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Jousting Over Jurisdiction: Sovereignty and International Law in Late Nineteenth-Century South Asia

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In 1879, the Government of India passed the Elephant Preservation Act mandating that individuals acquire a government-issued licence to engage in the capture of wild elephants. A year later, it promulgated a set of rules to make the British Indian legislation applicable to an area that included Keonjhar,[1] one of the 600-odd "princely states" that covered about two-fifths of the area and one-third of the population of South Asia under British rule.[2] The princely states were ruled by indigenous rulers and were legally distinct from directly-ruled British India.[3] The relationship between the states and the British Government[4] was mediated by political officers who were posted at the states' courts to "advise" the princes on how to rule, while the Government of India exercised certain functions, such as defence and external affairs, on the princes' behalf.[5] Despite being subject to British "influence," Dhanurjai Narayan Bhanj Deo, the

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[1] Letter from the Superintendent, Orissa Tributary Mahals to the Political Secretary, Government of Bengal, 15 May 1882, IOR/P/2034, Proceedings of the Government of Bengal in the Political Department, June 1883, no. 26. In this article, I use material from the India Office Records, Asia, Pacific, and Africa Collections, British Library, London (IOR); European Manuscripts, Asia, Pacific, and Africa Collections, British Library, London (Mss Eur); and the National Archives of India, New Delhi (NAI).

[2] These statistics exclude Burma and Ceylon. The exact number of princely states varied over time and the very category of "princely state" remained contested. See Ian Copland, *The Princes of India in the Endgame of Empire, 1917-1947* (Cambridge: Cambridge University Press, 1997), 8; and Barbara Ramusack, *The Indian Princes and their States* (Cambridge: Cambridge University Press, 2004), 2.

[3] British India was directly administered by the British Crown through the Viceroy and Governor-General, who was the executive head of the Government of India and subject to the control of Parliament through the Secretary of State for India, a member of the British cabinet.

[4] I use the term "British Government" to refer to various levels of British authority with respect to South Asia, including the Crown, the Secretary of State for India, the India Office in London, the Government of India, the Governments of various British Indian provinces, and British political officers in the princely states.

[5] Ramusack, *The Indian Princes and their States*, 53. For analyses of the early development and working of this system, see K. N. Panikkar, *British Diplomacy in North India: A Study of the Delhi Residency, 1803-1857* (New Delhi: Associated Publishing House, 1968); Michael H. Fisher, *Indirect Rule in India: Residents and the Residency System, 1764-1858* (Bombay: Oxford University Press, 1991); and Michael H. Fisher, "Diplomacy in India, 1526-

maharaja (ruler) of Keonjhar, vociferously protested the Government of India's move, arguing that he had an "absolute" right to capture elephants found within his territory without requiring a licence issued by a British Indian authority. British Indian legislation, he contended, did not apply to the princely states on account of their separate legal status; any extension of such laws would breach the treaties made by the British with his predecessors and the *sanads* (British decrees offering protection to an Indian prince) issued to him.[6]

We can read this vignette in a number of ways: as an anecdote about the decadent lives of the Indian princes, obsessed with activities like hunting and typecast as "Oriental despots" by the British; as a tale of defiance by a high-minded *maharaja* against the might of the British Empire; or as an account of a contretemps between a princely state and the British Government over crucial natural resources.[7] But the case, like scores of others in a legally uneven empire,[8] raised broader questions about the legal status of the princely states and the nature and extent of the powers exercised by the princes and the British Government. These issues remained deeply controversial and heavily debated throughout colonial rule. What was the nature of the relationship among the state of Keonjhar, the Government of India, and the British Crown? Did the British have the right to prevent the *maharaja* of Keonjhar from capturing elephants within his territory? What rights did the *maharaja* enjoy within his own territory, in British India, and in Britain? Conversely, what powers did the British exercise within Keonjhar territory? What law governed the relationship between the princely states and the British Government – national, imperial, or international law? Even a seemingly innocuous dispute over elephants raised tangled questions of sovereignty, of empire, and of international law.

Using two late nineteenth-century disputes (over criminal jurisdiction and over jurisdiction over telegraph lines) as case studies, I examine debates over the legal status of the princely states to tease out insights for the broader history of the doctrine of sovereignty. Delving

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1858," in *Britain's Oceanic Empire: Atlantic and Indian Ocean Worlds, c. 1550-1850*, ed. H. V. Bowen, Elizabeth Mancke, and John G. Reid (Cambridge: Cambridge University Press, 2012), 249-81.

[6] Letter from the *maharaja* of Keonjhar to the Superintendent, Orissa Tributary Mahals, 4 January 1882, IOR/P/2034, Proceedings of the Government of Bengal in the Political Department, June 1883, no. 26.

[7] For a discussion of the economic significance of elephants, see Vijaya Ramadas Mandala, "The Raj and the Paradoxes of Wildlife Conservation: British Attitudes and Expediencies," *The Historical Journal* 58 (2015): 101-109.

[8] The British Empire was an assemblage of disparate legal entities over which the British exercised different levels of sovereign power. By the early twentieth century, when the Empire reached its greatest extent, these territories included dominions, colonies, protectorates, protected states, and mandates. For an overview of the differences in the legal positions of these entities, see Arthur Berriedale Keith, *The Governments of the British Empire* (London: Macmillan and Co., 1935).

into the legal arguments made by British colonial officials and princely state representatives, I trace the two diametrically opposed conceptions of sovereignty articulated in these jurisdictional conflicts: divisible and flexible or absolute and territorial. As I will elucidate later in this article, analysing both British and princely legal contentions illustrates the "doubled" nature of sovereignty as a concept that was and remains inherently capable of being defined in two ways.[9] By invoking the language of sovereignty in contrasting ways to support their differing visions of global order, British and princely state officials also attempted to reconfigure the boundaries among "national," "imperial," and "international" law. Exploring these disputes and debates is, therefore, key to understanding international law itself.

Scholars have long noted the significance of interrogating the jurisdictional politics of empire to understand the creation of the modern state-dominated international legal order.[10] In colonial South Asia too, as the Keonjhar case demonstrates, controversy over the scope of rights and the degree of powers in the context of the princely states was rife and generated a series of jurisdictional disputes[11] that became linked to broader questions about whether and to what extent the princely states were "sovereign states" or simply "hollow crowns,"[12] and the extent of

[9] Relying on the idea of linguistic indeterminacy, American legal realists have long argued that law is mutable, a product of human will, and a means to achieve social goals. See the overview in Hugh Collins, "Law as Politics: Progressive American Perspectives," in *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, ed. James Penner, David Schiff, and Richard Nobles (London: LexisNexis Butterworths, 2002), 279-333.

[10] In her pioneering work on jurisdictional disputes in legally diverse empires, Lauren Benton argues that plural legal orders in which individual litigants attempted to take advantage of imperial fragmentation gave way in the nineteenth century to a state-dominated order as engagement with the state's legal institutions reinforced the authority of the colonial state itself. See Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge: Cambridge University Press, 2002), 148-49.

[11] Lauren Benton provides an overview of the struggles of British officials to classify the princely states by analysing a late nineteenth-century crisis in the state of Baroda. See Lauren Benton, "From International Law to Imperial Constitutions: The Problem of Quasi-Sovereignty, 1870-1900," *Law and History Review* 26 (2008): 595-619. She also discusses these endeavours, linking them with the discourse about the backwardness of hill regions, in Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (New York: Cambridge University Press, 2010), 222-78. Eric Lewis Beverley traces jurisdictional conflicts along the border between the state of Hyderabad and Bombay in British India as well as Hyderabadi attempts to assert sovereignty over urban spaces. See Eric Lewis Beverley, *Hyderabad, British India, and the World: Muslim Networks and Minor Sovereignty, c. 1850-1950* (Cambridge: Cambridge University Press, 2015), 186-255. Beyond the princely states, there is also work on the disputes generated by the lumpiness of sovereignty in the frontier regions of British India. See Christoph Bergmann, "Confluent Territories and Overlapping Sovereignties: Britain's Nineteenth-Century Indian Empire in the Kumaon Himalaya," *Journal of Historical Geography* 51 (2016): 88-98; and Reeju Ray, "Interrupted Sovereignties in the North East Frontier of British India, 1787-1870," *Modern Asian Studies* 53 (2019): 606-32.

[12] In an early influential study, Nicholas Dirks argued that British colonialism preserved only the appearance of the pre-colonial regime, while there was a total collapse of earlier political structures and processes. The crown, he contended, was "hollow" and the princely states were reduced to "theatre states" obsessed with the symbols of past glory. See Nicholas Dirks, *The Hollow Crown: Ethnohistory of an Indian Kingdom* (Cambridge: Cambridge University Press, 1987). For a more recent study making a similar argument, see Bhangya Bhukya, "The

British "paramountcy"[13] in the region. As a result, schemas of sovereignty became particularly significant in defining the relationship between the princely states and the British Government.

The concept of sovereignty lies at the heart of much of the contemporary literature on the relationship between international law and empire.[14] During the "age of empire,"[15] many international lawyers envisaged a world composed of states that were recognized as "civilized" by those already part of the international community. Late nineteenth-century international law, then, was structured around the dichotomy between "civilized" Europe and the "uncivilized" non-European "other," with sovereignty being defined so as to exclude non-Europeans.[16] As Lauren Benton notes, this conceptualization did not clarify how entities like the princely states

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Subordination of the Sovereigns: Colonialism and the Gond Rajas in Central India, 1818-1948," *Modern Asian Studies* 47 (2013): 288-317. Other histories have more complicated notions of indigenous agency, the state, and sovereignty. Some scholars argue that the princely states provided the quintessential example of indigenous resistance to colonialism. See Hira Singh, *Colonial Hegemony and Popular Resistance: Princes, Peasants, and Paramount Power* (New Delhi: Sage Publications, 1998). Another stream of scholarship focuses on the construction of "alternative modernities" in the princely states through the centralization of power and include the attempts of several states to manoeuvre the partial autonomy they enjoyed in the colonial context. See Shail Mayaram, *Resisting Regimes: Myth, Memory and the Shaping of a Muslim Identity* (New Delhi: Oxford University Press, 1997); Manu Bhagavan, *Sovereign Spheres: Princes, Education, and Empire in Colonial India* (Oxford: Oxford University Press, 2003); Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights and the History of Kashmir* (Princeton, NJ: Princeton University Press, 2004); Janaki Nair, *Mysore Modern: Rethinking the Region under Princely Rule* (New Delhi: Orient BlackSwan, 2012); and Beverley, *Hyderabad, British India, and the World*.

[13] The doctrine of paramountcy can be traced to treaties that the English East India Company signed with some rulers in the early nineteenth century. Many treaties involved an acknowledgement by the states of British overlordship (for instance, a cession of the right to engage in diplomacy with foreign powers to the Company) in return for a measure of state autonomy. Later, this idea of overlordship found expression in the doctrine of paramountcy, which became the basis of British relations with all princely states regardless of whether a treaty had been signed. By virtue of being the self-declared "paramount power," the British claimed to possess both the right and responsibility to take decisions on issues such as defence and external affairs, and also to interfere in the internal affairs of the states to maintain peace in the region. See Fisher, "Diplomacy in India," 251, 260-64.

[14] Early scholarship examining this relationship focused on the role played by international law in the subordination of non-European peoples. See C. H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries)* (Oxford: Clarendon Press, 1967); T. O. Elias, *Africa and the Development of International Law* (Leiden: A. W. Sijthoff, 1972); and R. P. Anand, *New States and International Law* (New Delhi: Vikas Publications, 1972). Starting with Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (New York: Cambridge University Press, 2005), the focus of critical scholarship has shifted to examining the effect that colonialism has had on the construction of international law doctrines like sovereignty. See, for instance, Duncan Bell, ed., *Victorian Visions of Global Order: Empire and International Relations in Nineteenth-Century Political Thought* (Cambridge: Cambridge University Press, 2007); Benton, *A Search for Sovereignty*; Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History, 1842-1933* (Cambridge: Cambridge University Press, 2014); Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law, 1800-1850* (Cambridge, MA: Harvard University Press, 2016); Luis Eslava, Michael Fakhri, and Vasuki Nesiah, ed., *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge: Cambridge University Press, 2017); and Jennifer Pitts, *Boundaries of the International: Law and Empire* (Cambridge, MA: Harvard University Press, 2018).

[15] I borrow this term from Eric Hobsbawm. See Eric Hobsbawm, *The Age of Empire: 1875-1914* (New York: Pantheon Books, 1987).

[16] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 33-35.

(and other similar sub-imperial polities), which both exercised sovereign powers and were subject to imperial authority, fit within the broader configuration.[17] Benton argues that when faced with this problem, British colonial officials such as Henry Maine and Charles Lewis Tupper created a new jurisprudence of "imperial law" with distinctive qualities; it was "a hybrid of municipal law and international law that could encompass divided sovereignty."[18] In this scheme, "[r]ather than signifying a quality that a state either possessed or failed to retain, sovereignty could be held by degrees, with full sovereignty reserved for the imperial power."[19] The construction of "imperial law," however, did not resolve questions of sovereignty or the significance of international law for the princely states. Instead, the legal wrangle over their international status continued into the twentieth century.[20] As Stephen Legg observes, these debates gained traction in the context of India's entry into the League of Nations and the controversy over whether international conventions applied to the princely states.[21]

Amidst these jurisdictional tangles, scholars have traced British attempts to define sovereignty in a manner that would enable paramountcy to ultimately reside with the colonial state. Ian Copland and Barbara Ramusack describe how the legal manoeuvres of late nineteenth-century colonial officials stripped the princely states of much of their sovereignty.[22] Lauren Benton argues that the British advocacy of "divisible" sovereignty often occasioned the "outright

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[17] Benton, *A Search for Sovereignty*, 238.
[18] Benton, *A Search for Sovereignty*, 294.
[19] Benton, *A Search for Sovereignty*, 245. For the argument that sovereignty was consolidated, albeit only for the "last five minutes" of the nineteenth century, into an abstract idea in terms of which it was absolute, exclusive within its territory, excluding other, overlapping authorities, and thereby an "on/off affair," see David Kennedy, "International Law and the Nineteenth Century: History of an Illusion," *Quinnipiac Law Review* 17 (1997-1998): 99-138.
[20] Eric Beverley makes this point in relation to the state of Hyderabad. See Beverley, *Hyderabad, British India, and the World*, 54-72.
[21] Stephen Legg, "An International Anomaly? Sovereignty, the League of Nations and India's Princely Geographies," *Journal of Historical Geography* 43 (2014): 96-110. There were also questions about the position of the states within the broader constitutional scheme of India, particularly during the federation discussions of the 1930s. For a review of the stances of the various parties in this debate, particularly on the issue of the states' sovereignty, see Andrew Muldoon, *Empire, Politics and the Creation of the 1935 India Act* (Farnham: Ashgate, 2009); Sarath Pillai, "Fragmenting the Nation: Divisible Sovereignty and Travancore's Quest for Federal Independence," *Law and History Review* 34 (2016): 743-82; Rama Sundari Mantena, "Anticolonialism and Federation in Colonial India," *Ab Imperio* (2018): 36-62; Kavita Saraswathi Datla, "Sovereignty and the End of Empire: The Transition to Independence in Colonial Hyderabad," *Ab Imperio* (2018): 63-88; and Sunil Purushotham, "Federating the Raj: Hyderabad, Sovereign Kingship, and Partition," *Modern Asian Studies* (forthcoming), https://doi.org/10.1017/S0026749X17000981 (accessed August 23, 2019).
[22] Ian Copland, *The British Raj and the Indian Princes: Paramountcy in Western India, 1857-1930* (Bombay: Orient Longman, 1982), 211-21; Copland, *The Princes of India in the Endgame of Empire*, 19-20; and Ramusack, *The Indian Princes and their States*, 92-97.

suspension of law;"[23] quasi-sovereign entities such as the princely states, therefore, were examples of "anomalous legal spaces, where imperial law applied differently – and sometimes not at all."[24] These views, however, capture only one side of the legal debates; the states' responses to the endeavours of colonial officials, although sometimes alluded to, remain largely unmapped. Benton, for instance, touches on legal arguments made by the states but does not explore them in depth.[25] Legal language, however, was a feature of arguments made by both the British and the princes in these jurisdictional conflicts.

This all-round reliance on legal language was facilitated by the lack of a clear boundary between the "imperial" and "international" spheres in late nineteenth-century legal thought. The consequences of this fluidity were significant; I argue that it enabled a variety of interested players, including international lawyers, British politicians, colonial officials, rulers of princely states, and their advisors, to appropriate international legal language in different ways during the course of jurisdictional disputes. Specifically, these actors articulated differing versions of the idea of sovereignty to resolve questions of legal status, the extent of rights, and the proper exercise of powers, and also to construct a political order that was in line with their interests and aspirations. In the process of "jousting over jurisdiction,"[26] therefore, both the princely states and the British Government considered the concept of "sovereignty" to be the tool and the terrain of legal and political struggle.[27] So it is only by exploring both British and princely articulations of sovereignty that we can understand the work that international law and legal language performed in the colonial context. Examining this complex history is, I argue, critical to understanding the doubled nature of sovereignty and the stakes of international law itself.

To trace these varied iterations of sovereignty, I examine legal texts authored by

[23] Benton, *A Search for Sovereignty*, 241.
[24] Benton, "From International Law to Imperial Constitutions," 600.
[25] Benton, *A Search for Sovereignty*, 265.
[26] This is inspired by Lauren Benton's use of the term "jurisdictional jockeying." She uses it to describe both the competition among colonial authorities to gain jurisdiction over disputes and the strategic use of institutional gaps by litigants in their own favour. See Benton, *Law and Colonial Cultures*, 2-33. I prefer to use "jurisdictional jousting" in order to provide a clearer focus on the competition among state authorities (i.e. the princely states and the British Government) over jurisdiction rather than actions of forum shopping in which a number of low-level participants engaged in the imperial world. Mitra Sharafi also takes inspiration from Benton but prefers to use the term "jurisdictional jostling" to describe forum shopping in order to emphasize "the often clumsy nature of these moves," as in her view, the term "jockeying" implies "a certain amount of skill." See Mitra Sharafi, "The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda," *Law and History Review* 28 (2010): 981.
[27] I am influenced by E. P. Thompson's idea of law constituting a site of conflict where the aristocracy and the plebians engaged in battles to redefine the nature of property rights. See E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Allen Lane, 1975), 261-69.

nineteenth-century British international lawyers and colonial officials as well as imperial legal practice, using the arguments made in two jurisdictional disputes between the princely states and the British Government as a fulcrum for analysis.[28] By analysing colonial legal arguments and princely state responses, we can see that there were two opposing conceptions of sovereignty articulated in late nineteenth-century South Asia. British colonial officials, influenced by Henry Maine, argued that sovereignty was "divisible," "flexible," and a "question of historical fact." This understanding allowed the British to rely on the separate legal status of the princely states to maintain them as "allies" in the imperial project, while also affirming the right to intervene in the internal affairs of the states. However, on account of the capacity of sovereignty to be defined in two ways, the princely states were able to weigh in with their own contentions in response to British legal arguments. State representatives argued that sovereignty was "absolute" and "territorial" in order to defend the states' jurisdiction from British interference and also to consolidate control in the effort to construct powerful, centralized administrations; these endeavours were successful to a limited extent. Princes, their political advisors, and state bureaucrats, therefore, played a significant role in negotiating relations between the states and the British colonial power.

By exploring British legal arguments and also bringing the voices of princely state representatives into the conversation on the relationship between sovereignty and empire, I hope to provide fresh perspectives on the role of international legal language in the colonial context and its continuing significance. International law, and the doctrine of sovereignty in particular, I argue, became the shared language for a variety of players in colonial South Asia to discuss political and social problems and to debate and resolve jurisdictional disputes; it was also a key forum for the negotiation of political power, and continues to remain as such.[29]

This article is divided into five parts. First, I discuss the significance of sovereignty in

[28] In considering both legal treatises and imperial legal practice, I follow Lauren Benton and Lisa Ford who assert that international legal language was intricately linked to the everyday administration of the British Empire. See Benton and Ford, *Rage for Order*. For debates on the appropriate methodology for writing histories of international law, particularly on the discussion of the broader "context" within which legal arguments were made in the past, see Anne Orford, "On International Legal Method," *London Review of International Law* 1 (2013): 166-97; Liliana Obregón Tarazona, "Writing International Legal History: An Overview," *Monde(s)* 7 (2015): 95-112; and Lauren Benton, "Beyond Anachronism: Histories of International Law and Global Legal Politics," *Journal of the History of International Law* 21 (2019): 7-40.

[29] I follow Rande Kostal in arguing that law was the language in which disputes over the exercise of political power were carried out across the British Empire. See R. W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

late nineteenth-century international law, tracing the different approaches taken by scholars in the period to the legal status of entities such as the princely states. In particular, I focus on the work of Henry Maine to trace the theoretical basis of the conception of "divisible" sovereignty, which became the legal foundation of the turn in British imperial ideology towards working with local rulers rather than annexing territory. Then, I study the manner in which three colonial officials in the Political Department of the Government of India (Charles Aitchison, Charles Lewis Tupper, and William Lee-Warner) adapted Maine's theory of divisible sovereignty and developed a system of precedent in order to expand British authority over the princely states. After analysing the British understanding of sovereignty, I move toward exploring the approach taken by the princely states in the next two sections of the article. Specifically, I review the princely state conception of "territorial" sovereignty by examining the legal arguments made by state officials in two jurisdictional disputes: the dispute between Travancore and the British Government over criminal jurisdiction over European British subjects and the dispute between Baroda and the British Government over jurisdiction over telegraph lines. In the conclusion, I reflect on the broader significance of these historical debates for understanding the role of sovereignty in the construction of global legal structures and for appreciating the continuing ramifications of the relationship between international law and empire.

The Princely States, Sovereignty, and Late Nineteenth-Century International Law

Defining the "boundaries of the international"[30] has always been a central concern of international law. Contemporary international lawyers, for instance, argue over the entities that constitute the "proper" subjects of international law, including questions such as whether indigenous peoples are to be recognized as peoples entitled to self-determination.[31] Late nineteenth-century international lawyers were engaged in similar debates on the scope and limits of "the international" during a period when empire loomed large[32] over the newly developing

[30] I borrow this term from Jennifer Pitts. See Pitts, *Boundaries of the International*.

[31] See the discussions in Matthew Craven and Rose Parfitt, "Statehood, Self-Determination, and Recognition," in *International Law*, 5th ed., ed. Malcolm D. Evans (Oxford: Oxford University Press, 2018), 177-226; and James Crawford, *Brownlie's Principles of Public International Law*, 9th ed. (Oxford: Oxford University Press, 2019), 105-33.

[32] For instance, John Westlake dedicated three of the eleven chapters of his international law textbook to colonial issues, including an entire chapter to "The Empire of India." See John Westlake, *Chapters on the Principles of International Law* (Cambridge: Cambridge University Press, 1894). Scholars have noted that "the British rarely lost sight of the commanding ambitions of their Empire, which seemed particularly to condition their attitudes to any international juristic order." See William Cornish, "International Law," in *The Oxford History of the Laws of*

field of international law.[33] More specifically, they sought to demarcate the frontiers of the spheres of national, imperial, and international law.

The so-called "standard of civilization,"[34] which limited the applicability of international law to "civilized," primarily European states, provided one solution.[35] For instance, John Westlake, one of the most influential British international lawyers of the time,[36] argued that international society was geographically limited to European and American states, and "a few Christian states in other parts of the world."[37] This was because international law was "social" and had to be "well adapted to the character and circumstances of the men who are to observe it."[38] Westlake's contemporary, the English lawyer William Edward Hall,[39] also thought that international law was "a product of the special civilisation of modern Europe, and forms a highly artificial system of which the principles cannot be supposed to be understood or recognised by countries differently civilised."[40] This view was shared by Thomas Joseph Lawrence, a lawyer and clergyman[41] who argued that international law was a body of rules that "grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome," and then spread to "all civilized communities outside the European boundaries."[42] In the eyes of these scholars, international law was "based on the possession by states of a common and in that

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England, vol. 11, *1820-1914: English Legal System*, ed. William Cornish, J. Stuart Anderson, Raymond Cocks et al (Oxford: Oxford University Press, 2010), 263.

[33] The late nineteenth century is often seen as a formative period in the history of international law. For some, this is because of the "professionalization" of international law through the establishment of associations and chairs at universities. See Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (New York: Cambridge University Press, 2001), 11-97; and Casper Sylvest, "International Law in Nineteenth-Century Britain," *British Year Book of International Law* 75 (2004): 9-70. For others, it is because of changes in doctrine rather than the structure of the profession. See Anghie, *Imperialism, Sovereignty and the Making of International Law*, 32-33; and C. H. Alexandrowicz, "Some Problems in the History of the Law of Nations in Asia," in *The Law of Nations in Global History*, ed. David Armitage and Jennifer Pitts (Oxford: Oxford University Press, 2017), 79-80.

[34] Gerrit Gong, *The Standard of "Civilization" in International Society* (Oxford: Clarendon Press, 1984).

[35] The most comprehensive analysis of the effect of the idea of the "standard of civilization" on the construction of the doctrine of sovereignty in nineteenth-century international law is in Anghie, *Imperialism, Sovereignty and the Making of International Law*, 32-114.

[36] Westlake was appointed Whewell Professor of International Law at Cambridge in 1888. See Nathan Wells, "Westlake, John (1828-1913)," in *Oxford Dictionary of National Biography*, online ed., ed. David Cannadine (Oxford: Oxford University Press, 2004), https://doi.org/10.1093/ref:odnb/36840 (accessed May 23, 2019).

[37] Westlake, *Chapters on the Principles of International Law*, 81.

[38] Westlake, *Chapters on the Principles of International Law*, 80.

[39] T. E. Holland, "Hall, William Edward (1835-1894)," rev. Catherine Pease-Watkin, in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/11997 (accessed May 23, 2019).

[40] William Edward Hall, *International Law* (Oxford: Clarendon Press, 1880), 34.

[41] A. Pearce Higgins, "The Late Doctor T. J. Lawrence," *British Year Book of International Law* 1 (1920-21): 233.

[42] T. J. Lawrence, *The Principles of International Law* (Boston, MA: D. C. Heath & Co., 1895), 4-5, 26.

sense an equal civilization."[43] On account of the "civilized/uncivilized" dichotomy, they drew relatively sharp distinctions between the international and imperial spheres. Westlake argued that the relationship between the princely states and the British Government had "shifted from an international to an imperial basis,"[44] relegating the governance of princely states to imperial constitutional law.[45] Lawrence also claimed that the princely states were "not even part-sovereign" and thereby not subjects of international law."[46] Hall shared this view, noting that entities such as the princely states "are of course not subjects of international law."[47] These jurists then proceeded to devise a series of techniques to "civilize the uncivilized" in order to bring non-European peoples into the realm of international law. The ideological basis of this approach was, as Antony Anghie argues, the idea of expanding European empires for the purpose of educating and improving the lives of the colonized peoples.[48]

In the second half of the nineteenth century, however, justifications of imperial rule based on the idea of the "civilizing mission" were undergoing a broad critique in South Asia, largely on account of the events of 1857. This was the year in which almost the whole of northern India broke out in a widespread and violent revolt, the intensity of which left a deep impression on British administrators. There was broad participation in the revolt, which included a military mutiny, peasant uprisings, and rebellions led by deposed rulers and landlords. The British repressed the revolt after a long and violent siege and transferred control over territories in India from the English East India Company to the Crown. Karuna Mantena notes that prior to the rebellion, "liberal" imperial administrators inspired by the "civilizing mission" had engaged in deeply interventionist modes of rule to radically reconstruct "native societies."[49] This project included the annexation of princely states that, in the opinion of British administrators, had failed to provide "good government" to their subjects. Allegations of misgovernment were brought to

[43] Westlake, *Chapters on the Principles of International Law*, 102-103.
[44] Westlake, *Chapters on the Principles of International Law*, 204.
[45] Lauren Benton argues that Westlake continued to regard international law as having "the power of analogy" in relation to the princely states despite relegating them to the "imperial" field. See Benton, *A Search for Sovereignty*, 239. However, Westlake's contemporaries in South Asia were more circumspect of his views on the princely states and his advocacy of a constitutional tie between the states and the British Government; see, for instance, the discussion on William Lee-Warner below.
[46] Lawrence, *The Principles of International Law*, 68.
[47] Hall, *International Law*, 23n2.
[48] Anghie, *Imperialism, Sovereignty and the Making of International Law*, 96.
[49] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton, NJ: Princeton University Press, 2010), 1-2.

justify the annexations of Jhansi and Awadh,[50] both of which became centres of the uprising in 1857. Consequently, later British administrators attributed the revolt to the "Evangelical zeal of the liberals."[51] The second half of the nineteenth century was, therefore, dominated by an imperial ideology that focused on rule through local rulers, chiefs, and power brokers.[52] The increasingly dominant view within the British establishment was that the rulers of the princely states were "traditional" or "natural" leaders who commanded the respect, loyalty, and obedience of the Indian masses who were immune to earlier projects of reform.[53] However, the language of "good government" and "progress" continued to be employed to rank and rate these rulers.[54]

This change in imperial ideology was facilitated by Henry Maine's nuanced critique of the liberal view of empire. Maine was a leading Victorian jurist; between 1862 and 1869 he was also a prominent member of Britain's colonial administration in India as Law Member in the Council of the Viceroy and Governor-General of India. On his return to England, he was appointed Corpus Professor of Jurisprudence at Oxford; in 1871, he became a member of the Secretary of State's Council of India in London;[55] in 1887, he was elected Whewell Professor of International Law at Cambridge.[56]

As Karuna Mantena notes, Maine was a central figure in the late nineteenth-century reconfiguration of ideas about modernity and progress. He constructed a binary model: ancient societies were based around communities and fractured on contact with imperial rule by societies that had reached later stages of evolution and were focused on the individual. But rather than advocating the end of imperialism, he contended that only the British Empire's dominance could

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[50] Ramusack, *The Indian Princes and their States*, 81-84.

[51] Partha Chatterjee, *The Black Hole of Empire: History of a Global Practice of Power* (Princeton, NJ: Princeton University Press, 2012), 212. For further discussion of the causes and consequences of the revolt, see Thomas Metcalf, *The Aftermath of Revolt: India, 1857-1870* (Princeton, NJ: Princeton University Press, 1964), 219-27; Copland, *The British Raj and the Indian Princes*, 88-98; and Mantena, *Alibis of Empire*, 1-7.

[52] Chatterjee, *The Black Hole of Empire*, 212. For a longer history of the engagement between the princely states and the British Government, and particularly of ideas of sovereignty in the eighteenth century, see Robert Travers, "A British Empire by Treaty in Eighteenth-Century India," in *Empire by Treaty: Negotiating European Expansion, 1600-1900*, ed. Saliha Belmessous (Oxford: Oxford University Press, 2015), 132-60; and Kavita Saraswathi Datla, "The Origins of Indirect Rule in India: Hyderabad and the British Imperial Order," *Law and History Review* 33 (2015): 321-50.

[53] Fisher, "Diplomacy in India," 265; and Mantena, *Alibis of Empire*, 52.

[54] Bhagavan, *Sovereign Spheres*, 3-4.

[55] R. C. J. Cocks, "Maine, Sir Henry James Sumner (1822-1888)," in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/17808 (accessed May 23, 2019).

[56] Maine had considered standing for the Whewell professorship as early as 1867, with a view to having a settled position after his upcoming return to England from India. See George Feaver, *From Status to Contract: A Biography of Sir Henry Maine 1822-1888* (London: Longmans, 1969), 109-10, 255-57.

prevent a further dissolution of "traditional" societies.[57] To prevent further episodes of rebellion that would threaten the stability of the Empire, he argued in favour of "the preservation and incorporation of native institutions into imperial power structures."[58] The princely states were the archetype of such "native" institutions. Since maintaining alliances with entities such as the princely states necessitated their legal recognition in some form, it also required reinterpreting the concept of sovereignty and the nature of the boundary between imperial and international law, drawn so sharply by international law scholars like Westlake, Hall, and Lawrence. Key to this change was Maine's conceptualization of sovereignty as "divisible."[59]

Maine first discussed the concept of sovereignty in an 1855 paper that he delivered before the Juridical Society. There he regretted the tendency of "the great majority of contemporary writers on International Law [to] tacitly assume that the doctrines of their system, founded on the principles of equity and common sense, were capable of being readily reasoned over in every stage of modern civilization" when, in fact, the explanation behind the doctrines was "entirely historical."[60] This historical approach contrasted with what he considered to be the abstract and ahistorical analytical school of jurisprudence, which was predominant in England at the time and was exemplified in the work of John Austin. In his view, Austin's definition of law as "the command of the sovereign" placed an overwhelming emphasis on the coercive power of a sovereign as the source of legal obligation. This position, he argued, was the outcome of abstraction, which neglected "the entire mass of its historical antecedents, which in each community determines how the Sovereign shall exercise or forbear from exercising his irresistible coercive power."[61] The result was that law, as defined by analytical jurisprudence,

[57] Mantena, *Alibis of Empire*, 57, 177.
[58] Mantena, *Alibis of Empire*, 171.
[59] Nearly two decades ago, Carl Landauer pointed out that Maine's multiple biographers rarely paid attention to his ideas on international law. See Carl Landauer, "From Status to Treaty: Henry Sumner Maine's *International Law*," *Canadian Journal of Law and Jurisprudence* 15 (2002): 221. This has changed in recent years, with scholars considering Maine's conception of sovereignty within the context of trends in Victorian international law, in social thought, or in imperial legal practice. See Michael Lobban, "English Approaches to International Law in the Nineteenth Century," in *Time, History and International Law*, ed. Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi (Leiden: Martinus Nijhoff Publishers, 2007), 65-90; Benton, "From International Law to Imperial Constitutions," 603-607; Casper Sylvest, *British Liberal Internationalism, 1880-1930: Making Progress?* (Manchester: Manchester University Press, 2009), 61-100; Benton, *A Search for Sovereignty*, 246-50; Mantena, *Alibis of Empire*, 113-18; and Pitts, *Boundaries of the International*, 148-84.
[60] Henry Sumner Maine, "The Conception of Sovereignty and Its Importance in International Law," *Papers of the Juridical Society* (1855): 40.
[61] Henry Sumner Maine, *Lectures on the Early History of Institutions* (London: John Murray, 1875), 360.

was exclusively the product of coercive force and required the backing of a sanction.[62] Maine argued instead that the link between coercive force and legal obligation was not a logically necessary one, but rather was the product of particular historical and social processes. He contended that sovereignty in Europe was linked to legislative activity on account of the influence of the Roman Empire, which had both legislated and levied taxes. The result of the Roman legacy was the modern social organization of Western Europe: highly centralized, actively legislating, territorially sovereign nation-states.[63] This position, however, was historically exceptional since other ancient empires had raised revenues and armies but had interfered only minimally in the civil and religious life of their subjects.[64] Consequently, other empires had not developed along the lines of centralized Western European states. Maine even doubted the status of the United States, with its "semi-sovereign" constituent states, and the German Confederation.[65]

Relying on the claim of a radical difference between "traditional" societies that were based around local communities (rather than a distant ruler) and "modern," centralized Western European states, Maine rejected the analytical school's insistence on the indivisibility of sovereignty. Instead, he contended that "[t]he powers of sovereigns are a bundle or collection of powers, and they may be separated one from another."[66] Maine sharpened this idea of the "divisibility" of sovereignty in the context of theorizing the relationship between the princely states and the British Government.

In 1864, Maine wrote what was to become a tremendously influential minute on the sovereignty of Kathiawar, the collective name for a number of small princely states in the peninsular region of western India.[67] Before the arrival of the British, the rulers of the Kathiawar states had recognized the supremacy of a succession of overlords, including the *sultans* of Delhi, the Mughals, and the Marathas, through the payment of tribute. In 1820, after a series of

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[62] Maine, *Lectures on the Early History of Institutions*, 363.
[63] Mantena, *Alibis of Empire*, 116.
[64] Maine, *Lectures on the Early History of Institutions*, 383, 389-93.
[65] Henry Sumner Maine, *International Law* (London: John Murray, 1888), 20-21.
[66] Maine, *International Law*, 58.
[67] As the key theoretical basis of the British understanding of princely state sovereignty, Maine's minute has received considerable scholarly attention. It is extracted as one of the main documents defining the relationship between the princely states and the British Government in Adrian Sever, ed., *Documents and Speeches on the Indian Princely States*, vol. 1 (Delhi: B. R. Publishing, 1985). Both princely state historians and legal historians have discussed it. See Ramusack, *The Indian Princes and their States*, 94-96; Benton, "From International Law to Imperial Constitutions," 604-607; and Benton, *A Search for Sovereignty*, 247-50. For a discussion of the Kathiawar dispute more generally, see Copland, *The British Raj and the Indian Princes*, 98-112.

agreements, the East India Company obtained the right of tribute over the region.[68] In the 1830s, the Company increasingly intervened in Kathiawar affairs; for instance, it took over criminal jurisdiction in the states. Despite this, on several occasions Company officials stated clearly that Kathiawar was not part of British territory, indicating their recognition of the separate legal status of the princely states.[69]

A rather innocuous attempt to transfer jurisdiction over the state of Bhavnagar from Ahmedabad authorities (in British India) to the Kathiawar Political Agent (a British representative in princely state territory) set the stage for Maine's minute.[70] This process ran into trouble when the Finance Department of the Government of India questioned whether Kathiawar was part of British territory. If Kathiawar was foreign territory, then the proposed transfer could not be done by legislation. It would require a properly ratified treaty of cession since the change would not merely reorganize territory, but transfer it to a foreign sovereign.[71]

The members of the Council of the Government of Bombay, a province in British India, unanimously decided that Kathiawar was British territory,[72] with the Governor, Henry Bartle Frere, contending that the Kathiawar rulers' minimal rights, such as jurisdiction over their own subjects, could not be called rights of sovereignty.[73] Henry Mortimer Durand, the Foreign Secretary of the Government of India, agreed with the Bombay Council, arguing that the Kathiawar rulers had the status of dependents. He dismissed the East India Company's earlier declaration of Kathiawar as foreign territory, arguing that it had been a confidential expression of views, and not a formal and publicly promulgated renunciation of British sovereign rights.[74] The matter was referred to the Council of the Viceroy and Governor-General of India, of which Maine was the Law Member.

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[68] John McLeod, *Sovereignty, Power, Control: Politics in the States of Western India, 1916-1947* (Leiden: Brill, 1999), 14-19.

[69] In 1858, the East India Company's Court of Directors wrote, "We cannot, however, dismiss the correspondence which has arisen out of these questions of jurisdiction, without expressing our surprise that an officer in the high political position occupied by Major Davidson (Resident at Baroda), should have declared his opinion that "the whole province of Kattyawar, with the exception of the districts belonging to the Gaekwar is British territory and its inhabitants are British subjects."" See Despatch of the Court of Directors, no. 8, 31 March 1858, IOR/L/PS/6/532.

[70] Minute by Governor of Bombay, 22 July 1860, IOR/L/PS/6/532; Letter from the Under-Secretary, Government of India to the Government of Bombay, no. 3174, 12 July 1861, IOR/L/PS/6/532.

[71] Extract from the Proceedings of the Finance Department, Government of India, 10 February 1862, IOR/L/PS/6/532.

[72] Letter from the Chief Secretary, Government of Bombay to the Government of India, no. 119, 17 October 1863, IOR/L/PS/6/532.

[73] Minute by Henry Bartle Frere, the Governor of Bombay, 21 March 1863, IOR/L/PS/6/532.

[74] Note by Henry Mortimer Durand, Foreign Secretary, Government of India, 13 April 1864, IOR/L/PS/6/532.

In his minute, Maine defined sovereignty as "a term which, in International Law, indicates a well ascertained assemblage of separate powers or privileges. The rights which form part of the aggregate are specifically named by publicists, who distinguish them as the right to make war and peace, the right to administer civil and criminal justice, the right to legislate, and so forth. A sovereign who possesses the whole of this aggregate of rights is called an independent sovereign, but there is not, nor has there ever been, anything in International Law to prevent some of these rights being lodged with one possessor and some with another. Sovereignty has always been regarded as divisible." He went on to note, ""sovereignty" is divisible, but "independence" is not." In his view, the British Government was the only independent sovereign in India, but there also existed numerous other sovereigns, i.e. the princely states, which were not independent.[75]

Maine also argued that sovereignty, for the purposes of international law, was a "question of fact" that had to be separately decided in each case and to which "no general rules" applied. Treaties often contained the manner in which sovereign rights were to be divided, but when there were no written documents or when the documents were ambiguous, jurists could determine this distribution from the *de facto* relations of the states with the British Government. Maine proceeded to conduct a factual analysis of the situation and concluded that the principal right the Kathiawar states enjoyed was immunity from foreign laws; other rights included the exercise of limited civil and criminal jurisdiction and the right to coin money. He, therefore, approved of British interference for the improvement in administration so long as it did not disturb the unqualified immunity of the states from foreign laws. However, he also admitted that the Kathiawar states enjoyed some limited degree of sovereignty, and hence were foreign territory, so international rules and conceptions applied to them "in some sense."[76]

Another Council member, H. B. Harington, agreed, and quoted the work of the American international lawyer Henry Wheaton to argue that the exercise of some rights by the British did not mean that the Kathiawar chiefs had lost all their rights of sovereignty. Like Maine, however, he argued that this did not prevent the British, as the "paramount power," from intervening to improve the peace.[77] The Viceroy, John Lawrence, also expressed his support for the divided nature of Kathiawar sovereignty, contending that "although Kattywar is British Territory in the

[75] Minute by Henry Sumner Maine, 22 March 1864, IOR/L/PS/6/532.
[76] Minute by Henry Sumner Maine, 22 March 1864, IOR/L/PS/6/532.
[77] Minute by H. B. Harington, 16 March 1864, IOR/L/PS/6/532.

sense that its Chiefs and people owe allegiance to the sovereignty of the British Crown, yet it is not British Territory in the sense of its being subject to British Laws, Regulations, and Administration;" hence, British laws could not be extended to the region.[78]

Maine's views received a stamp of approval when the Secretary of State for India, Charles Wood, recognized the "modified form of sovereignty" of the region. Wood argued that although the British Government had intervened in Kathiawar for the maintenance of order, it had never imposed British laws since official policy was not aimed at undermining the authority and independence of local chiefs, but rather to work through the agency of these rulers.[79]

The Kathiawar minute exemplified Maine's historical approach to legal concepts such as sovereignty, with the idea that the princely states possessed only certain sovereign rights (the remainder being exercised by the British Government) fitting within his broader understanding of "native" societies as radically different from "modern" centralized European nation-states. By arguing that sovereignty was divisible, and thereby that the Kathiawar rulers were both sovereign and not sovereign, Maine softened the boundary between imperial and international law and advocated the application of international law to the states "in some sense," for instance, in the case of treaty interpretation or sovereign immunity, but not in others.[80] Like Maine's thought in general, this conceptualization of the fuzzy frontiers of national, imperial, and international law enabled the British to entrench their paramountcy in South Asia by providing the legal basis of the post-1857 imperial ideology of the recognition of the princely states and their simultaneous incorporation into the broader imperial hierarchy.[81] Consequently, the British abandoned their earlier policy of princely state annexation, and replaced it with a strategy of providing support to the princes to maintain them as "junior allies" in the imperial project. Maine's approach proved to be an inspiration for the Political Department of the Government of India, influencing successive generations of British political officers in the late nineteenth century.[82] In the next

[78] Minute by the Viceroy and Governor-General and President of the Council of India, 23 February 1864, IOR/L/PS/6/532.
[79] Despatch of the Secretary of State for India to the Government of India, no. 79, 16 December 1864, IOR/L/PS/6/597.
[80] Lauren Benton, however, argues that Maine distanced the princely states from international law. See Benton, *A Search for Sovereignty*, 249.
[81] As Jennifer Pitts notes, the "inclusion" of certain entities into the international community on unequal terms was often the basis for the dispossession and subjugation of indigenous peoples. See Pitts, *Boundaries of the International*, 8-10.
[82] Maine's influence is unsurprising as his texts were required reading for members of the Indian Civil Service. See Mantena, *Alibis of Empire*, 155.

section, I will examine the many ways in which these political officials interpreted Maine and drew on his ideas to develop a coherent approach to understanding the relationship between the princely states and the British Government.

Divisible Sovereignty and the Indian Political Department

The British handled their relations with the princely states through the Political Department of the Government of India,[83] whose officials were recruited from both the Indian army and the Indian Civil Service.[84] Although the department came under the Government of India, it was different from the other government departments. Unlike the secretaries of the others, who reported to Members of the Viceroy's Council, the most senior civil servant of this department, the Political Secretary (at times also known as the Foreign Secretary), reported directly to the Viceroy, who was the representative of the British Crown in India.[85] Political officers were located at the Political Department's offices in the British Indian capital, Calcutta, at provincial capitals like Bombay or Madras, or at the courts of individual states, where they were known variously as residents, political agents, or agents to the Governor-General. Although political officers were representatives of the British Crown, Barbara Ramusack has convincingly argued that they were "janus-faced functionaries" because they formulated and implemented British policy as well as represented the views of the princes to the British Government. These dual functions "spawned continual disagreements within the British hierarchy"[86] that are particularly visible in jurisdictional disputes between the princely states and the British Government.

Around seventy percent of serving political officers had an army background. Although Ian Copland claims that the preference for military men meant that the Political Department

[83] The name and organization of the department changed significantly over time. In 1843, it was named the Foreign Department; in 1914, it was renamed the Foreign and Political Department; and in 1937, it was renamed Political Department. Overviews can be found in Terence Creagh Coen, *The Indian Political Service: A Study in Indirect Rule* (London: Chatto & Windus, 1971); and William Murray Hogben, "The Foreign and Political Department of the Government of India, 1876-1919: A Study in Imperial Careers and Attitudes" (Ph.D. diss., University of Toronto, 1973). For uniformity, I will refer to the department as the Political Department.
[84] L. S. S. O'Malley, *The Indian Civil Service, 1601-1930*, 2nd ed. (London: Frank Cass, 1965), 160.
[85] Hogben, "The Foreign and Political Department of the Government of India," vi.
[86] Ramusack, *The Indian Princes and their States*, 105.

"became a byword for intellectual mediocrity,"[87] the most influential members of the department were civil servants who had passed competitive examinations for their place.[88] Political officers did not have any special administrative or diplomatic training and relied largely on learning through experience.[89] Internal Political Department texts and manuals, therefore, became particularly significant in guiding officials in their work. Consequently, understanding the nuances of these texts is crucial for analysing the British colonial view of princely state sovereignty and the nature of the relationship between the states and the British Government.[90]

One of the first of the Political Department treatises was an 1875 tract titled *The Native States of India*,[91] written by Charles Aitchison, a political officer who spent much of his career in Punjab and rose to become the Foreign Secretary of the Government of India.[92] Although he did not specifically acknowledge Maine's Kathiawar minute (he, did, however cite *Ancient Law*[93]), Aitchison emphasized the divisibility of sovereignty by arguing that sovereignty was "an assemblage of powers or attributes which may either be all concentrated in one possessor or shared with another."[94] With respect to the princely states, he noted that sovereignty was shared between the British Government and the princes in varying degrees.[95] The princely states enjoyed sovereign power "more or less imperfect," but did not possess "international life."[96] Although Aitchison argued that international law did not apply to the relations between the British Government and the princely states, he noted that it could be a useful guide for the settlement of disputes to the extent that it was "an embodiment of principles of natural equity, or

[87] Ian Copland, "The Other Guardians: Ideology and Performance in the Indian Political Service," in *People, Princes and Paramount Power: Society and Politics in the Indian Princely States*, ed. Robin Jeffrey (Delhi: Oxford University Press, 1973), 287.
[88] The first annual open competitive examination for recruitment to the Indian Civil Service was held in 1855; men recruited in the early decades of open competition were referred to as "competition wallahs." See Takehiko Honda, "Competition wallahs (*act.* 1855-1891)," in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/95501 (accessed May 23, 2019).
[89] Ramusack, *The Indian Princes and their States*, 101.
[90] For other analyses of these texts, see Copland, *The British Raj and the Indian Princes*, 211-21; Copland, *The Princes of India in the Endgame of Empire*, 19-20; Ramusack, *The Indian Princes and their States*, 92-97; Benton, "From International Law to Imperial Constitutions," 600-607; and Benton, *A Search for Sovereignty*, 242-50.
[91] Charles U. Aitchison, *The Native States of India: An Attempt to Elucidate a Few of the Principles which Underlie their Relations with the British Government*, 2nd ed. (Calcutta: Office of the Superintendent of Government Printing, 1881).
[92] A. J. Arbuthnot, "Aitchison, Sir Charles Umpherston (1832-1896)," rev. Ian Talbot, in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/253 (accessed May 23, 2019).
[93] Henry Sumner Maine, *Ancient Law* (London: John Murray, 1861).
[94] Aitchison, *The Native States of India*, 34.
[95] Aitchison, *The Native States of India*, 34.
[96] Aitchison, *The Native States of India*, 6.

of usages which independent nations have found it convenient or for their common advantage to agree upon regulating their intercourse with each other."[97]

Aitchison's enduring contribution to the Political Department, however, did not lie in the treatise, but rather in his work on the compilation of treaties between the princely states and the British Government.[98] He built on the idea that he first developed in his monograph, where he had outlined general principles drawn from a series of disputes between the states and the British Government; these principles, he argued, sustained British relations with the states. This was the first indication of the development of precedent to define the relationship. In the compilation, Aitchison listed the treaties state-wise, and prefaced each one with a detailed historical narrative,[99] arguing that the treaties had to be interpreted based on the evolution of the relationship between the states and the British Government.[100] Aitchison's successors in the Political Department built upon this insight to argue that "decisions" in later "cases" or disputes could be used to override specific provisions in the treaties, most often at the expense of the states.

One of these successors was Charles Lewis Tupper, also a man who spent much of his official life in Punjab.[101] Tupper freely admitted his intellectual debt to Maine, noting, "his pregnant suggestions have constantly guided my work in India, and throughout my life have chiefly inspired my studies."[102] In 1893, Tupper published an unofficial text, *Our Indian Protectorate*,[103] in which he provided an outline of "Indian political law," a term he used to refer to the law that governed the relationship between the princely states and the British Government.[104] For Tupper, one of the basic principles underlying Indian political law was the divisibility of sovereignty; he quoted extensively from Maine's Kathiawar minute to support this contention. He described the princely states as "autonomous states, enjoying various degrees of

[97] Aitchison, *The Native States of India*, 2.
[98] Charles U. Aitchison, ed., *A Collection of Treaties, Engagements and Sanads Relating to India and Neighbouring Countries*, 14 vols., 5th ed. (Calcutta: Government of India Central Publication Branch, 1929-1933). The first volume was published in 1862; eleven volumes appeared by 1892 and the Political Department continued to update the collection after Aitchison's retirement. See Arbuthnot, "Aitchison, Sir Charles Umpherston."
[99] Arbuthnot, "Aitchison, Sir Charles Umpherston."
[100] Copland, *The Princes of India in the Endgame of Empire*, 19.
[101] Katherine Prior, "Tupper, Sir (Charles) Lewis (1848-1910)," in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/36577 (accessed May 23, 2019).
[102] Charles Lewis Tupper, "India and Sir Henry Maine," *Journal of the Society of Arts* 46 (1898): 390.
[103] Charles Lewis Tupper, *Our Indian Protectorate: An Introduction to the Study of the Relations between the British Government and its Indian Feudatories* (London: Longmans, Green and Co., 1893).
[104] Tupper, *Our Indian Protectorate*, 6.

sovereignty, levying their own taxes, administering their own laws, and possessing territory which is, for purposes of internal administration, foreign territory, and has not been annexed to the dominions of the British Crown."[105] The states, however, did not have the right to external relations and were politically subordinate to the British Government, and so, could not be subjects of international law.[106] Despite this assertion, Tupper, like Aitchison, did not entirely dismiss the application of international law to the princely states.[107] The states had immunity from foreign law, the British Government concluded treaties with the states, and questions arose relating to boundary disputes, extra-territorial jurisdiction, and the extradition of offenders. In all these cases, Tupper argued that international law could be used to resolve the issue.[108]

Tupper's views proved to be influential and the Government of India invited him to update *Leading Cases*, a textbook on Indian political practice written by Mortimer Durand.[109] The result was Tupper's four-volume *Indian Political Practice*,[110] a survey of major cases from which he drew the main principles governing the relationship between the British Government and the princely states. The treatise became a reference manual for the Political Department, and was kept confidential.[111] Tupper included treaties with the princely states, provisions in British Indian statutes, and court decisions as sources of the principles, but noted that the most important source was the actual practice of the British Government in its dealings with the states – what he dubbed "usage."[112] Tupper essentially produced a manual of case law to guide political officers in their work in relation to the princely states. The emphasis, building on Aitchison's work, was

[105] Tupper, *Our Indian Protectorate*, 2.
[106] Tupper, *Our Indian Protectorate*, 4-5.
[107] Ian Copland and Barbara Ramusack both argue that Tupper considered the relationship between the princely states and the British Government to be a feudal one. See Copland, *The British Raj and the Indian Princes*, 218; and Ramusack, *The Indian Princes and their States*, 96-97. Lauren Benton contends that Tupper rejected the use of the term "international" in favour of the term "political" law. See Benton, *A Search for Sovereignty*, 244n67.
[108] Tupper, *Our Indian Protectorate*, 7-9.
[109] Henry Mortimer Durand was a former Foreign Secretary of the Government of India and his book, *Leading Cases*, was an important text on Indian political practice. See H. V. Lovett, "Durand, Sir (Henry) Mortimer (1850-1924)," rev. S. Gopal, in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/32941 (accessed May 23, 2019). Tupper's first revision was titled *Political Law and Policy* and although it was acknowledged as a brilliant piece of legal theorizing, it was considered insufficiently practical for the men in the field. Hence, Tupper was seconded to the Government of India to enable him to produce his second version. See Prior, "Tupper, Sir (Charles) Lewis;" and Copland, *The British Raj and the Indian Princes*, 217-18.
[110] Charles Lewis Tupper, *Indian Political Practice: A Collection of the Decisions of the Government of India in Political Cases*, 4 vols. (1895; repr., Delhi: B. R. Publishing, 1974).
[111] Hogben, "The Foreign and Political Department of the Government of India," 194-97. By way of an example, the legal counsel representing the princes before the Indian States Committee in 1928 was denied access to copies of *Indian Political Practice* on account of its confidential nature. See Copland, *The Princes of India in the Endgame of Empire*, 70.
[112] Tupper, *Our Indian Protectorate*, 10.

on historical practice in order to determine the manner in which sovereign rights were divided between the princely states and the British Government.[113] Tupper's work developed the idea that principles developed in the case of a single state were applicable in relation to all states; unsurprisingly, then, "usage" formed the basis of British claims of more extensive sovereign powers, thereby strengthening British authority over the states.

The final architect of the legal understanding of the relations between the states and the British Government was William Lee-Warner, who was largely based in the Bombay Presidency through his career, and was Tupper's competitor in "the realm of ideas, and for official favour."[114] Lee-Warner also cited Maine to argue that sovereignty was divisible; in the case of the princely states, the distribution of sovereign powers was a question of fact to be determined by the evidence of treaties or usage. Of the two, he emphasized the role of usage; like Tupper, he argued that practice in relation to some states could constitute a precedent that was applicable against other states as well.[115] He first tried to promote his views in an 1886 manuscript titled *Elementary Treatise on the Conduct of Political Relations with Native States*; however, the Government of India chose Tupper over him to compile a textbook on political practice.[116] In 1894, therefore, Lee-Warner published the work as a private individual, under the title *Protected Princes of India*, a revised version of which appeared in 1910 as *The Native States of India*.[117]

In comparison with Tupper and Aitchison, Lee-Warner was a much stronger proponent of the international status of the princely states.[118] He relied on the idea of divisible sovereignty to argue that the princely states were semi-sovereign since they possessed some (though not all) powers of a sovereign. He admitted that the tie between the princely states and the British Government was not "strictly" international, since the states were not equal powers, and had

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[113] Parallels can perhaps be drawn with Tupper's other great work of the period, a multi-volume treatise titled *Punjab Customary Law*, which was an attempt to codify local unwritten customs into some kind of usable precedent. I am grateful to an anonymous reviewer who pointed out the compatibility of these two projects.

[114] Copland, *The British Raj and the Indian Princes*, 217.

[115] William Lee-Warner, *The Native States of India* (London: Macmillan and Co., 1910), 30-34.

[116] Ian Copland and Barbara Ramusack claim that Tupper was chosen over Lee-Warner as he was willing to characterize the relationship between the princely states and the British Government as a feudal rather than a constitutional one. See Copland, *The British Raj and the Indian Princes*, 218; and Ramusack, *The Indian Princes and their States*, 97.

[117] F. H. Brown, "Warner, Sir William Lee- (1846-1914)," rev. Katherine Prior, in *Oxford Dictionary of National Biography*, https://doi.org/10.1093/ref:odnb/34472 (accessed May 23, 2019).

[118] Ian Copland claims that Lee-Warner considered the tie between the states and the British Government to be a constitutional one. See Copland, *The British Raj and the Indian Princes*, 218. Lauren Benton also argues that Lee-Warner considered international law to be inapplicable to the states. See Benton, "From International Law to Imperial Constitutions," 602n24.

restrictions placed on both external relations and internal government.[119] Despite this, he argued that it was possible to conceive of a sovereignty that, "although wanting in completeness in every respect, was a sure defence against annexation." [120] Combined with the argument that international law regulated, to a limited extent, the relations of "communities of an analogous character with independent states," Lee-Warner argued that the princely states could claim the shelter of international law.[121]

Lee-Warner specifically criticized John Westlake, for being "the strongest advocate" of the argument in favour of a constitutional tie between the princely states and the British Government.[122] Westlake noted that the states "had no international existence" as foreign states could not engage with them without the acquiescence of the British Government.[123] Hence, he argued that the ties between the states and the British Government could only be "constitutional."[124] Lee-Warner, however, relied on Maine's Kathiawar minute to argue that the loss of one facet of sovereignty, i.e. the right to external relations, did not destroy the international status of the princely states.[125] He noted that even "if we officially avoid speaking of [states] as sovereigns we constantly apply to them conceptions of sovereignty, and are guided in many our negotiations with them by the spirit or the conceptions of international law."[126] He pointed out that the British Parliament had accepted princely states' treaties as binding, while British courts had consistently treated the treaties as international obligations, with international law principles being used for their interpretation. He also described situations where the princely states were not treated as a constitutional part of British India: for instance, the exclusion of princely states from obligations under commercial treaties and from British Indian law.[127]

For Lee-Warner, the break in the constitutional tie signified that international law could be the only law applicable to the relationship, even if the states lacked complete independence or even internal autonomy. Instead, the crucial tests were, first, whether there was "common subjection to a common legislature, capable of making municipal laws binding upon the

[119] Lee-Warner, *The Native States of India*, 390.
[120] Lee-Warner, *The Native States of India*, 398.
[121] Lee-Warner, *The Native States of India*, 399-400.
[122] Lee-Warner, *The Native States of India*, 397.
[123] Westlake, *Chapters on the Principles of International Law*, 213-14.
[124] Westlake, *Chapters on the Principles of International Law*, 223-24.
[125] William Lee-Warner, "The Native States of India: A Rejoinder," *Law Quarterly Review* 27 (1911): 84.
[126] Letter from William Lee-Warner to John Westlake, 14 April 1898, William Lee-Warner Papers, Mss Eur F92/3.
[127] Lee-Warner, "The Native States of India," 86-87.

consenting states and their subjects," and secondly, the existence of "a conflict of rights and interests which the states concerned could not in the absence of international law settle otherwise than by appeal to force."[128] The lack of a common legislature for British India, the princely states, and other parts of the British Empire, together with the existence of disputes led him to argue that peaceful adjustment was needed by legal methods, leaving the field open for international law.[129]

Lee-Warner argued that Maine himself had envisaged such a view. In his Kathiawar minute, Maine had relied on the assumption that international law applied "in some sense" to the case in order to argue that the British Government was bound, with regard to international rules, by its earlier disclaimer of sovereignty over Kathiawar. If international rules were applied, then rulers of princely states would be entitled, Lee-Warner argued, to "the respect and independence which the idea of international law so powerfully secures."[130] Since the states were foreign territory, if the British Government wished to obtain an attribute of sovereignty within the realm of the state, such as railway jurisdiction, then it had to obtain a concession from the state; it could not simply use the constitutional mechanism of enacting a law to obtain the jurisdiction.[131]

A review of the writings of Aitchison, Tupper, and Lee-Warner reveals the two basic principles that guided British political officers in late nineteenth-century South Asia. The first was the idea of "divisible sovereignty," developed through Henry Maine's powerful influence. So sovereign powers were divided between the princely states and the British Government; as a result, the states were both sovereign and not so, blurring the boundary between imperial and international law. Maine and his cohort in the Political Department all thought that international law had some part to play in defining the relationship between the states and the British Government, although each of them had a different answer as to the precise nature of this role. Since boundaries between imperial and international law were hazy, colonial bureaucrats were able to argue in favour of extensive British extra-territorial jurisdiction, while also maintaining the princely states as "allies."

Interlinked with the first principle of divisible sovereignty was the second, the idea of

[128] Lee-Warner, "The Native States of India," 85.
[129] Lee-Warner, "The Native States of India," 85.
[130] See Lee-Warner's comments on Tupper, "India and Sir Henry Maine," 401.
[131] See Lee-Warner's comments on Tupper, "India and Sir Henry Maine," 400-401.

"precedent."[132] Since colonial officials agreed that sovereign powers were divided among a number of entities, they were also concerned with the question of how such powers were distributed. Instead of deducing answers from an abstract idea of sovereignty, they relied heavily on history and political practice. This led to the development of precedent in the context of princely state relations, exemplified in the reliance on manuals of case law like *Indian Political Practice*, and the official claim that general principles drawn from cases in relation to one state could be applied in similar cases in other states. Much like the concept of divisible sovereignty, the idea of political precedent enabled the British to entrench their paramountcy by expanding their own sovereign powers at the expense of the princely states through the mechanism of relying on case law to override specific provisions in British treaties with the states.

The twin principles of "divisible sovereignty" and "precedent" formed the core legal repercussions of the shift in British imperial ideology in the aftermath of the turmoil of 1857. Inspired by Henry Maine's understanding of radical differences between "traditional" Asian and "modern" European societies, this new philosophy of colonialism relied on the incorporation of local rulers into the imperial hierarchy to provide stability to colonial rule after a period of rebellion. As a result, entities such as the princely states were recognized as "somewhat" sovereign junior allies albeit within the broader enterprise of entrenching British paramountcy.

The softening of the boundaries between the imperial and the international, however, also had other consequences. Specifically, it led to the saturation of the South Asian landscape with the language of international law, and sovereignty in particular. In addition to British officials, princely state representatives also appropriated international legal language to argue about the legal status and sovereign powers of the states. Colonial civil servants considered jurisdiction to be one of the powers exercised by a sovereign; since sovereign powers were divided between the British Government and the princely states, they argued that the British Government exercised some jurisdiction within a state, while the remainder was with the state itself. Therefore, disputes over jurisdiction were rife, and the states and the British Government continually argued over the

[132] For other discussions of precedent in the context of the states, see Copland, *The British Raj and the Indian Princes*, 215; Copland, *The Princes of India in the Endgame of Empire*, 19-20; and Ramusack, *The Indian Princes and their States*, 96. Lauren Benton, however, argues that "indeterminacy" was the core of British policy as officials relied on imperial prerogatives rather than the systematization of political relations. See Benton, *A Search for Sovereignty*, 250-60.

appropriate manner in which jurisdictional powers were divided.[133] The princely states had their own conceptions of sovereignty that they articulated in these disputes, at times with some success. It is critical to examine these arguments to understand the different ways in which sovereignty was defined as well as the stakes of international law in the colonial context. In the next two sections, therefore, I examine two such conflicts: the first was a dispute between Travancore and the British Government over jurisdiction over European British subjects who committed crimes within the territory of princely states, and the second was a dispute between Baroda and the British Government over jurisdiction over telegraph lines within state territory.

Travancore and Jurisdiction over European British Subjects

In the second half of the nineteenth century, the British Government began to claim jurisdiction over its subjects who resided in the princely states.[134] The states resisted these claims as they considered British extraterritorial jurisdiction to be highly intrusive. A case in point was the long-running dispute between Travancore and the British Government over jurisdiction over European British subjects[135] who committed crimes in Travancore territory.[136]

The dispute was triggered in September 1868 by John Liddell's petition to the Governor of Madras, a province in British India, seeking relief from an alleged unlawful detention by the

[133] Lauren Benton also argues that disputes continued to fester between the princely states and the British Government but contends that they were often settled through the claim that the suspension of law was a core feature of imperial law itself. See Benton, *A Search for Sovereignty*, 241, 250. I consider the articulation of divisible sovereignty to result in a deeper engagement with the language of law by the parties.

[134] This jurisdiction can be traced to seventeenth-century agreements between the East India Company and Mughal emperors that permitted the English to adjudicate internal disputes in their factories. In the latter half of the nineteenth century, however, the British Government started to claim more expansive jurisdiction. See M. P. Jain, *Outlines of Indian Legal History*, 5th ed. (Bombay: N. M. Tripathi, 1990), 8. In general, there is extensive literature on extraterritorial jurisdiction claimed by European empires in non-European territories. See Benton, *Law and Colonial Cultures*, 201-52; Anghie, *Imperialism, Sovereignty and the Making of International Law*, 85-86; Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China* (Cambridge: Cambridge University Press, 2010); Pär Kristoffer Cassel, *Grounds of Judgment: Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (New York: Oxford University Press, 2012); Becker Lorca, *Mestizo International Law*, 76-97; and Li Chen, *Chinese Law in Imperial Eyes: Sovereignty, Justice, and Transcultural Politics* (New York: Columbia University Press, 2015).

[135] The term "European British subjects" was defined in section 71 of the Code of Criminal Procedure, 1872 as, "(1) All subjects of Her Majesty, born, naturalized, or domiciled in the United Kingdom of Great Britain and Ireland or in any European, American, or Australian Colonies or possessions of Her Majesty, or in the Colony of New Zealand, or in the Colony of the Cape of Good Hope or Natal. (2) The children or grandchildren of any such person by legitimate consent."

[136] Lauren Benton briefly discusses the Liddell case to argue that indeterminacy was core to the British articulation of divisible sovereignty. See Benton, *A Search for Sovereignty*, 257-58.

authorities of the state of Travancore.[137] Liddell had been convicted of theft by a Travancore court,[138] but claimed that as a European British subject, he was subject only to the jurisdiction of British Indian courts. He argued, therefore, that his trial and subsequent conviction had been illegal.[139] To support his claim, he adduced the Governor-General's proclamation (dated 10 January 1867) that provided:

> … The Governor-General in Council is … pleased to declare … that original criminal jurisdiction over European British subjects of Her Majesty being Christians residing in the Native States and Chiefships below named, shall … be exercised by, and distributed among, the several High Courts … as follows:
>
> …
>
> By the High Court of Madras in Mysore, Travancore, and Cochin.[140]

The Advocate-General of the Madras Government opined that Liddell's trial was illegal, arguing that "[t]he criminal jurisdiction over European British subjects hitherto exercised by the Travancore Courts does not appear to rest upon any treaty, but to have been ceded by courtesy and comity," and that it had ended with the 1867 proclamation that conferred such jurisdiction on the Madras High Court.[141] The Madras Government, therefore, asked Travancore for Liddell's release.[142]

In response, T. Madhava Rao,[143] the *diwan* (chief minister) of Travancore, launched a strong defence of Travancore's exercise of criminal jurisdiction over European British subjects. He cited from international law treatises by Henry Wheaton and Emer de Vattel to argue that

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[137] Petition from John Liddell to the Governor in Council, Madras, 3 September 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, October 1868, no. 1.

[138] A copy of the witness statements as well as the appellate court judgment in the case can be found in Papers on Prosecution in *Sadr* Court of John Liddell, Late Commercial Agent at Alleppey, referred by the *maharaja* of Travancore for disposal by this Court, IOR/L/PJ/5/405.

[139] Petition from John Liddell to the Governor in Council, Madras, 3 September 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, October 1868, no. 1.

[140] Notification in the Madras Gazette, no. 221, 10 January 1867, IOR/P/441/8, Proceedings of the Government of Madras in the Political Department, August 1870, no. 1.

[141] Opinion of the Advocate-General, Government of Madras, 28 September 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, October 1868, no. 2.

[142] Letter from the Resident at Travancore to the *diwan* of Travancore, no. 776, 12 October 1868, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 24.

[143] For discussions of Madhava Rao's life and service in various princely states, see G. Paramaswaran Pillai, "Raja Sir T. Madava Row," in *Representative Men of Southern India* (Madras: Price Current Press, 1896), 33-48; and "Raja Sir T. Madhav Rao," in *Indian Statesmen: Dewans and Prime Ministers of Native States* (Madras: G. A. Natesan & Co., 1927), 193-224.

jurisdiction was "an inherent right of sovereignty,"[144] and that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. … All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself."[145] He also noted that Travancore had not agreed to cede jurisdiction over European British subjects; in fact, on several previous occasions, the British Government had recognized Travancore's right to try Europeans residing in its territory. Finally, he argued that the 1867 proclamation, being British Indian municipal law, could not affect the inherent rights of foreign states, which were subjects of international law.[146] For Madhava Rao, sovereign powers were linked with the control of territory, and jurisdiction was a right exercised by the territorial sovereign, in this case, the *maharaja* of Travancore.

Travancore also sought additional support to buttress its case, taking the opinion of J. D. Mayne, a well-respected member of the Madras bar and former Advocate-General of the Madras Government.[147] Mayne first discussed the situation in the Ottoman Empire and China, both of which had entered into treaties for the cession of jurisdiction over foreigners. In comparison, none of Travancore's treaties contemplated such a renunciation. And in support of Madhava Rao, Mayne also insisted that the Government of India's 1867 proclamation would be inoperative against Travancore since "Parliament is as incapable of taking away the powers of a court in Travancore as it is of dealing with the courts of France."[148]

On the strength of these arguments, a majority of the members of the Council of the Government of Madras agreed with Travancore's claim. The dissenter, H. D. Phillips, claimed that the British Government was bound by the 1867 proclamation and denied that Travancore could claim the privileges of international law since it was a "feudatory" state.[149] However, the Governor of Madras, Francis Napier, conceded that no treaty was necessary to confer jurisdiction on Travancore, as it was "a right which is inherent in free and absolute sovereignty." He denied

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[144] Letter from the *diwan* of Travancore to the Resident at Travancore, 19 October 1868, IOR/P/438/18, Proceedings of the Government of India in the Foreign Department, Judicial, September 1870, no. 18.
[145] Letter from the *diwan* of Travancore to the Resident at Travancore, 20 October 1868, IOR/P/438/18, Proceedings of the Government of India in the Foreign Department, Judicial, September 1870, no. 18.
[146] Letter from the *diwan* of Travancore to the Resident at Travancore, 23 October 1868, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 24.
[147] Charles Edward Buckland, *Dictionary of Indian Biography* (London: Swan Sonnenschem & Co., 1906), 280.
[148] Opinion by J. D. Mayne on the Liddell case, 11 November 1868, IOR/P/438/18, Proceedings of the Government of India in the Foreign Department, Judicial, September 1870, no. 18.
[149] Minute by H. D. Phillips, Member of the Council of the Government of Madras, 13 November 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, December 1868, no. 25.

that Travancore had the right to appeal to international law, which regulated the relations of independent and equal European states, since the position of the British as the "paramount power" deprived the princely states of some of their sovereign rights. In this specific case, however, he argued that it was inappropriate to deny Travancore the exercise of criminal jurisdiction.[150] A. J. Arbuthnot, the final member of the Council, agreed with Napier and emphasized the need for a state's explicit consent for the cession of jurisdiction.[151] As a result, the Government of Madras revoked its previous resolution seeking Liddell's release.[152]

When the Government of India intervened in the situation, the Law Member, Henry Maine, admitted that Travancore "theoretically" had jurisdiction to try European British subjects for offences committed within its boundaries since it was not a part of British India. He also agreed with J. D. Mayne that the 1867 notification could not take away Travancore's inherent jurisdiction, any more than English statutes could take away the rights of France or Prussia to try British subjects committing offences in their territories. Being politically astute, however, he argued that without denying Travancore's abstract right to try European British subjects, the British Government ought to point out that there were reasons for Europeans to be committed to Madras for trial, including the importance of trying them by a procedure to which they were accustomed and the problems of native prisons.[153] This was a practical application of Maine's enunciation of divisible sovereignty; here he argued that the British could exercise jurisdiction over some persons within princely state territory while the state would retain the jurisdiction over everyone else.

In August 1871, the Government of India laid down a categorical rule, stating, "No Native State can be allowed to try a European British subject according to its own forms of procedure and punish him according to its own laws." It admitted that in theory, every state that had independent internal administration had the right to deal with persons resident within its jurisdiction according to its own laws. However, it claimed that there was a universal exception

[150] Minute by Francis Napier, President of the Council of the Government of Madras, 15 November 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, December 1868, no. 24.
[151] Minute by A. J. Arbuthnot, Member of the Council of the Government of Madras, 21 November 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, December 1868, no. 26.
[152] Resolution of the Government of Madras, no. 274, 14 December 1868, IOR/P/441/6, Proceedings of the Government of Madras in the Political Department, December 1868, no. 30.
[153] Henry Maine, "Trial of European British Subjects under Jurisdiction assumed by Native States," in Montstuart Elphinstone Grant Duff, *Sir Henry Maine: A Brief Memoir of his Life, with some of his Indian speeches and minutes*, ed. Whitley Stokes (New York: Henry Holt & Co., 1892), 400-401.

to this – extraterritoriality, which had been applied by Christian states in Muslim and "heathen" countries "out of necessity" on account of the differences in "religion, education, social habits, laws and judicial institutions." Underlining the role of historical facts in determining the division of powers, the Government of India also built upon earlier claims relating to extradition, asserting that the British had never surrendered European British subjects for trial by princely state courts. Since full reciprocity between the British and the princely states had never been accepted practice in the past, the Government of India argued the princely states could not be permitted to try European British subjects apprehended in princely state territory; instead, they were to be tried by Justices of the Peace appointed by the British Government, and committed to courts in British India.[154]

After the 1871 resolution, the Government of India passed the Foreign Jurisdiction and Extradition Act, 1872, which provided for the appointment of Justices of the Peace in the princely states to commit European British subjects to trial and barred the extradition of European British subjects to the states. The Act did not, however, explicitly provide that princely states could not try European British subjects. The Government of India then issued a notification delegating jurisdiction over European British subjects in Travancore to the Resident, appointed the Resident as a Justice of the Peace, and directed that the Resident commit European British subjects to the Madras High Court for trial.[155]

Travancore lodged a protest, with A. Sashiah Shastri,[156] Madhava Rao's successor as *diwan*, referring to his predecessor's arguments in the Liddell case. He questioned the notification since it related to European British subjects, but not to other Europeans or Americans or the subjects of Indian or Asian sovereigns.[157] Surprisingly, the British Resident at Travancore supported Sashiah Shastri; he contended that European British subjects had voluntarily chosen to settle under the sovereignty of a princely state and that Residency records did not show any complaints against the exercise of jurisdiction by state authorities. He proposed a compromise: Christian judges in Travancore courts, who could be arranged to be European

[154] Resolution of the Government of India in the Foreign Department, Judicial, no. 158J, 8 August 1871, IOR/P/748, Proceedings of the Government of India in the Foreign Department, Judicial, August 1871, no. 24.
[155] Notification of the Government of India, Foreign Department, no. 8J, 9 January 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, January 1874, no. 12.
[156] For a description of Sashiah Shastri's life, see B. V. Kamesvara Aiyar, *Sir A. Sashiah Shastri, An Indian Statesman: A Biographical Sketch* (Madras: Srinivasa, Varadachari & Co., 1902).
[157] Letter from the *diwan* of Travancore to the Resident at Travancore, 13 April 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 24.

British subjects, could be appointed Justices of the Peace with powers to try petty cases, with serious offences committed to the Travancore Sadr Court. He suggested that the appointment of the Justices of the Peace not be done by a unilateral act of the British Government but rather through an arrangement with Travancore.[158] The Madras Government described the compromise as one deserving the "most attentive consideration."[159]

The Government of India consented to the Resident's alternative proposal on account of the "special circumstances affecting the States of Travancore and Cochin, and more particularly of the enlightened and progressive principles which have been followed by those States in their judicial administration."[160] The Secretary of State for India also approved of the general principles governing criminal jurisdiction over European British subjects as well as the compromise in the Travancore case. However, he did not consider that Liddell, who had been released by Travancore after the completion of his sentence, had suffered any hardship as a result of his conviction, and so refused to ask Travancore to pay any compensation.[161] As a result of this decision, princely states were required to consult the political officer posted at their court in the trial of European British subjects and were bound by his advice.

The Travancore case is an example of a dispute over the exercise of extraterritorial jurisdiction by European colonial empires; such jurisdiction is often considered to be based on the idea of a "civilizational difference" between Europeans and non-Europeans that required special privileges for Europeans. In the case of the princely states, the idea of such a difference was complicated by multiple factors: the British both did not claim jurisdiction over certain Europeans and did claim jurisdiction over those who were not European. Perhaps the most curious was the position of Americans and Europeans who were not British subjects. The Government of India admitted that the same concerns of "heathen" laws applied, yet it did not

[158] Memorandum of the Resident at Travancore on criminal jurisdiction over European British subjects, 25 April 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 25.
[159] Letter from the Acting Chief Secretary, Government of Madras to the Foreign Secretary, Government of India, no. 252/3, 24 June 1874, IOR/P/752, Proceedings in the Government of India in the Foreign Department, Judicial, October 1874, no. 22.
[160] Letter from the Foreign Secretary, Government of India to the Chief Secretary, Government of Madras, no. 189J, 12 October 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 30.
[161] Despatch from the Secretary of State for India to the Government of India, no. 99, 14 August 1873, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, September 1873, no. 16; Despatch from the Secretary of State for India to the Government of India, no. 97, 23 July 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 28.

include these subjects in its considerations. This was on account of concerns about the legality of extending British laws to foreign subjects in a foreign state. On several occasions, the British Government claimed jurisdiction over Americans and Europeans who were not British subjects on the ground of being the "paramount power" and to prevent "awkward diplomatic incidents," but admitted that the question was controversial.[162] A later memo clarified that Americans and Europeans who were not British subjects or in the service of the Crown did not have the right to be tried by British Indian courts. Instead princely states exercised jurisdiction over them subject to the control of British political officers who had the responsibility to ensure that foreigners received a fair trial since the British Government was responsible for the external affairs of the states.[163] The states also retained jurisdiction over those European British subjects who were charged under state laws for acts that were not offences under British law; these included, for instance, offences against revenue laws.[164] European British subjects in the service of princely states were also usually left to the jurisdiction of state courts.[165] Another exception followed on account of the difficulty in determining what constituted a criminal case, with the British contending that "technical" criminality (such as trespass)[166] existed on the boundary of civil and criminal questions, and could be dealt with by princely state courts.[167] Further complicating the idea of a "civilizational difference" was the fact that the British also claimed jurisdiction over persons who were not European British subjects. Most prominently, they claimed the right to exercise jurisdiction over British Indian subjects who were in the service of the Crown (i.e. those who were government personnel); these would include, for instance, postal or railway employees

[162] Jurisdiction of the Nizam over Europeans, 1895, IOR/R/2/81/188; Letter from the Political Secretary, Government of India to Manley O. Hudson, Harvard University, 23 February 1927, NAI, Foreign and Political Department, 567-Internal, 1926; Trial of Europeans and Americans not in the service of the Nizam, 1940, IOR/R/1/1/4810.

[163] Political Department Note clarifying the present position in regard to the exercise of jurisdiction over Europeans and Americans and British Indians in Indian States, 8 October 1937, IOR/R/2/901/416.

[164] Despatch from the Government of India to the Secretary of State for India, no. 3, 1 September 1873, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, September 1873, no. 9; Letter from the Foreign Secretary, Government of India to the Chief Secretary, Government of Madras, no. 175J, 29 August 1873, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, September 1873, no. 34.

[165] Circular from the Foreign Secretary, Government of India to the Governments of Madras, Bombay, and Bengal, no. 188J, 12 October 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, October 1874, no. 29.

[166] Although trespass is primarily a civil wrong, British Indian legislation also criminalized trespass under certain circumstances. See Sections 441-447, Indian Penal Code, 1860.

[167] Letter from the Foreign Secretary, Government of India to the Chief Secretary, Government of Madras, no. 9J, 9 January 1874, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, January 1874, no. 13.

who were posted in the princely states.[168]

As these complexities demonstrate, the notion of a "civilizational difference" could not fully encompass British claims to jurisdiction within entities like the princely states, which straddled the boundaries of the "imperial" and the "international." In the Travancore case, the British Government argued that it possessed some (though not all) sovereign rights within the territory of princely states. By defining sovereignty as divisible, it was able to claim jurisdiction not only over European British subjects (on most occasions, at least), but also over British Indian subjects who were in charge of critical infrastructure works (such as railways and the postal service) in the states, while admitting that the states retained jurisdiction over most other people present in their territory. The idea of divisible sovereignty, therefore, enabled the British to establish and expand their control over the states, a position that was further facilitated by the notion of political precedent. The British buttressed their claim to jurisdiction over European British subjects apprehended in state territory by building on earlier decisions where the Government of India had refused to extradite European British subjects who were apprehended in British territory.[169] Initially, this strategy of expanding British sovereign powers by building on earlier affirmations ran into a problem since Madhava Rao had specifically pointed[170] to an 1837 Government of India statement that provided, "Europeans residing in the territory of Native States, not being servants of the British Government, must be held in all respects, and in all cases, civil and criminal, subject to the law of the country in which they reside."[171] Consequently, the Government of India chose to engage in a move familiar in the common law: it distinguished the cases, arguing that earlier (unnamed) difficulties in the British exercise of jurisdiction in the states had been removed by legislation; the question, therefore, "was placed on

[168] Political Department Note on Jurisdiction to be exercised over British Indian subjects and servants of Government for offences committed in the territory of Indian States, NAI, Foreign and Political Department, 808-Internal (Secret), 1926.
[169] Resolution of the Government of India in the Foreign Department, Judicial, no. 158J, 8 August 1871, IOR/P/748, Proceedings of the Government of India in the Foreign Department, Judicial, August 1871, no. 24.
[170] Letter from the *diwan* of Travancore to the Resident at Travancore, 19 October 1868, IOR/P/438/18, Proceedings of the Government of India in the Foreign Department, Judicial, September 1870, no. 18.
[171] This statement was made in a letter from the Government of India and was issued after a query from the Resident at Travancore seeking clarifications about the extent of British jurisdiction over Europeans in the princely states. See Letter from the Secretary, Government of India to the Secretary, Government of Madras, no. 24, 12 June 1837, IOR/F/4/1811/74609.

a different footing from that on which it formerly rested."[172] The Liddell case then became the basis for British claims to jurisdiction over European British subjects in other princely states. Tupper, for instance, included it in *Indian Political Practice* as a precedent to be relied on.[173] Several later Political Department notes also relied on the case to articulate the general principle that princely states could not exercise criminal jurisdiction over European British subjects.[174]

Travancore's *diwans*, Madhava Rao and Sashiah Shastri, sought to challenge this vision of divisible sovereignty and the significance of precedent, and thereby also the British colonial claim to powers of intervention in the states. In this, they relied on the idea of "territorial sovereignty." Both argued that there was a single entity that exercised jurisdiction over a particular piece of territory, in this case, Travancore. Therefore, they argued that the Travancore state had jurisdiction over everyone (regardless of nationality) within its territory, and hence, had the jurisdiction to try European British subjects who committed offences in state territory. Since jurisdiction was vested in a single entity, all jurisdictional powers were vested in the Travancore state, with other entities like the British Government being excluded from exercising jurisdiction in Travancore territory. This focus on a unified notion of sovereignty lent support to the efforts of the princely states to maintain their separate existence and limit British interference in their internal affairs through extraterritorial jurisdiction. Madhava Rao, in particular, had expressed his concerns about the pre-1857 British policy of annexation of states, and argued that "native administrators" had a duty to defend the princely states and ensure their survival.[175]

One of the most significant ways to minimize colonial interference, Madhava Rao realized, was to develop the kind of administration that would win British approval.[176] The product of an English education, Madhava Rao "knew what the British wanted, and he was able

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[172] Letter from the Foreign Secretary, Government of India to the Chief Secretary, Government of Madras, no. 175J, 29 August 1873, IOR/P/752, Proceedings of the Government of India in the Foreign Department, Judicial, September 1873, no. 34

[173] Tupper, *Indian Political Practice*, vol. 3, 8-11.

[174] Jurisdiction of the Nizam over Europeans, 1895, IOR/R/2/81/188; Political Department Note on Jurisdiction to be exercised over British Indian subjects and servants of Government for offences committed in the territory of Indian States, NAI, Foreign and Political Department, 808-Internal (Secret), 1926; Political Department Note, 30 April 1928, NAI, Foreign and Political Department, 243-Internal, 1928.

[175] Koji Kawashima, *Missionaries and a Hindu State: Travancore, 1858-1936* (Delhi: Oxford University Press, 1998), 37-38.

[176] In a lecture delivered to the *maharaja* of Baroda when he was *diwan* of the state, Madhava Rao argued the best means for a prince to ensure his state's survival was to "govern his state well." See T. Madhava Rao, *Minor Hints: Lectures delivered to the Maharaja Gaekwar, Sayaji Rao* (Bombay: British India Press, [1881?]), 285-89.

to give it to them; he played them successfully at their own game."[177] Even though colonial control was established largely on the basis of divisible sovereignty and precedent, the British did rely on the idea of "civilization" in a secondary manner: they used it as the basis for an elaborate system of classification of the princely states, whereby "more" civilized states enjoyed the exercise of broader powers than "less" civilized states;[178] states that wished to defend their sovereignty were, therefore, compelled to conform to British ideals of governance. During his tenure as *diwan*, Madhava Rao instituted a range of reform measures, including the establishment of a plantation economy and fiscal reforms to improve the finances of the state, the improvement of both the English and vernacular education systems of the state, the institution of competitive examinations for government jobs, and the construction of a wide-ranging public works system.[179] One of the rationales for the institution of these projects was to enable Travancore to take advantage of the colonial scheme of classification, but although the measures impressed the British, as Robin Jeffrey points out, they only "sought to 'improve' society as a whole, not to adjust relationships among its members."[180] Rather than resulting in any meaningful social engineering, the reforms simply resulted in the development of a centralized, bureaucratic, efficient state that was capable of intervening more deeply in the lives of its citizens. The articulation of absolute, territorial sovereignty in disputes with the British Government was a crucial legal argument in this effort to empower state elites and bureaucrats and thereby also build administrative structures that would limit British interference.

Travancore's claims of territorial sovereignty and its status as a "progressive" state enabled the state's bureaucrats to negotiate a compromise with British colonial officials whereby Travancore judges could remain involved in the exercise of jurisdiction over European British subjects. Ultimately, however, it was the British idea of divisible sovereignty that won out in the dispute, and the universalization of the decision into a generally applicable political precedent

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[177] Robin Jeffrey, *The Decline of Nayar Dominance: Society and Politics in Travancore, 1847-1908* (London: Chatto & Windus for Sussex University Press, 1976), 74.

[178] An example of these distinctions can be seen in the complicated eight-tier classification of the jurisdiction of the Kathiawar states developed by the political agent, Richard Keatinge, and allegedly based on the "progress" of the states. The categories ranged from "first class" (full civil and criminal jurisdiction, except over European British subjects) through to "seventh class" (very limited criminal and no civil jurisdiction) to non-jurisdictional chiefs who were not placed in any class. The classification was not watertight; states argued for increases in their jurisdictional powers, while the British argued that the non-provision of "good government" was a ground for states to be stripped of jurisdiction. See Copland, *The British Raj and the Princes*, 108-12; and Mcleod, *Sovereignty, Power, Control*, 119, 247.

[179] For a description of these reforms, see Jeffrey, *The Decline of Nayar Dominance*, 70-103.

[180] Jeffrey, *The Decline of Nayar Dominance*, 74.

soon enabled the Government of India to claim extensive criminal jurisdiction within the territory of the princely states more generally.

Baroda and Jurisdiction over Telegraphs

The telegraph-based communication system, established in South Asia in the second half of the nineteenth century,[181] facilitated increasing levels of state surveillance, but also led to concerns about leaks of confidential information sent through the telegraph. Control over telegraph lines, therefore, was closely linked to the stability of British colonial rule.[182] These security concerns extended to lines in the princely states as they were closely interwoven with British Indian territory. As a result, there were numerous disputes over the construction of telegraph lines within and across the states.[183] A look at the development of the telegraph in Baroda can provide some insight.

In 1873, the Government of India granted the Bombay, Baroda, and Central India Railway Company (BBCIR, a private British company) a licence to operate the telegraph line that ran along the railway line between the towns of Miyagam and Dabhoi in Baroda; BBCIR already operated the railway line in question. It is unclear under what authority the licence was issued and there was no discussion about the legal framework that would govern the operation of the telegraph line. Ten years later, the Government of India sought Baroda's formal consent for the application of the Indian Telegraph Act, 1876 (a British Indian legislation) to the line, stating that the measure was "usual" and "the necessity for it had escaped notice" earlier.[184]

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[181] The first telegraph line in South Asia was laid in 1851 and the entire system was opened to the public in 1855. See Mel Gorman, "Sir William O'Shaughnessy, Lord Dalhousie, and the Establishment of the Telegraph System in India," *Technology and Culture* 12 (1971): 581-601.

[182] Deep Kanta Lahiri Choudhury, *Telegraphic Imperialism: Crisis and Panic in the Indian Empire, c. 1830-1920* (New York: Palgrave Macmillan, 2010), 7-8, 37-49.

[183] Conflicts generated by struggles over the control of infrastructure and resources were common. See, for instance, the overview of a dispute over water and dams with Mysore in Sunil Amrith, *Unruly Waters: How Mountain Rivers and Monsoons Have Shaped South Asia's History* (London: Allen Lane, 2018), 129-31, 161-63; and the discussion of a dispute over railways with Mysore in Priyasha Saksena, "Jousting Over Jurisdiction: Sovereignty and International Law in Colonial South Asia, c. 1858-1950" (SJD diss., Harvard Law School, 2018), 107-22. These conflicts could have far-reaching consequences. In some instances, states managed to carve out relative autonomy to pursue their own development strategies. See Sunila S. Kale, "Structures of Power: Electrification in Colonial India," *Comparative Studies of South Asia, Africa and the Middle East* 34 (2014): 457-61. In others, private companies exploited ambiguities over the legal status of the states to gain access to mineral resources at minimal cost. See Mircea Rainau, ""A Mass of Anomalies": Land, Law, and Sovereignty in an Indian Company Town," *Comparative Studies in Society and History* 60 (2018): 369-77.

[184] Letter from the Foreign Under-Secretary, Government of India to the Agent to the Governor-General at Baroda, 16 June 1883, IOR/P/2331, Proceedings of the Government of India in the Foreign Department, Internal, Financial, Judicial, Military, July 1884, no. 63.

In response, the *diwan* of Baroda, Kazi Shahabuddin,[185] argued that the Telegraph Act was not applicable to the line in question as it was "constructed at the expense of the Baroda Government," was "situated entirely in Baroda territory," and was "under the jurisdiction of His Highness's Government." After explicitly linking control over the telegraph line to its presence within Baroda territory, he went on to explain the role of the BBCIR. He claimed that the company was simply Baroda's agent, operating the line for and on behalf of the state, implying that Baroda continued to exercise ultimate authority over the telegraph line. Based on the claim that the princely states were separate legal entities from British India, he argued that as with any other statute passed by the British Indian legislature, the Telegraph Act did not apply to Baroda. Making the legislation applicable to the state would, he contended, be a "detriment to the integrity of jurisdiction and other rights of His Highness's Government."[186] Much like Madhava Rao and Sashiah Shastri had done in the Liddell case, Kazi Shahabuddin defended the Baroda's right to control activities in its territory.

The Government of India, however, disputed Shahabuddin's claim on finances, asserting that the telegraph line had been constructed and was maintained at its cost, and not at the cost of the Baroda state. More significantly, it stated that the application of the Telegraph Act to the princely states was not "an unusual measure" (giving the example of the state of Hyderabad as a precedent) and simply provided the advantage of uniformity across India.[187] The Government of India later clarified that would be satisfied if Baroda enacted its own law "following the provisions" of the Telegraph Act and the rules thereunder.[188]

When the Baroda Telegraph Act was finally drafted,[189] the grant of the operation licence by the Government of India became a point of contention. The *diwan* noted that there was no existing engagement between Baroda and the Government of India requiring the Viceroy's consent for the establishment of telegraph lines in Baroda territory. As a result, the draft Baroda

[185] For a discussion of Shahabuddin's life, see "Kazi Shahabuddin," in *Indian Statesmen*, 225-32.
[186] Letter from the *diwan* of Baroda to the Agent to the Governor-General at Baroda, 14 January 1884, IOR/P/2331, Proceedings of the Government of India in the Foreign Department, Internal, Financial, Judicial, Military, July 1884, no. 67.
[187] Letter from the Officiating Foreign Under-Secretary, Government of India to the Agent to the Governor-General at Baroda, 19 March 1884, IOR/P/2331, Proceedings of the Government of India in the Foreign Department, Internal, Financial, Judicial, Military, July 1884, no. 68.
[188] Letter from the Foreign Secretary, Government of India to the Agent to the Governor-General at Baroda, 23 July 1884, IOR/P/2331, Proceedings of the Government of India in the Foreign Department, Internal, Financial, Judicial, Military, July 1884, no. 71.
[189] Draft Telegraph *nibandh*, IOR/P/3038, Proceedings of the Government of India in the Foreign Department, Internal, May 1887, no. 274.

Act required the state to issue a licence to the BBCIR in supersession of the licence that had been issued by the Government of India. This was an indication that Baroda was attempting to retain as much control over the line as possible by claiming that it was the appropriate authority for the issue of licences in relation to telegraphs in state territory. The Agent to the Governor-General (AGG) at Baroda noted that the draft Act provided the state with the authority to make rules for the conduct of telegraph lines but did not take exception to this provision since it was framed more as an "assertion of State prerogative than with any view of interfering with the working of the line."[190]

The Government of India was not as relaxed about the assertion as the AGG, stating that Baroda was required to pass a law "in the spirit" of the Telegraph Act, the main principle of which was to vest in the Governor-General "complete control" over the telegraphic system in British India. It argued that a Baroda enactment framed along those lines would have vested control over state telegraph lines in the Governor-General. Instead, the draft statute reserved that control to the state itself and would consequently defeat the British objective of securing control over the whole telegraphic system of the region. It therefore reverted to its demand for Baroda's consent to the application of the Telegraph Act to the line. It also objected to the "assertion of State prerogative" by Baroda in retaining the power to frame rules for telegraph lines as "inappropriate."[191] The Government of India's arguments relied on the idea that sovereign powers were divided between the British and the princely states. Consequently, the British Government could claim the exercise certain sovereign powers within the territory of the princely states; in this case, it happened to be the power to determine the law applicable to telegraph lines situated within state territory.

In the attempt to retain control over its telegraph lines, Baroda delayed granting consent for the application of the Telegraph Act to its territory for years. As a result, the construction of telegraph lines in the state ground to a halt. In 1890, the issue began to be pursued more vigorously, since there were increased fears of an accident on railway lines that did not have

[190] Letter from the Agent to the Governor-General at Baroda to the Foreign Secretary, Government of India, 15 February 1886, IOR/P/3038, Proceedings of the Government of India in the Foreign Department, Internal, May 1887, no. 273.
[191] Letter from the Foreign Secretary, Government of India to the Agent to the Governor-General at Baroda, 12 May 1887, IOR/P/3038, Proceedings of the Government of India in the Foreign Department, Internal, May 1887, no. 276.

parallel telegraph lines.[192] The Government of India refused to permit construction until the state extended the Telegraph Act to Baroda territory.[193] To resolve the issue, the *diwan*, Manibhai Jashbhai, one of Kazi Shahabuddin's successors, suggested a compromise. First, he proposed that the telegraph lines in Baroda that were connected with the general telegraph system of British India (as distinguished from local lines that lay completely within Baroda territory) would be worked according to the spirit of the Telegraph Act, with control (including the power to issue licences) vesting with the Government of India. Second, he argued that jurisdiction with respect to offences under the Telegraph Act on telegraph lines in Baroda continue to vest with Baroda courts. He argued that this arrangement would preserve Baroda's "jurisdictional integrity," while ensuring that through telegraph lines were worked on a general and uniform system.[194]

The AGG found the *diwan*'s proposal satisfactory,[195] but the Government of India refused to accept anything "short of the complete and unconditional application of the Indian Telegraph Act by the Darbar to the lines in the Baroda State." It also refused to accept a carve-out for local lines, demanding that the Telegraph Act be made applicable to all lines.[196] After another two years, the *diwan* finally conveyed Baroda's consent to the application of the Telegraph Act "to all present and future telegraph lines in the Baroda State, that may be connected to the Imperial system, or, being isolated, may be thrown open to the public whose messages are charged for."[197] Jurisdiction over offences against the Telegraph Act, however, remained with Baroda courts, except in cases involving European British subjects.[198]

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[192] Letter from the Officiating Agent to the Governor-General at Baroda to the Foreign Secretary, Government of India, 6 May 1890, IOR/P/3742, Proceedings of the Government of India in the Foreign Department, Internal, July 1890, no. 343.

[193] Letter from the Public Works Secretary, Government of India to the Public Works Secretary, Government of Bombay, Railway Branch, 21 June 1890, IOR/P/3742, Proceedings of the Government of India in the Foreign Department, Internal, July 1890, no. 348.

[194] Letter from the *diwan* of Baroda to the Agent to the Governor-General at Baroda, 11 August 1891, IOR/P/3968, Proceedings of the Government of India in the Foreign Department, Internal, October 1891, no. 319.

[195] Letter from the Officiating Agent to the Governor-General at Baroda to the Foreign Secretary, Government of India, 15 August 1891, IOR/P/3968, Proceedings of the Government of India in the Foreign Department, Internal, October 1891, no. 318.

[196] Letter from the Foreign Under-Secretary, Government of India to the Agent to the Governor-General at Baroda, 13 October 1891, IOR/P/3968, Proceedings of the Government of India in the Foreign Department, Internal, October 1891, no. 320.

[197] Letter from the *diwan* of Baroda to the Agent to the Governor-General at Baroda, 1 February 1893, IOR/P/4401, Proceedings of the Government of India in the Foreign Department, Internal, August 1893, no. 59.

[198] Letter from the Foreign Under-Secretary, Government of India to the Agent to the Governor-General at Baroda, 18 July 1893, IOR/P/4401, Proceedings of the Government of India in the Foreign Department, Internal, August 1893, no. 69.

As with the Travancore dispute over criminal jurisdiction, Baroda's dispute over the laws to be applied to telegraph lines within its territory (a dispute over legislative jurisdiction) demonstrates the significance of the differing conceptions of sovereignty that the princely states and the British Government favoured. Baroda officials relied on the idea of "territorial sovereignty" to argue that the state was the exclusive and absolute sovereign over everything in its territory. Therefore, Baroda had the sole right to enact its own laws and to have its courts exercise jurisdiction with respect to telegraph lines within state territory even if the lines were part of a larger system connected with British India. Since the idea of territorial sovereignty implied that there was a single sovereign with respect to any piece of territory, Baroda officials argued that other entities such as the British Government could not exercise any sovereign authority over Baroda territory, i.e. over telegraph lines that lay completely within state territory.

Much as Travancore bureaucrats had done, Baroda officials sought to establish a single point of legal authority within state territory. The similarity of arguments is, perhaps, unsurprising, as Madhava Rao had been Kazi Shahabuddin's predecessor as *diwan* of Baroda, and had delivered a series of lectures to the minor ruler, Sayaji Rao III, emphasizing the importance of a well-run administration to minimize British interference in the state.[199] Shahabuddin had served as the head of the finance department during Madhava Rao's tenure as *diwan* and had been his close confidante.[200] He also carried on the extensive reforms that Madhava Rao had started in the state, including changes to the land revenue system, investment in education through the opening of a number of schools, the institution of competitive examinations for the civil service, and the establishment of an extensive public works system. These were analogous to the reforms carried out in Travancore, and among the varied reasons they were carried out was the need to impress colonial officials and conform to British ideals of responsible rule. More significantly, these reforms included the institution of a bureaucracy that concentrated power in the hands of the *diwan* and his subordinates at the expense of local nobles who had traditionally enjoyed enormous privileges.[201] Shahabuddin himself had been heavily involved in a similar effort of centralizing power during his tenure as the *diwan* of Kutch; there, he had pleaded the state's case against British interference in relation to the rights of the local

[199] See, in particular, Madhava Rao, *Minor Hints*, 285-89.
[200] "Kazi Shahabuddin," 230-31.
[201] David Hardiman, "Baroda: The Structure of a 'Progressive' State," in *People, Princes and Paramount Power*, 107-35.

zamindars (landholders).[202] The construction of sovereignty as "absolute" and "territorial" in the course of disputes with the British Government fit with the princely states' general efforts to create strong, centralized governments in the late nineteenth century.

Baroda's claims of territorial sovereignty or even its reliance on the status as a "model" state did not go very far. British officials defined sovereignty as divisible to argue that certain sovereign powers in relation to the princely states vested with the British Government, with the remainder left to the Baroda state. As a result, the British Government claimed the power to determine the laws applicable to telegraph lines even if they lay completely within Baroda territory. British officials also used the precedent of other princely states like Hyderabad to argue that Baroda was required to apply British Indian legislation to and cede partial jurisdiction over telegraph lines within its territory. Tupper's *Indian Political Practice* used the Baroda case itself as the basis of a generally applicable principle;[203] soon other princely states were also deprived of control over telegraph lines.[204] Relying on the twin principles of divisible sovereignty and precedent, therefore, enabled British officials to cement colonial control by integrating princely state infrastructure into the broader imperial system, but also claim that the states were "sovereign" in the sense that they retained the exercise of jurisdiction over most offences committed along telegraph lines.

Conclusion

The Travancore and Baroda disputes are only two of several late nineteenth-century jurisdictional conflicts between the princely states and the British Government. The vast colonial archives are brimming with debates over sovereignty that occurred in the everyday administration of the Empire, including in disputes with states like Bhopal[205] and Hyderabad.[206] As the two case studies I have discussed in this article demonstrate, the colonial encounter in South Asia generated two versions of sovereignty: absolute and divisible.

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[202] "Kazi Shahabuddin," 228.
[203] Tupper, *Indian Political Practice*, vol. 1, 194-95.
[204] For complaints by the princely states about the loss of such control, see Appendix 8 to Cabinet Paper RTC 31(2), Relations with Indian States, September 1931, IOR/L/PS/13/550.
[205] In 1863, Bhopal protested the exercise of jurisdiction by the British political agent over British subjects residing in the state. For a more detailed discussion, see D. K. Sen, *The Indian States, their Status, Rights and Obligations* (London: Sweet and Maxwell, 1930), 99-101.
[206] Hyderabad attempted to shut down a court that settled civil cases among Europeans residing in the state. See Beverley, *Hyderabad, British India, and the World*, 221-56.

British jurists like Henry Maine insisted that sovereignty was "divisible;" so entities like the princely states were sovereigns "of a certain kind" to which international law applied "in some sense." Political officers in the Government of India (such as Charles Aitchison, Charles Lewis Tupper, and William Lee-Warner) adopted this view of sovereignty and also built on Maine's insights to develop a system of precedent as a mechanism to determine the specific division of sovereign powers between the states and the British Government. Parsing through the post-1857 shift in British imperial ideology towards maintaining "native" rule is critical to understand these two moves. The construction of the states as entities that only possessed some sovereign powers with the remainder being exercised by the British Government was seen as both historical fact (since Maine argued that "traditional" Asian societies were different from "modern" centralized European nation-states) and a tremendously forceful legal argument that balanced the imperial push towards extensive British jurisdiction in the states and the political need to maintain the princes as allies. This latter assertion was also enabled by the system of precedent, in terms of which determinations made in a specific case were universalized into general principles and considered to be applicable to all states. The reliance on examples of the historical exercise of power soon enabled the British to reduce the princes' guarantees under individual treaties to mere "scraps of paper"[207] and entrench their paramountcy in the region.

By simultaneously recognizing the states as sovereign and not so, colonial officials softened the divide between the imperial and the international and reinforced the significance of legal arguments made in the course of the jurisdictional disputes that permeated British relations with the princely states. Law in general, and the concept of sovereignty in particular, became the language that the participants in these disputes used to articulate their differences.[208] And since sovereignty is capable of being defined in multiple ways, the princely states relied on a different set of arguments, claiming that sovereignty was absolute, unitary, and linked with the control of territory; they were, therefore, entitled to exercise all sovereign rights within their territory. The "sovereignty as territory" argument had two main aims. The first was to limit British interference in the internal affairs of the states, which was intensifying in the late nineteenth century. In this, the princes and their advisors can be situated within a broader tradition of protest against colonial

[207] I borrow this term from A. P. Nicholson. See A. P. Nicholson, *Scraps of Paper: India's Broken Treaties, Her Princes, and the Problem* (London: Ernest Benn Limited, 1930).
[208] John Fabian Witt, "Anglo-American Empire and the Crisis of the Legal Frame (Will the Real British Empire Please Stand Up?)," *Harvard Law Review* 120 (2006-2007): 783-84.

authorities. Madhava Rao, for instance, relied on the international law treatise authored by Emer de Vattel that, tellingly, was also a source of inspiration to American colonists who had rebelled against British authorities a century prior.[209] The "territorial sovereignty" argument of the princely states is also similar to the "absolute sovereignty" claim of nineteenth-century international lawyers from the "semi-periphery" to argue for autonomy and equality.[210] In the case of the princely states, the idea of territorial sovereignty was not only externalized as a defence against British interference, but also had a second, inter-linked aim that was directed inwards. During the late nineteenth century, many states were engaged in the task of creating centralized, bureaucratic states. Although this effort met a variety of goals, it also helped to maintain the façade of well-administered states to minimize British intervention. It was frequently carried out at the expense of local nobles, who often exercised tremendous influence that had the potential to undercut monarchical authority within the state.[211] For instance, as a Marathi *brahmin* in Travancore, Madhava Rao was himself the beneficiary of a common move by ruling princes of importing western-educated administrators from outside the state to replace local nobles who had an independent power base within the state.[212] In addition to engaging in legislative and administrative activities to counter the power of the nobility and to intervene more extensively in the lives of their subjects, states also moulded an image of centralized control through the idea of territorial sovereignty.

To some extent, studying the princely states can also provide us with a basis for investigating the broader role that the doctrine of sovereignty played in political struggles across the British Empire. As India was the ideological and economic foundation of the Empire and the basis upon which it expanded across Asia and Africa,[213] it provided "inspiration, precedents, and

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[209] For a discussion of Vattel's influence on the American colonists, see David Armitage, *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013), 222-25.

[210] For a discussion of this argument of semi-peripheral international lawyers, see Becker Lorca, *Mestizo International Law*, 62-65.

[211] For instance, the Kathiawar rulers relied on the "rights of independent sovereignty" to limit the support provided by the British to *girassias* (local landholders) who often set up alternate power bases challenging sovereign authority. See Memo submitted by the *vakeels* of Junagadh, Nawanagar, Bhavnagar and Dhrangadhra, 11 July 1871, IOR/L/PS/6/597; Letter from the *nawab* of Junagadh, the *jam* of Nawanagar, the *thakur* of Bhavnagar, the *thakur* of Dhrole, the *thakur* of Wadhawan, the *thakur* of Choora, the *khan* of Bantwa, and the *malik* of Banjana to the Governor and President in Council, Bombay, 1 January 1872, IOR/L/PS/6/597; Letter from the Foreign Secretary, Government of India to the Political Secretary, Government of Bombay, no. 1451P, 2 July 1872, IOR/L/PS/6/597. See also, Copland, *The British Raj and the Indian Princes*, 112-16.

[212] Ramusack, *The Indian Princes and their States*, 112, 182-86.

[213] Fisher, *Indirect Rule in India*, 459.

personnel for colonial administration."[214] The model of "divisible sovereignty" that was articulated in the context of the princely states was consciously exported to other parts of the Empire, including the Persian Gulf states, the Malay states, Uganda, and northern Nigeria.[215] Nevertheless, indirect rule did not look alike in these different places as colonial officials quickly adapted general ideas to suit specific contexts. Even the Malay states and northern Nigeria, considered to be heavily influenced by the princely state model, ended up being under greater direct supervision of British officials than the princely states ever were.[216] The princely states were, therefore, considered to be *sui generis*, both by British[217] and state officials.[218] Although other local rulers made arguments in the language of sovereignty, in comparison with other indirectly ruled territories within the British Empire, the princely states' sovereignty had the most substance,[219] at least during colonial rule.[220] International law, as David Kennedy argues, means different things to different people in different places.[221] Even within South Asia, the

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[214] Thomas R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley: University of California Press, 2007), 45.

[215] See Copland, *The British Raj and the Indian Princes*, 298; and Fisher, *Indirect Rule in India*, 459. Lauren Benton notes that nineteenth-century international lawyers and colonial officials also drew comparisons between the princely states and Native American tribes that were considered to be "domestic dependent nations" within the United States; however, she also concedes that the histories of these two types of polities were quite different. See, Benton, *A Search for Sovereignty*, 271-76.

[216] Metcalf, *Imperial Connections*, 32-45; and Fisher, *Indirect Rule in India*, 461-77. In fact, Mahmood Mamdani argues that there was little difference between direct and indirect rule in Africa. See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996); and Mahmood Mamdani, *Define and Rule: Native as Political Identity* (Cambridge, MA: Harvard University Press, 2012).

[217] In correspondence with the Colonial Office, India Office officials repeatedly noted that the princely states' rulers exercised far more sovereign powers than other rulers like the Malay *sultans*. See Simon C. Smith, *British Relations with the Malay Rulers from Decentralization to Malayan Independence, 1930-1957* (Kuala Lumpur: Oxford University Press, 1995), 51-53. See also *Report of the Indian States Committee, 1928-29* (London, 1929), para 43.

[218] K. M. Panikkar, *An Introduction to the Study of the Relations of Indian States with the Government of India* (London: Martin Hopkinson, 1927), xix.

[219] However, despite wresting concessions from colonial officials, the states were not recognized as "sovereign states" in later international law treatises. See Lassa Oppenheim, *International Law: A Treatise*, vol. 1, *Peace* (London: Longmans, Green & Co., 1905), 135n1. Most inter-war British international lawyers acknowledged the divisibility of sovereignty but were broadly unconcerned with the specific question of the sovereignty of entities like the states, largely on account of the wholesale critiques of the concept of sovereignty itself in the aftermath of the First World War. See Hersch Lauterpacht, "Westlake and Present Day International Law," *Economica* 15 (1925): 307-25; and J. L. Brierly, "The Sovereign State Today," in *The Basis of Obligation in International Law and Other Papers*, ed. Hersch Lauterpacht and C. H. M. Waldock (Oxford: Clarendon Press, 1958), 348-57.

[220] The disappearance of the states in the wake of Indian independence was astonishingly rapid. See Copland, *The Princes of India in the Endgame of Empire*, 269-70. This is surprising since others, such as the Malay *sultans*, managed to survive a similar transition. One reason for the difference could be that the princes had an antagonistic relationship with Indian nationalists, as opposed to the Malay *sultans*, who managed to reach an accommodation with Malay nationalists. On this latter relationship, see Smith, *British Relations with the Malay Rulers*, 167-99.

[221] David Kennedy, "The Disciplines of International Law and Policy," *Leiden Journal of International Law* 12 (1999): 17.

versions of sovereignty articulated by the British and the states in the latter half of the nineteenth century did not remain static during the entire period of colonial rule. While legal language continued to provide a fertile means for debate, the strengthening of anti-colonial nationalism at the turn of the century reconfigured relations between the British and the princes and led to new sets of arguments about sovereignty and political order.[222]

Although the specific late nineteenth-century context is important, there are two ways in which the particular history that I have traced in this article assumes broader significance. First, it highlights the fact that both British colonial authorities and the princely states constructed themselves and their notions of political order through the articulation of versions of sovereignty in the course of jurisdictional disputes. Sovereignty was a concept that gained multiple meanings and justifications over time, as a variety of players attempted to use, manipulate, cannibalize, reimagine, and structure the idea in different ways to give shape to their often-conflicting visions for imperial and global order. It also retained this creative role after decolonization, as seen in the long afterlife of the "territorial sovereignty" argument of the princely states, which was taken up with increasing vigour by anti-colonial nationalists in the aftermath of Indian independence in 1947.[223] More generally, the absolutist conceptualization of sovereignty formed the basis of the principles of non-interference and territorial integrity, prized by many newly-independent nations in the mid-twentieth century in their efforts to minimize neo-colonial intervention and build a more equitable international order.[224] Unravelling the complex history of sovereignty in the colonial context then, can help us to understand the history of the various ways in which people have thought about organizing the world and their relationships with each other. Arguments about sovereignty were and remain a reflection of broader discussions over where the realms of the "national" and the "international" lie, i.e. they are debates over the "boundaries of the international;" tracing this history is, therefore, key to understanding international law itself.

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[222] In the inter-war period, the states faced both British intervention and criticism from Indian nationalists. To balance their relationships with British India and the Crown while also carving out a space for themselves, they started to rely on a version of divisible sovereignty. For a fuller discussion, see Saksena, "Jousting Over Jurisdiction," 137-363.

[223] For instance, Indian officials relied on the idea of territorial sovereignty in disputes over the state of Hyderabad and the Indus basin. See A. G. Noorani, *The Destruction of Hyderabad* (London: Hurst & Company, 2014), 247-68; and Daniel Haines, *Rivers Divided: Indus Basin Waters in the Making of India and Pakistan* (Oxford: Oxford University Press, 2017), 43-49.

[224] See Antony Anghie, "Bandung and the Origins of Third World Sovereignty," in *Bandung, Global History, and International Law*, 535-51.

Second, the sovereignty arguments made in the particular context of late nineteenth-century South Asia also map on to a broader understanding of the relationship between law and empire. In recent years, historians have moved beyond binary notions of law as either being a mechanism of imperial oppression or a tool in the hands of colonized peoples to fight such subjugation. Colonialism was violent, ruthless, and exclusionary, and so even though legal concepts are malleable, on account of the limitations of the colonial context and the inequalities of power relations, it is difficult to think of colonized peoples who made legal arguments as agency wielding heroes. This is particularly true in the case of the princes and their bureaucrats, who did not demand political freedom and social revolution, but rather were engaged in the task of carving out a space for state elites in the struggle for power.[225] But rather than view such actors as collaborators on account of their reliance on the colonial legal system, it is important to recognize the complexity of the interplay of voices, interests, and demands in the shaping of law.[226] Conflict was a part of the framework; it was the very essence of imperial legal structures.

Charting out the details of colonial-era debates over legal concepts such as sovereignty can also help us to understand processes of domination and resistance in the contemporary world.[227] For instance, debates over humanitarian intervention have played out in a manner similar to imperial legal disputes over jurisdiction, illustrating the doubledness of the concept of sovereignty. So arguments over the legality of military action by the "international community" for the purposes of upholding ideals such as democracy or human rights revolve around the construction of particular versions of sovereignty, i.e. whether the sovereignty of a state is regarded as "absolute" or whether sovereignty is interpreted as being dependent on factors such as the provision of "good government" or the protection of human rights.[228]

By focusing on the multiple iterations of concepts like sovereignty by a variety of actors

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[225] For the argument that Madhava Rao was not a political radical as he made no case for democracy, see S. V. Puntambekar, "Raja Sir T. Madhava Rao's Prince or the Law of Dependent Monarchies," *Indian Journal of Political Science* 5 (1944): 293-305.

[226] See Mitra Sharafi, "A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire," *Law & Social Inquiry* 32 (2007): 1064; and Eleanor Newbigin, Leigh Denault, and Rohit De, "Introduction: Personal Law, Identity Politics and Civil Society in Colonial South Asia," *The Indian Economic and Social History Review* 46 (2009): 1-4.

[227] On this point, see Sally Engle Merry, "Review Essay: Law and Colonialism," *Law and Society Review* 25 (1991): 889-922.

[228] For discussions of the parallels between colonial legal arguments and contemporary debates over humanitarian intervention, see Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (Cambridge: Cambridge University Press, 2003), 45-46; and Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge: Cambridge University Press, 2011), 1-34.

over time, we can understand the crucial role played by conflict and struggle in the creation of the legal architecture of the world. As I have argued in this article, the language of international law, and of sovereignty in particular, was all-encompassing; throughout the latter half of the nineteenth century, it was used a means to debate and resolve disputes, and continues to be a forum for the negotiation of political power even today. Legal forms and practices, therefore, are political products that arise from the contests of clashing social groups, rather than being timeless and neutral arbiters of social and political disputes; hence, they are contingent and capable of being challenged. As a result, international law, and the concept of sovereignty in particular, is a field of conflict, a site of struggle.