Crim429/INDG429

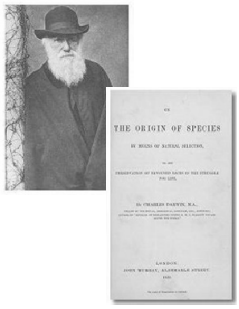
Indigenous Peoples and International Law:

Positivist Law

1800s

- In North America, transition in 9th century 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



- 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

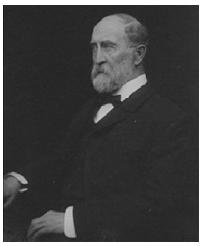
- International law moves from a period of "natural law" to "positivist law"
- Natural law was socially constructed, but did offer an external standard by which to measure human behaviour
- In Positivist law, law is self-referential; law becomes an end in itself . Tries to separate law from morality.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

https://www.youtube.com/watch?v=d6JYlhz0Q-k

Making it Legal

- 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

- After asking quasi-rhetorically whether American or African tribes had the sort of government that could take on European nations who might come to their soil, and responding in the negative, Westlake continues,
  - Can the natives furnish such a government, or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilization and the want of it. … The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied. If any fanatical admirer of savage life argued that the whites ought to be kept out, he would only be driven to the same conclusion by another route, for a government on the spot would be necessary to keep them out. Accordingly international law has to treat such natives as uncivilized.

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

L. OPPENHEIM, LL.D.

Vol. I.

PEACE

LONGMANS, GREEN, AND CO.

- The "Law of Nations" now officially recognized as nothing more/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

Premises of Positivist Int'l Law

1. International law concerns *only* the rights and duties of states towards each other:

- a de Vattel influence here
- differentiates between the "international" sphere and the "domestic" one

Premises of Positivist 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

Premises of Positivist 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
- no external standard by which these rules might be measured (nothing "above" states)

Premises of Positivist 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
- law of nations does not apply to "organized wandering tribes"

Implications of Positivist Law

- Many non-European nations left out as "not yet civilized enough," e.g., China, Persia (Iran), Siam (Thailand) and most of Africa
- Indigenous peoples not part of the dialogue
- States use opportunity to solidify rules regarding treatment of "their" Indigenous peoples
- Treating as "domestic" issue shelters them from international scrutiny
- Might be moral obligations, but not legal ones

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

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.

Deskaheh

- In 1923, Chief Deskaheh of the Haudenausaunee went to the League of Nations meetings in Geneva
- Looking for dispute resolution under Article 17

Covenants 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. If such invitation is accepted, the provisions of Articles 12 to 16 inclusive shall be applied with such modifications as may be deemed necessary by the Council.

Covenants of the League of Nations

ARTICLE 17 cont'd

- Upon such invitation being given the Council shall immediately institute an inquiry into the circumstances of the dispute and recommend such action as may seem best and most effectual in the circumstances. …
- If both parties to the dispute when so invited refuse to accept the obligations of membership in the League for the purposes of such dispute, the Council may take such measures and make such recommendations as will prevent hostilities and will result in the settlement of the dispute.

Chief Deskaheh in Geneva

- So what happened?
- Were the Haudenausaunee recognized by the League?
- What were some of the issues that Deskaheh was bringing forward?
- Why did he think the League was the appropriate forum?

Last Speech of Chief Deskaheh

Over in Ottawa, they call that policy "Indian Advancement." Over in Washington, they call it "Assimilation." We who would be the helpless victims say it is tyranny. If this must go on to the bitter end, we would rather that you come with your guns and poison gases and get rid of us that way. Do it openly and above board.

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

- "Such a tribe is not a legal unit of international law. The American Indians have never been so regarded. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied ... They have been said to be "domestic dependent nations. ... The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive. ... So far as an Indian tribe exists as a legal unit, it is by virtue of the domestic law of the sovereign nation within whose territory the tribe occupies the land, and so far only as that law recognizes it."

Island of Palmas (Miangas)

Island of Palmas (Miangas)

- What was the case about?
- The two main parties were the Netherlands and the United States. What were their respective arguments?
- What role did the inhabitants of Miangas have in the case?
- How was it resolved? What were the legal principles that were supported and which were refuted?

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 civilization 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.

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

"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.