

## WAS AUSTRALIA COLONISED BY AN INVASION OF SOVEREIGN TERRITORY?

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*This article presents a reassessment of the British colonisation of Australia from the internal perspective of the international law of the period. After a discussion of the value of using historical doctrine in this way, the article introduces three positions that might be taken on the peoples who were perceived as the least 'civilised' by Western international lawyers. These have not always been distinguished in the literature. The 'preclusive' position, according to which these peoples were incapable of sovereignty, is rejected as inconsistent with state practice. Although it does not prove feasible to eliminate either of the other two possibilities, the 'naturalist-legislative' and 'contractual' positions, they lead to similar results. On this basis it is concluded, not with complete certainty but with a high degree of confidence, that before colonisation the Aboriginal and Torres Strait Islander peoples of Australia were sovereign within their territories in the strict sense of international law. It is also concluded that describing colonisation as an 'invasion' of sovereign territory accords with the doctrinal language of the period. In these respects, historical international law, despite being shaped by and in the interests of Western colonisers, agrees with language used today by Aboriginal and Torres Strait Islander peoples. In the course of this reassessment, the article offers insights of broader application into the role of customary norms and the legal status of pre-colonial non-Western entities.*

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The British took about a hundred years to colonise the whole of Australia. On 26 January 1788, they established a beachhead at Warrane (renamed Sydney Cove) in the country of the Gadigal;<sup>1</sup> year-by-year until the late 19<sup>th</sup> century, they extended their control into each of the other parts of the continent.<sup>2</sup> The question I am going to consider is whether this century-long series of acts was an invasion of sovereign territory in the strict doctrinal sense of the international law of the

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<sup>1</sup> The Gadigal were a group within the Eora: see Tim Flannery, 'The Sandstone City' in Tim Flannery (ed), *The Birth of Sydney* (Text Publishing, 1999) 1, 17–20. On how this distinction may have been relevant to sovereignty, see Gerald C Wheeler, *The Tribe, and Intertribal Relations in Australia* (John Murray, 1910) 62.

<sup>2</sup> Elizabeth Evatt, 'The Acquisition of Territory in Australia and New Zealand' in CH Alexandrowicz (ed), *Grotian Society Papers 1968: Studies in the History of the Law of Nations* (Martinus Nijhoff, 1970) 16, 26–36. The last part of the mainland to be colonised was what is now Western Australia. The British claimed the whole territory in the 1820s but were still exploring and occupying it in the late 19<sup>th</sup> century: at 34–6. The Torres Strait Islands were annexed under the *Queensland Coast Islands Act 1879* (Qld) and 'Letters Patent Dated 30 May 1872' in Queensland, *Queensland Government Gazette*, Vol 13, No 80, 30 May 1872, 1269.

period. I will not form my conclusion with complete certainty; at some points in the argument there will be doubts. But I will conclude with a high degree of confidence that Australia was the sovereign territory of its inhabitants. On that premise, saying that Britain invaded Australia is not only a matter of historical, moral or political opinion.<sup>3</sup> It is, in addition, a legally accurate description from the perspective of international law. It might even be called a neutral description, in that it accords both with the perceptions of colonised peoples and with a system of law that was accepted by the colonisers at the time.

I will begin by justifying why I am asking this question at all. Then I will introduce the main obstacle to answering it: uncertainty about the status of non-Western entities, including the Aboriginal and Torres Strait Islander peoples of Australia, according to the international law of the century from 1788. I will discuss three possible positions. This will form the bulk of the discussion and will offer insights into historical international law that may be of broader application. Finally, I will draw my conclusions about sovereignty and invasion.

## I JUSTIFYING THE QUESTION

I have framed my question in terms of international law, as distinct from domestic law, and I have foreshadowed that I will apply the international law of the century from 1788, as distinct from the international law of today. I will briefly clarify those distinctions.

The colonisation of Australia raises two separate questions of domestic law. The first was answered by the High Court of Australia in 1992, in *Mabo v Queensland (No 2)* ('*Mabo*'): whether property interests in land that 'existed under native law or customs' before colonisation were 'preserved and protected by the domestic law of the Colony'.<sup>4</sup> This is not directly relevant to my enquiry, which hinges on sovereignty rather than property (though it will be relevant indirectly).<sup>5</sup> The second question is who had sovereignty over Australia as a matter of domestic law. In *Mabo*, Justice Brennan observed that 'sovereignty imports supreme internal legal authority'<sup>6</sup> and distinguished it from property.<sup>7</sup> He found that Britain's acquisition of sovereignty 'cannot be challenged in an Australian municipal court';<sup>8</sup> it was an act within the prerogative power of the Crown.<sup>9</sup> Note that, even though the British position on the acquisition of sovereignty was decided by the Crown rather than by a court, it is a position adopted within the framework of British domestic law (and inherited by Australian domestic law). The position in international law is not necessarily the same. International and domestic law are functionally separate systems that sometimes disagree on the

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<sup>3</sup> During the relevant period, the Kingdom of Great Britain (1707–1800) became the United Kingdom of Great Britain and Ireland (from 1801); today it is the United Kingdom of Great Britain and Northern Ireland (from 1927 but reflecting events of 1922). For convenience, if not precision, I will just call it 'Britain'.

<sup>4</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 82, 100 (Deane and Gaudron JJ) ('*Mabo*').

<sup>5</sup> See especially below Part II(A).

<sup>6</sup> *Mabo* (n 4) 36 (Brennan J).

<sup>7</sup> *Ibid* 43–5.

<sup>8</sup> *Ibid* 69.

<sup>9</sup> See *ibid* 31–2. Cf at 121 (Dawson J).

topic of sovereignty.<sup>10</sup> For example, according to Russian domestic law, Russia has sovereignty over Crimea,<sup>11</sup> but in international law Russia is an unlawful occupier of territory that is under Ukraine's sovereignty, on the ground that territory cannot be acquired by the use of force.<sup>12</sup> The British position is relevant to my enquiry but is far from conclusive: Britain could not unilaterally decide the position in international law any more than, say, the Netherlands could have decided that by making a rival claim to Australia.<sup>13</sup>

So the question I have posed, framed from the perspective of international law, is distinct from questions about property and sovereignty that may be familiar from domestic law.

The other clarification I need to make is as follows. Today, international law acknowledges the human rights of individuals and the rights of peoples to self-determination; it also generally prohibits the use of force.<sup>14</sup> If those norms could be projected back into the past, no one would be surprised to find that the colonisation of Australia conflicted with them. There may be good reasons to analyse historical events with reference to norms such as these. For instance, Raphael Lemkin, who coined the word 'genocide' in 1944 to describe 'the destruction of a nation or of an ethnic group',<sup>15</sup> wrote a case study about conduct by the British in Tasmania, even though that conduct predated the emergence of a concept of genocide into international law.<sup>16</sup> Analysis of that sort may show that historical conduct breached a moral standard that is accepted in the present day. But that is not international law in a strict doctrinal sense. International law operates according to an 'inter-temporal' principle. This principle was articulated in *Island of Palmas (Netherlands v United States of America)* ('*Island of Palmas*'), a case to which I will refer on several points: 'a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time

<sup>10</sup> Cf *Certain German Interests in Polish Upper Silesia (Merits) (Germany v Poland)* (Judgment) [1926] PCIJ (ser A) No 7, 19: '[f]rom the standpoint of International Law ... municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures'.

<sup>11</sup> See the summary of Russian domestic legal instruments in Thomas D Grant, 'Annexation of Crimea' (2015) 109(1) *American Journal of International Law* 68, 70–1.

<sup>12</sup> See *Territorial Integrity of Ukraine*, GA Res 68/262, UN Doc A/RES/68/262 (1 April 2014, adopted 27 March 2014).

<sup>13</sup> Abel Tasman made an earlier claim on behalf of the Netherlands when he visited what is now Tasmania: JE Heeres (ed), *Abel Janszoon Tasman's Journal* (Frederik Muller & Co, 1898) entry for 3 December 1642.

<sup>14</sup> These principles of international law all date from the 20<sup>th</sup> century. The prohibition of force was introduced in 1945 in the *Charter of the United Nations* art 2(4). Most of international human rights law postdates the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948). On self-determination, see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* [2019] ICJ Rep 1 [144]–[161].

<sup>15</sup> Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (Carnegie Endowment for International Peace, 1944) 79.

<sup>16</sup> Raphaël Lemkin, 'Tasmania' (2005) 39(2) *Patterns of Prejudice* 170 (this article was written in the 1940s or 1950s but published posthumously). The concept of genocide was firmly established as part of international law in the *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) art 2.

when a dispute in regard to it arises or falls to be settled'.<sup>17</sup> So in answering a question about the colonisation of Australia from an international legal perspective, I will have to apply the international law of that time: from 1788 to the late 19<sup>th</sup> century. This means that I cannot consider self-determination, human rights, the prohibition of the use of force, or genocide.

Why take this particular legal perspective?

There are reasons to hesitate. On one hand, my analysis will not have obvious tangible consequences such as those that might follow from a judicial decision. On the other hand, since I will be applying the international law of the past, which may not reflect a moral standard that is accepted today, my analysis will not have the pure moral force of, say, Lemkin's analysis of Tasmania.<sup>18</sup> This objection about moral force is strong because, viewed from the 21<sup>st</sup> century, the international law of the colonial period may actually appear *immoral*. It can more accurately be called 'Western' international law, because it was shaped by and in the interests of Europeans and their colonial successors.<sup>19</sup> When I detail features of this system, it will be seen that some of them were at best Eurocentric and at worst explicitly racist. It will also be seen that non-Westerners did not always follow or accept these Western ideas. Historically, communities in Africa and Asia had their own conceptions of international law; so did Aboriginal Australians, as will be seen. For these reasons, one might hesitate to take the Western international law of the time seriously as an intellectual framework.

It is still, however, a *living* intellectual framework and as such cannot be discounted lightly. Although it has changed radically — among other things, it has abandoned explicit 19<sup>th</sup> century-style racism and is now broadly accepted worldwide<sup>20</sup> — no sharp dividing line can be drawn between the international law of the past and that of the present; they form a single continuously existing and evolving system. In cases in recent decades, consistent with the inter-temporal principle, the International Court of Justice ('ICJ') has been willing to answer questions according to colonial international law, for example, in *Right of Passage over Indian Territory (Portugal v India)* ('*Right of Passage*'),<sup>21</sup> *Western Sahara (Advisory Opinion)* ('*Western Sahara*')<sup>22</sup> and *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* ('*Cameroon v Nigeria*').<sup>23</sup> An argument that the colonisation of Australia was an invasion of sovereign territory is similar to an argument before the Court in a case such as these. It is a statement within that same living intellectual framework — a system of law that

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<sup>17</sup> *Island of Palmas (Netherlands v United States of America) (Award)* (1928) 2 RIAA 829, 845 ('*Island of Palmas*'). The second limb of the principle, which clarifies that the law may evolve so as to take away rights with prospective effect, will not be relevant.

<sup>18</sup> Lemkin, 'Tasmania' (n 16).

<sup>19</sup> See, eg, Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press, 2014); Jennifer Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press, 2018).

<sup>20</sup> See below Part II. See also Martti Koskenniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27(2) *European Journal of International Law* 415.

<sup>21</sup> *Right of Passage over Indian Territory (Portugal v India) (Merits)* [1960] ICJ Rep 6 ('*Right of Passage*').

<sup>22</sup> *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12 ('*Western Sahara*').

<sup>23</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea Intervening) (Judgment)* [2002] ICJ Rep 303 ('*Cameroon v Nigeria*').

is used today to resolve disputes about sovereignty, territory and other matters and as a shared normative language. As a statement made in that language it has at least the potential to influence discussions about the colonisation of Australia, even if only in a limited way, and even though there are doubts about the moral legitimacy of the system in this context.<sup>24</sup>

An illustration of the influence that this analysis might potentially have, even if that influence is limited, can be taken from the Uluru Statement from the Heart.<sup>25</sup> In 2015, the Australian Prime Minister and opposition leader appointed a Referendum Council to advise them on a ‘referendum to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution*’.<sup>26</sup> In 2017, the Referendum Council held a National Constitutional Convention, at which the delegates — all of whom were Aboriginal and Torres Strait Islander representatives — adopted the Uluru Statement from the Heart.<sup>27</sup> In part the statement says:

Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. ... This sovereignty is *a spiritual notion* ... *This link is the basis of the ownership of the soil, or better, of sovereignty*. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown. ... With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.<sup>28</sup>

The Referendum Council endorsed the statement and made further remarks to similar effect in its final report.<sup>29</sup> It also observed that what the British considered to be the ‘settlement’ of Australia was ‘[f]rom the perspective of the First Nations ... an invasion’ in that their ‘land and sovereignty was annexed without consent and without treating with the country’s rightful owners’.<sup>30</sup>

These are not — or at least are not solely — statements within the intellectual framework of international law. Among other things, they invoke the laws and customs of Aboriginal and Torres Strait Islander peoples themselves and a conception of sovereignty that may be distinct from how the word has traditionally been used in Western thought. Whatever I conclude about international law, these statements will lose none of their moral force. But they also use terms that have a meaning to international lawyers: not only ‘sovereignty’ but also ‘invasion’, ‘annexed’, ‘consent’, and ‘treating’ (treaty-making). The italicised words in the Uluru Statement from the Heart, beginning with the description of sovereignty as ‘*a spiritual notion*’, are in fact quoted from the separate opinion of the Vice-

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<sup>24</sup> On some potential limits of this sort of approach to historical international law, see Matthew Craven, ‘Introduction: International Law and Its Histories’ in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2007) 1, 15–23. See also Mark D Walters, ‘Histories of Colonialism, Legality, and Aboriginality’ (2007) 57(4) *University of Toronto Law Journal* 819.

<sup>25</sup> ‘Uluru Statement from the Heart’ (Statement, First Nations National Constitution Convention, 26 May 2017).

<sup>26</sup> Commonwealth of Australia, *Final Report of the Referendum Council* (Report, 30 June 2017) 46.

<sup>27</sup> See *ibid* i–ii, 10–12.

<sup>28</sup> ‘Uluru Statement from the Heart’ (n 25) (emphasis in original).

<sup>29</sup> See, eg, *Final Report of the Referendum Council* (n 26) 1, 20.

<sup>30</sup> *Ibid* 1.

President of the ICJ in *Western Sahara*.<sup>31</sup> Language that has a meaning in international law might gain an extra dimension of force insofar as international law agrees with it. In asserting that ‘Aboriginal and Torres Strait Islander tribes were the first sovereign Nations’ of Australia and that colonisation was ‘an invasion’, one will not always need to give the qualification that this is from ‘the perspective of the First Nations’.<sup>32</sup> That assertion will, insofar as I find support for it, also be true as a matter of law. And this will be despite the fact that international law was shaped by Westerners, despite the fact that it tended to operate to legitimise colonialism, and despite the fact that some of its principles were Eurocentric or racist.

I emphasise that all that I am claiming here is that this analysis might potentially influence discussions about colonisation and potentially only in a limited way. I make no claim about how much weight ought to be given to it. It is only a legal analysis — law, not history as such — and it confines itself within the boundaries of a single legal system, a parochial Western system whose flaws I have pointed out. It cannot be more objectively ‘true’ than other legal, historical, moral or political accounts of colonisation. In particular, I do not suggest that this Western perspective has any priority over the perspectives of colonised peoples themselves.<sup>33</sup>

## II POSSIBLE POSITIONS ON SOVEREIGNTY

The question is whether the British colonisation of Australia was an invasion of sovereign territory. If I were hoping to answer this comprehensively, an obstacle I would encounter is that it would call for a granular level of detail. I would have to ascertain at what date the British entered each specific area; what the law said at that specific date; and whether a specific people had sovereignty over that area under that law. But the point at which this obstacle would be encountered will never be reached, because it will be a struggle to answer the question even at a high level of generality. Still, it will be seen that the law and the facts were consistent enough throughout the period and across the continent that I will be able to form a conclusion at that general level.

The main obstacle to answering the question at any level is uncertainty about the status of non-Western entities in international law during the century from 1788.

Today, the peoples and territories of the world have more or less been homogenised into ‘states’ in the technical sense in which that word is used by international lawyers. Before the 20<sup>th</sup> century, the situation was more complex. Outside Europe, there existed decentralised chiefdoms, nomadic groups, empires

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<sup>31</sup> *Western Sahara* (n 22) 85–6 (Vice-President Ammoun). He was summarising with apparent approval comments made during the oral proceedings, which can be found in ‘Exposé Oral de M Bayona-Ba-Meya [Oral Presentation of Mr Bayona-Ba-Meya]’, *Western Sahara (Advisory Opinion)* [1975] IV ICJ Pleadings 439 (Nicolas Bayona-Ba-Meya). The same passage from Ammoun’s opinion was quoted in *Mabo* (n 4) 41 (Brennan J), 181–2 (Toohey J).

<sup>32</sup> *Final Report of the Referendum Council* (n 26) 1.

<sup>33</sup> On the colonisation of Australia from the perspective of Aboriginal law, see Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015). See also Aileen Moreton-Robinson, *The White Possessive: Property, Power, and Indigenous Sovereignty* (University of Minnesota Press, 2015).

with vassalage and tribute networks and various other independent entities. Western scholars, especially in the 19<sup>th</sup> century, responded to this diversity by categorising entities based on their perceived degree of ‘civilisation’.<sup>34</sup> It was argued that international law applied to the fullest extent only among European states and their offshoots, such as the United States and the Latin American republics (what I will call ‘Western states’).<sup>35</sup> International law was often said to apply to non-Western entities in proportion to their ‘civilisation’.<sup>36</sup> But the notion of ‘civilisation’, without being translated into precise legal terms, was too vague to serve as a consistent test to identify specifically which parts of the law applied to which entities; there were different theories about precisely what it meant.

The result was a mess of theory and practice. The status of non-Western entities was never authoritatively resolved. The question became redundant, because almost all of them were colonised and the remaining few, beginning with the Ottoman Empire and Japan, eventually came into line with the Western model of statehood.<sup>37</sup> I have analysed this mess more broadly elsewhere.<sup>38</sup> In this context the analysis will be limited in scope by two factors.

First, I will not need to consider the applicability to non-Western entities of the whole of international law. I will only need to consider the applicability of norms about sovereignty.

Although sovereignty is now associated with statehood in a technical legal sense, the word ‘state’ was used less consistently before the 20<sup>th</sup> century; the fact that an entity was or was not described as a state is not conclusive of whether it had sovereignty.<sup>39</sup> Exactly what sovereignty meant during this period is difficult to pin down. Many rights, from the right to be accorded immunity to rights to exploit marine resources, have been described as aspects of sovereignty.<sup>40</sup> But there is one right that is unquestionably an aspect of sovereignty, even if it is not the only aspect: an entity’s right to exercise exclusive jurisdiction over its territory.

<sup>34</sup> See generally Liliana Obregón, ‘The Civilized and the Uncivilized’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 917; Stephen C Neff, *Justice among Nations: A History of International Law* (Harvard University Press, 2014) 311 (‘Justice among Nations’).

<sup>35</sup> A few states established outside Europe and the Americas but on the Western model, such as Liberia (founded by freed African American slaves) and the Boer republics, were also included in this category: John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894) 81–2. Maps of the supposedly ‘civilised’ world as defined by scholars between 1882 and 1949 can be found in Becker Lorca (n 19) 356, 362.

<sup>36</sup> See, eg, James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities* (William Blackwood & Sons, 1883–84) vol 1, 101–2.

<sup>37</sup> See Gerrit W Gong, *The Standard of ‘Civilization’ in International Society* (Clarendon Press, 1984) 106–19, 164–187.

<sup>38</sup> Rowan Nicholson, *Statehood and the State-Like in International Law* (Oxford University Press, 2019) 51–91.

<sup>39</sup> JA Andrews, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’ (1978) 94(3) *Law Quarterly Review* 408, 410–13; Mamadou Hébié, ‘The Role of the Agreements Concluded with Local Political Entities in the Course of French Colonial Expansion in West Africa’ (2015) 85(1) *British Yearbook of International Law* 21, 50–1; Nicholson (n 38) 86–8. Several instances in which the term ‘state’ was used in a loose sense will appear in the course of the present article. See, eg, the British statement about the Māori from 1839 quoted in below Part II(C).

<sup>40</sup> Samantha Besson, ‘Sovereignty’ in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011) [118]–[122]. See, eg, the ‘sovereign’ rights in *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) art 56(1)(a).

This appears in most definitions of the term.<sup>41</sup> According to *Island of Palmas*, '[s]overeignty in the relations between States signifies independence' and '[i]ndependence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State'.<sup>42</sup> This aspect of sovereignty was already an entrenched feature of international law at the beginning of the period under discussion. Confirmation of this can be found in the treatise of the Swiss jurist Emer de Vattel,<sup>43</sup> which appeared 30 years before the colonisation of Australia began and became a seminal text (including in Britain, where the 'illustrious name' of Vattel was known and cited in the courts).<sup>44</sup> Vattel wrote that 'sovereignty ... establishes the jurisdiction of the nation in her territories'<sup>45</sup> and that '[o]ther nations ought to respect this right'.<sup>46</sup> When I discuss whether an entity had 'sovereignty', this is the essence of what I will mean.

The second factor limiting the scope of my analysis of non-Western entities is that I will have little to say about entities such as China, the Mughal Empire, the Ottoman Empire and Thailand, which were placed in an intermediate category on the scale of 'civilisation'.<sup>47</sup> I will focus on the supposedly lowest category. James Lorimer, a Scot, called this category 'savage humanity';<sup>48</sup> John Westlake, an Englishman, used the term 'uncivilised tribes'.<sup>49</sup> It was typically said to include peoples of North and South America before their colonisation, many islanders of the Pacific and Southeast Asia and most Africans (excluding certain exceptions that were placed further up the scale, such as the peoples of Morocco and Ethiopia).<sup>50</sup> The peoples of Australia were placed in this category too and, along with those of Tierra del Fuego, were sometimes considered to be the lowest of all on the scale of 'civilisation', including by British officials.<sup>51</sup> I do not take for granted that this categorisation corresponded with a legal distinction; part of my task is to work out whether it did. I certainly do not endorse the racist assumptions

<sup>41</sup> A more recent example than those that I am about to cite is American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 206 cmt b.

<sup>42</sup> *Island of Palmas* (n 17) 838.

<sup>43</sup> Emer de Vattel, *The Law of Nations, Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury*, ed Béla Kapossy and Richard Whatmore (Liberty Fund, 2008). This was first published in 1758.

<sup>44</sup> *Campbell v Hall* (1774) Lofft 655, 98 ER 848, 864. See also Alex C Castles, *An Australian Legal History* (Law Book, 1982) 16–17; Emmanuelle Jouannet, 'Emer de Vattel (1714–1767)' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 1118–21.

<sup>45</sup> Vattel (n 43) 303.

<sup>46</sup> *Ibid* 304.

<sup>47</sup> See, eg, L Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905–06) vol 1, 33–4 ('*Oppenheim's International Law Vol 1*').

<sup>48</sup> Lorimer (n 36) 101.

<sup>49</sup> Westlake (n 35) 143.

<sup>50</sup> Nicholson (n 38) 76–7, 89. See also Oppenheim, *Oppenheim's International Law Vol 1* (n 47) 33, 157.

<sup>51</sup> Ian Brownlie, 'The Expansion of International Society: The Consequences for the Law of Nations' in Hedley Bull and Adam Watson (eds), *The Expansion of International Society* (Clarendon Press, 1984) 357, 362. In the view of British officials, in Australia there were 'Aboriginal tribes, forming probably the least-instructed portion of the human race in all the arts of social life': Select Committee, *Report of the Parliamentary Select Committee on Aboriginal Tribes (British Settlements)* (House of Commons Papers No 425, Session 1837) 82 ('*Select Committee on Aboriginal Tribes*').

and biases that underlie it. My only reason for referring to it is that international lawyers referred to it at the time and I am seeking to understand what the law of the time was.

I am going to evaluate three positions that might be taken on the status of the peoples in this supposedly lowest category. I will reject the first, the ‘preclusive’ position. But I will find that neither of the other possibilities, the ‘naturalist-legislative’ and ‘contractual’ positions, can be conclusively ruled out. I will apply each position to the pre-colonial peoples of Australia and will form a view about whether they had sovereignty. This question has been considered before, notably by Henry Reynolds, the historian who has done much to reframe the legal context of the colonisation of Australia.<sup>52</sup> Reynolds, however, does not take into account the contractual position and does not wade as deeply into the swamp of doctrine as I am going to.

Note that I have restricted the discussion to the ‘pre-colonial’ peoples of Australia. This is because the question of whether a particular people had sovereignty ceases to be pertinent from such time as Britain became sovereign over that people’s country and, in that sense, colonised it. I will comment later on how and when this event could have occurred from the perspective of international law<sup>53</sup> (there are, of course, also other perspectives on this that fall outside the scope of the article, including the perspectives of the peoples themselves). Note, too, my reasons for not using two terms for Aboriginal and Torres Strait Islander peoples that are heard today. ‘Indigenous’ might be inapt in this historical context: in international law, it often describes an identity that emerges *after* colonisation.<sup>54</sup> ‘First Nations’ might be very much apt, but in this context it could be read as accepting in advance a claim that is being investigated: that the peoples of Australia were sovereign nations in an international legal sense.<sup>55</sup>

#### A *The Preclusive Position*

Of the positions that might be taken on the status of the supposedly least ‘civilised’ peoples — Africans, Australians and others — the most extreme possibility is that they were necessarily precluded from having sovereignty by their supposed lack of ‘civilisation’. A description of the consequences that would follow from this can be borrowed from remarks by the German jurist Lassa Oppenheim in 1905 (though he made these remarks in a slightly broader context and used the word ‘state’ an example of the word being used more loosely than it

<sup>52</sup> Henry Reynolds, *Aboriginal Sovereignty: Reflections on Race, State and Nation* (Allen & Unwin, 1996) ch 3 (‘*Aboriginal Sovereignty*’). See also Henry Reynolds, *The Law of the Land* (Penguin, 3<sup>rd</sup> ed, 2003); Henry Reynolds, ‘Reviving Indigenous Sovereignty?’ (2006) 6 *Macquarie Law Journal* 2.

<sup>53</sup> See below Part IV.

<sup>54</sup> See, eg, International Labour Organization, *Convention (No 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 1650 UNTS 383 (entered into force 5 September 1991) art 1(b):

peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country ... at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

<sup>55</sup> On the meaning of the term ‘nation’ see Nicholson (n 38) 1–3.

is used today). He wrote that international law ‘naturally does not contain any rules concerning the intercourse with and treatment of such States as are outside’ the ‘Family of Nations’.<sup>56</sup> It was obvious that

this intercourse and treatment ought to be regulated by the principles of Christian morality ... But actually a practice frequently prevails which is not only contrary to Christian morality, but arbitrary and barbarous. Be that as it may, it is discretion, and not International Law, according to which the members of the Family of Nations deal with such States as still remain outside that family.<sup>57</sup>

This is what I will call the preclusive position. I will consider three variants of it.

The first relies on an expanded concept of *terra nullius* (no one’s land).<sup>58</sup>

The significance of a territory being *terra nullius* in international law was that no entity yet had sovereignty over it and that a Western state could acquire sovereignty merely by means of occupying it. The acquisition of other territories, in contrast, required something going beyond mere occupation, such as a treaty of cession, conquest in war, or ‘prescription’.<sup>59</sup> Uninhabited territory was certainly *terra nullius*.<sup>60</sup> But some scholars argued, in effect if not always in this language, that the territories of the supposedly least ‘civilised’ peoples were also *terrae nullius*. Vattel thought that ‘[e]very nation is ... obliged by the law of nature to cultivate the land that has fallen to its share’<sup>61</sup> and that nations that fail in this — nations that, in order ‘to avoid labour’, choose ‘to live only by hunting, and their flocks’<sup>62</sup> — cannot complain if

other nations, more industrious, and too closely confined, come to take possession of a part of [their] lands. Thus, though the conquest of the civilised empires of [Inca] Peru and [Aztec] Mexico was a notorious usurpation, the establishment of many colonies on the continent of North America might, on their confining themselves within just bounds, be extremely lawful. The people of those extensive tracts rather ranged through than inhabited them.<sup>63</sup>

At the other end of the relevant period, in 1895, the English jurist William Edward Hall, among others, argued that a state could acquire ‘title by occupation’ by intentionally taking possession of ‘territory unappropriated by a civilised or

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<sup>56</sup> *Oppenheim’s International Law Vol 1* (n 47) 34.

<sup>57</sup> *Ibid.*

<sup>58</sup> In earlier times, the term used in international law was often *territorium nullius* (no one’s territory): Andrew Fitzmaurice, ‘Discovery, Conquest, and Occupation of Territory’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 840, 856–60. But *terra nullius* is now heard more often and has been used by the International Court of Justice (‘ICJ’) and its predecessor, the Permanent Court of International Justice: see, eg, *Western Sahara* (n 22); *Legal Status of Eastern Greenland (Denmark v Norway) (Judgment)* [1933] PCIJ (ser A/B) No 53, 22.

<sup>59</sup> MF Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (Longmans, Green and Co, 1926) 1–2. Further on conquest and prescription see below Part IV. On later developments in this area of law, see RY Jennings, *The Acquisition of Territory in International Law* (Manchester University Press, 1963).

<sup>60</sup> Lindley (n 59) 4–9.

<sup>61</sup> Vattel (n 43) 129.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.* 130. On uninhabited territory, see at 214.

semi-civilised state'.<sup>64</sup> Westlake asserted in 1894 that the degree of 'civilisation' required for a territory to escape this fate was 'a government under the protection of which' Europeans 'may carry on the complex life to which they have been accustomed ... which may prevent that life from being disturbed by contests between different European powers ... and which may protect the natives'.<sup>65</sup> He affirmed that 'natives in the rudimentary condition' had 'no rights under international law'.<sup>66</sup>

There was, however, always evidence against these expanded interpretations of the terra nullius test. The usual means by which Western states purported to acquire territory from these peoples was not occupation. Sometimes it was conquest; often it was an agreement in the form of a treaty of cession. In Africa and the Pacific Islands, colonisers frequently made such agreements with the peoples they encountered.<sup>67</sup> Only a few territories of significant size may possibly have been colonised on the ostensible basis of terra nullius, including Australia, Te Waipounamu (renamed the South Island of New Zealand) and the regions that are now California and British Columbia.<sup>68</sup> MF Lindley, writing in 1926 but having regard to earlier practice such as this, concluded that for a territory to escape being terra nullius it was

necessary and sufficient that it be inhabited by a political society, that is, by a considerable number of persons who are permanently united by habitual obedience to a certain and common superior, or whose conduct in regard to their mutual relations habitually conforms to recognized standards.<sup>69</sup>

This is a much more limited concept of terra nullius than Vattel's or Westlake's. Unlike other questions of historical international law that I will encounter, the disagreement between expanded and limited interpretations of the terra nullius test has now been resolved by an authority. It was dealt with in *Western Sahara* in 1975. Asked whether a part of North Africa was terra nullius before colonisation by Spain, the ICJ said:

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers. ... In the present instance ... at the time of colonization Western Sahara was inhabited

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<sup>64</sup> William Edward Hall, *A Treatise on International Law* (Clarendon Press, 4<sup>th</sup> ed, 1895) 106–7. Cf *Oppenheim's International Law Vol I* (n 47) 276.

<sup>65</sup> Westlake (n 35) 141.

<sup>66</sup> *Ibid* 144.

<sup>67</sup> A list of British treaty partners from 1750 to 1850 can be found in Brownlie (n 51) with the comment that it is representative of 'the more important powers': at 360. The list was compiled from Clive Parry and Charity Hopkins (eds), *An Index of British Treaties 1101–1968* (Her Majesty's Stationery Office, 1970). On treaties between European states and African peoples, see CH Alexandrowicz, 'The Afro-Asian World and the Law of Nations (Historical Aspects)' (1968) 123 *Recueil des Cours* 117, 172–82 ('Afro-Asian World'); Hébié (n 39).

<sup>68</sup> See Lindley (n 59) 42 (New Zealand); Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Harvard University Press, 2007) ch 5 (California), ch 6 (British Columbia).

<sup>69</sup> Lindley (n 59) 22–3.

by peoples which, if nomadic, were socially and politically organized in tribes and under chiefs competent to represent them.<sup>70</sup>

In short: a people had to be socially and politically organised. This is close to Lindley's notion of a 'political society';<sup>71</sup> it is far from the expanded interpretations of the terra nullius test. The preclusive position can be rejected insofar as it relies on those interpretations.

This does not eliminate the possibility that territories of the supposedly least 'civilised' peoples were terra nullius; it just changes the threshold. The second variant of the preclusive position is to say that, even on the limited *Western Sahara* interpretation, the terra nullius test still caught a narrower category of peoples that included the peoples of Australia.

On this point, too, there is a judicial decision: *Mabo*, in which the High Court of Australia decided that the continent was not terra nullius.<sup>72</sup> Although *Mabo* was decided by a domestic court, and although the Court applied the terra nullius test in order to answer a question about property, not sovereignty, it still provides evidence of the position in international law. First, the test was in substance the terra nullius test from international law, which had been adapted by British domestic law into the basis for a distinction between modes of colonisation that had consequences for property.<sup>73</sup> Secondly, the High Court relied on the *Western Sahara* interpretation of the test: social and political organisation.<sup>74</sup> Justice Brennan, after quoting *Western Sahara*, held that if

the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law' can hardly be retained.<sup>75</sup>

The words 'no longer commands general support' might seem to imply that this was a new development that, in accordance with the inter-temporal principle, cannot be projected back into the past. Here one must distinguish between the legal and factual elements in *Mabo*.

The international legal test applied in *Mabo* was not actually new. It was the ICJ's articulation of what the terra nullius test, correctly interpreted, had been in the past.

What conceivably may have been new was the High Court's knowledge of historical facts. The British colonisers believed that Aboriginal Australians were not socially and politically organised (or at least expressed that belief, whether or not it was always genuinely held). In 1837, a select committee of the House of Commons noted that they were 'so entirely destitute ... even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil,

<sup>70</sup> *Western Sahara* (n 22) 39 [80]–[81]. Cf at 43 [92].

<sup>71</sup> Lindley (n 59) 22–3.

<sup>72</sup> *Mabo* (n 4) 109 (Deane and Gaudron JJ). The principles in the case were 'applicable throughout Australia': at 179 (Toohey J).

<sup>73</sup> *Ibid* 36 (Brennan J) (citations omitted).

<sup>74</sup> *Ibid* 40–1 (Brennan J), citing *Western Sahara* (n 22) 39, 85–6. See also *Mabo* (n 4) 181–2 (Toohey J), citing *Western Sahara* (n 22) 39, 85–6.

<sup>75</sup> *Mabo* (n 4) 41, quoting *Re Southern Rhodesia* [1919] AC 211, 233–4.

have been utterly disregarded'.<sup>76</sup> Twentieth-century social scientists discredited this and showed that they had elaborate forms of organisation.<sup>77</sup> So conceivably the British colonisers had less knowledge of the facts than the High Court had by the time of *Mabo*. One retort to this is that the knowledge was not 'new' in the sense that it was possessed all along by Aboriginal and Torres Strait Islander peoples themselves.<sup>78</sup> But whether historical facts were known at the time is not decisive anyway. The inter-temporal principle is about the relevant *law*: the principle says that, when international law must be applied to facts, the relevant law is 'the law contemporary with' those facts.<sup>79</sup> The principle does not restrict which *facts* are relevant. On the contrary, in *Island of Palmas* (the case in which the principle was articulated), the arbitrator, Max Huber, emphasised that he could take account of any facts that were available. He was

entirely free to appreciate the value of assertions made during proceedings at law by a government in regard to its own acts. Such assertions are not properly speaking legal instruments, as would be declarations creating rights; they are statements concerning historical facts. The value and the weight of any assertion can only be estimated in the light of all the evidence and all the assertions made on either side, and of facts which are notorious for the tribunal.<sup>80</sup>

This is generally true when international law is applied to historical facts. It must be applied based on all historical facts that are presently available, not on the facts that were known at the time.<sup>81</sup> In this case, the law must be applied based on what is known today about the social and political organisation of the peoples of Australia. That knowledge is reflected in *Mabo*. It is therefore proper in international law to conclude that they escaped the *terra nullius* test.

<sup>76</sup> *Select Committee on Aboriginal Tribes* (n 51) 82. Cf *Cooper v Stuart* (1889) 14 AC 286, 291: what would become the colony of New South Wales 'consisted of a tract of territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions'.

<sup>77</sup> For examples from the decades leading up to *Mabo*, see Nii Lante Wallace-Bruce, 'Two Hundred Years On: A Reexamination of the Acquisition of Australia' (1989) 19(1) *Georgia Journal of International and Comparative Law* 87, 96–100. See also *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267: '[i]f ever a system could be called "a government of laws, and not of men"', it was the Aboriginal system evidenced in the case — 'a subtle and elaborate system highly adapted to the country in which the people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence'. See also Reynolds, *Aboriginal Sovereignty* (n 52) ch 2.

<sup>78</sup> Another retort is that evidence that Aboriginal Australians were socially and politically organised was already available to the British long before *Mabo*. For examples from 1889 and 1910, see below Part II(C).

<sup>79</sup> *Island of Palmas* (n 17) 845.

<sup>80</sup> *Ibid* 841. As Huber hinted (the remarks just quoted applied '[f]ailing express provision') procedural rules about jurisdiction and admissibility may restrict which facts a specific tribunal can consider. But that is not pertinent where, as here, the law is considered as a matter of principle rather than by a tribunal.

<sup>81</sup> Note that there is a difference between the existence of historical facts and the ascription of *responsibility* for unlawful historical conduct. Responsibility may or may not depend on whether facts were known at the time. For example, 'mistake of fact' may preclude individual criminal responsibility: *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) art 32(1). In contrast, mistake of fact only rarely precludes state responsibility: James Crawford, *Second Report on State Responsibility*, 51<sup>st</sup> sess, Agenda Item 3, UN Doc A/CN.4/498/Add.2 (30 April 1999) 19 [260]. But in any case, I will not discuss responsibility, except briefly in Part IV below; the point I have made is merely that the existence of facts, as such, does not depend on whether those facts were known at the time.

The second variant of the preclusive position — that the test caught a narrower category of supposedly least ‘civilised’ peoples that included those of Australia — can be rejected.

A third variant of the preclusive position remains logically possible. This is that merely exceeding the terra nullius threshold was not enough: the supposedly least ‘civilised’ peoples were still necessarily precluded from having sovereignty by their supposed low degree of ‘civilisation’. This possibility remains because of the uncertain implications of the terra nullius rule. Calling a territory nullius (no one’s) implies that it lacks a sovereign. As a matter of language, one is tempted to assume the converse: that denying that a territory is nullius implies that it must be someone’s, that it must have an existing sovereign. I will identify some support for this view in Part II(B). But at this stage, in light of the function of the terra nullius test, I cannot assume that it follows automatically. Recall that the function of the test was to decide whether a Western state could acquire sovereignty by occupation.<sup>82</sup> So, perhaps denying that a territory is terra nullius does not say anything about whether or not there is an existing sovereign; perhaps all that it implies is that a Western coloniser must satisfy some other procedure.

*Island of Palmas* becomes pertinent again here. It suggests a procedure that Western states might have satisfied in order to acquire sovereignty over a territory that was not terra nullius and yet, at the same time, had no existing sovereign.<sup>83</sup> The case was decided in 1928 but concerned ostensible treaties made by or on behalf of the Netherlands with monarchs on the island of Sangir (now in Indonesia) between 1677 and 1899.<sup>84</sup> Huber, as arbitrator, held that although these could help to establish that the Netherlands had acquired sovereignty, that was not because they transferred it from the former sovereigns; they were not ‘agreement[s] between equals’.<sup>85</sup> Instead they were relevant ‘facts’ of which international law ‘must in certain circumstances take account’.<sup>86</sup> Huber explained that they were

a form of internal organisation of a colonial territory, on the basis of autonomy for the natives. In order to regularise the situation as regards other States, this [entails establishing] powers to ensure the fulfilment of the obligations imposed by international law on every State in regard to its own territory. And thus suzerainty over the native State becomes the basis of [the coloniser’s] territorial sovereignty as towards other members of the community of nations.<sup>87</sup>

Huber asserted that the region was ‘inhabited by savages or semi-civilised peoples’<sup>88</sup> and described the islanders as ‘peoples not recognized as members of the community of nations’.<sup>89</sup> This suggests that they themselves necessarily lacked sovereignty, even if their presence in the territory affected the means by which the Netherlands could acquire it.

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<sup>82</sup> Lindley (n 59) 46.

<sup>83</sup> *Island of Palmas* (n 17) 858.

<sup>84</sup> *Ibid* 856.

<sup>85</sup> *Ibid* 858.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid* 858.

<sup>88</sup> *Ibid* 845.

<sup>89</sup> *Ibid* 858 (emphasis omitted).

Although I have made use of *Island of Palmas* on other points, in this context it cannot be relied upon as decisive. There are reasons both for and against relying on it.

In favour of it is its apparent partial endorsement by the ICJ. In *Western Sahara* the Court appeared to leave Huber's approach open, neither embracing nor rejecting it. All that the Court said was that 'agreements with local rulers, whether or not considered as an actual "cession" of the territory' — a transfer between sovereigns — 'were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*'.<sup>90</sup> But in 2002, in *Cameroon v Nigeria*, the Court directly quoted Huber.<sup>91</sup> At issue in that case were the consequences of the ostensible 'Treaty of Protection' of 1884 between Britain and a West African entity: the Kings and Chiefs of Old Calabar.<sup>92</sup> The Court found that

many factors point to the 1884 Treaty ... as not establishing an international protectorate. It was one of a multitude in a region where the local Rulers were not regarded as States. Indeed, apart from the parallel declarations of various lesser Chiefs agreeing to be bound by the 1884 Treaty, there is not even convincing evidence of a central federal power. There appears in Old Calabar rather to have been individual townships, headed by Chiefs, who regarded themselves as owing a general allegiance to more important Kings and Chiefs. Further, from the outset Britain regarded itself as administering the territories comprised in the 1884 Treaty, and not just protecting them.<sup>93</sup>

In effect, the Court endorsed Huber's belief that at least some agreements of this sort were 'a form of internal organisation of a colonial territory' rather than binding treaties.<sup>94</sup>

But there are three reasons against relying on the approach taken by Huber in *Island of Palmas* to support the proposition under consideration — the proposition that the supposedly least 'civilised' peoples, despite exceeding the *terra nullius* threshold, were necessarily precluded from having sovereignty by their supposed low degree of 'civilisation'.

First, to the extent that *Cameroon v Nigeria* followed Huber's approach, it is not squarely on point. The ICJ was interested in the 1884 agreement because it was relevant to whether Britain had acquired sovereignty by a particular date. The Court did not decide — and did not need to decide — who, if anyone, had been sovereign before Britain.<sup>95</sup> More broadly, a finding that a particular agreement with an entity is not a binding treaty is not conclusive of whether that entity or a similar entity ever had sovereignty in the past.

<sup>90</sup> *Western Sahara* (n 22) 39 [80].

<sup>91</sup> *Cameroon v Nigeria* (n 23) 405 [205], quoting *Island of Palmas* (n 17) 858–9.

<sup>92</sup> *Cameroon v Nigeria* (n 23) 404–6 [205], [207].

<sup>93</sup> *Ibid* 405–6 [207].

<sup>94</sup> *Island of Palmas* (n 17) 858. Other authorities have also looked beyond the title and form of agreements in order to conclude that those particular agreements were not governed by international law. See, eg, *Warman v Francis* (1958) 20 DLR 2d 627 (the Mi'kmaq people in Canada); CH Alexandrowicz, *The European–African Confrontation: A Study in Treaty Making* (Sijthoff, 1973) 97–103 ('*European–African Confrontation*') (certain agreements with African entities that were 'obviously not treaties in international law' but concerned 'rights in private law').

<sup>95</sup> Nigeria, however, argued that the Kings and Chiefs of Old Calabar had been sovereign: *Cameroon v Nigeria* (n 23) 402 [201]. Judge Koroma, who dissented, accepted this: at 479–80. This tends to support my eventual conclusion that sovereignty was at least a possibility.

Secondly, whatever implications *Island of Palmas* and *Cameroon v Nigeria* may or may not have for pre-colonial sovereignty, the approach taken in those cases cannot be generalised to all of the supposedly least ‘civilised’ peoples. *Cameroon v Nigeria* turned partly on facts peculiar to the case: doubts about whether there was an identifiable ‘federal’ entity that could make a binding treaty on behalf of various communities, along with how the parties acted after making the agreement.<sup>96</sup> In other instances, agreements were regarded as binding treaties between sovereigns.

One relevant case is *Ol Le Njogo v Attorney-General* (*‘Ol Le Njogo’*),<sup>97</sup> a decision of the Court of Appeal for Eastern Africa (a British colonial court) in 1913. Members of a Maasai tribe had brought proceedings against the British government for breach of agreements under which part of the tribe had been removed to a reserve in exchange for land and other inducements.<sup>98</sup> The case is disorienting in that the stances taken by the parties were the reverse of what might be expected: the Maasai argued that the agreements were not treaties between sovereigns;<sup>99</sup> the British said they were.<sup>100</sup> The British did this to plead the doctrine of act of state, according to which treaties were not justiciable in a domestic court.<sup>101</sup> The Court in substance accepted this.<sup>102</sup> One judge remarked that where a state has created a protectorate ‘it is competent to the protecting State to permit some vestige of sovereignty to remain in the native authority’.<sup>103</sup> By indicating that the Maasai retained a ‘vestige’ of sovereignty, the Court hinted that they had once had exclusive sovereignty.

Given the unusual context of *Ol Le Njogo*, this cannot be taken as more than a hint. But it accords with the wider practice of states.<sup>104</sup> In that wider practice, agreements with the supposedly least ‘civilised’ peoples were frequently regarded as binding treaties governed by international law.<sup>105</sup> It is true that ostensible treaties were sometimes alleged to be invalid. Western states challenged treaties secured by their colonial rivals on the ground that a chief did not have authority to transfer territory or that a treaty did not reflect his genuine will, especially in cases of coercion or fraud.<sup>106</sup> But the fact that challenges were made on these specific grounds implies that, absent such specific grounds, it was in principle possible for

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<sup>96</sup> Ibid 405–6 [207].

<sup>97</sup> *Ol Le Njogo v Attorney-General* (1913) 5 EAPLR 70 (*‘Ol Le Njogo’*).

<sup>98</sup> Ibid 78–9.

<sup>99</sup> Ibid 78, 80–1.

<sup>100</sup> Ibid 82–3.

<sup>101</sup> Ibid 83.

<sup>102</sup> Morris Carter CJ speculated that ‘an agreement between a civilised State and an uncivilised community is not governed by International law’, but he held that in any case such agreements must ‘be taken to be governed by some rules analogous to International law and to have similar force and effect to that held by a treaty’: *ibid* 91–2. Cf at 112 (King Farlow J).

<sup>103</sup> Ibid 92 (Morris Carter CJ).

<sup>104</sup> On the evidentiary weight of state practice in the century from 1788, regardless of whether a naturalist or a purely positivist view is taken of the international law of that period, see below Part II(B).

<sup>105</sup> See Nicholson (n 38) 79–83; DP O’Connell, ‘International Law and Boundary Disputes’ (1960) 54 *American Society of International Law Proceedings* 77, 81.

<sup>106</sup> Yasuaki Onuma, ‘When Was the Law of International Society Born? An Inquiry of the History of International Law from an Intercivilizational Perspective’ (2000) 2(1) *Journal of the History of International Law* 1, 48–9; Alexandrowicz, *European-African Confrontation* (n 94) 36–41.

these peoples to make treaties. Yasuaki Onuma observes that ‘hardly any European state seemed to attack other European states for concluding an agreement with an African ruler on the ground that African tribes were uncivilized and therefore not entitled to conclude a treaty’.<sup>107</sup> Consistent with this, Western treaty-makers tried to protect treaties against challenge by engaging witnesses and interpreters, on the apparent assumption that a treaty based on manifest consent would be valid.<sup>108</sup> These included treaties explicitly transferring sovereignty. Lindley observed of these:

The [colonial] Powers themselves ... have in large numbers of cases accepted sovereign rights from the chiefs, and based their titles upon such cessions, and, unless one is prepared to argue that the maxim *Nemo dat quod non habet* [one cannot give what one does not have] has no application to such a case, it must be admitted that the chiefs themselves possessed those rights.<sup>109</sup>

That inference is intuitive in that it takes Western states at their word. Herbert Arthur Smith, writing in 1932 particularly about British practice, similarly observed that numerous

treaties have been made by Great Britain with native rulers in various parts of the world, and in many cases it is clear that these treaties are regarded as sources of international obligations in the strict sense. Many of these treaties are acts of cession, which extinguish the independence of the native community ...<sup>110</sup>

All of this adds up to persuasive evidence that Huber’s approach to the treaties — to regard them as mere instruments of internal colonial organisation — cannot be generalised.

Thirdly and most compellingly, sometimes Western states explicitly said that peoples had sovereignty. That directly contradicts the proposition that they were necessarily precluded from having it by their supposed low degree of ‘civilisation’. The Congo Declarations, made at the conference of Western colonisers held in Berlin in 1884–85, referred to treaties ‘concluded with the legitimate Sovereigns in the basin of the Congo’,<sup>111</sup> a region in which Henry Morton Stanley, representing Léopold II, King of the Belgians, claimed to have made more than 200 treaties.<sup>112</sup> One instance from British practice concerned Lobengula, the King of Mashonaland and Matabeleland (now in Zimbabwe).<sup>113</sup> In 1888, the British described him to the Portuguese as an ‘independent king’ of his territory who had not parted with his sovereignty.<sup>114</sup> In 1889, the British Colonial Secretary assured him that he was ‘king of the country’ and that ‘no one can exercise jurisdiction in

<sup>107</sup> Onuma (n 106) 49.

<sup>108</sup> Alexandrowicz, ‘Afro-Asian World’ (n 67) 176–81.

<sup>109</sup> Lindley (n 59) 44.

<sup>110</sup> Herbert Arthur Smith (ed), *Great Britain and the Law of Nations: A Selection of Documents Illustrating the Views of the Government in the United Kingdom upon Matters of International Law* (PS King & Son, 1932) vol 1, 31.

<sup>111</sup> No 139 — *Declarations Exchanged between the Belgian Government and the International Association of the Congo*, signed 23 February 1885, reproduced in Sir E Hertslet, *The Map of Africa by Treaty* (Frank Cass & Company, 3<sup>rd</sup> ed, 1967) vol 2, 544. See also Alexandrowicz, ‘Afro-Asian World’ (n 67) 176.

<sup>112</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2001) 136–43.

<sup>113</sup> *Re Southern Rhodesia* (n 75) 214.

<sup>114</sup> *Ibid.*

it without his permission'.<sup>115</sup> In 1919, the British Privy Council confirmed in *Re Southern Rhodesia* that Britain had 'recognized Lobengula as sovereign of both peoples'.<sup>116</sup> Later I will discuss another people whom Britain explicitly acknowledged as 'sovereign': the Māori in 1839.<sup>117</sup>

Taken with the other reasons against Huber's approach, this is enough to dismiss the view that the supposedly least 'civilised' peoples, despite escaping the terra nullius rule, necessarily lacked sovereignty.

I have now rejected all of the variants of the preclusive position. But I must be careful not to put my findings too highly. What I have rejected is the possibility that these peoples were *necessarily precluded* from having sovereignty by their supposed lack of 'civilisation': that is how I defined the preclusive position. I have cited affirmative evidence that at least some peoples in this category actually did have sovereignty. I have also found that the peoples of Australia cannot be distinguished from other members of the category on the basis that they had an even lower degree of 'civilisation' reflected in the terra nullius rule. But there may be some other basis for treating them differently from the likes of the Maasai and Lobengula, so I am still some distance from forming a conclusion about their status. Whether the supposedly least 'civilised' peoples had sovereignty in all cases or just in some cases depends on what theoretical explanation is adopted for the evidence that at least some of them had sovereignty. It will be seen that on the naturalist-legislative position (to which I turn next) virtually all of them did, whereas on the contractual position only some of them did.

### B *The Naturalist-Legislative Position*

What I am calling the naturalist-legislative position in fact comprises two theoretically distinct positions that might be taken on sovereignty. But they can usefully be considered together. The first is natural law; the second is what I will call the legislative view of customary norms.

A long history supports the idea that some norms of international law emanate from nature. In the 16<sup>th</sup> century, the Spanish jurist Francisco de Vitoria (sometimes known as 'Victoria') argued that these norms applied not only among European states but also in relations with the pre-colonial peoples of North and South America.<sup>118</sup> Vitoria's conception of natural law was based on 'natural reason'.<sup>119</sup> Accordingly, the justification he gave for its applicability to the peoples of the Americas was that they 'are not of unsound mind, but have, according to their kind, the use of reason. This is clear ... for they have polities which are orderly arranged'.<sup>120</sup> He wrote that they 'undoubtedly had true dominion in both public and private matters'.<sup>121</sup>

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<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> See below Part II(C).

<sup>118</sup> Francisco de Vitoria, *De Indis et de Ivre Belli Relectiones*, ed Ernest Nys, tr John Pawley Bate (Carnegie Institution of Washington, 1917) 127. See also Brett Bowden, 'The Colonial Origins of International Law. European Expansion and the Classical Standard of Civilization' (2005) 7(1) *Journal of the History of International Law* 1, 4; Anghie (n 19) ch 1.

<sup>119</sup> Victoria (n 118) 151.

<sup>120</sup> Ibid 127.

<sup>121</sup> Ibid 128.

In the period during which Australia was colonised, especially as the 19<sup>th</sup> century progressed, there was a shift away from the naturalist tradition and towards positivism: the view that most or all norms of international law must be posited by men and women and their institutions rather than emanating from nature.<sup>122</sup> Even in this period, however, some scholars continued to preserve a role for natural law. Dietrich Heinrich Ludwig von Ompteda, in 1785, divided the norms of international law into a number of categories.<sup>123</sup> There were norms based on a presumption of consent (corresponding with the ‘legislative’ approach to customary norms that I will discuss in a short while); there were treaty norms; and there were customary norms that derived from the tacit consent of their subjects.<sup>124</sup> Ompteda thought the norms in these categories applied only among ‘civilised’ states.<sup>125</sup> In contrast, norms in the remaining category were derived from natural law, and Ompteda argued that *these* norms applied to all nations, ‘civilised’ or not.<sup>126</sup> Examples of naturalist views can also be found from much later in the relevant period. For instance, Georg Friedrich von Martens, in 1831, argued that if there were ‘a society subsisting between states, nations, etc, as between individuals, that society is natural, and not positive, and regulates itself only by natural laws’.<sup>127</sup> Even after the period had ended, in a major French textbook published in 1905, Henri Bonfils and Paul Fauchille asserted that ‘*positive* International Law was formed in Europe’ and applies ‘to the relations of all States that have attained that degree of civilisation’ but ‘*natural* or *rational* International Law applies to all States, to all peoples ... even to the barbarian tribes that still exist in Africa’.<sup>128</sup>

These scholars did not always detail exactly which norms were natural law and which were positive law. But the only thing that matters for present purposes is sovereignty, whatever other norms may have existed. In Ompteda’s scheme, positive law included such specific rules as the prohibition of poisoned weapons, but it was natural law that provided for the freedom, independence and equality of nations.<sup>129</sup> ‘Independence’ might here be taken to imply sovereignty. Bonfils and Fauchille explicitly used both words:

Men of all races, white or black, red or yellow, however unequal they may be in knowledge, in wealth, in industry, must be considered as equal in law. ... To deny to tribes or clans who freely occupy the soil, for thousands and thousands of years, the right to independence, to sovereignty, is unacceptable. That these tribes do not

<sup>122</sup> Neff, *Justice among Nations* (n 34). See especially at ch 6.

<sup>123</sup> Dietrich Heinrich Ludwig von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts* (JL Montags sel Erben, 1785), discussed in CH Alexandrowicz, ‘Doctrinal Aspects of the Universality of the Law of Nations’ (1961) 37 *British Year Book of International Law* 506, 506–8 (‘Doctrinal Aspects’).

<sup>124</sup> Alexandrowicz, ‘Doctrinal Aspects’ (n 123) 507.

<sup>125</sup> *Ibid* (citations omitted).

<sup>126</sup> In Latin the categories were, in the order I have just introduced them, the *ius gentium voluntarium* based on *consensus praesumptus*, the *ius gentium pactitium*, the *ius consuetudinarium*, and the *ius gentium naturale*: at *ibid*.

<sup>127</sup> GF de Martens, *Précis du droit des gens moderne de l’Europe* [Summary of the Modern Law of Nations of Europe] (JP Aillaud, 2<sup>nd</sup> ed, 1831) vol 1, 49.

<sup>128</sup> Henri Bonfils and Paul Fauchille, *Manuel de droit international public (Droit des gens)* [Manual of Public International Law (Law of Nations)] (Arthur Rousseau, 4<sup>th</sup> ed, 1905) 17–18 (emphasis in original).

<sup>129</sup> See Alexandrowicz, ‘Doctrinal Aspects’ (n 123) 507.

have sovereignty as it is conceived of by the peoples of Europe: that is certain. But they have nonetheless a certain notion of it; and the proof is in their treaties, their truces, their alliances, in the protection actually granted by these petty kings or sultans to peaceful explorers.<sup>130</sup>

For so long as this conception of natural law provided a foundation for basic principles of international law, the supposedly least ‘civilised’ peoples had sovereignty under that law.

This has the virtue of continuity with Vitoria’s earlier view that international law extended to the peoples of the Americas. But it may give the international law of the period under discussion the appearance of radical *discontinuity* with the law of the present. There is no escaping the fact that natural law was going out of fashion in the 19<sup>th</sup> century, even if the shift was not yet total by the end of the period; nowadays it plays virtually no role in international law.<sup>131</sup> Moreover, although international law has an inter-temporal principle (‘a juridical fact must be appreciated in the light of the law contemporary with it’)<sup>132</sup> it is not obvious how this principle is to be applied here. This is, first, because what is at stake is not merely an ordinary norm but the foundation on which the entire system of norms operates and, secondly, because the change was a change of opinion by theorists rather than a change enacted by lawmakers. Conceivably the decline of natural law might trigger a retrospective reassessment of how international law *always* operated. For these reasons, natural law is not an unassailable basis for concluding that the supposedly least ‘civilised’ peoples had sovereignty.

It will be seen that this apparent discontinuity can potentially be mended by combining the naturalist explanation with the legislative view of customary international law.

‘Legislative’ is the word used by Stephen Neff to describe a current of opinion among 19<sup>th</sup> century scholars that is essentially consistent with how customary international law operates today.<sup>133</sup> Today, a customary norm must be evidenced by state practice accompanied by *opinio iuris* (‘a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’).<sup>134</sup> But ‘it is not necessary to show that all States have participated in the practice’;<sup>135</sup> nor is it necessary to point to *opinio iuris* articulated by all states, just to ‘broad and

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<sup>130</sup> Bonfils and Fauchille (n 128) 310–11. In the original, the phrase is ‘*le droit à l’indépendance, à la souveraineté*’.

<sup>131</sup> *Statute of the International Court of Justice* art 38(1)(c) refers to ‘general principles of law’. Some have interpreted these as a remnant of natural law. See, eg, *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 298 (Judge Tanaka).

<sup>132</sup> *Island of Palmas* (n 17) 845.

<sup>133</sup> Stephen C Neff, ‘The Dormancy, Rise and Decline of Fundamental Liberties of States’ (2015) 4(3) *Cambridge Journal of International and Comparative Law* 482, 491 (‘The Dormancy, Rise and Decline’).

<sup>134</sup> *North Sea Continental Shelf (Federal Republic of Germany v Denmark) (Judgment)* [1969] ICJ Rep 3, 44 [77] (‘*North Sea*’). This definition of *opinio iuris* was repeated in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 108–9 [207] (‘*Nicaragua*’).

<sup>135</sup> International Law Commission, *Report of the International Law Commission: Seventieth Session*, UN GAOR, 73<sup>rd</sup> sess, Supp No 10, UN Doc A/73/10 (17 August 2019) 136 (Conclusion 8 Commentary [3]) (‘*Conclusions on Identification of Customary International Law*’).

representative acceptance, together with no or little objection'.<sup>136</sup> Moreover, once the norm has come into being, it generally applies to all states. Thus, in *North Sea Continental Shelf (Federal Republic of Germany v Denmark)*, the ICJ observed that customary norms 'by their very nature, must have equal force for all members of the international community'.<sup>137</sup> It is true that states have a limited opportunity to opt out of a new norm: by objecting while the norm is still being formed and then maintaining the objection persistently.<sup>138</sup> But the existence of such a limited exception confirms that a customary norm generally applies to all states, even to states that did not participate in the practice and did not articulate *opinio iuris* accepting the norm. This is the legislative view.

Many 19<sup>th</sup> century international lawyers took an essentially legislative view of custom, including some who were among the strictest of positivists and who classified entities by degrees of 'civilisation'. Westlake, for instance, accepted that when a rule 'is invoked against a state, it is not necessary to show that the state in question has assented to the rule' but merely 'that the general *consensus* of opinion within the limits of European civilisation is in favour of the rule'.<sup>139</sup>

The theoretical justification is radically different, but the practical result of the legislative view of custom is, in one respect, similar to that of natural law: a body of general norms applies to an entity even if that entity has not consented specifically to each particular norm. Take the norm according to which Western states have sovereignty. There was a period when this norm could be justified on the basis of natural law; in a later period, natural law ceased to be taken seriously as a foundation for norms of international law, but the norm could instead be explained on the basis of a legislative view of custom; in the middle there was a period of overlap when either explanation could plausibly be given.<sup>140</sup> If the practical result is the same and only the theoretical justification for that result is different, it is not necessary to say on which ground the norm was applicable at any specific point in time.<sup>141</sup> In addition to this, the naturalist and legislative approaches to evidence are more similar than might be imagined. The evidentiary weight of state practice was on both approaches treated as significant; it was frequently the case that adherents of 'so-called natural law theories relied on the practice of nations for the content of that law'.<sup>142</sup> So when the existence of a norm must be established on the evidence, it may not always be necessary to distinguish between the naturalist and legislative approaches.

<sup>136</sup> Ibid 139 (Conclusion 9 Commentary [5]). Cf Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law* (Oxford University Press, 9<sup>th</sup> ed, 1996) vol 1, 25–31. Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 1<sup>st</sup> ed, 2014) ch 3.

<sup>137</sup> *North Sea* (n 134) 38–9 [63].

<sup>138</sup> *Conclusions on Identification of Customary International Law*, UN Doc A/73/10 (n 135) 152–4 (Conclusion 15 Commentary); *Fisheries (United Kingdom v Norway) (Judgment)* [1951] ICJ Rep 116, 131.

<sup>139</sup> Westlake (n 35) 78 (emphasis in original). Neff describes Westlake as an exponent of the 'empirical variant of positivism': Neff, *Justice among Nations* (n 34) 229.

<sup>140</sup> See Neff, 'The Dormancy, Rise and Decline' (n 133) 485–92.

<sup>141</sup> In principle, natural law and the legislative view of custom might not have *precisely* the same result. This is because (as I will discuss momentarily) the legislative view might be defended by reference to different types of consent, each of which might have slightly different consequences for precisely which entities are subject to the legislative view. For practical purposes, however, the results would be at least very similar.

<sup>142</sup> Jennifer Pitts, 'Empire and Legal Universalisms in the Eighteenth Century' (2012) 117(1) *American Historical Review* 92, 100.

It is in this manner that the naturalist and legislative views can be combined to mend the apparent discontinuity of international law between the past and the present.

There are, however, two reasons to hesitate to conclude that the supposedly least ‘civilised’ peoples had sovereignty on the basis of the legislative view of custom.

First, not all 19<sup>th</sup> century positivists agreed that custom operated among Western states in the way I have described. Some took what Neff terms a ‘contractual’ view of custom, according to which a particular customary norm cannot apply between two particular entities unless both entities have consented specifically to that norm.<sup>143</sup> If, in the 19<sup>th</sup> century, customary norms did not even operate on a legislative basis among Western states — within the community in which the norms had developed — then it is improbable (reasoning a fortiori) that they operated on that basis to the extent that they applied to non-Western entities.

Secondly, even if custom operated on a legislative basis among Western states, a different procedure may have applied to the supposedly least ‘civilised’ peoples.

Accepting that a different procedure applied can be defended by reference to the foundational positivist principle of consent. Although the legislative view of custom does not require a state to consent specifically to each norm, during the relevant period it might still have required consent of a more generic type. States might have consented once-and-for-all to the legislative view of custom, with the result that they would then be bound by any norm established on that basis.<sup>144</sup> Or states might have been *presumed* to consent to the legislative view by reason of their geography or culture.<sup>145</sup> In this period, however, these claims about consent can plausibly be made only about Western states (plus, late in the period, a few states that had set out to integrate with the West, notably Japan).<sup>146</sup> Peoples in other parts of the world — not just those placed in the supposedly least ‘civilised’ category but also, for instance, the Chinese — were often not familiar with the norms of Western international law and, even if made aware of them, might not have acknowledged them as valid.<sup>147</sup> It can be inferred that they had not consented and could not plausibly be presumed to consent to the notion that the entirety of customary international law was applicable to them. In other words, applying the

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<sup>143</sup> See Neff, *Justice among Nations* (n 34) 247–9; Neff, ‘The Dormancy, Rise and Decline’ (n 133) 491–2.

<sup>144</sup> One version of this is to adopt what is traditionally called the ‘constitutive’ theory of recognition: that an entity must be recognised by other states in order for it to be constituted as a state. According to this theory, two entities that recognise each other thereby make ‘a fundamental pact that puts into force a system of law’: Robert Redslob, ‘La reconnaissance de l’État comme sujet de Droit International’ [‘The Recognition of the State as a Subject of International Law’] (1934) 13 *Revue de droit International* 429, 431–2; cf Dionisio Anzilotti, *Cours de droit international* [Course of International Law], tr Gilbert Gidel (Recueil Sirey, 3<sup>rd</sup> ed, 1929) 161. Assuming the system includes the legislative view of custom, customary norms will apply between the two entities on the basis that they have consented indirectly by making the fundamental pact. These norms will, in contrast, not generally extend to unrecognised entities. Although once in vogue, the constitutive theory is nowadays rejected by most scholars: see Nicholson (n 38) 113–23.

<sup>145</sup> On whether a similar presumption might still exist today, see Nicholson (n 38) 99–100.

<sup>146</sup> *Ibid* 69–76, 89.

<sup>147</sup> For example, there is nothing in any official Chinese documents to verify that China accepted any norms of Western international law before 1839: Chi-Hua Tang, ‘China–Europe’ in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 701, 704.

legislative view to them would clash with the theoretical basis of that view in consent.

Westerners during the relevant period sometimes alluded to this as a justification for treating non-Western entities differently. For example, in 1801, in one of a series of decisions about the applicability of norms to North Africans, a British admiralty judge, Sir William Scott, commented that the inhabitants of Morocco might, on some points of international law,

be entitled to a very relaxed application of the principles established by long usage between the states of Europe, holding an intimate and constant intercourse with each other. It is a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system, which is not familiar either to their knowledge or their observance.<sup>148</sup>

In another decision he remarked that North Africans conceived ‘that there is no other law of nations, but that which is derived from positive compact and convention’.<sup>149</sup>

Some scholars similarly appeared to suggest that a legislative view of custom applied within the West but that elsewhere international law was purely contractual. The English jurist Travers Twiss wrote that there was no ‘Common Law of Nations’ between European and North African states, although there could still be treaties or an ‘established usage’.<sup>150</sup> Huber argued that Western states had passed beyond the purely contractual stage of international law, so that they now recognised legal propositions by common conviction, but that this community could continue to conduct contractual relations with entities that remained outside it.<sup>151</sup> Hall argued that ‘differently civilised’ entities could not ‘enter into the circle of law-governed countries’ until they had accepted ‘the law in its entirety beyond all possibility of misconstruction’,<sup>152</sup> but he alluded to the possibility that these non-Western entities might adopt particular norms by treaty.<sup>153</sup> Gerrit Gong, in a retrospective study of the standard of ‘civilisation’, calls this ‘the orthodox positivist doctrine’.<sup>154</sup>

This is a plausible way to explain evidence of apparent differences in how Western and non-Western entities were treated.<sup>155</sup> This is especially true of the treatment of the supposedly least ‘civilised’ peoples. Although, as has been seen,

<sup>148</sup> *The ‘Hurtige Hane’* (1801) 3 C Rob 324, 165 ER 480, 481.

<sup>149</sup> *The ‘Helena’* (1801) 4 C Rob 3, 165 ER 515, 516. See also *The ‘Kinders Kinder’* (1799) 2 C Rob 88, 165 ER 248; *The ‘Fortune’* (1800) 2 C Rob 92, 165 ER 250; *The ‘Madonna del Burso’* (1802) 4 C Rob 169, 165 ER 574.

<sup>150</sup> Travers Twiss, ‘Applicability of the European Law of Nations to African Slave States’ (1876) 1 *Law Magazine and Review* 409, 412–13, 423–4.

<sup>151</sup> Max Huber, ‘Die Gleichheit der Staaten’ [The Equality of States] in Fritz Berolzheimer (ed), *Juristische Festgabe des Auslandes zu Josef Kohlers 60. Geburtstag* [Legal Gift from Abroad for Josef Kohl’s 60<sup>th</sup> Birthday] (Enke, 1909) 112, 114, discussed in Becker Lorca (n 19) 196.

<sup>152</sup> Hall (n 64) 42–3.

<sup>153</sup> *Ibid.* This might explain how the legislative view came to bind the likes of the Ottomans and Japan. Some scholars (eg, Oppenheim) highlighted a treaty that declared the Ottoman Empire to be ‘admitted to participate in the advantages of the public law and concert of Europe’: *General Treaty for the Re-establishment of Peace*, signed 30 March 1856, 114 CTS 409 (entered into force 27 April 1856) art 7, discussed in *Oppenheim’s International Law Vol 1* (n 47) 32–3.

<sup>154</sup> Gong (n 37) 56.

<sup>155</sup> But see Nicholson (n 38) 69–70, where I hesitate to embrace this explanation categorically.

Western states often made treaties with these peoples, they seldom invoked specific customary norms.<sup>156</sup> Lindley, despite his belief that these peoples had sovereignty, thought that most of the rules of international law ‘are inapplicable to the conditions of backward peoples’.<sup>157</sup> Antony Anghie observes that the degree to which international law was applicable was decided ‘on an almost completely ad hoc basis’.<sup>158</sup> That can more readily be explained on a contractual approach than by taking the legislative view of custom. When Westerners alluded vaguely to degrees of ‘civilisation’, what that may have meant in more technical legal terms was the degree of an entity’s willingness or capacity (or its capacity as perceived by Westerners) to consent to international legal norms.

I draw the following conclusions from the discussion so far. So long as natural law provided a foundation for basic principles of international law, peoples in the supposedly least ‘civilised’ category had sovereignty, without any need for them or Western states to consent specifically to a norm to that effect. To the extent that natural law ceased to be accepted during the relevant period, the same position may have resulted from the legislative view of custom. The legislative explanation is weaker, because there are reasons to doubt that the legislative view applied outside the West. But the naturalist explanation, although not unassailable, is strong even considered on its own; international lawyers invoked it throughout the period. This is the naturalist-legislative position.

There remains a further question. What was the test, on the premise that this position was correct, of whether a particular people had sovereignty?

So if the naturalist-legislative position is correct, the test of whether a particular people had sovereignty is probably the same as or similar to the terra nullius test. On this premise, ascertaining whether the peoples of Australia had sovereignty is simple. A socially and politically organised people had sovereignty over its territory; as reflected in *Mabo*, the peoples of Australia were socially and politically organised; therefore they had sovereignty.

International law commonly uses tests of two broad types to determine which entities are bound by a norm.<sup>159</sup> First, there are tests that require relevant entities to consent — for example, by joining a treaty.<sup>160</sup> But here such a test can be excluded for reasons I have already established: the naturalist-legislative position denies that consent must be given specifically to each norm; and if this position applies to the supposedly least ‘civilised’ peoples, that is incompatible with a requirement of a once-and-for-all act of consent.<sup>161</sup> Secondly, there are tests that

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<sup>156</sup> Ibid 78–86; Alexandrowicz, ‘Afro-Asian World’ (n 67) 181.

<sup>157</sup> Lindley (n 59) 46.

<sup>158</sup> Anghie (n 19) 81.

<sup>159</sup> These are respectively the most familiar forms — and the most likely to apply here — of what I have classified as ‘volitional’ and ‘automatic’ tests of legal personality: see Nicholson (n 38) 193–5, 204–6.

<sup>160</sup> See, eg, *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 11–15 (‘*Vienna Convention*’).

<sup>161</sup> A requirement of consent specifically to each norm directly contradicts the naturalist-legislative position as just defined. Earlier in the present part of this article, I raised and left open the possibility that the legislative view of custom may have required states to consent generically — once-and-for-all — to the legislative view; but I also found that this could not plausibly apply to non-Western entities, so if it is correct that the naturalist-legislative position applied to the supposedly least ‘civilised’ peoples then the test must have been something different.

depend on factual effectiveness. Today, for example, an entity can qualify as a state by meeting certain factual criteria: territory, government, population and independence.<sup>162</sup> On the naturalist-legislative position, the obvious candidate for the test of whether a people had sovereignty is a test of this second type, something loosely analogous to the criteria for statehood that operate today, save that the threshold of effectiveness may be lower. In other words, the test can be expected to be the same as or similar to the terra nullius test: a people must be socially and politically organised.<sup>163</sup> Earlier I was cautious about assuming that a territory that is not nullius — that is not no one's — must therefore have an existing sovereign; but there is no doubting that this makes sense as a matter of language. It also fits hand-in-glove with the practice. Territories that were not terra nullius (not available for acquisition by occupation alone) were precisely the territories in which Western states tended to acknowledge the inhabitants as sovereign. A test of sovereignty based on social and political organisation can additionally draw support from writers such as Lindley, who observed that '[m]any of the so-called "savage" races ... possess organized institutions of government, and it cannot be truly said that the territory inhabited by such races is not under any sovereignty'.<sup>164</sup>

I have not, however, concluded that the naturalist-legislative position is definitely correct. It will be evident by now that any attempt to present the law in this area as certain, consistent and stable would be artificial. The best that one can do is to speak in terms of the strength of the argument. So, my conclusion at this stage is that it is strongly arguable that the naturalist-legislative position applied to a socially and politically organised people and that, if that is correct, then it follows that peoples of Australia had sovereignty. I still need to consider the remaining possibility: the contractual position. It will be seen that an argument that the peoples of Australia had sovereignty can also be made from this position.

### C *The Contractual Position*

The contractual position is that neither natural law nor the legislative view pertained to the supposedly least 'civilised' peoples but norms could apply on the basis of the contractual view of custom: the view that a particular customary norm applies between two particular entities where both entities have consented specifically to that norm.<sup>165</sup> I observed that many 19<sup>th</sup> century positivists took this view of custom either generally or insofar as custom applied to non-Western

<sup>162</sup> *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11, 13 (Germano-Polish Mixed Arbitration Tribunal). See also *Montevideo Convention on the Rights and Duties of States*, signed 26 December 1933, 165 LNTS 19 (entered into force 26 December 1934) art 1, which refers to the 'capacity to enter into relations with the other states' instead of 'independence' — but these are often read to mean the same thing. See also James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> ed, 2006) ch 2 ('Creation').

<sup>163</sup> See above Part II(A); *Western Sahara* (n 22) 39 [80]–[81]. Logically (and based on an analogy with the criteria for statehood) it may also be necessary for the people to be independent of any other sovereign. Without a degree of independence, it is hard to see how an entity could have the aspect of sovereignty that I highlighted earlier: a right to exercise exclusive jurisdiction. See also Reynolds, *Aboriginal Sovereignty* (n 52) 41–2; Crawford, *Creation* (n 162) 62–89.

<sup>164</sup> Lindley (n 59) 20.

<sup>165</sup> Neff, *Justice among Nations* (n 34) 247–9.

entities.<sup>166</sup> The consequence in either case would be that a people in the supposedly lowest category of ‘civilisation’ had sovereignty relative to a Western state if and only if both the people and the state consented to a norm to that effect.

The contractual position seems to enable bizarre situations to occur. Imagine that a people cedes its sovereignty to a Western state by treaty. If the basis on which that people initially had sovereignty relative to that state was a contract, then the contract cannot bind *other* states that are not parties to it;<sup>167</sup> those states might deny that the people ever had anything to cede, in which case the treaty-making state has not acquired much of value. It is also possible to imagine a territory having a sovereign relative to some states but not others. This relativism might be seen as a weakness. It is not, however, a definitive reason to reject the contractual position. Some international lawyers have embraced relativism of this sort. Hans Kelsen wrote in 1941 that since ‘we have to acknowledge the relativity of time and space — the general conditions of natural existence — relativity of legal existence is no longer paradoxical’.<sup>168</sup> Furthermore, even if anomalies like these are possible in theory, whether they occur in reality depends on what approach is taken to ‘consent’: the more liberal the approach, the more likely an entity is to have sovereignty and the less likely anomalies become.

What counts as consent to a norm about sovereignty is, in fact, the critical question here. Guidance can be drawn from analogies with other situations in international law in which a norm cannot apply between two or more entities unless each entity has consented specifically to that norm. These analogies suggest two approaches, which I will refer to as the ‘rigid’ and ‘liberal’ variants of the contractual position.

The rigid approach is to insist that each entity must consent explicitly — or perhaps by clear implication, but in any event consciously — not only to the existence of the norm but also to its applicability in relations with each other entity. This is analogous with how treaties work: each party agrees explicitly not only that treaty norms exist in the abstract but also that those norms apply in relations with the other treaty parties.<sup>169</sup> If this rigid approach were definitely applicable, my argument would hit a dead end because Britain did not explicitly recognise *any* people as sovereign. On some occasions the British avoided even implying that a people might have any pre-existing rights. After John Batman made an agreement to buy land from Wurundjeri elders in 1835, the Governor of New South Wales declared all such agreements null and void (though this may not be conclusive evidence of the British position, because it related at least as much to Batman’s status as a private individual as it did to the status of the Wurundjeri).<sup>170</sup> Perhaps the closest the British came to a sort of recognition was in 1840, after the Milmenrura killed survivors of a shipwreck who had ‘either refused to deliver food and gifts they had promised, or were involved in sexual violence against

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<sup>166</sup> See above Part II(B).

<sup>167</sup> The principle is reflected in *Vienna Convention* (n 160) art 34.

<sup>168</sup> Hans Kelsen, ‘Recognition in International Law: Theoretical Observations’ (1941) 35(4) *American Journal of International Law* 605, 609. This remark was made in the context of the norms about recognition and statehood.

<sup>169</sup> This is also analogous with how the constitutive theory of recognition is said to operate: see above nn 144.

<sup>170</sup> See Castles (n 44) 28–30; Immanuel Ness and Zak Cope (eds), *The Palgrave Encyclopedia of Imperialism & Anti-Imperialism* (Palgrave Macmillan, 2019) vol 1, 317.

Aboriginal women'.<sup>171</sup> The Advocate-General of South Australia argued that the killing was to be regarded in law as a crime 'not ... of individual British subjects, but of a whole hostile tribe — that is, of a nation at enmity with Her Majesty's subjects'.<sup>172</sup> He cited Vattel to justify retribution: the police had hanged two Milmenrura men without a regular trial.<sup>173</sup> But this legal argument was not taken up and did not result in any act of recognition by the British.<sup>174</sup>

A hint that a rigid treaty-like approach to consent is applicable might be extracted from a British statement about the Māori made in 1839.<sup>175</sup> Note that this statement predates the *Treaty of Cession between Great Britain and New Zealand* of 1840.<sup>176</sup> Note also that I am approaching it solely from an international legal perspective; I will not enter here into the complex question of the status of the Māori following the treaty or in later domestic law. In the 1839 statement, the British secretary for war and colonies said

that we acknowledge [Māori] New Zealand as a sovereign and independent state, so far at least as it is possible to make that acknowledgment in favour of a people composed of numerous, dispersed and petty tribes, who possess few political relations to each other, and are incompetent to act, or even to deliberate, in concert. But the admission of their rights, though inevitably qualified by this consideration, is binding on the faith of the British Crown.<sup>177</sup>

This could be taken to mean that Britain was bound to treat the Māori as sovereign on the basis of a legally binding 'admission' made with particular reference to the Māori.

This is, however, far from compelling evidence that consent *must* be given in such rigid terms. One interpretation of this passage — perhaps the one that fits best, in that it gives meaning to Britain's doubts about the degree of social and political organisation among the Māori — is that, *regardless of whether* the Māori were sovereign according to a relevant general norm of international law, Britain had bound itself to treat them as sovereign for at least some purposes.<sup>178</sup> Just as today a norm may bind a state concurrently on the basis of both treaty and custom,<sup>179</sup> Britain might have been bound both on the basis of its 'admission' and on the basis of a general norm that would have required it to treat peoples as

<sup>171</sup> Ann Curthoys and Jessie Mitchell, *Taking Liberty: Indigenous Rights and Settler Self-Government in Colonial Australia, 1830–1890* (Cambridge University Press, 2018) 95 n 104. See also Robert Foster and Amanda Nettelbeck, *Out of the Silence: The History and Memory of South Australia's Frontier Wars* (Wakefield Press, 2012) 25–32; Reynolds, *Aboriginal Sovereignty* (n 52) 119–21.

<sup>172</sup> 'Summary Execution of the Natives', *The South Australian Register* (Adelaide, 19 September 1840) 255, archived at <<https://perma.cc/5CDC-KMP9>>.

<sup>173</sup> *Ibid.*

<sup>174</sup> Castles (n 44) 31.

<sup>175</sup> Letter from the Marquis of Normanby to Captain Hobson, 14 August 1839, reproduced in United Kingdom, *Correspondence with the Secretary of State Relative to New Zealand* (No 238, 1840) 37–9 ('*Correspondence with New Zealand Secretary of State*').

<sup>176</sup> *Treaty of Cession between Great Britain and New Zealand*, 89 CTS 473 (signed and entered into force 6 February 1840).

<sup>177</sup> *Correspondence with New Zealand Secretary of State* (n 175) 37–8. A later memorandum referred once again to Britain's recognition 'of New Zealand as a substantive and independent state': Letter from J Stephen to John Blackhouse, 18 March 1840, reproduced in *Correspondence with New Zealand Secretary of State* (n 175) 68–9.

<sup>178</sup> Cf *Re Southern Rhodesia* (n 75) 214: Britain 'recognized Lobengula as sovereign'.

<sup>179</sup> See *Nicaragua* (n 134) 97–101 [183]–[190].

sovereign anyway, provided they passed a certain test. Indeed, in the next part of this discussion, I will quote a passage from Smith in which he cites the Māori episode in support of a ‘general principle’ applicable to other ‘tribal communities’.<sup>180</sup> The difficulty with extracting evidence from the Māori episode can be generalised to other evidence that might be found for the rigid treaty-like approach: the mere fact that an entity might become bound by a norm on the basis of consent given in rigid terms does not exclude the possibility that it might also be bound on a wider basis.

Doubts about the rigid approach do not necessarily lead one back towards the naturalist-legislative explanation; one can also conceive of a more liberal approach to consent.

Here the analogy is not with treaties but with what are usually known as local customary norms. Recall that, nowadays, custom of the ordinary sort (what I have so far called plain ‘custom’) has a legislative basis and generally applies universally. In contrast, a local customary norm ‘applies only among a limited number of States’ and requires ‘a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves’.<sup>181</sup> In this way, subsets or even pairs of states can supplement universally applicable custom by creating extra norms that apply locally.<sup>182</sup> But despite its confined scope, local custom is nevertheless custom, not a tacit treaty-like agreement; the evidence required is still practice and *opinio iuris*. Gérard Cohen-Jonathan explains the distinction:

In the case of a tacit agreement, we are in the presence of an exchange of wills effected simultaneously and once and for all. ... In contrast, local custom is formed in a somewhat unconscious manner, by a slow practice in which the wills of the States will be manifested progressively, not necessarily at the same moment, not always with the same degree of intensity.<sup>183</sup>

The test for a tacit agreement is more rigid in that ‘the psychological element’ assumes ‘a more complex character going beyond simple legal conviction to veritable mutual consent’.<sup>184</sup> To put this another way: a more liberal approach is taken to consent to a local customary norm. It is enough that the entities that are to be bound by the norm believe that a practice ‘is rendered obligatory by the existence of a rule of law’.<sup>185</sup> Each entity does not need to consent consciously to the applicability of the norm in its relations with each other entity.<sup>186</sup> This parallels how ordinary custom works: its creators ‘do not necessarily know that they are

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<sup>180</sup> Smith (n 110) 30–1.

<sup>181</sup> *Conclusions on Identification of Customary International Law*, UN Doc A/73/10 (n 138) 122 (Conclusion 16).

<sup>182</sup> For an example of a custom between a pair of states, see *Right of Passage* (n 21) 39.

<sup>183</sup> Gérard Cohen-Jonathan, ‘La coutume locale’ [Local Custom] (1961) 7 *Annuaire français de droit international* 119, 138. Robert Kolb similarly rejects ‘attempts to constrict regional custom in the corset of an informal or tacit agreement’ and affirms that it is ‘categorically of the same strain as universal custom’: Robert Kolb, ‘Nullité, inapplicabilité ou inexistence d’une norme coutumière contraire au *jus cogens* universel? [Nullity, Inapplicability or Non-Existence of a Customary Norm Contrary to the Universal *Jus Cogens*?]’ (2013) 117(2) *Revue générale de droit international public* 281, 296.

<sup>184</sup> Cohen-Jonathan (n 183) 139, citing the pleadings in *Right of Passage* (n 21).

<sup>185</sup> This is the description of *opinio iuris* from *North Sea* (n 134) 44 [77].

<sup>186</sup> Cohen-Jonathan (n 183) 119.

creating legal norms and they do not necessarily have the intention of creating any',<sup>187</sup> and the creation of norms is 'the effect and not the purpose of their activity'.<sup>188</sup>

It is tempting to regard local custom as more than an analogy. It is essentially the same as the contractual view of custom that I am seeking to understand, save that local custom merely provides supplementary norms rather than operating as the sole basis for all the customary norms that apply to an entity. On the premise that the contractual view played a prominent role in 19<sup>th</sup> century international law, local custom could be seen as a vestige of it, as a living fossil that reveals direct information about how the contractual view must have operated in the past. This temptation might be strengthened by the ICJ's remarks in *Right of Passage*, in which it identified a local custom between Britain and Portugal in 19<sup>th</sup> century South Asia.<sup>189</sup> It remarked that '[h]istorically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice.'<sup>190</sup> This suggests that local custom or something like it played a prominent role in a colonial setting.

But as elsewhere in this argument, I will be cautious: I will treat local custom merely as an analogy. The procedures for identifying custom were less meticulously defined in the past than they are today; the International Law Commission attempted to bring clarity to them as recently as 2018.<sup>191</sup> Moreover, there is a contextual difference between how local custom works today and how the contractual view of custom might have applied to non-Western entities in the past. As indicated by the term 'local custom', it typically (though not necessarily) applies among states with 'some geographical relationship'.<sup>192</sup> That is different from a colonial situation in which peoples from opposite sides of the Earth are coming into contact for the first time and the norms are applied to their initial interaction.

Still, the rigid contractual position is the less convincing of the two variants in that it creates a sharper disjuncture with the international law of the present (in which customary norms, whether universal or local, do not require a rigid treaty-like form of consent) and with the natural law of the past (in which norms were applied even more liberally).<sup>193</sup> And the liberal variant also fits better with the evidence about non-Western entities that led me to consider the contractual position in the first place. It can explain the attention paid by 19<sup>th</sup> century jurists, such as Scott, when applying norms to these entities, to whether those norms were 'familiar either to their knowledge or their observance'.<sup>194</sup> That is because such familiarity becomes, in substance, the test. On a liberal approach to consent, a particular customary norm was applicable between a Western state and a non-Western entity if both entities followed the norm in practice (it was familiar to

<sup>187</sup> Hans Kelsen, 'Théorie du droit international public [Theory of Public International Law]' (1953) 84 *Recueil des cours de l'Académie de droit international de La Haye* 1, 123.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Right of Passage* (n 23) 39.

<sup>190</sup> *Right of Passage* (n 23) 44.

<sup>191</sup> *Conclusions on Identification of Customary International Law* (n 136).

<sup>192</sup> *Ibid* 154 (Conclusion 16 Commentary 5).

<sup>193</sup> See above Part II(B).

<sup>194</sup> *The 'Hurtige Hane'* (n 148) 481 (quoted at more length in above Part II(B)).

‘their observance’) and accepted the norm as law (it was familiar to ‘their knowledge’), even if they did not consciously recognise the norm as applicable to their relations with each other. The body of customary norms applicable between them was thus the *common core* of norms that both sides followed and accepted.<sup>195</sup> This gives a meaning to the insistence of Western scholars that international law applied to them to varying extents, but it is not as tightly shackled to anthropologically dubious or racist explanations of that result. Instead, the result follows from the same principle — consent — that was said to give rise to positive international law generally.

Was a norm about sovereignty part of the common core of norms that were followed and accepted both by Britain and by the peoples of Australia before colonisation?

A summary of the British stance, consistent with cases that I have cited, such as that of Lobengula, can be found in Smith’s analysis of Britain’s relations with ‘tribal communities’.<sup>196</sup> Smith adverts to the ‘controversy as to how far the law of nations is applicable to the relations between European powers and communities outside the range of European civilisation’<sup>197</sup> and to ‘the degree of civilisation and stability necessary’.<sup>198</sup> He then continues:

The modern practice of Great Britain makes it clear that in her view this is the real test. ... [T]he general principle sufficiently appears in the papers which deal with the relations between Great Britain and the Maori tribes before the annexation of New Zealand. From these we see that in a proper case European states may act on the assumption that an aboriginal community, organised upon a tribal basis, may be regarded as an independent subject of the law of nations.<sup>199</sup>

‘Independent’ in this context may imply sovereign; this is reinforced by the fact that Britain used both terms to describe the Māori.<sup>200</sup> This could, of course, be read as supporting the naturalist-legislative position. But I am conducting the present part of the discussion on the premise that the contractual position is correct. On that premise, the British stance might be taken to reflect the contractual position: Britain acted on the basis that ‘an aboriginal community, organised upon a tribal basis’,<sup>201</sup> was sovereign, with effect relative to other entities that accepted that.

That leaves the Australian stance. In justifying this investigation, I quoted from the Uluru Statement from the Heart, according to which Aboriginal and Torres Strait Islander peoples were ‘sovereign Nations’ under their ‘own laws and customs’.<sup>202</sup> The views of Western social scientists support this — and that

<sup>195</sup> An analogy might be drawn with the situation where two states make declarations accepting the jurisdiction of the ICJ but each state imposes different conditions. The Court has jurisdiction between the two states ‘only to the extent to which the Declarations coincide in conferring it’, which represents ‘the common will of the Parties’: *Certain Norwegian Loans (France v Norway)* [1957] ICJ Rep 9, 23.

<sup>196</sup> Smith (n 110) 30–1.

<sup>197</sup> *Ibid* 30.

<sup>198</sup> *Ibid* 31.

<sup>199</sup> *Ibid*.

<sup>200</sup> Letter from the Marquis of Normanby to Captain Hobson, 14 August 1839, reproduced in *Correspondence with New Zealand Secretary of State* (n 177) 37.

<sup>201</sup> Smith (n 110) 31.

<sup>202</sup> *Final Report of the Referendum Council* (n 26) i.

includes views expressed during or soon after the relevant period. In 1889, AW Howitt gave an example from what is now central Queensland:

The Wakelbura tribe as a whole occupies a certain defined tract of country, which forms its hunting and food grounds, and which it claims exclusively, not admitting the right of any other tribe or any other individuals to use it unless when they happened to be within its boundaries as the visitors of the Wakelbura.<sup>203</sup>

This claim to exclude others is comparable to what international lawyers describe as exclusive jurisdiction over territory, which I identified as the essence of sovereignty as I am using the term.<sup>204</sup> In a book of 1910, intended to synthesise earlier work on the topic, Gerald Wheeler included a chapter called ‘Territorial Sovereignty’ in which he cited examples from across Australia.<sup>205</sup> He affirmed that ‘[e]ach tribe occupies a defined tract of country, and the members have the exclusive right to all the game and products found within this area, with such restrictions as are involved by the rights of intratribal groups or of individuals’.<sup>206</sup> He went on to draw this highly pertinent conclusion:

The evidence we have been able to collect from the Australian tribes shows us many of the ideas of International Law clearly developed — territorial sovereignty, the sacredness of messengers and envoys, a normal and recognized intercourse over wide areas through intermarriage and the exchange of commodities, and the existence in many cases of the rights of asylum, domicilement, and hospitality. ... The ordinary method of settling all disputes, even in questions of murder, between the local groups has been found to be one or other of the forms of a strictly regulated justice.<sup>207</sup>

Lest this be dismissed as a conception merely of domestic law, Wheeler emphasised that ‘in Australia we have a very early stage in the differentiation of intergroup from intragroup justice’<sup>208</sup> (corresponding with the distinction between interstate justice and justice within states) and that ‘[w]e may hold this to be the earliest stage in what is known as International Law’.<sup>209</sup>

It appears, then, insofar as a generalisation can be made about the diverse peoples of Australia, that both elements of consent on the liberal approach are present: peoples followed a norm according to which they had sovereignty; and they accepted this norm as law in an identifiably international sense rather than a domestic sense.

The ingredients for a customary norm that these peoples had sovereignty — applicable between each people and Britain on the basis of a liberal approach to consent — are now all present. Since I have found the liberal variant of the

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<sup>203</sup> AW Howitt, ‘On the Organisation of Australian Tribes’ (1889) 1 *Transactions of the Royal Society of Victoria* 96, 101.

<sup>204</sup> See above Part II.

<sup>205</sup> Wheeler (n 1) ch 4.

<sup>206</sup> *Ibid* 62. He attributed these territorial rights to the ‘tribe’ as a whole. But he observed that ‘the assertion of the tribal sovereignty always takes place in the form of the assertion of its own sovereignty by each intratribal local group; the tribe does not act as a whole’: *ibid*. So it may be debatable whether sovereignty in the relevant international legal sense belonged to the ‘tribe’ or belonged to the ‘local group’ or was divided between them. But for present purposes, this does not matter; it is enough that sovereignty belonged to one or the other or both.

<sup>207</sup> *Ibid* 160.

<sup>208</sup> *Ibid* 163.

<sup>209</sup> *Ibid*.

contractual position to be more convincing than the alternative rigid variant, I conclude that, if the contractual position is correct, then the peoples of Australia probably had sovereignty relative to Britain before colonisation.

### III A CONCLUSION ON SOVEREIGNTY

Of the positions that might be taken on the status of the supposedly least ‘civilised’ peoples, I have eliminated only one: the preclusive position. Among my reasons for rejecting it was the affirmative evidence that at least some peoples in this category — among them the Maasai, Lobengula’s people, and the Māori — had sovereignty. This evidence does not indicate which is correct out of the two remaining positions, because it can be explained by either of them. The naturalist-legislative explanation is that these were all socially and politically organised peoples: a test of factual effectiveness. The contractual explanation is that they and the relevant Western state both consented specifically to a norm under which they had sovereignty. I have not been able to decide between these positions. It may not even be meaningful in principle to say that one was ‘correct’ and the other ‘incorrect’, because the law was uncertain, inconsistent and unstable. If I were to commit to just one of them, my argument would be open to attack on the ground that I would be neglecting the other.

Yet I have cited evidence that at least some of the supposedly least ‘civilised’ peoples had sovereignty, and that evidence calls for an explanation one way or other. The law was uncertain, inconsistent and unstable only within limits: the possibilities can be narrowed to those that can be reconciled with the theory and practice of the time. Furthermore, it appears that pre-colonial peoples of Australia had sovereignty either way. This means that I can proceed on the basis that *either* one of these positions *or* the other must have been correct (or that both were correct at different points in time during the period). These two positions are actually stronger in combination than either one is alone, for the following reason. It was seen that the liberal contractual test of sovereignty largely turns on whether a people followed and accepted a norm about sovereignty. That is so close to the naturalist-legislative test and the terra nullius test that all these tests might in practice be assimilated: any socially and politically organised people might be presumed to have some notion of sovereignty. The contractual view of custom can thus be added to natural law and the legislative view of custom as yet another theoretical justification for the same practical result. Much of the uncertainty now becomes explicable and excusable, because in practice it did not matter which justification was correct; the debate was purely academic (although note that I have only established that this is true of a norm about sovereignty; when applied to other norms, the different positions might have different results).

My conclusion here comes with qualifications. I repeat that I am speaking at a general level and only in terms of the strength of the argument.<sup>210</sup> Little can be said on this topic that is entirely categorical: it is too complex. In particular, although I found the liberal variant of the contractual position to be the more convincing one and have reasoned on that basis, I did not outright eliminate the rigid variant, which if correct would change the outcome.

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<sup>210</sup> See above Parts I(B), II.

I conclude, then — not with complete certainty, but with a high degree of confidence, as high as can be hoped for — that pre-colonial peoples of Australia generally *did* have sovereignty in international law, at least relative to Britain, in the century from 1788. The idea that in this respect they were comparable to states is evoked by the term ‘First Nations’.<sup>211</sup>

#### IV A CONCLUSION ON INVASION

Establishing that Australia was sovereign territory was like methodically clearing rubble from the road. From here on, it is straightforward to show that this territory was invaded.

Although ‘invasion’ is not a term of art, it has been used frequently and largely consistently by international lawyers — for example, by Vattel.<sup>212</sup> The Argentine jurist Carlos Calvo (writing in French as ‘Charles’), in his dictionary of international law of 1885, gave three overlapping definitions: ‘[o]ccupation by force of the territory of others’; an ‘[i]rruption by an army or a large multitude of people into another land in order to seize it’, as with ‘the invasion of the Roman Empire by the Barbarians’; and ‘the action of invading a country by force of arms, of penetrating it militarily’, which is how ‘[a]ll continental war begins’.<sup>213</sup> Explicit in the first definition is the idea that the territory belongs to someone else. And this is consistent with the other definitions, especially if they are read on the understanding that war, in the sense relevant to historical international law, usually meant war between sovereign entities (not with a non-sovereign group of individuals).<sup>214</sup> Thus, in the international legal language of the period, the central meaning of ‘invasion’ was the entry by force by one sovereign entity into the territory of another sovereign entity.

It may be at least arguable that in a small number of Australian territories no invasion occurred in this strict sense. First, some territories were ‘clear[ed]’ for the later advance of pioneers by smallpox, a disease introduced by the British that spread ahead of them.<sup>215</sup> If the social and political structure in any of these territories collapsed before the British themselves arrived, with the result that there was no longer an existing sovereign, it might be argued that there was no invasion in the central sense of the word. Secondly, at least one area was already uninhabited before any Europeans set foot in Australia: the island that the Kurna called Karta and that the Ngarrindjeri considered the ‘land of the dead’ (renamed Kangaroo Island).<sup>216</sup> And thirdly, there may be territories that were appropriated

<sup>211</sup> See also my remarks about that term in above Part II.

<sup>212</sup> Vattel (n 43) 206, 364, 515, 527.

<sup>213</sup> Charles Calvo, *Dictionnaire de droit international public et privé* (Puttkammer & Muhlbrecht, 1885) vol 1, 297, 403. The dictionary actually includes entries for two French words that mean ‘invasion’ and that share an etymology: *envahissement* (from the verb form *envahir*) and *invasion*. The two entries are cross-referenced. The first definition I have given is of *envahissement*; the others are of *invasion*.

<sup>214</sup> See, eg, L Oppenheim, *International Law: A Treatise* (Longmans, Green and Co, 1905–06) vol 2 (*‘Oppenheim’s International Law Vol 2’*). ‘To be considered war, the contention must be going on *between States*’: at 58 (emphasis in original).

<sup>215</sup> Janet McCalman and Rebecca Kippen, ‘Population and Health’ in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 1, 294, 294–6.

<sup>216</sup> Rebe Taylor, *Unearthed: The Aboriginal Tasmanians of Kangaroo Island* (Wakefield Press, 2002) 19–20.

by squatters or other private individuals ‘without the imprimatur of the state’:<sup>217</sup> if and insofar as this private conduct was not legally attributable to Britain, arguably it was not an invasion by one sovereign entity of the territory of another.<sup>218</sup> This last possibility may be less noteworthy than the others, because it may still qualify as an invasion in one of the senses mentioned by Calvo: an ‘[i]rruption by ... a large multitude of people’ seeking land, such as the ‘barbarians’ of classical Roman times.<sup>219</sup>

In any case, any territories of these types that may have existed are localised exceptions. Elsewhere, colonisation was achieved by the British state while the existing sovereigns were still present on the territory — and often actively defending it.<sup>220</sup> Especially at the beginning of the process, colonisation even had an overt element of military force. The First Fleet in 1788 was commanded by Arthur Phillip of the Royal Navy and included two warships (*HMS Sirius* and *HMS Supply*) and more than 200 officers and marines.<sup>221</sup>

I conclude that it is legally accurate to say, as a general statement about the whole continent, that the British colonisation of Australia was an ‘invasion’ of sovereign territory.

Two caveats must be made about this conclusion.

The first is that in 1788 and the following century, invasion was not necessarily *unlawful*. Western states invaded each other frequently; the general prohibition on the use of force had not yet entered international law.<sup>222</sup> A particular invasion might have been unlawful, though scholarly views about this differed. The traditional ‘just war’ theory was that ‘[t]he right of employing force, or making war, belongs to nations no farther than is necessary for their own defence and for the maintenance of their rights’;<sup>223</sup> an additional requirement of a war to maintain rights was said to be a ‘declaration of war’ setting forth the justification.<sup>224</sup> Later positivists such as Oppenheim were sceptical of this theory.<sup>225</sup> Oppenheim, nonetheless, thought there was a minimal expectation: ‘negotiation must precede war’;<sup>226</sup> there was ‘no greater violation of the Law of Nations’ than starting a war

<sup>217</sup> Lisa Ford and David Andrew Roberts, ‘Expansion, 1820–50’ in Alison Bashford and Stuart Macintyre (eds), *The Cambridge History of Australia* (Cambridge University Press, 2013) vol 1, 121, 129.

<sup>218</sup> On the historical norms about when conduct by private individuals was attributable to the state, see Clyde Eagleton, *The Responsibility of States in International Law* (New York University Press, 1928) ch 1. As with other norms, it is not obvious whether these would have applied between Britain and the peoples of Australia.

<sup>219</sup> Calvo (n 213) 403.

<sup>220</sup> See generally Bain Attwood and SG Foster (eds), *Frontier Conflict: The Australian Experience* (National Museum of Australia, 2003).

<sup>221</sup> Manning Clark, *A History of Australia: From the Earliest Times to 1838* (Melbourne University Press, 1962) vols 1–2 76. See also Reynolds, *Aboriginal Sovereignty* (n 52) 101–4.

<sup>222</sup> See Randall Lesaffer, ‘Too Much History: From War as Sanction to the Sanctioning of War’ in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Oxford University Press, 2015) 35.

<sup>223</sup> This was the view of Vattel (n 43) 483.

<sup>224</sup> *Ibid* 484, 501. A defensive war did not require a declaration: 503. For further examples, illustrating the diversity of views over the relevant period, see Lesaffer (n 222).

<sup>225</sup> *Oppenheim’s International Law Vol 2* (n 214) 69.

<sup>226</sup> *Ibid* 103 (citations omitted).

without attempting negotiation.<sup>227</sup> Britain did not invade Australia in self-defence or to maintain rights that it set forth in a declaration of war; nor did it try to negotiate. It is true that Phillip was instructed ‘to endeavour ... to open an intercourse with the natives and to conciliate their affections’.<sup>228</sup> But insofar as this was done, it was an attempt to ‘conciliate’ *after* invading, not to negotiate in advance. So it is conceivable that the British invasion was unlawful.<sup>229</sup> A conclusion about this, however, would require a more detailed analysis that can fit within the scope of the current discussion. Among other things, one might have to identify what norms about war and responsibility applied between Britain and the peoples of Australia, and that might be difficult given the uncertainty about something as basic as sovereignty.

The second caveat is that, during the century from 1788, a claim that a state had acquired sovereignty over territory that it had invaded (regardless of whether the particular invasion was unlawful) was not necessarily *invalid*. Earlier I alluded to several means by which a state could acquire territory that was not terra nullius. One was conquest. Lindley observed that ultimately international law could not prevent ‘a forcible expropriation of the natives’ of a territory:<sup>230</sup> ‘[a]ll it can do ..., in the absence of consent on the part of the natives, [is to] leave a State to justify its acquisition to public opinion as a conquest’.<sup>231</sup> Another means of acquiring sovereignty was by ‘prescription’, which is where territory remains under ‘continuous and undisturbed dominion during a period sufficient to justify the assumption that the position has become part of the established international order’.<sup>232</sup> So my conclusion does not necessarily cast doubt on Britain’s claims of sovereignty over the various parts of Australia following the invasion. All that can be inferred is that Britain could not have become the new sovereign by occupation of terra nullius; it could have done so only by a process of conquest and possibly prescription that began in 1788 and might have continued into the late 19<sup>th</sup> century.<sup>233</sup>

The full consequences of my conclusion for the acquisition of sovereignty and for who had sovereignty in later periods, like the consequences for the lawfulness of Britain’s conduct, go beyond the scope of this article; they might be a topic for future scholarship.

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<sup>227</sup> Ibid 105.

<sup>228</sup> ‘Governor Phillip’s Instructions, 25 April 1787’, in Frederick Watson (ed), *Historical Records of Australia* vol 1 (Library Committee of the Commonwealth Parliament, 1914) 9, 13–14.

<sup>229</sup> In territories where war did not occur (or elsewhere in the period before it broke out), some of the ‘peacetime’ norms of international law might have applied between Britain and peoples of Australia. See, eg, *Oppenheim’s International Law Vol 1* (n 47) 172–3 (citations omitted): in peacetime each state had ‘to abstain ... from any act which contains a violation of another State’s independence or territorial and personal supremacy’; among other things, it could not ‘send its troops ... through foreign territory’ or ‘exercise an act of administration or jurisdiction on foreign territory, without permission’. So, an additional theoretical possibility is that Britain violated norms such as these.

<sup>230</sup> Lindley (n 59) 47.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid 2.

<sup>233</sup> Cf Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, 1986) paras 66–7. See also Reynolds, *Aboriginal Sovereignty* (n 52) ch 5 (on how Australia ‘became British’), 4–8 (on claims that Aboriginal peoples retained sovereignty after colonisation).

What I set out to do in this article, however, was to analyse the legal situation of the past in a manner that might potentially influence discussions about the colonisation of Australia, even if only in a limited way. I have considered whether Britain invaded sovereign territory in the strict doctrinal sense of the international law of the period. I have found, with as high a degree of confidence as can be hoped for, that Australia was sovereign territory. And that has led me straightforwardly to the conclusion that ‘invasion’ is a legally accurate description of what the British did: it reflects the central meaning of the word in the usage of international lawyers of the time. I repeat here that this is only a particular parochial legal perspective; I am not claiming that it is more objectively ‘true’ than other accounts or suggesting that it has priority over the perspectives of colonised peoples themselves. But the word ‘invasion’ might, in a sense, be called a neutral description: it accords with perceptions of Aboriginal and Torres Strait Islander peoples while also being consistent with a system of law that was accepted as binding by the British at the time and that in an evolved form is now accepted around the world.

Discussions about the colonisation of Australia can be had on this footing: that it was an invasion of sovereign territory in a legal sense, in addition to any historical, moral, or political sense, and this is despite the fact that the international law of the time was shaped by and for the colonisers and was often Eurocentric or racist — even from *that* perspective.