority. In other words, the post-Westphalian War/Truth paradigm played in indispensable role in building the emerging Territory/Truth paradigm. Against this backdrop, the goal was not to eliminate, or even limit, the radical contingency associated with war, but rather to organize class, authority, and social property relations/expectations around this contingency through regimes of legalization. Here, the War/Truth paradigm constructed elaborate identities while simultaneously exposing them to the risks of demolishment via the radical contingency inherent in war. However, law maintained a synergistic relationship with this paradigm by providing identities with a basis for continuity and reconstruction regardless of how fractured they become as a result of war.

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[65] Whitman 2012.

[66] Ibid.

[67] Ibid. 110-111.

This account admittedly overlaps with Schmitt's theory to the extent that both portrayals depict mutually recognizable patterns of order and predictability that emerged through interaction between actors unbound by formal constraints beyond their self-interest. However, this account moves beyond the Schmitt's analytically-limiting monolithic ontology of warfare through its ability to link these intertwined practices of war, law, and rationalized territorial authority to larger patterns of social change. Articulating this link requires an analysis of the practice responsible for organizing and administering these perpetual developments; bureaucracy.

4.3.4. Bureaucracy and Its Contradictions

In executing this undertaking, much insight can be gained from the work of Pierre Bourdieu. For Bourdieu social organization forms around discrete 'fields' of practice that contain their own unique manifestations of knowledge and custom. However, this functional specialization does not render fields autonomous, for they are perpetually interacting with other fields and are shaped by the dictates and interests of the dominant forces within the greater society.[68] Towards this end, fields act as the drivers of state authority not just by maintaining the monopoly on physical coercion in the Weberian sense, but also through maintaining a monopoly on symbolic legitimation.[69] By applying this analytical frame to the context of increasingly rationalized territorial authority within a system that reproduced itself via personalized, dynastic practices of geopolitical accumulation the bureaucratic field - and the related juridical field - faced a growing contradiction when managing increasingly divergent justifications for control.

In outlining the anatomy of this contradiction, on the one hand, there was increased accumulation of rational knowledge about territories subject to regimes of transfer, exchange, and obligation governed by the legal sensibilities designed to insulate the

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[68] For an overview of Bourdieu's theory, see Bourdieu 1998.

[69] For a detailed account of 'the state' in these terms, see Bourdieu 2014.

contingencies of increasingly prevalent wars.[70] This privileged depersonalized forms of knowledge. After all, without a reliable mechanism for organizing and claiming these interests in a relatively coherent capacity, these systems would be hamstrung in providing reliable benefits to those deriving power from them. This is especially true for the relatively autonomous juridical field, which derives its authority from limiting membership to a closed group of individuals who monopolize the ability to dispense legal justification and rationality in a depersonalized capacity.[71] Without these bureaucratic functions, a prince was profoundly limited in his ability to provide food, supplies, and wages to the armed forces he needed to participate in the warfare demanded of the geopolitical accumulation that formed the basis of absolutist social reproduction. Relatedly, without adequate legal justification a prince was profoundly limited in his ability to articulate the customary claims to the spoils of war (especially territory) which provided the primary means of accumulating power within this system.

On the other hand, the dynastic princes who relied upon this depersonalized bureaucrat expertise, exercised authority on a personalised basis. As Bourdieu has shown, the original model for the princely realm was literally the 'King's House.'[72] Given that dynastic power was directly premised on maintaining the purity of a bloodline, monarchs endemically feared that the bureaucrats and advisors they relied upon might become entwined within the dynastic reproduction process in a literal biological sense. This could lead procreating advisors to subsequently claim genealogical lineages of their own in a manner that exponentially increased the class of dynastic heirs and diluted the power of those who could claim obedience

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[70] This was especially true following the Seven Years War and the pressure it placed on Europe's dynastic absolutist regimes to make the military and fiscal reforms needed to maintain competitive, see Scott 2011; see also Chapter III, Part 3.4.5.

[71] Bourdieu 1987.

[72] Bourdieu 2004.

and material wealth based on dynastic rights.[73] As a means of protecting this ruling class exclusivity, royal advisors were often individuals who could not engage in the physical act of reproduction (at least in a socially validated capacity) including eunuchs, celibate clergy, and foreigners/ethnic minorities without rights or connections within their realms of operation.[74] These practices of personalized loyalty maintained a high degree of efficiency in the early feudal era where authority was decentralized amongst a nobility where individual lords were limited in their scope of authority.

However, the process of absolutist centralization rendered the personalized basis for legitimate authority increasingly attenuated while simultaneously producing the need for ever-growing ranks of bureaucrats to manage increasingly complex tasks of centralized governance.[75] While the sharpest edges of this contradiction between personalized authority and depersonalized knowledge were alleviated by the development of the 'reason of state' concept[76] (as well as the post-Westphalian reconfiguration of divinity that granted a mandate of perfection to territorial sovereigns), the real challenge occurred when new governmental forms able to transcend this contradiction became consequential political actors. This materialized with the rise of political forms directly adapted to a liberal capitalist political economy, first in the form of the Seven Dutch Republics, and later, more comprehensively, with England's transition into the first modern state.

4.4. The Provincialisation of Dynastic Power

4.4.1. Dutch Republican Uprising

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[73] Ibid. 21-22.

[74] Ibid. 23-24.

[75] Ibid. 25.

[76] See Ibid. 28-30.

In analysing *de facto* authority's function as an international legal mechanism that accommodates revolutionary aspirations in the name of popular will within the nation-state framework, the Dutch Revolt (1566-1648) provides an illuminating study of this phenomenon's prehistory. Here, the Dutch Revolt occurred in the name of republican popular will that materially and ideologically opposed the prevailing systems of dynastic legitimacy and geopolitical accumulation. However, the lack of the modern nation-state concept meant that resistance by the Seven Dutch Republics against the Spanish Monarchy was without a strong legal basis for claiming sovereign independence as demonstrated by 'facts on the ground.' However, before a granting of Dutch independence within the confines of the prevailing dynastic system via the Peace of Westphalia's component Treaty of Munster, the Dutch Revolt showed how assertions of popular will are limited if there is no juridical concept of territorial authority available to support them.

As discussed in the previous chapter, the colonial extraction of mineral wealth from the New World ended up entrenching Spain within a system of stagnant feudalism that allowed the Dutch to reap their 'privilege of backwardness.'[77] It was here that the Dutch usage of Spanish plunder to finance an innovative system of overseas commerce in the East Indies generated extensive social transformation in the Dutch countryside.[78] 'This led to forms of 'proto-industrial' development, in which merchant entrepreneurs invested directly in rural industries and peasant production became increasingly geared toward the world market.'[79] However, this nascent capitalist development, and its deviation from the dominant socio-economic model of feudalism, ultimately lead to conflict with the Hapsburg Spanish King Philip II, who dynastically inherited the Netherlands in 1556. Here, the Hapsburg Empire's rivalry with the Franco-Ottoman Alliance placed tremendous pressure on the subordinated Netherlands to provide revenue, manpower and supplies for waging this

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[77] See Anievas and Nisancioglu 2015, 142-146.

[78] Ibid. 183.

[79] Ibid.

perpetual dynastic warfare.[80] Yet, this burdensome requisitioning of resources eventually led the Dutch to revolt.[81] Like so many other conflicts within this general timeframe, social competition came to express itself though religious schisms whereby the Catholic Spanish Monarchy was pitted against the Protestant Dutch republicans.[82]

In waging the revolt, the Dutch Republics had distinct topographical advantages. Flood-prone marshlands created difficulties for invading armies, while access to seaports supplied resources generated by the trans-oceanic Dutch mercantile empire.[83] Furthermore, the perils of indebtedness and military overreach endemic to Spain's dynastic system prevented a decisive military victory against a highly resilient and well-supplied Dutch resistance.[84] Directly related to the greater ease of acquiring material wealth from colonial ventures, the Dutch also possessed a more efficient administrative structures better able to avoid the contradictions of personalized bureaucracy discussed above. According to Andrew Fitzmaurice, it is plausible that many of the institutional and organizational techniques developed in the context of the Dutch East India Company's overseas exploits were ultimately implemented in Europe itself.[85] Thus, (building on its capitalist advantages) by developing practices in a colonial setting unconstrained by the strictures of European traditions, the Dutch possessed innovations that allowed them to maintain a fight with larger European military powers constrained by contradictory bureaucratic organs.

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[80] Ibid. 187.

[81] Ibid. 187-188.

[82] Ibid. 186.

[83] Parker 1975, 55-56.

[84] See Brenner 2001, 230.

[85] In accounting for the Dutch reception of innovations in this context of long-term revolt, it must be noted that the empire-managing Dutch East India Company functioned as a laboratory for developing numerous ideological features of modern European statehood, see Fitzmaurice 2017, 101-103.

Connecting these various points provides a body of explanations as to why the Dutch maintained a geopolitical standstill with the Spaniards for more than eight decades. However, this lack of quick resolution also highlights the contingent and ideological nature of modern international legal standing despite the ethos of timelessness that frames the question of 'objective, *de facto* territorial authority.'[86] In this way, the Dutch Revolt was ahead of its time by presenting a situation where the assertion of popular will was coupled with the attainment of a strong degree of *de facto* authority generated by independence movement's opposition of an external power. However, the prevalence of dynastic legitimacy upheld a system of inter-polity juridical relations where 'facts on the ground' were not a self-justification for sovereign autonomy.[87]

Unfortunately, the systemic clash between dynastic power and emerging capitalist modernity exemplified by the Dutch Revolt is obscured by the reigning Westphalian myth. Under this narrative, the granting of independence to the United Provinces (the Seven Dutch Republics) is incorporated into the resolution of the Thirty Years War despite the fact the Dutch Revolt had been raging fifty years before the outbreak of that conflict.[88] This view is furthered by the Dutch Revolt's dimension of religious antagonism and its contribution to the construction of a reified meta-narrative of 'Catholics vs. Protestants.' Recourse to this frame obscures material analysis of how localized, yet interconnected, conflicts emanating from diverging

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[86] However, despite its similarities to latter events, it must be remembered that numerous understandings in context of the Dutch Revolt were still very much tied to a presumption of dynastic legitimacy. On this point, according to Han Liu: 'Unlike the American Revolution, the king was abjured not because of the origin of right, but because of his abuse of that right.' Liu 2019, 39.

[87] See Ibid. 38-41

[88] See Parker 1975, 72.

forms of social reproduction that were ultimately expressed through sectarian rhetoric.[89] Furthermore, the fact that a republican system was validated by the Westphalia settlement lends credence to the belief that 1648 marked the beginning of a genuinely pluralist international order.[90]

The significance of this event is further concealed by the influence of Hugo Grotius, international law's great founding father figure. As a steadfast advocate for Dutch independence, he framed the Revolt in a manner alien to our modern conceptions of the nation-state and, correspondingly, the distinction between public and private. While such structures are implicitly assumed within contemporary international legal discourse, in the context of the Dutch Revolt, it was their unsettled that nature allowed Grotius to construct a legal justification for independence with such great creativity. As Keene has detailed, Grotius approached the question of a people's natural right to declare independence from a tyrant with great caution.[91] After all, advocating the unqualified right to declare sovereign independence as a matter of natural law would produce a massive amount of uncertainty regarding whose authority was legitimate. This could easily invited chaotic upheaval capable of undermining the Grotian goal of promoting well-ordered relations between sovereigns.

However, in denying the general validity of independence claims, he provides a caveat by proclaiming that a people victorious in a just war against their sovereign can legitimately force the ruler to divide its sovereignty by conceding governance functions to the victorious rebels. In other words, the control over the institutions of state administration was a spoil of war that could be maintained after hostilities

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[89] On religious rhetoric and discourse in the context of the Dutch Revolt, van Gelderen 1992, 62-109, 213-259.

[90] This in turn allows to ignore how Westphalia was rooted in an understanding of dynastic power fundamentally at odds with modern sovereign equality, see Teschke 2003, 241.

[91] Keene 2002, 45-47.

had ceased.[92] Significantly, Grotius's formulation occurred through a highly flexible approach to the distinction between public and private. As such, his justification for rebels attaining autonomy occurred through to analogy ships and cargo captured in wartime that legitimately became the private property of their captors under the law of the prize.[93] Additionally, this justification was made possible through an understanding of divisible sovereignty that is exceedingly difficult imagine in contemporary international legal terms where the nation-state's the robust right to territorial integrity is based on the presumption that sovereignty is indivisible.[94] In light of this situation, we must historicize the way in which indivisible sovereignty and the modern public/private division became materially entrenched *after* the Dutch Revolt. This entails an account of seventeenth century England's emergence as the first modern sovereign nation-state.

4.4.2. English Nation-State Modernity

As discussed in the last chapter, through class-based shifts in domestic agricultural production combined with innovative colonial practices, England transitioned from feudalism to become the first modern capitalist state.[95] This modernity took the form of a constitutional-parliamentary structure that maintained a stark ideological distinction between 'private' economic activity and the 'public' domain of politics/government.[96] Such ideological innovations gave rise to a truly depersonalized bureaucracy where the abstract state operated according to standardized procedures, was separated from any dynastically empowered individuals, and was managed by

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[92] Ibid. 49-50.

[93] Ibid. 50.

[94] Ibid. 48-49.

[95] See Chapter III, Part 3.3.2.

[96] On the ideology of 'purity' centred by this distinction, see Wood 2015.

functionaries loyal to the abstraction, and thus severed from the bonds of personalized obligation.[97] As a result, England was breaking free of the above-discussed contradiction of absolutist bureaucracy where depersonalized knowledge practices tensely coexisted alongside personalized modes of authority. To better understand the entrenchment of English modernity, and its impact on the rest of the world, we must consider the proximate geopolitical pressures placed on England by the continental dynastic system it was transitioning away from.

In addition to the changing class dynamics that lead to the English Civil War (1642-1651), the consolidation of the modern English state was driven by numerous conflicts (including the Anglo-Dutch Wars and Anglo-French Wars) which prompted additional rounds of military-fiscal innovation.[98] Furthermore, attempts to reintroduce the monarchical absolutism (which could systemically undermine capitalist innovation) were finally eliminated by the 1688 'Glorious Revolution' which lead to the constitutional-monarchical reign of William of Orange, whose invasion from the Netherlands was prompted by a quest for an alliance with England in a war against France.[99] Thus in both the Netherlands and England, the vestiges of monarchical authority, that coexisted alongside emerging forces of modernity, opposed absolutism by making usage of the very dynastic practices and traditions that legitimized absolutism.

Viewing all of this in the aggregate, we can observe how England's 'Administrative Revolution' forged the attributes of nation-state modernity via its construction of a depersonalized bureaucracy premised on an ideological distinction between public and private.[100] In contextualizing how this development furthered the emergence of

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[97] Teschke 2003, 253-255.

[98] Anievas 2015, 851.

[99] Ibid. 852. For a detailed account see Pincus 2009.

[100] On this process see Brewer 1990; However, as detailed in the last chapter, it was not until the American Revolution that a society exemplifying this form through internally-generated 'facts on the ground' achieved international legal standing in direct repudiation of all forms of monarchial authority, see Chapter III, Part 3.6.

de facto authority as the default criteria for international legal subjectivity, we must account for how the new modern nation-state form exerted pressure on the existing order of inter-polity interaction. As Benno Teschke has shown, the English constitutional-parliamentary state constructed a double-track model of external relations whereby one approach governed relations between European sovereignty while another dealt with the non-European world. Accordingly:

> The 'Glorious Revolution' not only rationalised the English state, it also occasioned a revolution in British foreign policy. This was characterised by a shift from dynastic to parliamentary foreign policy making, defined no longer by the whims of dynasticism but by the 'national interest.' As a result, Parliament adopted a very distinctive 'dual foreign-policy strategy', based, on the one hand, on active power-balancing versus its rivals on the continent (a policy driven first and foremost by British 'security interests'), and, on the other hand, on unlimited commercial and colonial expansion - the so-called 'blue water policy.'[101]

Regarding the first approach, promoting the balance of power within the continental absolutist system encouraged a juridical ethos of tradition, parochialism, and justified harshness. Here, especially after the 1713 Treaty of Utrecht ending the War of Spanish Succession, the focus on statecraft and dynastic rights revolved around a treaty-based balance of power system where strategic marriages and alliances sought to prevent the rise any all-powerful monarch, namely a union of the French and Spanish crowns.[102] This development was accompanied by a heightened legalization of warfare where, as discussed above, the primary concern was the post-

[101] Teschke 2005, 17.

[102] One the presence of these ideas in classical international legal doctrine see Vagts and Vagts 1979, 560-564. For a detailed study of law and diplomacy in this context, see Dhont 2015.

conflict division of rights, property, and obligations between the respective victorious and vanquished parties.[103] In this emerging order of diplomatic relations between absolute sovereigns, the distinction between political discretion and private consciousness began to take on a character of profound rigidity.[104] As documented by Reinhard Koselleck, the post-Thirty Years War era witnessed the rise of the 'reason of state' concept assuming that sovereign acts must occur in an autonomous political sphere beyond the moral judgment of individuals.[105] This dynamic was fundamental for preserve order in a world of irreconcilable interests and beliefs.

While Britain maintained a functional equivalent of 'reason of state', in contrast to continental absolutism, it was substantively justified through a depersonalized bureaucratic state empowered by the collective will of its people.[106] This diverging justification related directly to the fact that, in Britain, the separation between public discretion and individual morality was accompanied by an additional ideological separation between bounded public authority and transcendent economic rights. Conversely, Continental Europe continued to reproduce its social order through feudal-absolutist modes of geopolitical accumulation that, despite adopting new juridical sensibilities, continued to lack any all-pervasive distinction between political and economic power. Given its development of a new system of social reproduction that could nonetheless be impacted by external events, 'Britain largely withdrew from direct military commitments and territorial aspirations on the Con-

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[103] See Part 4.3.3.

[104] After all, it was in this context that publicists such as Wolf and Vattel turned away from the tradition of 'just war' and emphasised a new doctrine of 'regular war' where the maintenance of order, promoted by the tolerance of ideological pluralism, was its own normative justification. On this shift, see Kalmanovitz 2018.

[105] Koselleck 2000, 43-44, 49-50.

[106] For a broad study of the contours of 'reason of state' within the British constitutional, commercial, and imperial contexts, see Poole 2015.

tinent…., yet started to regulate the state-system by means of rapidly changing alliances with and monetary subsidies to smaller powers - always to counter any emergent continental hegemony.'[107]

In the second approach regarding extra-European colonisation, the British built upon earlier juridical ethos that emphasized innovation, utopian experimentation, and universalist proclamations to justify ever-expanding modes of access and presence.[108] By contrast to the emerging gap between private 'lifeworlds' and public autonomy in Europe, the exemplary sociopolitical form in the second track was the chartered company (i.e. the Dutch and later British East India Companies) where public governance and the accumulation of profits were generally indistinguishable.[109] However, as shown in the previous chapter, by attaining dominance within this world-spanning system of colonial capitalism, the British became victims of their own success with regards to their American colonies.

Here, the massive accumulation of overseas territories during the Seven Years War (1756-1763), a highly successful execution of the 'blue-water policy'[110] fundamentally threatened the privileged identity of the American settlers who ultimately waged a successful war of independence.[111] It is worth recalling how the American revolutionary deployment of popular will grew out of both Britain's first approach to foreign relations that managed interaction between European sovereigns and its second approach that directed the accumulationist project of colonial capitalism.

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[107] Teschke 2005, 17-18. This provides context for why publicists concerned with the rights of small states, especially Vattel, viewed British influence so positively, see Whatmore 2010.

[108] For an exploration of English discourses that in this context, see Koskenniemi 2017.

[109] See Pahuja forthcoming; see also Stern 2011.

[110] Teschke 2005, 18. On the 'blue water policy' more generally, see Baugh 1989.

[111] The nature of Britain's dual foreign was not lost on early American commentators fearful of a British war to retake its lost colonies. In one of the first international legal engagements in the independent US, the lawyer William John Duane describes Britain's connected maritime-continental strategy as follows: 'A commercial monopoly has been necessary to her supremacy, and to attain this object she has constantly kept the nations of the continent at was and made the existence of war the pretext for annihilating the trade of neutrals.' Duane 1809, 98.

While their society was a by-product of the second approach, due to their relative 'backwardness', American settlers proved capable of importing the rules of state-craft that animated the first approach while simultaneously being spared from, and explicitly disavowing, its constraints. However, although the rigidity of the first approach acted as an innovation in the context of second approach, the French Revolution showed how this process could reverse its direction.

4.5. The Juridical Implosion of Absolutist France

4.5.1. French Contradictions, French Revolution

In theorizing Britain's transformation as a contributor to the French Revolution, we must account for how this development exerted pressure on France's existing order. Here the attempts to challenge British overseas expansion through the Seven-Years War and, later support of the American Revolution, placed a tremendous financial burden on the French administrative state.[112] While the public/private distinction may have been delineated the legitimate participants in European statecraft, in absolutist France, it had yet to translate into material institutions for managing sovereign debt as something independent from the personal debt of the monarch.[113] As a result, the inability of the absolutist system to spare its population from the burdens of national indebtedness resulted in a peasantry- bourgeois professional class alliance that ultimately toppled the *Ancien Regime*.

The need to extract revenue from base-level agricultural producers intruded upon the system of peasant subsistence and this contributed to large-scale starvation in the late 1780s.[114] This deeply eroded the longstanding class alliance between the peasantry and the centralizing forces of absolutism against the nobility.[115] As for

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[112] Anievas 2015, 856-857.

[113] See Teschke 2005, 20.

[114] Hobsbawm 1974, 81-82; Anievas 2015, 857.

[115] Ibid. 858.

the bourgeoisie, their grievance was prompted by the way in which the crisis of indebtedness resulted in a mass sale of noble titles and public offices. According to Alexander Anievas:

> …Despite the mass of office sales to replenish the state's ailing finances, it was actually becoming more difficult for the bourgeoise to become nobles as increases in offices failed to keep pace with the dramatic expansion of the bourgeoisie over the 18th century. Moreover, intensified competition and increased office prices meant that a more aspirant bourgeoise than ever were failing to purchase their way up the social ladder, consequently fueling bourgeois resentment against the old order.[116]

Yet, what did this crisis of absolutism in its formative heartland mean for the development of the international law? A fitting entry point is Teschke's theory that the rise of the modern English state formed a system so efficient in geopolitical competition that all other territorial forms had to either adapt or perish in the face of it.[117] However, while England's concerted pressure to intensify the power-balancing system in Europe contributed to an increased ideological distinction between public and private spheres, this ideological shift did not create the material social institutions embodying this ideal. This point is clarified when observing the sociological and geopolitical forces that spawned new interpretations of the relationship between popular will, territorial authority, and the law of nations in the French revolutionary context.

Foundationally, England's transition to modern statehood created an entirely new dimension of unevenness applicable to its relations with both the absolutist structures that dominated continental Europe and the locations in the non-European world it sought to colonize. Regarding the former, pressure from Britain caused Europe's absolutist dynastic actors to mobilize existing intuitional logics as a means

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[116] Ibid (notes omitted).

[117] Teschke 2003, 265-266.

of adapting to external pressures. As such, the dynastic rights and customs surrounding territorial authority and geopolitical accumulation, and their attendant contradictions, were intensified by Britain's indirect influence (while Britain itself was being freed from the constraints of this system). The pressures this rivalry placed on France, the predominant absolutist power on the European continent, led it to double down on dynastic power as the recognizable form of authority that could mobilize opposition to Britain, despite the consequences this produced.[118] By intensifying this embrace, France was severely stunted in its ability to produce international legal innovation outside this system's parochial confines of absolutist diplomatic custom.[119]

Given the French commitment to an increasingly rigid and outmoded system of absolutism, the contradictions tied to its preservation ultimately sealed the fate of the *Ancien Regime*. However, with the outbreak of revolution and overthrow of the existing order, a void emerged that could be filled with new juridical innovations. As to where these innovations came from, the excesses that accompanied the intensification of absolutism under the reign of King Louis XIV emboldened French civil society's embrace of Enlightenment conceptions of natural rights and limitations on official power.[120] Furthermore, there was the anti-British geopolitical posturing that resulted in France's involvement on the American side during its revolution. This forced King Louis XVI to align with those who believed that, on the question of sovereignty, *de facto* territorial authority was a legitimate competitor to

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[118] See Anievas 2015, 856-858.

[119] For an analysis of dynastic parochialism in French approaches to the law of nations during the Early Modern period, see Koskenniemi 2009, 31-43. An example of this stunting of juridical imagination concerned the was the 'balance of power' whereby jurists became trapped within circular arguments as to whether the 'balance of power' was 'legal' or 'non-legal' in character, see Vagts and Vagts 1979, 563-564. For perhaps the most influential French text on law and dynastic diplomacy produced in this context, see Mably 1758.

[120] See Rothkrug 2015 [1965]. For a study on the lineages of republicanism in the century preceding the revolution, see Edelstein 2009, 45-126

dynastic legitimacy.[121] This close working relationship between the architects of American independence and their French supporters provided a vector for transmitting the Enlightenment ideal that the legitimacy of popular will demanded recognition under the law of nations, and 'facts on the ground' provided the criteria for assessing these claims.[122] While support for American independence formed a common cause amongst different actors in an increasing divided French class system, with absolutist forces motivated by geopolitical interests and bourgeois forces motivated by socio-economic interests, this cooperation would not last. In words of Mikulas Fabry:

> It would prove a supreme irony of history that in an attempt to consolidate US independence, the French *ancien regime* sowed the seeds of its own destruction. But while Louis XVI might have been executed in January 1793 as an implacable feudal reactionary, nothing changes the fact that he was in effect a founding father of the first country created explicitly on the basis of consent of the governed.[123]

Ultimately, France's unique position as the vanguard of an unstable absolutist system within a changing international context resulted in a massive internal upheaval spreading outward at a rapid pace. In a very short amount of time, the leading expression of absolutism was dramatically replaced by the leading expression of popular will. The international legal order hosting this rupture would never be the same.

4.5.2. Natural Rights and Territorial Legitimacy

4.5.2.1. Theoretical Divergence

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[121] Fabry 2010, 30-31.

[122] For a study of how American influences, amongst others (including those from Scotland, Geneva, and the Netherlands) manifested in the context of the French Revolution, see Jourdan 2007.

[123] Fabry 2010, 35-36

When accounting for how the French revolutionary invocation of popular will changed international law, Emer de Vattel provides an appropriate starting point for connecting dynastic tradition to international modernity. As Isaac Nakhimovsky has shown, there is a distinct split on how Vattel's theory explains the French Revolution. On the one hand, for theorists such as Carl Schmitt and Reinhard Koselleck, '…Vattel epitomised the civilizing of war through the successful exclusion of natural law morality from international law - an achievement that was subsequently undermined by Enlightenment critics of absolutism.'[124] For Schmitt, Vattel's great achievement was his rejection of 'just war' which served as a basis for Schmitt's previously discussed articulation of a golden age of limited war between sovereigns recognizing one another as 'lawful enemies' as opposed to the 'unjust enemies' that justified unrestricted total war.[125] For Koselleck, the great failure of the Enlightenment, materially expressed through the French Revolution, was its disastrous attempt to invoke incontrovertible moral truth as a means of extinguishing irreconcilable political disagreement as they were acknowledged following the wars of religion.[126] In this respect Vattel, represented the publicist who was able to subordinate personal convictions to the greater good and accept a world containing such harsh political realities.[127] Such an interpretation is backed by Vattel's robust defense of a people's wide-ranging right to choose its preferred form of government despite his personal views on the superiority of republicanism.[128]

However, recent theorists such as Dan Edelstein and David Bell questioned this presumption by claiming that Vattel's theory directly contributed to the resurgence of natural law within international legal reasoning, and this was a key feature of the

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[124] Nakhimovsky 2010, 142.

[125] Ibid. 146-148; see also Schmitt 2003, 142-167.

[126] Koselleck 2000, 5-6.

[127] Nakhimovsky 2010, 148-149.

[128] Vattel 1852 [1758], Book I, Chapter II, § 37.

French revolutionary wars.[129] For Edelstein, Vattelian influence is apparent in the justifications given for the trial and execution of King Louis XVI as an 'enemy of mankind' under law of nature and nations.[130] Under this account, the legal ordering of the revolutionary Terror showcased a system whereby the reigning order of civil law is voided and, in its absence, assertions of natural law are the only controlling source of juridical authority pending the establishment of a new system of civil law.[131] This juridical separation and ultimate subordination of the civil law to the natural law is contrasted to the American Revolution for, 'while the preamble to Thomas Jefferson's declaration invokes the "Laws of Nature and Nature's God" the grievances listed beneath stem from a revered constitutional tradition, equally if not more important than its jusnaturalist foundation.'[132] For Bell, it was this all-encompassing natural law influence beginning in the context of the French Revolution that lead to the total social mobilization and total war via Napoleon's wars of conquest that involved nearly every nation in Europe, either as exporters or opponents of revolutionary popular will.[133]

4.5.2.2. Material Convergence

Viewing this discrepancy through the lens of the modern approach to international legal standing (encapsulated within the effective control doctrine) these two interpretations are consistent, to a certain extent. After all, the modern approach is premised upon the assumption that the project of establishing peace between nations necessarily means not intervening in situations of domestic ruthlessness because doing so could normalize the delegitimisation of political communities' rights to

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[129] Nakhimovsky 2010, 142.

[130] Edelstein 2008, 244-251.

[131] Ibid. 260-261.

[132] Ibid. 260.

[133] See Bell 2007.

define their own destinies and thus incentivize predatory behaviour by the powerful. This is the reasoning of the all-important 'effective control doctrine' discussed in Chapter I. [134] Furthermore, while the above accounts dealt primarily with Vattel's theory of war, we must also consider Vattel's political theory of domestic authority, and its relationship to his theory of international order, discussed in Chapter II.[135] Here we must be recall the vagueness of Vattel's simultaneous call for a high degree of deference to an established sovereign's authority *and* the right of a people to overthrow a governing entity.[136]

Despite this indeterminacy, the one guideline Vattel does give entails the duty of outside states to refrain from intervention in domestic affairs.[137] This links to his theory of war where he proclaims that foreign involvement in civil conflicts is illegitimate.[138] Reading these considerations together, we are left with a coherent proto-articulation of modern determination of international legal standing in situations of domestic strife where the question of which priority should attach to the natural law, the civil law and their degree of interaction can only legitimately be answered by the political community itself. In this way, the failure of the French Revolution to conform to this notion was not its internal practices of Terror, chaos, or regicide, for all these were expressions of a political contestation coming to terms with deep internal tensions.[139] Rather, the French Revolution's improprieties was militaristic expansion across national borders which involved parties that, when

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[134] See Roth 1999, 425-428.

[135] This gap can be viewed as part of the much larger separate and unequal study of war and revolution in international theory, see Halliday 1999.

[136] For an additional account of the utility of Vattel's vagueness on international legal standing questions, see Mieville 2005, 235-236.

[137] Vattel 1852 [1758], Book II, Chapter I, § 7.

[138] Ibid. Book III, Chapter XVIII, § 296.

[139] On importance of these events contributions to the theory of Revolutionary Democracy-Dictatorship as a tradition informing the legitimacy of the effective control doctrine, see Roth 1999, 106-108.

viewed in light of the state-centrism that shapes our consciousness of 'the international', had no direct stake in France's intensified social transformation.

Leaving analysis here fails to account for material context. While international legal standing via 'facts on the ground' is the logical conclusion in a world of bounded nation-states represented by governments presumably empowered by the will of their people, this was far from the case during the French Revolution. Instead, the military expansionism and conquest prompted by this event was undertaken in the name of bestowing popular will and national self-determination upon people's living under systems of dynastic legitimacy, the overwhelming norm of the time.[140] In this way, exporting the French Revolution tested the point of ambiguity in Vattel's treatise as to whether it was legitimate to aid a people asserting their popular will in a struggle against tyranny.[141] A prototype for future conquests on this basis was the 1791 union of Avignon and Comtat Venaissin with France despite the fact that these territories had been non-incorporated papal enclaves since the fourteenth century.[142] By implementing the Union in contravention of the traditional concept of legitimacy, in the words of Edward Kolla: 'French revolutionaries' idea that the

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[140] In Nehal Bhuta's account:

> Instead of annexing territories which came under their effective control, French armies replaced the religious and dynastic political authorities with popular committees, under revolutionary guidance from France. In other words, the revolutionary wars, and the Napoleonic wars that followed them, initiated constitutional change in place of conquest and (under Napoleon in particular) attempted to radically transform the nature of the state and the accepted bases for territorial control.

Bhuta 2005, 730. For an additional study of how the discourse of occupation in the French revolutionary context disavowed earlier understandings of conquest, see Stirk 2015.

[141] See Chapter II, Part 2.5.2.

[142] Kolla 2013, 718.

will of the people, instead, was the legitimate basis for politics, precipitated an unintended re-evaluation of international legality, just as it was undermining the position of the king domestically.'[143]

The abandonment of dynastic legitimacy provided the French revolutionaries with a high degree of latitude in advancing novel legal arguments when legitimizing territorial imposition in the name of popular will. One such innovation involved interpreting the principle of nonintervention to necessarily require a collective security alliance to enforce this order.[144] Because achieving this scheme required a base-level homogeneity, it would be legitimate for France to occupy territories and transform their domestic constitutional orders as a means of guaranteeing this collective security regime's conditions of possibility.[145] Another innovation, which characterized the Union of Avignon, was the usage of plebiscites whereby France retained the ultimate authority to draw the boundaries defining what counted as territorial unit that could assert self-determination.[146]

Yet, another innovation was the internationalization of its natural law-justified domestic regicide. This manifested as a 'governmental illegitimacy' argument whereby the presumption of non-invention did not apply to monarchies. According to Grewe's characterisation of this understanding, waging war against a monarchical regime '…was not a war of 'nation against nation' but the lawful defense of a free nation against the illegal aggression of a king.'[147] However, these revolutionary challenges forced the defenders of the existing order to clarify their own arguments against this new position that 'called into doubt all territorial claims, and all international treaties concluded over the centuries that had not taken into account

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[143] Ibid. 728.

[144] Grewe 2000, 417.

[145] Ibid. 418-419.

[146] Ibid. 420-42; see also Fisch 2015, 82-90.

[147] Grewe 2000, 423.

the will of the people and thus augured the collapse of a diplomatic and legal relations between states.'[148] This formative assertion of localised tradition in face of universalist calls for transformation would have far-reaching consequences for the evolving relationship between popular will and the international legal order.

4.6. The Impossible Task of Reversal

4.6.1. Enter the Concert of Europe

The ultimate defeat of Napoleon led to many questions as to what a settlement could possibly look like following such profound challenges to the existing order. Here the familiar account is of the rise of the Concert of Europe system where an assemblage of victorious powers convened the Congress of Vienna in 1815 to rectify the chaos left in the wake of the French revolutionary wars.[149] While this system represented one of the most influential early attempts to create a regime of 'global governance,'[150] it has received little systemic attention in critical international legal analysis.[151] This is arguably due to the Concert's avowed rejection of the sovereign equality ideal in favour of what Gerry Simpson deemed a 'legalized hegemony' consisting of Britain, Prussia, Russia, and Austria as a core of great powers that reserving special rights and privileges for themselves.[152] However, while this is arrangement patently contradicts modern international legal sensibilities, a contextual account of the Concert shows that the modern conception of sovereign equality is

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[148] Kolla 2013, 743.

[149] For an important overview of this international system, see Elrod 1976

[150] See Mazower 2012, 3-12.

[151] This absence is important given the way in which the Westphalia narrative is often critiqued as the entrencher of a Eurocentric conception of international law. While this is certainly true, the Concert of Europe was far more explicit in its drawing of a dividing line between the European community of nations and the rest of the world, see Lev 2011, 131-133.

[152] Simpson 2004, 102-108; see also Peterson 1945.

a relatively recent invention.[153] As a result, Westphalian orthodoxy has a distorting effect on the analysis of the Concert by striping this system of its juridical implications through imaging it as an exercise in 'power politics' fundamentally contrary to the rule of law.[154] This distorting effect allows the critics of international law's restraints on intervention to advance misleading arguments concerning the Concert of Europe in relation to subsequent models of international organization.[155]

However, the Concert was not as a rupture in the existing international order, but rather as an invaluable milestone in establishing our modern international system.[156] It was at this point that the particular balancing of sovereignty, autonomy and intervention informing our modern approach were entrenched under the auspices of the Great Powers. Understanding this impact requires an analysis of the Concert Great Powers as differing sociopolitical forms that nonetheless found common cause in reconstructing the system ruptured by the French Revolution. In accounting for the nature of four major Great Powers, they can be divided between Britain as the proponent an emerging liberalism primarily concerned with facilitating capitalist social relations and Prussia, Russia, and Austria (collective known as the 'Holy Alliance'), the reactionary forces concerned with the preservation of dynastic rights.

As a starting point for this analysis, while the two blocs depended on differing modes of accumulation to reproduce their respective social orders, French revolutionary innovations posed distinct threats to both of them. While the Holy Alliance

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[153] According to Peter Stirk sovereign equality as a universally accepted presumption did not occurred until immediately after the Second World War, Stirk 2012, 659.

[154] Even Simpson's nuanced and politically conscious account of the Concert maintains this Westphalian narrative of 1815 being a regression of an ideal established in 1648, Keene 2013a, 1079 (footnote 4).

[155] See e.g. Yoo 2014

[156] This timeframe has been the analytical starting for the 'English School of International Relations' in their project of analysing 'international society.' Keene 2002, 13-15.

members operated according to the logic of dynastic custom-backed geopolitical accumulation that was the object of direct repudiation by the French revolutionaries, the situation becomes more complex when Britain is considered. For Britain, the new mode was that of capital accumulation where surplus had to be continually reinvested in pursuit of increased growth as the only means of preventing systemic collapse.[157]

As previously discussed, the British colonization of the New World provided both a mechanism for absorbing the social costs of capitalist political economy as well as access to the resources that generated further rounds of accumulation. While the resulting society ultimately achieved its independence, this loss of territorial control via the American Revolution (something that would have been devastating under the earlier system of geopolitical accumulation) still allowed many mechanisms supporting British interests to remain intact.[158] This marked the beginning of a new approach to empire-building whereby territorial impositions did not necessarily entail formal political control but rather revolved around the impositions of measures to guarantee the conditions of capitalist reproduction.[159] Towards, this end, it sought to reproduce the nation-state form, analogous to what developed in Britain, where depersonalized public authority actively protected and enforced private property interests.

Thus when conceptualizing the threat the Concert of Europe was addressing, we must account for is the hybrid form of accumulation that developed through the

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[157] See Luxembourg 2003.

[158] For an analysis of how legal and commercial links preserved patterns of British imperial influence in its formally independent colonies, see Gould 2012b.

[159] Gallagher and Robinson 1953. Moreover, this new approach was aided by the reality that justification for expansion in the name of trade, access and the 'common good of mankind' were already centuries old, see Koskenniemi 2011.

French Revolutionary challenge.[160] While this mode of accumulation occurred in the name of liberal's fundamental trope of 'liberty,' it utterly lacked the core structuring features that defined capitalist political economy. Rather, the French Revolutionary rationale for territorial authority was very much in the mode of pre-capitalist geopolitical accumulation; only the old basis of dynastic rights and custom that shaped this system were roundly rejected and invocations popular will filled this void. Thus, the appropriate term for French Revolutionary reproduction would be that of 'Jacobin Accumulation' that utilized both the dynastic strategy of direct territorial appropriation and the capitalist ideal of formal equality of citizens.[161]

Moreover, the larger system of inter-sovereign relations lead to a direct clash between these two modes of geopolitical accumulation. For the chaos of revolution led the monarchial powers to believe that intervention in France would provide numerous opportunities for geopolitical accumulation of the dynastic variety, while conversely, the French revolutionaries viewed the weakness and illegitimacy of the prevailing dynastic order as an opportunity for geopolitical accumulation of the Jacobin variety.[162] While this practice explicitly undermined the Holy Alliance and its veneration of dynastic right, Britain had its own reasons for opposing such a justification for claiming territorial authority. After all, capitalism's development in England consisted of gradual shifts that the nonetheless preserved the pre-capitalist ruling class structures.[163] Jacobin accumulation threatened to radically appropriate and redistribute these accumulated resources to a mass of citizenry whose

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[160] While there is debate as to whether the French bourgeoisie were actively participating in the emerging system of capitalism at the time of the Revolution, France's full-scale transition to capitalist political economy was a far more drawn out process. For a study on how the French transition to capitalism was driven by the need to reassert competitiveness following the end of the revolutionary wars, see Lafrance 2019.

[161] On Jacobinism as a mode of political economy produced by 'relative backwardness', see Shilliam 2009b, 43-55.

[162] Bukovansky 1999, 207.

[163] Teschke 2003, 257.

entitlement to this wealth was then legitimized on the basis of military service.[164] This threatening reality meant that there was no shortage of British conservative argument regarding the dangerously destabilizing impact of the French Revolution and what it represented.[165]

Despite the spirit of conservatism deeply entrenched amongst many of the Concert's participants, the system established was in no way a return to the pre-Revolutionary order. This was due to the reality that profound changes to the longstanding system of dynastic rights and the balance of power were already underway well before the French Revolution. According to Keene:

> Challenges to the traditional authorities - the effects of the Reformation on papal influence (a major part of the assertion of quasi-imperial kingly sovereignty), and the dissolution of the Holy Roman Empire in the context of violent struggles surrounding the French Revolutionary wars - compounded the problem, as did Napoleon's personal revolutionisation of the dynastic order of Europe, and the fact that the Congress of Vienna deliberately chose not to pursue the fantasy of a perfect return to the *ancien regime* world.[166]

Against the backdrop, of ongoing tension and an acknowledged impossibility of returning to the past, the Concert powers were forced to come to terms with legacies of the French Revolution that could not be excised. As a result, the need to imagine some place for popular will within the new international order was unavoidable.

4.6.2. Visions of Future Unity

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[164] Shilliam 2009b, 48-55.

[165] For a study of the French Revolution's impact on British conservative thinking, see Schofield 1986.

[166] Keene 2013a, 1087.

The French Revolution introduced new ideological catalysts for asserting popular will, new administrative practices that serve as evidence of 'objective *de facto*' territorial authority, and a newfound emphasis on the relationship between these two aspects. Regarding the first issue, claims to legitimacy and moral defensibility on the basis of *de facto* authority rest upon the sacrosanct character of popular will and its ability to elude value-neutral definition in an ideological plural world.[167] Given this normative grounding, the importance of the French Revolution and its immediate aftermath in constructing the modern incarnations of these core political concepts is almost impossible to overstate. After all, the French Revolution introduced the very possibility of political discourse and engagement under conditions of modernity via its dialogical designations of 'Right' and 'Left.'[168]

Moreover, this event introduced a meta-scale reconceptualization of temporality itself. As Koselleck famously remarked, the conception of time operating in cyclical patterns gave way to 'revolutionary time' whereby the future could, for the first time, be imagined as a radical break from the past resulting in entirely new manifestations of possibility.[169] In this capacity, the French Revolution introduced a multitude of unprecedented political ideals and corresponding political consequences. These included: the quintessential proclamation of liberal ideals within a secular state via the *Declaration of the Rights of Man and the Citizen*; the Committee for Public Safety's 'Terror' as the original attempt to radically transcend the limits and contradictions of liberalism via 'Revolutionary Democratic-Dictatorship;'[170] numerous backlashes by religious, provincial, and conservative social elements;[171] and the conception of grandiose national unity under an all-powerful, yet worldly empowered, law-giving leader via Napoleon.

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[167] See Roth 1999, 38.

[168] Palmer 2016, 7.

[169] Koselleck 2004, 43-57.

[170] See Roth 1999, 75-76.

[171] For a study, see Hanson 2003.

Thus, when it comes to articulating the diverse ideological manifestations a people could conceivably assert as necessary to achieve popular will, the French Revolutionary experience inexorably widened this ideology spectrum in a very short timeframe. Moreover, the assertion of novel forms of popular will and debates over the means of accomplishing them against the backdrop of the violent overthrow raised difficult ethical dilemmas even amongst some of the most influential theorists of revolution and popular will. For example, in commenting upon the Jacobin's 'Terror,' Thomas Jefferson lamented the fact that so many were executed without the benefit of procedural safeguards, yet, ultimately defended these actions as a necessary to excise tyranny.[172] In response to these inevitable dilemmas, an ideologically pluralist view of international legal standing provides a mechanism for resolution by declaring that difficult issues surrounding popular will can only be legitimately decided upon at the level of a bounded sovereign political community.

On the second issue, while the French Revolution prompted acute barrages of ideological innovation, the upheaval generated by these free-ranging assertions lead to new forms of rational territorial administration especially after Napoleon took power. In the words of Mlada Bukovansky:

> The French Revolution…demonstrated the virtues and vices of state centralization by achieving an entirely new level of centralization, a level which ironically surpassed that achieved by French 'absolutism.' While the rationalization of administrative structures was already underway in many enlightened monarchies, the revolution and Napoleonic rule greatly accelerated the process. Centralization was spurred on by the eradication of intermediate nobility and clerical bodies, as it became increasingly evident that eroding the power of corporate estates could enhance the wealth and power of the state. The French were a model to be emulated in this respect, and where they had conquered, they left a template on which to base newly-centralized regimes.[173]

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[172] Jefferson, 1999 [1793], 134.

[173] Bukovansky 1999, 214 (notes omitted).

It can be argued that these new approaches to territorial administration were grafted onto the naturalized understandings that emerged during post-Westphalian consolidation of absolutism, whereby a prince's fulfilment of his duty to acquire actual knowledge of his realm was evidence of the territorialized divinity that attached to the nation-state form. Only with the French Revolutionary, and later Napoleonic, displacement of divinity did this mode of authority became justified as a secular myth that derives its power from the rejection of all other myths in the name of an impossible standard of rationality. Here, perhaps the single greatest French Revolutionary legacy that linked the practical functions of territorial administration and social ordering to the invocation of timeless secular truth was Napoleon's Civil Code. With its rejection of papal and feudal modes of authority, the Code became regarded by its adherents '…as a unique historical event with no historical past, [and] the jurists claimed that the Code was comprehensive, immutable, and gapless.'[174]

This ideal of flawless, rational legality plainly conflates the features of ideological contestation and 'objective *de facto'* territorial authority that the modern view of international legal standing strives to separate. In the Napoleonic context, despite long-standing perceptions otherwise, the act of 'law-giving' was not even an articulation of new juridical concepts and forms derived from the revolutionary experience but was rather, largely, a rehashing of previously existing French legal principles.[175] As such, this act was not a profound articulation of newfound truth, but

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[174] Herman 1984, 617.

[175] See Gordley 1994. However, while the principles may have had deep roots, what was radical was their reconfiguration. This is especially true of the way in private property rights could no-longer apply to ownership and control over public institutions. In this way the French Revolution, formed an important site for the entrenchment of the rigid ideological distinction between public and private. For a recent study detailing this transformation, see Blaufarb 2016.

rather the compilation of existing juridical practices presented as a means of consolidating political power.[176] However, Napoleon was motivated by a deeper grandiosity in this endeavours and, towards this end, emulated the Byzantine Emperor Justinian whose very act of giving the law in the name of a political community necessarily implied a higher order of legitimacy capable of imbuing this act with universality.[177] This notion of a universal law that was both 'people-made' yet beyond mere 'politics' spoke to the many Utopian (albeit irreconcilable) longings that characterized the French Revolutionary experience. Thus, both figures, to quote Donald Kelley:

> inspired not only nostalgic or a reactionary longings for a return to the Old Regime but also dreams of social justice and even a 'socialist' future in which law would be defined not as a political creation or an accumulation of individual rights but rather as an expression of social needs and ideals by which it should be judged and to which it should ultimately be subject.[178]

In this way, the presentation of an all-encompassing legal order that invites catastrophic contestation over whether this law is transcendent truth or parochial politics can be viewed as a distillation of Koselleck's proclamation of the Enlightenment's dark side, i.e. the ability of individuals to articulate universal truth unburdened by the realities of irreducible difference justifies the harshest acts of violence.[179] In relating this back to '*de facto* authority' as the determinate of international legal standing, it is the construction of bounded political communities corresponding to inviolable national borders (however historical unjust these borders

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[176] Moreover, while the visions of popular will that were immensely developed by this vision embodied by Napoleonic rule seem deeply at odds with imperial domination, many of Napoleon's actual practices were inseparable from the imperialism of his general era, see Bayly 1998, 35-38.

[177] 'As Justinian invoked divinity, so Napoleon celebrated reason and natural law as the guarantors of his legal structure…' Kelley 2002, 294.

[178] Ibid. 302.

[179] See Koselleck 2000.

may be) that serves to re-inscribe the agonic sensibilities rejected by radical Enlightenment rationality of the French Revolution.

All of the above-discussed issues of rationality, ideology, and modernity are bound together in the ultimate legacy of the French Revolution. This legacy was the introduction of the popular will ideal into the international system in a manner that could not be undone despite the concerted actions of the world's most powerful sovereigns. Moreover, this legacy built on the American Revolution where, unlike the ultimate restoration of dynastic order that occurred in France, the system it established was able to sustain its republican identity and accumulate power and influence at an exceptional pace.[180] This being the case, how long would it take before those peripheral to, or controlled by, the Concert's Great Powers demanded that their expressions of popular will be validated?[181] How did the precepts constructing today's effective control doctrine emerge to legitimize and consolidate this process? How did fundamental disagreement over popular will construct articulations of what acceptably fell with the ambit of 'ideological pluralism'? These questions shall be addressed in the next chapter where my focus shifts to the consolidation of the modern international order. Here the horizons of popular will were contained through a diversity of justifications that entailed the imposition of new forms of control.

4.7. Conclusion

Through this account of the consolidation and rupture of Europe's *Ancien Regime*, this thesis's methodological merging of 'juridical thinking' and historical sociology

[180] See Chapter III, Part 3.6.

[181] This was especially true regarding Napoleon's escape from his exile on the Island of Elba and attempt to regain power in the 'Hundred Days.' This event led to much contestation of the hierarchical ordering of the Concert system for '…the Powers who had the responsibility for banishing Napoleon from the Continent felt that their political power should be proportionate.' Peterson 1945, 548.

has been deployed once again in constructing an account of 'world-historical context.' Here I showed how absolutism's juridical narrative of divinity-rooted, personalized authority was challenged through the meta-event that was the 'discovery' of the New World. While this led to a more rationalized reconfiguration of dynastic power, changes in material social relations placed a tremendous degree of pressure on this particular justification for authority. The result was a series of compounding contradictions that manifested themselves in the institutions of war, bureaucracy, and lawful authority across a variety of contexts.

Focusing on the leading absolutist power, France, I showed how these contradictions lead an important, yet disproportionately powerful, middle class to advance their material interests through a discourse of popular will. Thus, what emerged was a new juridical narrative fundamentally incompatible with the prevailing juridical narrative justifying absolutism, which became the rallying point for the French Revolution. This lead to a whole-scale uprooting of Europe's *Ancien Regime* through a series of efforts to both export and contain the Revolution that raised numerous questions regarding war, social organization, and the boundaries of political community. These challenges remained after the defeat of the various French revolutionary incarnations. As such, a new approach to lawful order was needed given the impossibility of returning to the pre-revolutionary system both as a matter of material social relations and juridical imagination.

CHAPTER V

The Containment of Popular Will: The Concert of Europe, Bounded Territoriality, and Imperial Nationalisms

5.1. Introduction

This chapter examines how the shards of post-French revolutionary popular will and the vestiges of dynastic authority constituted a new international order via the Concert of Europe system. Through this process, the French Revolution's universalistic exportable conception of popular will was replaced by the view that popular will was a parochial expression of organic community increasingly conflated with the bounded nation-state. This containment process was twofold. In addition to containing popular will within sovereign borders, the very idea that organic popular will justified sovereign independence was being increasingly contained within Europe (and its settler progeny) at the exclusion of the rest of the world. Thus popular will's organic, parochial turn directly facilitated the infamous nineteenth-century distinction between 'civilized' and 'uncivilized' nations where only the former could claim the full protection of international law.

This twofold containment of popular will was immensely beneficial to the consolidation of global capitalism. With the hardening of borders in Europe, the modern depersonalized nation-state presumed by international law, and characteristic of capitalist social relations, began universalising in a manner that challenged all other modes of authority. This process of state consolidation allowed capitalist latecomers in continental Europe to engage in top-down 'passive revolutions' as a means of 'catching up' with the original capitalist powers, namely Britain. Furthermore, the juridical exclusion of the rest of the world allowed the popular will-based 'family of nations' to use international legal recognition as coercive tool for pressuring

excluded societies to enter into capitalist social relations as a precondition for subjectivity.

Part 5.2. situates the process of containment as the pre-history of international law's emergence as an unambiguous discipline and profession in the late nineteenth-century. Part 5.3. returns to the immediate aftermath of the French Revolution and highlights a distinct tension within the top echelon of the Concert hierarchy between a liberal-capitalist Britain and a dynastic-reactionary Holy Alliance. Part 5.4. then explores the ideological basis for this synthesis by highlighting contributions from Edmund Burke and, by extension, Sir James Mackintosh that produced anti-expansionist theories of popular will suited to an emerging international order where bounded territoriality facilitated capital accumulation. Part 5.5. turns to the reception of this ideal through an examination of how the clashing interests of both Britain and the Holy Alliance were accommodated through the modern conception of sovereign equality as a medium of international coexistence.

Part 5.6. then accounts for the developmental nexus between capitalism, international law, and the diffusion of the nation-state form through focusing on changing juridical modalities of territorial imposition during the Concert era. This particularly occurred through the decline of 'title by conquest' and its replacement with 'belligerent occupation' as a tool for protecting private property that configured this presumption as the basis for legitimate sovereignty. In complicating the nationalism-international law relationship, Part 5.7. examines the status of multi-ethnic empires as international legal subjects as well as compounding contradictions surrounding the question of nationalist ambitions that did not conform to international legal boundaries. Finally, Part 5.8. shows how the non-European world was excluded from the sphere of those who could claim unconditional sovereign authority on the basis of popular will. Through their resistance, however, non-European actors contributed to the presumption that popular will is the universal basis for domestic authority under international law. However, importing this discourse of conflation between state sovereignty and popular will meant importing the material constraints that shaped its original development.

This sets the stage for Chapter VI's examination what 'popular will', and its socio-juridical presumptions, could possibly mean in a region on the periphery of the emerging global system, Latin America. Following this, Chapter VII returns to the legacy of the European containment of popular will and its contribution to the post-war 'world of popular will' embedded in the UN Charter. Here I show how the contradictions between border consolidation, the expansion of colonial capitalism, and hierarchical organic conceptions of political community eventually imploded Europe's nineteenth-century international order. This occurred through the rise of aggressive nationalism (reaching its ultimate expression with fascism) that led to an aggravated collapse of the dividing line between intra-European and colonial modalities of violence that resulted in hyper-intensive eruptions of war and genocide. While an attempt at rectification occurred through a postwar reorganization of world order that venerated popular will, this development entailed a grand abstraction of the material social relations that led to this ultimate rupture.

5.2. Prelude to the Gentle Civilizer

This chapter accounts for how the previously expansionist conceptions of popular will were contained to justify the modern European states-system. However, this containment of popular will was in no way the containment of capitalism. Rather, the making of an exclusionary and bounded state-system in Europe was very much a direct adaptation to capitalism's continued expansion. Bringing these realities to our analytical forefront allows for a materialist interpretation of how new understandings of international law were constructed from the premise that the consent of these popular will-expressing units are this system's exclusive source of legitimacy. In this capacity, I offer a prelude to Martti Koskenniemi's observation in *The Gentle Civiliser of Nations* that the 1870s represented a watershed in the professional development of international law through specialist conferences, publications, and associations.[1] While there is much insight in Koskenniemi's depiction of

[1] See Koskenniemi 2001, 39-97.

this ‘gentle civilizing’ as a meta-effort of European liberals seeking to align their interests, this necessarily begs the questions as to what material and ideological presumptions framed this project; issues I address in detail in this chapter.[2]

Against this backdrop of formalized disciplinary consolidation, a key presumption was that this multiplicity of nation-states, each representing a unique bounded community, had no incentive to legally interact with one another if doing so might destroy their local autonomy.[3] In historicizing this presumption within its post-Napoleonic context, the exporters of the French Revolution who dismantled feudal structures in the name of liberating national communities were frequently condemned as defiling the very communities they purported to liberate.[4] Thus, the Great Powers seeking to ‘restore order’ could exploit this resentment and invoke a pluralist traditionalism when opposing the idea that ‘popular will’ could be achieved through universal revolution.[5]

From this counter-revolutionary foundation, as capitalism expanded, the victorious enemies of the French Revolution could conflate ideological pluralism (increasing expressed as nationalism) with their specific means of maintaining or implementing

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[2] Koskenniemi was certainly aware of sociological factors that animated the consolidation of international law in this particular way. As such, my analysis in this chapter entails an unpacking of his observation that:

> Men who extolled the spirit of liberalism in the mid-Victorian age were compelled to conclude that the prevailing economic and political conditions by no means guaranteed further progress and were positively responsible for the presence of that…redoubtable nemesis, revolution.

Ibid. 12.

[3] On the deeper roots of this positivist orientation towards order between sovereign states, particular as developed in the late-eighteenth century by Frederich von Martens (1756-1821), see Koskenniemi 2008.

[4] According to the Scottish jurist James Lorimer (1818-1890), a major participant in these early endeavours to consolidate international law as a science and a profession, the French Revolution had ‘…confused and bewildered the generation on which it fell, and arrested all rational inquiry into the laws by which social relations are governed.’ Lorimer 1890 [1866], 33

[5] Bhuta 2005, 731.

this form of political economy. Here, state sovereignty constituted the authority to implement capitalist reforms and a positivist understanding of international law became the mechanism for ordering this presumption of absolute political sovereignty (as opposed economic sovereignty) amongst multiple actors. As a practical matter, 'ideological pluralism' was restricted to liberal or reactionary variants of state-based nationalism, the choice of which was profoundly influenced by a nation's particular place within the expanding order of global capitalism. More radical and egalitarian expressions of popular will appear outside this scope of acceptable political expression. This was no accident.

However, a striking paradox was presented for international lawyers regarding the notion that popular will legitimized domestic authority through the nation-state form. While containing previously expansive notions of popular will into the territorially bounded nation-states was a task of profound methodological complexity, the turn to international legal positivism was a task of profound methodological simplification. On the question of complexity, one need only consider the efforts of Casper Johann Bluntschli (1808-1881) whose theory of the sovereign state as a repository of popular will emerged through a dizzying synthesis of:

> historical anthropology, historical sociology, stage theories of the economy, histories of Europe, histories of European legal and political though, abstract theories of politics, time-hounoured doctrines concerning form of government, modern class analysis and the legal and constitutional theories of modern representative government.[6]

However, Bluntschli was an anomaly when it came to rigorously theorizing 'the state' as a demand of international legal thought, despite it being international law's primary subject matter.

For most international lawyers the deeper questions of 'what the state is?' were largely irrelevant to the question of 'what did the state consent to?' According to

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[6] Kelly 2016, 286.

the positivism that asserted itself during this era, the presence of 'consent' was the reducible essence of what international law actually was.[7] On this point, the problem of state identity was largely solved by the doctrine of constitutive recognition whereby an affirmative approval from established sovereigns was required for international legal standing regardless of 'facts on the ground.'[8] This view is consistent with the positivist presumption that compelling a state to recognize an entity against its will contradicts consent, and hence cannot produce valid law.[9] However, such an approach diverted efforts away from theorizing how state formation is facilitated through international law just as much as international legal formation is facilitated through the will of states.[10] This one-sided understanding is aptly expressed by Lassa Oppenhiem's (1858-1919) depiction of a '…family of nations [that] arose out of different states which were in no way connected with each other.'[11]

While it is now common for international legal histories to highlight how exclusionary applications of recognition justified imperialism and upheld a 'standards of

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[7] While positivists often failed on their own terms in this capacity, they still warrant this label to the extent that 'positivism' was a distinct political project just as much as it was a jurisprudential theory, see Garcia-Salmones Rovira 2013; Vec 2017; Pitts 2018.

[8] See Orford 2012, 278. While the difference between 'declarative' and 'constitutive' theories of recognition has produced an endless amount of doctrinal controversy amongst international lawyers (see Woster 2009; Parfitt 2016), a historical materialist view of the way different recognition theories serve different interests brings a great deal of clarity to these debates. This point was plainly obvious to jurists in the early Soviet Union. According to Evgeny Pashukanis (1891-1937), declarative theories are, '…the reflection of the epoch, when the bourgeoisie struggled for national liberty and the formation of national states.' Quoted in Korovin 1934, 259. In Evgeny Korovin's (1892-1964) addendum to Pashukanis's observation, '[o]n the other hand, the theories of constitutional [constitutive] recognition reflect the practice of the imperialistic policy of the greater powers.' Ibid. 259-260.

[9] Roth 1999, 124.

[10] See Pahuja and Eslava forthcoming.

[11] Oppenheim 1908, 317. On the political goal of international peace that motivated Oppenheim's minimalist approach to questions of state identity, see Kingsbury 2002.

civilization', questions remains as to how this situation came about.[12] Despite the numerous important works exploring the international law of colonialism late in the 1800s, considerably less have detailed the first half of this century.[13] As such, few scholars have focused on how the 1815 Concert of Europe (even more so than the 1648 Peace of Westphalia) helped to construct an inter-sovereign order that stripped the law of nations of its non-European influences and applications.[14] Though we should not ignore the hierarchies and exclusions justified through the pre-1815 law of nature and nations, its proclaimed universality provided political opportunities for marginal actors that a state-centric, recognition-based, and unapologetically parochial legal positivism did not.[15] Here, by the late eighteenth century, such discourses had developed into anti-colonial legal universalisms that failed to survive international law's nineteenth century disciplinary consolidation process.[16] The loss of these discourses is fundamentally linked to the containment of popular will within a bounded European state-system that arose in response to a colonization-hungry expansion of capitalism. A new order of international law was shaped in this image.[17]

5.3. Concert Tensions and Intervention Questions

As Concert of Europe system emerged through the 1815 Congress of Vienna, its core principle was hierarchical domination by Britain, Russia, Prussia, and Austria,

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[12] For important works in this capacity, see e.g. Grouvogui 1996; Anghie 2004; Mieville 2005; Bowden 2005; Obregón 2012.

[13] Pitts 2018, 16.

[14] An exception was CH Alexandrowicz (1902-1975), see Armitage and Pitts 2017, 19.

[15] Keal 2003, 111.

[16] See Pitts 2018, 152.

[17] For an important account of how the discourse of 'civilisation' was central to this process of transforming the world into an international system of sovereign states geared towards the dynamics of capital accumulation, see Tzouvala 2019a.

who possessed virtually limitless discretion to redraw borders, install their preferred rulers, and conduct interventions.[18] As discussed in Chapter IV, the threat of an expanded rejection of established of authority in the name of an all-encompassing vision of popular will represented by the French Revolution, and later Napoleon, was sufficient to create common cause amongst a diverse grouping of great powers. Yet, while this common interest may have been enough to establish a centralized mechanism, beyond the immediate acts of reordering, there was minimal agreement on the nature of this system's long-term functioning. This was especially true of the question of intervention. While the Concert powers reserved this option as a right, questions remained as to how frequently it should be applied in light of the aspirations towards popular will that persisted beyond the French revolutionary wars. This controversy over whether the persistence of popular will justified an increase or a restriction on intervention in the post-Napoeonic order produced two very different responses within the respective liberal and reactionary power blocs.

5.3.1. Holy Alliance Geopolitical Accumulation

Beginning with the reactionary dynastic bloc, on September 26th, 1815 the Austrian Emperor Francis I, the Russian Tsar Alexander I, and the Prussian King Frederick William III signed a treaty of Holy Alliance. The text of this agreement revolved around the affirmation of Christianity as the one true basis for public authority and the three signatories installed themselves as guardians of this order.[19] As a practical

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[18] On the hierarchical dynamics of this system, see Lingelbach 1900; Peterson 1945; Slantchev 2005.

[19] According to Article II of this treaty:

> [T]he sole principle in effect, both between the said Governments and their Subjects, shall be that of rendering reciprocal service, and by an unalterable good will, to bear witness to the mutual affection with which they ought to be inspired, to consider themselves all but as members of one Christian Nation; the three Allied Princes looking upon themselves but as delegated by Providence to govern three branches of the same family, namely, Austria, Prussia, and Russia, thus confessing that the Christian Nation, of which they and their

matter, this agreement provided a basis for the Holy Alliance powers to uphold their preferred rulers against popular will-invoking challenges.[20] According to Henry Wheaton's 1841 depiction:

> This union was intended to form a perpetual system of intervention among European States, adopted to prevent any such change in the internal forms of their respective governments as might endanger the existence of the monarchical institutions which had been re-established under the legitimate dynasties of their respective reigning houses. The general right of interference was sometimes defined as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning Sovereign.[21]

This anti-popular will agenda stemmed largely from Austrian Foreign Minister Prince Klemens von Metternich (1773-1859) who conflated the affirmation of the 1815 settlement with the interests of a broader European social order that transcended narrow political contestations.[22] According to Carsten Holbraad, when facing the challenge of popular will, Metternich '…did not see a number of independent revolutionary movements, each taking advantage of local conditions, but one vast conspiracy against all the governments of Europe.'[23] Thus, the Holy Alliance represented a shift from politics between sovereigns to one of sovereign unity against the demands of local populations 'since a local revolution constituted a European emergency.'[24]

> people are a part, has truly no other Sovereign than Him to Whom alone belongs the Power.

Quoted in Hartmann 1969, 7.

[20] Simpson 2004, 247-249.

[21] Quoted in Alexandrowicz 2017 [1958], 370.

[22] Holbraad 1970, 15.

[23] Ibid. 29.

[24] Ibid. 30.

However, this vision of an interventionist order was almost entirely absent amongst the British, who, while not categorically opposed to intervention, disclaimed it as a matter of general policy. While justified on differing grounds, this position of non-intervention was shared amongst British politicians and theorists of all major ideologies. For the Whigs, preserving the territorial status quo complimented the principle of opposing dynastic rights. In an inversion of Metternich's conspiracy, according to the Whigs (including Sir James Mackintosh), intervention directed by a cabal of dynastic princes represented the institutional undermining of popular will expressed through the territorially bounded nation-state form.[25] For the Conservatives, while less sympathetic to Whig emphasis on popular will, the Holy Alliance regime of intervention was unnecessary given their view that internal politics was largely irrelevant to maintaining a stable international system.[26] For British radicals, their opposition to Continental dynastic powers overcame their opposition to preserving a territorial status quo they believed to be unrepresentative of underlying national communities.[27] To quote Holbraad:

> each of these [British] groups of ideas sprang from aversion to established doctrines of [Continental European] conservative thought. Territorial conservatism was advanced as an alternative to the Continental theory of dynastic conservatism. The Tory and Whig criticisms were directed at the dynastic, the Radical at the territorial version of European conservatism.[28]

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[25] Ibid. 126-127.

[26] Ibid. 121.

[27] Ibid. 135.

[28] Ibid.

The complexities informing this divergence between an interventionist Holy Alliance and an non-interventionist Britain furthers Gerry Simpson's point that, historically, the production of (non-)interventionist arguments is irreducible to any political ideology.[29] Yet if ideology alone cannot explain these developments, what can? Viewing international legal innovations as inseparable from their material conditions, I argue that the schism between the Holy Alliance and Britain is explainable as a divergence between modes of social reproduction. In short, the Holy Alliance represented the continuity of pre-capitalist dynastic modes of geopolitical accumulation, while Britain represented capital accumulation at a crossroads. In light of the challenges posed to both of these blocs, the rise of a new formulation of capitalist expansion able to contain these revolutionary (and reactionary) passions was of mutual necessity. However, this demanded a high degree of adaptation from the prevailing international legal order.

In theorizing the Holy Alliance' pre-capitalist mode of social reproduction, the initial process of reordering post-Napoleonic Europe amounted to a variable feeding frenzy of geopolitical accumulation. Here the French revolutionary wars' reset the pre-existing 'balance of power', and its record compounded territorial rights and obligations.[30] This allowed the victorious powers to side-step the historically-

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[29] Simpson 2004, 250.

[30] Vagts and Vagts 1979, 564. The Concert system has long been remarked upon as a classic application of the balance of power, see e.g. Kissinger 2013. However, as Paul Schroeder has argued, though it formed a narrative understanding amongst the Concert powers, the 'balance of power' (understood according as a principle of rational political action) cannot explain the dominance of Britain, Russia, Prussia, and Austria within this system given that Britain and Russia's supreme positions of power were fundamentally in Prussia and Austria. Thus, according to Schroeder 'the stable peaceful equilibrium Europe enjoyed from 1815 to 1848 rose not from a balance of power but from a mutual consensus on norms and rules, respect for law, and an overall balance among the various actors in terms of rights, security, status, claims, and satisfactions rather than power.' Schroeder 1992, 694. However, the great problem with explanations such as Schroeder's is strict separation of legality from power characteristic of Realist theories of international relations. For an account of how materialist theories of international law can produce more concrete depictions of international interactions than Realism due to their acknowledgement of constitutive force of legal and juridical phenomena, see Knox 2019.

shaped patchwork of layered and divided authority and organize themselves around more territorially coherent 'spheres of influence.'[31] In this process, the dynamic of absolutist centralization was very much at work in the rapid consolidation of the many of the German polities that constituted the old Holy Roman Empire, a confederated entity dissolved in 1806 via monarchical abdication.[32] Here, following the Congress of Vienna, the number of German states shrunk from 350 to 38.[33] Moreover, the class dynamics of centralizing absolutist monarchies opposing a decentralized feudal nobility was showcased by the fact that one of the kingdoms left unrestored was Poland (a bastion of the nobility's power) which was previously partitioned between the Holy Alliance powers.[34]

Despite this initial boon, as a long-term issue, how exactly could this system reproduce itself? After all, the post-Napoleonic settlement brought to Europe a new political configuration where the old patchwork of authority, formed and justified through historically-developed custom, began to resemble the modern order of bounded territoriality.[35] This was a direct result of the 1815 settlement and its conflation of territorial upheaval with the destabilizing actions of the French revolutionaries.[36] However, as Jordan Branch has shown, this was not a unique solution as much as it was an innovation transfer given that such practices had originally developed through overseas colonialism, where drawing abstract lines to demarcate exclusive authority compensated for the lack of actual knowledge of the territories

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[31] Slantchev 2005, 385.

[32] The purpose of this dissolution by abdication was to prevent the Holy Roman Empire from being inherited by the heirs of Napoleon, who by this point had crowned himself Emperor and the thus occupied a central place in Europe's dynastic order. For a multi-layered account, see Forrest and Wilson 2008.

[33] Slantchev 2005, 385.

[34] Fabry 2010, 40.

[35] Branch 2010, 289.

[36] Neff 2003, 220-221.

being claimes.[37] The Holy Alliance thus faced a profound contradiction. While their reproductive process of geopolitical accumulation was adapted to earlier configurations of sovereignty where territorial authority was alterable, post-Napoleonic legitimacy committed them to upholding a settlement where political authority was now encapsulated within bounded territorial units.[38]

In this context, we can understand the material impetus behind the Holy Alliance attempt to construct an order based on the interventionist suppression of popular will. While upending the 1815 settlement through endlessly territorial conquests was not a legitimate option, direct geopolitical appropriation through endless dynastic warfare could be maintained by shifting the concrete reality of territory to the abstraction of territorial authority as a justification for intervention. Under this envisioned adaptation, it would be the governments claiming control over territories (rather than territories themselves) that would justify military imposition. Though the Holy Alliance may have reconciled bounded territoriality with dynastic accumulation, this project failed and the story of its failure is vital to the narrative of how popular will became the sole basis for domestic authority within international law.

5.3.2. British Imperial Capital Accumulation

Turning to Britain, we can observe how the capitalist configuration of institutions and interests lead to a united opposition to the Holy Alliance amongst a diverse array of internal factions. This dynamic is encapsulated by Britain's rejection of the

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[37] Branch 2010, 290-291.

[38] This dynamic exposed the difficulties of managing the reconstruction in a time of great uncertainty where, according to Wilhelm Grewe, the Concert sought: 'a well-balanced distribution of territories that did not submit unconditionally to the demands of the nationality principle but continued undisturbed by the dynamics of nationalism to take account of historical, cultural, economic, and strategic considerations.' Grewe 2000, 430.

proposal that it join the Holy Alliance. When approached, despite expressing a degree of sympathy, Prince Regent George declared that acceding to this agreement on his own authority would violate the British Constitution.[39] This very notion of a constitutional constraint on dynastic diplomacy is a massive indicator of how capitalist modernity rendered Britain fundamentally different from its reactionary rivals. As discussed above, the emergence of capitalist social relations in Britain led to the abstraction of popular will through a constitutional-parliamentary state. As a result, personalized dynastic diplomacy transformed into a foreign policy based on a depersonalized 'national interest.'[40] By the time of the Concert, Britain's entrenched mode of social reproduction was one where, in the words of Frederick Dufour:

> …the capitalist landed aristocracy gave a *national* form to its social interests. The internationalization of this social-property regime strengthened the conditions of possibility of nationalism in the separation of the economic from the political and the emergence of a bourgeois public sphere…more than everywhere else on the continent, the agrarian property owners identified with the monarch, the state, the nation, and the empire.[41]

We can thus see how Britain's participating in the Holy Alliance could have locked it into a disadvantageous diplomatic position where it would have competed against rivals far less constrained by domestic institutions when making sovereign decisions. At a broader level, there was the question of capitalist systemic reproduction. Unlike the dynastic mode of direct appropriation, capitalism required an expanding system of social relations premised on ever-increasing consumption.[42] Towards this end, Britain sought to expand its consumer market to the European continent where

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[39] Boutell 1922, 28.

[40] Teschke 2005, 17; see also Chapter IV, Part 4.4.2.

[41] Dufour 2007, 594.

[42] For the classic study of endless expansion as point of distinction between capitalism and other modes of social reproduction, see Luxemburg 2003.

Napoleon had previously banned its imports.[43] This narrow interest linked to a larger ideological project whereby 'the ending of war in 1815 had prompted the creation of the peace society and its vision of a world without wars was one that would cross-fertilize with the secular vision of free trade.'[44] Thus, the Holy Alliance's perpetual war-based entrenchment of pre-capitalist social relations was deeply at odds with British interests.[45] After all, popular will could be a rallying point for assertions of individual liberty deeply consistent with capitalist ideology. The pre-emption of these social transformations by reactionary intervention would eliminate this possibility.

Moreover, Britain's ongoing management of an overseas capitalist empire taught it the value of accommodating some version of popular will as means of maintaining functional legitimacy amongst its white colonial subjects. This was a key lesson of the American Revolution where a population of colonial subjects showed how popular will, evidenced by *de facto* authority, could successfully result in an assertion of sovereign independence under international law.[46] Such issues were prominent in its settler colonies (i.e. Canada, Australia, New Zealand, Southern Africa) where, on the question of popular will, '[i]nstead of an absolute right to independence one spoke, as a compromise, simply of an absolute right to autonomy.'[47] We cannot overstate importance of accommodating these aspirations given the way settler colonization continued to manage Britain's domestic surplus while expanding the base of raw materials production that supplied its engines of industry.

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[43] Wolf 2010, 296.

[44] Howe 2007, 28.

[45] On British opposition to Holy Alliance interventions, see Lingelbach 1900, 12; Grewe 2000, 431.

[46] An example of this could be found in Australia where two policies prompted by the loss of American colonies were a ban on chattel slavery and a denial of treaty-based indigenous land rights, Wolfe 2016, 31.

[47] Fisch 2015, 94.

However, especially as it concerned relations between settlers and indigenous communities, a related issue was enhancing the capabilities of imperial structures to respond to situations of what Lauren Benton and Lisa Ford have deemed 'Dominion Despotism.'[48] Here Britain needed to maintain enough of a colonial presence to prevent bellicose settlers pursuits from sparking costly conflicts with indigenous populations with whom the Empire maintained various relations. In the aggregate, managing these tasks of facilitating empire, appeasing settlers, and providing a modicum of protection to natives required further material investment in the various imperial institutions.[49] This required exploiting every available opportunity for capital accumulation as a means of financing the required infrastructure to expand its so-called 'self-organizing' system of free trade.[50] Thus, while Britain's role in the Concert placed it in a close working relationship with the reactionary Holy Alliance, the entrenchment of an anti-popular will (and by extension pre-capitalist) interventionist order could undermine the this relationship in the long term.

However, ending this problem of diverging modes of dynastic versus capitalist modes of social reproduction was possible and popular will formed part of the solution. This would entail the dynastic powers abandoning accumulation based on direct appropriation and transitioning to capitalist political economy in a manner that vitiated the need for interventions as a matter of course. That said, the forms of legitimation by which the dynastic powers would transition to capitalism could by no means be a carbon-copy of what had occurred in Britain. After all, Britain,

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[48] On efforts at constraint, see Benton and Ford 2017, 28-55. On the other side, in this general context, Vattelian justification for settler colonialism that proved so influential in North America was frequently invoked in relation to British settlement in New Zealand, Pitts 2018, 134. For an account of law and property in relation to the settlement of New Zealand, see Hickford 2006.

[49] For a study imperialism within this context of classical political economy, see Semmel 1970. These material demands can also be traced into the realm of ideology as well whereby previously anti-imperial interpretations of Enlightenment had to be rebutted by newly formulated liberal justifications for empire. On the rise the liberal case for empire in Britain, see Pitts 2005, 101-162.

[50] For the classical account of this era as constituting Britain's 'empire of free trade' whereby new territorial acquisitions were generally limited to regions deemed vital for facilitating ever increasing flows of commerce and capital, see Gallagher and Robinson 1953.

largely by virtue of its possession of a vast overseas empire, was able to achieve a relatively 'bottom-up' transition to capitalism with only a 'cheap state.'[51] By contrast, capitalist latecomers, including the Holy Alliance members, required a decidedly more 'top-down' transitory process via 'revolutions from above' orchestrated through the elite management of resource-intensive 'expensive states.'[52]

Perhaps the single greatest innovation enabling 'revolutions from above' was a variation of popular will expressed through the type of nationalist identity construction the French revolutionaries used as a justification for dismantling the *Ancien Regime*. In this context, France itself proved pivotal. Subject to a restoration of the pre-Revolutionary Bourbon dynasty in 1815 Vienna settlement, in 1818 it was formally accepted as Great Power with the highest strata of the Concert system.[53] Thus, France occupied an intermediate position between the Holy Alliance powers and Britain in that it was a relative latecomer to capitalism, yet maintained lingering liberal ethos of popular will unleashed by the Revolution. Here, the enduring vision of France as a unified collective of the equal citizens comprising its population, in contrast to the British ideal of a minimalist state placing primacy on individual liberty, formed the basis for the filling of the institutional and administrative voids left by the Revolution's dismantling of the *Ancien Regime*.[54] This alternative justification provided grounding for the French transition to capitalist political economy in the latter half of the nineteenth-century in response to increased British competition/geopolitical pressure.[55]

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[51] Wolf 2010, 309. On Britain's settlement-capitalism feedback loop during this timeframe, see Piterberg and Vercini 2013.

[52] Wolf 2010, 309. Originally termed by Antonio Gramsci, this theory of elite-directed 'Revolution from Above' or 'Passive Revolution' raises numerous questions regarding the formation of the modern international order. For studies, see Morton 2007; Bruff 2010; Hesketh 2017.

[53] Peterson 1945, 538. For the treaty text detailing this invitation and response, see Hertslet 1875, 564-574.

[54] Dufour 2007, 595-596.

[55] Comninel 2000, 478-479; see also Lefrance 2019.

On a broader scale, this nationalist legitimation of the transition to capitalism via 'revolutions from above' in the name of collective popular will was ultimately embraced by numerous reactionary actors, despite their previously opposition to popular will. In the words of Barry Buzan and George Lawson:

> many absolutist regimes sought to ally gradual democratisation with a form of elite nationalism, seeing these concessions as a prophylactic against more radical uprisings. For both absolutist regimes and their bourgeois challengers, nationalism proved to be a powerful vehicle of mobilisation.[56]

This being the case, it is vital to account for how this newfound nationalist sentiment came to inform the very core of domestic legitimacy under international law. Here I identify such a configuration where classical conceptions of international law and statehood were re-adapted to host conceptions of organic community that limited the expansive expressions of natural rights. This development played a vital, yet under-acknowledged, role in allowing popular will to meet the material and ideological demands of the post-Napoleonic order.

5.4. Organic Community as Natural Right's Limitation

What exactly was the ideological foundation of the international legal order that enabled liberals, nationalists, and the vestiges of reactionary monarchies to coexist in the building of an expanding system of capitalism? Relatedly, how did this theory determine which political formations failed to qualify as legitimate expressions of popular will in the post-Napoleonic international legal order? In addressing these questions, a vital issue is Emer de Vattel's formative vision of international law emanating from a world of self-perfecting sovereign nation-states legitimized by the popular will. As the previous chapter has shown, applying Vattel's theory of

[56] Buzan and Lawson 2015, 116.

popular will to the events of the French Revolution reveals a profound indeterminacy. It could either be as a shield for preserving local autonomy, or as a sword for aiding populations being denied the exercise of popular will.

In addressing these issues, this section focuses on how the Vattelian vision of the world faced critique by Edmund Burke's (1729-1797) proclamation that the bounds of organic community constituted an inherent limitation on the exercise of natural rights. From this basis, it was the Scottish jurist Sir James Mackintosh (1765-1832) who effectively synthesized Vattel's state-centric framework at the level of form with Burke's organicist conservatism at the level of substance. What emerged was the first ever theorization of international law as a distinct historical development, as opposed to a timeless order of transcendent morality, that *also* placed Europeans in a position of superiority over all other peoples.[57] On the question of receptivity, Mackintosh's proto-formulation of the infamous 'Standard of Civilization' was of the utmost ideological value in both his own nation and its geopolitical rivals. Thus, this development forms an indispensable episode when accounting for the international legal creation of a world premised on a pluralist, but deeply limited, conception of popular will.

5.4.1. Edmund Burke's Anti-Jacobin Law of Nations

Beginning with Burke, despite profound influences elsewhere, his theories have received minimal attention within international law.[58] However, despite this lack, when thinking through popular will as the basis for domestic authority his influence

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[57] Before Mackintosh, historicist international legal arguments were largely non-hierarchical in their depiction of human societies. A case in point is Robert Plumer Ward's 1795 treatise *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and the Romans, to the Age of Grotius*, is generally considered the first history of international law in the Western cannon. Pitts 2018, 129. Thus, Mackintosh was the first to combine this historicism with a belief in European supremacy (something previously justified through ahistorical formulations), Ibid. 130-131.

[58] For two exceptions, see Stanlis 1953; Davidson 1959.

is difficult to overemphasis. After all, Burke's thorough engagement with Vattel's *The Law of Nations* on the questions of sovereign legitimacy and (non-)intervention in the context of the French Revolution deeply advanced discussions on the meaning of popular will within an ideologically diverse world. Here Burke was forced to confront the reality that while Vattel was the leading authority on sovereign legitimacy, his theory nonetheless left open the possibility that intervention to assist a people struggling to achieve popular sovereignty was justified as a matter of natural right.[59] For Burke, viewing the Vattelian conception of sovereignty as rationally deducible through natural philosophy was entirely too similar to the justifications of the French revolutionaries who violently destroyed societies by severing the unique communal bonds that had developed over centuries.[60]

However, unlike other figures within this general timeframe, including the Holy Alliance's champions, Burke's condemnation was not a general disavowal of popular uprising. Rather it was motivated by the view that the French Revolution introduced an all-consuming dogma unprecedented in its desire to overturn all established authority and this exceeded any existing political justification.[61] This distinction between unjustifiable dogmatic instability and justifiable political change was demonstrated by Burke's early support for the American Revolution.[62] After all, the notion that the American Revolution was waged to complete a long developed political project while the French Revolution sought to destroy existing order with no outward limit is easily conceivable in Burkean terms.[63] In this sense, Burke's views can be observed within the current international legal order's stance that a sovereign political community's expression of popular will is, in the overwhelming majority of cases, impossible to substantially judge from an external perspective. It

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[59] See Armitage 2000, 627-630.

[60] See Hampsher-Monk 2005, 88.

[61] Burke 1999 [1791], 237.

[62] See Burke 1999 [1775].

[63] See Barrow 1968, 463.

is only when the impetus for internal change becomes a rationale for external intervention that certain political expressions can be explicitly condemned through international legal discourse.

An early critic of the French Revolution, Burke's initial pleas for British intervention were largely rebuked by a general non-interventionist attitude.[64] Yet, as destabilizing events unfolded and Britain became an active participant in the French revolutionary/Napoleonic wars, Burke was provided with a substantial platform for his views.[65] This occurred most famously through in his 1796 'Letters on the Regicide Peace' where his proposed solution for pre-empting future revolutionary disorder was the formation of a new polity deemed the Commonwealth of Europe that derived its identity as a collective distillation of Europe's shared sense of manners, tradition, and duty.[66] For Burke, the introduction of disorder at the level of the French Revolution, made the proposed Commonwealth's empowerment as a source of restorationist intervention a strong moral necessity.[67] According to Burke, without this preventative mechanism, the only choices left were unacceptably harsh. Here, with the Jacobins' '…violent breach of the community of Europe, we must conclude to have been made…either to force mankind into an adoption of their system, or to live in perpetual enmity with a community the most potent we have ever known.'[68] However, this portrayed destruction of virtuous organic community by pathological revolutionary force certainly appealed to the conservative sentiments empowered after Napoleon's defeat, Burke's Commonwealth as a project of supra-national institution-building was never substantively embraced.

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[64] See Hamspher-Monk 2005.

[65] On the general atmosphere of British conservative thought in the wake of the French Revolution, see Schofield 1986.

[66] Burke 1999 [1796], 315-316.

[67] Ibid.

[68] Ibid. 316.

Understanding the non-implementation of this Commonwealth project requires further inquiry into the consolidating anarchic system of sovereign states that Burke's views were limited in their ability to account for. After all, while Burke provided an answer regarding Vattel's open-ended conception of invoking natural rights to demolish existing orders, by being deliberately pro-interventionist, his Commonwealth scheme completely dispensed with other aspects of the Vattelian framework that had already proven their utility, namely letting 'facts on the ground' define popular will. In an intimately related-capacity, Burke's non-statecentric approach to organic community also was deeply at odds with the harshest aspects of colonialism that would increasingly be justified through nineteenth-century international law. Towards this end, he famous lead the prosecution of the British East India Company governor Warren Hastings for acts of cruelty against local populations.[69] For Burke, the reality that Indians had an ancient culture with extensively developed hierarchical customs and traditions invalidated claims that cruelty was justified as a means of 'civilizing' a 'barbarous' people.[70] Crucially in Burke's thought, the fact that Indians were not politically organized along similar lines to the European state could not justify their exclusion from the reciprocal legal relations given that the existence of a plurality of organic communities produced an ethical imperative to recognize a '…multiplicity of legal orders within and among states.'[71] Thus, the Commonwealth of Europe was highly consistent with his view of organic community as something that neither required, nor could be perfectly expressed by, the sovereign nation-state form. As such, albeit in very different contexts, both the Jacobins and the East India Company represented distinct threats to the natural development of the social institutions Burke advocated.

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[69] Burke 1999 [1788].

[70] Pitts 2011, 112-114; However, there were clear limits to Burke's approach to cultural inclusion. His admiration for the hierarchies that existed in India, that justified their parity with Europe, scarcely applied to the indigenous peoples of Africa and the Americas, see O'Neil 2009.

[71] Pitts 2011, 112.

5.4.2. Sir James Mackintosh's Nation-Statist Anthropology

If Burke's views on organic community derived from acknowledging the limits of state-centrism, why did these ideas ultimately inform the deeply state-centric ethos central to popular will's legitimation of domestic authority under international law? In confronting this paradox, a key figure is the Scottish jurist, parliamentarian, and former colonial judge Sir James Mackintosh who, ironically enough, gained fame as a defender of the French Revolution and critic of Burke.[72] Despite these early differences, ultimately, Mackintosh effectively merged Vattel's state-centrism with Burke's organic community concept (as well as his presentation of 'Europe' as a unique civilizational entity). On the question of state authority, Mackintosh begins from the first principle that '[a]lmost all of the relative duties of human life…arise out of the two great institutions of property and marriage' and their protection by the distinct state-entity is necessary for civilizational progress.[73] In this way, his approach to political community (similar to Burke) is far more focused upon the vicissitudes of everyday life than earlier Enlightenment figures (including Vattel) whose justifications for authority were derived from intangible abstractions.[74] From these premises, he highlights the sacrosanct need for local discretion in choosing a system of authority for '[s]uch a body of political laws must in all countries arise out of the character and situation of a people; they must grow with its progress, be adapted to its peculiarities, change with its changes, and be incorporated into its habits.'[75]

However, despite such broad proclamations regarding the synergy between local character and legitimate authority, Mackintosh presents a conundrum as to which

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[72] For Mackintosh original defence of the Revolution and Critique of Burke, see Mackinstosh 1846 [1791].

[73] Mackintosh 1823[1799], 363.

[74] Ibid. 364.

[75] Ibid. 369.

communities fall under this banner of organicist justification. On the one hand, he speaks of universally discernible principles of governmental authority '…recognized and revered (with few and slight exceptions) by every nation on earth, and uniformly taught (with exceptions still fewer) by a succession of wise men from the first dawn of speculation to the present moment.'[76] Yet on the other hand, working from the premise that '[h]istory…is now a vast museum, in which specimens of the variety of human nature may be studied', his description of the presumably 'few and slight exceptions' to the acceptance of universal principles for proper social organization appear to encompass nearly the entire world beyond Europe.[77] According to Mackintosh's appraisal:

> We may be said to stand at the confluence of the greatest number of streams of knowledge flowing from the most distant sources, that ever met at one point…We can bring before us man in a lower and more abject condition than any in which he was ever seen before…We can make human societies pass in review before our mind, from the brutal and helpless barbarism of Terra del Fuego, and in the mild and voluptuous savages of Otaheite; to the tame, but ancient and immovable civilization of China, which bestows its own arts on every successive race of conquoerors; to the meek and servile natives of Hindostan, who preserve their ingenuity, their skills and their science, through a long series of ages, under the yoke of foreign tyrants; to the gross and incorrigible rudeness of the Ottomans, incapable of improvement, and extinguishing the remains of civilization among their unhappy subjects, once the most ingenious nations of the earth.[78]

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[76] Ibid. 357.

[77] Ibid. 356.

[78] Ibid

Through this 'Burke-Vattel synthesis', Mackintosh provided Britain with an international legal argument that forced the dynastic powers to confront their contradictions and consequentially hasten their transitions to capital accumulating forms. This was illustrated in an 1815 Parliamentary speech on the legality and legitimacy of intervention in Genoa where Mackintosh harshly condemned the Holy Alliance's practices as the functional equivalent of the pro-revolutionary invasions of the French revolutionary wars. For Mackintosh, if this hierarchical interventionism was legitimate, the return of sovereignty to conquered territories would be illusory for '…it is all by grants from …lords paramount [for]…[t]heir will is the sole title to dominion…' and '[a] single acre granted on such a principle is, in truth, the signal of a monstrous revolution in the system of Europe.'[79]

In explicating the 'true' nature of the relationship between national independence and sovereign autonomy in the face of the Holy Alliance's hierarchical interventionism, Mackintosh interpreted Burkean notions of organic community as encapsulated within the Vattelian ontology of multiple juridically equal sovereign states in what Iain Hampsher-Monk deems a 'curious synthesis.'[80] The result was Mackintosh starkly demonstrating his statist anthropological hierarchy by conflating the Peace of Westphalia with the establishment of the modern international order, a development he venerates as an '… ancient system of national independence and balanced power, which gradually raised the nations of Europe to the first rank of the human race.'[81] However, while this framework of formal equality and inherent autonomy exposes the pretences of liberal political philosophy embedded within the structure of modern international legal argument. Thus, according to Hampsher-Monk, in the context of Mackintosh's claim:

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[79] Mackintosh 1846 [1815], 512

[80] Hampsher-Monk 2005, 99

[81] Mackintosh 1846 [1815], 512

> these principles of were not…asserted as a popular or abstract and absolute rights (in many cases Mackintosh was defending virtually unlimited monarchies). Such autonomies and identities are instead now portrayed as grounded in the same considerations that Burke had advanced for intervening in France. That is to say as part of an inherited and customary international system, crucial to the very 'existence of social order', in defence of which all Europe – republics and monarchies alike – had, rightly and in defence of justice, joined against revolutionary France for 'the re-establishment of that ancient system, and of those wise principles under which it had become great and prosperous.'[82]

In lodging this claim, Mackintosh counterfactually asserted one of the first articulations of the Westphalian orthodoxy that ultimately dominated mainstream understandings of international legal and political order. While this narrative is difficult to sustain as a material historic reality, in the context of the long post-Napoleonic re-ordering process, it provided a highly convenient theoretical basis for accommodating a diverse array of political positions at a superficial level while nonetheless furthering an all-encompassing capitalist logic. For Britain, this veneration of the sovereign state naturalized the ideological public/private dichotomy that characterized an order of international anarchy structurally linked to capital accumulation. This in turn, allowed the British to deflect claims from the dynastic actors that their attempts to implement liberal commercial regimes in the name of capitalist political economy were dangerous destabilizers of the traditional order.[83] After all, incorporation of Burkean organic community into this liberal nation-statist argumentative structure via Mackintosh allowed such invocations of 'tradition' by dynastic legitimacy proponents to be dismissed as hypocritical. This defensive mechanism was readily apparent in Mackintosh's account of the intervention in Genoa where, much

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[82] Hampsher-Monk 2005, 99-100 (quoting Mackintosh 1846 [1815], 520)

[83] Such condemnations arose from the continental powers that Britain's commercial policies had devastating upon the mercantile states of Italy. In response, Britain claimed that it could have no liability for the impacts of domestically enacted Navigation Acts these disruptions stemmed from for they were legitimate exertions of sovereign will. Nakhimovsky 2010, 160-161.

like in Vattel's framing, it was Britain who defended the autonomy of small states against the conquest-mad forces of dynastic reaction; forces who were ultimately no different from the same French revolutionary elements they condemned.[84]

Beyond the narrow furthering of British interests, Mackintosh's formulation spoke directly to emerging debates, especially in the German-speaking world. Such discourses revolved around the nature of lawful authority as abstract rationality was pitted against historically-developed particularity as two mutually excluding foundations.[85] While unanswerable in any metaphysical sense, this dispute (driven by the mechanics of legal indeterminacy) helped generate the presumption that only the unique 'will' of a given people (however justified) could legitimately define the nature of its collective juridical personality.[86] The emergence of this newfound juridical consciousness, and the styles of argument that expressed it, directly undermined the longstanding legitimacies garnered by hierarchical paternalist arrangements (i.e. the Holy Alliance), at least in the formalized domains of government and commerce.[87]

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[84] Mackintosh 1846 [1815], 517-518. This characterisation of the Holy Alliance became entrenched in the British approach to international law as its shifted from the classical, universally-oriented, law of nature and nation into the parochial juridical 'science' that defined the nineteenth century. According to William Oke Manning's 1839 *Commentaries on the Law of Nations*, generally viewed as the first British contribution to the latter tradition: 'The Holy Alliance was professedly formed for the support of the true principles of the law of nation; but, in the manner in which it has been carried out, its members have violated that law, by the gratuitous interference with independent states.' Manning 1839, 87-88.

[85] In this context, the rationalist position was largely associated with Georg Hegel (1770-1831) while the historicist position was largely associated with Frederick von Savigny (1779-1861). While bitter rivals in life, '…the discord between them pales in comparison to the hegemony of the worldview they helped create.' Barozzo 2015, 257.

[86] Ibid. 251-254.

[87] The indeterminate, yet particular, mode of juridical ordering that consolidated against this backdrop, 'combined the conservative elements of eighteenth century historicism and the utopian elements of its contemporaneous rationalism to create a powerful and pervasive political settlement to which the popular will accedes.' Ibid. 268.

When faced with the Vattel-Burke synthesis, reactionary actors were forced to confront how their own agendas could be popularly legitimized. This opened the door to the possibility of elite-led top-down reforms that allied monarchical actors with bourgeois forces with popular nationalist ethos.[88] Approaching this situation in its totality, state sovereignty was the authority to undertake these reforms, popular will its legitimation, international law the means of external coordination, and capitalist transition the means of financing it all. Thus, while Duncan Kennedy is correct in his assertion that changing legal sensibilities in this timeframe resulted in '…the eventual universalization…of a single Classical system of public international law…based on the conceptual innovations…of sovereignty as a territorial (not personal) power absolute within its sphere', the precise mechanics of this process need to be accounted for.[89]

5.5. Making Modern Sovereign Equality

5.5.1. The Emptiness of Great Power Treaties

While the right of bounded political communities to their preferred manifestation of popular will was a contested point as the Great Powers deliberated upon the fate of Europe's small polities, the seeds of resolution already existed within the upper strata of the Concert system. This was due to the reality that, despite the Concert's overarching hierarchy, the five Great Powers treated one another equals. According to Gerry Simpson's assessment, 'paradoxically, legalized hegemony between the Great Powers and the rest, in order to work effectively, requires a formalistic commitment to sovereign equality among the Great Powers themselves.'[90] Thus, through its inclusion of both liberal-capitalist Britain and the reactionary-dynastic Holy Alliance, the highest rung of the Concert hierarchy was a milestone in the

[88] On the consignment of paternalism to the domestic sphere in the early nineteenth century development of 'classical legal thought', Kennedy 2006, 32-24.

[89] Ibid. 28-29.

[90] Simpson 2004, 108-109 (emphasis in original).

development of the modern international legal order. This was nothing short of the *first* modern instance where sovereign entities, who possessed different forms of social reproduction and political legitimation, coexisted as formal equals within an overarching juridical order while also engaging in intensive interactions with one another. While the Concert's imposition of a 'legalized hegemony' has typically been understood as a *suspension* of the existing equality-based order, this is premised on the assumption that the modern sovereign equality actually emerged through the 1648 Peace of Westphalia settlement.

To situate this development, we must revisit Teschke's alternative to the Westphalian myth. Here, in contrast to any horizontal, equality-based order, the competition between dynastic actors aspiring to the status of the one true universal monarch resulted in a situation where '…polities into coexisting sovereign monarchies did not *eo ipso* imply the general acceptability of formal parity…after the Westphalia settlement….Clashes over precedence in diplomatic negotiations were symptomatic of the persistence of hierarchical conceptions of inter-state organization.'[91] This resulted from an arrangement where the existing social-reproductive order was premised on geopolitical competition over which dynastic sovereign could best claim the mantle of 'universal monarch.'[92] As such, parties to this system were fundamentally unequal by virtue of their ever-shifting status in relation to this end.[93] Such formalized inequality was directly reflected in the 'ranking of powers' that formed the basis for diplomatic practice against this backdrop.[94]

However, one can claim that this early modern international order did possess a form of equality in that it allowed all (European) sovereigns to pursue the agenda

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[91] Teschke 2003, 224

[92] Ibid.

[93] Ibid.

[94] For an account of this 'power ranking' system as it manifested in this early modern era, see Keene 2013b, 269-276.

of claiming universal monarchy by any means in a capacity where all actors were mutually unanswerable to one another.[95] Yet, the sovereignty within this scheme was vested in the bodies of individual dynastic actors as opposed to underlying political communities thus side-stepping the question of popular will as a legitimating abstraction. Additionally, even if we conceptualize this basic premise of non-judgement as the prelude to modern juridical equality, there remains the issue that practices falling under this rubric were all imbricated within a common mode of social reproduction premised on pre-capitalist geopolitical accumulation via endless wars of conquest (that were fundamentally linked to personalized sovereignty).[96] By contrast, the Concert's Great Powers did not initially share a common mode of social reproduction (or a legitimizing conception sovereign of authority), yet their cooperation was required to preserve this order. Consequently, they were forced to cooperate in a system stripped of the common conventions that grounded earlier modes of diplomacy. However, if a common mode of social reproduction cannot explain a functioning sovereign equality-based international legal system with the Concert's highest rung, what can?

In answering this question, a phenomenon of great importance was the early nineteenth century 'treaty-making revolution' where, as Edward Keene's empirical investigation has demonstrated, the number of new treaties exploded in the post-Napoleonic era.[97] This development further exposes the non-Westphalian origins of modern sovereign equality. According Keene, if Westphalia introduced the medium of the treaty as a means of ordering relations between diverse actors, then this should have led to a steady increase in treaty-making from this point onwards.[98]

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[95] This formed the basis for Carl Schmitt's account of this era, see Schmitt 2003.

[96] On this order's formation of a medium of inter-sovereign legality, see Teschke 2003, 227-229. On the way in which Britain's capitalist transition lead it distance itself from this system, see Teschke 2005, 17.

[97] Keene 2012, 478.

[98] Ibid. 478-479.

However, if anything, treaty-making had actually declined in the eighteenth century.[99] Applying Keene's observation, I claim that this dramatically quick development of a treaty-based international legal order resulted from the unprecedented ability of the treaty-form to act as a common medium of interaction between Britain liberalism and the Holy Alliance conservatism, despite the substantive irreconcilability of these two mode of political authority. While the underlying legitimation of treaty-making itself differed immensely between the liberal-capitalist and reactionary-dynastic power blocs, it nonetheless enabled coexistence. Here, divergent legitimizing rationales (including questions of popular will), at least in the short-term, could be separated from the handling of basic day-to-day affairs.

For Britain, the value of the treaty can be located in its embodiment of the fundamentally capitalist presumption of free-exchange between juridically equal units without any need to account for the deeper systemic realities shaping these transactions. Recourse to such justification was deeply enabled by the fact that Vattel was the single most influential international legal source in early nineteenth-century Britain.[100] In this capacity, British international lawyers could base the ontological grounding of treaty-making on the Vattelian premise of a world of bounded sovereign equals even when this rendering of abstract equality did not reflect the actual position of their treaty partners.[101]

For the Holy Alliance powers and their allies, the value of the treaty its affirmed dynastic diplomacy that grounded authority in adherence to tradition (and by extension opposition to popular will). This treaty-tradition-authority nexus was made apparent by the practice of 'treaty collecting' whereby the rise of the Concert sys-

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[99] Ibid. 479.

[100] Pitts 2018, 118.

[101] This was especially true of early nineteenth century British anti-slave trade treaties made with the Muslim and African rulers whereby initial equality justified unidirectional imposition in the long term, see Keene 2007, 323-329.

tem lead many Continental diplomats to bring forth an accumulated corpus of centuries-old treaties as a means of articulating a positivistic grounding for the post-Napoleonic international legal system.[102] Regarding the question of popular will, the great significance of this treaty-based ordering was that it created a functionally narrow conception of 'will', restricted to consent to the specific terms of a given treaty.[103] On this basis, it was fundamentally ambivalent to whether the broader sovereign authority that enabled this consent was 'popular', 'dynastic', or otherwise.

In the absence of any effectual consensus against it, popular will as the grounding for domestic authority in this treaty-based poly-reproductive international legal system was able to continually assert itself. Here, an especially pertinent issue surrounded what would happen if one of the Concert's Great Powers internally rejected the dynastic order installed by the 1815 Congress of Vienna in the name of popular will. This is precisely what happened in France with the 1830 July Revolution where the Concert-imposed Bourbon monarchy was popularly overthrown and replaced by an exceeding more liberal constitutional monarchy.[104] It is telling here that the Holy Alliance powers did not reinstall, attempt to reinstall, or even seriously consider reinstalling its preferred ruler despite its self-appointed status as enforcer of the Vienna settlement.[105] This failure exposed the limits to which one sovereign equal could impose its will upon another in a world where idea of popular

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[102] Keene 2002, 17-18. On this practice's contribution to the rise of international legal positivism, particular as it provided opportunity for Frederich van Marten's source compilation efforts, see Koskenniemi 2008, 200-201.

[103] It can be argued that the roots of this arrangement consolidated in the German Confederacy in the 1840s where a distinct split occurred between 'philosopher jurists' and positivist lawyers. While the former offered theories regarding the need to shape internal orders to a eliminate strife on a deeper level and broader scale (with Kant's 'Perpetual Peace' being the single greatest example), the latter disclaimed the relevance this of type of thinking when it came to articulating legal relations between nations, see Hunter 2016.

[104] For studies of the details of this event see Pinkney 1973; Pilbeam 1991.

[105] Grewe 2000, 433; Failure to act in this regard revealed the material limits of Metternich's Holy Alliance policies whereby intervention '…would only work in weak states where Austria was already influential.' Lyons 2006, 39.

will as the basis for domestic authority enjoyed widespread, if not universal, legitimacy.

5.5.2. Modernizing Recognition

As sovereign equality became entrenched as a safeguard for local popular will there emerged subsequent questions of how, and under what circumstances, this protection could be extended beyond the core grouping of Great Powers? Thus, the need to navigate this shifting understanding of sovereignty brought with it the question of recognition as a necessary corollary.[106] This provided the British with an opportunity to advance a theory of international legal membership directly aligned with their goal of building a capitalist system where integration in the transcendent domain of economics bolstered a general policy of nonintervention in the bounded domain of politics. Such a view that rejected Holy Alliance interventionism and explicitly embraced the insights of Mackintosh was articulated by the barrister Frederick Eden in his 1823 piece *An Historical Sketch of the International Policy of Modern Europe as Connected with the Principles of the Law of Nature and Nations Concluding with Some Remarks on the Holy Alliance*.[107] Embracing popular will in a manner deeply in-line with Mackintosh, under Eden's theory, recognition on the basis of dynastic legitimacy:

> was contrary to the 'imprescriptible right' of all nations to select their own constitutions, the changes to which would not prevent states from maintaining 'usual relations of peace and amity' or the 'ancient federal maxims of the European Commonwealth' that preserved independence regardless of national strength.[108]

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[106] See Orford 2012c, 277-278.

[107] Clark 2018, 14.

[108] Ibid. 14-15 (Quoting Eden 1823, 108-110)

As a means of further justification, for Eden, acknowledging the changing circumstances of interstate coexistence meant recognition of international legal standing must be now acknowledged based on 'facts on the ground' out respect for local popular will over the judgments of outsiders. That said, according to Eden: '…the constant communication among the European states, has not only given every Nation a clearer insight into her real interests, but has introduced a new principle in politics, unknown to ancient times, in the salutary and effectual controul [sic] which Public Opinion has long exercised even over the most ambitious and enterprises Princes.'[109] On this basis, his formulation harmoniously weaved together the impossibility of reversing the captivating influence of popular will, the inevitable march of linear progress, the premise that 'effective control' is the only basis for legitimate external judgment, and the belief that national borders properly consolidated unique bounded political communities. In other words, it grounded an international legal ordering perfectly suited to a system of capitalist reproduction where the transcendent expansion of economic relations is contingent upon the domestic containment of political expression.[110]

5.6. Popular Will and Territorial Imposition

5.6.1. The Scandal of Title by Conquest

The Concert of Europe system, albeit in a paradoxically hierarchical way, played a key role in entrenching the Vattelian counterfactual of a sovereign equality-based international order. However, this was largely an abstraction given ongoing realities of domination. In moving beyond ideological consolidation, what demands attention are the material effects the discourse of 'popular will as the legitimate basis

[109] Quoted in Clark 2018, 15.

[110] Beyond serving British interests, this theory of recognition resonated with the earlier German theories of recognition that did not privilege dynastic legitimacy and, relatedly, rejected standing of third states to challenge the outcome of disputes between a people and its sovereign. For a study of these theories, see Alexandrowicz 2017 [1958].

domestic authority' had for communities asserting this right while being subject to the control of outsiders. A highly noteworthy development was the declining legitimacy of attaining title by conquest whereby military force provided the central justification of a state's acquisition of territory under international law.[111] As previously discussed, the experiences of the French revolutionary wars left much of Europe with negative attitudes towards foreign domination, and this was readily reflected in the widespread rejection of the Holy Alliance. Moving beyond these timeframe-specific events, there remained the deeper relationship between conquest and popular will.

While the ability to attain good title by conquest was essential to the old dynastic order premised on endless wars of geopolitical accumulation, the introduction of popular will presented multiple challenges to this dynamic.[112] As an initial matter, how could domestic authority legitimized through unique manifestations of popular will be meaningful if external military force could arbitrarily destroy local institutions?[113] According to Sharon Korman's appraisal:

> …if the doctrine of the self-determination of peoples was now emerging as the new principle of legitimacy in international relations in place of the old dynastic principle, which had placed the rights of rulers above the rights of the nation or the people, then the logical corollary was the right of conquest, by means of which the conqueror had the right to rule the inhabitants of the conquered territory, could itself no longer be part of international law. For if the principle of self-determination applies,

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[111] For studies seeking to account for the phenomenon of title by conquest, largely in reference to its outlawing, see e.g. MacMahon 1940; Langer 1947; Korman 1996; Hathaway and Shapiro 2017.

[112] Moreover, it must be noted that the success and certainty of conquest in this European dynastic context had everything to do with the existence of shared presumptions regarding social reproduction and legitimate authority. As Lauren Benton, has recently shown, conquest-based interactions between societies without these shared presumptions resulted in a far less certain patchwork of obligations based on truce, betrayal, and protection, see Benton 2018.

[113] See Fisch 2015, 56-58.

> then a victor cannot have a right to rule by virtue of *conquest*, but only by virtue of the people's *consent*.[114]

However, the risk of conquest in a popular will-based international order did not only concern local political communities but extended to would-be conquerors as well. As James Whitman has shown, the ability of military victory to effect orderly territorial transfers amongst dynastic actors was premised on the willingness of conquered populations to accept their new rulers.[115] In a system where sovereignty was layered and divided amongst complex dynastic hierarchies and lineages, such changes in authority were distanced from the daily life of most individuals.[116] Yet, as the nineteenth century progressed, and sovereign authority became increasingly bounded and exclusive, nationalist movements within subjugated territories mounted concerted campaigns of resistance against invading forces regardless of what their vanquished leaders had agreed to.[117] The entrenchment of popular will thus consigned a once reliable means of territorial acquisition to the status of profound uncertainty and exposure to violence.

Moreover, when considering how the discourse of popular will set the conditions for increased capital accumulation, larger questions are raised concerning the relationship between conquest and capitalism. Here, licensing conquerors to violently disrupt existing social relations via direct appropriation of territory could easily contradict the entrenchment of the social relations/expectations needed to sustain capital accumulation. After all, this is nothing short of a fundamental contradiction

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[114] Korman 1996, 37 (emphasis in original).

[115] Whitman 2013, see also Chapter IV, Part 4.3.3.

[116] On the place of nationalism in facilitating transitions to capitalism, particularly amongst capitalist latecomers, see Dufour 2007.

[117] Here Whitman shows how nineteenth century nationalism's ability to undo previous traditions was made evident by the American Civil War and the Franco-Prussian War where the battlefield success of regular armed forces was not sufficient to quell popular resistance from below by guerrilla factions. Whitman 2013, 7-8.

between a mode of social reproduction with an inextricable hierarchical component (i.e. a conquered population is formally subordinated to its conqueror) and a mode of social reproduction that revolves around exchange on the abstract basis of formal equality.[118] As discussed above, this dynamic provides key insights into why a capitalist Britain was adamant in its advocacy for a general presumption of nonintervention in the face of a dynastic intervention-demanding Holy Alliance.

However, the solution to title by conquest's intertwined threats to both popular will and capital accumulation was not to ban it outright. Thus, as international law's consolidated into a bounded disciplinary field, conquest remained a recognized basis for territorial acquisition in numerous nineteenth and early-twentieth century treatises.[119] This persistence continued despite deep internal controversies over the nature and status of title by conquest, and external controversies regarding this doctrine's incompatibility with a consolidating international legal order premised on popular will, bounded territoriality, and capital accumulation.[120] In reconciling this apparent paradox, we must consider the rise of new doctrinal innovations that were better suited to the changing material and ideological conditions of the post-Napoleonic aftermath. While these innovations limited applications of title by conquest in both the European and non-European worlds, they did so in profoundly different ways, and thus, contributed immensely to the construction of an unapologetically

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[118] When it came to the certainties demanded by capitalist social relations, the continued legal status of title by conquest proved a persistent challenge. This included the profound uncertainty of private property rights in conquered territories, where unlike temporary occupation, a conqueror's acquisition of sovereignty vested absolute power that could not be contested by outsiders. Thus, if a conqueror '…declares that the private property in which it succeeds is not to be respected, the judges can only leave its conduct to the indignation of mankind.' see Westlake 1901, 394-395. Additionally, substantial controversy existed as to whether a conquer acquired the sovereign debt of a conquered territory, Bentwich 1907, 67.

[119] For a listing of the treatises in this era that acknowledged title by conquest, see McMahon 1940, 69.

[120] Here it can be said that conquest had a great degree of overlap with other recognized modes of territorial acquisition under international law, especially cession by treaty, prescription on the basis of long-term usage, and occupation of 'uninhabited' or 'primitive' territories, see Ibid. 4.

Eurocentric international legal order aligned with Mackintosh's hierarchical vision.[121] Against this backdrop, the continued existence of title by conquest can be attributed to its offering of an argument of last resort in face of anomalous situations where other categories of territorial acquisition failed.[122] While this did nothing to resolve the title by conquest-popular will contradiction, the increasing rarity of this situation diverted attention away from this reality as the nineteenth century progressed.

5.6.2. Belligerent Occupation's Property

In accounting for the post-conquest juridical innovations that emerged during the extended post-Napoleonic settlement process, key amongst them was the doctrine of belligerent occupation. Distinct from conquest, occupation posited a legal regime of territorial imposition where the sovereignty did not vest in the occupier who was now duty bound to conserve the territorial status quo to the extent needed to maintain order.[123] The introduction of this innovation can be viewed as a point of reconciliation between the ability of Concert powers to conduct hierarchical interventions and the acknowledgement of widespread resentment to the intrusive impositions that characterized the French revolutionary wars.[124]

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[121] With this turn to explicit hierarchy in international law, conquest could be understood as an egalitarian relic, see Lindley 1926, 160 ('[c]onquest, as a title to territory, assumes the absence of any formal transfer on the part of the previous sovereign, whether that sovereign be an advanced state or a native political society.').

[122] An example being the 1900 British conquests of the Boer Republics in Southern Africa, see Stirk 2016, 255-256. For an analysis of the uncertain sovereign status of the Boer Republics from this timeframe, see Westlake 1899.

[123] For the most recent large-scale effort to theorize military occupation's international legal dimensions, see Gross 2017.

[124] In Peter Stirk's appraisal, while 'the presence of troops, especially Great Power troops, on foreign territory could not readily and openly be justified in the language of conquest…it could be justified in the language of occupation.' Stirk 2016, 105.

This framing necessarily demands scrutiny into the way shifting understandings of 'order' conditioned the scope of what institutions warranted conservation under this regime. In tracing this conservationist ethos, proto-formulations existed in earlier depictions of conquest where, despite the presumption that a conquering sovereign maintaining complete discretion over annexed territory, preserving existing structures could nonetheless be a wise policy option. For example, after their 1763 annexation of Quebec, the British preserved most of the French colonial institutions.[125] Beyond administrative discretion, one of the first attempts to legally limit this power was found in Vattel's treatise where, in calling for the protection of private property, he claimed that '[t]he conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs.'[126] This preservation of property interests carried no reciprocal obligation for a conqueror to uphold local governmental structures. Rather, Vattel expressly recommended against it for '…this method is dangerous: it produces no real union of strength; it weakens the conquered country, without making any considerable addition to the power of the victorious state.'[127]

At first glance, this anxiety over the preservation of an existing governmental order may seem irrelevant to the doctrine of belligerent occupation given its intended operation as a temporary measure as opposed to a permanent conquest. However, a variation on this Vattelian disparity between the conservation of private property

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[125] Interestingly enough, in the debates surrounding the Quebec Act that proclaimed this preservation of existing laws, one of the examples cited of positive practice in this domain is the Ottoman Empire and its impositions in Wallachia and Moldavia. Here, Member of Parliament Alexander Wedderburn raised this point while nonetheless proclaiming the Ottomans to be 'the worst of all conquerors.' Quoted in Korman 1996, 34.

[126] Vattel, 1758[1852] Book III, Chapter XIII, § 200.

[127] Ibid. § 202. Despite the conquest-popular will paradox discussed above, this position could nonetheless be reconciled with Vattel's theory of popular will in that conquest simply enlarged the size of a sovereign political community tasked with the duty of self-perfection. However, this view was exceedingly similar to the Jacobin justifications for exporting the Revolution through direct territorial imposition. As such, it was incompatible with the Concert-era view of popular will as grounded in unique organic communities.

versus public government manifested in the early applications of this regime. In this context, while protecting property interests was of paramount importance, proclamations of the right of occupying powers to transform existing constitutional orders only began declining around 1848.[128] Thus, the rise of belligerent occupation is a quintessential case study in the way international law entrenched the protection of private property as *a priori* qualifier of acceptable of public authority, even though the discourse of popular will justified presumptively limitless political possibilities

In accounting for why belligerent occupation functioned as a mechanism for property protection prior to governmental protection, we must revisit the contention between liberal-capitalist Britain and the reactionary-dynastic Holy Alliance. Here, despite the core differences between these two blocs, a shared presumption was opposing the modes of redistribution practiced by the Jacobins.[129] Importantly, property protection was in the interests of both the Holy Alliance's drive to preserve feudal holdings as the source of legitimate hierarchy and Britain's drive to protect the certainty of property interests/expectations necessary for functional market-exchange amongst formal equals. On this basis, belligerent occupation forged an axiomatic point of unity between two rival systems.

Interestingly, much of the theoretical groundwork for belligerent occupation is traceable to earlier French jurists who, strangely enough, wrote in support of the French revolutionary project of top-down implementation of popular will the Concert was formed to oppose. Here the writings of Jean-Jacques Rousseau on the rights of individuals to be free from the impact of inter-sovereign wars was further refined by figures including Jean-Étienne-Marie Portalis and Charles Talleyrand to produce the 'Rousseau-Portalis Doctrine' dedicated to civilian protection in war, including property protection.[130] While these doctrines were developed to facilitate

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[128] Arai-Takahashi 2010, 57-58.

[129] See Chapter IV, Part 4.6.1.

[130] Benvenisti 2008, 625-627. For a study on the broader French revolutionary/Napoleonic applications of occupation, see Stirk 2015.

the anti-dynastic, top-down French revolutionary export of popular will, the Concert powers successfully extracted the principle of property protection from its formative context for their own ends. Thus, in an ironic development, the component of the larger revolutionary project to achieve both formal and substantive equality ultimately legitimized the formal inequality of dynastic reaction and, more enduringly, the substantive inequality of capitalism.

Yet, what does this joint Holy Alliance-British interest in property protection reveal about the continued acceptability of an occupier's prerogative to dismantle local constitutional orders? When considering the Holy Alliance, given its stated agenda of suppressing revolutionary movements along with its reliance upon a feudal absolutism that lacked any modern distinction between political and economic power, the answer is rather self-evident. This was precisely the legitimation the reactionary Great Powers needed to bar the formation of any popular will based government threatening to export revolution.[131] However, when considering capitalist Britain, while its assertions were far less explicit, this toleration of the defence of private property prior to the protection of political expression is nonetheless deeply revealing. For this disparity in what the law of occupation originally conserved is illustrative of the capitalist presumption that any political form is acceptable, on the condition that it designates 'private' matters of property and economic transaction as decidedly 'apolitical' features that only become 'politicized' when there is an attempt to place them in the service of a collective purpose.[132]

On this basis, belligerent occupation's great advantage over conquest was that, as a temporary regime, it enhanced an occupier's accountability on the question of property protection. On this point, despite assertions that conquerors did not acquire the

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[131] With this objective in mind '[b]y enjoining the occupant from changing the political order of the occupied territory, and by interdicting the legal transfer of sovereignty until the state of war was formally concluded, the legal category of belligerent occupation effectively facilitated the mediation of territorial and constitutional change.' Bhuta 2005, 732.

[132] See Rosenberg 1994, 131-135.

private property of their new subjects, since conquerors attained sovereign power, outsiders were left with no real means of enforcing this standard.[133] By contrast, with the rise of belligerent occupation there emerged novel procedures for individuals to claim compensation for property requisitioned by occupying forces that were unthinkable in earlier times when conquest brought with it the prospect of limitless plunder.[134] This exacerbated the difficulties of allowing title by conquest to exist in an international legal order legitimized by the popular will that presumed capitalist social relations as its foundation. As the nineteenth century progressed, belligerent occupation's function in upholding private property as a precondition of political legitimacy became increasingly entrenched. A striking example can be located in French assertions during the Franco-Prussian War proclaiming that the law of occupation's virtue was upholding of the sanctity of private property against the internal threat of anarchists and socialists just as much as against the external threat of German invaders.[135]

5.7. Nationalism and the Fate of the Holy Alliance

5.7.1. The Question of Multi-Ethnic Empires

Why did governmental forms ever became objects of protection under the law of occupation at all? Addressing this seemingly narrow question turns our attention to the much larger issue of how entrenchments of nationalism ended dynastic reaction against popular will while introducing new contradictions. In identifying the eventual embrace of nationalism through an effective synthesis of popular will with dynastic power, a starting point is the disagreement between Metternich and Russia's Tsar Alexander I. While Metternich was opposed to any invocation of popular will

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[133] Westlake 1901, 394-395.

[134] On the development of these procedures for requisition and compensation, see Nabulsi 1999, 22-27.

[135] Fitzmaurice 2014, 242-245.

on the grounds that it had no place within dynastic politics, Alexander articulated a vision where a political order acknowledging multiple national/cultural identities was not only tolerated, but something to be embraced.[136] Thus, Alexander's views were similar to Mackintosh's in that they elevated the immutability of organic community above earlier Enlightenment ideals of reason and consent as the grounding of political order. However, they differed in that Alexander's organicism did not justify sovereign independence, but instead presented a pluralist configuration where the ability to balance and arbitrate varied cultural expressions was a hallmark of legitimate monarchical leadership.[137]

This internal monarchical legitimation of nationalism received major external motivation as struggles for popular will ignited a series of uprisings throughout continental Europe in 1848.[138] While reactionary forces forcibly suppressed challengers, this was only a temporary answer to threats of popular mobilization that increasingly strained traditional structures of authority. When devising long-term solutions, dynastic powers could insulate themselves from radical popular demands by allying with nationalist expressions that transmuted popular will into parochial ethos of shared history, culture, and identity as opposed to any universalist reinvention of the relationship between an authority and its subjects.[139] With these intertwined developments, popular will embodied through a discrete local governmental configuration became an institution worth upholding, even when under belligerent occupation.[140]

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[136] Delfiner 2003, 144-145.

[137] Ibid. 139-141.

[138] For accounts of the 'Revolutions of 1848', see Jones 1991; Rapport 2009; Weyland 2009.

[139] Buzan and Lawson 2015, 115-116.

[140] On the law of occupation's paradoxical facilitation of both dynastic and popular sovereignty, see Bhuta 2005, 732.

Validating Mackintosh's critique, the Holy Alliance attempt to build an interventionist order was exposed as incompatible with the forms of nationalist expression that were fast emerging as a new vessel for popular reactionary captivation. This transformation of the reactionary Great Powers was profoundly emblematic of how the contradictions of material historical change is susceptible to concealment through sweeping juridical abstraction.[141] Here, the ascription of 'ancient traditions' to nationalist expression as opposed to dynastic diplomacy was able to avoid any serious reckoning with the fact that anti-nationalist reaction (embodied by Metternich) and nationalist reaction (advocated by Alexander) constituted profoundly different modes of sovereign authority. For the former, an all-pervading hierarchy blurred the boundaries between internal and external sovereignty, while the later could accept external equality by consigning hierarchy to a purely internal matter shielded from outside judgment.[142]

Leaving the question of Prussia to the side, this embrace of nationalism reveals a great deal as to how Austria (later the Austro-Hungarian Empire) and Russia came to function as counterintuitive, but nonetheless uncontroversial subjects in an international legal order where popular will formed the basis for domestic authority.[143] In these manifestations, 'popular will', at least for the purposes of international legal standing, did not need to reside in a common identity amongst citizens represented through liberal and/or republican institutions as was the case in Britain, France, and the US. Rather it could be located in the ability of an overarching monarchical entity to accommodate a diverse array of subjects increasing expressing

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[141] See Orford 2013.

[142] On the role of multi-ethnic empires in entrenching a divide between sovereignty and nationalist ambitions in the context of nineteenth century international law, see Bunk and Fowler 2002, 39.

[143] Especially in Russia following the its defeat to Britain, France, and the Ottoman Empire in the Crimean War (1853-1856), Russia became a major proponent of the discourse of 'civilisation' that defined international law in this era, see Myles 2002. This development should not be underestimated given the extent to which the Crimean War as an event deeply influenced the agenda of 'preserving peace' as key legitimizing end of international law. On place of Henry Maine as a pivotal developer of this sensibility, see Kustermans 2018.

themselves in nationalist terms.[144] This would seem to demonstrate just how robust the international law's tolerance of pluralism actually was given that its emerging subject, the 'ideologically neutral' nation-state, could include both constitutional democracies and multi-ethnic dynastic empires as juridical equals.[145]

Coexistence amongst such entities under the banner of ideological pluralism is still consistent with the notion that capitalism limits the expression of popular will under international law. While the persistence of dynastic institutions may have slowed (but did not completely block) the expansion of capitalist social relations, so long as these multi-ethnic empires more or less commitment themselves to respecting sovereign borders, the threat to capital accumulation posed by pro-dynastic interventionism was stemmed. After all, from the perspective of capital accumulation, the great problem with the Holy Alliance agenda was its interventionist entrenchment of feudal pre-capitalist social relations. The reactionary embrace of popular will via the accommodation of nationalist claims largely solved this problem.[146] Here, in contrast to earlier crusades against popular will, for former Holy Alliance members, the new sovereign statist, and nationalism-focused, ordering of dynastic multi-ethnic empires enabled elite-lead incorporations of capitalist practices ('Revolutions from Above') in varying measures.[147]

5.7.2. Challenges to Actually-Existing Borders

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[144] On the changing manifestations of nationalism within the Austro-Hungarian, see Lyons 2006, 81-84.

[145] Ironically, while the Ottoman Empire's multicultural composition was increasing viewed as alien to the emerging European idea of sovereign borders as the natural embodiment of popular will (see Aksakal 2004), its *millet* system for managing ethnic diversity was highly influential in the Russian and Austro-Hungarian Empires, Tzouvala, 2018, 1153; see also Barkey and Gavrilis 2016, 29.

[146] Grewe 2000, 484-485.

[147] For studies industrial modernisation in the respective Austro-Hungarian and Russian contexts, see Crisp 1991; Good 1991.

While nationalism may have solved the problem of dynastic interventionism, it introduced new problems in its wake. Namely, what was to be done when nationalist aspirations did not correspond to the internationally recognized borders that increasingly delineated the acceptable boundaries of political expression? While much important work has detailed the responses by international lawyers to this situation following the First World War, we must also account for how the seeds of these eventual developments were planted nearly a century beforehand.[148] As aggressive dynastic legitimacy receded and a pluralist statist conception of popular will became the juridical core presumption of the European state-system, the nationalist challenge to this particular configuration was twofold.

On the one hand, there were entities who claimed that their distinct national character, particularly in relation to alien rulers, warranted sovereign independence under international law even when 'facts on the ground' could not support this claim. This was especially pressing in cases of territorial annexations where local refusals of consent raised the issue of whether a would-be conquest was actually an occupation and, as such, a temporary regime regardless of the occupier's intention. On the other hand, there were questions of whether engaging in the process of unifying a national community under one sovereign authority was a legitimate effort, even if it forcibly redrew international law's recognized borders. While the emergence of popular will levied a sharp critique against dynastic conquest on the grounds of consent, could projects of national unification side-step this issue by presuming the consent of the populations it sought to incorporate on the basis of national identity? On one level, these two challenges were in profound contradiction in that one declared conquest anathema while the other validated it under a new banner. However, on another level, both of these challenges were bound together through the understanding that popular will was the sole basis for domestic legitimacy, and international law had to address this truth despite its shortcomings.

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[148] See Chapter VII, Part 7.2.

5.7.2.1. Can Legal Personality Survive Conquest?

On the first challenge, the preeminent illustration was the question of Poland, which, in an infamous illustration of dynastic geopolitical accumulation, was extinguished through a series of partitions orchestrated by Russia, Prussia, and Austria. Following the loss of a third of its territory and population through the First Partition in 1772, the Kingdom of Poland sought allies by applying the scandalously novel rhetoric of popular will to their predicament.[149] Towards this end, prominent Poles articulated novel narratives of national victimhood and advocated for the popular will-based causes of others, especially the Americans seeking independence from the British Empire.[150] However, surrounded by hostile neighbours, this participation in the politics of the revolutionary Enlightenment sealed Poland's fate. As the French Revolution broke out, fears of destabilizing popular will-based Polish sympathies led Russia, Prussia, and Austria to extinguish the Kingdom entirely through the Second and Third Partitions of 1793 and 1795.[151]

As popular will moved from the margins to encompass an increasingly broad array of political expressions, the partitions of Poland were increasingly condemned as an unjustifiable subordination of principle to raw power. This chorus of condemnation consisted of fervent supporters of the French Revolution including Thomas Jefferson and Charles Talleyrand (Napoleon's onetime Foreign Minister), as well as ardent critics of the French Revolution including Edmund Burke and the Prussian

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[149] In this context there emerged a discourse that even if independence could not be achieved through 'facts on the ground', continuing the struggle may convince the larger world of the justice of a national liberation cause, and thus furnish international importance to an otherwise local political matter. This is particularly evident regarding the Genevan philosopher Jean-Jacques Rousseau's advice to the rebelling Poles where he describes their plight as: 'A great example which shows how you can defy your neighbours' power and ambition. You may not be able to keep them from swallowing you; at least make sure they cannot digest you.' Quoted in Nabulsi 1999, 198

[150] Kattan 2015, 262, 264-265.

[151] Ibid. 269-274.

conservative Frederich Gentz.[152] Despite much argument as to what popular will actually was, by providing consensus amongst liberal and reactionary theorists of this concept, Poland demonstrated what popular will's denial looked like in practice. Once again, it was James Mackintosh who placed this event its broader international legal context. For Mackintosh, the partitions illustrated the presumption that:

> Conquest and extensive empire are among the greatest evils, and the division of mankind into independent communities is among the greatest advantages, which fall to the lot of men….To destroy the independence of a people, is to annihilate a great assemblage of intellectual and moral qualities, forming the character of a nation and distinguishing it from other communities.[153]

Moreover, while Mackintosh was deeply critical of Poland's government, he disavowed this perceived maladministration as a justification for conquest. According to Mackintosh: '[t]he greater number of nations live under governments which are indisputably bad; but it is less an evil that they should be gathered under a single conqueror, even with a chance of improvement in their internal administration.'[154] Subsequent nineteenth century publicists, often in treatises justifying war and colonialism on the basis of absolute sovereign prerogative, agreed that the Partitions of

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[152] Ibid. 275-278.

[153] Mackintosh 1846 [1822], 209.

[154] Ibid. Here, it must be noted that the Polish partitions were frequently constructed a narrative of a 'civilised' nation (Poland) being destroyed by 'barbaric' ones and their allies. According to Thomas Jefferson's appraisal:

> A wound indeed was inflicted on the character of honor in the eighteenth century by the partition of Poland. But this was an atrocity of a barbarous government [Russia] chiefly, in conjunction with a smaller one still scrambling to become great [Prussia], while one only of those already great, and having character to lose [Austria], descended to the baseness of an accomplice in a crime.

Quoted in Kattan 2015, 278. However Mackintosh's civilizational thinking was far more ambiguous on this point, see Mackintosh 1846 [1822], 209 ('In war alone, the Polish nobility were barbarians; while war was the only part of civilization which the Russians had obtained.')

Poland were a quintessential case in illegal and unjust conduct under international law.[155] However, despite acknowledging this wrong, the approach to international law in this timeframe was hamstrung in offering a remedy to the Poles given its general adoption of a rigid state-centrism that denied the juridical personality of stateless nations.[156] Thus, the ethos of the Polish question persistently left something more to be desired from international law. This, combined with a relevance continuously renewed by Polish uprisings, proved vital in shaping the liberal and radical conceptualizations of self-determination that transformed the international system after the First World War.[157]

5.7.2.2. Can National Unification Justify Conquest?

On the second challenge, this process of national unification had two key examples, the creation of modern Italy finalized in 1871 and the creation of modern Germany finalized in 1873. Regarding Italy, this case forms a quintessential study of how a nationalistic conception of popular will prevailed over recalcitrant forces of premodern reaction. Here the heartland of the Italian unification project was in the northern regions where nationalistic sentiments fuelled by the experience of Austria's earlier pro-dynastic interventions were exported to the central and southern regions.[158] Here, archaic forms of political organization, including the Papal States and the Two Kingdoms of Sicily, were ill-equipped to survive popular will-based

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[155] Influential treatise writers who viewed the Partitions of Poland in this capacity included Henry Wheaton, William Hall, and Thomas Lawrence, Kattan 2015, 247.

[156] See Oppenheim 1905, 100 ('the character of the Law of Nations and of an International Person can[not] be attributed…to…races after the loss of their state (as, for instance the Jews or the Poles.)').

[157] On the relevance of the Polish right to self-determination in the thought of both Woodrow Wilson and Vladimir Lenin, see Kattan 2015, 280-281.

[158] See Fabry 2010, 85-91; Fisch 2015, 109-112.

challenges.[159] While Italian unification entailed interventions and territorial acquisitions in a manner comparable to the French revolutionaries, its limited nationalist justifications precluded the threat of greater revolutionary export.[160] Additionally, it is difficult to say that Italian unification amounted to a denial of popular will given that many of the pre-modern polities it absorbed rejected the very legitimacy of this concept.[161]

However, in the overall scheme of popular will's entrenchment within the European states-system, German unification was far less straightforward. This had much to do with the fact that the main object of Pan-Germanic incorporation, the German Confederation (that arose after the collapse of the Holy Roman Empire and end of Napoleon's occupation), was neither a modern nation-state form nor a pre-modern dynastic one. Rather, according to Peter Haldén, it was a non-sovereign 'composite republic' that balanced centralized authority with localized autonomy in order to prevent the consolidation of either a singular sovereign state or a system of multiple sovereign states.[162] While viewed by many of its adherents as a unique solution to the questions of German political organization,[163] the issue remained of how the

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[159] However, this is not say that liberal sensibilities were absent in Southern Italy. For a study on Southern Italian liberalism as it consolidated in the face of British imperial influence in the early-nineteenth century Mediterranean see Grieco 2018.

[160] While the discourse of nationalism that was asserted in Italy certainly did extend elsewhere, namely to various Slavic groups, its applicability was limited given the very different social and institutional structures that existed in Eastern Europe compared to Italy, Volata 2003, 164-165. On liberal-nationalist intervention in this context, largely as it was developed by the key unification leader Giuseppe Mazzini, see Recchia 2013.

[161] This allowed for a legitimation of Italian unification through the holding of plebiscites where overwhelming majorities in the various polities voted for the cause of nationalism, see Fisch 2015 109-110.

[162] Haldén 2011, 289; It thus represented a modern polity that was an alternative to the sovereign state thus demonstrated possibility of a heterogeneous international order and, by extension, the contingency of nation-state exclusivity, see Ibid. 298.

[163] For many individuals within this timeframe: 'Seeing a united Germany as unnatural and as an undesirable consequence of foreign ideas was at this time not contrary to German patriotism, but an expression of it.' Ibid. 290.

Confederation would fare in light of the growing rivalry between its two most powerful members, Prussia and Austria.[164] Here, the Confederation's fate was sealed by Prussia's military victory over Austria in 1866.[165] This led to a systemic breakdown of this composite republican form and, by extension, the alternative to a state sovereignty-based international system that it represented. In filling void, Prussia directed a militaristic top-down capitalist state-building project where an all-encompassing understanding of nationalism forcibly harmonized a multitude of German social schisms.[166]

To account for this outcome, a particular manifestation of popular will must be understood as it applied to post-Holy Alliance Prussia, which, in contrast to the Austrian and Russian projects of *multi*-ethnic empire, was laying the foundations for a *pan*-ethnic empire. When pursuing this project, in contravention of the view that popular will is undermined by conquest, an understanding emerged in Prussia whereby it was the ability to successfully resist a would-be conqueror that demonstrated popular will.[167] As such, a right of conquest was not only legitimate, but also essential. Put differently, it provided the one true mechanism for determining whether claims of popular will were genuine or fictitious. A concise summation of this view was expressed in 1844 by the Prussian philosopher Constantin Roessler: 'As soon as a nation presents symptoms of an incurable weakness, in its internal or external life, its stronger neighbours must take away its independence, until either its dormant strength awakens to liberation or it disappears, spiritually as well as politically, from the ranks of living nations.'[168] This justification was well-suited

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[164] Ibid. 287-288, 297.

[165] Ibid. 296.

[166] See Dufour 2007, 597-599.

[167] A rather surprising articulator of this sensibility was the Prussian general Karl von Clausewitz, the author of the famous text *On War*. While largely known today as a theorist of struggle between great powers, Clausewitz was especially fond of the notion of grassroots civilian resistance against invading forces in 'small wars', see Scheipers 2017.

[168] Quoted in Holbaard 1970, 75-76.

for the process of German unification in that conquest was not a denial of popular will, but rather its fulfilment.[169]

A grave challenge presented by Prussian-led German unification was that, unlike Italian unification, it entailed expansion at the expense of entities that could very well be understood as justified on the basis of popular will.[170] Here, a vital development that shaped the future trajectory of German unification occurred through Prussia's 1865 forceful separation of the Duchies of Schleswig-Holstein from the Kingdom of Denmark.[171] While under a regime of joint Danish-German Confederation rule formalized in the 1852 Treaty of London following an earlier Danish-Prussian conflict concluded in 1848, Denmark's King Frederick VII issued an 1863

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[169] Amongst many nineteenth century international lawyers, this organicist sense of popular will justifying national unification resonated with notions of European superiority over non-Europeans. A prime illustration of this can be found in the writings of James Lorimer who is most famous a tripartite categorization of human societies along the lines of 'civilised', 'barbarian', and 'savage' humanity that was exceedingly chauvinist even by the standards of nineteenth century juridical science, see Koskenniemi 2016c. For Lorimer the Prussian campaign to build a unified Germany was:

> …a manful and vigourous if not a very scrupulous effort, by the more energetic and progressive portion of a great people, broken up by historical accidents, but united by their deeper sympathies and antipathies, one in blood and one in speech, to assert for themselves by political union that place in the counsels of civilized mankind of which their internal divisions alone have deprived them.

Lorimer 1890 [1866], 28

[170] If we remove clashes of popular will from consideration, measured simply by territory (at least in our modern conception of it), the unification of Germany can be viewed as far less intrusive than the unification of Italy, see Langer 1947, 9 ('The former involved at first no annexation of foreign territories except in the case of Schleswig-Holstein. Italian unification, however, could only be accomplished by conquest, namely, by the annexation to the Kingdom of Sardinia of the Lombardo-Venetian provinces of the Austrian Empire and the territories of various independent Italian states (Tuscany, Naples-Sicily, etc.)'). However, since the areas conquered to create a unified Italy could not readily claim a violation of popular will, this did not present the same issues of clashing interpretations of popular will as the unification of Germany.

[171] See Korman 1996, 82-87.

decree banishing German influence from this region followed by an attempt to implement a liberal constitution.[172] In militarily responding to this development by invoking the plight of ethnic Germans whose nationalist ambitions would be marginalized, Prussia's intervention represented one understanding of popular will (pan-ethnic empire) being mobilized to forcefully contest another (liberal constitutionalism). Moreover, this development exposed the contradictory realities within the existing international order where dynastic hierarchy remained, but was being transformed by emerging manifestations of popular will (of both the liberal and reactionary variety). In furthering its German unification project, Prussia took full advantage of this situation.

As a foundational matter, there was the issue of how Prussian expansion could disrupt a settlement attached to the larger Concert project whereby upholding the integrity of Denmark was, according to the Treaty of London (of which Prussia was a signatory), '…connected with the general interests of the Balance of Power in Europe is of high importance with the preservation of Peace.'[173] As Stacey Goddard has shown, by setting a series of 'rhetorical traps' against a range of potential critics, '…Prussia's legitimation strategy appealed to both conservative rationales—treaties and dynastic norms—and nationalist concerns simultaneously.'[174] Thus, in its interactions with the dynastic Great Powers of Russia and Austria, Prussia claimed its actions were necessary responses to Danish violations of the Treaty of London and thus essential to fulfilling the mission of the Concert and its positive juridical regime.[175] Alternatively, in its interactions with liberal Britain, republican France, and the German Confederation's nationalists, Prussia invoked the language of popular will.[176]

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[172] Goddard 2009, 113.

[173] Quoted in Herslet 1875, 1151.

[174] Goddard 2009, 127.

[175] Ibid. 128

[176] Ibid.

Through this process of dual-legitimation, Prussia masterfully forced those who might impede its endeavours to confront their own contradictions. These issues stemmed directly from the challenges posed by the increasing prevalence of popular will as international law's basis for domestic authority. An example can be found in how Prussia's actions disarmed any attempt by Austria to lead a rival project of unifying German nationalism by revealing how taking such a path would undermine its ability to maintain legitimacy in ruling its multi-ethnic empire.[177] In the Austrian diplomat Bernard von Rechberg's assessment of this dilemma '…the Hungarians, the south Slavs, the Poles, and the Italians would unite in the dictum that they would reject any policy that requires sacrifices of money and blood for Germany.'[178]

Another demonstration the potency of Prussia's challenge involved Britain, where a general stance of support for Denmark against Prussian expansion was undermined from two different directions: Queen Victoria's pro-German sentiments and the belief amongst British radicals that unification could furnish a great ally in the form of a liberal German nation-state.[179] Regarding Victoria, this demonstrated that despite Britain's development of constitutional-parliamentary defined 'national interest' separate from personalized dynastic politics, the persistence of monarchical institutions could still impede unified action on this basis.[180] Regarding the radical

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[177] According to Lorimer's characterization of Prussia's victory: 'The hard-working, anxious, restless, and progressive North has once more prevailed over the indolent, easy, and retrograde South; the lesser of the two Empire States of Germany has swallowed up several of the minor subdivisions of the land, and become more than the equal of its hereditary rival.' Lorimer 1890 [1866], 25. On relations between Austria and Prussia once the latter had attained its objective of forming a unified German nation-state while the former remained the German-led leader of a multi-ethnic empire, see Vermeiran 2011.

[178] Quoted in Goddard 2009, 129.

[179] Goddard 2009, 132-133.

[180] See Teschke 2005, 17.

liberals, their motivation rested on an assumption (foundational to a not yet universalised liberal international legal sensibility) that state entities and their governmental apparatuses were separate structures. This view was largely alien to many proponents of Prussian-led German unification where state consolidation and ethno-nationalist rule were inseparable (and thus a liberal united Germany was anathema).[181] Taking all of this into account, and considering the subsequent legitimation provided by the Austro-Prussian and Franco-Prussian Wars, it is difficult to overstate how the greater Schleswig-Holstein question enabled a reactionary German unification. In the process, it showcased the possibilities of mobilizing contradictions within international legal order where popular will was increasingly conflated with actually-existing borders.

5.8. The Exclusion of the Non-European World

5.8.1 Defining the Mediterranean Edges

As nineteenth century international law solidified, while it became increasingly difficult to define what popular will actually was, it became increasingly easy to proclaim what popular will was not. Since the Concert of Europe was premised on the separation of Europe from the rest of the world, the question of *what* constituted popular will was inseparable from the question of *where* popular will did or did not exist. However, by this moment in history Europeans had already maintained a vast a degree of connections with societies throughout the globe, and delineating the juridical-geography of popular will was not straight-forward. On the one hand, much of the formative violence and repression that forged these connections was justified through the law of nations.[182] On the other hand, by the late eighteenth

[181] On the consolidation of this assumption in Britain during this era, see Clark 2018a, 23-26. On Prussia's very different conception of this dynamic, see Willoughby 1918b; Willoughby 1918c.

[182] See Keene 2002; Keal 2003; Anghie 2004.

century, elaborate critiques of these justifications had emerged calling for an unprecedented degree of equality between diverse societies.[183]

To understand why these inclusionary critiques failed at the same time popular will increasingly justified domestic authority, a pivotal role was played by the particular historicist-evolutionary view of international law first expounded by Mackintosh. In the hierarchical scheme that emerged on this basis, in the words of Jennifer Pitts:

> …the European law of nations was a global legal system in embryo,…other nations were lawless in so far as they failed to participate in the European system, and…a key task of European jurists was to construct a process by which these others might be granted admission to the European global legal community.[184]

Through this conflation of European parochialism with universality, to quote Peter Stirk, questions of sovereign legitimacy were conditioned according to '[a] kind of doctrinal apartheid [that] helped to maintain the contrast between a world of sovereign states and a world of colonies, protectorates and *terra nullius*.'[185] In defining the contours of this separation, the Mediterranean region proved to be a pivotal site. Here, analogous invocations of popular will in Greece and Algiers produced dramatically different international legal results.

5.8.1.1. The Success of Greece

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[183] See Pitts 2018.

[184] Ibid. 152.

[185] Stirk 2011, 654.

A formative event in setting the international legal boundaries of popular will was the 1820s intervention by Britain, France, and Russia on behalf of the Greek struggle for independence from the Ottoman Empire.[186] Materially, the Greek movement for independence is easily identifiable as a contributor to capital accumulation. As the Ottoman Empire struggled to adapt to new modes of distribution and exchange, Greek merchant activity throughout Europe and the Mediterranean generated vast amounts of wealth that stood to be expanded if the Greeks could break their Ottoman bonds.[187] Moreover, Greek merchants active in Europe's major commercial and cultural hubs were well positioned to learn of revolutionary developments elsewhere and became skilled in applying the justificatory rhetoric of popular will to their cause.[188]

On an intimately related note, the Greek independence movement was aided immensely by the emergence of the homogenous nation-state as the ideal: vessel for popular will, mode of capitalist modernity, and subject of international law. In meeting this ideal, '…the bulk of ethnic Greek settlement lied in the southernmost tip of the [Balkan] peninsula where the Greek nation-state was ultimately instituted – an advantage which subsequent secessionist nationalisms in either the Balkans themselves or in Asia Minor did not always enjoy.'[189] In a manner deeply consequential for subsequent claims for ethnic autonomy, this Greek uniqueness resulted in a major international legal innovation. Here, unlike the Americas and elsewhere in Europe where the reconfiguration of borders in response to popular will somewhat corresponded (in varying degrees) to earlier patterns of recognised authority, the borders of the newly independent Greece were recognized on an exclusively

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[186] On the various international legal dimensions surrounding the intervention of the three powers of behalf of Greece in the Battle of Navarino that secured Greek independence, see Smiley 2016 .

[187] Lekas 2005, 170-171.

[188] Ibid. 171.

[189] Ibid. 172. On the Balkans as site of future international legal ambiguity, see Tzouvala 2018.

entho-linguistic basis.[190] As a result, Greek independence was a milestone in forging the nexus between 'immutable' ethnic identity and the boundaries of sovereignty, a premise future international lawyers would return to time and time again.[191]

For the European observers of the day, Ottoman opposition to the Greek uprising was eminently observable as the pitting of the archetype of civilizational foundation against the archetype of 'oriental despotism.'[192] As such, calls for intervention on behalf of the Greeks were influentially phrased in the language of promoting 'humanity' in the face of Ottoman 'barbarism.'[193] What is truly interesting about this discourse is the way it formed a common cause amongst interveners who adhered to very different conceptions of 'humanity' as the vindication of an independent Greece.[194] For the British and French, promoting 'humanity' bolstered the right of a society to organize itself through a liberal nationalist form free of 'barbarian' rule; and this complimented their existing discourses of popular legitimation.[195] By contrast, for the Russians, their continued commitment to dynastic legitimacy made

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[190] Fabry 2010, 97-98. This assertion pan-ethnic identity was a persistent source of Greek international legal claims discourse regarding the need to protect proclaimed co-nationals living in Ottoman territories. On the case of Greek claims over the island of Crete on this basis, see Fujinami 2016.

[191] This was especially true of internationally orchestrated population transfer that began during the interwar period. Here the great model for later practice was 1922 Treaty of Lausanne's formulation of a reciprocal transfer of ethnic Greeks from Turkey and ethnic Turks from Greece. For an account of the history and international legality of this event, see Özsu 2014.

[192] On 'Oriental Despotism' narratives, see Pitts 2018, 28-67.

[193] On use of Greece as an example of intervention on behalf of 'humanity' in the nineteenth century, see Wheaton 1836. 128-130. On humanitarian justifications for European intervention in the Ottoman Empire, see Rodogno 2011; see also Rodogno 2016.

[194] This encapsulation of a plurality of justifications contributed immensely to popular will's presumptive universality.

[195] Such a discourse was needed to challenge the various liberal oppositions to empire that developed in the broader Enlightenment timeframe, see Pitts 2005.

them weary of nationalist independence movements.[196] However, in a manner deeply in-line with Alexander I's view of paternalist nationalism, intervention could be justified in Greece given Russia's self-styled perception as the protector of Orthodox Christians living under Muslim rule.[197]

This seemingly pluralistic coordination of bringing about national autonomy in the name of popular will was deeply consistent with the expansion of colonial capitalism. As an immediate matter, in addition to the lofty rhetoric conflating national independence with 'humanity', disruption caused by Greek-Ottoman clashes proved advantageous for pirates whose pillaging of trade routes was something the Great Powers had an interest in suppressing.[198] In a deeper capacity, Greek independence stood for the proposition that modern nation-states breaking away from pre-modern empires furthered 'civilization' development.[199] It thus feed into the consolidating view that assigning racially differentiating qualities to territories and peoples could justify practices of capitalist accumulation in certain locations that would be unacceptable elsewhere given the universal demands of international law.[200]

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[196] Fabry 2010, 79.

[197] Ibid. 79-80.

[198] Ibid. 97.

[199] However, this could create a precarious situation given that this logic could be invoked against certain members of the 'family of nations' who vigorously sought to stem local challenges to their authority by rigidly distinguishing sovereignty from nationality as the basis for legitimate international legal subjectivity, see Bunk and Fowler 2002, 39. This point contextualizes the way in which Islam functioned as the division point between the Ottoman Empire and the Europe long after religious difference was considered irrelevant regarding questions of order between nations. A particularly vitriolic voice here was Lorimer who claimed that no juridical relations could be established between Christian and Muslim societies on the grounds that the latter could not comprehend the reciprocity that international law depended upon. Lorimer 1883, 123-124. According to this reading, even recognition by the 'family of nations' was insufficient for membership. On Lorimer's rejection of the conditional inclusion of the Ottoman Empire's highly conditional 1856 inclusion in the European diplomatic order, see Lorimer 1890 [1876].

[200] See Knox 2016b. See also Ince 2018a; Tzouvala 2019a.

5.8.1.2. The Failure of Algeirs

This ability of 'civilizational' discourse to vastly restrict the scope of what could be accomplished through claims invoking popular will was made starkly apparent by France's 1830 invasion of Algiers.[201] As a response, Hamdan Khoja, the Ottoman Emir of Algiers, delivered an impassioned articulation of Algiers' status as a sovereign equal whose difference from France provided opportunity for mutual learning between Western and Islamic perspectives.[202] In his 1833 French-language publication *Le Mirror,* Khoja explicitly invoked Vattel's *The Law and Nations* and its emphasis on pluralism.[203] In further making his case, Khoja's argument included a direct comparison between the plight of the Algerians and the plight of the Poles and the Greeks. Here, he posed the question of why his nation's struggle had not been elevated to iconic status comparable to the Polish and Greek situations.[204] However, Khoja's claims were roundly rejected by the French who invoked their ethnographic studies claiming that diversity amongst the region's tribes precluded the existence of unified Algerian nation, let alone one entitled to sovereign autonomy.[205] Algiers was thus a formative application of the emerging hierarchical historicist-evolutionist view that the popular will needed to justify international legal personality only manifested in modes of social organization analogous to the European nation-state form.

Relatedly, this situation was also highly revealing as it concerned the emerging restraints on territorial imposition. After all, this situation demonstrated how law of

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[201] For nineteenth century account of this event, see Wagner 1854.

[202] Pitts 2018, 141

[203] Ibid. 139-140.

[204] Pitts 2009, 308-309.

[205] Ibid. 310-311.

belligerent occupation and its imperative of preserving the local *status quo* did not automatically apply outside Europe.[206] This was abundantly evident in Algiers given the massive degree of coordinated plunder and despoliation attributable to the invading French forces.[207] Nevertheless, this disparity was deeply consistent with the logic that informed the development of the law of occupation given its prerogative of protecting very specific modes of property ownership. Thus, in a capacity linked to the overarching rhetoric of civilizational superiority, the types of property-based social relations that justified preservation under a conservationist legal regime in Europe were largely absent in North Africa.[208] However, despite the fate of Algiers, as the nineteenth-century progressed, the practice of attaining title by conquest declined precipitously as a means of justifying European imposition in the non-European world. While conquest's threat to popular will was generally irrelevant to colonizers, conquest' threat to capital accumulation remained fully intact.[209]

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[206] Arai-Takahashi 2012, 75.

[207] Greenhalgh 2014, 121-123.

[208] The link between property rights and 'civilization' in this context was driven by the discourse of Barbary piracy whereby North African attacks on European shipping and commerce was a pattern of international outlawry that placed these communities outside the protection of the law of nations. For the classic study, see De Montorency 1918. However, this view should not be separated from the way it was shaped by the intertwined expansion of capitalism and solidification of imperial race hierarchy. After all, earlier more inclusive theories had an entirely different approach to the question of Barbary piracy. For instance, the highly influential English admiralty judge William Scott, Lord Sowell (1745-1836) viewed losses by European to raiding not as a universally reviled crime, but as a necessary risk faced by those who chose to do commerce in a world that contained multiple conceptions of property rights, Pitts 2018 112-113. However, views on the law of nations from this era also supported the French colonial position as well. Here while Vattel's provisions of the equality of nations were cited to further the Algerian cause, this same treatise also proclaimed 'the necessity of chastising an unjust and barbarous nation', and on this basis: 'Who can doubt that the king of Spain and the powers of Italy have a very good right utterly to destroy those maritime towns of Africa, those nests of pirates, that are continually molesting their commerce and ruining their subjects?' Vattel 1758[1852], Book III, Chapter IX, § 167.

[209] However, there were situations where traditional recourses to conquest in this context of colonial modernity was deeply enabling of capitalist expansion. An example is how Tsarist Russia's post-Crimean War invocation of 'civilisation' to justify its increasing intensive conquests in the Caucuses

5.8.2. Conquest After Conquest

On this point, the nineteenth century witnessed a cascade of justifications that fulfilled the traditional function of conquest in a manner compatible with capital accumulation. This included reassertions of the doctrine of prescription whereby continuous possession of a territory over a sufficient passage of time furnished ownership regardless of how this possession occurred.[210] In light of its temporal prioritization of 'facts on the ground' over morality, prescription was frequently applied to solidify European claims within regions subject to violent domination over the preceding centuries.[211] As an additional alternative, there was the doctrine of occupation (not to be confused with belligerent occupation) where the 'actual possession' of territory created rights of ownership.[212] Unlike conquest and its ethos of timelessness, occupation (and its focus on 'improvement' as a basis for ownership), was consistent with a linear progressive view of historical development.[213]

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and Central Asia had the effect of diverting its pre-capitalist, feudal accumulationist ambitions away from the capitalist, popular will-based order consolidating in Europe, see Korman 1996, 59-60.

[210] For a broad history of prescription's development as tool of empire-building from the Byzantine Empire to the early modern era, see Cavanagh 2017c.

[211] Fitzmaurice 2012, 850-851.

[212] According to Fitizmaurice's explanation of how early theories of the law of nations, namely those of Francisco de Vitoria, could be used acquire territory, even if it was inhabited by indigenous peoples. Here:

> If the measure of a just society was whether it had understood and exploited the laws of nature, it was possible merely to reverse the description of non-European peoples from being civil, from having occupied their territory, to being savage. Savage or barbarian people did not understand natural law—they sinned against it—and they did not, therefore, occupy the land upon which they lived.

Ibid. 852.

[213] Ibid. 860.

Perhaps the most prominent practice of acquiring non-European lands was cession by treaty. Such practices were able to manifest in increasingly novel forms given that (as Concert Great Powers interaction had shown) a shared presumption of popular will, and by extension substantive legitimacy, was unnecessary for treaty consent.[214] As a result, this formalistic process of enforcing the validity of dubiously made agreements for territorial concessions completely up-ended any mutual sense of substantive equality underlying treaties existing between Europeans and non-Europeans in previous centuries.[215] Eventually, the emphasis on form over substance became so great that, in numerous locations throughout the world, treaty-making capacity by non-Europeans was often recognized for the sole purpose of transferring territory to European hands.[216] Aiding this process immensely was the fact that, unlike the domestic law of contract, fraud and coercion were almost never recognized as grounds for treaty abrogation in this timeframe.[217] Against this backdrop, the more vast swaths of the globe became subject to increasingly invasive regimes of external imposition, the less relevant doctrines of conquest, traditionally understood, would actually become.[218] In a grand irony of history, by marginalizing

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[214] See Grovogui 1996, 77-88; Alexandrowicz 2017 [1974]. On the capitalist justification of this treaty-based acquisition process whereby 'free trade' served as the animating 1884-85 Berlin Conference that was convened to set legal guidelines for the European colonization of Africa, see Craven 2015.

[215] For a study on the legal universalisms that underpinned these interactions, see Alexandrowicz 2017 [1961].

[216] According to a recent account, the first modern site of this type of treaty-making occurred in Borneo in the 1840s and it was this practice that later served as the template for determining treaty-based claims across Africa, see Press 2017.

[217] For an extensive study of such imposed treaties, see Malawer 1977.

[218] Here 'backwards' peoples had validly alienated their lands on the basis of treaty as was acceptable between 'civilized' nations (this point was conceded even amongst ardent critics of colonialism, see Fitzmaurice 2014, 293), or they were considered so primitive that they could not be legally 'conquered' because their land-usage never qualified as 'ownership' in the first instance (see Carty 1996, 6). Moreover, when conquest in the traditional sense was effected in the non-European world, it was often done so to solidify the advantages generated by earlier practices of imposition and cultivated dependency. A case study here is Madagascar where the 1896 conquest by France was preceded by a more than a century of deep enmeshment in European colonial capitalist expansion, see

title by conquest and its validation of explicitly suppressing popular will through force, what emerged was a complex maze of legal justification that culminated in almost the entire world being placed under some form of Western colonial domination. The sheer scale and depth of control effected in this manner likely exceeded anything that could have been effected through forcible conquest alone.

With the spread of these impositions, and their inability to genuinely incorporate non-European influences (while nonetheless positing a pluralist notion of popular will), resistance itself contributed to universalizing capitalism, international law, and the nation-state form.[219] Indispensable sites of this process were the regions identifiable as a 'semi-periphery' (the Ottoman Empire, China, Japan, Siam, Persia, etc.[220]) where international recognition was tied to the acceptance of capitulations, unequal treaties, and the extraterritorial imposition of European laws.[221] When seeking freedom from these impositions, non-Europeans often asserted their long-standing histories of inter-societal interaction to claim subjectivity within the expanding international legal order emanating from Europe.[222] Through this conflation of premodern interactions between peoples with modern interactions between states (once again demonstrating law's genealogical detachment from the rigidity of historical context), semi-peripheral actors deeply contributed to the universalization of sovereign equality and, by extension, its presumptions of popular will and the nation-state form.[223] Here the deep interconnection between capitalism and the

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Campbell 2005. On the conquest itself as an exception to the typical European practice of gaining title by cession in late-nineteenth century Africa, see Korman 1996, 65

[219] For an excellent recent study on this process, see Parfitt 2019.

[220] While Latin America can be included within this category of the 'semi-periphery', it is dealt with as a separate matter in Chapter VI.

[221] For studies of these nineteenth-century legal techniques of 'informal empire', see Horowitz 2004; Craven 2005; Kayaoglu 2010a.

[222] On the example of Chinese assertion in this capacity, see Pitts 2018, 137-138.

[223] Becker Lorca 2015, 188-189; see also Becker Lorca 2010. This mode of thought was deeply important in the context of postwar decolonisation in that it allowed for arguments that Asian and African nations were sovereign from time immemorial and, as such, the end of empire was not a

international legal construction of popular will was displayed yet again given that the most successful societies were those best able to accommodate capitalism, Japan being the preeminent case.[224]

However, the question remains as to what this ability to pursue any governmental system in the name of popular will actually meant for those marginalized by the geopolitics and distributional mechanisms produced by the same capitalist order responsible for globalizing popular will. While these limits were demonstrated on a worldwide scale with the postwar movement towards decolonization, a key prelude can be located nearly a century and half beforehand with the independence of Latin America. I detail this development in the following chapter.

5.9. Conclusion

By showing how an organicist conception of popular will justified the consolidation of borders within Europe and the hierarchy between Europeans and non-Europeans after Napoleon, this chapter further demonstrated the explanatory possibilities of my methodology of 'world-historical context', and its merging of 'juridical thinking' with historical sociology. Following the French Revolution, it became clear that the ostensibly aligned victorious Great Powers harboured consequential differences in the domains of material social relations, authority justifications, and geopolitical interests. Managing these tensions necessitated a new formulation of juridical authority capable of providing a medium of coexistence against this uneven international backdrop. As a result, this context staged the reception for influential

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bestowal of new sovereignty as much as it was a '' to original sovereignty. For a presentation of this theory, see Alexandrowicz 2017 [1969].

[224] On Japan's transition to capitalism through 'revolution from above', see Allinson and Anievas 2010. On Japan's relationship with the 'standard of civilisation', see Suzuki 2005; Shahabuddin 2019a. On Japan's respective military victories over China and Russia as further solidifying its status within the 'family of nations', see Howland 2007; Howland 2011. It must also be noted that the coercion entailed by the embrace of capitalist social relations, including those justified through international law, did occur in 'semi-peripheral' nations far less successful than Japan when engaging Europeans on European terms. On the Ottoman Empire in this capacity see Minawi 2016. On China in this capacity, see Carrai 2017.

publicists who framed an international legal order whereby popular will was unique to discrete, bounded political communities as a matter of fundamental historical truth.

This facilitated coexistence amongst differently situated European sovereigns set the stage for an international legal order able to contain the radical invocations of popular will that characterized the French Revolution. Additionally, this consolidating order was highly adept at facilitating capitalist social relations. Here bounded sovereignty allowed capitalism's latecomers to make their transition through 'revolutions from above.' Accompanying this process were new class formations whereby the vestiges of absolutism increasingly aligned with nationalistic forces to justify expressions of popular will. The confluence of the nation-state form and an increasingly reactionary discourse of organic community (that justified bounded sovereignty) was the lynchpin of this alliance.

Thus, what emerged was modern European states-system where the same organic community-based reasoning that justified rigid national boundaries in Europe also justified European superiority over all other peoples. Furthermore, the colonial endeavours enabled on this basis were indispensable for capitalist expansion. Taken as a whole, a reconfigured juridical narrative of popular will justifying inviolable sovereign borders within Europe, in conjunction with a European sense of civilization supremacy, developed to reproduce the particular array of social relations demanded by colonial capitalism.

CHAPTER VI

The Periphery of Popular Will: Latin American Independence and the Making of Postcolonial Statehood

6.1. Introduction

In this chapter, I return to the Western Hemisphere to explore the place of Latin American independence in the transforming contexts of capitalism, international law, and political authority that stemmed from the American and French Revolutions, and their aftermaths. Far from simply being a seamless continuation of European and US American trends, the emergence of new states in Latin America offers a unique exercise in showing how societies can both transform the idea of popular will and be transformed by it. This uniqueness was twofold. On the one hand, formative assertions of Latin American popular will presumed a configuration of sovereignty very different from the modern nation-state form. One the other hand, given its marginalized geopolitical and geoeconomic position, Latin America was comparatively constrained in accessing the riches of colonial capitalism that provided the US and much of Europe with the material base to transform their societies in the name of popular will.

Situated against a backdrop of structural coercion, Latin American states invoked popular will, expressed through the discourse of international law, as resistance to external interventions. Paradoxically, the more Latin America raised this shield of popular will, the more it had to conform its institutions to the European and US American ideal of the nation-state form. Thus, when placed in its international contexts, the manifestation of popular will in Latin America shielded it from the harshest effects of capitalist predation while simultaneously entangling itself within a deeper web of capitalist social relations at the expense of any alternatives.

In moving forward, Part 6.2. examines contemporary discourse on Latin America within the international legal order as a region whose particular position stemmed from its place as being neither conclusively 'Western' nor 'non-Western.' Part 6.3. then historicises Latin American uniqueness during the age of revolutions and shows how its distinct merger of feudal and indigenous institutions presented deep questions regarding its future as its Spanish (and Portuguese) rulers could no longer maintain traditional modes of authority. Following this, Part 6.4. places the question of Latin America in the context of the post-French revolutionary reassertion of dynastic legitimacy and examines the questions faced by Europe's monarchical powers regarding their support for the Spanish Crown against its rebelling colonies. Correspondingly, Part 6.5. scrutinizes British and US American support for Latin American independence in accordance with the popular will-based view that *de facto* authority warrants international recognition. For both of these powers, independence in Latin American would serve their capitalists interest to a far greater degree than if dynastic authority prevailed in the region. Finally, Part 6.6. explores how the intertwined processes of capitalist proliferation and international legal argument entrenched the modern nation-state form in Latin America. While this development provided a modicum of leverage in the face of predation, on a deeper level, it eliminated the possibility of any alternative conception of 'popular will' unmeasured against a European or US American ideal.

As Chapter VII then shows, Latin America's contradictory experience with popular will as a source of both hope and constraint extended far beyond the region itself. With the postwar rise of the 'world of popular will' through the UN Charter-based international order, and increasing failure of racial/cultural inferiority arguments as denials of sovereign independence, to what extent could Latin America provide a template for decolonizing Asia and Africa. While new states were provided opportunities to embrace the discourses developed in Latin America over more than a century, this also meant that the unresolved contradictions defining Latin American engagement with the international order now manifested across a completely new range of contexts. Thus, the exponential reproduction of key portions of the Latin American experience showed that the universal attainment of popular will through

the nation-state form remains profoundly limited when no means exist to confront the enduring structures of colonial capitalism and its compounding legacies.

6.2. A Continent Apart

Paying attention to Latin America's contributions to the contemporary international law opens the door to numerous subversions of conventional narratives. As a significant upsurge in critical scholarship has shown, Latin America's existence on the margins of global power, and its unique position of being neither conclusively 'Western' or 'non-Western', has produced a history of international legal engagements that forces us to re-evaluate standard categories.[1] Here, if the modern international legal order emerged through a separation between the Western 'family of nations' and the 'un-civilized' world beyond it, Latin America's precarious position deeply complicates this binary despite its frequent association with the 'Third World project', broadly understood.[2] In historicizing this complication, we must remember that 'only after the independence of Africa and Asia following the Second World War does Latin America…[become]…incorporated into Third World discourse and politics. Prior to that it is treated as a somewhat aberrant Western adjunct.'[3]

Despite, and in many ways because of, this uniqueness, Latin America has deeply contributed to the contemporary international legal order and, in this capacity, its particular articulations of the relationship between and domestic authority and popular will has been vital. After all, given its disadvantaged position within global

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[1] See Obregón 2008; Becker Lorca 2015; Scarfi 2017. This new approach to the critical study of Latin America has in no way been confined to the field of international law. For recent contributions from the fields of history and political theory, see Sanders 2014; Simon 2017; Del Castillo 2018; Sabato 2018.

[2] On the 1966 Tricontinental Conference in Havana as a major watershed in marking Latin America's involvement with the Afro-Asian radical Third World project, see Barcia 2009.

[3] Fawcett 2012, 682.

orders, robust arguments for absolute, unqualified understandings of sovereign equality and non-intervention were viewed as essential for affirming autonomy in the face of external predation.[4] Thus, Latin America proved indispensable for delineating the extent to which the popular will of weak states could be free from foreign interference as a matter of international law.

In this context, the general Latin American approach to the concept of popular will has frequently been cast as an alternative to that of its northern neighbour, the United States, which, as discussed in Chapter III, was vital in introducing popular will as the basis for modern international legal standing. Broadly speaking, while the US American conception of popular will viewed the liberty of the individual as coextensive with the liberty of the state, the Latin American conception viewed the liberty of state as necessitating the authority to undertake transformative social projects, even when they prioritized collective uplift over private individual interests.[5] While ideological pluralism in relation to the domestic boundaries of popular will emerged to facilitate peaceful relations between diverse modes of social reproduction amongst the core great powers of Europe (which remained intact until the First World War), in the Americas, clashes over differing conceptions of 'popular will' and its associated liberties proved far more contentious. This was especially true when Latin American efforts to realize popular will through state-led social transformations interfered with outside efforts to guarantee individual interests regarding private property/commercial enterprises located in Latin America.[6]

A brief historical overview of Latin American contributions to international law reveals the influence of how impassioned juridical proclamations were intended to safeguard (peripheral) sovereign autonomy in a hostile world. Famously, the late-

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[4] For account of Latin American contributions to international law in this capacity, see Dawson 1981.

[5] See Grandin 2012.

[6] For a study of the development of international responsibility for foreign property in Latin America in relation to localised political developments, see Greenman 2018.

nineteenth and early-twentieth century Calvo Clause and Drago Doctrine sought to limit the coercive options foreign creditors could use to collect sovereign debts.[7] Additionally within this timeframe, the Brazilian delegate Ruy Barbosa called for highly robust conception of sovereign equality at the 1907 Hague Peace Conference as means of promoting the interests of weak states.[8] Such counter-hegemonic juridical tactics informed moves to towards Pan-Americanism in the early twentieth century, where institutionalized cooperation was explicitly asserted to uphold sovereignty, despite the common presumption that the former erodes the later.[9]

Additionally, throughout the entirety of their history, Latin American actors were acutely aware of how foreign declarations of recognition could devastate domestic political stability. This culminated in Mexico's 1930 'Estrada Doctrine' where Secretary of Foreign Affairs Genaro Estrada pledged to automatically accept the results of local political contestations without question, thus disavowing formal declarations of recognition as a legitimate practice.[10] Such a move was widely believed to be necessary to preserve the sovereignty of weak states from the judgments of the powerful.[11] These commitments received a newfound impetus during the proxy interventions of the Cold War.[12] It was against this backdrop that the International Court of Justice delivered its iconic 1986 pronouncement that US efforts to under-

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[7] For an early study, see Hershey 1907.

[8] Simpson 2004, 141-144.

[9] See Scarfi 2014.

[10] For an important account of the Estrada Doctrine from timeframe, see Jessup 1931.

[11] In this context: '[t]aking a position on recognition—especially of a government claiming power through the use of force—could be considered an act of intervention either by extending or withholding approval.' Esquirol 2012, 568.

[12] On US responses to challenges to its regional dominance in this context, see Kolko 1988, 93-109

mine Nicaragua's Sandinista regime grossly violated of a sovereign state's fundamental right to choose its system of government.[13] Such an ethos carried into the ideologically narrow post-Cold War era in the form of the Bolivarian Alliance led by Venezuelan President Hugo Chavez. In direct contravention of liberal international legalist understandings of institutional integration, economic governance, and 'human rights', the Alliance resurrected visions of popular will associated with projects of state socialism and Third Worldism that many believed were progressively surpassed.[14]

Building on this minimalist sketch of a vast history, the purpose of this chapter is to account for a foundational consideration that has yet to be theorized in detail. While there has been much work on Latin American states as international legal subjects in the global context, the international legal dimensions of Latin American independence in the early nineteenth century is comparatively under-explored.[15] Critically confronting this issue of origin has profound implications for how we conceptualize popular will as an international legal ideal. While many important Latin American contributions to international law have ardently defended the nation-state on the grounds of its function as a vessel for popular will, a missing line of inquiry is whether the sovereign state is the only, or indeed even the best, means of realizing popular will.[16] This question is particularly pertinent in the context of Latin America given that, in contrast to the US and Europe, the successful assertion of popular will in this region did not at all correlate to the same accumulation of material wealth and influence. Raising this issue is in no way a pejorative judgment of all those who invoked the powers of state sovereignty to attain a modicum of

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[13] *ICJ Nicargua Case* 1986, p. 263.

[14] Lean and Roth 2015, 222.

[15] Much of this focus has been attributed to the development of an understanding of 'Latin American International Law' as a distinct consciousness of the field as proclaimed by the Chilean jurist, and later judge at the International Court of Justice, Alejandro Álvarez (1868-1960). For his defining study, see Álvarez 1909. For a studies of Álvarez's contexts and influences, see Obregón 2006; Becker Lorca 2006; Esquirol 2006.

[16] See e.g. Álvarez 1919.

leverage in a dramatically unequal world. Rather it is to highlight the contingent ways in which broader historically-constituted structures have shaped our conception of popular will and what it can be. Such a need for critical inquiry is exposed by the reality that despite a tireless history of international legal advocacy, in Latin America, the material results have perpetually fallen short of what generations of advocates had hoped for.

A preliminary inquiry that contextualizes this perpetual disappointment must also confront how exactly we imagine the emergence of Latin American states as international legal subjects. Towards this end, a standard presumption is that the independence of Latin American states from Spain was more or less analogous to US independence from Britain.[17] Such a comparison fits neatly into narratives, such as the one presented by Benedict Anderson's *Imagined Communities*, that by the late-eighteenth/early-nineteenth centuries the dissemination of new modes of print-based communications gave rise to widely dispersed nationalist consciousness that could no longer abide imperial rule.[18] However, Anderson's theory presents stark limitations when applied to the Latin American context,[19] one of which being the very different substantive theories of popular will when compared to the US. Keeping in mind the broader history of popular will that I have presented in the previous chapters, an alternative account of the divergence between the US's broadly individualist and Latin America's broadly collectivist conceptions of popular will must show how the sociological and geopolitical contexts of Latin American independence were radically different from US independence. While cognizant of the risk of the homogenizing and context-eliding effects of the larger international legal order,

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[17] This can be largely be attributed to the fact that, like the US, the formative histories of Latin American independence were fixed on the heroic deeds of founding father figures who were presumed to embody the entirety of national consciousness and purpose. According to one prominent historian: 'The cult of the founding fathers—which was always accepting of their flaws, and got a great deal of narrative mileage from their tragic traits—has been an enduring strain of Latin American historiography about independence.' Adelman 2010, 155.

[18] Anderson 2016.

[19] For an insightful collection of contestations of Anderson's work as it concerns Latin America, see Castro-Klaren and Chasten 2003.

such a move allows Latin America to be evaluated in light of its world-historical position.

6.3. Latin America the Age of Revolutions

6.3.1. Layered and Divided Sovereignty

As discussed in Chapter III, the US's emergence as an international legal entity was inseparably connected to Britain's simultaneous development as both a capitalist state form and an overseas empire. Here, the fact that English-speaking settler populations were excluded from the full panoply of rights enjoyed by the British metropole's spatially-bounded political community lead to the adaptation of British modes of law and government. This ultimately coalesced into a novel, yet recognisable, form of popular will that eventually led to demands of sovereign autonomy placing the US on equal footing with the British imperial metropole. This forcible achievement of popular will via the establishment of 'facts on the ground' as a self-justifying basis for sovereign legitimacy opened the door for occurrences such as Latin American independence. Yet, despite this relationship, Spanish rule was channelled through sociopolitical forms fundamentally different from British rule.

Here the British imperial structure, and the system of free-trade anarchy it was facilitating, centred on consolidating modern nation-state forms where authority was depersonalized, formal equality was the ideal, and territorially-bounded 'public' authority was ideologically separated from the territorially-transcendent 'private' economic activity. Against this presumption, the accumulation of overseas colonial possessions were defined by exceptions to the idealized presumptions of the modern British constitutional-parliamentary state. By contrast, the Spanish crown did not represent a modern state but rather a monarchical order whose otherworldly

claims to universal authority were personalized, hierarchical, maintained no distinction between political and economic power, and recognized no inherent spatial boundaries.[20]

This being the case, New World 'Spanish Americans considered their *patrias* (lands) to be kingdoms in the worldwide Spanish Monarchy, and not colonies.'[21] Thus while Britain represented a model of colonial modernity where empire and the modern state existed as separate yet intertwined modes of political organization, the Spanish universal monarchy could not be divided along this axis and as such could not be called a 'Spanish Empire' in the modern sense.[22] That said, unlike the American Revolution, the emergence of Latin American nations as sovereign subjects under international law was not the breaking away of colonies from an imperial metropole, but rather the result of the breakdown of a universal monarchy. Viewed through this lens, in addition to the new nations of Latin America, another modern state that emerged from this breakdown was Spain itself.[23] In taking this alternative framing seriously, how are we to account for the emergence of new states who eventually challenged the international legal order by demanding that it clarify the extent of this system's ability to uphold the popular will of its weakest members?

As a preliminary matter, it must be noted that the transition from premodern forms of divided and layered sovereignty to modern statehood in the Western Hemisphere did not automatically occur the moment universal monarchy broke down, but rather

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[20] Rodriguez 2000, 133; While its boundaries of authority were ever shifting in the context of perpetual inter-dynastic warfare, '[a]t its height, the Spanish crown claimed the entire Iberian Peninsula, Sicily, parts of Italy, France, and the Germanies, Flanders and the Netherlands, parts of North Africa, islands in the Mediterranean and off the west coast of Africa, as well as the Americas, islands in the Pacific, the Philippines, and parts of India.' Ibid.

[21] Ibid. 136.

[22] Pagden 2012, 30.

[23] Rodriguez 2000, 142.

was a far more drawn out process.[24] Such a phenomenon may appear counter-intuitive given that the practice of drawing cartographic lines to demarcate exclusive authority over a territory prior to actual knowledge of it was developed in the context of European colonization of the Western Hemisphere.[25] In a manner contemporaneous with Latin American independence in the early-nineteenth century, this colonial innovation of bounded territoriality was being practiced in Europe as a means of consolidating the modern state-system in the wake of Napoleon.[26] The colonial character of territorial-demarcation in Europe was especially prescient in the partitions of Poland where, in remarking upon the harshness of this imposition, an Austrian official reported that: 'I don't believe that even among the Iroquois and Hottentots such ridiculous things occur.'[27]

Given that the consolidation of indivisible sovereignty was occurring in Europe within the same timeframe of Latin American independence, it would be easy to make broad, sweeping statements that the entrenchment of the territorially-bounded sovereign state had come full-circle. Yet, in contrast to any claim that the original practice of bounded territoriality automatically translated into indivisible sovereignty in the New World, what persisted were forms of 'layered sovereignty' whereby the authority of multiple actors overlapped and shifted across a variety of spatial and temporal contexts.[28] Such configurations stand in stark contrast to our present dominant conception of sovereignty, where authority is both bounded in the domain of space and infinite in the domain of time.[29] Thus, an account of how bounded sovereignty emerged in Latin America must begin from the premise that

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[24] Mulich 2017.

[25] Branch 2010, 283-285.

[26] Ibid. 290.

[27] Quoted in Ibid. 289.

[28] Mulich 2017, 190.

[29] On this spatial-temporal presumption of sovereign 'modernity', see Davenport 2016, 260-261.

'[t]he principle of layered sovereignty was built into the constitutions…' of the republican successors to the Spanish colonies.[30] Here, to quote Jeppe Mulich, '[c]ities and provinces such as Buenos Aires…Santa Fe…Bogota and Quito…were autonomous or semiautonomous political units in their own right, enjoying a degree of sovereign control layered below the overarching sovereignty of the political federations to which they belonged.'[31]

How then did Latin American states become not just adherents to, but also champions of, the absolute character of permanent invisible state sovereignty? Answering this question requires mapping interconnected social and geopolitical forces within this early nineteenth-century timeframe. In this context, international law must be understood as an active shaper and implementer of its own preferred mode of socio-political organization, the modern sovereign nation-state. The operation of a consolidating international legal order against this backdrop cannot be understood as restricted to popular will-based claims and rebuttals lodged between the Spanish crown and its rebellious New World subjects. Rather, when placed on a larger scale, beyond just the direct parties to the collapse of the Spanish universal monarchy, the Holy Alliance (Russia, Prussia, Austria), France, Britain, and the US were all entangled in the Latin American question. Their contrasting economic, geopolitical, and ideological agendas were expressed through diverging visions of international law. The very concealment of this vast scheme of global politics through its reduction to a limited popular will-based controversy between the Spanish crown and its subjects was itself directly produced by the specific manifestation of international legalism that happened to prevail. Such a bounding of contestation is vital to our modern conception of popular will under international law where third party attempts to influence local political challenges are believed to undermine a people's right to establish the political system of its choice on its own terms.

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[30] Mulich 2017, 190.

[31] Ibid. 190-191.

6.3.2. The Spanish World's Breakup

In contextualizing Latin American independence, while the former Spanish possessions of Argentina, Bolivia, Colombia, Chile, Ecuador, Guatemala, Mexico, Paraguay, Peru, Uruguay, and Venezuela emerged as independent between 1810 and 1830,[32] this does not cover the entirety of this meta-event. There were also the cases of Haitian independence from France in 1804 and Brazilian independence from Portugal in 1822. In the former situation, Haiti's successful slave uprising represented a rejection of white rule and material inequality that introduced an unprecedentedly radical contestations that carried deep consequences for international law.[33] In the later situation, Brazil's breakaway from Portugal resulted in the establishment of a new monarchical order that was not exclusively based on popular will in the generally invoked liberal or republican sense of the term.[34]

Through their own distinct ways, Haiti and Brazil each problematize any linear progress narrative of the Enlightenment revolutions and their formation of the modern world. After all, the rise of liberal/republican popular will as a basis for sovereign autonomy in the context of Spanish America was ideologically flanked from both sides by diverging radical and conservative expressions. That said, this development can be portrayed as a reasonable accommodation of competing interests that is easily absorbable into international law's overarching narrative of progress through rational solution-making. However, this was in no way preordained and a closer analysis of this situation in its global context exposes the many contingencies that informed this outcome.

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[32] Fabry 2010, 49.

[33] See this chapter, Part 6.6.2.1.

[34] For an account of Brazil's recognition in light of this particular institutional configuration, see Manchester 1951.

To establish this context, the events that ultimately led to Latin American independence were rooted in the Napoleonic Wars. Here the Napoleonic conquest of the Iberian Peninsula led to drastic changes with far-reaching consequences. In Portugal, having been stripped its territorial authority in Europe, the royal family relocated to Brazil thus transferring the seat of the Portuguese Empire from Lisbon to Rio de Janeiro in 1808.[35] With Spain, the situation was more complex in that resistance to Napoleon's installation of his brother Joseph on the Spanish throne lead to liberal forces rallying behind the legitimacy of King Ferdinand VII through the formation of the *Junta Central* in Seville, a body that commanded the loyalty of Spanish America.[36] When this entity broke down, a variety of New World *juntas* emerged in a manner '….justified by a tenet in Spanish medieval law, according to which in the absence of the monarch, government reverted directly to the people.'[37] That said, these '…provisional governments repudiated the existing overseas authorities composed of peninsular officials as illegitimate' and, as such 'they invited conflict over who was the rightful government of the crown in the American territories.'[38]

When considering the strained relationship between the Spanish metropole and its New World subjects, it is tempting to view the rebellion and emergence of new states as the inevitable outcome of this contestation over authority. However, such a view ignores the efforts to preserve the Spanish world in a capacity that sought to mutually reinforce the persistence of monarchical authority and the accommodation of local popular will. Chief amongst these attempts was the Constitution of 1812 that sought to vastly enhance the representation of American subjects (including

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[35] Fisch 2015, 73.

[36] Fabry 2010, 51.

[37] Ibid. On relevant institutions of Spanish colonial law in Latin America, see Obregón 2008, 250-252.

[38] Fabry 2010, 51.

indigenous communities) with Spain's monarchical authority structure.[39] However, following his 1814 restoration, King Ferdinand ended attempts at accommodation by harshly suppressing rebellious subjects, and this, along with the persistence of the *juntas*, intensified the division between Latin America's republican and loyalist factions.[40]

Through the destabilization of this delicate political situation, '[r]epression by the crown prompted decisive action by the minority of Spanish America's politically active population that favored independence.'[41] In this context, 'self-proclaimed generals, such as Simon Bolivar, and former professional soldiers, such as Jose de San Martin, gained immense power and prestige as the leaders of the bloody struggle to gain independence.'[42] Yet, given the above-discussed persistence of divided/layered sovereignty forms following the disavowal of European monarchical authority in the New World, 'independence' alone does not explain the entrenchment of the nation-state and its presumption of indivisible sovereignty. Resolving this discrepancy requires close attention to the broader geopolitical context these events unfolded within.

As it became apparent that peninsular Spain (weakened by years of Napoleonic occupation and internal political contestation) could not conclusively assert control over the New World, the Concert of Europe had to address questions of mediation and recognition. Here, diverging responses regarding the legality and legitimacy of Latin American independence reflected deep tensions amongst the Concert's Great Powers: Britain, Russia, Prussia, Austria, and later France. As discussed in Chapter V, while the Concert operated under the unifying banner of reconstructing Europe following Napoleon, there was a schism between liberal Britain and the reactionary Holy Alliance of Russia, Prussia, and Austria. While Britain sought to entrench a

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[39] Rodriguez 2000, 144-145.

[40] Ibid. 147.

[41] Ibid.

[42] Ibid.

system of rules that enabled market-based capital accumulation, the Holy Alliance sought to resurrect hierarchical absolutist authority that demonised popular will. While the temporary accommodation of these differences through bounded territoriality and ideological pluralism may have succeeded in Europe, the question of Latin America revealed just how different the two blocs actually were in their visions of international legal order.

6.4. Independence and Dynastic Legitimacy

With the 1818 formation of the Holy Alliance at Aix-de-Chappel, the great powers of Russia, Prussia, and Austria committed themselves to affirming the dynastic status quo established in 1815 by legitimizing external intervention against popular uprisings.[43] While primarily focused on Europe, the question of upholding the Spanish crown's authority over its overseas possessions forced the Holy Alliance to articulate the scope and extent of its commitment to dynastic legitimacy. On this question, Austria and Russia were preeminent. For Austria's arch-dynastic foreign minister Prince Klemens von Metternich, there could be no legitimate recognition of independence in Latin America unless the Spanish monarchy explicitly relinquished its sovereign claims. According to Metternich's characterization of these independence movements:

> If the political systems upon which these declarations are founded should be generally approved in Europe, it is evident that henceforth the most illegal and audacious enterprises will be judged only by their material success, that any revolt would be sanctioned by the mere fact that the results existed *de facto*, and finally there would no longer prevail among men any other right than that of force or any other bonds than those imposed by the victorious usurpation of a particular moment—bonds which might be dissolved the following moment.[44]

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[43] On this Holy Alliance and its objectives, see Chapter V, Part 5.3.1.

[44] Quoted in Robertson 1941b, 540.

Furthermore, Metternich's fear of sovereign autonomy on the basis of popular will evidenced by 'facts on the ground' was intimately linked to his knowledge of Latin America's deeply unequal social hierarchy. Here, when the Portuguese monarchy returned to Lisbon, yet remaining factions sought to declare a separate Brazilian Empire,[45] Metternich commended the fact that this essentially monarchical order was tempered by elements of liberal constitutionalism. According to Metternich's appraisal, '[a]bove all, the dogma of the sovereignty of the people…is extremely dangerous everywhere and most dangerous in a land full of slaves.'[46]

While Metternich's articulation of dynastic legitimacy was certainly influential, this overarching image is complicated when we considers the role of Russia under the rule of Tsar Alexander I, a figure often at ideological odds with Metternich.[47] Although Russia was committed to dynastic legitimacy, and made frequent appeals to Spain on this basis,[48] its approach to Latin America was also guided by geopolitical considerations that differentiated it from Austria.[49] As Europe's greatest land power, Russian interests were predominantly directed against Britain, the greatest maritime power.[50] However, in pursuing its rivalry with liberal capitalist Britain, Russia was constrained by a need to appease the dynastic orthodoxies of both the Spanish crown and Metternich. This dual source of frustration provides context for Alexander's lament that:

> the deplorable situation of the Iberian Peninsula…[and]…the moral and the material causes of its ills could not be remedied so long as the fortunes of its colonies were subject, on the one hand to the mediaeval

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[45] Fisch 2015, 73.

[46] Quoted in Robertson 1941b, 551.

[47] On Metternich's and Alexander's differing visions, see Delfiner 2003.

[48] Robertson 1941a, 197.

[49] For an extensive study of Russian interests in this context, see Bartly 1978.

[50] Blaufarb 2007, 746.

> methods of Cadiz and Madrid and, on the other hand to the commercial activities of the merchants of London.[51]

In its Western Hemispheric context, Russia's strategy involved developing close relations with the US whose anti-British resentment was still fresh from the War of 1812.[52] The drive for this relationship was so strong that Russia even unsuccessfully attempted have the US become a member of the Holy Alliance.[53] However, such efforts ultimately meant accommodating US proclamations against future European imperial claims in the Western Hemisphere. This damaged the overarching status of dynastic legitimacy as a basis for preventing Latin American independence. Due to its accommodation of US assertions, Russia embraced a neutral, non-interventionist stance towards the contestations between the Spanish monarchy's Old World rulers and New World subjects.[54] Ironically, this attempt to oppose Britain ultimately rendered the Russian position on Latin American independence the functional equivalent of the British position.

France presented yet another complicating influence on the Latin American question. For France, which was already asserting its dynastic influence over a chaotic political situation in Spain, the prospect of Latin American independence from the Spanish crown on the basis of *de facto* territorial authority was deeply troubling.[55] Remarking on this situation, in January 1824 the influential French journal *L'Etoile* stated that: '[s]uch a maxim would shake the political system of all Europe and might even expose those professing it to terrible consequences.'[56] However, as opposed to the Holy Alliance commitments to upholding the existing rights of the

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[51] Quoted in Robertson 1941a, 202.

[52] See Blaufarb 2007, 750.

[53] Robertson 1941a, 206.

[54] Ibid. 211-215.

[55] For a study of the French positon regarding Latin American independence, see Robertson 1939.

[56] Quoted in Robertson 1912, 551.

Spanish monarchy against secessionist Latin American claims, France presented an alternative formulation of dynastic legitimacy. According to the French agenda, Latin American states should emerge as independent entities under the rulership of a leader from the Bourbon dynasty.[57] That said, '[e]ven as it publicly supported Ferdinand VII's sovereignty over Spanish America, the French government was involved in secret projects to transfer sovereignty to Bourbon princes—preferably of the French line'[58]

6.5. Anglo-America's *De Facto* Authority

Given the interests in maintaining the Spanish crown's claims to authority against rebellious forces in Latin American, how exactly did popular will, sovereign statehood, and *de facto* authority as legitimate independence come to prevail. Here, our attention turns to the role of Britain and the US whose responses to the Latin American revolutions were a milestone in the co-consolidation of international law, capitalist social relations, and the presumption that the nation-state form is the natural vessel of popular will.[59] Superficially, the two nations harboured great distrust and differed immensely in terms of many of their immediate interests in this timeframe.[60] However, on a deeper level, they were united by their common history and ongoing commitments to the intertwined disseminations of liberal ideology and capitalist political economy. As such, while their respective solutions emerged because of their different positions, the long-term objectives of both Britain and the US were united under the broad rubric of the 'Angloworld.' Thus, Anglo-American divergence was not a fatal flaw but rather bolstered a trans-continental crucible of

[57] Blaufarb 2007, 749.

[58] Ibid.

[59] For an important study contextually detailing the policies of the UK and US in response to wars of liberation and independence claims in Latin America, see Paxson 1903.

[60] For an overview of these tensions, see Campbell 1974.

innovation production and knowledge transfers that produced a unified systemic logic exerting unavoidable pressure on all other social and ideological forms.[61]

6.5.1. Britain's Modernization of Recognition

The great British interest in Latin America centred on the ways in which independence might open up new opportunities for its expanding free trade empire. Thus, as the initial rebellion broke out, Britain hoped that this might break Spain's trade monopoly over its New World possessions and, towards this end, it sought to mediate a settlement that would guarantee British access to this commercial sphere.[62] This tactic was supported by many of Latin America's rebelling creoles elites who sought the lucrative opportunities that would accompany integration into Britain's commercial networks.[63] However, such a possibility was threatened by the Spanish monarchy's appeal to the Holy Alliance who were inclined to reaffirm the Spain-New World trade monopoly as an extension of upholding the legitimacy of the Spanish crown.[64] Considering how the Concert of Europe system demanded unity amongst the great powers despite their tensions, to quote Rafe Blaufarb:

> [t]he British sought to prevent clear resolution of the Spanish American conflict while preserving the insurgents' goodwill and avoiding the European peace. Having emerged triumphant from the Napoleonic wars, Britain was happy with the status quo—which allowed it to trade with Latin America without repudiating the principle of legitimacy.[65]

However, maintaining this state of frustrated uncertainty was not a long-term solution. To permanently ground its desired outcome, Britain had to articulate a distinct

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[61] See Belich 2009.

[62] Gallagher and Robinson 1953, 8.

[63] Lynch 1969, 7-8

[64] Blaufarb 2007, 754

[65] Ibid.

international legal approach to recognition as it applied to Latin America. In this capacity, Britain was aided by the fact that the consolidating post-Napoleonic state system hosted a stark tension between the entrenchment of a positivist legal order on the one hand, and the interventionist discretion of great powers on the other hand. While both features were asserted as hallmarks of legitimacy within the Concert system, the tension was that positivism was intended to guarantee order and predictability, yet, the prospect of forcible intervention was a persistent source of instability. On the question of recognizing international legal subjects, by this point in history, theorists increasingly aspired to a positivist ideal that distanced itself from justifications for force that explicitly furthered discrete modes of political legitimacy.[66] As discussed in Chapter V, Britain was already taking advantage of this tension, namely through its claims that the pro-dynastic interventions of its Holy Alliance rivals furthered the very instability these reactionaries professed to oppose.[67] In the context of Latin American independence, Britain seized its opportunity to elevate this line of argument to an entirely new level.

According to Inge Van Hulle's extensive analysis, Britain's overarching claim was that factually acknowledging the decisive results of a struggle between a people and its ruler was distinguishable from an act of intervention in a sovereign's internal affairs.[68] This stood in contrast to the dynastic legitimist view, whereby any recognition by a third power of a new political entity that came into being without the express consent of the original sovereign was a grave violation.[69] Such an approach placed Britain in an difficult position for, as discussed in Chapter III, when its North American colonies revolted against the British Crown, French support of the Amer-

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[66] For an influential text on these efforts, see Alexandrowicz 2017 [1958].

[67] See Mackintosh 1846 [1815], 508.

[68] Van Hulle 2014, 293.

[69] Ibid. 299.

ican rebels was regarded as an unjustifiable interference in a dispute between a sovereign and its subjects.[70] While France's involvement was based on American *de facto* authority (demonstrated through the 1778 victory at the Battle of Saratoga), for the British, this was not enough to furnish revolting settlers with the requisite legitimacy to invite the external support of a third power.[71] However, Britain's argument for recognizing Latin American independence over the continued objection of the Spanish crown was based on the ability of 'facts on the ground' to overcome the claims of the incumbent sovereign. Why then was Latin America a situation where *de facto* authority alone justified the recognition of a new international legal subject over the rejection of an established sovereign authority? Precision on this question was essential for distinguishing the contrasting legitimacies of US American versus Latin American independence under a coherent system of international legality.

For the British, the pivotal difference was one of timing in that France's third party recognition occurred in the midst of an ongoing conflict where the imperial metropole was actively contesting the rebellion.[72] This remained the case even after the defeat at Saratoga. By contrast, with Latin America, the British claimed its recognition could not amount to an intervention because by the time it undertook this act, the Spanish crown provided no reasonable evidence that it could reassert its authority in the Western Hemisphere.[73] After all, Britain formally declared its recognition of Latin American states in 1825, and by 1826, no soldiers fighting to uphold Spanish title remained (even though Spain did not formally relinquish its claims until 1836).[74] In formulating this standard, the leading expounder was none other than Sir James Mackintosh who, as discussed in Chapter V, played a pivotal

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[70] Ibid. 296-298.

[71] Fabry 2010, 29-31 .

[72] See Van Hulle 2014, 301. For a comparative study to this effect, see Gibbs 1863.

[73] Van Hulle 2014, 302-303

[74] See Rodriguez 2000, 151.

role in developing arguments that allowed Britain to contest the Holy Alliance's pro-dynastic European interventions by exposing the contradictions within its self-professed logic.[75] In an 1824 speech in Parliament on the recognition of Latin American sovereignty, according to Mackintosh: 'the tacit recognition of a new state, which alone I am now concerned, not being a judgment for a new government, or against the old, is not a deviation form perfect neutrality, or a cause of just offence to the dispossessed ruler.'[76]

Mackintosh's statements through his role as a Member of Parliament were undeniably political in nature and he himself was deeply embedded in commercial circles with strong interests in the Latin America question being resolved in Britain's favour.[77] However, expressing the recognition of Latin America states in this context was nonetheless deeply consistent with his theoretical innovations regarding the law of nations. In recalling Chapter V, for Mackintosh, the nation-state emerged not through first principles-based philosophical abstraction, but through the realities of organic community. On this basis, outside interference was unjustified in that it would undermine the popular will that emerged in a unique organic context. As such, an outsider was in no position to substantively define what popular will should mean in relation to a foreign political community (so long as it was organized in a manner analogous to a European state).[78] Thus, in stark contrast to views such as those of the French revolutionary Jacobins, Mackintosh's popular will-based condemnation of intervention was not limited to liberal and/or republican systems of government, and extended even to absolute monarchies.[79]

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[75] See Chapter V, Part 5.4.2.

[76] Quoted in Van Hulle 2014, 304; see also Mackintosh 1846 [1824].

[77] Van Hulle 2014, 303.

[78] This focus on Europe as a site of diverse organic communities lead Mackintosh to articulate an early, and utterly ahistorical, narrative of the Peace of Westphalia as the birth of the modern state system. Mackintosh 1846 [1815], 513.

[79] Hampsher-Monk 2005, 99-100.

However, while claims to dynastic authority could be legitimate in Europe (provided they were portrayed as emerging through the organic manifestation of a bounded community's popular will), using such dynastic claims to justify overseas territorial authority was an entirely different matter. Such a distinction was especially true in Latin America where, unlike the US American claims of settler and metropolitan political communities being rooted in a common 'Anglo-Saxon' identity, those seeking sovereign autonomy placed a strong emphasis on how their indigenous heritage collectively rendered them distinct from Europeans.[80] Given this issue of differentiated origins, how could any claim of monarchical rulership as a localized organic development justify authority over multiple organic communities?

Despite such a formulation, rejection of Spanish authority over Latin America should not be conflated with any general anti-colonialism on the part of Mackintosh. After all, Mackintosh venerated the form of the European state as essential for protecting the fundamental social institution of property.[81] Additionally, he was explicit that a clear hierarchy existed between those societies that were organized on this basis and those that were not.[82] Taking his theory as a whole, it logically follows that outside impositions made to protect European property in the non-European world, where such protections were otherwise nonexistent, would be eminently legitimate. Under this scheme, while popular will may have been sacrosanct, certainly property-based social relations were a precondition to its very existence. Thus, Mackintosh's theory in relation to Latin America can be understood as part of a turning point between two modes of domination: a classical form that placed

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[80] Rodriguez, 2000, 139-141. While, this distinction can be drawn at a broad level, there were numerous formulations of political thought in the Western Hemisphere where the insights of US American and Latin American publicists were highly analogous. For an excellent study on these points of congruence, see Simon 2017.

[81] Mackintosh 1821 [1799], 364-369.

[82] Ibid. 356-357.

primacy on direct territorial appropriation and a modern form that placed primacy on specific property regimes and dealt with territorial sovereignty accordingly.[83]

Against this backdrop, British arguments that were comparatively limited and pragmatic in scope merged into the broader tapestry of theoretical justification for this transforming international legal order. This was especially true regarding the question of rebelling forces maintaining a limited degree of international legal standing on the basis of *de facto* territorial authority via the standard of belligerency recognition, a concept that first emerged in the context of Latin American independence.[84] It was on this basis that Britain could maintain commercial relations with Latin American rebels while remaining formally committed to neutrality and non-intervention in the face of Spain's handling of the revolt by its subjects. Relatedly, there was the anti-pirate strategy articulated George Canning, Britain's Foreign Minister, which in Van Hulle's description, was:

> …employed in pushing towards recognition…by consistently complaining of piracy in the Atlantic seas and the lack of personality the Spanish American states had to suppress it as long as they remained unrecognised….Canning therefore stressed that any co-operation with the Spanish American states to stop piracy would necessarily 'lead to some further recognition of the existence de facto of some or more of these self-created governments.'[85]

Thus, by acceding to a ready-made solution offered by the British as a reasonable response to pressing issues such as belligerency or piracy, an actor would become

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[83] Such relations of 'informal empire' represented a vast degree of European imperial practice as the nineteenth-century progressed, see Chapter V, Part 5.8.2.

[84] Esquirol 2012, 554-557.

[85] Van Hulle 2014, 306-307 (quoting George Canning).

implicitly committed to an emerging ontology of *de facto* international legal legitimacy that vastly limited the scope of dynastic legitimacy.[86] These innovations prompted by Latin American independence became a standard for the doctrine of recognition as portrayed in the treatises, especially those by British and American authors, which defined the theory and practice of nineteenth century international law.[87]

6.5.2. The US's Monroe Doctrine

While Britain's justifications for recognition played a vital role in dismantling dynastic legitimacy claims, this does not fully explain the entrenchment of the modern nation-state form as the expression of popular will in Latin America. Our attention here must turn to the US's Monroe Doctrine. Announced in an 1823 Congressional speech by US President James Monroe, this doctrine asserted that European powers could not recover any lost colonial possessions, nor could they claim any new colonies in the Western Hemisphere (although existing colonial relations would be respected).[88] This development can be viewed as expanding upon Britain's principles of recognition and international legal standing by introducing the question of popular will. After all, the great coherence of British recognition innovations was their ability to further Britain's interest as a maritime, commercial power seeking perpetual opportunities for capital accumulation. That said, whether the new Latin American entities embodied popular will was a secondary consideration at best and Canning held hopes that monarchical systems would prevail. According to him, 'monarchy in Mexico, and monarchy in Brazil would cure the evils of universal

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[86] This point underscores the way in which Canning was highly pragmatic in his deployment of international legal argument in a highly pragmatic manner and in no way can be characterised as a great defender of the non-intervention principle on the grounds of normative abstraction. For studies of Canning in this capacity, see Yamada 2009; Yamada 2013.

[87] Van Hulle 2014, 309.

[88] For a detailed history of the Monroe Doctrine and its context, see Sexton 2011; see also Álvarez 1926.

democracy…'[89] However, the Monroe Doctrine, and its embodiment of popular will, manifested in a distinctly Western Hemispheric context to delegitimize such discourses.

This interpretation of the Monroe Doctrine requires confronting its longstanding infamy as a justification for the US's assertion of dominance over Latin America. Amongst critical international legal scholars, perhaps the most influential formulation of the Monroe Doctrine is Carl Schmitt's argument that this proclamation was a US American assertion of influence over a 'greater space' beyond its own sovereign territory.[90] For Schmitt, such a move was emblematic of the new forms of political authority that necessarily had to emerge in a world where traditional absolute sovereignty no longer maintained its original force.[91] However, like most of Schmitt's international legal and political theory, this interpretation displays a characteristic fetishization of sovereign authority and geopolitics blind to historically varied social relations.[92] While Schmitt's characterization reflected his historical backdrop, a more contextual account of this doctrine's origins allows us to re-imagine its place within the development of an international order where popular will ended up forming the basis of domestic authority.

In the immediate context of the Monroe Doctrine, in contrast to any sweeping international realignment suggested by the Schmitt, the actual American interests it served were relatively limited. Regarding territorial gains in the wake of Latin

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[89] Quoted in Roberston 1912, 550.

[90] Schmitt 2003, 191.

[91] Ibid; see also Schmitt 2016. Towards this end, Schmitt advocated for the legitimacy of the German Reich to assert a 'Monroe Doctrine' of its own over Eastern and Central Europe to contest Anglo-American liberal imperialism. Carty 2001, 61-62.

[92] See Teschke 2011. For more on the critique of Schmitt's international theory, see Chapter IV, Part 4.3.3.

American independence, the US's primary concern was limited to Florida as a valuable geopolitical anchor in the Caribbean that it purchased from Spain in 1821.[93] Another theatre of the Monroe Doctrine's application involved containing Russian claims in the Northwest Pacific coast stretching from Alaska to Northern California.[94] Given that Russia sought the US as an ally in its rivalry with Britain, it was not in the strongest position to object to this proclaimed barrier to its expansion on this front. On top of all of this, the only two European powers, Britain and France, who could possibly have mounted a full-scale effort to recolonize the Western Hemisphere, had declined to do so thus leaving the US largely free to proclaim Monroe Doctrine without consequence.[95] Furthermore, on the question of economic motivations, while there were certainly growing American commercial interests who would benefit from a free trading Latin America, their scale and influence was nothing close to Britain. At this time, the primary site of US American accumulation was not overseas trade but rather its settler frontier where land was rapidly being converted into private property holdings thus expanding its capitalist social base.[96]

With the absence of any overwhelmingly reason for the Monroe Doctrine within the domains of orthodox geopolitics or economics, what explains its original imperative? In answering this question, the Monroe Doctrine can be interpreted as the embodiment of the US's self-legitimation as an international legal subject where popular will, stripped of any vestige of monarchical authority, forms the basis for sovereign autonomy. However, in the context of the consolidating US, this legitimation manifested against a very specific arrangement of capitalist social relations

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[93] Blaufarb 2007, 751-752.

[94] See Fitzmaurice 2014, 204-207.

[95] Gould 2012a, 211.

[96] Moreover, the question of which precise manifestation of capitalism would be implemented was anything but settled as fierce debates centred on whether a free labour-based or planation slavery-based system should guide frontier expansion, Mulich 2017, 188-189

that ideologically separated public sovereignty from private economic rights. On this basis, a veneration of pure constitutional independence went hand-in-hand with increased commercial linkages throughout the world.[97] After all, impassioned American condemnations of the old European political order coexisted alongside a reality where '[c]ommerce…was an area where the appearance of isolation from Europe obscured a deeper reality of convergence and integration' for '…Americans were more fully integrated into the Atlantic (and global) economy at the time of Monroe's inauguration then they had ever been…'[98]

Against this backdrop, the particular image of US sovereign autonomy received a massive boon with the revolutions in Latin America as it began recognizing the independence of rebelling forces in 1822.[99] This was a profound opportunity to replicate the Jeffersonian justification for its own independence by proclaiming that substantive judgement by outsiders was illegitimate and, as such, the results of domestic political contestation can only be externally judged on the basis of 'facts on the ground.'[100] Here Jefferson himself remained consistent in his position and supported Latin America's *de facto* authority-based sovereignty, despite his numerous substantive judgments of the region's society and culture.[101]

While British and US American positions on Latin American independence may have differed, ultimately, the British justification via Mackintosh and the American justification via Jefferson presented a profound degree of ideological overlap. Here, under the framework of public/private division, the success of political contestation

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[97] On the theoretical and juridical groundings of this arrangement as they developed in the formative institutional architecture of the early American republic, particularly in the domain of restabilising links to the British metropole, see Hulselboch 2018a.

[98] Gould 2012a, 213.

[99] Fabry 2010, 54-58.

[100] Weeks 2001, 492-494.

[101] For a study of Jefferson's characterisation of Latin Americans as an 'unfree' people, see Vajda, 2007. On the broader US American reaction to revolution and independence in Latin America, see Gleijeses 1992.

through attaining *de facto* control configured property rights as pre-political realities (i.e. ideologically neutral 'facts on the ground') that had to be established before any judgment of popular will could be made. Thus, Latin America provided a key milestone in the dissemination of the modern nation-state form developed through a mode of capitalist juridical ordering that emanated from the expansion of the 'Angloworld.' While popular will under this standard could be any system in theory, in reality, the substance of what could be achieved through this assertion of popular will was fundamentally constrained by its conformity with this larger process of capital accumulation. The case of Latin American independence furthered this transformation immensely by undermining the ability of personalized, hierarchal dynastic authority claims to impede upon the expansion of depersonalized, formal equality-based capitalist social relations.

6.6. Making Modern Latin American Statehood

6.6.1. Consolidation and Adaptation

6.6.1.2. Frontiers of Juridical Imagination

As the above-discussed geopolitical backdrop shows, the attempt to re-entrench dynastic legitimacy in the post-French revolutionary/post-Napoleonic era led to a series of interferences and destabilisations that ultimately proved intolerable in Latin America despite centuries of Spanish rule. This ultimately created a tumultuous situation where armed uprising occurred because distant dynastic intrigue and localized popular will proved to be incompatible. A clear expression of this can be found in the 1811 Venezuelan Declaration of Independence's statement that:

> America was called into a new existence, since she could, and ought, to take upon herself the charge of her own fate and preservation; as Spain might acknowledge, or not, the rights of a King, who had preferred his own existence to the dignity of the Nation over which he governed. All the Bourbons concurred to the invalid stipulations of Bayona, abandoning the country of Spain, against the will of the People;—they violated,

> disdained, and trampled on the scared duty they had contracted with the Spaniards of both Worlds, when with their blood and treasure they had placed them on the Throne, in despite of the House of Austria. By such conduct, they were left disqualified and incapable of governing a Free People, whom they had delivered up like a flock of Slaves.[102]

This independence was able to occur because, amongst other reasons, claims of dynastic legitimacy failed to overcome a new understanding of international law where domestic authority was 'now' based on popular will. The resulted was a great paradox. On the one hand, colonial Latin America was shaped by institutions where sovereignty was divided and hierarchical with no rigid ideological distinction between political and economic power.[103] Simply severing the bonds of the formal colonizers was not enough to extinguish these institutional structures and practices in an independent Latin America. On the other hand, the entities most responsible for recognizing Latin American independence expressed a view where sovereignty was indivisible and horizontal with a strict ideological divide existing between public sovereignty and private economic rights. Thus, in Latin America, maintaining the advantages of an international legal system where popular will served as the basis for domestic authority meant committing to an ideal of modern nation-statehood that developed in very different material and historical contexts. In short, the original emancipatory hopes expressed in the language of popular will were frustrated, constrained, and reconfigured in light of this implementation process.

This situation became apparent with the reception of the Monroe Doctrine by revolutionary actors in Latin America. While many leaders were initially elated at this commitment to the justice of their cause and intention to render their freedom permanent,[104] disappointing results ensued. For instance, there were claims that the

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[102] *Venezuelan Declaration of Independence* (July 5, 1811), quoted in Armitage 2007, 201.

[103] On this development in the context of Spanish colonization, see Chapter III, Part 3.3.3.

[104] Álvarez 1917.

Monroe Doctrine should be invoked against the independent monarchy in Brazil on the grounds that its personalized connections to dynasties in Europe amounted to Old World recolonization in the Western Hemisphere and warranted opposition as such.[105] Additionally, there was the proposal that the independence should be solidified though a hierarchical 'Concert of America' akin to the Concert of Europe as a means of guaranteeing independence and obligation in the transformed New World.[106] Neither of these materialized. While the US rejection of such proposals is unsurprising given its conceptualization of sovereignty as the exclusive domain of political communities encapsulated in separate nation-states, this view was not universal. For the Latin Americans accustomed to modes of divided and layered-sovereignty, formulations such as a 'Concert of America' were perfectly consistent with long-standing political structures. Why then did Latin America consolidate as a system of bounded sovereign states, each being the exclusive vessel for popular will, despite the unplanned nature of this outcome?

Here, perhaps the single most important international legal principle is *uti possidetis juris*, whereby former colonial borders dictate the borders of the new sovereign state emerging from decolonization. While Latin American independence was the first modern application of this originally Roman concept,[107] *uti possidetis* in this context was not perfectly analogous to the decolonization of Asia and Africa more than a century later where the colony-to-state jurisdictional issue of border identification was relatively straight-forward, albeit socially disastrous, in most cases.[108] Given the realities of divided and layered sovereignty whereby 'Spain distinguished between colonial jurisdictions of the higher type (viceroyalties) and lower type

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[105] Robertson 1915, 95-97.

[106] Ibid. 95, 105.

[107] Shaw 1997, 98. On the absence of this constraint in the consolidation of the US, see Chapter III, Part 3.6.1.

[108] On the role of *uti possidetis* in the production of deeply entrenched human suffering in Africa and Asia respectively, see Mutua 1995; Shahabuddin 2019b.

(captaincies-general, presidencias, audiencias, and provinces)' and there was no clear rubric for determining who was entitled to sovereignty.[109] This further refined the principle that sovereign autonomy under international law was only legitimately determined through 'facts on the ground' as evidence of popular will. Thus, according to Mikulas Fabry's account of state boundary consolidation in Latin America:

> [*u*]*ti possidetis* did not determine which units were eligible for sovereign status, but it did determine that once they established themselves as *de facto* states, they were to inherit whatever borders they had under colonial law and were not entitled to territory beyond them. *Uti possidetis juris* was thus expressly tied and subordinated to the *de facto* principle.[110]

Remarkably, Latin American jurists quickly adapted to this transformation by invoking and engaging with texts on the law of nations that associated indivisible sovereignty with popular will.[111] A prominent example was the Chilean jurist Andreas Bello (1781-1865) whose articulation of the mutually reinforcing relationship between sovereign equality, non-intervention, and ideological pluralism drew strongly on Vattel and the Anglo-American publicists he influenced including:

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[109] Fabry 2010, 66.

[110] Ibid. 67 (notes omitted).

[111] One of the main mechanisms through which the institutions of modern statehood consolidated in Latin America was through the adoption of centralised legal codes. Here the French Code Napoleon proved tremendously influential. For an extensive study of the reception, adaptation, and refinement of Code Napoleon in Latin America, see Mirow 2000. However, while this Code emerged as a means unifying identity and aspiration in the wake of revolutionary upheaval (see Chapter IV, Part 4.6.2.), in its formative French context, it did so in a fundamentally imperial capacity within a core European power that was radically different from the Latin American periphery. (On Napoleon's empire as a pivotal site of early modern imperial expansion, see Bayly 1998). Thus, while it has been argued that Code Napoleon, and the French revolutionary legacy more broadly, has been a destructive force in Latin America given its ability to legitimise unaccountable authority (see Figueroa 2010), these issues of cannot be separated from the divergent material circumstances of the Code's origins in Europe and its reception in Latin America. For more on the discourse of 'failure' in relation to legalist projects in Latin America, see Esquirol 2008.

James Kent (1763-1847), Joseph Chitty (1776-1841), and Henry Wheaton (1785-1848).[112] Moreover, Bello read these international legal conceptualizations that merged popular will, *de facto* authority and sovereign legitimacy into the historical process by which Latin American states became independent. On this basis, he stated that:

> If a new state appears as a result of the colonization of a recently discovered country, or of the dismemberment of an old state, the other states need only discover whether the new association is in fact independent and has established an authority that rules its members, represents them, and up to a point is responsible for their conduct to the world. And if this is the case, they cannot in justice refuse to recognise it as a member of the society of nations…In cases of violent separation from an old nation, where one or more provinces that comprised it established themselves as independent states [outsiders are obliged to] respect the rights of the original nation regarding the separated provinces as rebellious and refusing to deal with them…[O]nce the new state or states are in possession of power, no principle forbids the other states to recognise them as states, for in this regard they are merely recognising a fact.[113]

From this initial stance on state creation, Bello goes on to present a larger conceptual architecture of international law asserted with the explicit purpose of guaranteeing the survival of weak states in a hostile world.[114] This included a robust general rejection of the justifications for military intervention that were being formulated and applied in early nineteenth century Europe.[115] However, despite his state-

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[112] Fawcett 2012, 687.

[113] Quoted in Ibid. 687.

[114] See Fawcett 2012, 687-689.

[115] These rejected justifications included adjusting the 'balance of power', the extra-territorial protection of religious subjects, and opposing 'revolutionary spill-over' on the grounds of self-defence. Ibid. 689; see also Dawson 1987. On interventionist justifications in post-Napoleonic Europe, see

centric emphasis on indivisible sovereignty, Bello promoted institutionalized of co-operation between Latin American nations on the basis that this could help overcome shared weaknesses inherited from colonial rule.[116]

6.6.2.2. Realities of Economic Geography

While these juridical adaptations garnered much hope, consideration of larger global systems helps to explain why embracing a state-centric conception of popular will was profoundly limited in Latin America. As an initial matter, newly independent states were deeply concerned with continued interference by former colonial rulers and their dynastic allies. Towards this end, they were drawn into the orbit of the powers that had done the most to entrench external recognition, the UK and US (who ideologically separated bounded sovereignty from transcendent economic interests). Dealing with Anglo-American forces on this basis lead to a flood of capital penetration and indebtedness that proved highly consequential in reformulating a Latin American conception of popular will that did not adhere to this strict public/private distinction.[117] According to Frank Griffith Dawson's account of Anglo-American capital accumulation in post-independence Latin America:

> Shielding economic interests from foreign penetration was of secondary concern to the nation-builders. Indeed, foreign loans, investment, and immigration were eagerly sought by the new states. To encourage alien interest, the new constitutions promised foreigners equality of treatment with nationals…Between 1824-25, British investors placed over £17,000,000 in Latin American governmental bonds. In the same period at least 46 joint stock companies with a total capitalization of £35,000,000 were formed in England to carry out operations in Latin

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Lingelbach 1900. Moreover, Bello exceeded Vattel on this point, given the latter's much more flexible view on intervention to uphold the 'balance of power', see Cello 2017.

[116] Fawcett 2012, 693-695.

[117] For an in-depth study of British capital penetration in Latin America, see Dawson 1990.

> America. Mining engineers from Birmingham and New York flocked to the newly liberated states and colonisation companies began negotiations with various Latin American governments. Unfortunately, it was soon apparent that despite the good intentions of the new states, enthusiasm alone was insufficient to remedy the inability of their political, economic and social infrastructures to generate sufficient income or internal security to satisfy European expectations.[118]

The vast difficulties faced by the states subject to such conditions serves to highlight the very different material conditions in Latin America compared to the other cradles of revolutionary popular will, the US and Western Europe. With the US, the idea of popular will that justified revolutionary independence proved durable in that 'Lockean notions of domination [furthered] the drive…West and consolidated notions of property rights, while Madisonian ideas of federal expansion were offered as a way to dilute the factional passions that arise from a civil society founded on these property rights.'[119] In Western Europe, the post-Napoleonic move to a system of bounded territorial nation-states was accompanied by further expansions of the industrial revolution from its British heartlands. Here, a merger of nationalist legitimation, colonial expansion, and elite-led 'revolutions from above' allowed many of these locations to become key sites of production.[120]

When considering Latin America against these backdrops, to begin with the US (and the British Dominions), the basic topographical features supporting its smallholding, arable land-based frontier settlement where extraordinary different from

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[118] Dawson 1981, 45-46.

[119] Grandin 2012, 79.

[120] As discussed in Chapter V, this process was driven by an expanding imperialism where the same mode of human categorization that justified absolute sovereignty in Europe was invoked to deny sovereignty in a non-European world that was increasingly providing the raw materials that fuelled European industry.

Latin America's mountains and rainforests.[121] This was coupled with the fact that while the US's industry-fuelling expansion reached into Western regions where European powers maintained controversial and attenuated territorial claims, Latin American expansions were subject to *uti posidetis juris*. As such, while US Americans could raise flexible legal arguments in navigating its frontier settlement,[122] in Latin America, similar expansionist moves directly intruded upon the sovereignty of another nation thus resulting in potentially devastating border disputes.[123] Additionally, these topographic and territorial realities were intertwined with a centuries-long colonial social history where the Spanish imposition of the feudal *encomienda* system resulted in massive agricultural/extraction-based landholdings that operated according to complex racial hierarchies.[124]

Thus, in contrast to the industrialization that defined Western Europe and the US, Latin America's function in the nineteenth-century's consolidating global economy was that of a raw materials producer dependent on the demands of the industrial powers.[125] While Latin America's formal sovereignty distinguished it from other locations in the non-industrializing world, post-independence indebtedness to foreign powers willing to use force was a persistent barrier to developing any alterna-

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[121] The only Latin American location that facilitated the type of settler colonialism was South America's Southern Cone region (Chile, Argentina, Uruguay, and Southern Brazil), see Crosby 2004.

[122] On the law of conflicting colonial claims in North American, see Fitzmaurice 2014, 203-214.

[123] Fisch 2015, 78-80. As Chapter V (Part 5.6.1.) has shown, while title by conquest lost its popularity amongst Europe as popular will and capitalism became increasing important, it remained an acceptable legal basis for territorial acquisition. This raises the question of who first developed the idea that conquest was not simply unfashionable, but unlawful? In light of this question, owing to the imperatives of both safeguarding peripheral popular will and preventing war on the basis of border disputes, it was in Latin American jurists and statesmen who were the first to proclaim that attaining title by conquest was categorically illegal, MacMahon 1940, 121.

[124] See Chapter III, Part 3.3.3.

[125] For an influential account of the particular origins and continuity of this dependency, see Frank 1969.

tive system that might further affect its already frustrated debt repayment abilities.[126] In sum, the material conditions of Latin America completely subverted so many of the narratives of the self-mastering, property-owning subject so central to the theories of popular will forged in the North Atlantic world.[127]

6.6.2. Sovereignty, Dependency, and Anti-Imperial Imperialism

6.6.2.1. Whose Developmental State?

However, Latin America's non-conformity to the North Atlantic ideal opened the door to a new manifestation of popular will that turned away from mythologized individualism and centred the sovereign state form as a mechanism for achieving what was later deemed 'development.' As Luis Eslava argues, Latin America served as the original template for the 'developmental state' that, more than a century later, inspired hopes of achieving popular will amongst nations emerging from colonialism.[128] However, given the historical consolidation of the sovereign state through the process of European-led colonial capitalism, this 'development' was measured by a deeply Eurocentric standard.[129] According to Eslava's appraisal of this situation, 'Latin American states emerged…with a modernising impetus built into them, yet one that was reinforced by an assumed distance between their post-colonial realities and those of their counterparts in Europe.'[130] This simultaneous emulation of, and distinction from, Europe in the name of 'development' was rooted in the ideal of the sovereign state as a vessel for popular will, yet the attempt to consolidate the uniqueness of Latin American societies through this medium led to a cascade of contradictions.

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[126] See Dawson 1981, 47-48.

[127] Kennedy 2006, 35-36.

[128] Eslava forthcoming.

[129] Ibid.

[130] Ibid. 6.

These contradictions involved the violent potentialities presented by the sovereign state's premise of absolute autonomy, especially in relation to the facilitation of capital accumulation necessitated by the demands of 'development.' Moreover, as Liliana Obregon makes clear, this logic had a distinct racial/cultural supremacy component in that Latin America's state-building Creole elites were, albeit in a unique way, venerating European civilization 'despite the reality of a majority population in the continent still consisting of indigenous peoples and descendants of African slaves.'[131] What emerged was a form of 'anti-imperialist imperialism' where invocations of sovereign equality and nonintervention opposed European/US impositions by regimes simultaneously legitimizing the internal repression of indigenous and African communities.[132] In Greg Grandin's assessment of these realities:

> many of the Latin American jurists who in the late nineteenth century would weave together diverse legal arguments into an overarching theory of absolute sovereignty—used to contest what was described as an expansionist, Indian-killing, warmongering United States—were citizens of governments doing the exact same thing.[133]

When theorizing this outcome, we must consider the way in which this violence and exclusion fuelled the intertwined operation of international law, the sovereign nation-state, and capitalist political economy within the Latin American context. As discussed above, these institutional structures were largely alien to Latin American sensibilities and their impositions resulted from the external exigencies of geopolitical competition and protean juridical argument as opposed to any natural linear progression. This raises the question of what other modernities may have been possible in Latin America had its local institutions not been replaced by indivisible

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[131] Obregón 2008, 262; see also Simon 2017.

[132] Grandin 2012, 71.

[133] Ibid.

sovereign statehood and a capitalist European ideal of 'development.' If the reproduction of private property-based capitalist social relations had been successfully resisted, could there have been an enduring conception, or conceptions, of popular will more reflective of Latin America's distinct racial/cultural diversity and material environment? Given that independence-era Latin America played host to theories of inclusive republicanism, and their conditions of achievement, far more sophisticated than those existing in other formative cradles of modern popular will (especially the US), this possibility cannot be causally dismissed.[134] Latin America thus provides us with a vital rubric for theorizing the alternatives that were lost in the process of constructing a world according to a highly-specific understanding of international law where domestic authority is legitimized through a highly-specific understanding of popular will.

6.6.2.2. Haiti's Long Shadow

On this question of lost alternatives, we must remember how Latin American states existed in the shadow of a radical assertion of popular will that was crushed by powerful states upholding a racialized order of capital accumulation. This was none other than Haiti. Here, through a 1791-1804 revolution, a population consisting largely of black slaves overthrew France's colonial authorities and plantation owners and established a sovereign order based on an unprecedented conception of inclusion.[135] Long understood as challenging linear notions of progressive modernity, the Haitian Revolution's ruptures are exemplified when this event is placed within the genealogy of popular will's emergence as the basis for domestic authority under international law.[136] After all, harmonious narratives regarding the co-evolution of domestic orders based on popular legitimacy alongside an international order based

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[134] See Ibid. 73-76.

[135] For various accounts, see e.g. James 2001 [1938]; Dubois 2009; Ghachem 2012; Salt 2019.

[136] On the Haitian Revolution's general challenge to modernity, see Buck-Morse 2009.

on pluralist sovereign autonomy scarcely apply to Haiti.[137] In direct contrast to the earlier US American conjoining of domestic interest with normative appeals to the international order, Haiti's assertion of independence situated the nation's popular will in opposition to prevailing international standards and ideals.[138] Given the disruption of transnational wealth accumulation patterns occasioned by this revolt, namely those tied to slavery, this antagonism is unsurprising.[139]

This oppositionist stance should not be conflated with crude isolation on Haiti's part. Rather it engaged in a politics of trans-boundary engagement prominently displayed in its support for latter independence campaigns in Latin America.[140] However, once these states attained independence this support was largely unreturned and the particular fate of Haiti within the international order provides us with insights as to why. On one front, there was a lack of recognition by the US, which was in the process of expanding its practices of race-based plantation slavery along its Southeastern frontier and was deeply fearful of experiencing a slave-revolt of its own.[141] Against this backdrop, furnishing diplomatic recognition upon a black head of state representing a nation forcefully formed on the basis of slavery-rejecting black popular will would undermine the very social fabric of the consolidating American Federal Union.[142]

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[137] This contradiction was illustrated by Thomas Jefferson who, despite expressing a degree of sympathy for the Haitians, declined to extend recognition out a fear of domestic political consequences, see Mathewson 1996.

[138] See Armitage 2007, 115-116.

[139] For study of the international reactions to the Haitian Revolution, see Baur 1970.

[140] See Obregón 2013.

[141] Matthewson 1996, 25-26. This provides context as to why Haiti was an exception to the Monroe Doctrine's condemnation of European efforts to recover lost colonies in the Western Hemisphere, see Shiliam 2008, 800.

[142] Wesley 1917, 373-376.

On the other front, there was the question of Haiti's recognition by the European powers of Britain and France who, compared to the US, were far closer to abolishing slavery within their spheres of colonial authority. However, as a condition of Haiti's international recognition, there remained the issue of its liability for debts incurred by the revolution, which included French colonists' loss of value from the emancipation of the slaves that now formed Haiti's political community.[143] Under pressure from subjects who lost property in the revolution, France demanded a harsh indemnity repayment that required Haitian procurement of loans from French banks that then resulted in compounded layers of indebtedness.[144] Given this multitude of constraints, Haiti was derailed in its assertion of popular will as a means of overcoming hierarchal categories that bolstered a transnationally-constituted scheme of capitalist social relations.[145] Through a broader lens, this episode demonstrated how, within a capitalist order, racial discourses could be deployed to overcome international law's ostensibly 'universal' protections when the prerogative of accumulation demands an exception to the very rules that sustain this system.[146]

When theorizing Latin American attempts to avoid the fate of Haiti, we must consider these new states' overwhelming interest in avoiding interventions from external powers who associated the region's racial/cultural diversity with its precarious status as 'civilized.'[147] This is to say nothing of elite fears, especially in slave states, where the threat of revolt from below was coupled with the threat of intervention

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[143] Obregon 2018.

[144] Ibid. 612.

[145] Although slavery did not resume in Haiti, its experience was the catalyst for a host of new techniques of colonial capitalism, see Ibid, 614-615.

[146] According to Robert Knox's summation of Haiti's experience as an international legal subject: 'Any resistance was delegitimised by deploying racialised stereotypes. Profit maximisation was underscored and undergirded by racialisation.' Knox 2016b, 125.

[147] See Schulz 2014.

from above.[148] Against this backdrop, a multi-faceted solution embraced by many Latin American elites was to 'whiten' their societies through policies of facilitating immigration from Europe.[149] Through these 'whitening' projects, not only did elites demonstrate their commitment to Western ideals of 'civilization', but they also allowed certain regions, namely the Southern Cone, to engage in settler colonization projects analogous to those in North America, Australasia, and Southern Africa.[150] Faced with a world of hostile imperial powers, this process offered the fundamentally intertwined advantages of settlement-based economic enrichment and conformity with the ideal of a white frontier society that, through the earlier American Revolution, formed the modern template domestic sovereignty being justified through popular will.[151] With these co-constituting structures of international pressure and domestic internalization, at least at the level of the nation-state, experiments in radical Haitian-type expressions of popular will were thoroughly consigned to the margins in nineteenth century Latin America.

6.7. Conclusion

To conclude this chapter on Latin America, and its lessons, revisiting my analysis reveals an application of my methodology. Long acknowledged as a site of juridical innovation in the domains of sovereign equality and nonintervention, this Latin American narrative is expanded when we consider the region's formative social

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[148] This included the US consideration of seizing Cuba in the name of preventing an uprising analogous to the Haitian Revolution, Ibid. 850. This issue of intervention was especially relevant given the regional involvement of politically powerful US slaveholders seeking to build pan-Hemispheric 'slave empire', see Karp 2016.

[149] Schulz 2014, 852; see also Gott 2007.

[150] See Belich 2009, 518-540.

[151] In Argentina this took of the form of a project deemed the 'Conquest of the Dessert', an '…aggressive military [campaign] against the country's indigenous population that opened a vast swath of lands for cattle farming, the basis of Argentina's economic boom of the late and early 19th century.' Schulz 2014, 856. It was in this context that the Argentine capital Buenos Aires emerged as prominent hub of international commerce, capital accumulation, and legal innovation, see Adelman 1999.

structures as an alternative to the nation-state form that consolidated in the US and Europe. Distinct in their synthesis of feudal and indigenous traditions, these institutions persisted even as Latin America proclaimed its popular will and challenged metropolitan Spain's beleaguered monarchical order. Thus, rather than any simple conflation of popular will with the bounded nation-state form, Latin America represented the possibility of an alternative juridical formulation of popular will that, despite the persistence of colonial legacies, could have been far more representative of locally-rooted social relations. In accounting for the eclipse of this possibility, I focused on Latin America's place against the broader backdrop of inter-imperial rivalries that emerged in the protracted aftermath of the French and US American Revolutions.

Here, continued support for Spanish dynastic authority from the Holy Alliance of Prussia, Russia, and Austria (and France in a different capacity) was contested by British and US American assertions that the *de facto* authority of Latin American revolutionaries warranted recognition under international law. However advantageous it may have appeared to local actors, recognition by these colonial capitalist entities came at a price in that they expected Latin American polities to conform to the standards of bounded sovereign states. This expectation, compounded by post-revolutionary indebtedness and enmeshment with the capitalist world system, left Latin Americans with little choice but to gradually implement these institutional features of modern sovereign statehood. However, Latin America was not in a material position to engage in the same forms of capitalist empire-building that accompanied nation-state consolidation in the US and much of Europe. Relatedly, through survival based invocations of sovereign equality and nonintervention (as well as plans for creating 'developmental states') Latin America further committed itself to the nation-state form despite its harsh incongruities with local conditions. Thus, the Latin American experience reveals the limits of what the juridical discourse of 'popular will' can offer peripheral actors.

CHAPTER VII

A World of Popular Will: The Historical and Ideological Presumptions of the United Nations System

7.1. Introduction

Based on the preceding world-historical inquiry in Chapters III-VI, we are now in a position to revisit the entrenchment of the seemingly intractable difficulties stemming from the status of popular will within contemporary international legal doctrine presented in Chapter I. Since the 'effective control doctrine' is the logical outcome of consistently and holistically upholding Articles 2(1), 2(4), and 2(7) of the Charter of the United Nations, the world-historical formation of this document demands our attention.[1] This requires going above and beyond narrow diplomatic histories that ascribe agency to the drafters, and immediate interests they served, and instead focusing on the greater forces that underpinned this process.[2] Here, I claim numerous materially-shaped strands of meaning explored in this this thesis converged at this juncture to create a 'world of popular will.' In other words, while colonialism persisted, this moment of 1945 sparked a global vision of unqualified popular will, expressed through a plurality of sovereign nation-states, as the sole basis for legitimate authority. Such a vision was shared by an unprecedented array of actors despite the deep ideological differences that persisted amongst them.[3] This

[1] Roth 2010, 395.

[2] For such histories, see Russell 1958; Hilderbrand 1990; Amrith and Sluga 2008.

[3] On the lack of ideological cohesion in the making of the UN Charter system, see Mazower 2009.

raises the question of why this particular vision of popular will was able to holistically manage seemingly insurmountable tensions on a planetary scale at this particular moment.

Part I provides a high-altitude account of what the world of popular will was created to replace. Postwar, it became clear that sustaining 'global order' required rejecting the preceding century where political subjectivity and international legal personality were formally defined through an exclusionist race-hierarchy. This prompted the mobilization of an earlier, Enlightenment era ethos of universality nonetheless conditioned by the weight of subsequent historical developments. In substantiating my claim that the world of popular will was formulated on this basis, following an overview of failed attempts to hierarchically manage localized political expressions through a century of varied juridical innovations, I turn to the legacies and outgrowths of the events detailed in Chapters III-VI.

Part 2 turns to Chapter III's forging of a colonial capitalism-popular will nexus by examining the co-expansion of the British and American empires, and its profound material and ideological impacts. This provided the world of popular will with a foundational liberal internationalism while abstracting it from the material conditions of its formation. Part 3 turns to Chapter IV's depiction of transformative uprising in the face of systemic contradictions by examining Marxist challenges to the existing international order as the inheritance of the French Revolution. This provided the world of popular will with a means of acknowledging radical demands while legitimizing the bounded structure that constrained them. Part 4 turns to Chapter V's account of the chauvinist containment of popular will within organically-legitimized European borders and shows how fascist aggression was the ultimate result of this process. This provided the world of popular will with a condemnation of the harshest expressions of racialized violence while allowing it to insulate itself from the contradictions that produce this result. Finally, Part 5 turns to Chapter VI's exploration of postcolonial statehood in Latin America and shows how analogous situations presented themselves in the postwar decolonization of Asia and Africa. This provided the world of popular will with a means of captivating the

hope of peripheral actors while conjoining it with narrow ideologies of progress and responsibility that preclude alternatives.

7.2. The Return of Popular Will as 'All or Nothing'

Accounting for the ultimately global embrace of state-centric, 'unqualified' popular will requires a depiction of what exactly 'qualified' popular will looked like, and why it was rejected. In framing this leap from the mid-nineteenth century, when this thesis's predominant historical narrative concludes, to the post-Second World War moment of the UN Charter, when popular will was consolidated in both its doctrinal formulation and progressive trajectory, the roughly one hundred year space between constituted a 'racial century.'[4] According to Dirk Moses, this timeframe was one where increasingly violent and exclusionary measures practiced by Europeans against non-Europeans under the banner of 'scientific' racism ultimately returned to Europe itself in the form of the Nazi Holocaust.[5] This represented a dramatic shift regarding the concept of popular will as a product of Enlightenment universalism. In the Enlightenment, popular will can be interpreted as a reason-grounded first principle whose Others (be they dynastic monarchs, religious reactionaries, or indigenous communities) were deemed 'primitive' by virtue of having yet to conform to its dictates.

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[4] While forms of racialized violence certainly predated the mid-nineteenth century (see especially Chapter III, Part 3.4.), what is '[r]emarkable about the racial century….is the coincidence of Great Power projection into and penetration of the world and the degree of self-consciousness and self-justification about what they are doing.' Moses 2010, 34.

[5] Through this 'racial century' concept, we are provided with '….an account of European modernity that links nation-building, imperial competition and international and intra-national racial struggle to the ideologically driven catastrophes of the twentieth century.' Ibid. 33.

However with this mid-nineteenth century turn, race was now the first principle and its Others lacked popular will *because* they were 'primitive.'[6] Moreover, this development deeply exposes the intersection of international law, racialization, and capital accumulation. As Robert Knox has shown, this dynamic concerns the ability to juridically proclaim the variable inferiority of peoples and territories to justify appropriations that change as the demands of capital changes.[7] Thus, the race-based relativization of once ostensibly universal understandings of popular will justified far more direct access to the resources needed to fuel a vast expansion of industrial capitalism as the nineteenth century world-system consolidated.[8]

As popular will increasing challenged dynastic legitimacy, a key technology that emerged was the broad array of practices deemed 'indirect rule.' At its most basic, this was a regime of governance whereby the local autonomy was accepted in defined certain spheres of activity, largely justified according to narratives of 'tradition', while denied as overarching matter.[9] While traceable to medieval European regimes of divided sovereignty being increasing imposed in colonial settings (yet increasingly rejected in Europe itself), it was the nineteenth century's setting of rigid boundaries between 'Europe' and 'non-Europe' that perfected this process.[10]

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[6] Perhaps the quintessential international legal expression of this view came from the Scottish jurist James Lorimer who depicted humanity as exiting upon an immutable hierarchy of 'civilised', 'barbarian', and 'savage' variants, see Lorimer 1883, 100-101; see also Koskenniemi 2016c; Clark 2018, 31-38. For an account of how 'primitivism' occupied a central place in nineteenth century jurisprudence, see Kirby 2018.

[7] Knox 2016b, 112.

[8] On these mutually-reinforcing regimes of inequality within this timeframe, see Buzan and Lawson 2015, 171-196.

[9] While many proponents and implementers of these processes fixated on 'traditional' practices amongst subject populations, technologies of 'indirect rule' would create a vast multitude of new identities that this justificatory fixation could not readily account for, see Mamdani 1996; Eslava 2018.

[10] See Keene 2002, 98-100.

Applied in this imperial context, 'indirect rule' consolidated the triumph of the 'social' over the 'political.' Through this turn, a given people's 'popular will' was now a depoliticized scientific articulation justifying paternalistic intervention as opposed to an inherent quality of self-rule that justified the ability to contest outside interference.[11] Generally less intrusive, another popular will-qualifying development within this timeframe occurred in Europe's south-eastern periphery where the conditional recognition of new states (including the largely autonomous Ottoman regions of Romania, Bulgaria, and Serbia in 1878) was premised on conformity with externally imposed standards, namely property reform and minority protection.[12]

Both indirect rule and conditional recognition became unavoidable objects of international concern following the end of the First World War and the rise of the League of Nations system. Against this backdrop, the placement of former German and Ottoman colonial possessions in the Middle East, Africa, and the Pacific under internationally supervised trusteeship via the Mandate system provided new staging grounds for evolving techniques of indirect rule.[13] Beyond its individual sites of application, the Mandate system changed '…the structure of international political and legal order by introducing a new form of global regulation to govern the practice of colonialism, essentially making the promotion of civilization a concern of international society as a whole, rather than exclusively the responsibility of the relevant imperial power.'[14]

Relatedly, there was the creation of new states from the collapsed German, Russian, and Austro-Hungarian Empires that sought, with limited success, to encapsulate

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[11] Mantena 2012, 327-328.

[12] Berman 2002, 114. On the Ottoman perspective on sovereignty, collective autonomy, and international relations in this context, see Aksakal 2004.

[13] For a definitive study, see Pedersen 2015.

[14] Keene 2002, 126.

popular will through a coordination of sovereign borders with ethnic identity.[15] Building on previous practices of conditional recognition, this interwar meta-project was accompanied by a two-front qualifying of the state though the provision of unprecedented rights for nationalities and minorities from below, and the enforcement of these rights through novel international judicial and administrative mechanisms from above.[16] Such developments garnered overwhelming enthusiasm on the part of the international lawyers; a move that is unsurprising given that the evasion of stateless nationalism was a persistent point of international legal inadequacy regarding popular will as reality as opposed to an ideal.[17] How then did this proliferating plurality of international legal subjectivities with varying degrees of sovereignty (and consequently different manifestations of popular will) give way to a world where absolute sovereign discretion to pursue any system of authority within national borders became the sole legitimate expression of popular will? [18] This shift speaks to the very distinction between the League of Nations and the United Nations where, in the words of Edward Keene:

> the United Nations was envisioned as, or quite rapidly became, an organization *of* all the world's peoples, with universal participation in the project of preserving peace and developing global civilization; whereas

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[15] On the Austro-Hungarian Empire in this capacity, see Wheatley 2018, 482.

[16] Berman 1992, 355.

[17] Writing in 1925, for the French author René Johannet the this newfound nationalist turn in international politics sought 'not only to do without the principles of high diplomacy elaborated for centuries by international law, but also to oppose itself to them as truth to error, as a truth newly revealed to a mass of maleficent errors.' Quoted in Berman 1993, 1802.

[18] On this interwar hierarchy regarding conditional sovereignty versus potentially perpetual trusteeship, see Anghie 2006, 452-455. On the new modes of international legal personality that arose in this era, see Wheatley 2017. For an excellent recent connection of the unifying ends sought by the architects and administrators of the League of Nations through the Mandates system, the facilitation of conditional sovereignty, and the sanctioning of defeated states through peace treaties, see Parfitt 2019, 154-222.

> the League had, above all, been an organization of civilized nations, working collectively *for* all the world's people.[19]

According to a commonly invoked narrative, the globalization of universal sovereignty was the teleological fulfilment of the international order's 'natural' state, even if it took the world uniting against a genocidal Nazi aggressor to bring this about.[20] Yet, to accept this narrative is to ignore the deeper material forces that constructed this moment and how they re-manifested to further the systemic logics of capital expansion and nation-state universalization despite the mid-twentieth century rupture. However, it must be remembered that this vision of a 'world of states' offered an alternative to the previously foundational ontology of a 'world of races' that had been largely discredited by the horrors of Nazism.[21]

In accounting for the political success of this ontological displacement, we can observe how the more inclusive narratives of popular will that developed before the 'racial century' proved indispensable when providing the building blocks for a new order. This was the case for both those seeking to contest the 'racial century's' legacies and those wishing to preserve the material gains and institutional practices it generated. That said, by observing the trajectories of the developments detailed in Chapters III-VI, we are presented with a unifying view of how the formation of a world of popular will was possible and, correspondingly, how it was limited. As such, the return of universal popular will was a core aspect of the unique global moment of 1945 that Sundhya Pahuja has aptly depicted as profound for simultaneously being both deeply emancipatory and deeply counter-emancipatory.[22]

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[19] Keene 2002, 136 (emphasis in original).

[20] On the influence of this thinking amongst mainstream international lawyers, see Berman 1999.

[21] Henderson 2013, 76; Buzan and Lawson 2016, 124; see also Vitalis 2015. On the juridical dimensions of this 'crisis of civilisation' in the justification of international order, see Mazower 2006.

[22] Pahuja 2011, 29-30.

7.3. The Triumph(s) of Anglo-American Liberalism

As discussed in Chapter III, it was the expansion of colonial capitalism, that culminated in the outbreak of the American Revolution, which led in turn to the first great conflation of internal popular will, *de facto* authority, and international law. With the US's independence from the British metropole, the ability of popular will assertions to achieve 'facts on the ground' sufficient to alter existing configurations of sovereignty became something that no existing power in the world could causally dismiss.[23] In exemplifying capitalist modernity's division between bounded politics and transcendent economics (the dynamic that spawned the American Revolution in the first instance), the separation of the US and Britain in the domain of public authority went hand-in-hand with their increased integration when it came to private interests.[24] As a political matter, the partition of British and American sovereignty certainly led to a rivalry where war was an available means of dispute resolution.[25] However, despite the contentions of statesmen, in the parallel order of transcendent economic interconnection (and its base-level juridical ordering), Britons and Americans engaged in many lucrative joint-ventures facilitated by the commonalities of culture, language, and, above all, a commitment to capitalist modes of social reproduction.[26]

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[23] On the influence of the American Revolution on jurists whose theories of recognition deeply influenced the international legal publicists of the latter half of the nineteenth century, see Alexandrowicz 2017 [1958], 359-360.

[24] Gould 2012a, 213.

[25] This was demonstrated most prominently through the War of 1812 (1812-1814). On this conflict see e.g. Borneman 2004; Hickey 2012.

[26] Here, according to Daniel Hulsebosch's recent study, the particular structuring of the American Constitution was instrumental in allowing British capital to finance American frontier development, see Hulsebosch 2018b. For more on the ideology of transcendent economic right's shaping of constitutional sovereignty in this context, see Hulsebosch 2016. Moreover, when considering the global impact of the Anglo-American constitutionalism that proliferated in this context, studies of their conjoined nature have been rare given the traditions of 'exceptionalism' in both American and British constitutional theory, see Colley 2014, 263.

In an intimately linked capacity, this sovereignty division constituted a competitive dual-metropolitan structure fuelled by rival projects of settler colonization in the respective American West and 'British West' (Australia, Canada, South Africa, New Zealand).[27] While this dual expansion was a source of tension between the two powers, particularly at the immediate intersection of claims of territorial sovereignty (namely the disputed Canada-Oregon Territory boundary line[28]), it was also a transcontinental system of innovation transfer.[29] As the nineteenth century progressed, animosities faded and gave way to grandiose visions of 'perpetual peace' based on racial and cultural solidarity through a shared 'Anglo-Saxon' identity.[30] In addition to the 'Greater Britain' project of unifying the United Kingdom and its settler dominions as one vast sovereign entity, such visions even extended to proposals for Anglo-American political reunification within this frame.[31] Prominent formulation were, in varying capacities, developed by a diverse array of high profile figures including: leading theorist of the English Constitution Albert Dicey (1835-1922), Scottish-born American industrialist and influential promoter of liberal internationalism Andrew Carnegie (1835-1919), and renown British novelist and social critic HG Wells (1866-1946).[32]

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[27] Belich 2009, 70.

[28] On this dispute, see Fitzmaurice 2014, 203-214. For an important account of this situation from a leading international lawyer working in this timeframe, see Twiss 1846.

[29] Belich 2009, 120-126. To give just one example of innovation transfer in this capacity, there was the way in which white settler governments in Australasia sought to invoke their own version of the 'Monroe Doctrine' that condemned territorial claims by European powers in the Western Pacific region. For an important study of this 'Australasian Monroe Doctrine' see Tate 1961. For an important study Australasia as a site of 'sub-imperialism', see Storr 2019.

[30] See Bell 2014a. On the way in which this rapprochement was, and continues to be, based on a presumption of a shared racialized that defies theories mainstream theories of international conflict and competition, see Vucetic 2011.

[31] Bell 2007, 254-259.

[32] For respective studies of these figures in this capacity, see Bell 2014b; Bell 2017; Bell 2018.

Beyond the Americans, the British, and the indigenous peoples who resisted them, the external pressures generated by the rise of this 'Angloworld' had far-reaching consequences when it came to globalising a specific understanding of popular will. As shown in Chapter VI, a shared liberal commitment to expanding capitalist social relations had profound influences in both the recognition of Latin American independence and the subsequent consolidation of the nation-state form in the region. This came at the expense of both the continental dynastic powers and local Latin American attempts to build popular will-embodying institutions on their own terms.

Moreover, this mode of expansionism, particularly with the American frontier, was a persistent source of competition-based anxiety in continental Europe leading to visions of Africa as the inevitable frontier of European expansion.[33] The facilitation of colonialism in accordance to such visions was inseparable from conception of popular will that had emerged as a nationalist basis for domestic authority whereby many national projects justified through top-down capitalist implementation also sought overseas colonies.[34] Faced with the pressure of an 'American Danger', a continental European response could have occurred through either an intra-European integration process that undermined nationalist popular will, or an extra-European colonization process that bolstered nationalist popular will through the intertwined projects of external empire-building and internal state-consolidation.[35] As discussed Chapter V, since the 'organic' conception of popular will within Europe corresponded to the denial of sovereignty (and popular will) outside Europe, this triumph of colonization over integration is entirely unsurprising.

As for the ideological innovations that developed in this material context, there was a unique synergy between British and American thought: the British had a far more robust international theory of a world of the formally equal sovereign states; the

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[33] Beckert 2017, 1143-1144,

[34] Ince 2015, 389.

[35] See Beckert 2017, 1158-1161.

Americans had a far more robust theory of nationhood. In beginning with British international theory, their experiences in both European rivalries and imperial management led them to consistently adhere to an understanding of formal juridical equality set against the backdrop of a sovereign versus non-sovereign binary.[36] Regarding European rivalry, from the early-modern era onwards, Britain's general upholding of sovereign equality stemmed from its furthering of capital accumulation in opposition to continental modes geopolitical accumulation. This, as demonstrated in the earlier analyses of Emer de Vattel and James Mackintosh,[37] motivated a default British defence of the small European states for whom asserting international legal personality was a matter of basic survival.[38]

Regarding imperial management, in response to universalistic invocations from natural law treatises (especially Vattel's) by those on the receiving end of imperial impositions, British jurists increasingly expounded upon the 'civilizationally' restricted nature of 'positive' international law.[39] From these premises, previously horizontal relations between rulers in the non-European world were increasingly

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[36] On the larger British debate on the question of small nations in this era, see Varouxakis 2007. On the efforts of British international lawyers in this timeframe, see Sylvest 2004.

[37] See Chapter II, Part 2.6.3. and Chapter V, Part 5.4.2.

[38] Here, the small European states such as the Netherlands, Belgium, and Switzerland who sought to compensate for their territorially vulnerability by becoming leading proponents of international law were also major sites of finance capital, see Grewe 2000, 435. Assertions by these small European states where especially prevalent during conferences on the codification of the laws of war where a bloc was formed to oppose the expansive view of belligerent occupier's rights put forth by the large land-based powers. Nabulsi, 119, 17. Perhaps the supreme example of Britain's commitment to upholding the sovereignty of Europe's small states came through its entry into the First World War in response to the German violation of Belgian neutrality, see Hull 2014, 33-41.

[39] For a comprehensive study of the development of Victorian international law along these lines, see Pitts 2018, 148-184.

transfigured into vertical relations of imperial constitutionalism.[40] With this variable grey zone between the laws governing inter-sovereign relations and the laws governing a liberal domestic system, British jurists were highly adept in constructing legal orders applicable to the colonized populations who, in varying degrees, were neither sovereign nor equal.[41] Creative contributions towards this end sprang from a diverse array of publicists ranging from Dicey to Henry Maine (1822-1888) to Travers Twiss (1809-1897).[42]

This stood in contrast to an American exceptionalist view. Here, in addition to the dichotomy between sovereign versus non-sovereign, the US long operated according to alternative conception of 'civilization' where it arguably placed itself in a normative category above the formally equal 'family of nations.'[43] This was especially true in relation to Latin America where fear of abandoning Monroe Doctrine-

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[40] The problem of 'quasi-sovereignty' that emerged in this context '…could to some extent be avoided by imagining empires as composite nation-states…Rather than charactering empires as objects for international law, jurists represented them as particular variants of municipal law.' Benton 2008, 598.

[41] Through this flexibility in the legal management of peoples categorized as fundamentally different from themselves, the British largely avoided the contrasting dogmatic rigidities that frequently accompanied the colonial endeavours of their French and German counterparts. By emphasizing the universality of their culture, French colonizers were prone to fixating on the assimilation their subjects. By emphasizing the exclusivity of their culture, German colonizers were prone to fixating on the annihilation of their subjects. For a comparison of these diametrically opposed French and German ideologies and methods in this context, see Shahabuddin 2016, 62-97.

[42] While most famous for his highly influential writing on the English Constitution, Dicey's work was deeply enmeshed in his imperial context and this is only now gaining serious scholarly attention, see Lino 2016; Lino 2018. Regarding Maine, his writings on popular sovereignty and his writings on colonial law and governance, can be viewed as merged through his theory of 'Ancient Law' and its distinction between peoples who 'progressed' and peoples who did not, see Maine 1861. For studies of Maine in the context of Victorian imperialism, see Mantena 2010; Kirby 2012. For a study of how Maine's general approach to jurisprudence influenced his theory of international law, see Landauer 2002. Regarding Twiss, he is noteworthy for his break from the Vattelian conflation of national identity with absolute sovereignty, Clark 2018b, 20; see Twiss 1861, 20-21. This provided Twiss with great latitude in justifying a wide-ranging of international legal personalities subject to various externally imposed conditions, see e.g. Twiss 1876; see also Fitzmaurice 2018.

[43] Cha 2015, 744.

based justifications for intervention had long frustrated American attempts to develop a foreign policy premised on sovereign equality.[44] This very quality of exceptionalism allowed the US to develop a conception of universal, and exportable, nationhood far more coherent than anything the British had produced.[45] This development largely came about with the closing of the American frontier in the late-nineteenth/early-twentieth century which resulted in the replacement of an explicitly exclusionist settler nationalism (discussed in Chapter III) with an ostensibly more inclusive, albeit deeply paternalistic, civic nationalism.[46]

In addition to raising questions of race and national belonging, the closure of the Western frontier inexorably altered American political economy. After all, without a lack of new lands to settle ended the ideal of the private property based self-sustenance (premised on endless expansion) that was so crucial to ideal of the sovereign American republic.[47] This, coupled with assertions of radical populism, opened the door to an unprecedented proliferation of moderate state-led social improvement programs during the so-called 'Progressive Era.'[48] Moreover, these developments were intimately tied to the rise of a US overseas empire (distinct from the eariler project of Settler Empire) through its acquisitions of Hawaii (1893), the

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[44] Wertheim 2012, 217, 229.

[45] According to a treatise by the jurist, historian, and British Ambassador to the US, James Bryce, the institutions of American law and government:

> ….are, or are supposed to be, institutions of a new type. They form, or are supposed to form, a symmetrical whole, capable of being studied and judged all together more profitably than the less perfectly harmonized institutions of older countries…[and] are believed to disclose and display the type of institutions towards which, as by a law of fate, the rest of civilized mankind are forced to move, some with swifter, others with slower, but all with unresting feet.'

Bryce 1995 [1888], 1.

[46] For a study of how this development as resulting from the defeat of more radically inclusive options, see Rana 2010, 176-235; see also Gourevitch 2015.

[47] See Chapter III, Parts 3.4.4., 3.5.1., 3.6.1., and 3.6.2.

[48] On progressivism's retooling of the concept of American 'freedom', see Foner 1999, 139-162.

Philippines (1898), Guam (1898), Cuba (1898), and Puerto Rico (1898).[49] Thus, many viewed American colonial endeavours as an extension of a national mandate to fulfil the promises of popular will, and this differentiated them from European imperialism.[50] Deriving legitimacy through such posturing was absent in Britain given its explicitly imperial structure and self-definition against the nationalism of its continental European rivals.[51]

However, the British view of the international and the American view of the nation came together during the Second World War to lay the ideological framework for the 'world of popular will.' An emblematic development was the 1941 Atlantic Charter convened between Franklin Roosevelt and Winston Churchill expressing a '…desire to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned…[and]…respect [for] the right of all peoples to choose the form of government under which they will live'; base assumptions later codified within the UN Charter.[52] While there is ample room to doubt the scope of the Atlantic Charter's intended universality in a world still largely defined by colonialism, its universalistic ethos could nonetheless be persistently invoked by anti-colonial challengers.[53]

In a manner that would have a profound impact on these anti-colonial challengers, true to form, the Atlantic Charter embodied an implicit separation between bounded

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[49] For a fascinating interpretative history highlighting the way in which accounting for overseas territorial acquisition and management transforms our very understanding of what the US actually is as socio-political entity, see Immerwahr 2019.

[50] See e.g. Potter 1921. On the American approach to international law in this timeframe, see Coates 2016.

[51] In this sense the idea of a distinctly British 'national' project (as opposed to the imperial project that preceded it or European integrationist project that followed it) can be restricted to the 1940s-1970s, see Edgerton 2018.

[52] *Atlantic Charter* 1941.

[53] See Sherwood 1996.

sovereignty and transcendent economics. The assumption of local discretion in the former category produced no consensus on its applicability to the later. Textually, it sought: 'to further the enjoyment by all States, great or small, victor or vanquished, of access, on equal terms, to the trade and to the raw materials of the world which are needed for their economic prosperity.'[54] However, the Atlantic Charter was made in a context where economic reordering was not intended to be an open pluralistic affair (even if political sovereignty was), but rather a highly specific agenda. Here, according to Adam Tooze and Jamie Martin, 'the tools of national governance…would be reconciled with the disciplined cooperation of the restored international economy.'[55]

Moreover, any response to the demands of those seeking freedom from colonialism invoked the reality that Nazi atrocities had vastly discredited explicitly racialized formulations of 'Civilization', and the legitimacy of Anglo-American leadership hinged on their status as the vanquishers of Nazi evil.[56] This had profound consequences for international law, as some of the first authoritative texts on recognition began denying the validity of any criteria that drew any distinction between 'Civilized' versus 'Uncivilized' nations.[57] Caught between anti-colonial demands and an inability to invoke the old rhetoric of colonial justification, 'Civilization' was stripped of its explicitly racial references and re-emerged as a neutral emphasis on

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[54] *Atlantic Charter* 1941.

[55] Tooze and Martin 2015, 52.

[56] Keene 2002, 136-138. This success of this rhetorical tactic is premised on downplaying the myriad of ways in which Anglo-American conceptions of race and empire were profoundly important sources of Nazi emulation and justification, see Mazower 2008, 581-590; Snyder 2015, 12-22; Whitman 2017.

[57] This was especially prominent in Hersh Lauterpacht's highly influential treatise on recognition. Here it is noteworthy that it is the theory of James Lorimer that Lauterpacht singles out for the basis of his rejection. Lauterpacht 1947, 31-32.

liberty, individual rights, and peaceful dispute resolution.[58] Thus, liberalism became enshrined as a normative presumption that could navigate the question of popular will within an international order premised on pluralism in the realm of political authority and uniformity in the realm of economic governance.

What emerged against this backdrop of Anglo-American influence in this brave new world of popular will was a general ethos of American optimism coupled with British pessimism. Having seized its moment for global leadership during the War,[59] the US drew upon its revolutionary heritage, its history of progressive paternalism, and its disdain for old European empires (including the British) to actively promote projects aimed at making every person on earth identify as a member of a sovereign political community.[60] In Britain, faced with the reality of losing the Empire due to war debt, influential attitudes characterized the violence and disorder of ensuing independence struggles as solely attributable to colonized populations who asserted popular will without the adequate preparation, or even inherent qualities, to do so.[61] This included claims by prominent figures, including the influential British international relations theorist Martin Wight (1913-1972), that anti-colonial liberation movements were analogous to Nazism given their mutual disdain for the liberal order.[62]

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[58] Keene 2002, 138-139.

[59] See Wertheim 2019.

[60] On these projects, see Kelly and Kaplan 2001. This was supported by a vast degree of effort to export liberal constitutionalism throughout the global, largely as a bulwark against Soviet influence, see Bâli and Rana 2018, 271-272.

[61] See Hall 2011.

[62] Ibid. 48-51. According to Wight:

> The Bandung powers are moved correspondingly by the contrast between their poverty and our wealth . . . At its best this is expressed in the demand for equality, and clothes itself in Wilsonian language of natural rights, liberty, and self-determination. But it would be an error to suppose that this language means the same to those whose historical experience and religious premises

In locating this optimism-pessimism complex within an international order that allows political communities' to express popular will by any means, the continuous influence of Anglo-American liberal imperial sensibilities is readily apparent. On the one hand, benevolent (yet ideologically-loaded) external assistance is readily available to those who voluntarily accept it.[63] On the other hand, any harsh outcome is completely a matter of local responsibility. Thus, there exists a persistent discourse of blamelessness regarding the legacies (and continuities) of Anglo-American imperial expansion in relation to the violence that frequently accompanies attempts by the marginalized to assert popular will as a point of resistance to liberal capitalism.[64] The continued frustration of this connection is a testament to ways in which the presumptive 'ideological neutrality' of popular will, international law, and the nation-state form continues to benefit imperialism-rooted Anglo-American interests by insulating them from materialist critique and historical responsibility.

7.4. Systemic Contradiction and Revolutionary Transformation

In revisiting Chapter IV's account of how feudal absolutism led to a popular will-based rupture via the French Revolution, how might we identify the inheritor of this

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> are totally different from ours as it does to us. Hitler, too, employed it with consummate effect.

Quoted in Ibid. 49.

[63] Much of this has been associated with American 'modernization theory' and its positing of elaborate technical models of stage-based development that was used as a basis for implementing technical assistance schemes throughout the 'developing' world. For a leading text of this movement see e.g. Rostow 1991 [1960]. For an important contemporary account of 'modernization theory' and its legacy, see Gilman 2003. However, it must be noted that in addition to these mega-projects, there was a great material and ideological effort exerted to promote small-scale 'community development' as well within this context, see Immerwahr 2015.

[64] For an excellent study of Anglo-American 'deflections' of imperialist accusations as they have manifested across numerous contexts, see Morefield 2014.

revolutionary ethos that influenced the 'world of popular will'? If we wish to account for this second great attempt to pursue a politics of emancipatory transformation in light of contradictory material realities, we must move beyond France itself.[65] This entails turning to Karl Marx and his critique of capitalist political economy as bearers of influence from this 'Age of Revolutions' that began in 1789 and extended to 1848.[66] While Marx fashioned the popular will of a transnational proletarian labour as a 'Sixth Great Power' destined to challenge the Court of Europe's five Great Powers, understanding the trajectory of this development requires centring 'the state', and the international legalism that upholds it, as a contingent mode of social relations.[67]

This entails distinguishing the effect of the French Revolution on the international system from the effects of subsequent revolutionary challenges taken up under the banner of Marx's ideas. What the French revolution amounted to was a fundamental undoing of the existing absolutist political order from which it sprung. Through this event, the *Ancien Regime* was destroyed, its transformative challenger ultimately exhausted itself, and what emerged was a new order via the European states-system that consolidated internally through assertions of nationalist particularity and externally through the expansion of colonial capitalism. By contrast, later Marxist revolutions, despite ambitions otherwise, failed to completely demolish the existing order. Moreover, their impact paradoxically bolstered the international legal order's ability to ostensibly accommodate ideological pluralism while retaining its structural affinity towards capital accumulation. What explains this discrepancy?

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[65] Here France emerged as an imperial power rivalled only Britain and international law was of great importance in this capacity. For an comprehensive overview of the French empire, see Quinn 2000. For an account of international legal development in this context, see Jouannet 2009.

[66] On this periodisation, see Hobsbawm 1962. On Marx's theory as a response to his contexts, see Comninel 2000; Shilliam 2006; Roberts 2016.

[67] On the deficiency of state theory in the analysis of revolution as an internationally-constituted phenomenon, see Halliday 1990, 217.

Much of this confusion stemmed from debates amongst Marxist revolutionaries over the extent to which the nation-state form (and its associated international legal order) could be substantively retooled for revolutionary purposes, or whether the creation of entirely new institutions was essential.[68] Such debates were especially prevalent in the lead up and aftermath of 1917 Bolshevik Revolution where the overthrow of Russia's Tsarist regime represented the first successful assumption of state power by Marxists. One such illumination that represents a road not taken within international law was Rosa Luxemberg's theory of popular will and its relationship with the modalities of transnational class solidarity.[69] For Luxemberg, in her critique of the nation-state form as a hopelessly reactionary entity, efforts to forge emancipatory connections across borders could be derailed if national independence became the objective of movements for self-determination.[70] From this premise, shared by the Austro-Marxists, leaving the old multi-ethnic empires intact

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[68] It is worth noting that this debate was deeply linked to the colonial and settler colonial contexts that shaped the relationship between popular will and international law. Here a dimension of Marx's critique of Hegel can be read as confronting the way Hegel viewed colonial settlement as an opportunity to build virtuous political communities. For Marx, this idealism was delusional given the reality that capitalist social relations could easily reproduce themselves in these new contexts, while also expanding the overarching sphere of capital accumulation as a global force, Paquette 2012, 314-315

[69] According to Luxemberg's account of the contradiction national independence and anti-capitalist struggle using the example of her native Poland (a major flashpoint regarding the question of popular will and inadequacies of actually-existing international law, see Chapter V, Part):

> In order to win independence for Poland, the Polish proletariat would not only have to break the grip of the three most powerful governments in Europe, but would also have to be strong enough to overcome the material conditions of existence of its own bourgeoisie. In other words, despite its position as an enslaved class, it would have to take the position of a ruling class at the same time and to use its rule to create a new class state, which, in turn, would be the instrument of its further oppression.

Quoted in Whitehall 2015, 727

[70] See Whitehall 2015, 727-728.

and furthering regimes of cultural autonomy (that would not progress into national independence) could be harnessed for revolutionary purposes.[71]

However, this formulation was hotly contested by Vladimir Lenin who viewed national independence as a revolutionary imperative and thus furthered the idea that nation-state was essential for achieving popular will, even if it could never fully encapsulate it.[72] For Lenin, this stemmed from his theory of imperialism whereby the 'super-profits' generated from capitalist exploitation outside the national sphere allowed the national ruling class to '…economically bribe the upper strata of 'its' workers…' and divide the proletariat thus causing it to abandon revolutionary ambitions.[73] However, if regions subject to external domination could attain independence, the working classes would no longer be divided by this imperialism-funded buy-off process and be able to unite in revolution.[74] On this basis, national self-determination was imperative for forging necessary alliances between the workers of oppressed and oppressor nations.[75] Far from empty rhetoric, once the Bolsheviks attained power, Lenin viewed the Russian Empire as no exception to this axiomatic demand and oversaw the making of an independent Finland, Baltic states, and, less successfully, Ukraine and Armenia.[76]

As the Soviet Union consolidated following the death of Lenin, contestation over the nation-state occurred yet again in the form of Leon Trotsky's call to export

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[71] Ibid. 720; Wheatley 2018, 489-493.

[72] Lenin was clear that national independence alone was insufficiently revolutionary, Lenin 1964 [1916a], 145.

[73] Lenin 1964 [1916b], 115. For his broader theory of imperialism, see Lenin 1996 [1917].

[74] Writing in the context of the First World War, Lenin viewed national liberation having the potential to 'transform the imperialist war into a civil war for socialism.' Lenin 1964 [1917], 269.

[75] Lenin 1964 [1915], 409.

[76] Bowring 2008, 144-145.

popular will in the form of 'Permanent Revolution' versus Joseph Stalin's commitment to building 'Socialism in One Country.'[77] According to Trotsky's theory, the outbreak of revolution in comparatively 'backwards' Russia was, contra Marx, the result of contradictions within capitalism's global dynamics where highly advanced pockets of bourgeois exploitation and radical resistance were able to emerge in a predominantly feudal society without the need for the transitional stages experienced elsewhere.[78] For Trotsky, this very 'backwardness' that propelled Russia into revolution also meant that it lacked the material capabilities needed to sustain such a transformative endeavour. This necessitated the expansion of the revolution into Germany for the purposes of capturing the most advanced infrastructure of industrial production.[79]

However, this strategy lost to Stalin's infamous agenda of pursuing nationalist modernization as a precondition to promoting the revolution abroad. Though rarely acknowledged, the triumph of 'Socialism in One Country' was actively enabled by international law and the presumption of popular will as the basis for domestic authority had everything to do with it. As the early Soviet Union faced numerous denials of recognition, many prominent Western international lawyers condemned this as a breach of the popular will-based notion that the international standing of the government of a 'Civilized' nation, even a revolutionary one, must be determined by 'facts on the ground', not the normative judgment of outsiders.[80] Thus, tolerance of 'Socialism in One Country' within the ambit of acceptable pluralism could ultimately be viewed as compatible with the core presumptions of sovereign equality and nonintervention. Consequently, this entrenchment of a regime so repugnant to the world's ruling classes could stand for the presumption that international law was truly 'ideologically neutral.' However, the limits of this 'ideological

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[77] On this debate, see Anderson 1983.

[78] Anievas 2014, 96; see Trotsky 2017 [1932], 3-12.

[79] Rosenberg 1997, 10.

[80] See e.g. Dickinson 1931, 184-185, 193; Kelly 1961, 25-26.

neutrality' discourse were exposed by the inability of international law to accommodate Trotsky's revolutionary export and its critique of state-centrism.[81]

Despite the divisive force of these schisms, in much of its practice, the Soviet approach to furthering revolutionary popular will, while navigating existing rules and institutions, embraced both state-alternative and state-centric positions. In the domain of state-alternatives, despite Lenin's earlier critiques of Luxemberg and the Austro-Marxists on ethnic accommodation, this is precisely what Soviet policy towards national minorities came to resemble.[82] This was true especially in the Caucuses and Central Asia, which hosted extensive projects of unifying cultural diversity with Soviet policy while contesting racialized imperialism and fascism.[83] Yet, in the domain of state-centrism, while attempts to respect national independence resulted in stark reversals in Finland and the Baltic states, from the onset, the Soviets were nonetheless persistently call for the independence of European colonies in Asia and Africa in a capacity that radically rejected the distinction between 'Civilized' and 'Uncivilized' nations.[84]

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[81] The failure of serious engagement with this point within Soviet theory is understandable given the context of extreme repressions against all things associated with Trotsky. This suppression of the Trotskyites ultimately had a substantial international legal effect that manifested in the Soviet Union's role in developing an international legal basis for holding individuals criminally liable for planning and waging aggressive war as it was applied at Nuremberg. Here, according to the Soviets, ascribing individual liability to an entire ideology was driven, in part, by an analogy between the elimination of the Nazi and the earlier elimination of the Trotskyites, Sellars 2013, 56. For a broad account of why the Soviet agenda at Nuremberg failed to gain influence within postwar international legal sensibilities, thus rendering points such as this one obscure, see Hirsch 2008.

[82] For a comprehensive study of how ethnographic knowledge was mobilised for the purposes of building a state premised on a distinct interplay of revolutionary unity and cultural diversity, see Hirsch 2008.

[83] An under-analysed facet of were efforts emanating from this region to synthesize Marxism, anti-colonialism, and Islam, see Hamzić 2016. On the larger geopolitical backdrop that informed Soviet efforts in this broad diverse region deemed the 'Eurasian borderlands', see Rieber 2015.

[84] See Bowring 2008, 156-163; Mamyluk 2017.

As the world of popular will arose after the Second World War, the Soviets, elevated to the position of one the 'Big Three' victors alongside the US and Britain, seized their opportunity to use the transformation of international institutions as a platform for promoting their vision.[85] Equally weary of theories that emphasized strict sovereign equality as well as cosmopolitan theories seeking to transcend sovereignty, the Soviets embraced the paradoxical structure of the UN system committed to equality at the level of the General Assembly and Great Power hegemony at the level of the Security Council.[86] For the Soviets, such an order was warranted due to their extraordinary sacrifices during the War and that their history of pursuing nationalist emancipation made them indispensable to the UN's task of justly resolving the question of colonialism.[87]

While the UN Charter system may have emerged as the means through which the Soviets hoped to manage their compounded contradictions regarding international law, the nation-state, and the pursuit of revolutionary popular will, this was to be short-lived. In 1949, a new would-be contender for leadership over the world revolution emerged in the form of the People's Republic of China ('PRC') resulting from a communist overthrow of Chang Ki-Shek's nationalist regime.[88] Excluded from the UN (including a permeant seat on the Security Council) due to the continued recognition of the nationalist Republic of China, despite its effective presence being limited to the island of Taiwan,[89] the PRC could fashion itself as more radical option than the Soviets, especially for those waging anticolonial struggles.[90] This issue came to the fore with the 1956 Soviet announcement of a policy of 'peaceful

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[85] On the Soviet role in the development of the UN, see Roberts 2019.

[86] Korovin 1946, 746-748. On the UN equality-hierarchy paradox, see Simpson 2004, 192-193.

[87] Korovin 1946, 751.

[88] On this situation generally, see Wright 1955.

[89] On the ways in which the question of Chinese representation at the UN was hamstrung through various procedural arguments, see Schick 1963.

[90] See Friedman 2015.

coexistence' with the West whereby armed struggle would be displaced into the realm of competing development models; a move the Chinese called out as a betrayal of anticolonial liberation in the name of rapprochement with the West.[91]

What followed was a contentious Sino-Soviet spilt where the PRC was well-positioned to portray the Soviets as 'white colonizers' who, despite their revolutionary posturing, were fundamentally limited in understanding the aspirations of popular will within the decolonizing and postcolonial world(s).[92] Through these compounding contractions, the project of revolutionarily transforming popular will was left divided and international law's traditional structuring doctrines of sovereign equality and nonintervention could claim stabilizing coherence in the face of this contentious maelstrom.[93] This process of international legal stabilization became monolithic after the PRC's 1971 entry into the mainstream international order where it replaced the Republic of China as China's UN representative and began a process of rapprochement with the West.[94] With this inclusion came an abandoning of more radical theories of the relationship between popular will, international law, and the structures of global political economy that were developed by Chinese jurists.[95] Inclusion within the international legal order once again foreclosed radical conceptualization of popular will.

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[91] Ibid. 39-40. On the matter of development as medium of competition with the West it must be remembered that:

> [a]lthough the Soviet Union was not nearly as wealthy as the United States, it offered a clear example….of an impoverished state that had rapidly industrialized. Indeed, this example better approximated the particular circumstances across war-torn Europe and postcolonial Asia and Africa than did American economic and political history.

Bâli and Rana 2018, 272.

[92] Friedman 2015, 55-56.

[93] See Roth 2012, 32-33.

[94] See Kim 1973.

[95] For an overview of these theories, see Chiu, 1966; Christol 1968.

7.5. Justifications for War and the Fate of European Reaction

In Chapter V, we observed how the post-Napoleonic Concert of Europe system contributed to the modern order through its accommodation of both liberal and reactionary variants of popular will within the bounded nation-states against the backdrop of entrenching capitalism, colonialism, and racialization. While this context lead to the self-conscious rise of modern international law as a tool for peace from the 1870s onwards, this sensibility in no way displaced the contradictions embedded within the core structuring processes of colonial capitalist expansion and nationalist containment. A central blind spot in this turn to increased international legal rhetoric concerned the relationship between war, capital accumulation, and the nation-state form. While there was no centralized ban on war during the nineteenth century, this should not be conflated with an international order where states felt free to use military force without any legal justification or excuse.[96]

When accounting for the material grounding of legal argument in this historical and political context, Jochem von Bernstorff recent analysis is immensely helpful. For von Bernstorff, there were two identifiable, if not always categorically distinct, justifications for the use of force that became prominent in this context. On the one hand, there were 'order-related' justifications that primarily concerned the enforcement of obligations and the guarantee of interests emerging from varied interactions within the international sphere.[97] On the other hand, there were 'ontological' justifications where using force eliminated actual or perceived threats to state survival and could range from self-defence to territorial conquest as a means of doing so.[98]

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[96] To say that states where understood as completely free to resort to force for any reason in this era is largely unsupported by state practice. Here there is an extensive record showcasing the way resorts to war were condemned and/or justified in fundamentally legal rhetoric. For a study of these discourses see, Simon 2018.

[97] von Bernstorff 2018, 336.

[98] Ibid.

Regarding 'order-related' justifications, these resorts to force could be viewed as enforcers of capitalist social relations when voluntary agreement failed within an international system that lacked a centralized enforcement mechanism. These typically entailed actions that were coercive, but limited, and frequently deemed 'measures short of war.'[99] While presented in neutral terms, in actual practice, the scope, intensity, and duration of these 'measures short of war' largely corresponded to a given nation's position within the stratified international legal order organized according to a variable 'civilizational' hierarchy.[100] Thus, an uncontested member of the 'family of nations' rarely faced the degree of force regularly visited upon 'semi-sovereigns', let alone 'non-sovereigns.'[101] As previously discussed, it is not difficult to see how resistance to these impositions in 'semi-peripheral' regions through the discourse of sovereign equality (and by extension popular will) did much to expand Western international legal presumptions beyond the West.[102] Thus, the great success of 'order-based' justifications was their disciplining function in the entrenchment of capitalist social relations.[103] As such, they were no longer necessary when those on the receiving end of forcible interventions implemented the standards sought by the coercive party.

When facing the question of 'ontological' justifications, the question of what exactly these were was intimately connected to who was invoking them. That said, such resorts where largely found within the domain of latecomers to the modern state-based colonial capitalist order who had to forcibly dismantle alternative polit-

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[99] This included reprisals, blockades, or occupations that cease when as an obligation was met or an interest guaranteed. For an account of these practices, see Neff 2003, 215-249.

[100] On 'stratification' as a means of understanding the patterns of juridical division and hierarchy that pervaded the nineteenth century international order, see Keene 2014

[101] See von Bernstorff 2018, 248-254

[102] See Chapter 5.8.2.

[103] See Tzouvala 2019.

ical configurations to build their identity as unified nations, namely Italy and Germany.[104] Both of these nations proved adept when invoking the discourse of popular will to further novel 'ontological' justifications that ultimately devastated the larger system they operated within. For Germany and Italy, this general strategy extended 'ontological' justifications into the colonial/semi-peripheral context where 'order-related' justifications largely predominated.[105]

Beginning with Germany, feeling marginalized by its latecomer status, ontological justification was apparent in its demand for a settler colony in Southwest Africa to accommodate its expanding population. The result was a notorious extermination campaign against indigenous populations as a means of securing space for settlement.[106] Moving to Italy, ontological justification took the form of its conquest of the Ottoman territory of Libya where Italy's actions occurred in explicit rejection of a highly generous treaty-based regime of extraterritorial jurisdiction/protection in this region.[107] What is extraordinary here is that Italy's desire for an African colony as a matter of national prestige represented an 'ontological' justification prevailing over the ends sought by 'order-related' justifications. This demonstrates a

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[104] von Bernstorff 2018, 236.

[105] For a study on the ways in which colonialism came to occupy a prominent place in the works of unification-era Italian jurists, see De Napoli 2013. For a study on Germany's recourse to treaty-based acquisition arguments to justify its colonies in Africa, see Alexandrowicz 2017 [1980]. Moreover, Germany's African colonies became an interesting hybrid site in the production of technologies of indirect rule through its incorporation of racialized patterns of agricultural labour and administration originally developed in the post-Civil War American South, see Zimmerman 2010.

[106] On the connection between this outcome and German thought on international law in this context, see Shahabuddin 2013; see also Hull 2004. However, it must also be noted that efforts to exceptionalise the violence of German Southwest Africa (especially when depicting it as a model for the Nazi Holocaust) often fail to acknowledge how it was remarkably similar to other colonial wars within this same timeframe, see Gerwarth and Malinowski 2009. For instance, the death rates attributable to American actions in the Philippines vastly exceeded German actions in Southwest Africa. Ibid. 279-300. For an account of legal justifications in the context of American counterinsurgency in the Philippines, see Smiley 2018.

[107] von Bernstorff 2018, 253-254. On the Italian seizure of Libya as a 'conquest', as opposed to any other justification for territorial acquisition, see Lindley 1926, 161-164.

contradiction whereby perpetual latecomers within the capitalist order who felt an overwhelming need to consolidate a precarious sense of popular will no longer felt the need to refrain from (or even euphemize) territorial conquest, traditionally understood.[108]

The transformation of international law after the First World War did not prevent Italy and Germany from finding new ways to justify force through expansionist conceptions of popular will. Rather, they were both profoundly enabled by interwar developments. Beginning with Italy, despite being one of the victorious powers, economic difficulties and widespread perceptions of marginalization, especially regarding colonies, would fuel the rise of Benito Mussolini and animate views of international law emphasizing a state's fundamental right to expansion.[109] In addition to intensifying colonial efforts in Libya and claiming border regions from the collapsed Austro-Hungarian Empire, Italian ambitions for conquest as a means of self-perceived survival infamously turned to Ethiopia.[110] While long characterized as a lawless act in progressive international legal narratives, as Rose Parfitt as has shown, Italy's colonial effort included a highly legalistic case before the League of

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[108] This can be attributed back to the ways in which the unifications of Germany and Italy raised questions as to whether the assembly of a national community within sovereign borders could justify modes of conquest that had otherwise fallen out of favour in an international order premised on capital accumulation and popular will-based sovereignty, see Chapter V, Part 5.7.2.2.

[109] Parfitt 2017, 117-118; According to Mussolini:

> For Fascism, the growth of empire, that is to say the expansion of the nation, is an essential manifestation of vitality, and its opposite a sign of decadence. Peoples which are rising, or rising again after a period of decadence, are always imperialist; any renunciation is a sign of decay and of death. Fascism is the doctrine best adapted to represent the tendencies and the aspirations of a people, like the people of Italy, who are rising again after many centuries of abasement and foreign servitude.

Mussolini 1934, 16.

[110] For a study of the interconnection between Mussolini's efforts to construct a distinct 'nation-empire' through conquest and domination set simultaneously in both Europe and Africa, see Pergher 2017; see also Parfitt 2018.

Nations arguing that its actions were justified rectifications of Ethiopia's failure to meet the conditions of its League membership (conditions uniquely placed on Ethiopia due to widespread uncertainty over its 'Civilizational' development).[111] Undermining our widespread perception of an incompatibility between fascism and international law, Italy had once again transfigured an 'ontological' justification into an 'order-related' one.[112] An international legal order that still affirmed racialized imperial rule was in a limited position to deny them. [113]

As for Germany, its militaristic consolidation led to multiple tensions regarding the scope and nature of international law's ability to constrain war when the will of the nation demanded it.[114] This was especially pronounced in the interwar period, as the impositions placed on it as a result of the 1919 Versailles settlement were contested as an unprecedented violation of the German nation and international legal arguments were mobilised on this basis.[115] Thus, as the Nazis seized power they: claimed Versailles lacked juridical force due to its undermining of the fundamental minimum core of German sovereignty,[116] formalistically condemned the transfer of

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[111] Parfitt 2019, 327-334; In addition to the justifications for using force, similar arguments were made regarding the laws governing the conduct of hostilities as they applied to Italy's war against Ethiopia. For an account of how discourses of race and civilization were used to justify what would otherwise be grave breaches of the laws of war in this context, see Perugini and Gordon 2019.

[112] For more on how international law's inability to successfully contest such applications reveals its fundamental complicity with fascism, even after the supposed defeat of fascism, see Parfitt 2017a.

[113] Here it was even suggested by leading interwar era international lawyer Nicolas Politis that Ethiopia surrender its sovereignty and become a sub-sovereign League of Nations mandate to avoid destruction at the hands of Italy, Parfitt 2019, 315-316.

[114] On the debates amongst German international lawyers in this context, see Stirk 2005. On the connection between German ambivalence towards international law and German conduct during the First World War, see Hull 2014.

[115] On the terms of the Versailles Settlement in relation to Germany, see Parfitt 2019, 174-177

[116] Vagts 1996, 687-688.

Germany's colonies,[117] and invoked the degradation of 'Civilization' in relation to the use of Francophone African troops in the Versailles-mandated occupation of the Rhineland.[118]

However, the interwar international legal innovation that truly allowed the Nazis to go on the offensive was the introduction of nationalities/minorities as legal persons with rights that could qualify the sovereignty of states. This doctrinal development was deeply synergistic with Nazi legal theories that posited organic community-based visions of popular will so extreme they rejected the legitimacy of any legal form not in perfect alignment with 'ethic reality' as a Jewish conspiracy.[119] With this justification, and the fact that it could not be casually dismissed by the Western powers committed to 'ethnic peace', gave credence to Nazis' 'ontology-based' justifications where the object of survival was fashioned as the German race as a whole.[120] This enabled Hitler to seize Austria and Czechoslovakia's Sudetenland region, and use the question of the League-administered Free City of Danzig as a pretext for invading Poland thus setting off the Second World War.[121]

What impact did this intensification of reactionary conquest-justifying applications of popular will have on the world of popular will that gained its moment in 1945?

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[117] Lange 2017, 355-356. Moreover, it warrants mention Mussolini's conquest and colonization where viewed by Hitler as a successful model of how such actions could be undertaken by a fascist system, see Bernhard 2013.

[118] On the Rhineland Occupation in relation to conceptions of race and the laws of war within this timeframe, see Giladi 2017.

[119] In a manner inseparable from his Jewish heritage, attacks on Hans Kelsen's 'pure theory of law' were particularly prevalent in this capacity, Diner 2000, 56-58. Moreover, it was even asserted that the attempt to universal juridical principle through the Roman law was itself an elaborate Jewish conspiracy that dated back to Jewish schemes and manipulations within the ancient Roman Empire, Preuss 1934, 273-274.

[120] Wheatley 2018, 493-494. For general accounts of Nazi international law from this era, see e.g. Preuss 1935; Gott 1938; Herz 1939.

[121] Fisch 2015, 175-178.

On one level, the result was obvious. This was nothing short of a fundamental denouncement of conquest as the logical outcome between respect for popular will on the one hand and the general ban on the use of force on the other.[122] As such, in stark contrast to the ambivalence present in the nineteenth century, the clash between any formulation of popular will seeking to justify conquest and any competing formulation opposing conquest would be definitively decided in favour of the later.[123] This being the case, individual self-defence was the sole legitimate 'ontology-based' justification for using force that survived this process.[124] Bolstering this view was the position that invasion and plunder by Axis powers did not result in any transfer of title by conquest.[125] Rather, subjugated states were temporarily occupied and their would-be conquerors were gross violators of the law of occupation.[126]

With this transformed sensibility, popular will justified the juridical persistence of sovereign personality even when all state institutions were completely destroyed as

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[122] See Korman 1996, 135-178.

[123] It bears noting here that conquest by the Axis powers was incoherent even by their own understanding. A case in point in Carl Schmitt's conception of the 'Reich' as a 'greater spatial ordering' that left tremendous ambiguities as to how the populations of these territories would actually be ruled, see Stirk 1999.

[124] von Bernstroff 2018, 237.

[125] See *Atlantic Charter* 1941. On this basis, governments-in-exile retained international legal standing despite being stripped of effective control of their territories. For a study from this era, see Oppenheimer 1942.

[126] This point was made explicit in the 1943 Inter-Allied Declaration in which the Allied Powers issued 'a formal warning' that they '…reserve all their rights to declare invalid any transfers of or dealings with property, rights, and interests of any description whatsoever which are or, have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war…' Quoted in Langer 1947, 109.

factual matter.[127] This marked the end of the doctrine of deballatio whereby complete institutional collapse could cause a state to cease to exist as a subject of international law.[128] Ironically enough, post-defeat Germany was itself a great beneficiary of this development. With its unconditional surrender and placement under an all-pervasive regime of Allied-occupation, prominent legal scholars, namely Hans Kelsen, argued that Germany's complete subjugation to external powers could extinguish its international legal personality as an undeniable matter of fact.[129] However, in maintaining their view that war was an illegitimate basis for territorial acquisition, the Allied leadership made the decision to leave Germany almost entirely free of annexation (albeit divided in a manner reflecting the East/West division characterizing the Cold War).[130]

While the ban on conquest has been heralded as a tangible illustration of progress through international law, this should not divert attention from the deeper systemic logic informing this development. Unlike the early-nineteenth century where conquest became unfashionable but retained legal validity (albeit with much attendant controversy), in this new world of popular will all full international legal subjects were either present or future states whose sovereignty was inextinguishable absent

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[127] Simpson 2016, 568. On the way the modern understanding of the popular will-international law relationship displaces the older Kelsenian view that collapse of a foundational constitutional order destroys a states, see Roth 1999, 54-55.

[128] While the nineteenth century law of occupation reduced the instances of deballatio, it did not render it illegal, Arai-Takahashi 2012, 57.

[129] Kelsen 1945; Kelsen 1947. This theory is consistent with Kelsen's larger view that once a state losses an essential attribute of statehood (such an effective government) other states are no longer under a duty to continue recognising it, see Kelsen 1941. For a more uncertain account of Germany's postwar legal status from one of Kelsen's former students, see Kunz 1950. For a wide-ranging account of the governance of Allied occupied Germany, see Friedmann 1947.

[130] See Korman 1996, 177. Given that the 1989 reunification of East and West Germany resulted in a near complete restoration of the pre-division *status quo*, this can hardly be viewed as supporting the continued status of deballatio. On the legal dimension of German reunification, see von der Dunk and Kooijmans 1991. On the portions of Germany that were annexed in the adjustment of postwar boundaries, see Korman 1996, 243.

voluntary consent. In this particular ordering of the world, the globalization of the nation-state inexorably served capitalism by rendering its distinction between bounded political authorities and transcendent economic interests universal. Against this backdrop, there remained little usage for legal doctrine that legitimized the forcible destruction of the alternative polities that might impede this now-completed universalization process.[131] As such, the door remained open for new technologies of control to advance the ends once accomplished through conquest while appearing to be fundamentally distinct in their juridical operation.[132]

Moreover, while this ban on conquest seemingly fulfilled the promise that a people could pursue any system in the name of popular will without fear of external coercion, the reality was more complex. At this very moment the world of popular will gave the nation-state universal monopoly on political legitimacy (and in the process solidified the narrative of Westphalia as an uncontroversial presumption[133]), simultaneous discourses began declaring the nation-state to be an archaic relic in the process of being replaced by emerging forms of international organization and governance.[134] This discourse brought with it an ethos of limiting ideological pluralism in the name of global community and, towards this end, invoked the Axis powers as

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[131] Perhaps the most famous articulator of this sentiment was Carl Schmitt who viewed the fixing of territorial status quos to be extensions of the interest of those who created these spatial orders for their own purposes, see Schmitt 2003.

[132] Of particular importance here was the discourse of 'development' as a project of international morality that acted as a pretext, see Pahuja 2011. On the way in which this 'development' discourse additionally mobilised far more ancient understanding that stretch back to early Christianity, see Beard 2007.

[133] For a highly influential piece in shaping this presumption, see Gross 1948.

[134] For an early account articulating this 'decline of the sovereign state' in a world of international institutions narrative, see Herz 1957. This line of argument can be viewed as the forerunner to deployments of this discourse following the end of the Cold War, see e.g. Schachter 1998.

an illustration of how unconstrained sovereignty undermined the international order.[135]

Furthermore, the qualification of sovereignty was bolstered by the normative discourse of universal human rights within the international order, a move that persistently generates paradoxes within the sovereign state-centric world of popular will.[136] Towards this end, devising the proper configuration of state sovereignty, international cooperation, and individual rights were discussed in increasingly 'civilizational' terms.[137] Such a turn deeply resonated with emerging ideologies, largely Swiss, Austrian, and German in origin, that viewed any state-based efforts towards collective improvement as dangerous delusions and, as such, the facilitation of individual will was the only legitimate end of the state.[138] These theories, that today fall under the banner of 'neoliberalism', envisioned an elaborate architecture of international institutions that constrain the ability of states, especially new ones, to undertake transformative experiments in the name of popular will.[139] However, by

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[135] According to the influential theorist of international law and international relations, Quincy Wright, in addition to forcing individual submission to the and refusing any limitations on the conduct of war, a hallmark of totalitarianism was rejection of the international regimes governing property trade and investment. For Wright this drive towards economic autarky went hand-in-hand with aggression and conquest for '[i]f the totalitarian states have not sufficient resources to achieve this end within their existing territory, this policy has induced efforts to expand their frontiers.' Wright 1941, 741; This line of reasoning vastly enabled Western liberal opposition to the Soviets, whose challenge to the international order could now between conflated with fascism under the broad rubric of 'totalitarianism' in a manner that elided substantive analysis of the differences between the two ideologies. For an early application of this 'totalitarian' rubric in international legal terms, see Herz and Florin 1938.

[136] Keene 2002, 141.

[137] On the project of postwar European integration as emblematic of this development, see Keene 2013c.

[138] For the study this excellent recent study of this theory and implementation of international institutionalism as means of removing private wealth from the domain of acceptable political contestation, see Slobodian 2018.

[139] The original model for many of these thinkers was the end of the Austro-Hungarian Empire following the First World War. According to them, it would be disastrous to allow the states born of

positing inequality as natural and beyond political rectification, these theories were at odds with many of the social welfare oriented projects that informed the early UN system.[140]

Yet, when considering the cataclysmically violent rupture of European reaction, the seeds for neoliberalism's ideological ascension had already been planted. An important site in this capacity was the 1945 Nuremberg Trials of Nazi military and political leadership where the Western Allies used this opportunity to promote a peaceful capitalist order based on trade versus a warlike capitalist order based on aggression and plunder.[141] Such a characterization thus concealed the links between capitalism, war, international law, and human categorization that led the post-Napoleonic reactionary order to ultimately cannibalize itself. This opened space in the postwar era for the nineteenth century to be portrayed, not as a compounding array of contradictions, but as a golden age of liberalism undone by the rise of collectivist agendas, on both the right and left, that ultimately manifested as aggressive nationalism in the twentieth century.[142] As a result, this characterization placed a barrier between the ends of the world of popular will and a material account of why its emergence was desirable in the first place.

7.6. Latin America's Third World

In Chapter VI, we observed how international recognition and the consolidation of the nation-state form in Latin America blocked alternative formulations of popular

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this imperial collapse to pursue independent economic policy and this necessitated international institutions to fulfil the role previously played by the Vienna-centred Empire, Ibid. 105-106.

[140] To name just one prominent individual seeking out such ends, there was Gunnar Myrdal (1898-1987), a Swedish economist who served as Executive Secretary of the UN Economic Commission for Europe and extensively theorized the possibility of how international institutions could provide basic welfare standards on a global scale, see Myrdal 1957.

[141] Priemel 2013, 104-107.

[142] See e.g. Röpke 1954.

will while intertwining the region within expanding orders of capitalism. As the nineteenth century progressed, the more globally enmeshed Latin America became, the more it stressed the inseparability of nonintervention, territorial integrity, and popular will as a matter of basic survival. This need was made apparent when the US, despite its earlier support for Latin American independence under international law, later used this same line of international legal argument to justify devastating impositions in the region.[143] A formative turn in this capacity was the 1836 recognition of an independent Texas as having established the 'facts on the ground' that later justified an 1845 annexation over Mexican protest.[144] Following this was a series of American demands for Mexican debt repayment that led to the Mexican-American War culminating in US acquisition of nearly half of Mexico's territory through the 1848 Treaty of Guadalupe Hidalgo.[145]

Moreover, schemes for influence by European aristocracy in the region would continue long after independence. A prime example was the French-backed bid for Ferdinand Maximillian Joseph, the younger brother of the Austrian Emperor Franz Joseph I, to establish himself as Emperor Maximillian I of Mexico while the US was distracted by its Civil War.[146] Yet, US assertion of hemispheric dominance continued in force, especially after the 1898 Spanish-American War elevated the US to the status of a world power. In this context, a key development was the 1904

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[143] For a history of US intervention in Latin American focusing on resistance by those on the receiving end of these interventions, see McPherson 2014.

[144] For an account of Texas's recognition by the US, see Rather 1910. On this event within the US's larger annexationist strategy, see Pletcher 1973.

[145] This lost Mexican territory later became the American states of New Mexico, Arizona, Nevada, Utah, Colorado, and California. On the Mexican-American War within the context of US expansionism, see Weeks 1996, 113-139; see also Henderson 2007; Hahn 2017.

[146] See Bancroft 1896. For a historical account of this attempt to create a 'Mexican Empire', see Hyde 1946.

Roosevelt Corollary to the Monroe Doctrine where President Theodore Roosevelt proclaimed that all Latin American foreign debt was to be collected by US forces.[147]

Against this backdrop of multiple pressures, in Latin America, any qualification of popular will as something exclusively determined by locally-generated *de facto* authority could serve as a pretext for external interferences.[148] Moreover, Latin American states found that even attempts to qualify rigid adherence to the *de facto* authority standard, despite their utility in upholding conservative governments, would be rejected if they impaired external capitalist interests. This was demonstrated by the attempt to constrain coup regimes through the 1907 Tobar Doctrine whereby the governments of Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, and Nicaragua agreed to the mutual non-recognition of regimes that assumed power in violation of an existing constitutional order.[149] The limits of such a governmental legitimacy regime in the face of conflict with Anglo-American capitalism was starkly expressed through the 1923 *Tinoco* arbitration. In this case, Costa Rica's claim of non-liability for the debts of an unconstitutional coup regime was rejected on the grounds that obligations to British creditors were incurred by a holder of effective control (who by extension represented 'popular will' for international legal purposes).[150] According to the arbiter, who happened to be the Chief Justice of the US Supreme Court and former US president William Howard Taft:

> It is obvious that the obligations of a restored government for the acts of the usurping de facto government it succeeds cannot, from the international standpoint, be prejudiced by a constitution which, though restored to life, is for purposes of this discussion, exactly as if it were new legislation which was not in force when the obligations arose. Nor is it

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[147] Álvarez 1924, 18.

[148] On the specific approach to international law that developed in this context, see Thomas and Thomas 1956.

[149] On the Tobar Doctrine, see Stanisfer 1967.

[150] *Tinoco* 1923, 381

> an answer to this, to suggest that….the restored constitution may be construed not to prevent the Costa Rican courts from giving effect to the principles of international law…[151]

Thus, the Tobar Doctrine's non-recognition of extra-constitutional regimes provided no basis for debt discharge.[152]

Within the same timeframe of *Tinoco*'s affirmation of 'effective control', the relationship between international law, external economic interests, and the domestic political expression of a marginalized state reached an entirely new level with the 1910 Mexican Revolution.[153] Unlike previous extra-constitutional assumptions of power in Latin America that were largely intra-ruling class in character, the Mexican Revolution represented a truly radical endeavour towards uplifting the material conditions of the impoverished many and entailed vast expropriations of alien-owned property.[154] This event showed how the political dimensions of economic interests are only truly exposed under capitalism when they are captured for public purposes.[155] The Mexican Revolution thus forced international law to confront this dynamic by raising questions of how state obligations to protect foreign-owned property could limit local expressions of popular will that were otherwise within

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[151] Ibid. 386.

[152] As such, the *Tinoco* decision was the undoing of the Tobar Doctrine, Stanisfer 1967, 271-272.

[153] For contextual accounts of Revolution from the perspectives of actors involved with the revolutionary government, see Cabrera, et. al. 1916. On the broader social context of the Mexican Revolution, see Wolf 1999, 3-50.

[154] Dawson 1981, 60-61. On subsequent reference to expropriations of foreign-owned property as 'Mexicanization', see Creel 1968.

[155] Rosenberg 1994, 127-129. For a case study on how the influence of businessmen shaped American policy in the context of the Mexican Revolution, thus subverting assumed knowledge of the separation between public and private exercises of power, see Kane 1975.

the purview of unquestionable sovereign autonomy.[156] In light of this context, Mexico proclaimed an even more radical approach for respecting national sovereignty in the form of the 1930 Estrada Doctrine whereby local political outcomes would be accepted automatically and unconditionally.[157] Under the view presented by the Estrada Doctrine, even formal declarations of recognition or inquiry into the (non)existence of 'effective control', however 'objective' or 'ideologically-neutral', constituted an undue external imposition against local popular will.[158]

In the face of these mounting contentions centred on the international law, domestic political authority, and private property nexus, there emerged a progressive development in US-Latin American relations that carried profound consequences in constructing the world of popular will. Announced in his inaugural address in 1933, US President Franklin Delano Roosevelt's 'Good Neighbor Policy' constrained pro-capitalist interventionism with:

> …a blueprint for a revived globalism' centered on: An acceptance of national sovereignty; a way of managing that acceptance through a new array of multilateral institutions and agreements; the recognition of social rights, including the right of developing countries to regulate foreign investment and property….and a regional alliance system.[159]

While this move was deeply in line with the domestic-focused American Progressive era's reigning-in of the harshest excesses of capitalism that became Roosevelt's 'New Deal', its enduring effects on the larger international legal and political

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[156] For confrontations of these issues, particularly as they were entrenched in the 1917 Mexican Constitution, see Bullington 1927; Williams 1927; Dunn 1928; Kunz 1940.

[157] See Jessup 1931.

[158] Irizarry y Puente 1954, 325-326.

[159] Grandin 2012, 88.

order are difficult to over-state. In recalling the Anglo-American agenda of legitimating its world leadership despite its practices of colonial domination, a great performance of its commitments to transcending this past (and present) occurred at the Nuremberg trial of Nazi leadership. Faced with the defensive challenge that Nazi actions in Eastern Europe were functionally similar to US actions in Latin America, the US response was that the 'Good Neighbor Policy' progressively rendered such practices irrelevant.[160]

Beyond this self-legitimizing US co-option, it cannot be forgotten just how vital Latin American agency and experience was in confronting the contradictions that faced those attempting to build the 'world of popular will.' As discussed above, the liberal Anglo-Americans, (post-)reactionary continental Europeans, and Marxist revolutionaries were, despite their vastly different agendas and ideologies, united by their perpetual struggles to articulate the proper relationship between the sovereign state and international order. By contrast, Latin Americas came to the table with experience in building international organizations that sought, not just to 'balance' sovereignty autonomy with trans-boundary solidarity as opposing values, but also to mutually reinforce these two ends.[161] Moreover, between so much of the world still being colonized on the one hand, and the large-scale exclusion of the non-'peace-loving' states on the other, Latin America contributed a strong portion of representatives in the deliberations regarding the postwar order and, as such, their views could not be ignored.[162]

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[160] Thus when the Third Reich Foreign Minister Joachim von Ribbentrop drew an analogy between Nazi expansionism and the Monroe Doctrine, the response by the US Under Secretary of State Sumner Welles, a leading architect of Roosevelt's 'Good Neighbor Policy', was that 'the Minster was laboring under a misapprehension as to the nature of that policy…At this moment, I was glad to say, a new relationship existed in the Western Hemisphere.' Quoted in Hathaway and Shapiro 2017, 243.

[161] On Pan-American efforts to build sovereignty-affirming international organization in the early twentieth century, see Scarfi 2014.

[162] On the role of Latin American delegates in including strong provisions on sovereign equality and nonintervention in the UN Charter, see Grandin 2006, 37.

The Latin American experience of navigating the relationship between sovereignty and international cooperation in this world of popular will had much to offer to African and Asian efforts to navigate these issues in various measures. As a starting point, for the nations consigned to the status of 'semi-sovereign' in the nineteenth century, their campaigns centred on proclaiming absolute sovereignty had to adapt to the proliferation of constraints placed on such proclamations by the twentieth century's new institutionalist sensibilities.[163] Against this transforming backdrop, as African and Asian actors embarked upon independence in an increasingly formally equal world, Latin America offered guidance as a region whose formative marginalization in conforming to externally-imposed international legal standards prompted many innovations.[164] In addition to arguments regarding sovereign equality and nonintervention, this also included lessons from experiments with regional organization and state-led development projects.[165]

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[163] See Becker-Lorca 2015, 202-203. This was readily reflected in the interwar experience of the three states governed by those of African origin (Haiti, Liberia, and Ethiopia) where many autonomy claims available in an era of absolute sovereignty were pre-empted by a paternalism emanating from League of Nations' sensibilities, see Younis 2018. On this point, while there has been a common discourse that post-Second World War decolonization on the basis of self-determination was the universalization of Western modes of political authority, as Adom Getachew has recently shown, this view fails to account for how so many figures within the West contested self-determination's universal and unconditional applicability, Getachew 2019, 75-76. To provide just one example of such a figure from Getachew, there was the international lawyer Clyde Eagleton who, while expressing a degree of sympathy, saw no future for self-determination if anticolonial liberation movements continued '….to make the extravagant, impractical and irresponsible claims….which do not at all consider the needs of the community of nations, or even the welfare of the peoples concerned.' Eagleton 1953, 603.

[164] See Eslava forthcoming.

[165] Ibid. The influence of Latin America on postwar decolonization was important not just for what it accomplished, but also for what it failed to accomplish. For influential Anglophone African and Caribbean scholar-statesmen such as Kwame Nkrumah of Ghana and Eric Williams of Trinidad, the answer for their societies lie in the building of multi-state federations. For them, the model was the US, which they claimed, by organizing itself as a federation, avoided the fate of Latin America (as well as post-First World War Eastern Europe) where independence did not extinguish weakness and predation. However, as Getachew has made clear, the flaw in this line of thinking was its failure to consider how US American success was driven by the intertwined dynamics of race hierarchy, settler colonization, and imperial expansion. Taking this into account '…the United States was the only

The broad embrace of this ethos was apparent in the overarching spirit of the 1955 Bandung Conference, the world's first large scale summit of Asian and African leaders asserting their place in this new world of popular will.[166] An optimistic standpoint articulated in this Cold War context was that the new Asian and African states were the true responsible subjects of international law for, out of an appreciation for their hard-won sovereignty, they were the ones positioned to oppose the reckless nuclear militarism of the American and Soviet superpowers.[167] A key forerunner to this sensibility was the Chilean jurist Alejandro Álvarez (1868-1960) who, in the interwar period, claimed that the influence of a distinctly 'Latin American International Law' was needed to prevent a recurrence of the violence of the First World War.[168] However, following the Second World War the very idea of any deliberately 'regional' articulation of international legal order became associated with fascist justifications for conquest within proclaimed 'spheres of influence.'[169] As such, they were discredited in a West that viewed universal standards as the sole grounding for peaceful order.[170] Ironically, a key development within 'Latin American International Law' was an unprecedented condemnation of attaining title by conquest at a time when it was still considered valid within most US American and European treatises.[171]

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former colony to have triumphed over the postcolonial predicament not because it had federated, but because it was an imperial federation.' Getachew 2019, 119.

[166] On this 'Spirit of Bandung', see Eslava, Fakhri, and Nesiah 2017.

[167] Parfitt 2017b, 60-62.

[168] Álvarez 1940, 323; see also Álvarez 1929.

[169] Becker-Lorca 2012, 1039. On Carty Schmitt as the exemplar in this regard, see Carty 2001.

[170] For an important illustration of the critique of regionalist international legalism in the name of universalism, see Lauterpacht 1931.

[171] On Latin American influences the entrenchment of the ban on title by conquest, see MacMahon 1940, 121-149.

Recognizing this simultaneous production of hope and difficulties through international law provides a tremendous degree of insight into why the world of popular will proved so disappointing for so many Third World actors in Latin America and beyond. Immediately after the Second World War, numerous Latin American states were drawn into close security and defence treaty-relations with the US.[172] Here, the latter's escalating fear of Soviet influence impeded Latin American participation in the burgeoning Afro-Asian movement and justified increased intervention.[173] While many Latin Americans ultimately participated in the radical Third World movement, especially after the 1961 Cuban Revolution,[174] this broad coalition faced serious divisions regarding the relationship between popular will and intervention. While the Latin American experience revealed that any justification for intervention would be fully exploited (thus necessitating unconditional approaches to nonintervention), decolonizing locations, especially in Africa, debated the development of flexible use of force arguments as necessary anti-colonial tactics.[175] After all, in the decolonization setting, popular will, in a narrow range of cases, could now be represented by anti-colonial liberation movements whose goals were not actively facilitated by state-centric conceptions of international law.[176] This stood in contrast to Latin America, where popular will and the nation-state had become fundamentally intertwined.

As these issues surrounding armed struggle and decolonization winded down in the 1970s, the Third World struggle shifted to the arena of economic production.[177] Here a new unifying project arose in the form of the New International Economic

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[172] Obregón 2017, 233-235.

[173] Ibid. 235-237.

[174] See Ibid. 242-245.

[175] For an study of these arguments for expanding the use of force to include anti-colonial struggle, particularly as they were developed by the Organization for African Unity, see Dugard 1967.

[176] On representation of popular will through anti-colonial movements, see Roth 1999, 227-234.

[177] See Friedman 2015, 193-195.

Order (NIEO) that sought to re-configure institutional economics to provide the material conditions for allowing the Third World to truly achieve popular will.[178] This project drew heavily on the ideas of Dependency Theory pioneered through studies on Latin America claiming that the operation of the global system as a whole prevented state-centric policies from providing sufficient material uplift.[179] Thus, an international solution was required.[180] As such, the NIEO represented one of the single greatest illustrations of economic issues being politicized for a collective purpose. However, this action fundamentally impinged upon capitalist political economy's foundational understanding that the economy is 'apolitical.'[181] In the process of undertaking this risky move, and in light of numerous contentions, both the Soviet and Chinese would-be leaders of the Third World revolution each proved unreliable backers of this project.[182]

Given such widespread division amongst the proponents of systemic transformation, the West was in position to assert its now highly refined neoliberal standpoint that was explicit in its agenda of safeguarding private wealth from collective public purposes.[183] Under this view, the NEIO was an abomination that threated the axiomatic demands of the 'natural order.'[184] Here, any state that invoked sovereign autonomy under international law to pursue economic independence only had itself to blame when their radical project proved incompatible with larger systemic forces, and

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[178] For an influential study from this era, see Bedjaoui 1979.

[179] On the prominent role of the Argentine economist Raul Prebisch in the development of this theory, see Love 1980.

[180] On the influence of Latin America, and in particular Mexico, on the NIEO, see Thornton 2018.

[181] Rosenberg 1994, 132-135.

[182] On the Soviet distrust of the NIEO agenda, see Friedman 2015, 206. As for China, while there was degree of expectation that it would led this new distribution-focused struggle, its post-1972 normalization of with the West turned it away from this agenda, see Ibid. 195-203.

[183] On the assent of neoliberal ideas, and their accompanying models of institutional design, during this timeframe, see Slobodian 2017, 218-262

[184] This was very much tied to newly proliferating discourses international human rights that were prominently by those who condemned Third World collectivist endeavours as violators of the natural order, see Whyte 2018.

produced chaotic violence as a result. In other words, with the political triumph of a depoliticized economy, the systemic forces above the bounded sphere of the nation-state were categorically beyond reproach. This being the case, the exceedingly difficult issues regarding the domestic expression of popular will and the values of the international legal order discussed in Chapter I are fundamentally inseparable from the destruction of these historical alternatives. After all, the proponents of these alternatives directly confronted the material grounding of popular will in a manner that is utterly absent today.

7.7 Conclusion

By operating on a broader temporal and spatial scale than my previous analyses, this penultimate chapter integrated the 'world-historical context' unearthed by the interwoven accounts of 'juridical thinking' and historical sociology that occurred throughout this thesis. With the formation of the UN system following the Second World War, the world of popular will, and its presumption that all human beings are members of current or future sovereign political communities, arose as perhaps the single greatest juridical narrative since sovereignty itself. While profound in its sweeping abstraction of the world from its actual-existing material conditions, this narrative forged connections that may otherwise have never existed. Thus, it formed a base consensus amongst actors across an unparalleled range of conflicting ideologies. In highlighting the events of the previous four chapters, and their subsequent development, I showed how various contradicting assertions eventually coalesced into the world of popular will that acted as a variable repository of redemption, transformative hope, and the protection of accumulated interests.

However, simply acknowledging this grand juridical synthesis makes little sense if left abstracted from the material interests and ideologies that gave rise to it. The basis of this formation was an order of capitalist social relations that expanded throughout the world and manifested in radically different ways across a great variety of contexts. In the face of this uneven and combined transmission, arguments invoking categories of popular will, state sovereignty, and international law became a means of expressing a multitude of diverse interests in a universalizing language

of abstraction. Carving exceptions to the universal applicability of these categories in the interests of acquiring greater opportunities for capital accumulation resulted in a hierarchy of human division upheld through a new juridical discourse broadly deemed the 'Standard of Civilization.' This reconfiguration produced contradictions that ultimately rendered this order unsustainable and, as such, the return to a more universal juridical narrative was required. Through this turn, a 'racial century' gave way to a 'world of popular will.'

However, this did not transcend the contradictions inherent in capital accumulation, but merely shifted them into different forms as this new juridical narrative constructed new identities in a manner rife with new material consequences. The violent reality of this arrangement is readily observable in the durability of the effective control doctrine, whereby the current international legal order is compelled to posit domestic political authority as a matter of local agency, and, correspondingly, local responsibility. In this way, the consciousness of international law remains stunted in its characterization of the violence of domestic political contestation. After all, seriously considering the world-historical legacies of sovereign identity construction, persistent inequalities, and the elision of alternatives risks undermining the very juridical narrative that is the world of popular will so dutifully upheld by the UN system. In other words, the 'effective control doctrine' is the accumulated mass of contradictions that the 'world of popular will' is structurally incapable of displacing.

CONCLUSION

Vattel's World, Our World?

In this thesis, I explored popular will and why it became the sole basis for domestic authority under international law. Here I exposed the material and ideological presumptions that legitimize 'popular will' as an expression of possibility limited only by the imaginations of discrete sovereign political communities. To offer a conclusion, it is my claim that this very ethos of openness and contingency conceals the ways in which the discourse of popular will is itself complicit in the construction and maintenance of a very specific type of world. While alternative paths might have been taken, the popular will embedded in today's international legal order is none other than a core legitimation of a globalized system of capitalism that cannot abide alternative social relations. This is the result of the fact that international law's sole vessel of popular will, the modern sovereign nation-state, is an entity premised on the separation of a bounded sphere of politics and a transcendent sphere of economics. In a world where the nation-state is the only form of complete political subjectivity, nothing can exist outside capitalism's integral distinction between 'public' sovereignty and the 'private' economy where the former stabilises the latter

In reaching this conclusion, my method has emerged as a view of a world produced through intersecting accounts of the historical sociology of international relations on the one hand, and the function of 'juridical thinking' as an embodiment of international legal consciousness on the other. Taken together, an analysis of 'world-historical context' is possible. While historical sociology reveals the material forces that shape our modern international order, and offers insight into why some legal arguments succeed whereas others fail, 'juridical thinking' provides a uniquely powerful means of constructing narratives unbound by material constraints. After all, for 'juridical thinking' what truly matters is the encapsulation of timeless principle and any impediments spawned from the inevitability of material change can

be retooled accordingly. Through this ability to portray narratives as timeless, juridical thinking can justify the creation of new material realities and social relations in ways that are otherwise impossible.

The ultimate globalization of popular will began with such a narrative. As this thesis has shown, today's default metric for determining of popular will, the 'effective control doctrine', originated in the Swiss jurist Emer de Vattel's 1758 treatise *The Law of Nations*. Often mistaken for a pragmatic depiction of the existing political and diplomatic order, in reality, this treatise's foundational ontology of a world of formally equal sovereign states was a counterfactual based on natural law first principles. In other words, Vattel's treatise is an *ought* with a profound history of being mistaken for an *is*. When accounting for the current international legal order in this light, we are left with an all-important puzzle: if the world depicted in Vattel's treatise was not the world actually inhabited by Vattel, why is our world the world depicted in Vattel's treatise?

In confronting this question, Chapter I provided an overview of the contemporary international legal order where 'effective control' serves as the best available evidence of a sovereign political community's popular will. Attempts to transcend (or, more modestly, qualify) its harshness only seem to end up affirming it. Moving to Chapter II, the task of locating where and when exactly this justificatory formulation first emerged in the classical cannons of international law led us to Vattel's treatise. As a matter of context, it was shown how the Vattelian view of the world was tailored to the interests of his small eighteenth century Swiss Canton fearful of extinction amidst powerful neighbouring kingdoms. Historicizing this theory's great moment of reception, Chapter III examined how the intertwined process of European colonial expansion and the consolidation of the first modern capitalist state in England led to a situation where its North American settlers ultimately sought, and won, independence. Here Vattel's arguments proved invaluable when waging a campaign for sovereign autonomy in that it was legible within an established tradition, yet, could nonetheless support a dramatically unprecedented political experiment in popular will justified by a showing of 'facts on the ground.'

Chapter VI accounted for how the popular will born of colonial capitalist expansion migrated from the peripheries to the very European core these expansions radiated from. Here I showed how the compounding contradictions of absolutist centralization in continental Europe eventually erupted into the French Revolution which, despite ultimately exhausting itself, left the aspiration of popular will as a lasting challenge that absolutism never recovered from. Chapter V then showed how, in an alliance against the radicalism of the French Revolutionaries, and in the context of tensions between the expansion of capitalism and vestiges of absolutism, there emerged a new order of bounded sovereign states. Here an organicist conception of 'ideological pluralism' enabled the coexistence of liberal and reactionary nationalisms. Set against the expansion of colonial capitalism, treaty-making proliferated, belligerent occupation largely replaced conquest, the non-European world was increasingly excluded, and the asymmetry between national borders and nationalist ambitions was a persistent source of volatility.

Returning to the Western Hemisphere in Chapter VI, the question of Latin American independence pit Europe's reactionary powers, who sought to uphold the dynastic legitimacy of the Spanish Crown, against Britain and the US, whose interests supported recognition on a *de facto* basis. While this *de facto* authority ultimately vindicated independence, it stunted the development of uniquely Latin American conceptions of popular will. While capitalism, the nation-state form, and international law brought about this result, increased of assertion of, and identification with, these institutions became essential for basic survival of fragile Latin American sovereigns. Finally, Chapter VII looked at the future trajectories the events of Chapters III-VI and showed how their overarching manifestation lead to a 'world of popular will' whereby the nation-state form, within the confines of the UN system, formed a common point of agreement for so many diverse actors. However, the durability of the effective control doctrine was the price to be paid for this outcome.

Having established this account of the emergence and eventual domination of popular will, what questions are left open regarding popular will as international law's basis for domestic authority? As a preliminary matter, a key showing of this thesis is that different modes of authority create different modes of social relations. The

nation-state form, and the structure of international law that organizes its multiplicity, is just one such mode. Here, while it is a reflexive trope of the international legal imagination to contrast an anarchic world of sovereigns against a utopian world unified under a common authority, we must remember just how recent and how contingent our exclusive world of nation-states actually is. More importantly, there was never a system of political economy capable of providing the most basic sustenance to, let alone accommodating the deepest aspirations of, a world where the nation-state form is the sole unit of sovereign political expression and unique destinies can be pursued without the endemic risk of fatal destruction.

The key question raised by this thesis concerns then, what popular will – as something constrained only by the imagination – might truly look like given the inadequacy of the existing order to live up to its promises. What would this look like as a matter of political economy? How would it appear as a matter of political representation? As a matter of transcendent regimes of legality? Given that my conclusion was reached through an in-depth materialist history, it would make little sense to answer these questions with the same type of abstract idealization that dominates the current debate on the relationship between popular will and international law. For those braver than me who wish to theorize a world where the deepest aspirations of popular will harmoniously align with their concrete circumstances of possibility, finding a place to begin can emerge from any number of points and for any number of reasons. To those who pursue this path, I offer one piece of guidance: A counterfactual assertion made in the narrow interests of a small Swiss Canton can, under the right material conditions, conqueror the world so completely it would appear in retrospect that no alternative could have ever existed at all.

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