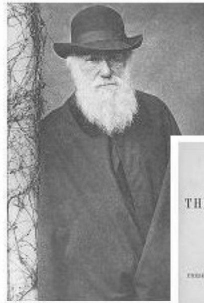
Crim429/FNST429

Indigenous Peoples and International Law

1800s

- Recall that the 19th century saw transition from "contact" to "conflict" periods
- Indigenous populations continue to decrease because of wars (in the U.S.), disease, relocation
- Settler populations become more numerous, stronger, militarized

Charles Darwin



ON

THE ORIGIN OF SPECIES

BY MEANS OF NATURAL SELECTION,

PRESERVATION OF FAVOURED RACES IN THE STRUGGLE FOR LIFE.

By CHARLES DARWIN, M.A.,

LONDON:
JOHN MURRAY, ALBEMARLE STREET.

- Darwin publishes *On the Origin of Species* (1859)
- Social Darwinists assert “survival of the fit(test)” to justify European supremacy and the subjugation of others

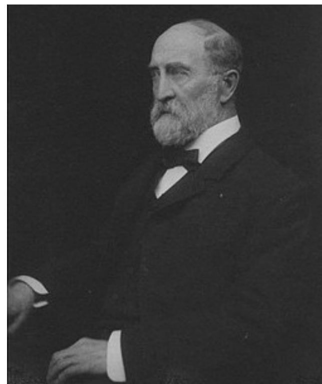
Transitions

- International law moves from a period of “natural law” to “positivist law”
- Natural law was socially constructed, but did offer an external standard by which to measure human behaviour
- In positivist law, law is self-referential; law becomes an end in itself . Tries to separate law from morality. Law as science.

Legitimizing Colonization

- By the end of the 19th century, any notion of Indigenous peoples as peoples with rights had been abandoned:
  - "The major premises of the late-nineteenth- and early-twentieth-century positivist school ensured that the law of nations, or international law, would become a legitimizing force for colonization and empire rather than a liberating one for Indigenous peoples." (Anaya, 2004, p.26)
- The law established the sovereign that established the law.

Positivist Law



- Exemplified by John Westlake
- *Chapters on the Principles of Int'l Law* (1894)
- Differentiated between "civilized" and "uncivilized" societies

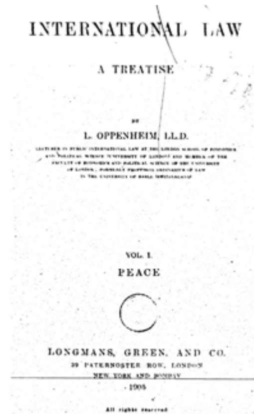
John Westlake

- Much revisionist history:
  - All Indigenous societies described as hunter-gatherers, which was in turn used as justification for why they did not understand or deserve "true" sovereignty.
  - Earlier discussions of rights must not have been about rights of Dominion:
    - "When again men like de Vitoria … maintained the cause of the American and African natives against the kings and peoples of Spain and Portugal, they were not so much impugning the title of their country as trying to influence its conduct."

John Westlake

- And if Indigenous peoples never functioned as and never were considered "real" nations, then Indigenous people must not have any rights other than those given to them by the nation states in which they exist:
  - …[I]t does not mean that all rights are denied to such natives, but that the appreciation of their rights is left to the conscience of the states within whose recognized territorial sovereignty they are comprised, the rules of the international society existing only for the purposes of regulating the mutual conduct of its members.

Lassa Oppenheim


INTERNATIONAL LAW

A TREATISE

BY

L. OPPENHEIM, LL.D.

VOL. I.

PEACE

LONGMANS, GREEN, AND CO.

39 PATERNOSTER ROW, LONDON

NEW YORK AND BOMBAY

1905

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- The “Law of Nations” now officially recognized as nothing more and less than a set of principles agreed to among civilized nations, and which they held exclusive jurisdiction to determine

Lassa Oppenheim

- Constitutive theory of recognition of statehood:
  - “As the basis of the Law of Nations is the common consent of the civilized States, statehood alone does not imply membership of the Family of Nations … Through recognition only and exclusively a State becomes an International Person and a subject of International Law.”
- Four main premises of positivist international law

Positivist Premises of Int’l Law

1. **International law concerns *only* the rights and duties of states**:
   - a de Vattel influence here
   - differentiates between the “international” sphere and the “domestic” one.

Positivist Premises of Int’l Law

2. **International law upholds the *exclusive* sovereignty of states**:
   - states are assumed to be equal and independent
   - the exercise of that sovereignty means freedom from external interference, i.e., the domestic issues that sovereign states face are nobody’s business but their own
   - another de Vattel premise

Positivist Premises of Int’l Law

3. International law is *between*, and not *above*, states:

- “consent” is the key
- “international law” comprises rules that the civilized nations agree upon amongst each other
- there is no external standard by which these rules might be measured

Positivist Premises of Int’l Law

4. States are a *limited* group, which *excludes* Indigenous peoples:

- membership in the club is determined by members of the club
- the only votes belong to European and European-derived nations and other equally “advanced” societies

The League of Nations

- League of Nations founded after WWI
- Formalizing an int’l system to encourage talk & arbitration would save the world
- List of members was small

Deskaheh

- In 1923, Chief Deskaheh of the Haudenausaunee went to the League of Nations meetings in Geneva

Covenant of the League of Nations

ARTICLE 17.

- In the event of a dispute between a Member of the League and a State which is not a Member of the League, or between States not Members of the League, the State or States not Members of the League shall be invited to accept the obligations of membership in the League for the purposes of such dispute, upon such conditions as the Council may deem just.

Covenant of the League of Nations

ARTICLE 1.

- Any fully self-governing State, Dominion or Colony not named in the Annex may become a Member of the League if its admission is agreed to by two-thirds of the Assembly, provided that it shall give effective guarantees of its sincere intention to observe its international obligations, and shall accept such regulations as may be prescribed by the League in regard to its military, naval and air forces and armaments.

Cayuga (Great Britain) v. U.S. (1926)

- Cayuga decision declares that Indian "tribe is not a legal unit of international law“
  - So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law within whose territory the tribe occupies the land, and so far only as that law recognizes it. Before the Revolution all the lands of the Six Nations in New York had been put under the Crown as “appendant to the Colony of New York,” and that colony had dealt with those tribes exclusively as under its protection . . . . New York, not the United States, succeeded to the British Crown in this respect at the Revolution. Hence the “Cayuga Nation,” with which the state of New York contracted in 1789, 1790 and 1795, so far as it was a legal unit, was a legal unit of New York law.

Island of Palmas (Miangas)

Trusteeship Doctrine

- With Indigenous peoples now entrenched in both domestic and international law as “domestic dependent nations,” the settler mission became one of weaning native peoples from their “backward” ways and “civilising” them, whether they wanted it or not
- Run in collusion with missionaries. The approach taken in Canada, the United States, Brazil, Argentina, Venezuela, and others

Covenant of the League of Nations

- **ARTICLE 22.**
- To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.
- The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

“American Progress” (1872)

- With God, Science and Law on their side, forcefully “civilizing” the natives was transformed from an act of cultural genocide and territorial theft to an act of kindness.

WWII: A Turning Point

- WWII was a turning point in many respects
  - The League of Nations was ineffective and abandoned, and replaced by the United Nations
  - After fighting an enemy driven by its alleged racial superiority, the victors were compelled to examine their own back yards
  - In international law, the positivist law era gave way to the contemporary rights-based era