

SPECIAL ISSUE ON MISRECOGNITION IN WORLD POLITICS: REVISITING HEGEL

Misrecognition in legal practice: the aporia of the Family of Nations

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Abstract

This article discusses the concept of misrecognition to analyse international legal ordering in the practice of colonial treaty-making. As critical interventions to the debate on recognition have made clear, recognition is about exclusion as much as it is about inclusion. The most obvious example is the nineteenth-century applications of the standard of civilisation, where the European Family of Nations introduced the criterion of ‘civilisation’, which excluded non-European entities as sovereigns and legitimised their colonisation. But at the same time colonial treaties included the ‘savage rulers’ as signatory powers, and thus legal persons within the international legal order that at once excluded them. This contribution to the Special Issue discusses these treaty-making practices as a practice of misrecognition; not because it misrecognises some natural, essential, or true identity of the indigenous entities, but as a misrecognition of the international order’s own conditions of possibility through practices that simultaneously constitute that order and undermine its constitutive conditions. A rereading of Hegel’s famous master–slave metaphor through the concept of misrecognition sheds light on the reversals and contradictions of the colonial legal enterprise and reveals the aporia of the contemporary international legal order by showing the void at its heart.

Keywords: Family of Nations; Standard of Civilisation; Hegel; Misrecognition; Treaty-making

Introduction

Identified as the ‘homage that politics pays to law’,¹ the concept and practice of recognition has been a subject of considerable interest to both International Relations and International Law scholars alike. Both scholarships draw on Hegel’s dialectics and philosophy of recognition to theorise the relationship between identity or international legal personality and recognition. But what would a practice of *misrecognition* – following the shift of focus proposed by this Special Issue – look like from a legal perspective? As the state and its legal personality are accepted as a legal fiction across the board of international legal scholarship, the notion of misrecognition might be even less straightforward from a legal perspective than it is from a political one. In my contribution to this Special Issue I explore what a practice of misrecognition could legally entail, and furthermore, how recognition can go hand-in-hand with misrecognition, as two sides of the same coin.² The first part of the article addresses these questions in doctrinal and conceptual terms; the second part discusses colonial treaty-making as an instance of mis/recognition, as an interplay of recognition and misrecognition.

¹Jan Klabbers, *International Law* (Cambridge: Cambridge University Press, 2017), p. 98.

²Charlotte Epstein, Thomas Lindemann, and Ole Jacob Sending, ‘Frustrated sovereigns: the agency that makes the world go around’, *Review of International Studies*, 44:5 (2018), introduction to the Special Issue.

In their discussions of recognition, both IR and IL scholarship make productive use of Hegel's metaphor of the master–slave to elaborate the relational character of identity, the constitutive nature of recognition, and distil the inherent hierarchies involved.³ This metaphor has also been a particularly popular entry to discuss and criticise the colonial practice of withholding sovereignty from the so-called uncivilised and barbaric nations, and thus legitimising colonialism as a *mission civilisatrice*, aimed, as formulated in the General Act of the infamous Berlin Conference (1884–5), at 'instructing the natives and bringing home to them the blessings of civilization'.⁴ Despite its usefulness in highlighting the mutual yet hierarchical constitution of the colonial self and colonised other, I argue that this import of Hegel's philosophy of recognition misses out on an important dimension of these practices, namely the self-engendered paradox or aporia of colonialism as a legal enterprise. By mainly focusing on the constitutive and dominating effects of this hierarchy on the colonised, such a reading of the master–slave imaginary conceals the productive force of the negative underlying the metaphor, 'as a motor in how any relation unfolds' as our editors put it.⁵ Drawing on the rereading of the master–slave metaphor through negativity as its constitutive force, as presented in this Special Issue, not only redirects our attention to the *mutual* constitutive relationship of self and other – thus shifting the focus to the European sovereigns (who want to but cannot be fully sovereign over the colonial), but also facilitates a more comprehensive understanding of what colonialism meant in terms of the projected international legal order, with European powers as the putatively established sovereign core of the Family of Nations. It sheds light on the 'difficult path of reversals and contradictions'⁶ through which that order is established, and at once is constantly undermined and rendered instable. Instability in this context should not be read in an immediate sense, but 'in a historical trajectory wherein the very existence of the "other" on the terrain of the international functions as both a constraining and an enabling force'.⁷

Focusing on the practice of colonial treatymaking, this article explores the more complex forms of subjectification that are at play in these practices, which in turn contradict the order on which they are based. Within postcolonial legal theory, colonial treaties have been forcefully criticised as rhetorical window-dressing, political expediency, and imperialist violence. These forms of domination and violence inherent in the treatymaking practices are key to the colonial legal enterprise, but from a performative perspective something more is at play, something that can be identified as a practice of misrecognition. As will be elaborated below, misrecognition in this reading does not concern a cognitive misrecognition of someone's true or authentic identity, to paraphrase Charles Taylor,⁸ but rather a misrecognition of the condition of possibility of our own practices, of what our practices *do* – 'a fundamental ontological misrecognition of the nature and circumstances of our own activity', as Patchen Markell puts it – which at once is rooted in a desire for absolute or full sovereignty, and ultimately makes this desire impossible to fulfil.⁹ This is captured in his notion of 'sovereign agency', which is more

³See references in the introduction. For a recent discussion of Hegel, recognition, and international legal personality, see Rose Parfitt, 'Theorizing recognition and international personality', in Florian Hoffman and Anne Orford (eds), *The Oxford Handbook of International Legal Theory* (Oxford: Oxford University Press, 2016), pp. 583–99.

⁴Article 6, General Act of the Berlin Conference, 26 February 1885, reproduced in Edward Hertslet, *The Map of Africa by Treaty, Volume 2* (London: Harrison and Sons, 1909), Treaty No. 128, pp. 468–86.

⁵Epstein, Lindemann, and Sending, 'Frustrated sovereigns'.

⁶Patchen Markell, *Bound by Recognition* (Princeton: Princeton University Press, 2003), p. 93.

⁷Vivienne Jabri, 'Disarming norms: Postcolonial agency and the constitution of the international', *International Theory*, 6:2 (2014), pp. 372–90 (p. 384).

⁸See Epstein, Lindemann, and Sending, 'Frustrated sovereigns' and Charlotte Epstein, 'The productive force of the negative and the desire for recognition: Lessons from Hegel and Lacan', *Review of International Studies*, 44:5 (2018), this Special Issue for a discussion of Taylor's conceptualisation of misrecognition.

⁹Patchen Markell, 'The recognition of politics: a comment on Emcke and Tully', *Constellations*, 7:4 (2000), pp. 496–506 (p. 503); 'The desire for sovereignty is impossible to fulfil, because it is itself rooted in a misrecognition of the basic conditions of human activity' (Markell, *Bound by Recognition*, p. 22).

than just a recognised formal capacity insofar as such a status brings with it ‘fantasies of sovereignty’ as a desire for absolute control, authenticity, and autonomy as a substantive but ultimately unattainable form of agency or power.¹⁰ This is how recognition and misrecognition are dual sides of the coin.

In order to analyse how recognition and misrecognition can go hand-in-hand in legal practices, the next sections first discuss the importance of recognition within international legal discourse and explore what the concept of misrecognition could entail from an international legal perspective. I argue why only a performative concept of (mis)recognition legally makes sense, whether from a critical legal or more doctrinal perspective. The second part of the article analyses colonial treatymaking as an instance of misrecognition by analysing the performative aspect of colonial treaties that were supposed to legally secure the sovereign power of the colonisers yet at the same time undermined the idea of an international legal order based on the core of civilised European sovereigns. The European claim of sovereignty over the colonial is incomplete or instable by virtue of the very legal practices that legitimise or constitute it. Analysing the treatymaking practices through the lens of mis/recognition redirects our attention beyond the material and cognitive violence on the colonial, and sheds light on the reversals and contradictions of the colonial legal enterprise, rendering not only the enterprise itself but ultimately the international legal order upon which it was based, instable. Thus the treaties at the same time are the condition of possibility of the contemporary international legal order, and its condition of impossibility.¹¹ Through these treatymaking practices European colonial legal order produced its own denial, and a void at the heart of the Family of Nations it allegedly merely regulated.

Recognition and international legal personality

Within international law, recognition concerns questions such as which states qualify as members of international society, what political entities count as sovereign states in the first place and, more specifically: who counts as an international legal person (ILP)? In international law these questions are in a sense different sides of the same coin insofar as ILP is in practice linked up with sovereignty, which in turn is linked up with statehood (even if in theory personality is a status that can be given to any entity, and the practice is also widening).¹² The crucial importance of the concept of ILP is that it not only refers to a formal legal status, but also (or according to some readings, primarily) to rights and duties attached to that status, and hence agency. ILP is ‘short-hand for the proposition that an entity is endowed by international law with legal capacity’;¹³ ‘To

¹⁰Markell, *Bound by Recognition*, pp. 11–14 (p. 22). Here one could make a further distinction between a formal agency as legal capacity (as addressed in the discussion of international legal personality later) and a more substantive notion of agency as a desire for and/or capacity to control or have a choice, as also addressed in other contributions to this Special Issue. In the final section, these two notions come together in a discussion of the treatymaking practices as part of the European desire to be sovereign and have sovereignty over the colonised. See further below as well as in Epstein, Lindemann, and Sending, ‘Frustrated sovereigns’; and the discussion of Markell in Epstein, ‘The productive force of the negative’.

¹¹In their contribution to this Special Issue, Minda Holm and Ole Jacob Sending, ‘States before relations: On misrecognition and the bifurcated regime of sovereignty’, *Review of International Studies*, 44:5 (2018) distinguish between two levels of misrecognition: misrecognition between actors as understood in the master–slave metaphor, on the one hand, and misrecognition at the level of institutional configurations that structure that dynamic, on the other. Drawing on the rereading of the master–slave metaphor through negativity as its constitutive force, I elaborate how these two forms of misrecognition are actually linked within legal practices, which impacts on how sovereign agency is claimed and constituted yet cannot be fulfilled. As such, mis/recognition is not only institutionally mediated, as Holm and Sending argue, but at once undercuts the whole institution or foundation of the endeavour itself. That is to say, it reveals the instability of sovereign agency in its very foundation in legal practices, which in term are grounded in sovereign acts and consent.

¹²See James Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 2006), p. 28.

¹³D. P. O’Connell, *International Law, Volume I* (London: Stevens, 1970), p. 82.

be a legal person is also to be recognized as an active participant in the polis',¹⁴ which in turn ties it in with political and moral considerations about who is or should be granted membership of – and voice in – the society. In other words, who can be considered competent, valid, and important interlocutors in the international as a social space and symbolic structure.¹⁵ International recognition hence is just as much about the constitution of (states as) legal persons, as sovereign agents in Markell's terminology,¹⁶ as it is about constituting (the boundaries of) international society, and about the making of 'non-persons'.¹⁷ Further, and contrary to the liberal perspective on recognition and international society, it is about exclusion as much as it is about inclusion.¹⁸

Hence, while international law is traditionally presented as regulating relations between states, as the product of their own making, as well as an outcome and indicator of the development of international society,¹⁹ international law crucially at once produces the objects of its own regulation as well as the kind of politico-legal order they inhabit, and the boundaries of international society. As such, law is not only a speech act that creates institutional facts,²⁰ but a performative practice that defines the subjects to be governed.²¹ In other words, law functions as a tool to determine the class of subjects to whom the law itself applies. It is through such 'personation' that rights (and duties) can be attached to an entity, and that international law can do its governing work: 'To abide by the law is thus not primarily a matter of "being good", but rather a matter of submitting oneself to a rule which makes it possible "to be" in the first place.'²² As such, 'personation' or the making of legal persons has been identified as 'the greatest political act of law'.²³ It also makes the question whether states really *are* persons and the critique of anthropomorphisation²⁴ somewhat beside the point from a legal perspective. The state is treated 'as if' it were a person, for certain legal purposes – namely as an ordering device, to make it capable of bearing rights and obligations – and as such it is 'just as

¹⁴Ngairé Naffine, 'Can women be legal persons?', in Susan James and Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Oxford: Hart, 2002), pp. 69–70 (p. 69).

¹⁵Epstein, Lindemann, and Sending, 'Frustrated sovereigns'.

¹⁶His focus was first and foremost on the domestic politics of recognition as opposed to the international practice that this Special Issue addresses. See also fn. 10 and Epstein, Lindemann, and Sending, 'Frustrated sovereigns' and Epstein, 'The productive force of the negative'.

¹⁷Fleur Johns, 'Introduction', in Fleur Johns (ed.), *International Legal Personality* (Farnham: Ashgate, 2010), pp. xi–xxix.

¹⁸Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005); Jens Bartelson, 'Three concepts of recognition', *International Theory*, 5 (2013), pp. 107–29; Tanja Aalberts, 'Rethinking the principle of (sovereign) equality as a standard of civilisation', *Millennium*, 42:3 (2014), pp. 767–89; Erik Ringmar, 'Recognition and the origins of international society', *Global Discourse*, 4:4 (2014).

¹⁹Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (London: MacMillan, 1995 [orig. pub. 1977]).

²⁰John R. Searle, *The Construction of Social Reality* (New York: Free Press, 1995), pp. 12, 27.

²¹Judith Butler, 'Sexual inversions', in Susan J. Hekman (ed.), *Feminist Interpretations of Michel Foucault* (University Park, PA: The Pennsylvania State University Press, 1996), pp. 59–76.

²²Erik Ringmar, 'The relevance of international law: a Hegelian interpretation of a peculiar 17th-century preoccupation', *Review of International Studies*, 21 (1995), pp. 87–103 (p. 95). He suggests that law is only of relevance as a resource for the identification of statehood at the moment of recognition and identity formation. However, as constructivist and post-structuralist literature has argued, sovereign statehood is an 'ongoing accomplishment of practice' (Alexander Wendt, 'Anarchy is what states make of it: the social construction of power politics', *International Organization*, 46:2 (1992), pp. 391–425); and sovereignty not a stable norm or identity, but one that is constantly reproduced (Cynthia Weber, 'Performative states', *Millennium*, 27:1 (1998), pp. 77–95). Law plays a productive role in this ongoing process; see Tanja Aalberts, *Constructing Sovereignty between Politics and Law* (London and New York: Routledge, 2012). See also the distinction between status as 'a condition achieved' versus status 'in continuous process of production', as discussed in Epstein, Lindemann, and Sending, 'Frustrated sovereigns'.

²³Ngairé Naffine, 'Who are law's persons? From Cheshire Cats to responsible subjects', *Modern Law Review*, 66:3 (2003), pp. 346–67 (p. 347).

²⁴See the symposium in *Review of International Studies*, 30:2 (2004). See also discussion by Epstein, in 'The productive force of the negative'.

real and no more real' than human beings in *their* capacity as legal persons.²⁵ As a legal fiction or abstraction, (state)personhood has to be assessed pragmatically.²⁶

The crucial question is hence: who counts as a state or international legal person, on what basis or classificatory scheme, and what role does recognition play? This is a highly contested issue in modern legal positivism, as exemplified in two recognition doctrines. According to the declaratory doctrine, an entity is a state under international law as soon as it displays the empirical features for statehood as defined in the Montevideo convention: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.²⁷ In this perspective, recognition is nothing but an additional confirmation of a pre-existing fact of statehood. As such, it provides categorical evidence that a sovereign state has come into being, but recognition itself is not instrumental to that birth. In other words, recognition is a political rather than legal act.

According to the constitutive doctrine, on the other hand, a state is a state only once the alleged facts of statehood are recognised as being in place by fellow-states. Recognition in this sense should be interpreted as '[t]he procedure provided by general international law to ascertain the fact "state in the sense of international law", in a concrete case.'²⁸ Thus, recognition is the act, both necessary and conclusive, which establishes the international personality of an entity that governs a population inhabiting a territory. This particular emphasis of recognition is often identified as the lasting legacy of Hegel on modern international law.²⁹ Of crucial importance in this regard is Hegel's identification of the existential necessity of relations (*Verhältnis*) with other states as condition of possibility of being 'an actual individual [*Individuum*]'.³⁰

²⁵As Smith notes with regard to the domestic context: 'The legal personality of a corporation [or sovereign state] is *just as real and no more real* than the legal personality of a normal human being. In either case it is an abstraction, one of the major abstractions of legal science, like title, possession, right and duty' (Bryant Smith, 'Legal personality', *Yale Law Journal*, 37 (1928), pp. 283–99, quoted by Naffine, 'Who are law's persons?', p. 352, emphasis added). Moreover, it should be noted that until rather recently it was human beings that did not count as persons under international law, and now they only do so in a limited sense as they have only some legal capacity but not full legal personality. For instance, they are the bearers of human rights, but cannot always submit individual petitions when their rights are being violated. The most revolutionary development in the international legal personation of individuals has been international criminal law, which enables holding perpetrators individually responsible and punish them for war crimes.

²⁶Nicholas Blomley, 'Disentangling law: the practice of bracketing', *Annual Review of Law and Social Science*, 10 (2014), pp. 133–48. The emergence of the concept of ILP in the late seventeenth century enabled a move beyond treaties as the personal obligations of monarchs as its signatories, to obligations of the state they represent and embody. This was illustrated by a change of practice in how monarchs were listed in the text and preambles of treaties – no longer by their names, but by their most important titles (Wilhelm G. Grewe, *The Epochs of International Law* (Berlin: de Gruyter, 2000 [orig. pub. 1984]), p. 361). As a result, through the legal fiction of international legal personality the state obtained some kind of transcendental status. This inappropriateness of the anthropomorphic critique for instance also transpires in the doctrine on State Responsibility. The key to establish state responsibility is whether particular violations of international legal obligations can be attributed to the state (because they were executed or endorsed by state organs), not what the mentality or intention (*mens rea*) of the state was.

²⁷165 Law of Nations Treaty Series 19 (1936).

²⁸Hans Kelsen, *Principles of International Law* (New York: Holt, Rinehart, Winston, 1966), p. 389.

²⁹Bartelson, 'Three concepts of recognition'; Parfitt, 'Theorizing recognition and international personality'.

³⁰G. W. F. Hegel, *Elements of the Philosophy of Right*, trans. H. B. Nisbet (Cambridge: Cambridge University Press, 2003), §331. 'Individuality, as exclusive being-for-itself, appears as the *relation* [of the state] *to other states*, each of which is independent [*selbständig*] in relation to the others.' (§322, emphasis in the original). See also Epstein, 'The productive force of the negative'. However, less widely discussed within IR is that Hegel himself seems to remain ambivalent in terms of the question of this relational or social element (also known as external sovereignty) relates to the internal basis of sovereignty as an independent power. Indeed, he identifies this recognition as a sovereign and independent power as a 'primary and absolute *entitlement*' (§331, emphasis added) of the state. Moreover, this statement is followed by a rather ambiguous explanation: 'On the [one] hand, the legitimacy of a state [and] the power of its sovereign, is a purely *internal* matter [which he then elaborates as a normative matter of an international dimension: 'one state should not interfere in the internal affairs of another']. On the other hand, it is equally essential that this legitimacy should be *supplemented* by recognition on the part of other states' (Hegel, *Elements of the Philosophy of Right*, §331, emphasis in the original). This would imply a kind of corporate identity as basis for recognition as constitutive of an additional social identity. This is similar to Wendt's discussion

This recognition debate is controversial precisely because statehood is directly linked to the notion of ILP – all states have international legal personality (as a status), which means they can have particular rights and obligations *vis-à-vis* each other and the international community as a whole.³¹ Ultimately, the crux of the debate concerns the legal consequences of recognition. This dilemma is nicely captured by Hersch Lauterpacht when he claims that ‘although recognition is ... declaratory of an existing fact ... such declaration is constitutive, as between the recognizing State and the new community, of international rights and duties associated with full statehood’.³² The problem of course is that facts do not speak for themselves, or as Lauterpacht points out: objective knowledge and facts cannot exist without a subject to know it. Recognition in this sense is not just a cognitive act, the acknowledgement of an already existing thing, or an acknowledgement of authenticity as Taylor suggests. Rather, *erkennen* (knowing) and *anerkennen* (acknowledging) are interlinked; and the question is who has the authority to identify that something is the case? Consequently, as Bartelson notes, the declaratory view – generally conceived as the dominant, less political, perspective in contemporary IL – easily collapses into a constitutive view of statehood,³³ which has been discredited precisely because it reduces the emergence of a legal fact (that is, a state under international law) to the discretion of existing states and, as such, falls prey to conflating law with politics. The most infamous example of such conflation in history is the nineteenth-century applications of this doctrine, where the European Family of Nations introduced the criterion of ‘civilisation’ (by their own image), which excluded non-European state entities as non-sovereigns and non-international persons and in turn enabled and legitimised the European colonising endeavours. However, this practice of exclusion by law was not as straightforward as that, and created a self-engendered paradox at the heart of the contemporary international legal order. I analyse this as a practice of misrecognition in the next section. In order to do so, the next section will first explore what a concept of misrecognition might look like in legal discourse.

Misrecognition in international law

Against the background of the legal recognition doctrines, what would a practice of misrecognition look like in legal terms? In mainstream international legal discourse the concept of misrecognition does not really resonate.³⁴ It is more common to speak of (a politics of) non-

of different types of identity (Alexander Wendt, *A Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999)). While not substantially referring to Hegel, Wendt too discusses ‘individuality’ as (the outcome of) a social practice, and displays a similar ambivalence with regard to sovereignty (Aalberts, *Constructing Sovereignty*).

³¹This was different in nineteenth-century legal doctrine, in which case a distinction was made between full sovereigns as international legal persons and recognised members of the Family of Nations, and states that lacked that personality. See Lassa Oppenheim, *International Law: A Treatise, Volume I* (London: Longmans, Green and Co., 1912), pp. 117, 166, and further discussion to come.

³²Hersch Lauterpacht, *Recognition in International Law* (Cambridge: The University Press, 1947), p. 6.

³³Bartelson, ‘Three concepts of recognition’. It also means that we can only distinguish between political and legal recognition in terms of the legal implications of recognition (rather than its rationales, desires, procedures, or criteria). This conflation of the two doctrines arguably also happens in light of the desire for sovereign agency in Markell’s terms: even if officially the declaratory doctrine is said to prevail (precisely because of the controversial legacy of the constitutive doctrine), states still seek to receive recognition from the international community to confirm their existence. Thus, the desire for sovereignty ‘doubles up as a *desire to be recognised* in one’s capacity as a rightfully entitled to be desiring that thing, and within the symbolic structure that sets the terms of this recognition drama’. See Epstein, Lindemann, and Sending, ‘Frustrated sovereigns’.

³⁴For a discussion of misrecognition and transnational law within the domestic context, see Ivana Isailovic, ‘Political recognition and transnational law: Gender equality and cultural diversification in French courts’, in Horatia Muir Watt and Diego P. Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford: Oxford University Press, 2014), pp. 318–42; and in the context of human rights: Kristin Bergtora Sandvik, ‘Rapprochement and misrecognition: Humanitarianism as human rights practice’, in Christoffer C. Eriksen and Marius Emberland (eds), *The New International Law: An Anthology* (Leiden: Brill, 2010), pp. 139–58.

recognition, in the case of entities that would qualify according to the factual criteria of statehood but do not pass the legitimacy bar by violating fundamental norms of international society. Notorious cases are the call for collective non-recognition of the UN Security Council upon declarations of independence by Southern Rhodesia (1965) and the Bantustans in South Africa (1976). While fulfilling the classical criteria of statehood, the UN argued that the racist nature of the regimes violated the fundamental right of nations to self-determination. Thus it called upon its members to refrain from recognising Southern Rhodesia and the African homelands as sovereign states.³⁵ It is now widely accepted that illegality of origin, based on a violation of fundamental rules of international law (so-called *ius cogens* as peremptory rules of law), states have a duty of non-recognition under customary law.³⁶ These cases of *non*-recognition could also be identified as unsuccessful claims to statehood, that is, ones that do not result in recognition and ILP; but what would *mis*recognition within a legal framework entail?

Another possibility to analyse misrecognition within a framework of law is to identify contradictions within the practice. One could, for instance, identify where similar cases are recognised differently, or different criteria are used to justify decisions of (non-)recognition – the Palestinian struggle for recognition comes to mind.³⁷ Apart from some methodological challenges the former strategy would involve (how to establish similarities as similar enough), the outcome would merely bring out the political character of recognition practices, which is hardly an innovative insight and indeed at the heart of the discussion about the recognition doctrines. Another reference could be cases of entities that did *not* fulfil the established criteria, but were nevertheless recognised as states. Here notably the postcolonial states that emerged during the process of decolonisation come to mind. As they obtained statehood on the basis of their newly obtained ‘inalienable right’ to self-determination,³⁸ Jackson has famously (though not unproblematically)³⁹ identified them as ‘quasi-states’ as these are merely juridical states without empirical statehood (effective government) – which are only negatively, not positively sovereign.⁴⁰ But in terms of the state as a legal fiction in the first place this is not necessarily revolutionary. Moreover, it is in line with the development of international law at the time, which prioritised the new right to self-determination and the consent of colonial powers to the transferal of sovereignty over the criterion of effectiveness as basis for postcolonial sovereign statehood.⁴¹ Another variant is so-called ‘premature recognition’ in which case a state recognises

³⁵See, among others, UNSC Resolution 216 (1965) of 12 November 1965 and UNSC Resolution 402 (1976) of 22 December 1976.

³⁶Crawford, *The Creation of States in International Law*, pp. 157–73. See also Article 41(2) of the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001), as well as paras 6–12 in the Commentary to the Draft Articles.

³⁷This is also a really interesting case in terms of different strategies to obtain international legal personality as a state whereas membership of the UN is blocked. See Catherine H. Powell and Jonathan Strug, ‘Palestine’s quest for statehood and the practice of the United Nations’, in Nikolas M. Rajkovic, Tanja Aalberts, and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016), pp. 233–64.

³⁸Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by General Assembly Resolution 1514 (XV) of 14 December 1960

³⁹Roxanne Lynn Doty, *Imperial Encounters: The Politics of Representation in North-South Relations* (London: University of Minnesota Press, 1996); Aalberts, *Constructing Sovereignty*.

⁴⁰Robert H. Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge: Cambridge University Press, 1990).

⁴¹Note that also the Montevideo criteria formally do not refer to *effective* government per se, even if it is usually interpreted as such. Discussing the Congo case as a popular reference in legal jurisprudence in the context of ‘quasi-states’, Crawford (*The Creation of States in International Law*) maintains that the criterion of (effective) government notably plays a role when there is no other source for sovereignty claims. In other words, the effectiveness criterion is primarily applicable when the right to sovereignty has to be proven, for example, when there are competing sovereignty claims, which was not the case with decolonisation given the newly emerged right to self-determination and the consent of the colonial states themselves. Still, effectiveness can be of legal significance, if we recall that the purpose of the legal fiction is ordering and regulating

statehood of an entity that turns out to be unfounded in law. This concerns notably cases of secession where the alleged new state wrongfully claims a right to self-determination.⁴² The (mis) recognising state then commits a wrongful act against the mother state as it interferes in the latter's internal affairs. As such, it is also claimed it 'should properly be considered as a species of intervention, rather than of recognition', and a political rather than legal act.⁴³

The difficulty of conceptualising misrecognition in legal terms is even more apparent if we move from mainstream doctrinal law to critical legal studies. If we turn from a legal positivist perspective on law as a body of rules towards addressing it as a performative practice, what would misrecognition entail?⁴⁴ Even if recognition is about the production of persons as much as the production of non-persons, as Fleur Johns suggests, that would not be the same as misrecognition. A distinction between recognition and misrecognition seems to assume that boundaries can be drawn between real and 'non-real' persons as given categories. But as the earlier quote from Bryant Smith shows,⁴⁵ states are just as real and no more real than other legal fictions (including human beings as legal persons). Indeed insofar as a notion of misrecognition seems to imply some kind of Archimedean point or authentic identity to distinguish recognition from misrecognition – and real legal persons, from not so real ones – it would go against the premises of critical legal studies. As a post-positivist approach, critical legal studies builds on the linguistic turn as a basis for its conceptualisation of law as an argumentative and performative practice, mediated by rules that not merely regulate, but create the very possibility of certain activities and constitutes its own subjects.⁴⁶ If what- and

international relations. If sovereignty is traditionally linked to the capacity to fulfil duties under international law, it makes sense to presume effective government to be one of its core elements: 'Without manifesting its territorial sovereignty in a manner corresponding to the circumstances, the State cannot fulfill this duty [to protect the rights of other States within one's territory]' (Island of Palmas case (*the Netherlands v. US*), 2 RIAA 829, 1928, p. 839). According to Schwarzenberger, this logic was also incorporated in the standard of civilisation, which sought to identify whether a state's 'government was sufficiently stable to undertake binding commitments under international law and whether it was able and willing to protect adequately the life, liberty and property of foreigners' (Georg Schwarzenberger, 'The Standard of Civilisation in international law', in George W. Keeton and Georg Schwarzenberger (eds), *Current Legal Problems* (London: Stevens & Sons Ltd, 1955), pp. 212–34 (p. 220).

⁴²In an authoritative ruling, the Canadian Supreme Court has suggested that the right to self-determination might not only belong to former colonies (GA Resolution 1514 (XV), 1960, also known as the Declaration on the Granting of Independence to Colonial Countries and Peoples), but can extend to situations 'where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development' (para. 138). However, the Court presents this potential unilateral right to secession as a residual right, as a last resort when the right to self-determination 'is totally frustrated' internally (para. 135). So it at once extends the right to self-determination to other groups than originally identified, but also limits it by defining it as a right that in principle should be exercised internally (Secession of Quebec, Re, Reference to Supreme Court (1998) 2 SCR 217).

⁴³Ti-Chang Chen, *International Law of Recognition, with Special Reference to Practice in Great Britain and the United States* (London: Stevens and Sons, 1951), p. 85.

⁴⁴The very notion of state personality as a legal fiction suggests that law is always performative. Doctrinal perspectives however subsequently bracket this knowledge to continue and argue from within that legal framework – this bracketing enables doctrinal lawyers to argue that international law (merely) regulates the relations between states. Critical legal studies (CLS), to the contrary, interrogate the performative nature of law, and the upshot that law is inherently political, as the very focus of their research agenda. See, for example, David Kennedy, 'A new stream of international law scholarship', *Wisconsin International Law Journal*, 7 (1988), pp. 1–49. Through bracketing doctrinal approaches can treat the categories of persons and non-persons as matters of pure legal fact (even if they would not identify this as a matter of recognition vs misrecognition as elaborated earlier). CLS rather is interested in how these boundaries are drawn, and what they do, that is, investigate law as a performative practice through and through. This difference is reminiscent of Abbott's distinction between focusing on 'the boundaries of things' versus a perspective of 'things of boundaries': Andrew Abbott, 'Things of boundaries', *Social Research*, 62:4 (1995), pp. 857–82.

⁴⁵See fn. 25.

⁴⁶Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2005 [orig. pub. 1989]). For a general overview of critical legal studies, see Nigel Purvis, 'Critical legal studies in public international law', *Harvard International Law Journal*, 32 (1991), p. 81. For the distinction between regulative and constitutive rules, see Searle, *The Construction of Social Reality*, p. 27.

whomever is 'real', is determined in and constituted by legal practice, how can that practice be identified as *misrecognition*, as getting someone's identity wrong? If recognition – from either a declaratory or constitutive perspective – is not just a cognitive act, as Lauterpacht has argued, and *knowing* its objects at once (re)makes them, this means, as Markell has argued, that 'identities are not [pre-given] phenomena that can simply be rightly or wrongly cognized'.⁴⁷ This specifically counts for legal personalities, as legal fictions to endow entities with legal capacity.

This can be further elaborated by a brief etymological detour into the notion of personality. It stems from *persona*, which was a mask used in theatrical plays in antiquity.⁴⁸ While in everyday life masks are often understood as a prop to conceal – misrepresent – one's real identity, in theatre it has a productive function, to bring into being and present a character. Moreover, and crucially, it originally also had a more technical function as masks were constructed to work like a sort megaphone, and thus to give voice to the player (*per sonare*, 'to sound through').⁴⁹ As its theatrical roots illuminate, legal *persona* hence does not refer to or is grounded in an authentic source of being, but rather 'offers a negotiable surface without a necessary anchoring authorial form'.⁵⁰

However, by taking a lead from Johns in identifying recognition as a practice concerning the creation of legal (non-)persons as well as the production of a particular order, another interesting avenue for exploring misrecognition emerges. Misrecognition could then be conceptualised as the misrecognition of the international legal order's own conditions of possibility. In this performative variant, misrecognition casts light on constitutive practices as the social structure through which sovereign agency is performed, as our editors put it, but which at once undermines the conditions of possibility of that order, and preclude the fulfilment of sovereignty, as an absolute and originary foundation. In such a reading, misrecognition concerns not the cognitive misrecognition of identity – getting someone identity wrong – but a more fundamental ontological misrecognition of the nature and circumstances of our own practices, which undermines the exercise of full sovereignty as autonomous power. As Markell suggests, '[t]he desire for sovereignty is impossible to fulfil, because it is itself rooted in a misrecognition of the basic conditions of human activity'.⁵¹ Such a performative conception of misrecognition invites an investigation of how forms of knowledge, modes of action, and social orders – and their combinations – fall into contradictions on their own terms,⁵² resulting in a self-engendered paradox or *aporia*.⁵³

In the remainder of this article, I elaborate this with regard to colonialism as a modern legal enterprise that postulated the origins of international society as a European Family of Nations, yet at once undermined the premises of that very order. As aforementioned, I will focus on treaty-making practices. The aim is not to investigate the historical record of colonial treaty-making as such, but to analyse the treaty-making practices as both the condition of possibility of the contemporary international legal order, and its condition of impossibility. Moreover, in this context this article does not seek to provide a legal analysis of treaties as repositories of legal facts (focusing on the content of treaty provisions) but zeroes in on the signature as an object of

⁴⁷Markell, 'The recognition of politics', p. 496.

⁴⁸Janne Nijman, *The Concept of International Legal Personality, an Inquiry into the History and Theory of International Law* (The Hague: T.M.C. Asser Institute, 2004).

⁴⁹Alessandro Pizzorno, 'The mask: an essay', *International Political Anthropology*, 3 (2010), pp. 5–28. However, he questions this etymology, and traces the word to Etruscan rather than Latin.

⁵⁰Sheryl N. Hamilton, *Impersonations: Troubling the Person in Law and Culture* (Toronto: University of Toronto Press, 2009), pp. 21–2.

⁵¹Markell, *Bound by Recognition*, p. 22.

⁵²*Ibid.*, p. 93.

⁵³Roxanne Lyn Doty, 'Aporia: a critical exploration of the agent-structure problematic in International Relations theory', *European Journal of International Relations*, 3:3 (1997), pp. 365–92.

international law that constitutes international legal authority.⁵⁴ The next section first provides some background to the legal and doctrinal foundations of colonialism to understand the role and significance of colonial treatymaking, and as a basis to start thinking about how this could be presented in terms of a framework or theory of misrecognition along the lines suggested earlier.

Colonialism as a legal enterprise

Whereas colonialism is often conceived as an exercise of brute violence and (abuse of) sovereign power, this violence was indeed embedded in and legitimised by international law. An important background condition for understanding how imperialism operated as a legal enterprise is the paradigm shift from naturalism to positivism as foundation for the international legal order.⁵⁵ As opposed to the premodern naturalist grounding of law in transcendental values and eternal norms of justice as an overarching morality, legal positivism recognised law as a manmade institution, grounded in rules formulated and agreed upon by sovereign states as the key subjects of international law to regulate their interactions. Given its grounding in state consent, treaties count as one of the most important sources of international law in positivist jurisprudence – with signatures as evidence of consent and authoritative force.⁵⁶ This in turn means that treaties can function as indicators of the legal status of their signatories, and treatymaking can hence involve an act of ‘implied recognition’ of an entity’s status as a legal person under international law.⁵⁷

The infamous ‘standard of civilisation’ was another product of the shift to positivism. Somewhat paradoxically, it is precisely the acknowledgement of law as a universal human institution that brought about the exclusionary legal practice of an absolute distinction between civilised and uncivilised nations. The boundaries of international society were drawn between European states as the Family of Nations, on the one hand, and barbarian nations and savages, on the other.⁵⁸ The language of a standard illustrates another characteristic of legal positivism, which is driven by the aim to provide an objective, coherent, and truthful account of law as a scientific alternative to the subjective fallacies of natural law.⁵⁹ However, it required significant legal gymnastics to come to an internally consistent scheme, which resulted in the exclusion of barbarians and savages on the basis of the standard of civilisation as a legal mechanism, coupled to their (partial) integration into the framework of positivist international law in its spatial expansion from a European to a global structure.

⁵⁴Tanja Aalberts, ‘Sovereign marks’, in Jessie Hohmann and Daniel Joyce (eds), *International Law’s Objects* (Oxford: Oxford University Press, forthcoming, 2019).

⁵⁵The classic contribution is Anghie, *Imperialism*. Although they constitute distinct historical and political practices, this article will use colonialism and imperialism interchangeably as they both relied on legal practices as the focus of this article.

⁵⁶Article 38(1) ICJ Statute. Whereas it is the signatures that turn a text or a draft into a treaty, according to contemporary legal doctrine the treaty only enters into force after a treaty has been ratified. Vienna Convention on the Law of Treaties (1969).

⁵⁷It is not as straightforward that all treaties inherently count as a form of implied recognition. For a detailed discussion see BYbIL, ‘Implied recognition’, *British Yearbook of International Law*, 21 (1944), pp. 123–50. While the British Yearbook cautions against implying recognition from any type of treaty, it identifies ‘the conclusion of a bilateral treaty which regulates comprehensively the relations between two states (and which must be distinguished from temporary arrangements and agreements for limited purposes)’ as a possible candidate (BYbIL, ‘Implied recognition’, p. 149). In the case of colonial treaties, it is both the form and the content of treaties as treaties of cession that logically imply that the indigenous rulers presumably had sovereignty, as will be elaborated later.

⁵⁸James Lorimer, *The Institutes of the Law of Nations: A Treatise of the Jural Relations of Separate Political Communities, Volume II* (Edinburgh: Blackwood, 1883); Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (Oxford: Clarendon Press, 1984).

⁵⁹At the same time, the language is also misleading, as the Standard was a rather impressionistic rule of customary law that was quite flexible in practice. Schwarzenberger’s characterisation of the Standard as ‘elastic but, nevertheless, relatively objective’ is telling in this context (Georg Schwarzenberger, *A Manual of International Law* (Abingdon: Professional Books, 1976), p. 84, quoted by Gong, *Standard of ‘Civilization’*, p. 14). See also Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge: Cambridge University Press, 2001), pp. 103, 135.

This partial integration was a result of the same new positivist paradigm that formed the foundation of the standard of civilisation that dictated their exclusion as savages. The legal problem was that as part of the new positivist paradigm, colonial treaties counted as one of the most important tropes in the claims to show a (better) legal title to territory.⁶⁰ Contrary to the popular imagery of a whole continent as *terra nullius*, the Scramble for Africa was not so much a rush for vacant, ‘no man’s’ land to be appropriated, as it was a ‘race for obtaining derivative title deeds’.⁶¹ Exploration, map-making, and legal ordering went hand-in-hand – quite literally as in many cases, explorers, including famous pioneers like Henry Morton Stanley, Karl Peters, and Pierre Savorgnan de Brazza, did all at once. This was some kind of expedition race with the explorers as all-rounders who combined their travels and map-making practices with frantic production of treaties of trade, protection, and cession with African chiefs on behalf of the colonial governments that financed their expeditions. Illustrative of this race are the instructions of the Belgian King Leopold II to Stanley ‘to place successively under the suzerainty of the Comité [d’Études du Haut-Congo], as soon as possible, and without losing one minute, all the chiefs from the mouth of the Congo to the Stanley Falls’.⁶² Stanley claims to have concluded more than four hundred treaties in the service of Leopold and the *Comité d’Études du Haut-Congo* (succeeded by the *Association Internationale du Congo*) as his private enterprise.⁶³

As in the European colonisation of North America, treaties thus functioned as the stepping-stones of empire.⁶⁴ It should be noted that the treatymaking practices as such were not novel.⁶⁵ However, crucially, the practice of treatymaking obtained new meaning and significance due to the shift in legal doctrine, which combined the sources doctrine – with treaties as an objective foundation of the international legal order – with the standard of civilisation as an allegedly objective scheme for the Family of Nations as the core of the international legal order. Precisely because treaties had become a key source of international law with the emergence of positivism, in the Scramble for Africa these treatymaking practices became crucial and problematic at the same time. The conundrum was that while the standard of civilisation clearly put the ‘savages’ outside the Family of (civilised and sovereign) Nations, the colonial treaties suggested something else.

⁶⁰Other titles that played a role in various (legally contradictory) constellations are *terra nullius* (effective) occupation, contiguity/Hinterland doctrine, and conquest.

⁶¹Charles Henry Alexandrowicz, *The European-African Confrontation: A Study in Treaty Making* (Leiden: A. W. Sijthoff, 1973), p. 7. This race was allegedly enhanced by the organization of the Berlin Conference, which stimulated participating colonial powers to ‘extend their claims as far as possible in order to strengthen their respective hands’. Matthew Craven, ‘Between law and history: the Berlin Conference of 1884–1885 and the logic of free trade’, *London Review of International Law*, 3:1 (2015), pp. 31–59 (p. 40).

⁶²Albert Maurice, *H. M. Stanley: Unpublished Letters* (1957), p. 137, quoted in Tim Jeal, *Stanley: The Impossible Life of Africa’s Greatest Explorer* (London: Faber and Faber Limited, 2007), p. 251. Only treaties of cession concern a full transfer of sovereignty; treaties of protection transferred external sovereignty to the Protecting State, while the African ruler retained internal sovereignty (Alexandrowicz, *The European-African Confrontation*). The usage of suzerainty in the earlier quote should not be misread in terms of the scope of Leopold’s ambitions (see also fn. 63). Moreover, for the argument about legal performativity and misrecognition pursued here it does not make a difference which part of sovereignty was thus ceded.

⁶³This number is put into question by Jeal, who also shows that Stanley was against treaties of cession, and that King Leopold indeed was dissatisfied with Stanley’s focus on treaties or leases of ‘privilege of residence’: ‘The terms of the treaties Stanley has made with native chiefs do not satisfy me. There must at least be an added article to the effect that they delegate to us their sovereign rights over the territories ... the treaties must be as brief as possible, and in a couple of articles must grant us everything’ (letter from King Leopold II to his assistant Colonel Strauch, 16 October 1882, quoted in Jeal, *Stanley*, p. 282). In the next year, Leopold hired a team of treatymakers to accomplish this (Jeal, *Stanley*, p. 283).

⁶⁴Colin G. Calloway, *Pen and Ink Witchcraft: Treaties and Treaty Making in American Indian History* (Oxford: Oxford University Press, 2013), p. 2.

⁶⁵See, for example, Alexandrowicz, *The European-African Confrontation*; Edward Keene, ‘A case study of the construction of international hierarchy: British treaty-making against the slave trade in the early nineteenth century’, *International Organization*, 61:2 (2007), pp. 311–39.

It is both the form and the content of treaties of cession that logically seem to imply that the indigenous rulers presumably had sovereignty. In terms of its form, it could be argued that through the treaty-making practices indigenous entities were constructed as legal subjects of the imagined global legal regime: the very ‘cross’ by which they at once officially ceded their sovereignty to the colonial powers also implied they actually had the legal status as sovereign states to do so.⁶⁶ Indeed, ‘the natives’ right to dispose freely of themselves’ was an important element of the repertoire of juridical technologies of colonial rule.⁶⁷ The ambiguity is nicely captured by Oppenheim in his observation that

[C]ession of territory made to a member of the Family of Nations by a State as yet outside that family is real cession and a concern of the Law of Nations, since such State becomes through the treaty of cession in some respects a member of that family. ... No other explanation of these and similar facts [such as that these non-sovereign entities engaged in sovereign behaviour] can be given except that these not-full Sovereign States are in some way or another International Persons and subjects of International Law.⁶⁸

As for the content of the treaties, it is an age-old principle that one cannot transfer what one does not have (*nemo plus iuris transferre potest quam ipse habet*).⁶⁹ Therefore, if the European rulers claim they obtained sovereignty via a treaty of cession as a formal title deed, this presupposes that the indigenous rulers indeed were in the possession of sovereignty that could thus be legally transferred.

Based on notably the unequal content and conditions of its drafting, these treaties are often brushed aside as a matter of window-dressing and mere expediency⁷⁰ to pursue imperialist projects. On these terms this strand of postcolonial critique queries the validity of the treaties.⁷¹ In this reading, there is a distinction between colonial powers as subjects and indigenous rulers as objects of international law. It problematises the conditions under which the treaties were drafted. Can we assume ‘free consent’? Did the chiefs have any understanding of what they were doing by putting the(ir) cross on this piece of paper? Did they have a conception of the ‘treaty’ as a legal instrument that endows legal rights and obligations to signatory parties? Can you cede and transfer – indeed ‘have’ – sovereignty, if this is a purely European concept, of which the native could not have had a conception?⁷² This scepticism is further enhanced by the content of the

⁶⁶As later famously described in the S. S. Wimbledon case: the right to enter into international treaties – including ones that restrict sovereign power – is an attribute of state sovereignty (PCIJ Series A, No.1 (1923), p. 25).

⁶⁷As stated – not uncontroversially – by the American representative to the Berlin Conference, Mr Kasson (Anghie, *Imperialism*, p. 93). See also Siba N’Zatioula Grovogui, *Sovereigns, Quasi Sovereigns, and Africans: Race and Self-Determination in International Law* (Minneapolis: University of Minnesota Press, 1996).

⁶⁸Oppenheim, *A Treatise*, pp. 286, 110.

⁶⁹*Ibid.*, p. 288.

⁷⁰Erik Ringmar, ‘The international politics of recognition’, in Erik Ringmar and Thomas Lindemann (eds), *The International Politics of Recognition* (Boulder: Paradigm Publishers, 2010), pp. 3–23.

⁷¹See, for example, Grovogui, *Quasi Sovereigns* and Koskeniemi, *Gentle Civilizer*. For a general discussion, see also Saadia Touval, ‘Treaties, borders, and the partition of Africa’, *The Journal of African History*, 7:2 (1966), pp. 279–93.

⁷²These arguments are also put forward by contemporary lawyers supportive of the colonial enterprise, Lassa Oppenheim (a renowned German jurist who wrote the locus classicus on modern international law, see fn. 31), M. F. Lindley, and John Westlake. In one of the major works on the acquisition of ‘backward territory’, Lindley identifies ‘steps ... taken to ensure that the provisions of the agreement are understood by the natives concerned’ as one of key conditions for validity of treaties of cession with ‘native sovereigns’: ‘An agreement to which an ignorant chief has affixed his mark without understanding a word of it, or having any correct idea as to its consequences, can have no validity, either as binding the natives or as against other Powers.’ (M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green and Co., 1926), p. 173). Apart from issuing translations of the treaties into local languages, several authors refer to the fact that treaty making practices were often accompanied by solemn rituals of blood brotherhood (*pacte de sang*) as evidence that the African chiefs were aware of the significance and binding nature of the treaties. See Alexandrowicz, *The European-African Confrontation*, pp. 51–3. John Westlake, a key publicist on the colonial issue at the prominent *Institute de Droit International*, also criticised the validity of

treaties, in which sovereign powers over huge areas are exchanged indefinitely for as little as twenty pieces of cloth.⁷³

This criticism of the colonial treaties as a form of organised hypocrisy⁷⁴ is further supported by the fact that the imperial legal repertoire was directed at regulating the intra-European rivalries, rather than concerned with legitimating the colonial endeavours *vis-à-vis* its direct objects. For instance, the treaties played an important role as currency at the 1885 Berlin conference, for which the indigenous rulers themselves were not invited.⁷⁵ In other words, these legal practices served first and foremost an endogenous function among European powers, rather than an exogenous function between colonisers and colonised.⁷⁶ However, this distinction of endogenous and exogenous functions at once might suggest too strong a separation of the inside of the Family of Nations, and its uncivilised outside. Rather than separate bi- and multilateral relationships between coloniser and colonised, on the one hand, and between colonial powers inter se, these exogenous and endogenous functions are inherently related. It is this constitutive interconnection between its inside and its outside that lies at the heart of the aporia of the Family of Nations. We can conceptualise this, following Markell, as a practice of misrecognition based on a misapprehension or concealing of the conditions of possibility of human activity – in this case the practices and production of the contemporary international legal order. His reading of Hegel's master–slave metaphor directs our focus beyond the material and cognitive violence on the colonial subject, to the self-engendered paradox of this violence to the international legal order – and the Europeans' desire for sovereignty – itself.

Colonial treaty-making practices as misrecognition

In his Hegelian reading of the origins of international society, Erik Ringmar draws our attention to the struggle for recognition among European powers. He suggests that we should not apply the master–slave metaphor to the hierarchical relationship between the civilised core and savage periphery, as a struggle for recognition by the latter that brings about a dialectical process of acculturation. Rather we should situate this struggle between Europeans as 'a group of masters who provide an identity for themselves by exaggerating the feature that separate, and thereby distinguish, them from others'.⁷⁷ This is an insightful addition to the debate, which identifies a horizontal element next to the vertical, hierarchical pivot of the metaphor as a struggle for

the colonial treaties. But rather than the organised hypocrisy that the treaties embody, Westlake seems to have trouble with the treaty-making practices precisely because of the performative aspects of the signatures, as will be elaborated later.

⁷³See, for example, the treaty (*Traité*) between Alexandre Delcommune (representing *l'Association Internationale du Congo*) and King Nè-Doucoula, 19 April 1884. The original copy is available in the archives of the Belgian Ministry of Foreign Affairs, Brussels, File A1/1377, document 1/2/a. The treaty consists of only two articles: the first stating that 'roi' Nè-Doucoula (whose name is spelled differently at various instances), 'chef indépendant' of Boma, 'cède à l'Association Internationale du Congo ses droits de souveraineté sur tous les territoires soumis à son autorité'. The second article states that he has received twenty pieces of fabric in return. This particular treaty is one of series of nine treaties, held together by a piece of rope, each identical in terms of their text and provisions, drafted on the same day, but concerning different territories, and signed by different kings (who are all identified as 'roi de Boma') (Aalberts, 'Sovereign marks'). Together they are exemplary of King Leopold's instructions, as quoted in fn. 63.

⁷⁴This term is adapted from Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), who uses it to identify the gap between norms states adopt, and their subsequent non-complying behaviour.

⁷⁵Stephen Humphreys, 'Laboratories of statehood: Legal intervention in Colonial Africa and today', *Modern Law Review*, 75:4 (2012), pp. 475–510. See also fn. 105.

⁷⁶Karin Mickelson, 'The maps of international law: Perceptions of nature in the classification of territory', *Leiden Journal of International Law*, 27:3 (2014), pp. 621–39. See also Touval, 'Treaties, borders', who, however, also reports on several appeals from African Kings to the British government to honour their obligations – which points to the triangular relationship investigated here, as well as the agency created by and claimed on the basis of the treaties.

⁷⁷Ringmar, 'Recognition', p. 2. This is the logic of difference, as put forward in the critical historiography of international law by Antony Anghie, who shows how colonialism was – and, crucially, continues to be – the condition of possibility for the development of both sovereignty and international law as modern institutions of international society (Anghie, *Imperialism*). See also Sundhya Pahuja, 'Postcoloniality of international law', *Harvard International Law Journal*, 46 (2005), pp. 459–69.

recognition. At the same time, and in parallel to the aforementioned distinction between exogenous and endogenous functions of these colonial treaties, Ringmar's alternative scenario based on practices of mutual recognition among the European core, and practices of non-recognition in relation to non-Europeans seems too quick in brushing aside the legal performativity of treaty-making practices, as well as the inherent tension in the modern legal order that these practices produce.

The crucial point is that rather than a strict separation of the outside and inside, and the endogenous and exogenous function of the colonial treaties, these treaties are part of a complex triangulation. In order for them to serve as better title deeds in the intra-European Scramble for Africa, the treaties had to be constituted and function as proper legal agreements between the European coloniser and indigenous ruler. This is not to say that the validity of particular treaties was never contested, by either other European powers or the indigenous rulers themselves,⁷⁸ but arguably that very contestation confirms that as a general practice the treaties were considered to be proper legal titles.⁷⁹ Moreover, this complex triangulation suggests we can conceptualise the colonial treaties as hybrid objects that rendered the boundaries of (the exclusive) international society instable, not (only) in terms of the sometimes contradictory claims to title,⁸⁰ but first and foremost in terms of the in/exclusion of indigenous rulers. This at once disrupted the sovereignty/civilisation doublet that allegedly defined the Family of Nations as an exclusive and already fully constituted club with European members, whose sovereign statehood, moreover, allegedly was a given, a natural fact based on their civilised nature. I will use these pointers to explore how the doctrine of legal positivism produced its own denial, and a void at the heart of the Family of Nations it allegedly merely regulated, through treaty-making as its 'core business'.

Another reading of Hegel's master-slave metaphor can serve as a starting point to illuminate these dynamics as a practice of misrecognition, along the lines suggested by Markell.⁸¹ As elaborated in this Special Issue, the metaphor asserts that sovereignty is not just about individual autonomy, but about a desire to have sovereignty over others. Moreover, it reveals the paradox inherent in this relational dimension, namely that sovereign power at once presupposes, is dependent on, and negates that over which it claims sovereignty.⁸² What the Europeans seek is sovereignty over the colonial, in light of their alleged being fully sovereign – in the thick meaning, as *both* civilised *and* as 'independent, self-determining agent[s] [with] something like full ownership of one's life and doings' (and being able to impose their will onto the world)⁸³ – themselves. But there is a significant tension between these two components of their identity. As civilised sovereigns, members of the Family of Nations, the kernel of the international legal order, they need to obtain this via proper legal titles. This is not so much in terms of legitimising their

⁷⁸There is a famous incident of conflicting treaties with Nikki with Frederick Lugard (on behalf of the Royal Niger company, chartered by the UK), on the one hand and France, on the other, as discussed by, among others, Touval, 'Treaties, borders', pp. 281–2; Lindley, *The Acquisition of Backward Territory*, pp. 170–1. When it turned out that Great Britain had made a treaty with a subordinate chief, a 'race to Nikki' by France and Great Britain followed (won by the latter). Alexandrowicz identifies this case as 'one of the most characteristic examples of what significance was attached to a title in the African scramble' (Alexandrowicz, *The European-African Confrontation*, p. 36).

⁷⁹This is further confirmed by the fact that conflicts as well as some arbitration cases that followed apparently focused on the legal capacity to transfer title of the specific signatory party – that is, were the signatories the right parties (the 'paramount rulers'), or where they rather under suzerainty, authority, or control of others (see also fn. 78). To try to preclude such conflicts with either competing African rules or European powers the treaties often included a declaration that the signatory was not dependent on any other African or foreign ruler. In some cases treaties also included clauses in which possible previous treaties with other foreign powers are declared null and void or inoperative (Alexandrowicz, *The European-African Confrontation*, pp. 32–41).

⁸⁰See also Craven, 'Between law and history'.

⁸¹For a detailed discussion of Markell's reading of the master-slave dynamic, see Ayşe Zarakol, 'Sovereign equality as misrecognition', *Review of International Studies*, 44:5 (2018), this Special Issue.

⁸²See also Holm and Sending, 'States before relations', for a discussion about legal personality as integral to this relationship.

⁸³Markell, *Bound by Recognition*, p. 11. See also the discussion by Zarakol, 'Sovereign equality as misrecognition'.

title *vis-à-vis* the colonial subjects themselves (who, after all, were not part of the Family of Nations), but rather about how the Europeans proved and settled their possessions *vis-à-vis* each other, as suggested by both Mickelson and Ringmar. Crucially, however, even if this ‘Scramble for title deeds’ served first and foremost an exogenous function as the European powers suggest, it could only serve this purpose through its relationship with the ‘savages’. After all, the European powers need the colonial to sign the treaties to serve as the legal basis for their colonial endeavour as civilised sovereigns. This means, on the one hand, that the Europeans can only obtain their full sovereignty *over* the colonial *from* the colonial itself.⁸⁴ What is more, this very legal practice through which they constitute themselves as civilised sovereigns, on the other hand, also reveals and is dependent on some kind of sovereignty – in a more limited sense of legal capacity – of the colonial, which, according to the same doctrine, it could not have as a savage.⁸⁵

In its elaboration of the mutually constitutive nature of identity, the master–slave metaphor identifies the relationship of the subject towards an external object that in its negativity allegedly confirms the presumably positive and originary identity of the subject. As aforementioned, the erasure of non-European subjectivity, and their projection as objects without agency, is a familiar postcolonial critique of the treaty-making practices: colonial treaties (whether of protection, trade, or cession) ‘took the form of agreements between sovereign States, the substance of which however was to deny any such pretension’.⁸⁶ The emphasis in these critiques is on the exclusionary practices of modern international law (in other words, the making of non-persons, that is, slaves and in this case, savages), and the material and cognitive violence this entailed: the colonial other was ‘encompassed by this speaking of the law but not able to claim subject-hood within it’.⁸⁷

But at the same time, the ridiculous content of the treaties – recall the twenty pieces of cloth⁸⁸ – cannot completely obliterate the form. It could not do so given the importance and role of treaty-making as a foundational practice of legal positivism and the modern international legal order, for one thing, let alone their importance as titles to territory in the intra-European rivalry in the Scramble of Africa, for another. Indeed, precisely because they served as basis for territorial claims against competing claims by other European powers, governments aimed to ‘present as convincing an image of the genuineness of their treaties as possible’.⁸⁹ While there was not a uniform practice in terms of what the treaties looked like – some based on standard forms,⁹⁰ some long and formal with official letterhead, others short and scribbly on a sheet of paper –⁹¹ and indeed there are no specific legal requirements of form for the creation of international treaties, they contain specific elements that clearly distinguish them from, for example, informal

⁸⁴With his famous self-coronation (allegedly ‘snatching’ the crown from the Pope Pius VII) Napoleon Bonaparte circumvented this dilemma. In her contribution to this Special Issue, Zarakol, ‘Sovereign equality as misrecognition’ makes a similar, if slightly different, distinction between the state’s need to be sovereign over its subjects and to be sovereign for its subjects within the domestic context.

⁸⁵In his contribution to the Special Issue, Thomas Lindemann, in ‘Agency (mis)recognition in international violence: the case of French jihadism’, *Review of International Studies*, 44:5 (2018) further elaborates on this link between agency and misrecognition.

⁸⁶Matthew Craven, ‘Statehood, self-determination, and recognition’, in Malcolm D. Evans (ed.), *International Law* (Oxford: Oxford University Press, 2010), p. 213, see also Grovogui, *Quasi Sovereigns*.

⁸⁷Pahuja, ‘Postcoloniality of international law’, p. 462.

⁸⁸See example in fn. 73

⁸⁹Touval, ‘Treaties, borders’, p. 280.

⁹⁰Henk L. Wesseling, *Verdeel En Heers: De Deling Van Afrika, 1880–1914* (Amsterdam: Aula, 2003). For instance Henry Stanley received instructions and draft formulations for: (i) a political treaty; and (ii) a treaty for territorial cession (in English and French), dated 1 November 1882 (file SA.4777, available in the archives of the Afrikamuseum, Tervuren, Belgium).

⁹¹Based on an investigation of the (incomplete) archive with treaties relating to the Congo Free State and Association Internationale du Congo (file A1/1377) at the Belgian Ministry of Foreign Affairs, Brussels. For a classic and comprehensive study of these practices and comparison of different colonial powers, see Alexandrowicz, *The European-African Confrontation*.

memos or private journal notes: the text includes ‘articles’ containing the elements of the agreement, there is a procedure of translation, sometime accompanied by the certification by witnesses, the identification of place and date, and last but not least the signatures of the parties involved (as either right and duty holders, or as witness to the treaty).

While the hypocrisy and inequality of the treaties in combination with the infamous standard of civilisation testify how the savages were little more than its ‘direct objects’ and allegedly in need of civilising missions, there is more going on than that. As Oppenheim’s earlier quote also suggests, the fact that these papers – pedantically dismissed by Otto von Bismarck as ‘ein Stück Papier mit Negerkreuzen darunter’⁹² – were constituted and served as legal title deeds, also means that another more intricate dynamic of in/exclusion was at play. Building on a performative understanding of law as an ordering device that not merely regulates interactions between given, but generates its own subjects points to a more hybrid subjectivation. Crucially, indigenous rulers became outsiders and objects through their very capacity as insiders and subjects. They were constructed as legal subjects of the imagined global legal regime through the treaty-making practices or rituals by which they officially ceded their ownership and sovereign identity to the colonial powers. Hence, rather than a mere denial of their identity (both on the basis of their exotic particularity as savages and their failure to meet the ‘universal’ ‘standard’), non-European entities were endowed with a subjectivity that rendered them sovereign subjects of law, and ‘outlaws’ that need to be disciplined and civilised via sanctions and coercions at the same time.⁹³ Their signature made them a subject and an object through the same strike of the pen, which at once made them participants in the legitimation of their imperial subjection, and dependent upon civilised nations for their redemption, thus allegedly confirming – or rather producing – the latter’s positive, superior, and originary sovereign identity.

In the encounter with the colonial, sovereignty was not only presented as a ‘gift of civilization’⁹⁴ (that is, one that barbarian and savage entities still had to obtain), but also – and somewhat contradictory – as a natural condition of European entities, the origins of which were ‘beyond history and inquiry’.⁹⁵ However, as Antony Anghie has argued persuasively, it was in the colonial encounter that the Europeans are produced as the original sovereign powers who command and impose their universal law *vis-à-vis* the uncivilised, who in turn fall within the orbit of international law, and are recognised as partially or proto-sovereign for the purpose of their own subjugation. He subsequently focuses on the erasure of the non-European identities: ‘[T]he methodology used by positivists to examine these treaties had the paradoxical effect of erasing the non-European side of the treaty even when claiming to identify and give effect to the intentions of that party.’⁹⁶

This ambiguity of the legal status of the ‘natives’ as ‘savages’ excluded from the contemporary Family of Nations, yet also signatories to one of the foundational practices of that legal order, was problematic enough for the positivist projection of a coherent and unitary system. But apart from the ambivalent status of the ‘native’ and whether it is inside or outside the international society, a Hegelian reading reveals a further and allegedly more fundamental

⁹²Quoted in Wesseling, *Verdeel En Heers*, p. 162. But at the same time, Von Bismarck had to admit that his preference for informal empire had lost against the race for title deeds based on such pieces of paper.

⁹³The primitive was not so much outside international law awaiting its ordering ministrations, but within the very heart of the discipline, and the subsequent efforts of the international jurist to define and manage the primitive served to conceal this fundamental connection’ (Anghie, *Imperialism*, p. 65). This resonates with Foucault’s suggestion to move from a theory of sovereignty to a theory of dominations, which reveals ‘how actual relations of subjugation manufacture subjects’ (Michel Foucault, *Society Must Be Defended: Lectures at the Collège De France 1975–1976* (New York: Picador, 2003 [orig. pub. 1976]), p. 45).

⁹⁴Koskenniemi, *Gentle Civilizer*, pp. 86, 110.

⁹⁵Anghie, *Imperialism*, p. 102

⁹⁶*Ibid.*, p. 71. The methodology he refers to is the positivist practice of focusing at the content of the treaty (textual interpretation) rather than the circumstances under which the treaty was drafted.

consequence as the master–slave metaphor also suggests that the force of negativity can never produce a complete order. This draws our attention to another element of their mutually constitutive relationship. Due to its dependence upon negativity as an alien power, Hegel argues, ‘fixed existence passes over into its own dissolution’⁹⁷ and the ‘solid basis [of] the motionless subject begins to totter’.⁹⁸ In other words, the (presentation of) fixed existence of originary identity and authority (in this case: the European sovereigns as the authentic core of the Family of Nations based on the positivist standard of civilisation) consists of a self-engendered paradox: the European claim of sovereignty over the colonial is incomplete or instable, and the solid basis of the international legal order ‘begins to totter’, by virtue of the very legal practices that constitute it.

Even if the subject turns into an object through the unequal legal exchange established within the treaty, the performative practice of treaty-making, as evinced in the indigenous signature or cross, is not completely erased. And given the complex triangulation of which they are part it *could not* be erased if the treaties were to do their legal work as better title deeds than whatever was presented by rival colonial powers. However, this also meant that European sovereignty over the colonial in this case was not *a given* (as a natural fact, a *pregiven*) following the legal positivist doctrine, but rather given as part of a legal exchange, and thus originating in the savage whose sovereignty they at the same time denied. While the ‘savage’ cross stands in stark contrast to the baroque signature of the colonising power, and thus aesthetically seems to illustrate the logic of difference,⁹⁹ the colonial subject remains visible through its signature, which marks its embodied presence as the authorising force to turn the treaty into a legal title deed.¹⁰⁰ In Derridian terms, the signature captures and marks a ‘having-been present in a past now’, which becomes a ‘now in general’ (maintenance, ‘the transcendental form of presentness’).¹⁰¹ So even though the content of many of the treaties *de jure* erased both status and rights of the indigenous rulers, and reduced them to objects of colonisation, there is the ghost of the indigenous signatory that authorised this title to territory, which not only undermines the very logic of the standard of civilisation as a marker of legality, but also the positivist self-image of the European core as a unitary and complete order by and of itself.

The fact that there was no unified position among contemporary lawyers and legal publicists, and – crucially – that their heated discussions on this matter did not focus on the content of the treaties and their legal provisions, but on the treaty-making practices as such, shows the fundamental nature of the controversy: it is not just about status of the indigenous chiefs and the boundaries of the international society (who is included or excluded), but about the foundation of contemporary legal order based on positivist paradigm and hence also about European sovereignty as such. The treaty-making practices were both a condition of possibility of modern international law, yet at once – in the case of colonial treaties – its condition of impossibility, and a potential rupture for the positivist self-image and European legal order based on standard of

⁹⁷G. W. F. Hegel, *Phenomenology of Spirit* (Bamberg and Würzburg: Joseph Anton Goebhardt, 2013 [orig. pub. 1807]), §55.

⁹⁸Hegel, *Phenomenology of Spirit*, §60. For an extensive discussion of the power of the negative in the master–slave metaphor, see Epstein, ‘The productive force of the negative’, and Catarina Kinnvall and Ted Svensson, ‘Misrecognition and the Indian state: the desire for sovereign agency’, *Review of International Studies*, 44:5 (2018), this Special Issue.

⁹⁹See fn. 77.

¹⁰⁰“Ritual” is not a possible occurrence [*éventualité*], but rather, *as iterability*, a structural characteristic of every mark’: Jacques Derrida, ‘Signature event context’, in Jacques Derrida (ed.), *Limited Inc* (Evanston: Northwestern University Press, 1988), pp. 1–23 (p. 15).

¹⁰¹Derrida, ‘Signature event context’, p. 20. At the same time, Derrida questions this illusion of the signature as an absolutely originary event, which is based on the assumption of a singular intentional present that is captured within the mark itself: representation of singular and pure will that appears readily but which is split. ‘[T]he condition of possibility of [the] effects [of signature] is simultaneously ... the condition of their impossibility, of the impossibility of their rigorous purity’ (Derrida, ‘Signature event context’, p. 20).

civilisation. The embodied presence of colonial subjects through their signatory marks destabilises the European international order as ‘always already’ present and complete, and reveals the role of the colonial subjects as its constitutive outside. As such the signatures can be identified as a legal technology that at once produced the boundaries of (the exclusive European) international society and rendered them instable.

Conclusion

If a performative conception of misrecognition addresses how particular orders can only function by concealing the exclusion that makes them possible, in this case the Family of Nations concealed – misrecognised – the inclusion of savages as its condition of possibility.¹⁰² Misrecognition thus can be conceived as a coping mechanism, as the ‘defensive operations of the self as it struggles to refuse this fragility and dependence on the other and assert itself as the ultimate source of its own meaning’.¹⁰³ It is a forgetting or bracketing of history by presenting the political-legal order (in this case, the Family of Nations) as something natural and ‘beyond history’ and by focusing on the legal content of the treaties following their positivist methodology, while ignoring that that content could only function as a legal title deed because of the crosses underneath. Once the treaties had done their job as title deeds, they could be forgotten and the colonial subject presented as the one who needs to be civilised in order to obtain sovereignty, as a gift of civilisation. However, this concealing of the conditions of possibility (erasure of history) ultimately cannot establish the complete order as ‘always already’. The reality of the ghost of the signature indeed transpires from legal discourse on ‘originary’ or ‘derivative title’ after decolonisation.¹⁰⁴ It also was reconfirmed in the Western Sahara case (1975), where the International Court of Justice concluded that

Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of *terra nullius* by original title but through agreements concluded with local rulers ... [S]uch agreements with local rulers, whether or not considered as an actual ‘cession’ of the territory, were regarded as derivative roots of title, and not original titles obtained by occupation of *terrae nullius*.¹⁰⁵

The performativity of the treaty-making practices and, in particular, the hybrid construction of legal subjecthood through the signature as mark further reveals the mutually constitutive relationship between coloniser and colonised, as well as its disruptive potential with regard to the positivist projection of that very order. A rereading of the master–slave metaphor through the concept of misrecognition refocuses our attention beyond the postcolonial critique of colonial treaties as ‘organised hypocrisy’ to the performativity of ‘Negerkreuzen’ as the condition of possibility *and* condition of impossibility of the international legal order, the aporia of the Family of Nations as an always-already fixed (‘natural’) order. It is in the tension or mismatch between the conditions of possibility of the contemporary legal order and the practices that at once

¹⁰²Jade Larissa Schiff, *Burdens of Political Responsibility: Narrative and the Cultivation of Responsiveness* (Cambridge: Cambridge University Press, 2014) also discusses concealing as condition of possibility of practices.

¹⁰³Schiff, *Burdens of Political Responsibility*, p. 130.

¹⁰⁴Charles H. Alexandrowicz, ‘New and original states: the issue of reversion to sovereignty’, *International Affairs*, 45:3 (1969), pp. 465–80.

¹⁰⁵*Western Sahara* (Advisory Opinion), ICJ Reports (1975) 116, para. 80. In his separate opinion to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* vice-president Judge Ammoun identified the 1884–5 Berlin Conference as a ‘monstrous blunder’ erasing the precolonial reality of native sovereignty (Advisory Opinion, ICJ Reports (1971) 55, 86, quoted by Craven, ‘Between law and history’, p. 43).

produce and undermine it, that one might conceive what misrecognition within colonial international legal practice could entail.

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