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LETTER FROM THE CHAIR

I am delighted to prepare this message in the capacity as the new Chair of this group.

It has been the practice of this group, and most other interest groups of the ASIL, to discuss and resolve on such matters as election of officers in their business meetings during the annual conference of the Society. This year's business meeting of our group was held on Friday, April 7, 2000, with some 13 attendees. We mainly discussed four matters during the meeting: (1) election or reelection of officers of our group; (2) sponsorship of a panel at the next annual meeting of the Society; (3) creation of a listserve for our members, and (4) solicitation of main articles and comments for our unique publication *International Legal Theory* (ILT).

Our immediate past Chair, Nicholas Onuf of Florida International University, re-expressed his desire to step down. Nick had been the Chair, and I myself the Vice-Chair, since April 1997. I personally witnessed Nick's leadership role (and his scholarship) throughout the last three-year period of development. Although the Society's relevant regulation provides for a general three-year limit on the term of interest group officers, such term is renewable. For that reason, I had encouraged Nick to continue his leadership. This time, though, he was more than serious about his resignation. As a result, upon the nomination by Mortimer Sellers, and unanimous approval by attendees present at the business meeting, I was elected the Chair.

At the same meeting, Onuma Yasuaki of Tokyo University Law Faculty and Bryan F. MacPherson of the United World Federalists were elected Vice-Chairs. Mortimer Sellers and Francesco Parisi of George Mason University were re-elected editors of ILT.

It was resolved at the meeting that our group should seek to sponsor a panel at the next ASIL annual meeting. Some attendees suggested some possible topics for the panel, including (a) the impact of religions on the development of international law, (b) international law and international relations; and (c) normativist approaches to international law. I have requested the organizing committee for the next annual to reserve a spot for our panel. I welcome more topics, ideas, and proposals, including those relating to the selection of the panel chair and identification of panelists.

Several members volunteered to seek ways for creating our own listserve and possible website. We had several options: (a) utilizing the services contracted by ASIL, for a one-time fee

of $100 plus a *nominal* monthly charge of $25; (b) benefiting from an existing academic (and presumably volunteered and free) service system such as that of the University of Baltimore; and (c) using a free commercial services such as the egroups.com system. Since our group has about $715 of deficit (as of Nov. 1999), we are not in a financial position to use the ASIL-contracted services. Free commercial services (such as eGroup.com) would be all right except we might be exposed to unnecessary commercials. Fortunately, thanks to the efforts of Tim Sellers, his colleagues/staff and the University of Baltimore School of Law, we now have our temporary yet official listserve in operation at the following address:

Listserv@ube.ubalt.edu

I regret I am not technology-oriented, but I am very pleased with this progress and trust that it will greatly facilitate group-wide communications in a fast and timely fashion. I encourage those of you who are not on the e-mail list yet to add you name to it soon. For information on how to subscribe to the list, please contact Donna Frank by e-mail at Dfrank@Ubmail.ubalt.edu.

Above all, the main activity of our group remains the promotion of scholarly discussion on various theoretical issues of international law through ILT. This issue features Nick's "Henry Wheaton and the Golden Age of International Law" and discussions inspired by it. The scholarship and quality of Nick's article and the resulting discussions speak for themselves. As in the past, we welcome your passive (*e.g.*, reading ILT issues) and active (*e.g.*, contributing a piece as a possible lead article, submitting a comment to a lead article, or otherwise) involvement in this continuing endeavor. Our continuing success depends on all of us as contributors, as commentators, as readers, or as members of this group.

Finally, in view of the deficit of our group hindering our ability to engage in more activities, I reluctantly but enthusiastically attach the following messages: (1) For those of you who may have inadvertently forgot to renew your group membership, please do so at your earliest convenience by contacting the ASIL and paying the required fees. (2) For those of you who are not officially members of our group yet, you are always welcome to join us at any time!

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HENRY WHEATON AND "THE GOLDEN AGE OF INTERNATIONAL LAW"

When I first came to the study of international law in the 1960s, I quickly learned that the 19th century was "the golden age of international law." Many years passed before I came to realize that this commonplace had no support beyond its constant reiteration. By support, I mean that the scholarly treatises to which I had been exposed gave remarkably little attention to doctrinal developments in this golden age. To be fair, their authors were inclined to view the 19th century as a golden age precisely because international law had substantially completed its doctrinal development by the end of the 18th century. Thereafter, it was the rapid expansion of positive law and the professionalization of legal practice that warranted retrospective appreciation. In this story, doctrinal refinements are beside the point.

As I look back on my own education, I have come to realize that the great writers to whom I am referring Lassa Oppenheim, Hersch Lauterpacht, J. L Brierly, Hans Kelsen were all figures whose scholarly careers were formed early in this century. The golden age was hardly a remote time for them. Indeed, I rather think that they saw themselves an integral part of it. In their eyes, the golden age of international law had not yet come to a close. After the regrettable interruptions of two world wars and the fascist assault of the rule of law, they saw themselves as principals in a great project of restoring the golden age of international law to its former glory.

One of the most conspicuous features of 19th

century international law was its role in turning large regions of the world into colonial dependencies. During the very years in which I first learned about international law and its golden age, this gigantic system of subordination came under sustained assault. Yet decolonization had the paradoxical effect of strengthening international law (indeed decolonization had same effect when it took place in the Americas much earlier). By reversing gears and making colonies into states, 19th century international law confirmed itself as the only available machinery for regularized relations among states, old or new, in the second half of the 20th century.

Nevertheless, decolonization in the 1960s and 70s also eventuated in a postcolonial sensibility, increasingly prominent in the 1980s and 90s and deeply antagonistic to the idea that international law could ever have enjoyed a golden age. Postmodern tendencies in Western scholarship have reinforced this sensibility. It is in this context that doctrinal developments in the 19th century have finally begun to receive some attention. It is serious attention, long overdue, but hardly flattering.

The postcolonial critique identifies international law as one of several instruments that Europeans used in the 19th century to gain control over other peoples, to exploit them and their resources systematically, and to justify having done so. Europeans made the best of their tangled political arrangements by erecting them into a formal, universal standard of sovereign equality that other, ostensibly less civilized peoples were unlikely to meet.

Such peoples were fit only to be colonized and, as colonies, would receive the benefits of civilization indirectly. Only because Europeans had failed to prevent an early wave of decolonization, the states of the Americas could claim to be the sovereign equals of European states. Elsewhere the alleged absence of sovereignty gave Europeans all that they needed to institutionalize inequalities and exploitation. 19th century doctrine confirmed the propriety of these activities, even if it made a mockery of the universalistic pretensions of its authors.

Rising civilizations are prone to arrogance. In the European case, extraordinary material success in the 19th century coincided with civilizational decline elsewhere. Nevertheless, European arrogance dramatically increased after mid-century. Expressed as a romanticized concoction of violence and racism, and dignified as social Darwinism, it fueled the imperial rampage of those decades. Nor is this all. In due course bringing general war to Europe and beyond, it set those decades apart from all others.

However convenient it is to mark time with the turn of the centuries, it is misleading to consider the 19th century as an unbroken stretch (even we shift its dates from 1815 to 1914). There are several decades (roughly 1815-1865) that are too easily dismissed as precursors to the more egregious decades to follow. Even if earlier decades in the century were hardly free of arrogance, or of imperial adventures for that matter, they invite a view of international law rather different from the one that postcolonial critics offer for later decades.

What I am presenting to you today is a sketch of doctrinal developments in the early decades of the 19th century. I suggest that these developments should be considered together, because together they constitute a distinctive, substantial and enduring contribution to the makeup of the Western world. To be more specific, we can see in these developments the defining features of the liberal world before it took on global proportions. In this sketch, I make no claim to having surveyed relevant materials in anything even remotely resembling an exhaustive fashion. Instead I focus most of my attention on a single treatise, Henry Wheaton's *Elements of International Law*. Its appearance in 1836 conveniently dates the conceptual world of liberal internationalism as a coherent project, though hardly a complete one. If not a olden age, then this was at least a telling moment in the history of European international law.

There are two reasons for treating Wheaton in particular as an exemplary figure. First, no

writer exceeded him in influence for at least three decades. His book went through several editions, including a French edition in 1848 the year of his death and a Chinese edition in 1864. The latter is famous for being the first translation of any international legal treatise into a non-European language. The eighth edition, which Richard Henry Dana, Jr., edited for publication in 1866, assured a continuing wide influence for Wheaton's *Elements* during the later decades of the century. Perhaps not too surprisingly, postcolonial critics draw on this edition selectively, I might add in their making the case that international law gave colonialism its practical and moral foundations.

Wheaton's enduring fame and influence draws attention away from the second, decisive reason for treating him as an exemplary figure. Wheaton's *Elements* provided his contemporaries with a cogent and all but complete exposition, not just of the elements of international law, but of the several elements which, taken together, make liberal internationalism a coherent representation of a world that took form in the decades following the Peace of Vienna. The key to this achievement is Wheaton's doctrinal genealogy. Definitively recapitulating the long, messy and uncertain process by which writers came to separate legal relations among states from legal relations within states, he did a great deal to make the liberal world conceptually independent from developments within societies.

While Wheaton's doctrinal genealogy demanded a show of respect for natural law, he gave practical primacy to positive law. At the same time, he disarmed the positivist deniers of international law. In so doing, he made it clear that states together constitute a society, but not, at least on a priori grounds, a universal society. On the contrary, he took international law to be grounded in legal practices specific to Europe. Finally, he rendered the entire body of international law -- natural and positive -- in the language of rights and thus the only language that makes liberal ideas intelligible in practice.

The language of rights is no doubt one that Wheaton found especially congenial, born as he was in the United States and seasoned in constitutional law as well as diplomacy. Yet he was not the only, or even the first, writer in his time to use this language in making international law uniformly available for liberal needs and uses. Who said what first is perhaps incidental to the point. In step with the times, Wheaton earned his influence because of what people could thereafter take for granted.

We often think that liberal ideas due to Hobbes and Locke represent a sharp break with the past. Transparently liberal, Wheaton nevertheless emphasized doctrinal continuity. He held that states are "independent moral beings" moral because their corporate character implicates them in human society, independent only by virtue of rights that confer duties on other, equally independent states. Obviously, the society that states constitute among themselves is a legal order, and thus a moral condition. Within that society, states are no less obviously free to pursue their interests individually and collectively.

Indeed the world became liberal, in just these terms, before Britain and the United States did. As Alfred Rubin has forcefully argued in *Ethics and Authority in International Law* (1997, pp. 19, 64), practice among states and its construction into positive law preceded any recognition of a legal order unique to states in their relations. Such a world was not liberal; it needed an appropriate doctrinal accommodation to become liberal. The same must be said for those societies that we most closely associate with liberalism.

Petty commercial activity, rights in common law and social contract theorizing had not turned Britain and its North American colonies into liberal societies during the 18th century, and perhaps could never have done so. Republican ideas and practices pulled in a different direction, and so did the vestiges of feudal life. Once states found themselves relating to each other in liberal terms, those societies where conditions were most propitious changed rapidly and reaped material advantages by doing so. The liberal world fostered liberal societies, and not the other way around. If states moved to

institute or rationalize internal markets, for example, they did so in response to pressures from beyond, so to speak, more than from within.

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Let me turn now to the key element in what I might call Wheaton's construction of the liberal world: the stipulation of a doctrinal genealogy codifying the separation of international and domestic law. It is to Grotius that Wheaton gave credit for the "new science of natural jurisprudence" -- "a mixed science of the law of nature and nations..."(*Elements*, p. 30). In the great succession of "scientific writers," Wolff, following on Pufendorf, "entitled himself to the credit of first separating the law which prevails or ought to prevail, between nations, from that part of the science which teaches the duties of individuals; and of reducing the law of nations to a full and systematic form..." (p. 31). These claims on Wolff's behalf are at least nominally true, since Wolff's systematic, multi-volume treatise on natural law concludes with a separate volume devoted to the law of nations the first such to appear. Having pored over that volume myself, I do not believe that Wolff entertained any such separation on conceptual grounds.

Wheaton gave the genealogy of doctrine far more attention in his *History of the Law of Nations*, which appeared in 1845. There he repeated his claim that Wolff was first to consider the law of nations on its own, but with a significant difference: "To Wolf [sic] belongs, according to his elegant abridger Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats the duties of individuals" (History, p. 177). To substantiate this new, more subtle claim, Wheaton reviewed Wolff's system and Vattel's reaction to it. As Martti Koskenniemi has argued (From *Apology to Utopia*, 1989, p. 92), I think correctly, Vattel "is logically led to making a boundary between international and municipal law." Wolff resisted the logic in question the logic of territorial sovereignty and drew no such conclusion.

While Wheaton's discussion of Vattel shows how inescapable this conclusion is, nowhere did Wheaton quote Vattel as having come to it in such straightforward terms. Indeed, in paraphrasing Vattel (very closely, I might add), he made it clear that Vattel never really came to it at all. Here let me quote Wheaton at some length:

> According to Vattel, that law of nations, in its origin, is nothing but *the law of nature applied to nations*. Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied being different, the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or states. A state is a very different subject from a human individual, from which result, in many cases, obligations and rights very different. (*History*, p. 186, his emphasis).

For Vattel to have acknowledged the logical implications of territorial sovereignty, he would have had to reconsider the "axiom" that the law of nations derives from natural law.

I might point out that the same logic drives Pufendorf's incisive critique of irregular political systems. Nevertheless, as Wheaton remarked, Pufendorf was content to lay down "the general principles of natural law, leaving it to the reader to apply it as he might find it necessary to private individuals or to independent societies" (*Elements*, p. 38). Later writers, up to and including Vattel, were no less content to compile the rules applicable to states, leaving the reader to decide whether nature made these rules necessary, presumably within states as well as among them. In short, all of these writers lacked a clear understanding that legal rules must have sources specific to, and valid for, the legal orders within which they are to be found.

Wheaton possessed just such an understanding, largely due to James Madison, which he fully articulated in *Elements*. As a consequence, he viewed the separation of international and domestic orders as obvious, and not only to himself. On logical grounds, he thought it had to be obvious to Wolff and Vattel

when, at least in my judgment, it was not. His error in this respect led to an anachronistic reading of his predecessors and an imaginative genealogy specific to the liberal world. Notice that the line of descent leading to himself (Grotius, Pufendorf, Wolff, and Vattel) parallels the line of descent for liberal thought in a domestic context (Hobbes, Locke, Montesquieu, Hume, Smith, Rousseau et al.). Fully separate from the standard domestic genealogy, Wheaton's genealogy leads the other by a few years at every interval. Moreover, due at least in part to Wheaton, his genealogy moves toward conceptual coherence while its domestic counterpart moves in the other direction.

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I want to comment now on a second element in Wheaton's construction of the liberal world. Though hardly his alone, it does help to eliminate a long history of confusion over natural law and how it relates to positive law. For Wolff, natural law came in two forms necessary law and voluntary law the latter inferred from the former to suit particular circumstances. Not only did Vattel defend this distinction. Making the former "the inner law of conscience," and the latter truly voluntary, he reinforced it. At the same time and somewhat contradictorily, he gave the voluntary law, now indistinguishable from positive law, the ascendant position in the practical affairs of states even as he continued to profess his belief in natural law principles.

Consistent with natural law in two forms, Wolff held there to exist a "natural society" ordained by the necessary law and, beyond that, a *civitas maxima*, or great republic, comporting with voluntary law. Vattel famously repudiated the latter but not the former. Andrew Carty has argued in *The Decay of International Law?* (1986, p. 16-7, 68) that this act was tantamount to repudiating the possibility of an actual international society, because the natural society that remains consists solely of individuals, human or corporate, free to do as they wish. With natural law confined to conscience, it is hard to fault the conclusion that Vattel's natural society is strictly notional. Carty is wrong, however, to think it applies equally to Vattel's successors.

This conclusion does apply to British writers such as Bentham and Austin, whose unqualified positivism has had such doctrinal importance, though less in Wheaton's time than in retrospect. For them, the concept of any society among states, natural or otherwise, was entirely vacuous. Wheaton's reaction to Bentham and Austin helps to make it clear why Carty has gotten it wrong about writers who kept a place, no matter how limited, for natural law. True to Vattel, Wheaton (*Elements*, p. 47) honored natural law as one "branch" of international law, and he limited it by making the positive law a separate branch.

Vattel had no doubt that an actual international society existed in his time, and that this society had existed for some time. Curiously, he never troubled to provide a basis for it in positive law, perhaps because most Enlightenment thinkers took its existence for granted. Instead, he evoked the time-honored practices of Europe's many sovereigns and their agents, which, by fostering a balance of power among the chief of these sovereigns, brought stability and prosperity to the "Republic of Europe." Notwithstanding the convulsions that France had brought upon Europe in the intervening years, Wheaton adopted Vattel's position that Europe constituted an actual international society. He also took a step that neither Vattel nor, as far as I have been able to tell, anyone else before him had taken. In his Preface to the Third Edition of *Elements* (the first revised edition, 1845, reprinted in the 1936 Carnegie version of the 8th ed.), he identified a specifically juridical basis for a distinctively European international law.

On Wheaton's account (p. xiv), the law of nations had its origins in the Middle Ages, thanks to two developments. First, the "Christian states of Europe" were drawn together by the moral authority of the Latin Church. Codified in the 13th century, canon law enhanced that authority by guiding "decisions of the Church in public as well as public controversies." The second development was the

"revival of the study of Roman law, and the adoption of this system of jurisprudence by nearly all the nations of Christendom, either as the basis of their municipal codes, or as subsidiary to the local legislation in each country." Wheaton could not have made his point more clearly: "The origin of the law of nations may thus be traced to these two principal sources, the canon law and the Roman civil law."

After the Reformation "undermined one of the bases of this universal jurisprudence," namely, canon law, jurists "continued to appeal to the Roman civil law, as constituting the general code of civilized nations" (still p. xiv). We should not attribute too much significance to the idea of "universal jurisprudence" in this context. For Wheaton, European international law is universal only to the extent that its "sources" reflect an ancient tradition of universalizing discourse. Roman civil law did not supply universally valid rules so much as it supplied analogies which, by informing practice among European nations, contributed to the emergence of customary rules of European international law.

Nor should we attribute undue significance to Wheaton's use of such terms as "Christian" and "civilized." Their presence in the Preface to the Third Edition is an incidental effect of the way that Wheaton corroborated the specifically European ancestry and reach of international law. In that text, Wheaton's main concern was eminently secular and practically oriented. He wanted to provide European international society with a solid foundation in law, not as a substitute for the balance of power to which Vattel had granted such importance, but as a complement to the balance as a source of stability. These terms are also found in the original edition of *Elements*, for example on p. 18, when Wheaton specifically argued against the universality of international law: "The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people in Europe or to those of European origin." With the Preface to the Third Edition as a guide, we can readily see that Wheaton used these terms without the lofty pretensions of superiority which, later in the century, their use all too typically conveyed.

I cannot say that Wheaton was entirely free of these pretensions. Consider the following: "If the international discourse of Europe, and the nations of European descent, has been since [Grotius] marked by superior humanity, justice and liberality, in comparison with the usage of the other branches of the human family to these private teachers of justice [such as Grotius], to whose authority Sovereigns and States are often compelled to bow, and whom they acknowledge as the ultimate arbiters of their controversies in peace;..."(Preface, pp. xv-xvi). Yet even here, the claim of superiority is incidental to the claim that the jurists whose genealogy Wheaton was so careful to document, and who drew so resourcefully on Roman law and ancient authority, had made European international law into the effective system of order that it had become over the preceding two centuries.

Practically speaking, Wheaton considered natural law less a repository of specific, universally valid rules than a conditioning presence, shared by canon, Roman and international law and shaping successive generations of juridical craft. Thus his definition of international law (*Elements*, p. 47) seems almost to make a virtue of ambiguity: "The law of nations, or international law, as understood among civilized, Christian nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent." Once defining international law in such process-oriented terms, Wheaton introduced Bentham's and Austin's famously rule-oriented objection that international law, backed as it is by "moral sanctions," is law only "by an analogical extension of the term" (p. 47, quoting Austin). Equipped with an opportunity to reject this claim, Wheaton proceeded to ignore it.

He did so, I believe, because he agreed with Bentham and Austin about the kind of sanctions that both branches of international law depend

on to work. Conceived as an integral development over many centuries, the rules of international law and the sanctions backing them up are specific to European international society. Moreover, Wheaton failed to see why anyone should be bothered by the claim that international law qualifies as law only by analogy. In itemizing the sources of international law, he observed that treaties embody rules that "are familiarly called laws by analogy to the proper use of the term" (p. 49, his emphasis). One of Wheaton's contemporaries, J. L. Klüber (*Droit de gens moderne de l'Europe*, 1819, pp. 17-8) went so far as to list analogies as a source of international law. Clearly these writers saw the use of analogy, not as a threat to the integrity of international law, but a mark of its distinctive status. Reciting the sources of international law, as I suggested above, has the same effect.

State recognition is yet another mechanism for insuring the independence, and perhaps the primacy, of the international society as a legal order. I find it curious that neither Wheaton nor Klüber conceived of it as such. Citing Klüber, Wheaton observed (Elements, p. 70) that a state acquires sovereignty when "it separates itself lawfully from the community of which it previously formed a part, and on which it was dependent." Begged is the question, whose law? -- nature's, international society's, the aforesaid community's? Wheaton meant the community's law, as his discussion of Latin America (p. 74) confirms: "where a revolted province or colony has declared, and shown its ability to maintain its independence, the recognition of its sovereignty by other foreign states is a question of policy and prudence only." For Wheaton, as a citizen of the United States, this is a surprisingly conservative position. A more liberal one would have better suited the liberal world, on conceptual as well as policy grounds.

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A final element in Wheaton's construction of the liberal world is the systematic rendition of its rules in the language of rights. Here we find no doctrine as such. Furthermore, I must point out that the expository format of his treatise strikingly resembles the format that Klüber had used in his treatise some years earlier. Gone from both is the language of perfect and imperfect rights, with its Aristotelian resonance and long history from Grotius to Vattel.

Instead, we have absolute and conditional rights. Klüber and Wheaton agreed that self-preservation, independence and equality are absolute rights, and present them in just this order. Klüber thought that property is a conditional right, but Wheaton classified it as absolute. For both writers, the rights and duties of states that constitute the bulk of the positive law are conditional. As Wheaton put it (*Elements*, p. 81), states are entitled to these rights "under particular circumstances"; they "arise from international relations existing either in peace or war."

After careful analysis of Klüber's treatment of absolute and conditional rights, Koskenniemi (*From Apology to Utopia*, pp. 108-11) concluded that, in the end, Klüber made natural law secondary to positive law. Koskenniemi's best evidence for this judgment is to be found, however, in Klüber's discussion of the sources of international law. There he considered natural law a source only when positive law did not suffice. Wheaton's discussion of sources listed natural law first and without qualification. Nevertheless, for reasons already discussed, I do not think that he wanted to make natural law primary except in a formal, notional sense.

As I see it, the way that Wheaton defined international law, presented its sources, and then ordered rights from absolute to conditional creates a firm structure of two tiers, or levels. In recognition of Wheaton's vocation as a constitutional lawyer, we might call it higher law in the sense that a constitution is. In effect, natural law grants international society a liberal constitution. Within the broad reach and permissive terms of that constitution, states' agents are free to conduct themselves as they see fit except insofar as they collectively agree to limit their conduct. They interpret those limits subjectively as rights, and regard them objectively as binding rules, for which the term law seems entirely appropriate.

Wheaton's firm structure of law in two tiers

makes international society analogous to the United States as a legal order. The contents of the top tier make international society liberal in a more thoroughgoing way than the Constitution makes the United States a liberal state. The timeliness and simplicity of Wheaton's conception help to account for its quick ascendancy, and the advantages that it conferred on liberal societies organized as independent states help to account for its remarkable staying power.

I do not wish to suggest that this sketch has included all the elements that the liberal world needed to achieve conceptual coherence. Rubin is surely right to insist (*Ethics and Authority*, pp. 130-5) that the development of private international law at just this time is highly significant. That Joseph Story -- U.S. Supreme Court Justice and Wheaton's patron wrote the first great treatise on conflict of laws in 1834 is telling. I want to conclude, however, on a different note.

Why has this simple conceptual scheme to lock the liberal world in place, retrospectively so obvious, garnered so little attention? I suggest that British intellectual tastes are responsible. Clearly British positivism fails to capture the distinctively liberal character of international society because it leaves no place for international society of any kind. The so-called Grotian tradition hopelessly muddles the relation of natural law to positive law and, in so doing, it loses all sight of the relation between law of any kind and the liberal world. Behind these intellectual failures is the misguided assumption that British liberalism provided the template for the liberal world in the 19th century. Thanks in large measure to Wheaton, the template for a liberal legal order among states came from across the Atlantic, where liberalism found its greatest support in Constitutional practice.

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I presented a more extensively documented version of this paper to the International Law Colloquium, Faculty of Law, University of Tokyo, November 12, 1999, and an earlier version at the 93rd Annual Meeting of the American Society of International Law, March 27, 1999.

Nicholas Onuf
Florida International University

INTELLECTUAL GENEALOGIES

I was privileged to serve as Chair of a Panel at the 1999 ASIL Annual Meeting devoted to Nineteenth Century International Legal History. It seemed a propitious topic, especially coming at the *fin de siècle* of the twentieth century. I was particularly struck by Professor Nicholas Onuf's presentation, which (I am pleased to see) has been expanded and now appears in the pages of INTERNATIONAL LEGAL THEORY.

I certainly agree with Professor Onuf's observation that the nineteenth century is indeed problematic for international lawyers and international legal historians. It is not just, however, because of the caustic colonial legacy that international law left from that century, an inheritance we continue to be burdened with in many respects. In truth, I think that most of the modern doctrinal attributes of contemporary international law were largely conditioned in the period from 1870 to 1939. These include: (1) a shift in the bases of obligation to international law rules; (2) a reformulation of both custom (using *opinio juris)* and treaties (using *pacta sunt servanda*) as sources of international law; (3) a diversification in both the subjects (recognized actors) and objects (legitimate topics) of international legal regulation; and (4) the separation of private from public international law. Although there have certainly been some significant doctrinal and institutional changes in international law in the twentieth century, the structure or "landscape" of the field is very much one of the nineteenth century.

Nick Onuf is certainly right in concentrating on the early part of the nineteenth century to locate some of the intellectual precursors to later doctrinal developments. The Napoleonic Wars were an authentically global conflict (the second after the Seven Years War), and the social and political upheavals brought by the French

Revolution and the stirrings of German and Italian nationalism in Europe were immense. So, too, were the economic effects of the Industrial Revolution. Lastly, the early nineteenth century saw significant stresses elsewhere in the world: revolution and separation in Latin America, challenges to cohesive regimes in India, China and Japan, and (of course) the beginnings of aggressive European imperialism.

But the central problem of nineteenth century international legal history is an intellectual one. That is our monomaniacal predisposition to regard doctrinal developments from 1815-1914 as some sort of morality play between natural law and positive law sources for international legal obligation. Positivism is portrayed as some sort of juggernaut, an angry and vengeful god sacrificing naturalist sources on the alter of State expediency and consent, only to be itself consumed in the general wars it spawned in 1914 and 1939. It is a neat and mythic tale. But I do wonder whether it can capture the entire breadth of international legal history in the 1800s. Tony Anghie and others have emphasized the universalism/particularism and center/periphery divisions. Others may seek other organizing principles for the intellectual life of international history for the nineteenth century.

And no figure is as attractive to use as a sounding board for these meditations as Henry Wheaton. Wheaton figures among the definitive trio of intellectuals who began formulating a distinctive American vision of international law. (The other two are Chancellor James Kent and Justice Joseph Story.) Wheaton is appealing in large measure because he was a cosmopolite. He was fluent in French. His European background and diplomatic experience was significant. He was thought to have strong sympathies for national liberation movements, particularly in South America (*see Elements*, II.1.8). The fact that he was also a superb lawyer, and (for a number of years) the official Reporter of Decisions for the U.S. Supreme Court, does not hurt, either.

Wheaton's writing provide a fertile ground for considering the doctrinal development of international law, and its transformation from a naturalist to a positivist footing (assuming that is the primary trope one wishes to employ). And I was particularly struck by Professor Onuf's attempt to trace the ideological lineage of many of Wheaton's ideas about the proper place for natural law sources for international legal obligations. It is precisely this genealogy of ideas that is crucial for an intelligible intellectual history of international law. In addition to the publicists that Nick Onuf describes in his piece as influencing Wheaton – particularly Wolff and Vattel – I think we would need to add a few additional sources.

It is important to realize that when Wheaton observed that "According to Vattel, [the] law of nations, is nothing but the law of nature applied to nations," he was doing nothing more than perpetuating a distinction derived from Justinian's *Institutes*:

> But the law which natural reason appoints for all mankind obtains equally among all nations, and is called the law of nations, because all nations make use of it . . ..
> . . . . The law of nations is common to all mankind, for nations have established certain laws, as occasion and the necessities of human life required. . . . (I. ii.1 & 2).

But this conflation of natural law and the law of nations carried with it the seeds of destruction for the legitimacy of international law in the early nineteenth century. The reason was the central, and most contentious, issue of that period: the legality of slavery and the slave trade. Ironically, Justinian's *Institutes* specifically observed that "[w]ars arose, and in their train followed captivity and then slavery, which is contrary to the law of nature." (Id. I. ii. 2).

A naturalist footing for the law of nations would seem to lead to the conclusion that the international trade in slaves was unlawful, and that States could take unilateral measures to suppress it. Joseph Story now enters the intellectual picture, Wheaton's friend and patron. Story was, of course, on record in

United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), as believing that the slave trade was in violation of this naturalist vision of international law. But just three years later, Story had to endure the indignity of silently recanting his position as a member of the Supreme Court ruling in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). And, indeed, *The Antelope* is usually regarded as the beginning of the "infection" of positivism in the American approach to the law of nations, what with Chief Justice Marshall's comment that

> [w]hatever might be the answer of a moralist to this question [the legality of the slave trade], a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. [We must] resort to this standard as the test of international law . . . .

Id. at 120-22. Of course, British courts had already reached this conclusion. (*See* The Le Louis, 165 Eng. Rep. 1464 (Adm. 1817).

Wheaton's *Elements*, published barely 11 years after *The Antelope* decision, marks this contradiction and confluence of natural law and positive law sources. And, indeed, the earlier publication of Joseph Story's volume, *Conflict of Laws* (in 1834), is a crucial moment in this story. As ably and humorously explained by Professor Alan Watson in his book, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (1992), Story's move to a territorial basis for resolving conflicts issues (largely, although erroneously, derived from Ulrichus Huber) was critical in establishing a difference between private and public international law. Henceforth, territorial sovereigns began to regard themselves as unrestrained by international law to decide such matters as prescriptive and adjudicatory jurisdiction.

There is one other figure in this mix of intellectual sources for nineteenth-century international law. That is John Austin. Although Austin's work follows Wheaton's by a few decades, his writings reflect the most extreme of English legal positivism. His renunciation of international law as not "law" at all, remains a crippling blow, one that conditions much of the debate that follows. Wheaton may well have anticipated the positivist critique and attempted to blunt it somewhat by recognizing that international law was – and remains – an admixture of natural and positive sources for obligation, of moral restraint and positive consent. Wheaton's American empirical pragmatism comes as a welcome diversion from later English and Continental positivist absolutism.

As international law has now experienced a half-century of a return to balanced naturalist and positivist outlooks – is that not the entire thrust of the "human rights revolution"? – it seems propitious to look back and trace the intellectual origins of these developments. Far from being a morality play, a Manichean drama of conflict between good and evil sources of international legal obligation, the tension between natural law and positive law is more of a *yin* and *yang*, a mystic relationship that mutually nourishes and annihilates the other. Henry Wheaton embodied a rare combination of those impulses. His example as a scholar, diplomat and lawyer should continue to inspire, if not periodically perplex, us.

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THE ELEMENTS OF INTERNATIONAL LAW

Henry Wheaton is the Blackstone of international law. By giving lawyers a simple, clear and convincing description of international law, as he understood it, Wheaton shaped the law of nations for his contemporaries, and their successors for at least half a century after his death. Wheaton's *Elements of International Law*, first published in 1836, went through many editions, culminating in the canonical eighth edition, with notes by Richard Henry Dana, Jr., published in 1866. Dana's became the most frequently cited version, and was selected by the

Carnegie Endowment for reproduction in its series on the Classics of International Law.

Wheaton's Elements of International Law

Wheaton's ideas still permeate the international legal order that they did so much to establish, but Wheaton himself is largely forgotten. Mentioned (if at all) only in quotations from nineteenth-century court decisions, Wheaton is seldom read and almost never cited. Yet no subsequent treatise has reached the same level of influence as Wheaton's *Elements*, and much of Wheaton's thinking remains embedded in the institutions of contemporary international law. Wheaton's arguments are worth reviewing and evaluating for their own sake, but also for the insights that they give into the philosophical foundations of the international legal order.

There has been a tendency among some recent scholars to exaggerate the separation between law and morality, even in international law (*see e.g*. Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, 1997). A close look at Wheaton confirms how late and incompletely (if ever) this doctrine infiltrated accepted public law doctrine. Just as lawyers since Cicero had understood that states should be communities of free and equal citizens, associated in pursuit of the common good, so Grotius, Wolff, Vattel and Wheaton saw international law as supporting a community of free and independent states, associated together for justice. The nature and moral independence of states requires a well-established set of laws to govern their community, just as human nature requires certain laws to regulate human society. The measure of both is justice.

This does not mean that people or states receive justice, unmediated, directly from nature. They must turn instead to the evidence of history, public opinion, judicial decisions, custom and other institutions that reveal justice through human behavior. Wheaton understood the value of collective perceptions in clarifying the details of international law. *The Elements of International Law* includes many specific precepts of international legal doctrine, supported by extensive citations to publicists, to decisions by various courts, and to other expressions of human opinion that show where history, morality and consensus have generated specific rules of international conduct.

The Sources of International Law

Henry Wheaton identified justice as the ultimate arbiter of international law (Wheaton, *Elements*, 3, 20), making use of those principles "which sound policy dictates as necessary to the security of any state"(xv). Europeans first recognized these maxims through their study of the canon law and Roman Civil Law, as revived by Spanish casuists and learned professors at the University of Bologna. The professors of Roman law were the public jurists and diplomats of their age and continued to be so even after the Protestant Reformation of Europe. Naturally, such learned men looked to well-recorded Roman civil law precedents to discover the basic requisites of justice, and to settle international disputes (xiv).

The value that Wheaton saw in Grotius and other public jurists (xvi) is the benefit that he himself offered to statesmen, by writing impartially to clarify justice, as revealed through reason and experience. What Wheaton's treatise on the "reciprocal duties of sovereign states" lacked in the force of "positive law", it gained through the moral sanction of enlightened opinion, responding to truth and sound reason (xvi-xvii). Wheaton's concentration on the relationship between states might seem at times to endorse the positivism that he elsewhere so explicitly rejected (xix), but Wheaton always measured international law according to "the principles of justice" which "ought to regulate the mutual relations of nations" (3).

Wheaton adapted his formal definition of international law from James Madison, believing that: "international law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may

be established by general consent." (20) Wheaton sought specific evidence for the content of international law from (in order of importance): first, the writings of publicists; second, treaties; third, the ordinances of particular states; fourth, the adjudications of international tribunals; fifth, private government archives; and finally, from the history itself, of how states have behaved in the past, and what they recognize as justice (20-23). The primacy that Wheaton gave to publicists, and their views, in determining international law, depended on their impartiality, as recognized by statesmen, and so ultimately on reason itself (20).

States

Wheaton's treatise concerns states, and their mutual relations (25). States, in this context, constitute separate political societies, supreme in their own spheres, and independent from the rest (27, 44). Wheaton posited a "great society" of states, with determinate rights and duties between them (28). Membership in this society depends on mutual recognition (29), with sanctions enforced by opinion (77). But the fundamental rights, which all states enjoy with regard to each other, derive from their separate existence as independent moral beings. Wheaton calls these basic rules the "*absolute*" international rights of states (75). There are also "*conditional*" rights, derived from particular conditions and circumstances (75).

The "*absolute*" rights of states include self-preservation, self-defense, peaceful expansion, peaceful internal development (75-77), and all the other ordinary processes of self-realization, naturally due to independent moral actors, living in a "state of nature" (77). International law depends for its efficacy entirely upon "moral sanctions", not including the resort to arms, except in exceptional circumstances (77-78). Wheaton hesitated to articulate the particular conditions of any specific "right to intervention," for fear that states would abuse it, as a pretext for invasion (79). He approved Britain's vigorous resistance to any overarching world government, which might superintend the internal affairs of other states (80). This policy of non-interference extended to protecting the independence of Spain's former American colonies, which Wheaton approved (81).

Wheaton supposed that the principles of international law might sometimes justify interference to *support* wars of national liberation "when the general interests of humanity are infringed by the excesses of a barbarous and despotic government" (95) or the "general peace" and "balance of power" are threatened (98-99). This despite every state's right "as a distinct moral being" independently to alter or abolish its own municipal constitution of government (100), without the interference of others (103). The difference here lies in Wheaton's distinction between "barbarous' and "civilized" governments. "Civilized" governments, established for the good of their own citizens, enjoy a right to autonomy which "barbarous" governments, acting despotically to dominate and exploit their own subjects, do not (97).

This illuminates the circumstances in which independent states may properly enforce the universal law of nations. Wheaton suggested (for example) that piracy was a crime by the universal law of nations, while slavery was not (174). The "general, ancient and admitted practice" of states, their treaties, and various transactions of civilized nations had once accepted slavery and the slave trade. To make these crimes "by the universal law of nations" Wheaton required a treaty, or universal change in state practice (174, 177). Notwithstanding that the slave trade was, as John Marshall observed (and Wheaton admitted), "contrary to the law of nature", nonetheless the enslavement of those defeated in lawful wars was an ancient practice, still widely recognized in Africa, where many European states had been willing to purchase slaves. Universal practice and opinion had once supported the slave trade and so (Wheaton supposed) must the law (178-179).

Jurisdiction

The law of nations, as recognized in Wheaton's day by "all civilized and commercial states throughout Europe" was in part unwritten, and in part conventional. Wheaton sought the

unwritten law first "in the great principles of reason and justice", but then also in the judicial decisions of various tribunals in every country, which tend to make the unwritten law more "fixed" and "stable" (356). The mutual independence of states leaves them without any common arbiter or judge, and so each must, in the end (of necessity) become a judge for itself against the others, whenever they disagree (309). The rules of law that Wheaton laid down tried to restrain this discretion to the "clear and open denial of justice" (310).

Wheaton understood that older and less humane rules of international conduct had gradually been replaced by newer and better principles, when publicists such as Grotius and Vattel articulated new standards. The law of nature often supplies a rule (such as proportionality) which publicists and practice make more complete (359). This "progress of civilization" (as Wheaton recognized) was not complete in his own time (378), despite the efforts of enlightened statesmen (380), nor is it now. In many cases, justice fails from an absence of reciprocity. For one state, unilaterally, to embrace the just rule, might leave it defenseless against the others (391). When one state exercises its jurisdiction unjustly, to harm another's nationals, Wheaton understood that the second state may respond with reprisals, to prevent "*the denial of justice*" (409).

Wheaton explained that the jurisdiction to legislate and to enforce the law in each separate and independent state properly extends throughout that state's own territory, to its own nationals (wherever situated), to offences committed on its vessels on the high seas, and "to the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed" (151, 161). Regarding pirates and other international criminals (458), Wheaton believed that since these are "common enemies of all mankind," all nations have an equal interest in their apprehension and punishment (162). Wheaton did not accept that the international law of his period extended to the punishment of ordinary murders on the high seas (164) or to preventing the African slave trade (165-167), except as between nations that had mutually agreed to do so (173).

Here Wheaton's commitment to "reason" and to "nature" gave way to a positivistic doctrine of previous consent. When states had first consented to the slave trade, a right had vested, such that states could not now withdraw their consent, to reflect their new sense of justice (179). Wheaton elsewhere accepted that "the progress of civilization" can change international law to support "the serious interests of mankind" (195-196), so Wheaton's views on slavery stand revealed as products of his own moral blindness. His position would seem to have been that once universal consent has recognized the justice of a doctrine of universal international law, that doctrine may not be superseded, except by subsequent universal consent.

Conclusion

The relationship between Wheaton's fundamental principal of international law ("justice") and his subsidiary measure ("consent") (20), depends on a belief (borrowed from Grotius) that justice itself requires good faith, even in war (416). Thus treaties and agreements become binding, even when unjust, through the underlying moral obligation to keep one's word (with certain obvious exceptions) (40-41,292). Wheaton accepted a doctrine of "moral impossibility," which sometimes limits this binding influence of treaties. "Moral impossibility" arises when fulfilling a treaty engagement would injure third parties (281). Coerced consent also voids treaties, because coercion violates justice (284).

The value of Wheaton today lies less in the specifics of his explanation of international law as it existed in his day, than his underlying conception of where law comes from, and the purposes that law serves. If international law consists in "those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations," (20) then the justice and nature of this international society will merit close attention. Wheaton's work should remind contemporary scholars of international law that there can be no

law without justice, no justice without community, and no international community without reflection about the underlying purposes that all states exist to serve.

The greatest weakness of Wheaton's *Elements* lies in his overwhelming commitment to states as the sole subjects of international law. States provide a useful vehicle for codifying and enforcing the international law, but not at the expense of individual justice (as Wheaton himself admits). The strong analogy made in liberal international law from Grotius to Wheaton between the liberty and equality of the individuals within the state, and the liberty and independence of the state within international society, breaks down when states deny their citizens' rights at home. Wheaton's commitment to justice of international society offers a vehicle for correcting despotic states. His emphasis on "civilized" values disparages "barbarism" and injustice.

Wheaton's distinction between "civilized" and "barbarous" nations lies at the heart of his practical legacy. Both terms seem crude and impolitic to modern sensibilities, but they capture important truths about the structure of international society, still recognized in the Statute of the International Court of Justice (Article 38(c)). Not all states deserve a place in the community of "civilized" nations, because not all states meet the minimum requirements of justice. Standards of membership can and should rise, as enlightenment advances -- which it has since the twelfth century on the basis of a civilian tradition, derived from Rome. Wheaton understood the purposes of international law better than many contemporary lawyers, but also its nature and sources. "*Le droit international, ou droit des gens positif, est fondé sur la morale internationale, qu'on a ordinairement appelée le droit des gens naturel*" (Wheaton, *Elements*, xi) (Preface to the 1848 edition).

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THE RELATIVITY AND HISTORICAL PERSPECTIVE OF THE GOLDEN AGE OF INTERNATIONAL LAW

I. Introduction

Nicholas Onuf's well-written lead article, "Henry Wheaton and the Golden Age of International Law", sparked my interest in writing this essay, not so much as a comment of Onuf's, but as a supplementary and free-style study of the idea of such golden age. At the outset, I find it interesting that my experience bears some similarity to Nicholas Onuf's: we can both trace ourselves to someone famous in our field. One of my former favorite law teachers at Peking University Law School was Professor (and now Judge Emeritus) Wang Tieya, who, in the 1930s, studied international law under, among others, Hersh Lauterpacht, who, in turn, had been a student of F.L. Oppenheim's. While an LL.B. student (1979-1983), I read, mostly on my own, a good portion of Kelsen's *Principles of International Law* (2nd ed.), Brierly's *The Law of Nations* (6th ed.), Akehurst's *A Modern Introduction to International Law* (3rd ed.), Starke's *An Introduction to International Law* (7th ed.), and more importantly Oppenheim's *International Law* (7th and 8th eds.), although I hardly consumed them well due to my language barrier, not to mention reading them "from cover to cover." I must admit, though, that Wang's and Oppenheim's overall positivist approach had a great deal of influence upon my subsequent study and teaching of international law.

It is not totally clear whether the assertion that the 19th century was the "golden age of international law" covers the entire nineteenth century solely or *more or less* that period; nor whether such "golden age" refers to the positive growth of international law (*i.e.*, the "law" of nations *per se*) or to the doctrinal development of international law (*i.e.*, the science of international law). Indeed, it is even questionable, as Professor Onuf observes, whether there is sufficient support for this assertion. Nevertheless, I am inclined to preserving the above assertion by attaching new or clarified meanings to the "golden age" from

the point of view of history rather than exploring what might have been meant by that notion. I also tend to believe that there is no reason why the relative "golden age" of international law cannot signify both the growth and application of positive international law and the development of doctrines and theories.

Let us first determine what the words "golden age" might suggest. We may want to use the growth of an apple tree as an analogy. To see the "creation" and growth of an apple tree on a piece of bare land, we must first plant an apple seed in the soil. We next observe the outgrowth of a sapling. It takes a few years for the sapling to grow into a mature tree. Then finally comes the time for harvest. This "final" yet recurring stage is exactly the exciting and "golden age" of the apple tree. However, this by no means signifies that the "golden age" of apple is the most important stage in the growth of an apple tree. The planting stage (the seeding process) and the growing stage (the sprouting and thickening process) may well be considered more important than the golden age (the harvesting process). In the absence of either prior stage, we will not be able to see an apple tree full of apples, and there will not be a "golden age of the apple tree" to talk about.

Similarly, the development of international law, both in practice and theory, also involves multiple stages that can roughly be equated with the "seeding age" (the "planting age"), the "growing age" (the "enlightenment age") and the "harvesting age" (the "golden age") of an apple tree. The pre-modern era (roughly antiquity–1648) may be said to belong to the planting age of international law, followed by the age of enlightenment (roughly 1648-1815) and the golden age (roughly 1815-1919). This classification does not necessarily follow exact quantitative and qualitative measurement. Rather, it merely reflects the different stages in the formation and development of international law as a whole system (not as to particular rule of international law) and the accompanying science of international law. The "golden age" of international law, roughly consisting of the 19th century, certainly does not suggest that it is the most important era that deserves the most credit. Instead, it was a nourishing period of the "flower" of international law, much of the credit for which, however, goes back to the seeding and growing ages. Further, the "golden age of international law" is not exclusive and stationary. It can be continuing and/or recurring. The classification adopted here is largely a matter of relativity. It is only relative to the 18th century and the pre-18th century era that the 19th century may be said to be fuller-grown, more concrete and more tangible in the course of international law development.

II. The Relative *Seeding* Age of Classical International Law

A. State Practice

Unlike what Montesquieu claimed, it is neither that "all nations … have a law of nations," nor that "there is [inherently] something in mankind like an innate idea of international law" (Nussbaum, p. 1). International law grew out of the practical interactions between States. The *seeding* or *planting* age of international law may be traced back to the classical period of ancient civilizations but was long enough to cover events and doctrines up to the Peace of Westphalia. What is unique is that the *seeds* and *planters* of the system of international law were the same entities – the States, whose behaviors and decisions were often influenced by doctrines.

In this lengthy age of planting and emergence, unsystematic and non-universal forms of embryo international law may be said to exist among ancient, medieval and post-medieval entities similar to modern nation-States. Examples include the peace and alliance treaty between Rameses II of Egypt and Hattusili II of Hittite (1291 B.C.) (*id.*, p. 2), the diplomatic, congressional and treaty relationship among the Chinese kingdoms in the Spring-Autumn and Warring States periods (Wang, pp. 362-364), the *proxenos* institution and the arbitration system of the ancient Greeks (*Nussbaum*, pp. 6-8), the *jus gentium*, treaties and rules of war of the ancient Romans (*id.*, pp. 10-16), the feudal or suzerain relationships,

mercantile and maritime law and the "seeds of international law" of the Dark Ages (*id.*, pp. 22-35), and the emergence of rules relating to war, reprisal, neutrality and *mare liberum* in the post-medieval Era of the Spaniards (*id*., pp. 66-71; Wang, pp. 270-273).

B. Doctrine

This classical era witnessed very important germination of doctrines as well, as are reflected in the works of Vitoria, Suárez, Gentili, and, above all, Grotius. The naturalist orientation of the former two writers is obvious. Francisco de Vitoria (1486-1546) believed that international law was founded on the universal law of nature, and that "principles derived from nature bind states in their external relations" (*see* Shen, p. 292). Francisco Suárez (1548-1617) similarly believed that international law was derived or extended from the law of nature (*see* Shen, pp. 292-293).

Alberico Gentilis (1552-1608), on the contrary, in essence stood as a classical positivist. Despite his constant reference to *jus naturae et gentium*, Gentilis showed his departures from theology and canon law. To him, international law could not be identified with natural law, and should instead be interpreted from the perspective of reality. Believing that every nation-State in reality had equal rights, he attributed the basis of international law to the *practice* of States, as reflected in their treaties, voluntary obligations, custom and history (*see* Shen, pp. 309-310).

Hugo Grotius (1583-1645), known as the founder of modern international law, stood somewhere in the middle between the naturalists and the positivists. He neither denied the existence of positive international law, which he believed to be based on the "common consent" of nation-States; nor did he abandon natural law, which he called "principles of nature." Grotius not only recognized man-made law, but also distinguished elements, which arose from positive law from those which allegedly, originated from nature. He continued: "For the principles of the law of nature, since they are always the same, [they] can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are" (Grotius, para. 30). Indeed, "Grotius understands by the 'Law of Nations' a law established by the common consent of Nations, and he thus distinguishes it from the natural law" (Fenwick, p. 4a). On the other hand, it must also be observed that "Grotius often [spoke] of the law of nature and the law of nations as if the two impose identical obligations on states – as if, notwithstanding their different sources, the law of nature and the law of nations speak to states with one voice" (Beck, *et al*, p. 36) (for more observations on Grotius, see Nussbaum, pp. 70-114).

III. The Relative Growing Age of Modern International Law

A. State Practice

Then came the stage in which international law was maturing into a modern system in terms of both doctrines and State practice. This period, also known as the *age of enlightenment*, roughly began with the conclusion of the Thirty Years War upon the Peace of Westphalia in 1648, and lasted until the 1815 Congress of Vienna. The Congress of Westphalia set a precedent for settling international disputes through international negotiations and conferences, and marked the beginning of a true system of international law in its modern sense. The resulting Peace Treaties recognized some important principles that laid down the foundation of modern international law. The most significant was the acceptance of the principle of territorial sovereignty, the principle of sovereign equality among nation-States and the principle that the territory of each State constitutes the sphere in which it exercises its political power. Further, the Treaties recognized the equal rights of different religious groups, discontinued the domination of the Papacy and trashed away the underlying theory of World Sovereignty, making it possible to save international law from the manacles of the so-called *divine* rights.

The balance of power in the post-Westphalia era served as a basis for the maintenance of the then international law and order. Within the framework of such balance, however, territorial changes, as well as changes of alliance relationships among major European powers, were frequent and constant. Along with these constant changes were developments and emergence of State practice in the areas of treaty making, exchange of diplomatic envoys, trade and shipping, rules of war and neutrality, privateering under letters of *marque*, most favored nations clause, and, unfortunately, such infamous practices as colonization, capitulations and engagement in and monopoly of the slave trade.

Revolutions in Europe and North America during the 18th-century greatly enriched the contents of international law. In particular, the American Revolution not only started the process of decolonization, but also reaffirmed and developed, in the Declaration of Independence and the subsequent US Constitution, many progressive principles and rules of international law. Similarly, principles and ideas emphasized during the French Revolution of 1789, such as those relating to State sovereignty, rights and duties of States, non-intervention, asylum, and humanitarian law, were either already part of, or eventually accepted into, positive international law. The sovereigns of major powers in the pre-revolution period were almost absolute within their respective sphere of political dominance, and as such were reluctant to solving their disputes peacefully by submitting to external or neutral arbitration. The absolute authority of sovereigns began to be liberalized along with the revolutions. The 1794 Jay Treaty between the United States and Great Britain set a good example of putting arbitration into practice.

Doctrine

The Age of Enlightenment is perhaps better known for the proliferation of lasting doctrines and publicists. Grotius, although predating the Age of Enlightenment, may be said to have marked the beginning of a new era in the history of international law both in theories and practice, and it is for this reason that he is regarded the father of modern international law. His contribution to both doctrinal and practical development of international law surpasses that of any prior and subsequent theoreticians and practitioners.

Theoreticians and practitioners, contemporary with or subsequent to Grotius in the Age of Enlightenment, may roughly be classified into the following categories: (1) deniers of international law; (2) naturalists; (3) Grotians; and (4) positivists.

1. Deniers

The deniers of international law, who had negative impact upon the growth and application of international law, include Hobbes, Spinoza, and Pufendorf. Thomas Hobbes (1588-1679) believed that the State's power was absolute, and thus denied the validity of any international undertaking, declaring that "Covenants, without the Sword, are but Words and of no strength to secure a man at all" (Hobbes, ch. 17, p. 76). Baruch Spinoza (1632-1677) similarly denied the binding effect of any treaty, stating in his *Tractatus theologico-politicus* of 1670 that the State was not subject to any authority but its own interests (*see* Wang, p. 322). Samuel Pufendorf (1632-1694) believed that there was in fact no positive law of nations in the sense of a State-made law with binding force, since it did not come from any superior habitually receiving obedience from all (Pufendorf, *at* ii.c.iii, §22).

2. Naturalists

The Age of Enlightenment was more dominated by the teachings of naturalists. Those who denied the existence or possibility of international law were likely themselves naturalists. Pufendorf's denial of international law was inseparable from his extreme naturalist belief. He "arrives at the unfortunate idea that there is no independent *jus gentium* at all, and that jural relations among nations can be found only in natural law", and "in fact sets out to prove that every rule actually observed among nations is nothing but law of nature" (Nussbaum, p. 148). Hobbes, too, maintained that "there is no law

among nations except natural law" (*id.*). For him, international law was the same as the law of nature, and was binding on sovereign rulers only in conscience, without being enforceable by a superior common power (*see* Shen, p. 294).

John Locke (1632-1704) was also an influential political thinker whose writings on the state of nature, social contract, natural rights and the law of nature continued yet distinguished from those of Hobbes' (*id.*). Believing that the "law of nature" had its source and authority in God, and that natural rights were higher than man-made principles, Locke stated:

> The obligations of the law of nature cease not in society, but only in many cases are drawn closer, and have by humane laws known penalties annexed to them to enforce their observation. *Thus the law of nature stands as an eternal rule to all men, legislators as well as others*. The rules that they make for other men's actions must, as well as their own and other men's actions, be conformable to the law of nature, *i.e.*, to the will of God, of which that is a declaration, and the fundamental law of nature being the preservation of mankind, no human sanction can be good or valid against it [*italics* added] (Locke, para. 135).

He argued that men were "by nature all free, equal, and independent" (*id*., para.95). In the state of nature thus conceived by Locke, the sole restraining force was one's own reason assuring that men's actions always conformed to natural law (*id*., paras. 123 & 128). Needless to say, Locke would similarly subject international law to the law of nature.

Christian Thomasius (1655-1728) was also closely linked with the domination of naturalism in the Age of Enlightenment. Thomasius' central theme of writings was about the "law of nature," and he was among other naturalist thinkers who "… recognized earthly laws as subject to nature and man's will and distinct from God's laws[, and who] viewed the state as the community or society of men, in which man-made laws would be applied consistently with natural law" (Swenson, p. 387). Thomasius hardly showed "any great concern with the special problems of international law" even if his major work bears the title of "... *jus naturae et gentium*" (Shen, p. 293).

Also influential at the time was Sir William Blackstone (1723-1780), who spoke of "the eternal, immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions" (Blackstone, , vol. 2, bk. 2, p. 40). For Blackstone, the law of nature was universally binding, so was international law which was deducible from "natural reason, and [was] established by universal consent among the civilized inhabitants of the world" (*id.*, vol. 2, bk. 4, pp. [66-68]). Since international law was contrived from natural law, it was binding upon all individuals and States. Each State was therefore required "to aid and enforce the law of nations, as part of the common law: by inflicting an adequate punishment upon offenses against that universal law" (*id.*, p. [73]).

3. Grotians

Between the classical naturalists and the classical positivists stood eclecticists or the so-called "Grotians," who, like Grotius, attempted to harmonize the extreme positions of naturalism and positivism. Despite being *eclectic*, the proponents of eclecticism were either more or less naturalist, or more or less positivist, although most of them were more naturalism-oriented. Representative eclecticist jurists such as Wolff and Vattel essentially belonged to the naturalist school.

Baron Christian von Wolff (1679-1754) distinguished positive international law from natural law, the latter of which was said to confer upon States only *imperfect* rights. Under the law of nature, according to Wolff, each State had the right and obligation toward itself aimed at self-preservation and self-perfection, including the right to ask other States to offer assistance for its own self-preservation and self-perfection. On the other hand, this right to assistance was not absolute. It would be subject to the requested States' assessment of their extra ability to provide assistance. In that sense, this right to request for assistance was *imperfect right*. Similarly, although

Wolff's "natural law" required a State to work toward its own preservation and perfection as well as those of others, its obligation to offer assistance to other States was also an *imperfect* one, because such obligation existed only if it had the extra ability to do so without prejudicing its duty toward its own preservation and perfection. However, Wolff envisaged that States could turn their *imperfect* rights and duties under natural law into *perfect* ones by positive law making. By entering into a treaty, *e.g.*, they could make their duty to offer mutual assistance an absolute obligation, and their right to request such assistance an absolute right (Wolff, pp. 10-11, 19 & 84-86).

Further, Wolff proposed an ideal *civitas maxima* (the super State) as the foundation of the law of nations, symbolizing a larger and perhaps higher *polis* than the political communities of modern States in 18th century Europe (Onuf, pp. 292-293). "In the *civitas maxima*," Wolff wrote, "the nations as a whole have a right to coerce the individual nations if they should be unwilling to perform their obligations" (Wolff, Prolegomena, para. 13). This *civitas maxima* also reflected Wolff's eclectic attempts at consolidating elements of natural law and positive law. His supreme State was "naturalist" in original thinking, but its actual creation and realization would also require the positive pacts of the communities of which it would be composed as well as the positive acts of a "ruler" acting on behalf of the *civitas*.

While a faithful disciple of Wolff's, Emerich de Vattel (1714-1767) distinguished himself from Wolff by questioning the latter's core feature, the *civitas maxima*. The international society was a more realistic one in the eyes of Vattel who recognized the importance of dealing with a public of "sovereigns and their ministers" (*see* Nussbaum, p. 156). Although he accepted Wolff's division of the law of nations into voluntary law and necessary law, he refused to regard the so-called *civitas maxima* as the foundation of the voluntary law of nations. Instead, he considered the voluntary law as the "presumed" law of nations (*id.*, p. 158). In essence and on the whole, however, Vattel continued and even furthered the legacy of Wolff by almost wholesalely embracing Wolff's ideas of *imperfect* rights and *perfect* rights (*id.*). For Vattel, the law of nations was a system "based on the principles of the law of nature and written with a view to practical application" (*id.*, p. 156). This system as conceived by Vattel was in the first place naturalist because it was guided by a higher natural law; it was also positivist because it consisted of rules artificially written (*e.g.*, enacted, agreed or stipulated) for practical purposes. However, it was the guiding natural law that controlled: No agreement could bind, or even authorize, a man to violate the natural law. Thus, both Wolff and Vattel accorded the "necessary law" or the "law of nature" an ultimately supreme role in the order of legal systems. They attempted to combine elements of naturalism and positivism but they both leaned more toward the former than the latter.

4. Positivists

The most important positivists of the Age of Enlightenment include Zouche, Bynkershoek, Moser and Martens.

Drawing on the works of Gentili, Richard Zouche (1590-1660) went on to deny the existence of natural law altogether (*see* Shen, p. 310). To better reflect the positivist nature of the law developed among nations, Zouche discarded the term *jus gentium*, and preferred to use *jus inter gentes* instead (*id.*). For Zouche, international law was "a law 'which has been accepted [through] custom … among most nations or which has been agreed upon by single nations,' to be observed in time of peace and war" (*id.*), a "law which is recognized in the community of different princes who hold sovereign power" (Lachs, p. 55). His approach to international law is said to indicate a beginning of "the era of positivism in international law" (*id.*, at 56).

Cornelius van Bynkershoek (1673-1743), with the duel status of a jurist and a practitioner, examined international law by looking at existing and historical facts, *i.e.*, by looking at practice of States. He neither adopted theologians' approach, nor indulged in the discussion of natural law, nor cared about talking about the notion of just war (Wang, p. 325). He even played down the role of doctrines by attaching "great importance to custom and treaties as safeguards of the

international order" (Lachs, p. 58). For example, when he examined the law of the sea, he illustrated "how … necessity or interest had prompted particular States … to make certain demands and to support them with legal doctrines"; and "he found favour in free navigation, thus agreed with Grotius, relying on practice rather than doctrine" (*id*.). Bynkershoek is particularly known for his emphasis of the principle of *bona fides* or good faith as the theoretical foundation of all agreements between States (*id*.; Shen, p. 310). "All such agreements he envisaged as the product of the sovereign will, and he saw that they must be worthless if that will is vitiated by bad faith" (Lachs, p. 58, Shen, p. 311).

Johan Jacob Moser (1701-1785) was once noted as "the real father of modern international law", and is surely regarded to have "had a noteworthy share in the evolution of the positivist school of international law" (Nussbaum, p. 179), although he did not abandon the law of nature altogether. His positivist approach to international law was apparent in that he recognized the existence of a *law of nations* consisting of "treaties and custom" as the sources from which only the "science of the law of nations [could] be demonstrated" (*id*., p. 177), and that his treatment of the "European law of nations" was only concerned "with the ways in which European rulers and states customarily 'behave' in their negotiations" (*id*., p. 176). He regarded natural law to be "unavailing" because it was too "controversial," could be "twisted too easily", and was too "silent with regard to many special situations" (*id*.). In particular, he denied the value of natural law in its application to Europe for being "too uncertain [as] a guide", whereas with regard to Asia and Africa, however, he considered the law of nature as a "necessary principle" in order to limit the external behaviors of European powers (Lachs, p. 61). "Thus his positivism stopped short at Europe's shores; in relation to other continents, he pleaded for application of a universal law which, he felt, protected their inhabitants." (*id*.).

Georg Friedrich von Martens (1756-1821) was a prolific writer on international law. The most important of his works was his *Precis du droit des gens moderne de l'Europe fondé sur les traites et l'usages* (1789). Before the publication of this work, he published an influential essay in his native language: "*Versuch über die Existenz eines positiven europäischen Völkerrechts und den Nutzen dieser Wissenschaft.*" (Essay on the Existence of a Positive European Law of Nations and on the Advantage of This Science) (1787). The very titles of these works suggest his positivist approach. He did not object to the expression of "the law of nature," but he minimalized the use of natural law by "considering it to belong rather to the domain of morality." (Lachs, p. 61). He distinguished between *necessary law* (being the dictates of reason and usefulness) and *voluntary law* (being the rules of law expressly or tacitly consented to by States). By relying on history and practice, he proved the existence of what he called a general positive European law of nations which could be extended to North America but not to Turkey and other parts of the world. For him, it would be impossible for there to emerge a *universal* positive international law – "only a natural law would be universal" (Nussbaum, p. 182), but again that would not have characteristics of law but only those of morality.

IV. The Relative Golden Age of Modern International Law

In relation to earlier stages in the development of international law, the 19th century and its surrounding years may be regarded as a period of greater achievements. A great number of rules and institutions became established and crystallized. Resort to and application of international law became more a matter of routines than ever before. A far greater number of writers and scholars emerged from more diversified backgrounds and national origins. The law of nations was no longer exclusive to the Europeans. International law was introduced into, and more or less accepted by, nations of other continents. The dissemination and development of international law reached a historical peak in the 19th century and around the turn of the 20th century.

I am not comparing this period with the contemporary time, nor with the 20th century, but rather with the eras preceding the Congress

of Vienna. Keeping such relativity and historical perspectives in mind, I find it not misleading to regard the 19th-cuntury-or-so period as the *golden age of international law*. The fact that writers of this period are not better known today than their counterparts in the classical and enlightenment eras does not discredit the contributions of the former. The more publicists we have, the less likely they are all to be remembered. The scarcity of references in contemporary literature to works of publicists of the golden age may exactly indicate the booming of international law and the science of international law in the 19th century.

A. State Practice

The proliferation of State practice and activities in the creation of positive law in the 19th century or so was inseparable from the growth of economy and the advancement of technology. It is no wonder why this golden age is also regarded as "the age of imperial expansion," in speaking of which, Lachs writes (Lachs, p. 68):

> … [The age of imperial expansion] begins in the aftermath of the French Revolution and was an era of congresses which shaped a new order for Europe and relations between the powers controlling it: it is an era of important international instruments determining in legal terms the destiny not only of the nations of Europe but also of other continents [referring to the Congresses of Vienna (1815), Paris (1856) and Berlin (1885)]. At the same time treaty law developed with enormous speed and covered ever-new areas: written law reached a hitherto unknown peak. It was also the dramatic age of nationalism in Europe and great economic development; outside, that of the expansion of European power over other parts of the world brought closer by growing and faster fleets, and some by the construction of great waterways, multiplying international intercourse. The way led to the great economic technological upsurge of those days: "The iron pouring in millions of tons over the world, snaking in ribbons of railways across continents, the submarine cables crossing the Atlantic, the construction of the Suez Canal, the great cities like Chicago stamped out of the virgin soil of the American Midwest, the high streams of migrants."…

1. Achievements of the Congress of Vienna

While the Congress of Vienna (September 1814-June 1815) was convened mainly to dispose of the territories conquered by Napoleon I and to create a new balance of power after Napoleon's downfall, the resulting Peace Treaty of Vienna (1815) nevertheless developed some important principles and institutions in international law. These include (1) the ranking system of diplomatic envoys, (2) the denunciation of slave trade, and (3) the institution of free navigation of international rivers (*i.e.*, the Rhine); (4) the international guarantee of the permanent neutrality of Switzerland; and (5) institutionalized cooperation between States through the European Concert (Nussbaum, pp. 186-188). Events after Vienna further necessitated the development of international through the making of treaties.

The call of the Final Act of the Congress of Vienna for the suppression of international slave trade on religious and humanitarian grounds was historically significant. Such initial efforts against slave trade eventually led to the conclusion of the 1841 Treaty of the Suppression of Slavery and ultimately culminated in the adoption of the comprehensive law-making General Act of the Brussels Anti-Slavery Conference of 1890 (Wang, p. 279).

The increasing commercial communications between European nations gave rise to the practical need for internationalizing certain rivers separating or traversing two or more States. Thus, such rivers became recognized as "international rivers" subject to certain regime and international regulation. The principle of free navigation for all states was introduced in 1815. This principle was crystallized into an effective institution when the 1831 Rhine Navigation Act under the Convention of Maine (and later under the revised Convention of Mannheim of 1868). The 1931 Convention provided for freedom of navigation on the Rhine

only for the riparian States and their nationals; the 1868 revision extended such freedom to non-riparian States as well (*see* Wang, pp. 279-280; Nussbaum, p. 186). The institution of international navigation was later created for the Schgeldt under the 1839 Treaty of London, the Danube under the 1856 Treaty of Paris and the 1865 Act for the Navigation of the Danube, and for international rivers in Africa and elsewhere (Wang, p. 280).

The most fruitful of the Vienna Congress was perhaps its codification and development of international law in the area of diplomatic relations. An Appendix to the Final Act dealt with the rank of diplomatic agents by dividing them into three categories: (1) ambassadors (including papal nuncios), (2) envoys (including papal legates), and (3) *chargés d'affaires*, with the 1st category representing the sovereign or head of State, the 2nd being dispatched to the sovereign of the receiving State, and the 3rd being dispatched to the head of the foreign office of the receiving State. The 1818 Protocol of Aachen added the class of "resident minister" between the 2nd and 3rd categories (Wang, p. 280). Such ranking system virtually remains in effect and constitutes a basis for the 1961 Vienna Convention on Diplomatic Relations.

Collective recognition and guarantee of Switzerland's neutrality, which had frequently been violated during the French Revolution and the Napoleonic Wars, were provided for in a signed declaration of the great powers at the Vienna Congress, and was acceded to by Switzerland itself. Such was confirmed by Article 84 of the Final Act of the Congress and subsequently by the Act of Paris of November 20, 1815. This process matured the institution of permanent neutralized States, which institution has been "one of the stabilizing factors of international law" ever since (Wang, p. 281). Belgium became neutralized in 1830, and its neutrality was confirmed by the 1831 Protocol of London. Luxembourg similarly attained the status of a neutralized State under a treaty concluded in London on May 11, 1867 (*id*.). Permanent neutralization became an established institution of international law during this era.

2. Expansion of the Sphere of International Law

The golden age of international law was an era in which the sphere of application of international law was expanded to cover regions and areas outside of Europe. In Latin America, the Napoleonic Wars and other causes sparked revolutionary movements working towards decololization. The early part of the 19th century alone witnessed the independence of Colombia (1800), Paraguay (1811), Venezuela (1811), Argentina (1816), Chili (1818), Mexico (1821), Peru (1821), Brazil (1822) and Uruguay (1825). The emergence of these new States in Latin America "brought about … another historically important event" (Nussbaum, p. 188). In the Middle and Near East, Turkey was accepted into the Public Law and Concert of Europe (*du droit public et du concert européen*) under the Treaty of Paris of 1856 following the Crimean War (*id*., p. 192). In Africa and Asia, many States and communities became colonies or protected States as victims of European colonialist and imperialist expansions and aggressions. In the Far East, Western Powers opened the doors of China, Japan, Thailand and others with force or threat of force, and compelled these countries (particularly China) to accept a series of unequal treaties. While international law throughout this period remained Euro-centered, it was apparent that its scope became much more broadened (Wang, p. 282).

3. Developments with regard to Non-intervention and Recognition

Associated with the independence movements of Latin America was the issue of intervention and/or non-intervention. Intervention became a tool for the powers of the Holy Alliance to deter revolutions and maintain the *status quo* and the so-called legitimacy. Such powers conspired to intervene in former Spanish colonies in order to restore the Spanish power and rule in Latin America. It was against this background that President Monroe in 1823 announced his *Monroe Doctrine* against European interventions in his backyard. Although the Monroe Doctrine was advanced for the self-interest of the United States, it in fact

contributed to the firm establishment of non-intervention as a fundamental principle of international law.

The issue of recognition also gained its momentum in the post-Vienna era, largely due to frequent revolutions and the emergence of new independent States. State practice and accompanying doctrines became greatly enriched. Insofar as the object of recognition is concerned, there were recognition of insurgencies and belligerencies, recognition of governments and recognition of States. Recognition of international organizations also became a practical issue in the latter part of the 19th century. As to the nature of recognition, state practice included both *de facto* recognition and *de jure* recognition. In Latin America where revolutions and the emergence of new independent States were the most frequent, a new mode of recognition was developed, *i.e.*, the Tobar Doctrine, which attempted to put democracy into the institution of recognition. In sum, the 19th century is well known for its richness in State practice concerning recognition and its legal effect (Wang, pp. 281-282).

4. Developments in the Law of the Sea

The law of the sea underwent significant development through State practice, domestic legislation, bilateral treaties and multilateral conventions. The 1841 Straits Convention neutralized the Dardanelles and the Bosporus, forbidding any military vessel to enter. The Treaty of Paris of 1856 similarly declared the neutralization of the Black Sea, opening it to all merchant ships except men-of-war of any sort. Russia revoked these restrictions in 1870 during the Franco-Prussia War, but she was soon to be pressured into accepting the 1871 multilateral Treaty of London which reiterated the opening of the Black Sea to all merchantmen and the closure of the Straits to men-of-war (Wang, p. 283). Such freedom of navigation was subsequently extended to man-made canals connecting two parts of the ocean. The Suez Canal, opened in 1869, was so regulated under the Convention of Constantinople (1888), and the Panama Canal, opened in 1914, under the Hay-Pauncefote Treaty (1901) (*id*.).

The most significant event concerning the law of the sea in the era was the Paris Declaration of Maritime Law (1856). The Declaration, touching upon the most controversial yet most important concerns of the time, first of all abolished privateering by prohibiting issuing letter of *marque* or otherwise furnishing private vessels with governmental authority to carry on hostilities. Second, it laid down rules relating to the prohibition of capturing (1) enemy goods on neutral ships except for contraband, and (2) neutral goods on enemy ships except for contraband. Third, the Declaration also provided for visitation, stoppage and search of vessels and the cargo on board. Fourth, it set forth rules on blockade by requiring that blockade, in order to be binding, must be effective (and enforceable) (*id*.). The Declaration, joined by most maritime States of the time, "has rightly been considered as representing general international law" (Nussbaum, p. 192) despite the decline of its importance due to State practice in the World Wars.

5. The Golden Age of the Law of Treaties

The law of treaties was greatly developed in the golden age. State practice and techniques concerning the conclusion of bilateral and multilateral treaties became simplified, customary and standardized. It has been observed (Nussbaum, 197):

> Invocation of the Divinity gradually disappeared even from peace treaties. The circumstantial recitals … of the titles and possessions of the rulers and of the manifold distinctions and decorations of the plenipotentiaries fell into disuse. Under … the doctrine of the equality of states the alphabetical order of the signatures according to the states represented became customary in multipartite treaties. Bipartite treaties were generally drawn in two copies, each signed by one of the parties and allowing the other to take precedence in the textual sequence of the parties…. While French generally remained the diplomatic language, a strong countercurrent toward the vernacular … became definitely

> marked. Bipartite treaties came to be drawn customarily in the language of either country, one of the languages often being made conclusive under the agreement.

The importance of good faith performance of treaty obligations was also emphasized. In 1871, *e.g.*, after Russia had breached the 1856 Treaty of Paris, the great powers emphasized the "essential principle of the law of nations" that a State could not abolish her treaty obligations without the consent of the other co-contracting parties (Nussbaum, p. 191).

6. The Proliferation of Treaties

The number of treaties in the golden age immensely multiplied. It has been estimated that "about sixteen thousand treaties were concluded between [1815] and 1924" (Nussbaum, pp. 196-197). Unlike the earlier periods of time in which treaties of political alliance led the way, the fast-growing treaties of the 19th century were mostly non-political ones dealing with matters ranging from inter-State commerce to sanitary issues.

More significantly, the proliferation of *multilateral* treaties was unparalleled in history. In contrast to earlier periods in which multilateral treaties were few and in which many treaties had dealt with the distribution of territories, delimitation of boundaries, and the regulation of other relations between the parties, "the multipartite conventions of the nineteenth century exhibited an increasing tendency to lay down general rules for the conduct of states" which can be properly labeled *law-making* treaties. Such *law-making* treaties, permitting accession by States not original signatories, "assumed the further characteristic of being 'open' treaties" (*id.*, pp. 197-198). The 19th century also witnessed the dramatic increase of multilateral treaties establishing various international organizations. In addition, there were numerous technical and utility-oriented multilateral treaties, which were neither for the purpose of creating international institutions, nor for the purpose of necessarily law-making. These treaties not only regulated particular matters or solved particular issues, but also greatly enriched the practice and custom of States in multilateral treaty making.

7. Developments with Regard to International Conferences and Institutions

In the area of international conferences and institutions, the 19th century was also a golden age. While the Congresses of Westphalia, Vienna and Paris were useful for solving political issues facing the attending sovereigns, a new type of international conferences, such as the postal conference of 1863 and the Geneva Red Cross Conference (also 1863), were devoted to nonpolitical matters. The delegates to such latter type of conferences were typically technicians, and the proceedings were less formal yet more efficiently managed. "All this had a salutary repercussion upon political meetings…; they, too, adopted progressive forms of organization and procedure, abandoning the former emphasis on ceremonials." (Nussbaum, p. 200).

Meanwhile, under many multilateral treaties were established formal and informal international institutions and agencies that "were designed to transform the treaty partners into a working community." (Nussbaum, p. 198). Examples of such international administrative unions include the Geodetic Union and its administrative agency (1864), Universal Telegraph Union (Paris, 1865) and the International Bureau of Telegraphic Administration (Berne, 1875) as its central organ, the General Postal Union (Berne, 1874, renamed the Universal Postal Union 1878) and its standing Bureau, the International Meteorological Organization (1878), the Central Office of International Transports established under the International Convention on Railway Freight Traffic (Berne, 1890), the Bureau of Radio Telegraphic Administration under the International Radio Telegraphic Convention (1906), as well as organs or agencies established under the Paris Convention for the Protection of Industrial Property (1883), the Berne Convention for the Protection of Literary and Artistic Works (1886), the General Act of the Antislavery Conference (Brussels, 1890), the Convention on the International Circulation of Motor Vehicles (1909), the Sanitary Convention

(1903), the Convention on the Creation of an International Office of Public Health (Paris, 1907), and two conventions on the suppression of traffic in women and children (1902 and 1910). Although these institutions and agencies did not have legislative authority, they were able to solve legal matters as well as exercise their international administrative functions. Most of them had (and still have) independent legal status under international law. These developments undoubtedly had significant impact upon later laws and practice of international organizations.

8. The Golden Age of Many Other Areas of International Law

Many more areas of international law underwent significant development in the Golden Age besides those mentioned above. One of such areas is the system of *asylum* and *extradition*. In addition to domestic legislation (such as the 1833 Extradition Act of Belgium), numerous treaties (such as the 1833 Extradition Treaty between Switzerland and France) contained detailed provisions for the right of asylum and conditions for extradition. New rules and principles emerged concerning the non-extraditability of political crimes and the right to grant asylum to those subject to political prosecution in their home country. The practice of Latin American countries in this area was particularly remarkable (Wang, p. 282). In the area of *diplomatic law*, the customary rules with regard to the privileges and immunities of diplomatic agents became more fully established, as with the customary rules concerning the interdiction of *piracy* (Nussbaum, pp. 201-202). More conventional rules and practices were formulated in the areas of *dispute resolution*, *commerce*, *consular privileges and immunities*, *monetary matters*, *postal, telegraphic and railway communications*, *fishing*, *maritime matters*, *intellectual properties* and *humanitarian matters* (*id*., pp. 196, 198-199 & 203-231). Of particular importance were the increasing resort to pacific settlement of international disputes through arbitration and other mechanisms (*id*., pp. 215-224) and the efforts of the Red Cross and the rest of the international community at codifying and developing detailed rules and conventions regulating and limiting the conduct of warfare (*id.*, pp. 224-230).

The peak of positive law development in the golden age was the Hague Peace Conferences of 1899 and 1907, which were not designed as conventional post-war settlement conferences, but rather as conferences for the making and maintenance of peace through codifying certain important areas of international law (such as the law of warfare) and promoting international arbitration. The 1899 Conference (1) established the Permanent Court of Arbitration, adopted the conventions (2) on the Law and Customs of War on land, and (3) on the Adaptation of the Principles of the Geneva Convention to Maritime Warfare. (Wang, p. 287). The 1907 Hague Conference adopted thirteen conventions, three of which amended the conventions of the 1899 Conference. Two other conventions codified rules relating to the rights and duties of neutrals in war on land and at sea. One convention attempted revival of the requirement for declaration of war as a prerequisite to armed conflicts. Another convention proposed the establishment of an International Prize Court but was never ratified. Still another convention, the so-called Porter Convention, dealt with the Limitation of the Employment of Force for the Recovery of Contract Debts. The remaining conventions regulated various aspects of maritime warfare (Nussbaum, pp. 217 & 229). Although these two conferences, and the subsequent Naval Conference (London, 1908-1909), failed to contribute to the peace of Europe, they nevertheless attained important legal significance and marked a memorable milestone in the history of international law.

A. Doctrine

The 19th century was a golden age not only for the development of positive international law, but also for the science of international law. Lachs regards this period "a time of prolific writings: the gallery becomes more crowded: the number of teachers who record their thoughts is growing: a variety of ideas flourished, and most arrived at similar conclusions", which by no means indicates that "new basic theory was lacking" (Lachs, p.

68). As Nussbaum observes, the 19th century "was the great era of positivism". In this era, "[t]he science of international law was now definitely conceived of as legal or juridical; it was severed from philosophy, theology, and considerations of policy, all of which had been ingredients of the law of nature". Publicists were able to draw a clear line "between the actual law of nations and the law of nations as it ought to be."

International law was distinguished from the art of diplomacy. A distinction was also made between private international law and public international law, with the latter truly referring to the law of nations. And so forth. Such "purification of doctrine reflected the demands of state practice. The rapidly growing role of international law in diplomatic transactions rendered the modernization of outdated doctrine and methods of presentation an urgent matter." (Nussbaum, pp. 232-233). Despite the general prevalence of positivism at the time, there remained believers in naturalism and eclecticism. There were also extremist positivist jurists who denied international law the character of *law* at all. Nevertheless, unlike writers of earlier periods of time whom we can almost instantly identify as belonging to a particular school of thought, 19th century writers are often difficult to classify. The following categories are therefore by no means accurate.

1. Deniers/Doubters of International Law

The 19th century continued to provide a market for deniers of international law who, unlike the deniers of earlier ages who were mainly naturalists, were often extreme positivist legal scholars. John Austin (1790-1859), an English jurist and the founder of the Austinian School, was the most representative one. He distinguished between "laws proper" (*i.e.*, laws which had a definite origin and a definite obligation attached to them) and "laws improper" (*i.e.*, laws which are indefinite in origin and obligation). He regarded international law not as true form of law but as a code of morality. According to him, "law" originates from decrees or orders of sovereign authority aided with sanctions. Since international law does not emanate from a sovereign, it is accordingly not decrees or orders with legal effect but code of conduct of merely moral force. He maintained that international law was a law set or imposed by general opinion and was improperly called as such; it was no more than "positive international morality" having its sanction in public opinion and sentiments (*see* Lachs, pp. 15 & 68; Wang, p. 331; Nussbaum, pp. 233-234).

Georg Wilhelm Friedrich Hegel (1770-1831), the great German philosopher, held that law was fully subordinated to the abstract notion of the State, and there was no room for any legal authority to bind the State being the supreme creation. According to Hegel, international law was nothing but "external public law (or external State law)" (*äusseres Staatsrecht*). While recognizing the principle that *pacta sunt servanda*, Hegel maintained that the existence of treaties depended on the will of States, and this sovereign will determined the contents of treaties. Similarly, he believed that States could wage wars in their own interest: "for their maintenance and aggrandizement … as manifestations of State sovereignty or what he labeled as 'Staatsfrommigkeit'. There was thus little room for general international law" (*see* Lachs, pp. 15-16).

Adolf Lasson (1832-1917) was one of the followers of Hegel's in this regard. In his *Prinzip und Zukunft des Völkerrechts* (Berlin, 1871), Lasson declared that no legal or moral alliance between States was possible (*zwischen den Staaten jede rechtliche und sittliche Verbindung unmöglich ist*); "thus, a State, in general without its will, can at no time be itself subject to a legal order" (*Der Staat kann sich also niemals einer Rechtsordnung vie überhaupt keinem Willen ausser ihm unterwerfen*). In his view, conflicts and rivalry between States were the rule, while temporary friendly contact was merely an exception, for the State as a leviathan was "ever hungry and never satisfied." For him, international law relied upon "continuity of interests but not as 'law.'" (*id.*, p. 16).

Georg Jellinek (1851-1911) subscribed to the same idea as Hegel had, holding that the international system, and its imperfection and *lacunae*, stemmed from the rights and wills of individual States, and that international law was

contingent upon the self-limitation of States and should therefore yield to the sovereignty of a State in case of conflict. (*id.*, p. 83). He was somewhere between the deniers of international law and another form of extreme positivism – voluntarism. For him, the State could disengage itself from the voluntary limitation upon its behavior "at any time without violating that law," *i.e.*, such self-limitation would be "freely revocable." (Nussbaum, pp. 234-235).

Sir Thomas Erskine Holland (1835-1926) may also be said to have somewhat subscribed to the Austinian School although he did not question the existence of international law itself. He considered international law as "law by courtesy." In his opinion, law without an arbiter is contradiction in terms. To Holland, it is impossible to regard the rules of the so-called international law as being, in reality, anything more than the moral code of Nations – in other words, the so-called international law is law merely by analogy. (Holland, p. 6).

Lord Bishop Salisbury (1808-1869), when speaking to a motion on behalf of an extended international arbitration in the House of Lords, also argued that since international law cannot be enforced by a tribunal, it is to some extent misleading to apply to it the word "law" (*see* Gould, p. 134). John duke Lord Coleridge (1846-1920), in an early English case, similarly supported the Austinian view (*Regina v. Keyn*, [1876] 2 Ex. D. 63, at 153).

The German scholar, Phillip Karl Ludwig Zorn (1850-1928), whose role at the 1899 and 1907 Hague Conferences subjected his country's delegation's position to severe criticism, was "almost a denier of international law" who, like Hebel, took international law as "external public law" (*äusseres Staatsrecht*). A prolific professor (with his main works including *Die völkerrechtlichen ergebniss der Haager conferenz* (1900) and *Die internationale Schiedsgerichtsbarkeit* (1917)), he denied the legal character of treaties until their incorporation into domestic law (Lachs, pp. 73-74). Also belonging to the category of deniers or quasi-deniers was Alexandre Mérignhac (1857-1927) who, in his *Traité de Droit public international* (1905-1912), asserted that international law was merely a "moral relationship between States, one which relied on 'la conscience humaine'" (Lachs, p. 17).

2. Naturalists/Grotians

With the 19th century or so being the golden age of positive international law, it is rather difficult to find and identify the *typical* naturalists or eclecticists of that age. What follows is merely a rough account of scholars of the time who, because of their preference for or inclination to naturalism or eclecticism, can hardly be identified with the more typical positivists.

Andres Bello (1781-1865), a Chilean publicist, was a founder and pioneer of the Latin American science of international law. He was an activist in the movement for his country's independence. He first served on a diplomatic mission in Europe, and later taught international law at the University of Santiago. His main work was *Prinapios de derecho de gentes* (1832). He was among the minorities of the 19th century writers who exhibited overwhelming or even exclusive belief in naturalism. His philosophy obviously contained religious and naturalist colors in that he founded the basis of his studies of international law upon "rational natural law," and that he "relied on … Suàrez, in whom … he saw the father of international law." (Lachs, p. 85). He nevertheless recognized to some extent the existence of positive law by holding that international law was the body of "laws and rules of conduct States have to observe in the interest of their security and their common well-being." (*id*.). His treatment of the issues of State recognition, state of war and intervention was particularly useful. Being against intervention as he was, he "emphasized the protection that international law should afford the new-born States." (*id*.).

E.W. Hall (1835-1894) was a prominent English publicist whose fame is simultaneous with his artistically styled *Treatise on International Law* (1880) that went through eight editions, four of which posthumous. His approach was pragmatic, and his argument

rational (Nussbaum, p. 247). A very selective writer, he showed little interest in international adjudication and arbitration, calling such area "the rough jurisprudence of nations." He was pro-positivist by recognizing custom and treaties as the sources of international law. At the same time, he was also somewhat naturalist or Grotian by holding that "the ultimate foundation of international law is an assumption that States possess rights and are subject to duties corresponding to the facts of their postulated nature" (*see* Lachs, p. 75).

Gustave Rolin-Jaquemyns (1835-1902) was a Belgian scholar and statesman. A strong defender of international law, Rolin-Jaquemyns particularly showed and called for respects to the rights of small States. It was largely his initiative that led to the creation of the *Institut de Droit International* (Lachs, pp. 79-80). His studies contained elements of both positivism and naturalism. Speaking of his philosophy and approach, Lachs writes (Lachs, p. 80):

> While shying away from utopia and trying to remain close to reality, he believed that "l'humanité, comme tout l'univers crée, obéit dans son développement à certaine lois générales et providentielles"…

In the category of naturalists I certainly cannot omit James Lorimer (1818-1890), a Professor and Chair of the Law of Nature and the Law of Nations at the University of Edinburgh, whose teaching was deeply influenced by theology and divine law. In his main work *Institutes of International Law* (1872) and elsewhere, he claimed that the divine order of nature was the source of all laws, including international law (Lachs, p. 76). For him, human laws were merely *declaratory* of the law of nature, so was international law which was "little more than the law of nature as each nation chooses to interpret it." Similarly, jurisprudence was but "a branch of the science of nature." He asserted that natural law rules were inferred from the facts of nature, *i.e.*, power relations. Such power relations, he claimed, formed the "dominant element of the law of nations." Under this so-called *de facto* principle, there could be no equality between States because they were unequal as a matter of natural fact. Thus, the rights of States would have to be measured by their size and power, including their "moral and intellectual quality." Accordingly, an *inferior* State was only entitled to "partial recognition" (Nussbaum, p. 238).

Finally, I wish to refer to the French scholar, Paul Auguste Josephe Fauchille (1858-1916), as an eclecticist. His early writings made contributions to the areas of legal and diplomatic history, the law of the airspace and the law of war on the sea. Particularly, his work on a proposed law of the air is said to have "made history." Fauchille, of course, is better known for his *Traité de Droit international* (1897-) whose value resides in "the encyclopedic knowledge it reflects." Speaking of this work, Lachs writes: "It is eclectic, for in the circumstances it could not be otherwise, but therein lies its richness and its enduring contribution to the science of international law" (Lachs, p. 77; also Wang, p. 335).

3. Positivists

Positivism was undoubtedly the mainstream of the 19th century in that most international legal scholars noted here adopted a positive law approach, though there was no lack of them who, to different degrees, also recognized a room for the law of nature.

Jean-Louis Klüber (1762-1836) was well known for his *Droit des gens de l'Europe* (1819). His overall positivist orientation is reflected in his historical approach to the development of international law. For him, the main body of international law was positive law as contained in custom and treaties; he nevertheless was receptive to natural law, which he thought would be useful to fill the gaps in positive international law. "Consequently he sees natural law as a subsidiary source of law to be resorted to if treaties and custom… fail." He emphasized the role of international law in relation to international politics and regarded international law as a part of diplomacy (Lachs, p. 69; Nussbaum, p. 243).

Mention may be made here of the works of

James Kent (1763-1847) who first served as the Chancellor of New York State and later as a law professor at Columbia. His *Commentaries on American Law* (1826-) contained "about two hundred pages [of] an admirably systematic survey of the law of nations, based primarily on English and American material. His discussion o neutral commerce in war proved to be particularly valuable" (Nussbaum, pp. 245-246). The value of his survey is similarly recognized by Lachs for being "a systematic study based almost entirely on practice""(Lachs, p. 70).

I now turn to Henry Wheaton (1785-1848), to whom Onuf's lead article is mainly devoted. This great American diplomat and jurist spent most of his life doing practical work, first as a Justice of the Maritime Court in New York, then as a Reporter of the US Supreme Court, and later as a career diplomat. He was about to teach international law and civil law at Harvard upon his retirement from foreign services when his ailing health untimely took his life. His *Elements of International Law* (1836) was "written in excellent style and relying on a very rich practice" and "soon became popular" (Lachs, p. 69). It went through no fewer than twelve editions in English, and was translated into French, Spanish, Italian, Chinese and (from Chinese into) Japanese. Indeed, the Chinese translation of Wheaton's *Elements*, under the support of the Qing Government, and titled *Wanguo Gong Fa* (*The Public Law of Nations*), was the first known published Chinese translation of Western works on international law. Although attempts were said to have been made at translating the works of Suàrez and Vattel (Wang, pp. 374-377), it was likely that such earlier translations were either never finished, or never put to print. In 1864, the Chinese Government for the first time relied on a stated principle of international law contained in the Chinese translation of Wheaton's *Elements* in solving a diplomatic dispute involving Prussia, Denmark and China (Wang, pp. 379-380). This suffices to show the influence of Wheaton and his works. His approach was substantially positivist, owing partly to his legal education in Europe (particularly due to the influence of German legal scientists such as von Martens and Klüber), and partly to his personal experience and diplomatic practice. "Emphasis on diplomatic actions and on cases is pronounced in his study, whose virtues were great enough to give it a considerable and long-lasting influence." (Nussbaum, p. 246). Similar to von Martens, Wheaton believed that the law of nations was "only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations," making it possible for there to exist a different law of nations for the Muslim world (Lachs, p. 70). While Wheaton was profoundly a positivist, he, as Onuf observes, showed considerable respect for the law of nature (Onuf, "Henry Wheaton," para. 12). He seemed to have retained the law of nature "as a basis, 'with such definitions and modifications as may be established by general consent'" (Lachs, p. 70).

The German Professor A.W. Heffter (1796-1880) inherited from Klüber a pro-positivist yet somewhat eclecticist approach. A man of "encyclopedic legal knowledge," he was best known for his *Das Europäische Völkerrecht der Gegenwart* (*The European Law of Nations of the Present*) (1844), which went through eight editions and was translated into six other languages. (Lachs, p. 69). "Dismissing the law of nature without much ado, the book exemplifies the later form of positivism." (Nussbaum, p. 243). Nevertheless, his "forthright positivist" approach did not prevent him from recognizing some "principles which are necessary for the mutual relations between States and which are independent of the sources of positive law" (Lachs, p. 69).

Jean Gaspard Bluntschli (1808-1881), the Swiss jurist, was a professor of civil law at the Universities of Zürich and München, and later a professor of international law at the University of Heidelberg. His main work was *Das moderne Völkerrecht as Rechtsbuch dargestellt* (*Modern Law of Nations Presented as a Lawbook*) (1868). This was the first attempt of *private* codification of international law. Since international law was not complete (as it has never been), he purposefully incorporated into the Lawbook "what he considered to be

commendable view", but he failed to identify which was *lex lata* and which *lex ferenda*. The Lawbook, in addition to its three German and four French editions, has been translated into Spanish, Hungarian, Russian and Chinese. (Lachs, p. 79; Nussbaum, p. 236). The Chinese edition was published in 1879 under the title *Gongfa Qian Zhang* (literally [Thousand] Articles of Public International Law) (Wang, p. 336). It has been commented that the Lawbook "is almost the only one, which is today consulted by the diplomats and by all those obligated by their profession to possess some notion of international law."(Nussbaum, p. 236).

Sir Robert Phillimore (1810-1885) was one of the outstanding British jurists of the golden age. He himself an Admiralty Judge, his major work, the four-volume *Commentaries on International Law* (1854-1861, three editions), was in heavy reliance upon practice. While he recognized the "'rich treasury of the principles of universal jurisprudence' … he [stood] firmly on positivist positions." (Lachs, p. 71). His *Commentaries* were "written in the typical common-law fashion" in which he made his presentations based on "careful and well documented" arguments. (Nussbaum, p. 246). He did show his respect for natural law in an introduction to his volumes, and even acknowledged the divine character of the law of nature, but he made "no use of it. In fact, he [was] a typical positivist whose real concern [was] confined to the actual controversies laid before statesmen, diplomats, and international jurists" (*id*.).

Contemporary with Heffter was Franz von Holtzendorff (1829-1889). A criminal law professor-turned international law professor, he was famous for organizing collective works. One of his collective handbooks, *Handbuch des Völkerrechts auf Grundlage Europäischer Staatspraxis* (1885, 1887, 1889), was mainly based on European State practice, which clearly indicated his positivist approach. At the same time, he "found no conflict between positive and natural law, as he viewed the former as the historical and critical development of the latter." (Lachs, p. 70).

Another contemporary of Heffter's was the Austrian-born German jurist, Franz von Liszt (1851-1919), whose name immediately reminds us of the great Hungarian composer, but who, like Heffter, was a law professor at the University of Berlin. Liszt's *Das Völkerrechts Systematisch Dargestellt* had twelve editions in German and several in French, Spanish, Polish and Russian. (Nussbaum, pp. 243-244). Of Liszt writes Lachs: "A man of progressive views, he pleaded for international co-operation and the recognition of the basic rights of States: he was thus no narrow positivist."(Lachs, p. 71).

The most prominent Russian contribution to the science of international law was from Fedor Fedorovich (Frederic) de Martens (1845-1909), the son of Lutheran German-Baltic parents who was converted to orthodoxy, and a law professor at the University St. Petersburg. His main work, a two-volume *Contemporary International Law of Civilized Nations* (1882, in Russian), basically followed the civil law approach, although the "spirit" was different. The treatise had five editions and was published in eight other languages including German, French, Spanish, Serbian, Chinese and Japanese (Nussbaum, p. 248-249; Lachs, p. 81). One of the unique aspects of his treatise is that he treated most parts of the law of nations as *administrative* international law whose supreme principle was expediency (Nussbaum, p. 249). Also a legal advisor to the Russian Ministry of Foreign Affairs, Martens was an active role player at the Hague Conferences and in international arbitration. His positivist orientation was nearly extreme, as was reflected in his belief that international law was binding only upon "those peoples who recognize the basic principles of European culture" (Lachs, p. 81).

The contributions of contributions of two other Belgian jurists also deserve mentioning: Rivier and Nys. Alphonse Pierre Octave Rivier (1835-1898) was a Latin-Swiss jurist who first taught at the University of Berne and later became a professor at the University of Brussels. His works include *Note sur la littérature du droit des gens avant la publication du Jus Belli ac pacis de Grotius* (1883) and "*Literarhistorische Übersicht der Systeme und*

Theorien des Völkerrechts" (1888), which was incorporated in von Holtzendorff's *Handbuch des Völkerrechts*. His work provided "concise and abundant information on the writers and writings of international law," but he also frequently rendered his own opinion that was "to the point and judicious" (Nussbaum, p. 292). Lachs refers to his work as "a striking example of *factum ex quo jus oritur*" that presented "an interesting survey of the development of the law." (Lachs, p. 80).

Ernest Nys (1851-1920) was better known as an international legal historian (as is reflected in his *Les origines du droit international*, 1894), but his numerous works on international law *per se*, including *Etudes de droit international et droit politique* (1896) and *Le droit international, les principes, les theories, les faits* (1906), were equally impressive (Lachs, pp. 80-81). A liberal writer, Nys "professed to the great principles of the Revolution, but he was neither radical nor aggressive" (Nusbaum, p. 294).

Endless indeed appears to be the list, to which I may add at least the following: Jeremy Bentham (1748-1832), for his *An Introduction to the Principles of Morals and Legislation* (1789), and to whom we owe for the continuing use of the very term "international law" (Lachs, pp. 48, 60, 212); *F.C.* von Savigny (1779-1861), well-known for his *System des heutigen römischen Rechts* (1840-49), among others (Nussbaum, p. 242); Pasquale Stanislao Mancini (1817-1888), one of the first members of the *Institut*, for his Italian approach, his *Diritto internazionale* (1873) and his well-known lecture on "*Della nazionalità come fondamento del diritto dei genti*" ("Nationality as the Basis of the Law of Nations," 1853) (Nussbaum, pp. 240-241);.Carlos Calvo (1824-1906), the well-known Argentinean publicist, for his *El derecho international: teorico y practico de Europa y America* (1868), his emphasis on the Western Hemisphere, his stress on facts and on associating theory with practice, and his famous *Calvo Clause* in international contracts (as well as the resulting *Drago Doctrine* as a derivative) (Nussbaum, pp. 216-217, 245; Lachs pp. 86-87); Paul Louis Ernest Pradier-Fodéré (1827-1904), a French publicist, for his *Traité de droit international public europeen et americain* (1885) and his efforts at combining positive law and theories reflecting improvements on positive law (Wang, p. 335; Lachs, p. 77; Nussbaum, pp. 236 & 244); John Westlake (1828-1913), Chair of International Law at Whewell, Cambridge, for his *International Law* (1904-1907) and his support for the respect of national sovereignty and independence and other fundamental rights of States, codification of international law and adjudicative settlement of international disputes (Lachs, pp. 74-75, 80; Nussbaum, p. 247; Wang, pp. 333-334); Henri Bonfils (1835-1897), a French publicist, for his *Manuel de droit international public* (1898) in spite of his Euro-centric philosophy and his presumed impassable wide gap between the Western society and the rest of the world (mainly consisting of colonies, China and the Muslim societies) preventing the reach of international law to the latter (Wang, p. 335; Lachs, pp. 77-78), Louis Renault (1843-1918), a winner of the Nobel Prize, for his *Introduction a l'etude de droit international* (1879) and his combination of theory and practice (Lachs, pp. 73, 77, 107; Wang, p. 333); T.J. Lawrence (1849-1920), a typical American positivist, for his *The Principles of International Law* (1880), and for his exclusion of natural law from his studies (Lachs, p. 75; Wang, p. 334); Karl Magnuo Bergbolm (1849-1927), a German publicist, for his *Juris prudenz und Rechts philosophie* (1892), his positivist approach, his doubt about the existence of the law of nature, and his stress on treaties as a source of international law (Wang, pp. 335-336; Lachs, pp. 16, 18, 78, 91); Antoine Pillet (1857-1926), a French jurist, for his *Les lois actuelles de la guerre* (1898) (among others), his plea for the necessity of keeping war within the bounds of law, and his critical view on the two Hague Conferences (Lachs, pp. 72-73); and many more.

Even the earlier writings of some later publicists began to show their influence at the turn between the 19th and 20th centuries. These include François Descamps (1847-1933), a renowned Belgian jurist, for his *Le droit international nouveau*, his rational realism, his devotion to peaceful settlement of international disputes, his role in drafting the Statute of the PCIJ, and his vision of a "juristic society

without violence" through a treaty outlawing war (as Lachs notes, "he saw in the Briand-Kellogg Pact 'la consécraion d'une société juridique sans violence'", Lachs, p. 104); John Bassett Moore (1860-1947), for his *History and Digest of International Arbitration* (1898), his 8-volume *A Digest of International Law* (1906), his passion for peace and his strong opposition to power politics; James Brown Scott (1866-1943), for his *Cases on International Law* (1902), his editorship for the series of *Classics of International Law*, his first Editorship-in-Chief of the American Journal of International Law, and his other significant contributions to the dissemination and development of international law; Heinrich Triepel (1868-1946), for his *Völkerrecht und Landesrecht* (1899), his dualism and his emphasis on the common wills of States as the basis of international law; Alejandro Alvarez (1868-1964), a well-known Chilean publicist, for his *Le droit international americain* (1910) and his proposition for an "American International Law"; Dionisio Anzilotti (1869-1950), one of the most prominent Italian publicists in history, for his *Corso di deritto Internazionale* (1912), his dualist doctrine, and his contribution to the area of State responsibility (Wang, pp. 340-357; Lachs, pp. 90-151); Walter Schücking(1875-1935), for his *Das Künstenmeer im internationale Recht* (1897), *Die Organisation des Welt* (1908), his long time devotion to the cause of international law as a professor, an internationalist and a pacifist, and his belief in "new positive law based on universal institutions and capable of encapsulating principles of natural justice which he felt were emerging" (Lachs, p. 109); and, of course, F.L. Oppenheim (1858-1919), for his globally well-received treatise *International Law* (1905-1906) which, along with its 2nd-9th editions successfully revised and updated by himself and later by A.D. McNair, H. Lauterpacht, and R. Jennings and A. Watts, has been regarded and indeed frequently consulted as a classic in the literature of international law (Lachs, p. 75).

Conclusion

The 19th century witnessed the expansion of European colonialism and imperialism at the same time as an unprecedented development of positive international law and international jurisprudence. Relative to the classical seeding period of evolution and the modern period of enlightenment, international law undoubtedly reached a historical peak in the 19th century with respect to both practice and theory. Although remaining Eurocentric, and despite being often utilized by great powers as a convenient instrument for justifying their overseas expansions and exploitations, it is clear that 19th century international law became more and more general and universal, more and more systematic, more and more rational, more and more progressive, more and more visible and applicable, more and more crystallized, and more and more specialized, thanks to the efforts of old and new States, their statesmen, practitioners, and, very importantly, *legal scholars* of the period, whose doctrines and approaches became less and less philosophical, less and less theological, less and less empty-talky, less and less unascertainable, and, at the same time, more and more juridical, more and more positivist, more and more practical, and more and more perceptible.

It is true that we know of Grotius, Gentili, Pufendorf, Vattel, Wolff, Bynkershoek and the like better than most of the 19th century or so publicists whose contributions to the cause of international law are recognized above or elsewhere, but the practical value of the latter group as a collectivity far surpasses that of the combination of prior scholarship. Scarcity makes more visibility and esteem, but it does not in itself make abundance less valuable as a whole, not to mention the high quality of the works of many individual publicists of the 19th century and early 20th century. International law, of course, entered into a new stage of even greater unparalleled development (despite periodic fallbacks) following the two World Wars, particularly after World War II. On the other hand, we cannot sever the present time from history, nor can we sever the 19th century from earlier periods of time. Just as the splendor of the 19th century was built upon theoretical and practical foundations and improvements of the seeding and growing ages, so is today's grandeur upon achievements of the past,

particularly of its immediate past. With such a historical perspective and the relativity of comparison in mind, I do not hesitate to continue to regard the 19th century or so period as the *golden age of international law*.

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