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Lesaffer, R.C.H.

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Roman Law and the Early Historiography of International Law:

Ward, Wheaton, Hosack and Walker

Randall Lesaffer¹

(Tilburg University/Catholic University of Leuven)

Abstract

The significance of Roman law for the evolution of international law is an issue as complex as it is contentious. It has two main dimensions: the continuity between Roman ‘international law’ and that of later times and the impact of Roman private law on the further development of international law. As several legal historians and international lawyers of the 20th century – among whom Hersch Lauterpacht is foremost – have indicated, modern concerns about international law have often steered and overshadowed the historical debate.

In this article, the works of four Anglo-American historians of international law from the 19th century are analysed in relation to Roman law. These early historians of international law all viewed the question of the Roman contribution to modern international law in terms of their understanding of that law. As was the case during the 20th century, and as Lauterpacht had claimed, the discussion on Roman law reflected the great debate between positivists and naturalists. Of course, each waged the debate in the terms of his day and age. None of these authors reduced international law to the positive public international law of the 19th century, based upon the sovereign State. None of them was over-concerned with consensualism and

¹ I am indebted to the Board and Directors of the Lauterpacht Research Centre for International Law at the University of Cambridge. Their hospitality, once again, allowed me to write this paper in the best of surroundings. I thank James Crawford (Cambridge University) as well as Benjamin Straumann (New York University) for their comments.

voluntarism, at least not directly. The central issue was the other one Lauterpacht had forwarded: the question of the autonomy of international law.

1. *Introduction*²

In the historical debate on continuity and universality of international law, the question of the significance of Roman law for the formation of international law looms large. The topic is as complex as it is contentious.

A first issue of contention regards the historical continuity between the ‘international law’ of the Roman Era and that of medieval and modern Europe. Many modern historians of international law see but little impact of Roman ‘international law’ and underscore the fundamental differences between the Roman and the modern conceptions of international law and relations. Among them are Wilhelm Grewe, Arthur Nussbaum and Antonio Truyol y Serra, or, more recently, David Bederman.³ On the

² Throughout the article, I will regularly use the term ‘international law’ in an abstract way, referring to all bodies of law governing relations between independent bodies politic, regardless of the area or era in which they applied.

³ David Bederman, *International Law in Antiquity* (Cambridge 2001) 4-6; Wilhelm G. Grewe, *The Epochs of International Law* (Berlin/New York 2000) 9; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York 1947) 1-2; Antonio Truyol y Serra, *Histoire du droit international public* (Paris 1995) 11-18.

opposite side, are those focusing on elements of similarity and continuity, chiefly among them Wolfgang Preiser and his disciple Karl-Heinz Ziegler.⁴

The understanding of the continuity between Roman and modern international law is, to some extent, related to the understanding of international law itself. At one side of the spectrum stand the ‘minimalists’ – as Laurens Winkel recently coined them.⁵ These writers reduce the whole notion of international law – whatever its name – to the law governing relations between sovereign, territorial States. Consequentially, the historian of international law cannot reach beyond the earliest stage of the emergence of the sovereign State, which is now commonly set somewhere in the Late Middle Ages. Authors who hold this view tend to deny the very existence of anything resembling international law in Roman times. The argument runs that under the Roman ‘world empire,’ there were no independent bodies politic to sustain a system of international law. The ‘maximalists’ hold to a more relative view of international law. Over the 20th century, many international legal historians – foremost among them Paul Vinogradoff (1854-1925) –⁶ have forwarded the view that throughout history, in different times and

⁴ Wolfgang Preiser, *Die Völkerrechtsgeschichte, ihre Aufgaben und ihre Methode* (Frankfurt am Main 1963); Karl-Heinz Ziegler, ‘Die römischen Grundlagen des europäischen Völkerrechts’ (1972) 4 *Ius Commune* 1; idem, *Völkerrechtsgeschichte: Ein Studienbuch* (Munich 1994). See also recently, Dominique Gaurier, *Histoire du droit international. Auteurs, doctrines et développement de l’Antiquité à l’aube de la période contemporaine* (Rennes 2005) 51.

⁵ Laurens Winkel, ‘The Peace Treaties of Westphalia as an instance of the reception of Roman law’ in Randall Lesaffer (ed), *Peace Treaties and International Law in European History: From the late Middle Ages to World War One* (Cambridge 2004) 222.

⁶ Paul Vinogradoff, ‘Historical Types of International Law’ (1923) 1 *Bibliotheca Visseriana Dissertationum Ius Internationale Illustrantium* 1.

places, quite diverse systems, or ‘types’ of international law have existed. For these scholars, the recognition of a Roman international law comes easier, though this does not necessarily induce them to accept the argument of continuity.⁷

But there is a second, very different dimension to the debate on the role of Roman law in the formation of international law: that of the impact of Roman private law. At first sight, this aspect seems far less under dispute. Is it historically well established that the law of nations of the Late Middle Ages fell for a large part within the domain of the learned *jus commune*, that amalgam of Roman and canon law – and some feudal law – studied by the scholastic jurists of the age. Less generally recognised, but hard to deny, is that the earliest ‘fathers’ of modern international law who started the process of making the law of nations into an autonomous discipline – the lawyers and theologians of the 16th and early 17th centuries, including Hugo Grotius (1583-1645) – largely drew on this medieval tradition. The concepts and notions these medieval and early-modern authors took from Roman law and transferred to the newly autonomous law of nations, they did not so much take from Roman ‘international law,’ but from Roman private law. Moreover, the transfer from Roman private law did not stop with Grotius. The use of private law principles, precepts and concepts for the formulation of the law of nations pertained to the very core of the Modern School of Natural Law’s intellectual endeavours.⁸

⁷ David Bederman doesn’t. See on these discussions, with reference to many examples, Grewe, *Epochs of International Law*, 7-12.

⁸ Randall Lesaffer, ‘Argument from Roman Law in current international law: *occupatio* and acquisitive prescription’ (2005) 16 *European Journal of International Law* 25; Karl-Heinz Ziegler, ‘The influence of medieval Roman law on peace treaties’ in Lesaffer (ed), *Peace Treaties and International Law*, 147-61.

The permeability between Roman private law and the medieval and early-modern law of nations was much eased on by the Roman concept of *jus gentium*, its relation to natural law, and the confusion this brought about in later times. For the Romans, *jus gentium* did not refer to ‘public international law,’ but was the body of private law the Roman courts applied to foreigners. It was at the one time ‘municipal law,’ as its rules were established by the Roman magistrates and courts, and ‘universal law,’ as it was applied to all foreigners. After the *constitutio Antoniniana* had bestowed Roman citizenship upon all free inhabitants of the Empire (212 A.D.), there was far less occasion than before to keep the *jus gentium* and the *jus civile* – the law applied to Roman citizens – apart, strengthening the mutual impact of both bodies of law. The *jus gentium* was a less strict and formalistic law than the *jus civile* was. It built on elements common in Roman and some major foreign law systems and held an important place for considerations of equity. The classical Roman jurists associated it closely to natural law,⁹ or even reduced it to being natural law.¹⁰ Moreover, they also contributed to the later confusion by classifying issues pertaining to the world of international relations under *jus gentium*, making it applicable both to individuals and to bodies politic.¹¹

⁹ Gaius, *Institutes*, 1.1: ‘(...) while the law that *natural reason* establishes among all mankind is followed by all people alike, and is called *jus gentium*’ (transl. Laurens Winkel, ‘Peace Treaties of Westphalia’ 225; my emphasis).

¹⁰ Ulpian in D. 1.1.1.4.

¹¹ Hermogenianus in D. 1.1.5. Isidorus of Sevilla (c. 560-636) reduced it completely to matters of international relations, *Etymologiae* 5.6, and thus paved the way for the medieval understanding of *jus gentium* as ‘public international law.’ See on all this, Winkel, ‘The Peace Treaties of Westphalia’ 225-6.

The historical contribution of Roman private law to the formation of modern international law is hard to contest. But whether it is to be appreciated or not, is an entirely different matter. Here we touch upon the debate about private law analogies in current international law. In his doctoral thesis, published in 1927, Sir Hersch Lauterpacht (1897-1960), later Whewell Professor of International Law at Cambridge (1937-1956) and Judge in the International Court of Justice (1956-1960), underscored the importance of the use of concepts and institutes of municipal private law in international law, both historically and currently.¹² While in recent times, the analogies had been made from precepts and concepts common to the major municipal law systems of the world, in earlier times – meaning chiefly, before the great codifications of the 19th century – , they had been taken from Roman law. Lauterpacht strongly defended and promoted the practice. It became one of the cornerstones of his system of international law. Reference to private law, which he considered to be a more developed system than international law, ensured the completeness and progressive articulation of international law.

¹² In the years immediately preceding Lauterpacht's book on private and international law, different other international lawyers also addressed the subject, e.g. Paul Ruegger, 'Privatrechtliche Begriffe im Völkerrecht. Studie zur Interpretation des internationalen Rechts' (1920) 18 *Niemeyers Zeitschrift für Internationales Recht* 425; Gordon Sherman, 'Jus Gentium and International Law' (1918) 12 *American Journal of International Law* 56; idem, 'The nature and sources of international law' (1921) 15 *American Journal of International Law* 349; Heinrich Triepel, 'Les rapports entre le droit interne et le droit international' (1925) 1 *Recueil des Cours de l'Académie de Droit International* 73. In his two articles, Sherman took great pain to explain the original meaning of Roman *jus gentium* as universal private law, as if it were a novel thing for the readers of the *American Journal* to learn. See on this David Kennedy, 'International Law and the Nineteenth Century: History of an illusion' (1997) 17 *Quinnipiac Law Review* 100, 126.

Lauterpacht realised his position to be contentious. It was in strong opposition to the positivist creed on international law. The use of private law rules for the regulation of international conflict went against two major tenets from the positivist approach to international law. First, it went against voluntarism and consensualism in international law, the claim that States are only subject to rules they have voluntarily consented to. In this view, treaties and customs form the sole sources of international law. Second, using private law analogies or transplants implies the rejection of the self-sufficiency of international law, in particular its autonomy and fundamental distinctiveness from private law. The claim to self-sufficiency is consequential to the conception of the State as an autonomous moral being, fundamentally different from individual man and not subject to the same moral rules and laws. In his book, Lauterpacht included a brief survey of the position of some major writers of international law, starting with Albericus Gentilis (1552-1608). Herein, he tried to prove that even those authors who had striven to deny the impact of Roman or private law, or rejected its further use, had in reality not escaped its use.¹³

The historical debate on the interaction between Roman and international law in its two dimension stands not aloof from international lawyers' debates about the essence of international law. The positivist defenders of modern international law as a system regulating relations between sovereign States – as a truly autonomous *public* international law – tend to reject the historical, let alone the contemporary significance of Roman law.

¹³ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (London 1927); a revised version of Lauterpacht's historical survey in Elihu Lauterpacht (ed), *International Law Being the Collected Papers of Hersch Lauterpacht*, vol. 2 (Cambridge 1975) 173-212. See also Lesaffer, 'Argument from Roman law' 27-38.

The reduction of the very concept of international law to international law as it was constructed within the context of the European States system, leads to minimising the continuity between Roman and later times and has even led to rejecting the very existence of a Roman international law. Voluntarism and the claims of moral sovereignty made for the modern States have induced students of international law, and its history, to neglect the historical contribution Roman private law made to the formation of modern international law.

In the debate on Roman law and international law, the name of Lauterpacht looms the largest among international lawyers since the early 20th century. Modern historians of international law mostly refer to their great German predecessors of the 20th century, particularly Grewe and Preiser. But how did the earlier historians of international law of the 19th century look upon the problem? How did these writers, who were living either in a day when the positivist conception was still on the rise or was dominant, approach the subject? In this article, we will analyse the views of four Anglo-American writers who, between 1795 and 1899, each wrote a monograph on the history of international law. We will try to relate their historical interpretation to their understanding of international law itself. These four pioneers of the history of international law are Robert Ward, Henry Wheaton, John Hosack and Thomas Alfred Walker.¹⁴

¹⁴ The discussion is limited to the writers of historical monographs, excluding the sometimes elaborate historical introductions to textbooks on international law, such as that of Sir Robert Phillimore (1810-1885). In the preface to the first edition of his *Commentaries upon International Law*, Phillimore gave a sketch of the history of international legal doctrine and of international law in England and Britain (i-li). In it, he particularly stressed the significance of civil law in England and Britain, also in the field of

It has to be remarked that for the lawyers of the common law countries, particularly those from Britain, of the 19th century the connection between the civil and international law came much more naturally than to their 20th-century successors or their continental counterparts. Since the establishment of the Regius Chairs of Civil Law at the universities of Cambridge and Oxford in the 16th century, graduates from these law schools, who have read in the civil law, have often counselled in matters of international law and relations, and this certainly not only in the context of the Court of Admiralty. Up to second half of the 19th century, international law as an academic field was to a large extent the province of those civilians. Of the authors studied here, Ward and Walker who read at Oxford and Cambridge were exposed to the civil law as students.¹⁵

2. *Robert Ward (1795)*

Robert Ward (1765-1846), or Robert Plumer Ward as he styled himself upon his second marriage (1828), was a conservative politician, who later in his life won some fame as a writer of didactic and theologically inspired novels. Ward was admitted to Christ Church

international law and relations, during the Early Modern Age. His main concern was to indicate that the gap between the English and continental legal cultures must not be overestimated. 4 vols. (London 1854-1861).

¹⁵ James Crawford, 'Public International Law in Twentieth-century England' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-speaking Emigré Lawyers in Twentieth-century England* (Oxford 2004) 685-92; Michael Lobban, 'English approaches to international law in the nineteenth century' in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds), *Time, History and International Law* (Leyden/Boston 2007) 66-70.

College in Oxford, where he read the classics (1783-1787), and was called to the bar by Inner Temple in 1790. He was a protégé of the younger William Pitt (1759-1806), thanks to whom he was elected to the House of Commons (1802). From 1807 to 1823, Ward actively served in government, among others as a junior Lord on the Board of Admiralty (1807-1811, under his brother-in-law Henry Phipps, Lord Mulgrave, 1755-1831) and at the Board of the Ordnance (1811-1823, again under Mulgrave and from 1819 under Arthur Wellesley, Duke of Wellington, 1769-1852).¹⁶ It was at the instigation of another conservative leader, John Scott, Lord Eldon (1751-1838) that Ward, then a young barrister, took it upon him to write on the law of nations.¹⁷ The political agenda behind this suggestion was to defend Britain's traditional understanding of the law of nations and fly it in the face of the revolutionaries of the French 'Convention.' Within the year from this suggestion, the young Ward published his two-volume *Enquiry into the Foundation and History of the Law of Nations in Europe*.¹⁸

Later, Ward would go on to publish on aspects of the law of nations, often induced so by current policy issues. So it was at the suggestion of the Foreign Secretary,

¹⁶ For Ward's life, works and thought, see: Diego Panizza, *Genesi di una ideologia. Il conservatismo moderno in Robert Ward* (Milan 1997); P.G. Patmore, *My Friends and Acquaintances: Memorials of deceased celebrities*, vol. 2 (London 1854) 1-202; Edmund Phipps, *Memoirs of the Political and Literary Life of Robert Plumer Ward, with selections from his correspondence, diaries and unpublished literary remains*, 2 vols. (London 1850); Clive Towse, 'Ward, Robert Plumer' in *Oxford Dictionary of National Biography*, vol. 57 (Oxford 2004) 341-2. On Ward as a novelist: Matthew W. Rosa, *The Silver-Fork School: Novels of fashion preceding Vanity Fair* (New York 1936) 63-8.

¹⁷ Phipps, *Memoirs*, vol. 1, 11-15.

¹⁸ Robert Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe, from the Greeks and the Romans to the Age of Grotius*, 2 vols. (Dublin 1795, repr. Clark, N.J. 2005).

William, Lord Grenville (1759-1834), that Ward in 1801 applied himself to the maritime laws of warfare in order to promote Britain's position in its conflicts with the neutral powers of Northern Europe.¹⁹ In 1805, Ward published a book on the commencement of war in history to support the Pitt government's stance that the British navy's action of 1804 against four Spanish frigates before war was declared was in accordance with international legal practice.²⁰

Ward's history of the law of nations of 1795 has to be situated within the context of the emergence of a coalition of conservative forces in British politics and of the early articulation of a conservative political ideology in reaction to the radicalisation of the French Revolution from 1792 onwards.²¹ Ward, who had been in France during the earlier stages of the Revolution and had found himself lucky to depart in time (1790), clearly adhered to this conservative reaction.

In the Preface to this work, Ward commenced by explaining that he first envisioned writing a 'Treatise of Diplomatic Law,' but that, after he had assembled all necessary materials, he had stumbled on the fundamental question of the basis of

¹⁹ Robert Ward, *A Treatise on the Relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs: In which the principles of armed neutralities and the opinions of Hubner and Schlegel are fully discussed* (London 1801) and idem, *An Essay on Contraband: Being a continuation of the Treatise of the Relative Rights and Duties of Belligerent and Neutral Nations, in maritime affairs* (London 1801).

²⁰ Robert Ward, *An Enquiry into the Manner in which Different Wars in Europe have been commenced during the last two centuries* (London 1805), which was read by Pitt before it was published and dedicated to Lord Eldon.

²¹ Panizza, *Genesi di una ideologia*, 5-15.

obligation and looked for answers in the existing treatises. There, so he went on, he had found himself:

(...) referred to the Law of Nature for the real and original source of all the obligation in men to obey the Law of Nations; and this Law of Nature again, I was told to look for in my own heart and natural conscience, which were to decide for me *and all the world* in the same manner, in almost all cases.²²

Ward did not reject the existence of natural law, nor that it formed part of the foundation of the law of nations. But he rejected another central tenet of Enlightenment natural jurisprudence, namely that it was feasible through the sole process of abstract reasoning to articulate a body of law, such as the law of nations. Natural law or reason could not be the sole basis of obligation of the law of nation.²³ That lay in the ‘authority and precepts of a religion.’ As there existed ‘varieties of religion and moral systems ... operated upon also by important local circumstances,’²⁴ so there also existed ‘*different* Law of Nations for *different* parts of the globe.’ And as religions and systems of morality changed through time, so also did the law of nations. ‘All this, Ward concluded, was to be proved

²² Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, ii.

²³ Casper Sylvest, ‘International Law in Nineteenth-Century Britain’ (2004) 75 *British Yearbook of International Law* 25.

²⁴ Ward referred in this context to Charles de Secondat de Montesquieu’s *De l’esprit des lois* 19 (Geneva 1748), see Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 79.

from history.’²⁵ For Ward, it was self-evident that the European law of nations, based on revealed, Christian religion, was the true law of nations. This came only to be developed by the days of Hugo Grotius (1583-1645).

Ward’s work entered into the fold of the emergent conservative reaction to Enlightenment and Revolution. He rejected the possibility of articulating law solely through natural reason and denied the possibility of a universal and immutable law of nations. The law of nations had to be found in the study of practice – of historical and current reality – and tradition and was ultimately based on religion and morality. The whole idea of revolutionary renewal was thereby implicitly rebutted.

The *Enquiry into the Foundation and History of the Law of Nations* fell into two parts. The first part (vol. 1, 1-102) served to refute the claims of natural, universal jurisprudence and expound Ward’s ideas on the relativity of the law of nations and its foundation in religion and morality. The much larger, second part (vol. 1, 103-236 and vol. 2, 1-379) offered a chronological survey of the development of the law of nations starting with the ancient Greeks and Romans and leading up to Grotius. It served as empirical evidence of Ward’s ideas about the law of nations. Robert Ward considered the Dutch humanist to be ‘the great father of the science,’ having given ‘to the world a Treatise which has stood the test of time.’²⁶ Only with Grotius did the law of nations become a true discipline. Later writings, such as those of Samuel Pufendorf (1632-1694)

²⁵ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, ii-iv. In stressing the inextricable bond between natural law and the Christian religion, Ward stuck close to the views expressed by William Blackstone (1723-1780) in the Introduction to his *Commentaries on the Laws of England*, Oxford 1765, vol. 1, 38-43.

²⁶ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 2, 370.

and Emer de Vattel (1714-1767) had only served a purpose because of the defective method of Grotius, who had neglected to first lay down the elementary principles before plunging into particular rules and practical matters. Here, as at other places, Ward showed to consider legal science in terms of a system of general principles and their concrete applications, which was central to natural law and enlightened thinking. The whole second part traced and explained the slow and gradual growth of the law of nations towards the Grotian moment, under the impact of changing morals, religion and practical circumstances. Ward focused on diplomatic and legal practice and had little regard for doctrinal developments.

Of the ancients, only the Greeks and the Romans were deemed worthy of any attention. They both had laws of nations, but these were lacking in humanity – or ‘politeness’ as he called it – as both the Greeks and Romans departed from the idea of natural enmity between the peoples of the world. Ward indicated that the Greeks and the Romans used the same word for ‘foreigner’ as for ‘enemy.’ He also quoted the maltreatment of the Persian King Darius’s (522-486 B.C.) ambassadors by the Greeks and the condoning of piracy. In general, the Romans were more generous to foreign peoples than the Greeks, whose malpractice Ward at one time compared with the actions of the French Convention.²⁷ Ward stipulated that the Romans did not allow their citizens to fight but under the authority of the State; if not they might be considered robbers. He likened this to ‘the modern notions.’²⁸ The laws of war condoned a lot of cruelty, which

²⁷ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 110-11.

²⁸ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 112.

Ward attributed to the ‘want of a milder religion.’²⁹ He deplored the Machiavellism of the Romans who pursued ‘their own great object, of dominion, by every mode, generous or subtile.’³⁰ On the other hand, it had to be admitted that the Roman writers on the law of nations often deplored this themselves and also that the Romans proved quite humane in the treatment of conquered people. But all in all, the Greeks and Romans had attained ‘all the *unassisted* genius of Humanity could attain to,’ because, so Ward went on:

One thing however was wanting to the perfection which, had they possessed it, they would probably have acquired: and that was, knowledge of the doctrines of a Religion, which whatever may be its points of controversy, has had the uniform effect, wher-ever it has taken root, of producing a more equitable notion of things, and a milder system of manners.³¹

All this makes clear that, opposed though he may be to the Enlightenment, Ward did not shake one of its central ideas: the idea of progress and civilisation itself. But his explanation of this process was both historical and religious. For him, progress was not attained through the emancipation of free thought, but through divine revelation and

²⁹ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 113.

³⁰ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 115.

³¹ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 103. Also see: ‘These Codes, however, were composed under whatever influence the precepts of the religions of the countries, such as they were, could be supposed to have; and it would have been better for the world if the concurrence of so many religions, in the praise of whose toleration Mr. Gibbon has been so copious, could have produced a better effect upon the codes of the Law of Nations than in existence,’ vol. 2, 6.

man's slow acceptance and understanding of it. The Greek and Roman civilisation, despite its high standing, could not develop any further than it did and could not attain anything near moral perfection because of its 'want of religion.'

The future politician also shed light on the role of medieval Roman jurisprudence in the formation of the law of nations. He accepted this as a historical fact, but led a harsh attack against it. He did so on two different issues.

First, Ward took offence against the medieval notion of the Emperor – that is of the Holy Roman Empire – as *dominus mundi*, as lord of all the world. Ward thought this misconception of the power of the Emperor, who was after all only the ruler of Germany and Italy, if that, to be based on the combination of the use of the imperial title of Charlemagne (768-814) with his possession of a much larger portion of the old Western Roman Empire. Ward reproached the 'civilians,' the medieval students of Roman law, for this 'jumble.'³²

A more direct denunciation of Roman law's influence on the law of nations came in the context of his discussion of a *cause célèbre* of English diplomatic history: the prosecution of John Leslie, Bishop of Ross (1527-1596), Mary Queen of Scots' (1543-1587) ambassador to England during the time of her captivity in that country, on the accusation of having conspired against Queen Elisabeth (1558-1603). In this context, advice was sought from a commission of foreign and of English civil lawyers. The English lawyers in their answer restricted the immunity from criminal prosecution of ambassadors, an opinion that was shortly to be overruled. Also, the issue

³² Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 2, 239, naming also Bartolus of Sassoferrato (1314-1357), vol. 1, 46 and vol. 2, 242-3 – there also taking down Ulpian (d. 212) with him.

(...) was, however, warmly contested in *Europe*, and for a long time divided the Civilians, who, as we shall have occasion to point out in another Chapter, had not yet fallen upon the true method of coming at the Law of Nations. In truth they had not yet shaken off the trammels of the Roman law, and numberless difficulties were therefore started from the *Digest*, concerning the word *Legatus*, the only one known in Latin for Ambassador. For they did not recollect immediately, that it admitted of two interpretations, namely, an Ambassador from one independent State to another; and a *Deputy* from a dependant province to the Court of Rome.³³

At once, this provided a fine example of how the perception of Roman civil law as a timeless embodiment of *ratio scripta* and the a-historical interpretation this led too, could be misleading and lead away from the true principles of the law of nations.

According to Ward, the law of nations came only into itself, once – among other things – the Roman civil law had been shaken off. He reproached the predecessors of Grotius to have,

(...) intrenched themselves behind the civil law of the Romans, from which they never suffered themselves to wander. As if *Ulpian* and *Papinian* had been infallible, and had been sent down from Heaven to prescribe laws for *all* the

³³ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 2, 312, see also 357 where he refers to the humanist jurist François Hotman (1524-1590) and complains about taking ‘the arguments ... from the civil law of the Romans, the inefficacy of which we shall presently have occasion to discuss.’

world; or as if its various nations were always to find a certain rule of conduct for their intercourse with one another as independent States, in laws made for one integral community, which had long been totally dissipated that few vestiges of its original people remained. Notwithstanding this, however the greatest public lawyers from the thirteenth to the sixteenth century, adjudged all controversies between nations by the rules of this celebrated law; and the errors of *Accursius* and *Bartolus* which might be excused by the ‘*Temporum suorum infelicitas*,’ were followed on the same authority, by the two famous Spanish Civilians, *Covarruvias* and *Vasques*, in the very age of Grotius.³⁴

This quotation in particular lays bare Ward’s reasons for his harsh rejection of the use of Roman law in the articulation of the law of nations. It is not so much as a staunch positivist – which he was not as he accepted a role for natural law as a foundation for the law of nations – that Ward took offence at the civilians’ influence. Ward rejected the idea that the law of nations could be gleaned by natural reason from the law of nature, and he opposed Pufendorf’s and other writers’ identification of natural law and the law of nations. In this context, he also expressly denounced the classical Roman lawyers’ association of the *jus gentium* with *jus naturale*, thereby making reference to Gaius 1.1.1 and D. 1.1.9 and 41.1.1.³⁵ As such, it was logical for him also to refuse the notion of Roman law as the embodiment of *ratio scripta* because of its association in his day and

³⁴ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 2, 366. Diego Covarruvias (1512-1577) and Fernando Vasquez de Menchaca (1512-1569) were both civil and canon lawyers.

³⁵ Ward, *Enquiry into the Foundation and History of the Law of Nations*, vol. 1, 3-5.

age with natural law and natural jurisprudence. In doing so, he broke down what was the Modern School of Natural Law's bridge between civil law and the law of nations.

3. *Henry Wheaton (1845)*

Upon graduation from Rhode Island College – now Brown University – in 1802, Henry Wheaton (1785-1848) spent some years in France. Even as a student, Wheaton had been fascinated by the French Revolution, to the point of him being nicknamed 'Citizen Wheaton' by his fellow students. In 1805 while in France, the young lawyer from Providence translated the entire *Code Civil* of 1804 to English, but his manuscript was lost. Back in Rhode Island in 1806, he was admitted to the State's bar. In 1811, he moved to New York where he became a journalist for the *National Advocate*. During his years as a journalist, Wheaton often came out in support of President James Madison's (1809-1817) foreign policy, particularly in relation to the Anglo-American War (1812-1814). In 1815, upon admission to the New York bar, Wheaton was appointed Chief Justice of the New York Maritime Court, a post he held until 1819. In 1816, he was appointed reporter with the United States Supreme Court. During the next twelve years, Wheaton would edit twelve volumes of Court reports. Many of the cases he reported involved international and transnational disputes such as trade and maritime cases, for which reference was made to the law of nations, applicable both the States as well as individuals. During that period, he also served as a member of the constitutional convention for the State of New York (1821) and as a reviser of the State's laws (1825-1827).

In 1827, Wheaton moved to a new career as he accepted to become the United States' *chargé d'affaires* in Denmark. While travelling to Copenhagen, Wheaton stopped at London where he got to know Jeremy Bentham (1748-1832). In 1835, Wheaton was promoted to become the U.S. representative with the King of Prussia in Berlin. He stayed there until 1847. When it became clear at that time that the incoming administration would not grant his life's wish to become ambassador in Paris or London, Wheaton resigned and returned home.³⁶

As a journalist, a legal practitioner and a diplomat, Wheaton was extensively exposed to international law, particularly relating to matters of trade and maritime warfare. In 1836, Wheaton published his major treatise on international law, *Elements of International Law*, which opened with a brief survey of the history of international law from the Greeks to the 18th century (1-29).³⁷ In 1845, followed Wheaton's great

³⁶ On the life, works and thought of Wheaton: 'Henry Wheaton' in *Dictionary of American Biography*, vol. 10.2 (New York 1964) 39-42; Elisabeth Feaster Baker, *Henry Wheaton 1785-1848* (Philadelphia 1937); Joyce Craig, 'Henry Wheaton' in *American National Biography*, vol. 23 (Oxford/New York 1999) 123-5; Edward Everett, 'Life, Services and Works of Henry Wheaton' (1856) 82 *North American Review* 1; Frederick C. Hicks, 'Henry Wheaton' in *Men and Books Famous in the Law* (New York 1921) 190-235; William Vail Kellen, *Henry Wheaton, An appreciation, being the address before the alumni on the occasion of the one hundredth anniversary of his graduation, June seventeenth, MDCCCIII* (Boston 1902); James Brown Scott, 'Henry Wheaton, 1785-1848' in W.D. Lewis (ed), *Great American Lawyers*, vol. 3 (1907) 241-85.

³⁷ Henry Wheaton, *Elements of International Law with a Sketch of the History of the Science* (London and Philadelphia 1836). The historical introduction or 'sketch' was based on a paper Wheaton had presented in 1820 to the New York Historical Society. George Grafton Wilson, 'Henry Wheaton and International Law'

monograph on international legal history, *History of the Law of Nations in Europe and America, from the Earliest Times to the Treaty of Washington, 1842*.³⁸ The book had first been written in French as Wheaton's submission to the *Institut de France's* Academy of Moral and Political Sciences' prize for the best essay on the question, *Quels sont les progrès qu'a fait le droit des gens en Europe depuis la Paix de Westphalie* in 1841.³⁹ The New York edition of 1845 was more than a translation. It was a much-extended version covering more recent developments, adding details on affairs involving the Ottoman Empire, the Middle East and the United States. Wheaton also greatly expanded the introductory chapter on the period before Westphalia.⁴⁰

Wheaton was above all a practitioner of international law – or better, of the law of nations –, which showed in his writings. His views on the foundations of international law can be gleaned, albeit with difficulty, from the first chapter of his *Elements of International Law*, as well as from his comments on the classics of international law in his historical sketch and monograph. Between the first two editions of his treatise in 1836 and the third edition in 1846,⁴¹ Wheaton moved somewhat through the spectrum of the

in Henry Wheaton, *Elements of International Law* (1866, Classics of International Law vol. 19, Oxford/London 1936) 11. For a full list of editions: Baker, *Henry Wheaton*, 312-3.

³⁸ New York 1845, repr. Buffalo, N.Y. 1982. Also appeared in Spanish, Besançon 1861.

³⁹ Published in Leipzig that year as *Histoire du progrès du droit des gens en Europe depuis la paix de Westphalie jusqu'au congrès de Vienne. Avec un précis historique du droit des gens européen avant la paix de Westphalie*. Further editions in Leipzig in 1846, 1853 and 1865. Wheaton came out second in the contest.

⁴⁰ Wheaton, *History of the Law of Nations*, iii.

⁴¹ Philadelphia 1846. In this edition, he largely omitted the historical sketch, though some parts were reinstated further in the book.

debate between positivists and naturalists to the former side.⁴² But such a shift in theoretical perspective did not induce Wheaton thoroughly to revise the rest of the book. It did, among other things, not lead the American diplomat to amend his definition of international law – which he took from James Madison –⁴³ or his theory on the sources of international law. There was no need. His move towards the positivist side of the spectrum brought the theoretical outlines he defended at the inception of his book more in line with his general understanding of international law as it appeared from the whole treatise. From its first appearance, *The Elements* had been the work of a practitioner writing for practitioners.

Modern historians of international law have classified Wheaton as a moderate in the debate between the positivists and naturalists of his day.⁴⁴ It may be more accurate to label him a very reluctant Austinian – in the sense that he acknowledged Austin’s main point only then to try to wriggle away from it – to the point of being an anti-Austinian. Wheaton referred to John Austin’s concept of law as command.⁴⁵ As such, the law of nations – a term Wheaton clung to until he exchanged it for Bentham’s ‘international law’ in the third edition of his *Elements* – was not ‘proper law’ in Austin’s view⁴⁶ On this

⁴² Wilson, ‘Wheaton and International Law’ 14.

⁴³ James Madison, *Examination of the British Doctrine, which subjects to capture a neutral trade not open in Time of Peace* (London 1806) 41; Wheaton, *Elements of International Law*, 54.

⁴⁴ Grewe, *Epochs of International Law*, 508.

⁴⁵ John Austin (1790-1859), *The Province of Jurisprudence Determined* (1832, ed. Wilfrid E. Rumble, Cambridge 1995).

⁴⁶ Wheaton quoted extensively from Austin, *Elements of International Law*, 54-5.

point, Wheaton, in his *History of the Law of Nations*, applauded Pufendorf for recognising that there was

(...) no other sort of law of nations, voluntary or positive, at least which has the force of law properly so called, binding upon nations as emanating from a superior. In using this qualification of the term law *properly so called as emanating from a superior*, Pufendorf seems to show that he had caught a glimpse of the truth.⁴⁷

But that indeed it was to Wheaton, ‘a glimpse of the truth.’ As to Austin, to Wheaton the law of nations was morally binding and was enforceable through moral sanction, or by

(...) fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected.⁴⁸

Wheaton may not have refuted and even have adopted Austin’s definition of law as command, but he was clearly not at ease with denying the legal character of international obligation or too prepared to attach much consequence to it. For Wheaton it mattered little whether the law of nations was called ‘proper law’ or not, what mattered was that it was real. From his experience as a legal practitioner and a diplomat, he had learned that

⁴⁷ Wheaton, *History of the Law of Nations*, 93.

⁴⁸ Wheaton, *History of the Law of Nations*, 94, quoting from Austin, *Province*, 171.

States and States' organs such as courts – and in particular, the United States Supreme Court – did take the law of nations seriously, considered it binding and, very often, applied it. As such, Wheaton attached great significance to Austin's qualification that – though not a legal obligation –, States could not disregard their duties under the law of nations without 'provoking general hostility and incurring its probable evils;' therefore, the laws of nations were called 'laws by analogy'. Observance of international law might not be enforceable the same way municipal law was, but it was dictated by 'international morality.' 'The history of the progress of the science of international jurisprudence' proved that this observance was real.⁴⁹ To Wheaton, the reality of international law as a determinant of States' behaviour clearly mattered more than its qualification as either law or morality. In other words, its moral character as well as its application by States in their mutual relations, counted for a lot with Wheaton.⁵⁰

Furthermore, in his third edition of *The Elements of International Law*, Wheaton was certainly eager to accept the great Berlin civil lawyer Friedrich Carl von Savigny's (1779-1861) definition of the law of nations as an 'imperfect positive law,' but still a law.

International law may therefore be considered as a positive law, but as an imperfect positive law, (*eine unvollendete Rechtsbildung*), both on account of the

⁴⁹ Wheaton, *Elements of International Law*, iii-iv and 60, also see *History of the Law of Nations*, iii-iv

⁵⁰ Mark Weston Janis, *The American Tradition of International Law: Great expectations 1789-1914* (Oxford 2004) 40-50. Janis stressed that, in Wheaton's view, moral sanction counted for a lot in the context of Christianity. In the Christian world, international law had the sanction of religion.

indeterminateness of its precepts, and because it lacks that solid base on which rests the positive law of every particular nation.⁵¹

In this later edition of his work, Wheaton also left out the references to Austin's definition of law.

In line with Austin, or Bentham for that matter, Wheaton could not agree to reduce the law of nations to a mere deduction from natural law. But neither did he accept its mere reduction to the conventions, usages or other positive enactments of the nations. Wheaton upbraided the 18th- century positivist Johann Jakob Moser (1701-1785) for

(...) reducing [the law of nations] merely to the positive rules to be collected from the practice of nations, laying entirely out of view of those general principles of justice which have commonly been referred to, as constituting its basis, under the name of natural law.⁵²

Wheaton held to a middle position between positivists and naturalists. The law of nations had to be looked for in the positive acts of nations – the sources of that law – but, for Wheaton, its ultimate foundation remained the law of nature. Wheaton took his definition of international law and his theory of the sources of international law from James Madison.⁵³ While international law was articulated in the positive enactments of States, it

⁵¹ Wheaton, *Elements of International Law* (1866) 19.

⁵² Wheaton, *History of the Law of Nations*, 324.

⁵³ Madison's definition – as quoted by Wheaton – held that 'the law of nations, or international law, as understood among civilized, christian nations, may be defined as consisting of those rules of conduct which

was ultimately based on natural law. However, Wheaton did not elaborate on the significance this foundation in natural law had for the law of nations. Wheaton held that ‘international law is commonly divided into two branches:’ the natural and the positive law of nations.⁵⁴ At some point, he based a general principle, such as the equality of states, on natural law.⁵⁵ But natural law did not have much impact in his conception of international law once it came to defining the sources and the material rules of international law. For him, ‘natural law’ referred to some general principles of justice that, through the ages, had found their way into great legal systems, including the law of nations. Above all, natural law seemed to be an inheritance Wheaton took on board from Madison, whose primary concern it had been to find a basis of objective justice to oppose the British ‘exercise of preponderant power’ as a ‘justification’ for their policy regarding neutral shipping during the Napoleonic Wars. It was there to give the law of nations a strong basis in justice and human progress, but not to dictate much of what the law of nations actually said. There was no need to elaborate on what natural law itself said.⁵⁶ To

reason deduces, as consonant to justice, from the nature of the society among independent nations; with such definitions and modifications as may be established by general consent,’ Wheaton, *Elements of International Law*, 54. See on Madison and international law, Peter Onuf and Nicholas Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions, 1776-1814* (Madison 1993) 197-220.

⁵⁴ Wheaton, *Elements of International Law*, 54-9.

⁵⁵ Wheaton, *Elements of International Law*, 193.

⁵⁶ According to Nicholas Onuf, ‘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,’ in ‘Henry Wheaton and “The Golden Age of International Law” ’ (2000) 6 *International Legal Theory* 7 (at http://law.ubalt.edu/cicl/ilt/ILT6_1.pdf). Also see Onuf and Onuf,

Wheaton, natural law primarily served to make the positive law of nations binding and to limit the free arbiter of States through the means of some notion of objective justice. All in all, natural law did not seem to sit easy in Wheaton's system.

There was, however, yet another dimension to Wheaton's genuflection to natural law. To Wheaton, international law was an autonomous body of public law not to be equated with natural jurisprudence or universal private law. Nevertheless, it did not exclusively apply to States. In the common law courts of the early 19th century such as the US Supreme Court, the 'law of nations' was not yet seen as solely applicable to States in their mutual relations to the exclusion of private citizens, but was regularly applied to what we would call today 'transnational' cases directly involving private citizens, such as trade or maritime disputes. In practice, this 'law of nations' consisted of an amalgam of customary law, treaty law as well as precepts and rules of canon and Roman law. Writing in 1836, Wheaton seemed to be relating to Jeremy Bentham's theory of the State acting under the same moral precept of utility as the individual.⁵⁷ The equation of the State's and the individual's moral duty certainly held an appeal to Wheaton and helps explain why he felt he needed natural law as the basis of the law of nations. However, in the later editions of the *Elements*, Wheaton embraced the solution the Berlin professor of international law August Wilhelm Heffter's (1796-1880) offered. Heffter defended the position that the – positive – law of nations, based upon general usage and tacit consent of nations, did not only apply to States but also to individuals as far as they were

Federal Union, Modern World, 201-7. Also see Martti Koskenniemi, *From Apology to Utopia: The structure of international legal argument* (2nd edn, Cambridge 2005) 140-1.

⁵⁷ Jeremy Bentham, *The Works of Jeremy Bentham*, vol. 2 (ed. Bowring, 1843) 538. See Janis, *American Tradition*, 18-21.

concerned by it. This referred to ‘human rights in general, and those private relations, which sovereign States recognize in respect to individuals not subject to their authority.’⁵⁸ Again, this change in the doctrinal outline at the beginning of his book did not have much impact felt in the rest of the book because it fitted. It nicely explained why ‘international law’ was also directly applicable to private persons, without having to give too much allowance to natural law and jeopardize international law’s autonomy as a system of public law all too much. In his later edition, Wheaton stuck to Madison’s definition of the law of nations, but did not follow it up any longer with the comment that there existed both a natural and a positive law of nations.

Wheaton clearly rejected the existence of a universal or immutable law of nations. He agreed with Ward, whom he referred to, that there was ‘only a particular law of nations, 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.’⁵⁹ The system Wheaton proposed to study was that of ‘the civilized and Christian people of Europe or to those of European origin.’⁶⁰ While Wheaton was in perfect agreement here with Ward, he did not feel the need so staunchly to detract from the naturalist’s position as Ward had. For Wheaton, the particularity of the law of nations

⁵⁸ Wheaton, *Elements of International Law* (1866) 14; quoted in translation from August Wilhelm Heffner, *Das europäische Völkerrecht der Gegenwart* (Berlin 1844) Wheaton published a review on this book as ‘De la Nature du droit des gens en général’ (1844) 1 *Revue de droit français et étranger* 955.

⁵⁹ Wheaton, *Elements of International Law*, 50-1, with reference to Ward.

⁶⁰ Wheaton, *Elements of International Law* (ed. 1866, *Classics of International Law*) 15. Von Savigny defended similar views, Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol. 1 (Berlin 1840) 32-4.

was self-evident from the fact that the positive acts, the conventions and usages, of nations constituted the law of nations and that these could only be uniform ‘among nations of the same class or family, united by the ties of similar origin, manners, and religion.’⁶¹ This did not seem to need further proof or qualification.

Of the 67 pages he devoted to the pre-Westphalian law of nations, Wheaton spent half (1-33) to the ancient Greeks en Romans. He shared Ward’s judgment that their laws, particularly the laws of war, were harsh. He mentioned the natural enmity, slavery and piracy and the cruel treatment of prisoners of war.⁶² He upbraided the ancients for putting public interest above everything else, but was inclined towards ‘a charitable indulgence for the imperfections of a lower stage of civilization.’⁶³ As with Ward, Wheaton’s perception of the law of nations of the ancients was coloured by the enlightened ideas of progress and civilisation.

Wheaton addressed the question whether the ancients knew the doctrine of the balance of power, a question raised by David Hume (1711-1776).⁶⁴ He acknowledged that they knew of the principle – Polybios (c. 200-120 B.C.) attests to that –,⁶⁵ but that the

⁶¹ Wheaton, *Elements of International Law*, 48.

⁶² In the light of the great debate on abolitionism then waged in the U.S., Wheaton devoted remarkably little attention to the problem of slavery in Antiquity. He upbraided the ancients twice for it, but did not single it out among the examples of their relative backwardness. Wheaton, *History of the Law of Nations*, 1 and 3.

⁶³ Wheaton, *History of the Law of Nations*, 14.

⁶⁴ David Hume, ‘On the balance of power’ in David Hume, *Political Essays* (1772, ed. Knud Haakonsson, Cambridge Texts in the History of Political Thought, Cambridge 1994) 154-8.

⁶⁵ Polybios 1.83.

Greeks had failed to apply it successfully in order to avert universal monarchy.⁶⁶ These comments about the balance of power, as those on the amphyctionic leagues show Wheaton to concede that the ancient law of nations already had some of the precepts and institutions of the modern law in it, but that it was greatly underdeveloped. Again, he was much less passionate in making the latter point than Ward was, but the superiority of modern civilisation was clearly upheld.⁶⁷

Wheaton opened his analysis of the Roman contribution by referring to Marcus Tullius Cicero's (106-43 B.C.) 'more liberal' theory of natural justice among all mankind.⁶⁸ He also acknowledged Cicero's musings on the Roman *jus fetiale*, the archaic body of religious law that applied to many aspects of external relations such as the declaration of war and the making of treaties. But in reality, Roman practice during war was much more brutal than Cicero held, and it became even more so with the decline of the Republic. Wheaton upbraided the Romans for having 'pursued a scheme of aggrandizement, conceived in deep policy, and prosecuted with inflexible pride and pertinacity' in what was an 'eternal war.'⁶⁹ The *jus fetiale*

(...) was merely intended to give regular sanction to the practice of war, and contributed but little to mitigate its enormities. The precepts of this code are

⁶⁶ Wheaton, *History of the Law of Nations*, 16-20.

⁶⁷ See also Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge 2005) 53-4.

⁶⁸ Wheaton, *History of the Law of Nations*, 20.

⁶⁹ Wheaton, *History of the Law of Nations*, 24.

strongly contrasted with the oppressive conduct of the Romans towards their allies, and their unjust and cruel treatment of their vanquished enemies.⁷⁰

The Roman version of the law of nations, the *jus fetiale*, might have had something to say for it, but it was hardly effective in lessening the hardships Rome inflicted upon its enemies.

Wheaton went on to inform his readership that ‘no professed treatise of international has been left us by any ancient writer.’⁷¹ There was, thus, no science of international law. Furthermore, *jus fetiale* was not truly international law as it was from Roman origin and as it was not based on reciprocity.⁷²

It was in itself only a civil law of their own; they called it a law of nations, because the design of it was to direct them how they should conduct themselves towards other nations in the hostile intercourse of war, and not because all other nations were obliged to observe it.⁷³

The term *jus gentium* was used to indicate something wholly different from the modern notion of law of nations.

⁷⁰ Wheaton, *History of the Law of Nations*, 25.

⁷¹ Wheaton, *History of the Law of Nations*, 25.

⁷² Wheaton thought that ‘if there be any such universal law acknowledged by all nations, it must be that of reciprocity,’ *Elements of International Law*, 50.

⁷³ Wheaton, *History of the Law of Nations*, 26.

(...) the idea associated with this term was not that of a positive rule governing the intercourse between independent communities, but what has been since called the law of nature, or the rule of conduct that is observed, or ought to be observed by all mankind independent of positive institution and of compact.⁷⁴

Making due allowances to Von Savigny,⁷⁵ Wheaton explained the double source of the Roman *jus gentium*. On the one side, the Romans conceived of it as the law common to all nations. But because it was impossible to establish it so, the Roman jurists accepted natural reason to be at its origin. So logically, Roman jurists started to identify the *jus gentium* with the *jus naturale*. Through the process of being applied side-by-side in the Roman courts, the *jus gentium* and the *jus civile* were increasingly assimilating in regards to their contents. As the Empire expanded, the *jus gentium* became more significant and was used to supplement the *jus civile* where the latter proved unsatisfactory.⁷⁶

Having thus introduced the growing association of natural law, law of nations and civil law, Wheaton moved to the greatest contribution the Romans made to the modern law of nations: that of Roman private law.

Though the Romans had a very imperfect knowledge of international morality as a science, and too little regard for it as a practical rule of conduct between states,

⁷⁴ Wheaton, *History of the Law of Nations*, 26.

⁷⁵ Friedrich Carl von Savigny, *Geschichte des Römischen Rechts im Mittelalter*, 7 vols. (Heidelberg 1834-1851). Volume 1 and 3 were the relevant ones to this outline of the *jus gentium*. Wheaton basically paraphrased Von Savigny.

⁷⁶ Wheaton, *History of the Law of Nations*, 27-9.

yet their national jurisprudence contributed to furnish the materials for constructing the new edifice of public law in modern Europe.⁷⁷

It was the Roman aristocracy – the most accomplished of all aristocracies in moral character thanks to Stoic philosophy –⁷⁸ that brought the Roman civil law to its great heights. As Von Savigny had attested, the Roman civil law survived through the Dark Middle Ages and never wholly disappeared. Following faithfully in the footsteps of Von Savigny, Wheaton explained that the vanquished Romans had not been completely exterminated or de-possessed by the conquering Goths – as opposed to the older historical telling – and that they had kept their personal law and municipal constitutions. Charlemagne’s conquest of the larger part of the old Western Empire had allowed for the Roman law once again to become ‘the common law of those continental countries which were formerly Roman provinces,’ and some other lands to the north and east of that, particularly, Germany.⁷⁹

On the revival of the study of the civil law, which as we have already seen had become more and more merged in the *jus gentium*, it became identified with the *jus gentium* in the modern sense of that term as synonymous with international

⁷⁷ Wheaton, *History of the Law of Nations*, 29.

⁷⁸ Wheaton, under the influence of Von Savigny, here adopted the idealisation of the Antonine 2nd century A.D., together with the early 3rd century, the heyday of classical Roman jurisprudence; see on this James Q. Whitman, *The Legacy of Roman Law in the German Romantic Era: Historical vision and legal change* (Princeton 1990) 81.

⁷⁹ Wheaton, *History of the Law of Nations*, 32.

law. The professors of the famous school of Bologna were not only civilians, but were employed in public offices, and especially in diplomatic missions and as arbiters in the disputes between the different states of Italy.⁸⁰

Wheaton then referred to the Emperor Frederick Barbarossa (1152-1190) seeking advice from the civilians from Bologna in his dispute with the Italian municipalities (Roncaglia, 1158), which Wheaton interpreted as evidence of ‘the growing influence and authority of the civilians as the interpreters of the only science of universal jurisprudence then known.’⁸¹

From this period the cultivation of the science of the *jus gentium* was considered as the peculiar office of the civilians throughout Europe, even in those countries which had only partially adopted the Roman jurisprudence as the basis of their own municipal law. The authority of the Roman jurisconsults was constantly invoked in all international questions, and was not unfrequently misapplied as if their decisions constituted laws of universal obligation.⁸²

Also some of the early-modern writers of the law of nations such as Gentilis and one of his successors in the Regius Chair of Civil Law at Oxford, Richard Zouche (1590-1660), continued to refer to the Roman civil law. Wheaton also mentioned the faulty

⁸⁰ Wheaton, *History of the Law of Nations*, 32.

⁸¹ Wheaton, *History of the Law of Nations*, 33.

⁸² Wheaton, *History of the Law of Nations*, 33. With reference to Hugo Grotius, *De Jure Belli ac Pacis libri tres* (Paris 1625) *Prol.* 53-5.

interpretation of the Roman term *legatus*. He briefly indicated that the Roman law found its way to the classical canon law. He pointed to the role theologians such as Francisco de Vitoria (c. 1480-1546) and Domingo de Soto (1494-1560) would play in the formation of the modern law of nations, who inspired by their Christianity, contributed to the justice and humanisation of the law of nations.⁸³

From his further, often elaborate comments on the early-modern classics of the law of nations from the 16th to the 18th century, we can surmise that Wheaton judged the emancipation of the law of nations from the Roman law and its emergence as a autonomous discipline of public law – he constantly referred to the writers of the law of nations as ‘public jurists’ – a step forward. Nevertheless, he did not take this ‘public’ character to the point of rejecting the direct application of international law to private citizens. Probably in part because of this, he had no qualms with the historical role of the Roman law during the Middle Ages and did not deny its persistent role with some writers of the 16th and 17th centuries. Nor was he in any way vocal or passionate in denouncing its role. Most of all, he took the trouble of explaining it – with the help of Von Savigny – by historically analysing the entanglement of natural law, law of nations and civil law. Though as Ward, Wheaton did not accept the reduction of the law of nations to a kind of natural jurisprudence, his moderate stance in the naturalist-positivist debate and his nuanced view on the autonomy of international law as public law based on his familiarity with practice, made him quite dispassionate in relation to the role of Roman private law in the formation of modern international law.

⁸³ Wheaton, *Elements of International Law*, 22-23; idem, *History of the Law of Nations*, 34-43.

4. *John Hosack* (1882)

John Hosack (1809-1887) was a legal practitioner. Born in Dumfries, he was called to the bar by the Middle Temple in 1841. Ten years before he died, he became a police magistrate at Clerkenwell, London. Hosack also served as an examiner for constitutional and international law at the Middle Temple. He published several books and essays in the fields of law and history.⁸⁴ In 1882, he published a history of the law of nations, entitled *On the Rise and Growth of the Law of Nations, Established by General Usage and Treaties, from the Earliest Time to the Treaty of Utrecht*.⁸⁵

As the subtitle indicated, Hosack's history was above all a history of state practice. Actually, it was much more a diplomatic history outlining wars, negotiations and treaties, than a legal history. Surprisingly, the only chapter in which Hosack gave more than a passing glance to legal matters was the first one, on the ancient Greeks and Romans (1-22).

Hosack held to a relative conception of the law of nations. From the time there had been independent communities, there had been a law regulating their intercourse.

⁸⁴ His writings include: *A Treatise on the Conflict of Law of England and Scotland* (London/Edinburgh 1847); *The Right of the British, and Neutral Commerce, as Affected by Recent Royal Declarations and Order in Council* (London 1854); *Mary Queen of Scots and her Accusers: Embracing a narrative of events from the death of James V. in 1542 until the death of Queen Mary in 1587* (Edinburgh 1869); *Mary Stewart: A brief statement of the principle charges which have been brought against her, together with answers to the same* (Edinburgh/London 1888). On his life and works, W.A.J. Archbodd and Eric Metcalfe, 'Hosack, John' in *Oxford Dictionary of National Biography*, vol. 28 (Oxford 2004) 224.

⁸⁵ London 1882, repr. Littleton, Co. 1982.

Hosack based the law of nations ultimately on the man's social nature, as it was this that brought him outside his own community and caused him to have relations with other communities.

Throughout all periods of authentic history we find that certain international obligations have been regarded as binding upon mankind. From the time, indeed, when distinct political communities began to be formed, the establishment of some definite rules to be observed towards strangers would naturally suggest itself. The enterprising nature of man and his migratory habits would lead him frequently to wander beyond the limits of his birthplace, and an intercourse between neighbouring states, being once opened up, would, without some disturbing cause, be continued and extended on some footing of reciprocity. The law of nations may, therefore, be said to have its origin in the social nature and the necessities of man.⁸⁶

For Hosack, natural law helped to explain why the ancients had been capable of developing the law of nations to such an extent. Hosack was much more appreciative of the contribution of the ancients than either Ward or Wheaton.

⁸⁶ Hosack, *On the Rise and Growth*, 1.

With regard to the positive law of nations, as it is understood and recognised in modern times, we are much more indebted to the ancients than is commonly supposed.⁸⁷

Hosack referred to the general respect for the sacred duties of hospitality and underscored the many examples of solidarity between the peoples of Antiquity. Hosack went on to enumerate many examples of how the ancient law of nations had paved the way for the modern one: the immunity of diplomats, the abiding to treaties, the respect for the rights of neutrals during war, the introduction of notions such as asylum, blockade or contraband. Hosack did concede that the amphycionian council was not a body of arbitration or an international tribunal, but it was a useful precedent thereof, not in the least because it instructed us about the difficulties of establishing such an institution. The ancients were also certainly familiar with the balance of power; after all, it was dictated by man's natural inclination to self-preservation.

According to Hosack, the Greek practices of war were surprisingly cruel for such a highly cultivated people. Among the peoples of Antiquity, the Romans were certainly commendable for their high standards of 'public morality.' He referred to the *jus fetiale*, which had a mitigating impact on warfare. Hosack had, however, to concede that their successes had changed the nature of the Romans and had led them in later times continuously to violate the law of nations.

But in general, so Hosack concluded his chapter on ancient law, 'many of the leading principles of the law of nations come down to us from a period of remote

⁸⁷ Hosack, *On the Rise and Growth*, 2.

antiquity.’⁸⁸ Since these times, the law of nations – and particularly, the laws of war – had been much improved, thanks to Christianity and commerce. Still, modern civilisation too had ‘its dark spots.’ The African slave trade was after all ‘of modern growth’ and was condoned by the law of nations. On this point, so Hosack concluded, we must be content ‘to suffer in comparison with the civilised nations of antiquity.’⁸⁹

Hosack’s evaluation of the contribution of the Greeks and Romans to the modern law of nations and of the continuity between ancient and modern law, was almost diametrically opposed to that of Ward and Wheaton. But he also thought in terms of the civilisation process. What led him – apart from a most probable influence from Henry Sumner Maine (1822-1888) whose *Ancient Law* first appeared in 1861 – to be much more appreciative of the Greek and Roman laws and practices, was the failure of modern man to live up to the standards of civilisation as well.

In the following chapters, Hosack traced the growth and development of what he referred to as the ‘modern public law of Europe.’ He set great stall on the humanising impact of Christianity, but apart from that, it was mostly a survey of wars and peace treaties. At no time, any reference to the law of nature – or the law of nations properly speaking for that matter – was made again. Unsurprisingly, Hosack made no mention of the significance of the civil law in the formation of the modern law of nations.

5. *Thomas Alfred Walker (1899)*

⁸⁸ Hosack, *On the Rise and Growth*, 21.

⁸⁹ Hosack, *On the Rise and Growth*, 22.

Thomas Alfred Walker (1862-1935) studied history, economics and law. In 1886, he entered the Middle Temple and qualified for the bar, but then decided upon an academic career. He became a fellow, tutor, lecturer and librarian at Peterhouse, Cambridge and taught both international law and history. Walker served as examiner in the Cambridge Law Tripos, and as an examiner in constitutional history, Roman law, jurisprudence and international law at the University of London. In 1896, Walker took holy orders. In 1924, he left Peterhouse to become Rector at Witnesham.⁹⁰ Apart from being a historiographer of his own college,⁹¹ he also published three books on international law. In 1893, *The Science of International Law* appeared, followed in 1895 by *A Manual of Public International Law*.⁹² The first book delved into the theoretical foundations of the discipline, while the second was more practical. *The Science* included a survey of the development of diplomacy and state practice before Grotius (57-90) and an analysis of Grotius's contribution (91-111). In 1899, Walker followed this up with the first of a planned two volumes on the history of the law of nations, entitled *A History of the Law of*

⁹⁰ H.A. Sams, 'Foreword' in Thomas Alfred Walker, *Peterhouse* (2nd edn, Cambridge 1935, vii-x). I am indebted to the librarian of Peterhouse for this information.

⁹¹ He wrote a brief history of the college, *Peterhouse* (London 1906). Further he edited, among others, *Admissions to Peterhouse or St. Peter's College in the University of Cambridge: A biographical register, being an exact transcription of the entries in the college admission books from 1616 to 1887, together with an abstract of the entries in the academi* (Cambridge 1912) and *A Biographical Register of Peterhouse Men and Some of their Neighbours from the Earliest Days (1284) to the Commencement (1616) of the First Admission Book to the College*, 2 vols. (Cambridge 1927).

⁹² Thomas Alfred Walker, *The Science of International Law* (London 1893); idem, *A Manual of Public International Law* (Cambridge 1895).

Nations. This first book, subtitled *From the earliest times to the Peace of Westphalia, 1648*, which actually led up to the Grotius, was to remain the only one.⁹³

In the preface to his treatise on international law from 1893, Walker acknowledged his indebtedness to the ideas of Maine, who had been both Regius Professor of Civil Law (1847-1854) and Whewell Professor of International Law (1887-1888) at Cambridge as well as Master of Trinity Hall (from 1877).⁹⁴ In the first chapter to his *Science of International Law*, which found its way in an abridged version in his historical monograph, Walker took great trouble in denouncing Austin's definition of law and his refusal to use the term law to indicate international law. Austin's definition of law was far too restrictive. It did not answer to the different understandings of law men had held through history. Walker also denied Austin the right 'to dictate, to deny the validity of the name "Law" to such other varieties of rule as have hitherto enjoyed the appellation.'⁹⁵ Refusing to call international law just that would only serve to weaken the bonds of obligations between States. Among others, as Maine had spelled out, this position was hurtful to 'the peace of the world' as Austin's criticisms 'passed outside the schools into the Cabinet, and into the public speeches of responsible Foreign Ministers.'⁹⁶

Walker defined law as follows:

⁹³ Cambridge 1899, repr. Buffalo, N.Y. 2004.

⁹⁴ Walker, *The Science of International Law*, vi.

⁹⁵ Walker, *History of the Law of Nations*, vol. 1, 6.

⁹⁶ Walker, *History of the Law of Nations*, vol. 1, 5, with reference to Henry Sumner Maine, *International Law: A series of lectures delivered before the University of Cambridge, 1887* (London 1888) 49.

A 'Law' is a rule of conduct observed, or otherwise recognised as binding, by men, and observed or otherwise recognised by them as wearers of a particular character, that is, as members of a particular body.⁹⁷

International law answered to this definition. Rules of international law were to be understood as

(...) rules of conduct observed by men towards each other as members of different States, *though members of the same International Circle*.⁹⁸

After having in his own eyes sufficiently debunked Austin's views, Walker stated that the only thing left to do was to prove through the study of history that such rules of international law existed.

The proof of the allegation can, it is clear, be only furnished by History and direct observation. So the available authorities are every written document, every record of act or spoken word which presents an authentic picture of the practice of States in their international dealings.⁹⁹

⁹⁷ Walker, *Science of International Law*, 41.

⁹⁸ Walker, *Science of International Law*, 44.

⁹⁹ Walker, *History of the Law of Nations*, vol. 1, 20.

According to Walker, these included the writings of men of authority, treaties, the ordinances of States, the adjudications of international tribunals, the opinions of official jurists and the documents attesting the history of war, negotiations and treaties. The writers of international law only offered relevant information inasmuch as they did ‘their duty’ and were ‘impartial historians of International Law.’

To them it belongs to note actual facts and events, and to extract from them the broad principles for the future guidance of mankind. The authority they possess, they possess not as judges, but as skilled observers and relaters, and that authority will increase or decrease, accordingly, according as their representations present, or do not present, an accurate picture of actual reality. When the text writer becomes a theorist, it is time for men to look askance of this opinion.¹⁰⁰

It may be so that the opinions of great writers, such as Grotius or Vattel, had influenced the opinions of their age, but that was in turned owed ‘to the strength of their intellect and the soundness of their appreciation of the moral needs of their times.’ In no way must they be treated as if they were ‘makers of law. The information of the text writers is commonly second hand.’¹⁰¹

Throughout Walker’s oeuvre, it is implied that at different times and places different ‘international circles’ and thus different international legal systems existed.

¹⁰⁰ Walker, *History of the Law of Nations*, vol. 1, 21.

¹⁰¹ Walker, *History of the Law of Nations*, vol. 1, 21-2.

(...) a *corpus* of International Law at any period must be the creation of the then prevalent International System, that is, of the prevailing concept of a state and of the bonds binding state to state.¹⁰²

The basis for the modern international law of 'civilised States' was territorial sovereignty.¹⁰³ As 'a matter of *scientific* appreciation' international law had only truly emerged from the Peace of Westphalia on, or better, with Grotius.¹⁰⁴ The international law of the civilised States was dictated by 'the natural characteristics of those communities' and by 'the moral influences arising from their surroundings.' In this, States were not fundamentally different from individual human beings, and international law was not from municipal law.¹⁰⁵

Walker underscored the moral character of international law. He was a positivist to the extent that he looked for the evidence of international law in the positive enactments of States and that he claimed territorial sovereignty to form the basis of modern international law. But at the same time, he stressed that States, which were after all composed of men, were affected by the self-same human nature and the self-same human morality. The influence of Maine spoke.¹⁰⁶

¹⁰² Walker, *History of the Law of Nations*, vol. 1, 30.

¹⁰³ Walker, *Manual of Public International Law*, 9.

¹⁰⁴ Walker, *Science of International Law*, 57.

¹⁰⁵ Walker, *Manual of Public International Law*, 9.

¹⁰⁶ Sylvest, 'International Law' 42-6 and 54-6.

While nations recognise the conception of territorial sovereignty as containing the main general principles of their just mutual dealings, they are, as being composed of men, obnoxious to external moral influences; in a word, nations are moral entities, and enlightened self-interest playing its part in the field of international intercourse, by the needs of that intercourse, if not by the operation of the forces of pure benevolence, the strict principles of territorial sovereignty and its corollaries must be at times affected and relaxed. The progressive improvement of human nature necessarily involved the progressive development of International Law.¹⁰⁷

Walker did consider natural law to be ‘the expression for the action of Man of an innate moral force.’¹⁰⁸ Inasmuch as human morality was a basis for international law, natural law, by consequence, was too. But the law of nation’s dependence on natural law was above all a *historical* fact. Walker did not seem keen on giving it an important place in his view on *current* international law. In this, Walker did not divert too far from Maine.¹⁰⁹ Natural law held altogether less significance in his system of international law

¹⁰⁷ Walker, *Manuel of Public International Law*, 10. Compare with Henry Sumner Maine, *International Law*, 33-4.

¹⁰⁸ Walker, *Science of International Law*, 110. It was also to be identified with divine law, 107.

¹⁰⁹ Maine recognised that historically and currently, a natural law of nations existed next to the positive law of nations. It inspired the ‘justice, good faith, and benevolence’ to which States were bound and thus offered the moral basis of the law of nations. Maine, *International Law*, 32-3. Maine, however, found that modern man had come to the point in evolution where he should shed the guidance of natural law. In the field of international law, this had not happened. To Maine, this was proof of its less developed state.

than it had in that of other influential British international lawyers of the 19th century such as Sir Robert Phillimore.¹¹⁰

The idea expressed in the last sentence from the preceding quotation permeated much of Walker's oeuvre and constituted one of the cornerstones of his interpretation of international law's history.¹¹¹ Though the international law of civilised States, based as it was on territorial sovereignty, only emerged in the 17th century and had a totally different foundation from the older international law – which had, in truth been rather 'Law Universal' –,¹¹² it was at the same instance another step in long history of the field, which was, a history of progress:

The history of International Law is on broad lines the history of progress. And even within narrow bounds of time it is possible to trace advance.¹¹³

Thus, Walker clung to the idea of modern civilisation as the summit of human achievement, while at the same time granting older times their place in the great story of that achievement.

Maine, *Ancient Law: Its connection with the early history of society and its relation to modern ideas* (London 1861) 73-4 and 111-12; Sylvest, 'International Law' 43-5.

¹¹⁰ Phillimore, *Commentaries*, vol. 1., xv-xvi and 1-37.

¹¹¹ 'Civilisation is progress,' Walker, *History of the Law of Nations*, vol. 1, 30.

¹¹² Walker, *Science of International Law*, 58.

¹¹³ Walker, *Science of International Law*, 110.

This vision of history also allowed Walker to give natural law its due in terms of its historical contribution. Walker acclaimed Grotius, critical though he was of him in many respects, because

[h]is teaching rests on a certain foundation, on the foundation of the grandest fact in history. There *is* a Law of Nature, which is not a fleeting day-dream.¹¹⁴

With Maine, Walker held that this natural law was identical to the law of God. It was also identical to the *jus gentium* of the classical Roman jurists.¹¹⁵ Walker recognised natural law to have played a significant role throughout history. And as the current international law was a result of a continuous progress, natural law had largely contributed to it.

This idea of progress also sheds some more light on Walker's understanding of natural law. To him, natural law, which was to be identified with divine law, was the innate moral force of Man. But as such, it was altogether less important to the articulation of international law than the gradual progress of man's understanding of human morality. For Walker, international law was to be found in the positive enactments of States. Throughout time, these had improved and progressed, driven on by an improving and progressing human understanding of morality. International law was positively instituted and determined by man's positive understanding of his innate morality.

After having summarised these notions on international law from his earlier books in his *History of the Law of Nations*, Walker then moved to the perusal of history. In the

¹¹⁴ Walker, *Science of International Law*, 107.

¹¹⁵ Maine, *International Law*, 34-5; Walker, *Science of International Law*, 108.

first third (30-61) of the chapter that went up to the 16th century (30-137), he discussed Antiquity's contribution to the law of nations. Before the Romans had conquered most of the Mediterranean and built their world empire, there was 'a fair field of International Law,' because there were different independent communities and theirs was the need to regulate their relations with one another. Walker judged the laws of war of the two oldest peoples he discussed, the Israelites and the ancient Greeks, as 'terribly severe' while adding that '[i]t is by the war practice that the state of international legal advancement of a people may be most easily gauged.'¹¹⁶ But he was also keen to point at the more 'advanced' elements in their law of nations, such as the inviolability of diplomats and treaties. All in all, Walker was dispassionate and seemed objective in his judgment on Israelite and Greek law, with the one exception that he attributed it to the 'Greek temper' that the rules were often trampled on. The notion of Greek emotionality as opposed to the Roman stoicism was a popular idea of the 19th century.¹¹⁷ But above all, both the laws of the Israelites and the Greeks were 'improving law[s].'¹¹⁸

Walker focused on the distinction the Greeks made between relations among themselves and those with the 'barbarian' nations. These were governed by a kind of 'universal law.'

It may be that on closer examination these laws reveal themselves rather as laws *universal*, rules of conduct observed by all men as men, than as laws

¹¹⁶ Walker, *History of the Law of Nations*, vol. 1, 41.

¹¹⁷ Whitman, *Legacy of Roman Law*, 67 and 82.

¹¹⁸ Walker, *History of the Law of Nations*, vol. 1, 43.

international, rules of conduct observed by men as state members towards the members of a political aggregate.¹¹⁹

Nevertheless, it did function as a kind of international law. In Walker's telling of the history of international law, this Greek 'universal law' served as a logical steppingstone towards the Roman the *jus gentium*. Walker correctly understood the Roman *jus gentium* to be a kind of private law applied to foreigners. Whether it stemmed from an abstraction from elements common in different municipal private law systems or was just the Roman version of equity was of little significance to Walker. Much more important was that, apart from being universal private law, *jus gentium* also included rules pertaining to international relations such as diplomatic immunity. Although *jus gentium* was the nearest thing the Roman had to modern international law, it was universal law applicable to men as men, as not as 'members of different bodies politic.'¹²⁰ Greek philosophy brought the Romans to associate their *jus gentium* with than natural law.

The Greek tutor explained this common observance, if the Roman pupil had not himself already conceived of some such ascription, by reference to a certain *Jus Naturale* or φυσικόν δίκαιον, a law which Nature herself had implanted in man, immutable and unchangeable, exact justice, self-evident to the individual exercising the right reason or the moral faculty with which he was endowed; but it

¹¹⁹ Walker, *History of the Law of Nations*, vol. 1, 42-3.

¹²⁰ Walker, *History of the Law of Nations*, vol. 1, 46.

was the *general recognition* of this law, its character as a rule acknowledged by all peoples who observed any law, which first caught the Roman eye.¹²¹

But Walker did not consider the Roman *jus gentium* to have been coterminous with natural law. He criticised Ulpian for having reduced the *jus gentium* to a mere law of nations by distinguishing it from *jus naturale* because the former only applied to men and the latter to men and beasts. Although the ultimate basis of *jus gentium* was *jus naturale*, it was ‘extracted primarily from actual practice.’¹²²

Apart from that, the Romans also had a *jus fetiale*. As a law of war, it was severe but the Romans tended to abide to the letter of it. Once Rome turned into a Mediterranean power and had regular intercourse with other powers around that sea, ‘a fair field existed for a true International Law.’ Polybios’s work clearly showed that, indeed, there now existed ‘a distinct society of civilised states of very considerable extent.’¹²³ Walker clearly understood this as an international context, which in some ways prefigured the modern European States system. Under the Late Republic, two kinds or systems of international law co-existed. On the one hand, there was the Roman *jus belli*; on the other hand, the ‘common laws of mankind’ to which the *jus gentium* gave expression.

As the Roman Empire grew and expanded, the ‘Roman national character’ worsened. Walker, in the trail of many modern historians, partly attributed this to Rome’s

¹²¹ Walker, *History of the Law of Nations*, vol. 1, 46-7. Also: ‘The most advanced Roman conception of Public Law was represented by that idea of Law Universal which was evolved out of the meeting of the old Roman *Jus Gentium* with the Greek *Jus Naturale*,’ vol. 1, 152.

¹²² D. 1.1.1.4; Walker, *History of the Law of Nations*, vol. 1, 152-3.

¹²³ Walker, *History of the Law of Nations*, vol. 1, 50-1.

exposure to the 'lax morality of the East.'¹²⁴ By the time of the Emperor Trajan (98-117), Rome reached its greatest expansion and was turned into a world empire. Therefore, no room was left for a true international law. What was left was universal law, a true world law.

In a World State International Law must find its vanishing point. And in point of fact, a science of International Law in the Roman Empire had been little else than a science of World Law enforced by the arbitrament of a single supreme ruler amongst subject tribes, cities and vassal kings.¹²⁵

To the relations with other states, mostly a matter of 'petty frontier wars,' the Roman kept applying their *jus belli* and *jus fetiale*. But a much more significant Roman heirloom was their *jus gentium*, which

(...) lived on within the Empire alike as the 'Law of all Mankind' and as Roman Equity, to be employed in the moulding of Grotius and his successors of the International Law of to-day. And not only so: the extension of the Roman citizenship throughout the limits of the Empire completed the familiarisation of the whole western world with the magnificent creation of the Roman Civil Law,

¹²⁴ Walker, *History of the Law of Nations*, vol. 1, 55-6.

¹²⁵ Walker, *History of the Law of Nations*, vol. 1, 58-9.

and secured the easy incorporation into modern International Law of decision after decision of Roman municipal origin.¹²⁶

In these few phrases, Walker thus first introduced the subject of the historical impact of Roman private law upon the medieval and early-modern law of nations. Through his interpretation of Roman history, Walker had explained the associations between private and international law through the *jus gentium*. He also referred to the definition of *jus gentium* by Isidorus, which had strengthened the bonds between the Roman *jus gentium*, and thereby Roman civil law, and the law of nations properly speaking.¹²⁷

In the codification of Justinian (527-565), the whole legal inheritance of the ancients was consummated and reached its peak: that of universality and the comity of all mankind.

The lines of the narrow International Circles traced by the exclusive hands of Greek, Jew and Egyptian have been effaced by the sceptre of the common ruler; Laws of the Hellenes and laws among kindred Tribes have alike sunk into insignificance before the Law of Mankind and the Roman Civil Law.¹²⁸

In the history of international law, which was a story of progress to Walker, the role of the Israelites, the Greeks and, above all, the Romans had been to overcome the

¹²⁶ Walker, *History of the Law of Nations*, vol. 1, 59.

¹²⁷ Walker, *History of the Law of Nations*, vol. 1, 153.

¹²⁸ Walker, *History of the Law of Nations*, vol. 1, 70.

differences and distinctions between different circles and formulate, or recognise, a universal law. This law was embodied in the Roman civil law and the Roman *jus gentium*.

Walker thus not only acknowledged the historical role the learned Roman law played in the formation and articulation of the law of nations during the Middle Ages, he also highly approved of it. Walker applauded the medieval students of Roman law to have corrected Ulpian's faulty understanding of *jus gentium* and for having recognised it as something distinct from natural law, namely universal law. They did not reduce it to natural law, and thus saved its connections to the amalgam of private law formed by the Roman civil law and the law of nations. Through the study and use of the Roman *jus gentium* – and through it, the Roman civil law from which it had become all but inseparable – the medieval jurists contributed to the progress of the law of nations.

The value attached by the mediaeval civilians to the letter of the written text would have effectually prevented their wide deviation from the lines of their predecessors, even had they been able to shake off entirely the influence of the Imperial theory. Their Public Law continued Law Universal; if they stumbled it was only fortuitously upon *Jus Gentium* as international law.¹²⁹

As Ward had done, Walker also mentioned that the medieval jurists often supported the Emperor's claims to world dominium. Although this position was unrealistic, Walker did not attack them for it. To him, it was just another historical fact.

¹²⁹ Walker, *History of the Law of Nations*, vol. 1, 153-4.

During the Middle Ages, the understanding of the different roles of natural law, law of nations and municipal law also found its way to canon law and to theology. The theologians and canon lawyers, just as the medieval Roman lawyers, learned to distinguish between law based on right reason and on common usage. *Jus gentium* was understood to be the product of both. This idea was further developed in the works of Fernando Vasquez and Francisco Suarez (1548-1617).

Defining the law of nations in, partly, positive terms and basing it upon usage, was, of course, instrumental in the development of the law of nations of the age of ‘territorial sovereignty’ and the emergence of an autonomous science thereof. But Walker was very expressive in underscoring that even in the 16th and 17th centuries the writers of international law did not shrink away from taking inspiration from ‘the existing storehouses of accepted and systematized legal principles.’¹³⁰ Walker found it perfectly natural for Mary Queen of Scots to have appealed to the Roman and civil law at the occasion of her trial in 1586, for Michel de L’Hôpital (c. 1505-1573), the French chancellor, to have appealed to Roman law over the return of Calais (1567) to the English, or for the English government to have done so in the case of the Bishop of Ross. No one less than Grotius had, after all, done the same.

The most cursory examination of the legal literature of the Age of the Reformation will suffice to prove that not only the foundation-stone, but the material for all the lower tiers, of the Grotian system was furnished by the labours

¹³⁰ Walker, *History of the Law of Nations*, vol. 1, 156.

of the canonist theologians of the Middle Ages and the classical jurists of the Roman Empire.¹³¹

Great though Grotius's contribution to the development of international law may be, his ideas were nothing 'but the product of long centuries of slow evolution.'¹³² The greatest part of this historical inheritance was that of the civilians. Their work had not stopped with the Middle Ages but been continued by the humanist jurists of the 16th century.

In these labours the foremost place was naturally taken by the Civilians. Irnerius, Bartolus, and Baldus were succeeded by a great galaxy of emulators, amongst whom in the age of Reformation Andrea Alciati, Francis Hotman, and Jacques Cujas shone preeminent.¹³³

Walker left it in no doubt that Grotius had acted wisely in building upon the work of his predecessors, and particularly, the civilians.

The very fact that that he employed old material was a primary condition of his success. His use of Roman Law furnishes a salient example. The Roman Law, like the Roman Faith, had resisted the shocks of the Middle Ages by the strength of an innate moral power. It had trickled through Barbarian Codes, and come in

¹³¹ Walker, *History of the Law of Nations*, vol. 1, 156-7.

¹³² Walker, *History of the Law of Nations*, vol. 1, 203.

¹³³ Walker, *History of the Law of Nations*, vol. 1, 203-4.

full stream through the Basilika and the Western commentators from the founts of Justinian. It had had its Professors in every great mediaeval University, and the common lawyer, who repudiated its sway, had borrowed on occasion largely of its dictates. What meaning was attached by Grotius to *Jus Gentium* in the mouths of Roman jurists it is of little more than curious interest to decide. Grotius, whilst he drew on all antiquity for precedents and proofs, had in the Roman Law an unfailing supply of principles; and he used it unsparingly. He did so with success because, made known by generations of mediaeval legal thinkers, the principles of Roman Civil Law yet spoke in the day of Grotius with the authority of the *lex scripta*. The obligatory force which men acknowledged in these principles as rules of a municipal legal system was accorded them when they were enunciated as laws of international conduct. The system of Grotius lived because it was grafted on a living tree.¹³⁴

6. Conclusion

Apart from John Hosack, who kept silent about Roman private law, all four authors covered the two sides of the debate on the impact of Roman law on international law.

None of them went so far as to deny the existence of a law of nations in ancient Roman times. All held to a sufficiently relative notion of the law of nations. But they all to some extent – Ward the least of all – weighed the ancients' laws and practices in terms

¹³⁴ Walker, *History of the Law of Nations*, vol. 1, 334-5.

of their contribution to the modern law of nations as a public law for the European system of sovereign states. This was, without a doubt, the superior system.

Their view on the continuity between the Roman laws and practices in regards to international relation and the modern law of nations were coloured by contemporary ideas on the progress of civilisation. For Ward and Wheaton, the direct contribution to the modern law of nations of the ancients was small because of the inhumanity of their law, in particularly regarding warfare. The Greeks and Romans stood at a much lower level of civilisation and this reflected upon their law of nations. To both, and particularly to Ward, this illustrated the role of Christianity in the process of civilisation.

Hosack from his side stressed the continuity between the ancients and the moderns, but he also did not escape the discourse of civilisation. The Greeks and Romans may have been lacking in humanity in several instances, but so were the moderns – with reference to the African slave trade. Walker held the most nuanced views. To him, the matter of continuity between the Roman and modern ‘public international law’ was much less important than that of the continuity between the Roman universal – private – law and modern international law.

Ward, Wheaton and Walker acknowledged the historical link through medieval scholarship between Roman private law – both the Roman civil law and the *jus gentium* – and modern international law. But it was nevertheless a contentious issue. Ward passionately denounced it as a flaw and saw the emancipation of the law of nations from its Roman influences as its true moment of birth. What Ward took offence at was Roman law’s traditional association with the concept of universal jurisprudence and with natural law. Ward rejected the possibility of a universal and immutable jurisprudence based on

natural reason. Roman law, which was just the municipal law of a vanquished people, could thus not be the embodiment thereof and held no claims to dictating the rules and laws of nations.

Wheaton also judged the emancipation of the law of nations from Roman private law in terms of progress, without, however, denouncing the historical reality of its impact on the law of nations in any way. Wheaton was no adept of universal jurisprudence either, but he lived in an age when few international lawyers did. He did not feel the need to denounce the historical role of Roman law, which for him had lost its automatic association with universal jurisprudence and with natural law. From the other side, approaching the rules and precepts ruling the behaviour of States to those ruling the behaviour of individuals held some appeal to Wheaton, who as a practitioner and diplomat had been involved in many cases where the law of nations was indeed applied to individuals. To argue this point, Wheaton was keen to refer to the writings of Bentham and particularly Heffner, who had broken through the divide between the State and the individual, between public and private law, without needing natural law to do so.

The continuity between the Roman and the modern jurisprudence was the very cornerstone of Walker's interpretation of the history of international law, for which he heavily borrowed from Henry Sumner Maine. Since the 17th century, international law might be public law regulating the relations between sovereign, territorial States, but these were ultimately subject to the impact of the same morals and nature as individual beings. Thus Walker inscribed the modern international law – at the top of the progress of humanity – into the long story that basically started with the Roman articulation, through right reason and actual practice, of a universal law. This applied both to men as men as

well as to men as members of a body politic. Walker did therefore consider the interaction between the Roman private and the international law as the great historical feature from before the 17th century. As opposed to Ward and Wheaton, he also recognised that Roman law's influence had not stopped with the emergence of an autonomous science of international law. Fortunately, the great father of international law, Grotius, had passed this inheritance on in his work. Walker clearly did not consider the modern international law to be a completely self-sufficient body of law. Finally, he also liked to stress the positive dimension in the Roman law of nations and played down its traditional association to natural law.

The early historians of international law all viewed the question of the Roman contribution to modern international law in terms of their understanding of that law. As was the case during the 20th century, and as Lauterpacht had claimed, this reflected the great debate between positivists and naturalists. Of course, each waged that debate in the terms of his day and age. None of these authors reduced international law to mere positive public international law, regulating relations between sovereign States. None of them was over-concerned with consensualism and voluntarism, at least not directly. More central to the debate was the other issue Lauterpacht had forwarded: the question whether international law was or should be self-sufficient and, as such, autonomous of the laws that regulated relations between individual men – of private law.