The History of International Law: As interpreted by Alexandrowicz

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CERTIFICATE

This is to certify that the dissertation entitled "***The History of International Law: As interpreted by Alexandrowicz***", submitted by Mr. Mohammed Ashraf Ali Khan is in partial fulfillment of requirement for the degree of Master of Philosophy of this University. It is his original work and may be placed before the examiners for evaluation. This dissertation has not been submitted for the award of any other degree of this University, or any other University.

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CHAPTER I: INTRODUCTION

§1: Background

One can describe international law as a body of rules that applies to all states regardless of their specific cultures, belief systems, and forms of political organization. It consists of a "common set of doctrines, principles and norms"[1], used by, and applicable to all states[2]. It is often suggested by Western scholars that international law has an European foundation. This is not surprising, as the majority of international law scholars are from the West. Further, the field of modern international law is linked by them with Christian civilization. The earlier roots of international relations existing in other parts of the world are easily overlooked. In other words, Western scholars neglect the ties that modern international law has with (ancient) Asian and African legal systems[3].

In the last few decades, the Western view of the origin and evolution of international law has come to be challenged. While a majority of those challenging Western historiography are of non-Western background, there are some Western scholars who share the same ideas. *Charles Henry Alexandrowicz* is among the most renowned writers in the latter category. Born in Austria in 1902, he was educated at the Scottish College in Vienna, and the Jagellonian University in Cracow (Poland). He obtained his Masters and Doctors degrees in Law, and practiced law from 1930 till 1939. Later, he was Chairman of the London Board of the National Economic Bank of Poland, and Financial Counselor at the Polish Embassy in London, from 1940 till 1946. He was then a part time lecturer in international law and relations at the University of London (1948 till 1950), and in 1951

1 Anghie, A., "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law", Harvard International Law Journal, 1999, 40 (pp. 1-80), p. 1.

2 See also Akehurst, M., A Modern Introduction to International Law (London: Routledge Publishers, 1993), p. 1.

3 As Alexandrowicz puts it: "The attention of international lawyers is more and more concentrating on legal aspects of contemporary problems of international relations and politics and on the operation of tribunals and quasi-tribunals and the case law produced by them. This, however, rarely saves them from being peripheral in their activities and rather distant from the centre of the great questions of juridical significance. One of the reasons of this deplorable state of affairs is the divorce of international law from its vital historical sources and the general disinterest in the study of its history", Alexandrowicz, C.H., "Some Problems of the History of the Law of Nations in Asia", Indian Yearbook of International Affairs (1963, pp. 3-11), at p. 3.

became a Research Professor of International and Constitutional Law at the University of Madras (India). He also became the editor of the *Indian Yearbook of International Affairs*. From 1954 to 1960 he lectured at Oxford and London Universities, and at the international faculty of comparative law in Luxemburg.

The fact that Alexandrowicz was one of the few Western professors to do extensive research in India, left a considerable influence on his work. And in turn he influenced the course of research in India. The need to revisit the work of Alexandrowicz arises from the fact that the history of international law has shaped the present system. And Alexandrowicz, above all, took the history of international law seriously. First, he decried the tendency "to consider contemporary and past reality as identical" absolving "the present-day student of international law (...) from going into complicated comparisons between past and present"[4]. Second, he sought to understand the integrated links between colonialism and the development of international law and their impact on contemporary international law. His work therefore allows us to understand the continuing divide between developed and developing countries. Even if Alexandrowicz has not written much on the events of the 20th century, his work provides an insightful framework in which to place these events, and understand both their background and effects. It is this framework that constitutes Alexandrowicz' important legacy to the world of international law.

§2: Objectives

This study therefore seeks to examine the history of international law as interpreted by and found in the works of Alexandrowicz. Needless to say, the history of international law is our 'main quest', in which Alexandrowicz' works form the guiding light, and the bridge between Western and Eastern analysis' of the history of international law. The questions the study seeks to *inter alia* address are:

4 Alexandrowicz, C.H., "Grotius and India", Indian Yearbook of International Affairs, 1954 (pp. 357-367), at p. 357.

Did the idea of one *Family of Nations*, and an universal *law of nations*, form the prevailing system of international relations before the 19th century? What was its content and did recognition of states play any role in this system?

In what sense did constitutivism (or recognition of a constitutive character), in contrast to the natural law idea of universality of nations, change international law, when it emerged together with positivism in the 19th century?

Does this difference in pre and post 19th century thinking have any effect on the present day application of international law to inter-state relations?

§3: Scope

This dissertation does not in any way pretend to give a full account of the history of international law. It does however offer an overview of the history of international law from the so called ancient times up until the present. But it devotes greater attention to the history of international law from the 15th to 19th centuries as they were central to the work of Alexandrowicz. As in Alexandrowicz' work, the overview will be limited to the developments in the Asian and African countries, and their interaction with the European countries.

Chapter II offers an overview of the history of international law from ancient times up until the 15th century. Chapter III examines the evolution of international law and trade relations, including the emerging universal Family of Nations, in the 16th, 17th and 18th centuries. Chapter IV looks at the 19th century theoretical positivism, practical colonialism and recognition, which undermine this Family. Chapter V looks at, albeit in a brief and sketchy manner, international law in the 20th century. Chapter VI will contain the conclusions of the study.

CHAPTER II: INTERNATIONAL LAW UP UNTIL THE 15TH CENTURY

§1: Introduction

The first contacts between different nations show us the earliest signs of international relations. Religious documents, whether in Asia or in Europe, contained rules on this interaction, and laid the foundation for more worldly legislation. Not only in ancient Greek and Rome, but also in ancient India and China. *Jus gentium*, the Roman idea for the law that was common to all men, became very important. It was closely linked to *jus naturale*, the natural law, and the definition of both terms still forms the basis for legal thinking and legal discussion in our times. The importance of this distinction lies in the fact that it recognized certain (legal) elements which were to be found among all cultures, and which *applied* to all cultures. In the Middle Ages Christianity and Islam, i.e. religion, played an even more important role. The crusades show that religion was a force to be reckoned with, but in between the periods of fighting, the cross-influencing of both sides took place as well. Something that had already occurred and continued since the days of the Roman Republic. Only after the dust of centuries of fighting had settled, and new thought had emerged with the Renaissance, did the 'modern times' start. The law of nations was stimulated, or perhaps even created, by international trade, which had started extending itself to the Asian continent. European states found that they had much in common with their Asian counterparts, and discovered that this was an attitude that was quite favorable to their national treasury.

§2: Ancient Times

One of the earliest recordings of international relations (the term 'international law' was not applicable yet), is a treaty concluded approximately in 3100 BC, "between Eannatum, the victorious ruler of the Mesopotamian city-state of Lagash, and the men of Umma, another Mesopotamian city-state"[1].

1 Nussbaum, A., A concise history of the Law of Nations (New York: The Macmillan Company, 1958), p. 1.

The treaty is preserved in a stone monument, and written in the Sumerian language. It deals with the concluded peace between the two communities, and prescribes rules for the maintenance of this peace. The next record of what might be called the earliest traces of international law as such, can be found few centuries later:

> From the second millennium B.C., texts of a goodly number of treaties have been preserved on clay tablets or on monuments. To most of them Egyptian or Hittite rulers were parties (the kingdom of the Hittites flourished in Asia Minor from the eighteenth to the twelfth century B.C.). Babylon and Assur are likewise in the fore. In addition to peace, the treaties are concerned with alliances and boundary lines[2].

One of the best preserved treaties dates from 1279 BC, and consisted of a pledge for reciprocal aid against enemies. It was concluded between the Egyptian ruler Rameses II and Hattusili II of the Hittites. It dealt mainly with internal enemies of the state which, if found in one country, would be extradited to the other country.

Further traces of international relations can also be found in the big religions. Judaism, Christianity and Islam all give examples. In the Old Testament (adhered by all three religions) one can find rules regarding (international) warfare. It is interesting to see how some authors interpret these sayings:

> To the history of international relations, rather than to the law, one must assign Isaiah's lapidary prophecy (2:4) that after the advent of the Messiah 'they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up sword against nation, neither shall they learn war any more.' Through the mediation of Christendom, this announcement has become a main root of modern pacifism, which in turn, as will be seen, has influenced the development of international law[3].

2 Nussbaum, note 1, p. 2.
3 Nussbaum, note 1, p. 3.

No doubt that the Old Testament influenced Christianity to this extent, yet to discard its influence on Islam and certainly on Judaism is a serious neglect. As we will see, this notion of Christianity being the "main root" for the development of international law, continues till far into our century. However, not only in Europe and the Middle-East was law taken on a broader plain. In ancient India and China there were already longstanding traditions of codifications with regard to international acts. In ancient India the Vedas and the Epics formed the first works of a faint political and legal character. The country was not a single centralised political entity; instead it was decentralised at every level. Or, as Herodotus (one of the earliest historians) wrote: "The Indians are the last of all nations on the Eastern side of the World (...). Indians are of many nations each speaking a different tongue"[4].

Alexandrowicz points out to us that the relations that took place between this country and other countries testified to:

> (...) clear-cut rules of warfare of a high humanitarian standard, in rules of neutrality, of treaty law, of customary embodied in religious charters, in exchange of embassies of a temporary or semi-permanent character, etc.[5].

Take, for instance, the so called Hindu *Code of Manu*, of circa 100 BC (though composed of older material), which gives detailed rules for warriors on how to act, and how not to act (a soldier, e.g., is not allowed to attack an enemy who is sleeping, or fleeing, or who is without arms, etc.). Other important works are the *Arthasastra*, by Kautilya, and Manu's *Dharmasastra*[6], which deal with inter-state rules in ancient India. The *Arthasastra* is supposed to have been written between 321 and 300 BC:

4 Nawaz, M.K., "The Law of Nations in Ancient India", Indian Yearbook of International Affairs, 1957 (pp. 172-188), at p. 174.
5 Alexandrowicz, C.H., "International Law in India", International & Comparative Law Quarterly, 1952 (pp. 289-300), at p. 19, quoting *inter alia* from International Law in Ancient India by S.V. Viswanatha, 1925.
6 Supposedly composed around 150 BC by Sumati Bhargava.

> It deals with the municipal legal system of the period and the rules relating to relations between Rulers. It differs from Dharmasastra in that it is completely divorced from rules of a spiritual nature[7].

The *Arthasastra*, according to Kautilya himself, is composed of works of 'ancient teachers'[8]. The *Dharmasastra*, as said, is more spiritual in nature. *Dharma* can be defined as "the innate quality of the soul", and according to some writers in that sense it can be seen as a form of the *law of nature*[9]. The threat with divine punishment was used to uphold the rule of law. According to Alexandrowicz the *Arthasastra*:

> is one of the most significant sources indicating the principles of inter-sovereign conduct in India and Further-India (...). (It) tried to circumscribe the anarchic freedom of the individual and to convert it into a discplined one. In the inter-State field it found its expression in the habit of discussing conflicting views and interests, arguing and negotiating 'to the limit' in order to preserve peace[10].

Furthermore, India had relations with ancient Greece and Rome, and Alexander the Great did not only leave his mark on India with his invasion in 327 BC, but took with him both material objects and cultural ideas, thus influencing European thought as well.
Within the Chinese domains, there was much intercourse between the different rulers, and the tradition of sending and receiving envoys was already established, and combined with elaborate ceremonials. The great philosopher Confucius had even drawn up a plan to come to a Grand Union of Chinese States, a conception that has been compared to the idea of establishing the League of Nations[11].

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7 Nawaz, note 4, p. 175.
8 Nawaz, note 4, p. 187, claims that the "Arthasastra apart from being a political treatise, contains a wealth of material on international law and that Kautilya was the first international jurist of India and indeed of Asia".
9 Nawaz, note 4, pp. 175-176, he refers to *inter alia* Prof. Nilakanta Sastri and his article "International Law and Relations in Ancient India", see the Indian Yearbook of International Affairs, vol. 1.
10 Alexandrowicz, C.H., "Kautilyan Principles and the Law of Nations", British Yearbook of International Law, 1965-66 (pp. 301-320), at p. 302.
11 Nussbaum, note 1, p. 4.

In ancient Greece (circa from the first millennium BC and onwards) one would expect more signs of international law. However, the Greeks basically considered everyone outside their realm to be natural slaves to their people, and thus the number of treaties is very limited. This obviously did not apply to the different Greek city-states, which could be enemies among each other, but would still be regarded as equals. And the number of treaties concluded between the different cities is therefore extensive. They ranged from peace treaties, to general alliances, to treaties of intermarriage and regarding the attendance of public games. A special oath was taken to maintain peaceful relations between the cities. The so called *Amphictyonic oath* contained the obligation "not to destroy a city of the league or cut off its water supply". Furthermore:

> among the lawful customs of the Hellenes (...), the observances to which Hellenes have a mutual claim, we find mentioned the prohibition of poisened arrows, the duty of releasing prisoners of war for ransom, and that of offering to submit disputes to arbitration before resorting to war[12].

Other internationally linked legal ideas, e.g., with regard to legalized foreigners and even arbitration, were common as well. However, the idea of a general justice that would govern all international relations was not there. The main thrust seems to have been feeling rather than reason, and that feeling stopped at the boundaries of Greece: "With other races, with barbarians, all Greeks are eternally at war"[13].

Yet, remarkably some authorative Western writers still see the fact that the Greeks did not want to interact on an equal level with other countries, as a sign of modern international law emerging, because:

> (w)e must not forget (...) that the Greeks never made the same distinction between law, religion, and morality which the modern world makes. The fact remains that the Greek States set an example to the future that independent States can live in a

12 Westlake, J., Chapters on the Principles of International Law (Cambridge: University Press, 1894), p. 17.

13 Westlake, note 12, p. 18, quoting the Macedonian envoys at the Aetolian council.

community in which their international relations are governed by certain rules and customs based on the common consent of the members of that community[14].

Ancient Rome is the basis for most of the civil law practised in continental Europe today. The famous *Corpus juris civilis*, drawn up by Emperor Justinianus (527-565 AD), is still praised, but has little to do with international law as such. The concluding of treaties was, as with almost all peoples discussed till now, a religious affair. Special ceremonies were held, and gods were invoked. For these and other relations with different countries, a group of priests, called the *fetiales*, applied a special form of sacrate law, the *jus fetiale*. The common 'unfriendly treaties' were mainly treaties of surrender, i.e. by the nations conquered by the Romans[15]. Under the imperial reign, the Roman empire resorted to several commercial treaties with neighbouring countries. Next to this, the Romans recognized the inviolability of envoys, and had special provisions for in-state foreigners. Roman law has influenced present day international law indirectly. With Roman law becoming the source for law under the later Holy Roman Empire, the 'old' ideas were transfered and used on the 'international' plane. The term 'law of nations' which is used often for 'international law'[16], is a direct translation of the Latin *jus gentium*. *Jus gentium* basically was the law that was common to all men. That is, if a dispute arose between two persons, one being a Roman, the other being from another country, the *praetor peregrinus*[17] had to apply a common law. "It was a law embodying the elements which were proved, by comparing the laws of different nations, to have the approval of men to whatever nations they belonged"[18]. To give an example:

14 Oppenheim, L., edited by H. Lauterpacht, International Law – A Treatise (London: Longmans, Green & Co. Ltd., 1966), p. 75.
15 The three general kinds of *friendly* treaties were a) of friendship (*amicitia*), b) of hospitality (*hospitium*) and c) of alliance (*foedus*).
16 The law of nations was the law that governed the so called Family of Nations. Though 'governing' is perhaps not the right word, as it was merely construed as a (divine) binding of the nations of the world. It is here that the law of nations differs with the contemporary term 'international law', which is a law *between* nations, and is supposed to actually govern the inter-state relations. Yet, the two terms are often used in the same context and not much difference can be discovered, other than this technical difference. Only at the in the beginning of the 20th century does 'international law' as a term replace the outdated 'law of nations'. But it is only justified to notice that the two are closely linked and more often used without preference.
17 The *praetor* was a special judge who had to do justice in cases where foreigners were concerned.
18 Westlake, note 12, p. 20.

> If any one (...) assaults an ambassador of the enemy, it is considered to be a breach of the *jus gentium* because ambassadors are held to be sacred. And therefore, in a case where ambassadors were at Rome at the time when war was declared against their nation, it was determined that they remained free in accordance with the *jus gentium*[19].

Jus civile, the 'old' Roman set of rules, was set apart from this, and considered as the classical Roman law dealing with, for instance, the changing of property[20]. Yet another effect of Roman law is found in the ongoing discussion with regards to *jus naturale*, (natural law) or law emanating from a higher source. This idea emanated among the Greeks (to be more precise among the group of philosophers called the Stoa), and appeared in Roman law as well. Some of the classic Roman writers suggested that *jus gentium* and *jus naturale* were the same. Examples can be found among writers like Gaius. The latter describes *jus gentium* as "what natural reason establishes among all men"[21], a declaration that was later accepted by Justinianus. Though in general some distinction was still made between the two forms of law, and *jus naturale* was 'merely' considered to be what nature teaches the animals. This distinction might not have been of huge importance to the Romans, it did form the basis for later discussions among learned writers in approximitely the 13th century and onwards, and even nowadays one can find articles full of almost metaphysical discussions. We will see that the different ideas on what exactly consituted (natural) law, influenced the course of history to rather large extents.

Continuing with our recollection of the Roman influence, we can see that it was not until the early 7th century AD, that different ideas on the content of *jus gentium* were voiced. Writing at a time that new kingdoms were emerging on the remains of the grand old Roman empire, Isidore of Seville describes *jus gentium* as:

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19 Westlake, note 12, p. 18, quoting Pomponius in Dig. 50, 7, 17.
20 The *jus civile* makes a distinction in three different kinds of transfer, i.e. *mancipatio, traditio brevi manu* and *traditio longa manu*. These forms can still be found in most continental legal systems, and differ from each other with regards to the moment of actual transfer of the property-right.
21 Westlake, note 12, p. 22, quoting from Gaius 2, 65; 1, 1 and referring to the Justinian Inst. 1, 2, 1.

> (...) the occupation of territory, the building and fortification of cities and castles, wars, captivities, enslavements, the recovery of rights by postliminy, treaties of peace and others, truces, the scruple which protects ambassadors from violence, prohibitions of marriage between person of different nationality[22].

With this he is clearly catering to the needs of the new rulers, who needed a (legal) reason for their actions in those turbulent times. The content of the law of nations changed rapidly, a matter we will discuss presently.

At this juncture, it is interesting to see what some modern writers, in this case Oppenheim, have to say on these early signs of international law:

> (...) And though this legal treatment [i.e. of the Romans] can in no way be compared to modern International Law, yet it constituted a contribution to the Law of Nations of the future, in so far as its example furnished many arguments to those to whose efforts we owe the very existence of our modern Law of Nations[23].

Strakosch argues the same:

> (T)he true polarity of the problem whose solution natural law sought and seeks arises from the fundamental personalism of the Christian doctrine according to which God, through His death on the Cross redeemed, not man in general, nor Jew or Gentile, but a great number of human persons (...). It was this Christian challenge to the monism of the pagan state which was regarded by the Romans as a principle destructive of civic order (...). (Therefore) (...) it is still true to say that natural law belongs to the Christian, perhaps even to the modern period of Western civilisation[24].

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22 Westlake, note 12, p. 25.
23 Oppenheim, note 14, p. 77.
24 Strakosch, H., "Natural Law: An Aspect of its Function in History", Indian Yearbook of International Affairs, 1960-61, vol. 9-10 (pp. 3-21), at p. 7.

The argument being, once again, that even though modern international law had not been born yet, the basic characteristics were supposed to be there. But only in the practice of the selected few viz., the Romans and the Greeks, and basically the Christians. Other authors do not agree with Oppenheim:

> (I)n no other part of the ancient world were the relations of man and man, and of man and the state, so fair and humane [than in ancient India] (...). No other ancient law-giver proclaimed such noble ideals of fair play in battle as did Manu. In all her history of warfare Hindu India has few tales to tell of cities put to the sword or of the massacre of non-combatants. The ghastly sadism of the Kings of Assyria, who flayed their captive alive, is completely without parallel in ancient India. There was sporadic cruelty and oppression no doubt, but in comparison with conditions in other cultures, it was mild. To us the most striking feature of ancient Indian civilization is its humanity[25].

Or, as Alexandrowicz simply points out:

> (T)he East Indian sovereigns (...) applied and generated in their mutual transactions legal principles and usages which ultimately became part and parcel of our generally accepted code of inter-State conduct (...). It may also be noted that some of the Kautilyan principles had an indirect impact on a number of European writers in the eighteenth century (...). Kautilya had centuries earlier [than similar practices occurring in Europe] systematically written down the tenets of Hindu government and the customs and usages of inter-State conduct[26].

Using the definition that international law is a "set of doctrines" that "governs states regardless of their specific cultures, belief systems, and political organizations", we can see that in actuality international law as such had not come into existence yet. Some

25 Basham, A.L., The Wonder That Was India (1981), quoted in Penna, L.R., "Written and customary provisions relating to the conduct of hostilities and treatment of victims of armed conflicts in ancient India", Extract from the International Review of the Red Cross, July-August 1989, no. 271 (pp. 333-348), at p. 333.

mentioned writers claim that the roots of modern international law could only be found within the two major Western societies. Others, Alexandrowicz as *primus inter pares*, show in great detail that some elements of what could be called international relations, or maybe even international law, were visible in ancient Asian societies as well. Be that as it may, in any case there was the idea of a certain divinity of law, i.e. basically divinity of every culture's own law. This played a major role in distinguishing between what could be agreed upon with foreign cultures and what not[27]. The idea of a single law of *all* nations in that case was kind of difficult. If you consider your own culture to be superior to others, interaction can obviously never take place on a footing of equality. Yet the foundation had been laid by the way the different ancient societies dealt with their internal situations, and their connections with other societies. As the Romans and other expanding societies came across many different peoples, some who were to be conquered, some who were not, international relations came more into the picture. We can see that, interestingly enough, it was religion (the main reason for the divinity of the national law) that actually was influenced by these connections. The Roman soldiers stationed in Asia Minor were greatly influenced by Mithraism, a 'form' of Zoroastrianism, and brought their ideas back home. This happened to an even greater extent with Christianity. Even though the resistance of the political force of the Roman empire was great, finally around 310 AD Constantine I made it the official state religion. This was not a pure switch. Constantine was not so much influenced by a religious zeal, rather than by practicality. As we have seen, and will see, throughout history the new set of (religious or more contemporary legal) rules can only be laid on top of the previous one(s). Constantine adopted Christianity to form a link between the Roman Empire and the other cultures in Asia Minor, yet reshaped it after his own image. Naming himself the Sun Emperor, he took upon himself the role of the Messiah, a powerfigure similar to Apollo, Zeus or Mithras. It clearly shows that religion (though the initial inhibitor)

26 Alexandrowicz, note 10, at pp. 301, 319-320.

27 Or as Wright, Q., The Role of International Law in the Elimination of War (Manchester: University Press, 1961), pp. 18-19, puts it: "In none of these periods was international law developed into a coherent system. It existed in general precepts of morality or religion, and in isolated customs and conventions imperfectly distinguishing foreign policies from legal rights, moral duties from legal obligations, or rules of order from principles of justice".

actually became one of the most important ways for forming international relations. A beginning was made.

§3: The Middle Ages: Christian Nations

Some few hundred years later Europe entered the Middle Ages. The ancient empires of the Romans and the Greeks had crumbled into smaller and diversified realms, and the upcoming of the Islam, the 'Moorish' invasions and the immensely powerful empires in the East (compare India and China) led to naming the time period the Dark Ages (obviously from the European point of view). Religion was a major power in the world; in Europe the Pope formed the spiritual head, while the worldly leader was the Holy Roman Emperor. Even though numerous 'battles' occurred between the two, in their struggle for power (compare the Avignon exile of the Pope). The bottom line for both the emperor and the Pope was, however, that Christian Europe stood against the 'barbaric' or Muslim East, which had already set foot in the south of Spain[28]. The crusades[29] for the Holy Land of Palestine formed the intense anti-climax of these meetings between East and West. No wonder then, that "(r)egarding warfare, medieval history is replete with incredible excesses of savagery and revenge committed during and after battle[30].

This extreme form of religious combat continued for several centuries, the first crusade reaching its 'height' as early as 1099, while the last desperate calls for Christians to battle the Muslims were made in the 14th century. These few centuries did not show a continuing state of warfare. Battles were fought time and again, but the times of religious fervor were followed by decades of peace and co-existence. The distances being very vast, many Christians entering the crusades actually settled in Palestine. What started as military orders like the Knights Templar and the Order of St. John, slowly evolved into

28 Other voices could also be heard. Dante, in his *De Monarchia* argued for a single world rule, applying to all peoples. Yet his arguments were made in vain. Instead, contemporary ideas of a Christian commonwealth were more popular.

29 Based on the principle of "Just War" as adopted by St. Augustine in the 4th century AD, when he was alarmed by the attacks on the, then already Christian, Roman Empire. "This theory was supported by Isidore of Seville (633), Thomas Aquinas (1265), and other medieval theologians, and is still the official doctrine of the Catholic Church", Wright, note 27, p. 19.

30 Nussbaum, note 1, p. 26.

mediums between the East and the West. History repeated itself, though this time Europe was not influenced by Christianity, but by Islam (and vice versa). The Muslims did not intend to wait for the century long process of integration, and choose the way of the sword. Europe held on to its own young religion, but decided to follow the Old Testament instead of the New: 'An eye for eye, a tooth for a tooth'. Religion was still the focus point:

> The medieval climate of the Western world was not favorable to the development of international law. This is obvious with respect to the Dark Ages, which, following the collapse of the Roman Empire, knew little of law at all. The reconstruction of law and, for that matter, of civilization was mainly the work of the Church. In the course of centuries the Church developed a comprehensive legal system, the canon law[31].

This was also called the *Corpus juris cannonici*. However, canon law was not intended to be international (or even national), but *supra*national, as a divine form of law. Most of this law was linked with the topics of war and peace, whether it dealt with the internal European feuds, or the wars against the 'infidels'. 'Real' international law was not yet that common, though some examples were there. For instance, "the compact of Joppa (1229) between Emperor Frederick II and the Sultan El Kamil during the Fifth Crusade"[32].

All the sub forms of government rule under the Holy Roman Empire (i.e. the state cities and the different forms of municipalities) engaged in their own bi- and multilateral relationships. And, as the power of the Empire diminished, these relationships began to include agreements with the local rulers inside the Empire, and even outside Europe itself. A new type of envoy appeared as a result of all this, the permanent ambassador. A product of the commerce mentality of mainly the Italian city-states, the ambassador started of as a mediator between the different cities. The emphasis on commerce became

31 Nussbaum, note 1, p. 17.
32 Nussbaum, note 1, p. 23.

even more clear with the increasing importance of commercial and maritime law in the Middle Ages.

> The main incentive was, of course, the need for an exchange of goods. A secondary motive was a desire of the territorial rulers to improve their finances by import duties and other exactions from foreign merchants. All this could be attained only where business was made attractive enough to foreigners[33].

As a result, unilateral declarations and regulations, and the rudimentary forms of bilateral declarations emerged. The city of Byzantium (Constantinople), being the middle between the large empires in the West and in the East, especially contributed to the evolving of international law in the fields of "elaboration and refinement of diplomacy and treaty practice"[34]. In this way it formed a model for the countries on both sides, and often worked as an intermediary between the two 'blocks' and their respective cultures and religions. Not suprisingly, the concept of *jus gentium* was explored once again by learned writers, especially in the Renaissance (14th century) and onwards and they started to adopt a clearer distinction with *jus naturale*:

> On the one hand the enlightenments of the conscience by Christianity, on the other hand the experience of centuries of practical barbarism, had made it evident to the best thinkers that general consent tolerated and even approved of much which could not be fairly charged on nature in any sense in which that term implied reason[35].

Thus it became a way of adapting the ancient concept to the new needs created by the Christian social and political order. Natural law, *jus naturale*, came to be seen as the necessary rules of law, private or public. This was basically the result of the work of René Descartes (1619). "Cartesianism seeks reality not in things but in the internal necessity of thought (...). A 'good' law in Cartesian thinking is a law which can be

33 Nussbaum, note 1, p. 27.
34 Nussbaum, note 1, p. 46.
35 Westlake, note 12, pp. 25-26.

logically deduced from a first principle; its 'goodness' is immanent and the functional aspect of law is denied"[36].

The law of nations, *jus gentium*, consisted of all those rules of which the necessity could *not* be seen (as opposed to natural law). It was the spirit of the Renaissance, the hailing of intellectualism, that dictated that the rules of which the logic could be understood, was the one and only true natural law. This way, "(t)he theory of natural law had created the ideological basis for the rise of the modern state"[37].

§4: Modern Times – The end of the 15th Century

According to a lot of writers, the so called 'modern times' started with the discovery of America in 1492. Together with the Reformation, these are seen as major events of changing times. Alexandrowicz argues:

> Forty years after Colombus had landed on American soil, Franciscus de Vitoria[38] defied offical Spanish policy and pronounced the principle of extension of the law between nations to the newly discovered continent. Spanish theologians and lawyers introduced the Central American Communities indirectly into the orbit of the existing Family of Nations and made at the same time an attempt to raise the law *between* nations to the level of a more organic law *of* nations[39].

The even faster emerging field of international law was, however, mainly because of the rise of countries like Spain, England and France. The feudal law within those countries disappeared, as did the independent position of the city states, merging and forming new states. The anarchy of feudalism was overcome by efforts of the kings of England and France, to convert their positions into effective forms of government[40].

36 Strakosch, note 24, at p. 17.
37 Strakosch, note 24 at p. 10.
38 See further for more details on Vitoria's thought.
39 Alexandrowicz, C.H., "Grotius and India", Indian Yearbook of International Affairs, (1954, pp. 357-367), at p. 358.
40 Strakosch, note 24, at p. 8.

With the beginning of the 16th century, international law became an important instrument in the hands of these rulers, as it did for the rulers in the East. The crusade-ideas were outdated, and trade interests emerged instead, most of the time requiring a more subtle approach than blunt warfare.

Alexandrowicz clarifies that it was mainly the instrument of *capitulations* that enabled the Europeans to settle themselves abroad, as a natural effect of the trading. A capitulation is an instrument through which a ruler allows foreign merchants to pursue their own way of living and governance in a settlement in the ruler's country, e.g., in the East Indies. The applicable law is the law of the settlement and the jurisdiction of the head of the settlement:

> (T)he fact that the foreign community was not subject to territorial law was considered as evidence of superior civilisation and the fact that the receiving country renounced a measure of jurisdiction over foreigners was not considered as evidence of inferior civilisation. It is thanks to this ancient tradition in Asia that Europeans were able to embark since the 16th century on their commercial career in the East Indies where they received concessions for the establishment of settlements and the privilege to govern themselves by their own law. In the course of time these concessions and privileges were embodied in bilateral treaties (capitulations) and became irrevocable thus affecting the sovereignty of the territorial Ruler[41].

But for now, the idea of the *Family of Nations* was born, though it was not till the later centuries that it evolved into a more defined and applied legal notion. It found its basis in the previously discussed, as the practices of the multitude of small and diverse countries that had established themselves independent of one another. Countries from the East and the West recognized each other's potential and strength, but the divinity of the own (legal) system still made interaction on an equal level quite difficult. Only with the slow adoption of elements foreign to its own religion did acceptance of other countries come

41 Alexandrowicz, C.H., European-African Confrontation: Study in Treaty Making (Leiden: A.W. Sijthoff, 1973), p. 83.

into existence. Religion thus played a very important role in bringing nations from the different continents together, whether it was indirectly (through warfare, the biggest example obviously being the crusades) or directly (through the acceptance of a 'foreign' religion, as we saw was what happened with the Roman empire). Now that the equal level of mutual international relations was created, religion lost much of its appeal, and influence for that matter.

§5: Summary

To summarize, seven important factors helped international law *in Europe* (!) to reach the stage where the European countries started interacting among each other, and thus forming the beginning of a Family of Nations:

1) The distinction between Civilians and Canonists is the first factor. The Civilians were basically a group of learned writers who stated that Roman Law (as put down in the mentioned *Corpus juris civilis* and the Comments and Digests after that) was the only law to be applied in the 'civilized' world, through the power of the Holy Roman Emperor, who was the rightful heir of the old Roman empire. The Canonists looked at legal questions from a moral and ecclesiastical point of view.
2) Several collections of maritime law emerged, and were closely linked with the upcoming international trade. The arising questions with regards to the use of the high seas, and the maritime laws, led to discussions which were important for the whole of international law.
3) The existence of the trading cities (e.g., the Hanseatic league), and the measures they took to protect their trade and citizens, boosted trade and international relations.
4) A fourth important factor is the increasing use of diplomats, who now formed permanent legations. The result was that countries could discuss their common interests without too much of time-delay, and with less misunderstandings.
5) The fact that a lot of (big) countries kept so called 'standing armies' ready at all times, led to an increase in more specialized practices and rules of warfare.
6) The already mentioned Renaissance revived ancient Greek thought, and applied it in a new context. The principles of Christianity were combined with this, and were

thought to be applicable on both the national and international field. The Reformation led to a division in Christianity, between Protestants and Catholics, and diminished the power of the Pope.

7) The final factor was the appearance of different peace schemes, starting already in the 14th century. The majority was highly utopian, but still left considerable influence on the rulers of most European countries.

These factors are brought forward by Oppenheim[42], focussing on the developments in Europe, but leaving the traditions and developments in the East aside. However, in Asia and Africa similar factors occurred:

1) The empires in the East were not only influenced by Roman law themselves, but (as discussed above) influenced the Romans on their turn, socio-politically and legally.
2) As Alexandrowicz points out[43] on numerous occasions, most of the maritime law collections were either of Eastern origin, or greatly influenced by practices that already existed in the centuries before they were applied by the Western countries[44].
3) A similar argument can be applied to the 'trading cities', which existed in, e.g., India as well. We can simply point to the mentioned fact that India at the time being discussed was divided into numerous little decentralised units, each with their own trade systems.
4) The custom of sending of ambassadors, or emissaries, was not unknown to countries like India and China either, even though the content of the term might have been different. For instance, to the Chinese emperor (who had a divine status) none could be equal, definitely not foreign emissaries, but the sending and receiving of envoys was still common practice, even within the empire itself.
5) This was linked to the large amount of sovereignty that smaller territorial units could have, and therefore it was not surprising either, that these cities kept armies of their own. We have referred to the Hindu Code of Manu of 100 BC (!), in which detailed

42 Oppenheim, note 14; pp. 79-82.
43 See the next Chapter.
44 Though, as we will see, a lot of 20th century writers do not even consider this: "It would doubtless be too much to call these rules regional international law, so little had they the character of law at all", Fenwick, C.G., International Law (Bombay: Vakils, Feffer and Simons Private Ltd., 1967), p. 5.

rules of warfare practices were laid down. Or, as Alexandrowicz quotes the 18th century writer Justi:

> Nothing is more peculiar than the way in which Asian nations wage war among each other. Their armies tend to avoid each other and both sides aim primarily at making prisoners of war and collecting booty[45].

6) Similar practices that took place in Europe with the Renaissance, such as the usage of ancient (legal) texts, took place in the Eastern empires as well. In India, the Vedas, Kautilya's work and even old Buddhist texts and edicts were often referred to and used by later scholars.
7) In a short note, it can be said that peace schemes were not limited to being drafted by Western scholars. Again referring to the earlier said, the great Confucius' idea for a Grand Union of Chinese States, was formed much before European writers could even cope with such an idea.

We can therefore state that these foundations for the *law of nations* were the product of academic writings and state practices on either side of the Bosporus. This was not a separate development, but instead the product of numerous occassions and situations of cross-influencing, paving the way for the 16th, 17th and 18th century, where international relations were taken onto a higher level. We will now examine how the law of nations evolved in the next few centuries, both in practice and in theory.

45 Alexandrowicz, C.H., "A Treatise by J.H.G. Justi on Asian Government", Indian Yearbook of International Affairs (1960-61, pp. 136-142), at p. 141. Justi (ibid.) further says that "Dieses ist eine Art eines Vertrags, welchen man ohne Verletzung des Völkerrechts nicht brechen kann", in other words, the mode of warfare is based on the existing custom, being part of law of nations.

CHAPTER III: INTERNATIONAL LAW IN THE 16TH, 17TH AND 18TH CENTURY

§1: Introduction

In this Chapter we will examine the reasons for the Europeans going to, and eventually settling themselves in, the Asian and African territories. The Peace of Westphalia created unity among the European countries, and brought new ideas. Trade played an important role. We will take a closer look at the trading companies, who forged steady bonds with the local rulers. Equality, and even (subtle) forms of submission by the Europeans to the Chinese and Indian rulers could be noticed. Yet, the way in which these local rulers treated the Europeans was one of the reasons for a slow but firm change in attitude. We will look at the rationalization of legal thinking, and see the first signs of the emergence of positivism. A short paragraph examines the different opinions of learned writers on *jus gentium* and *jus naturale*; and the differences between Grotius, positivist and naturalists. The concept of recognition became linked to positivism, and combined they led to major changes in the Family of Nations. A similar situation occurred in Africa. The European countries started to fight among themselves mainly via discriminatory clauses, but were united in setting themselves apart from the rest of the world, and creating a new world order.

§2: International Trade between East and West: Trading Companies

International trade started working on a global scale. Merchants and (government) corporations from the European continent explored the strange lands in the East, established trade routes, established embassies and formed other relations with the Eastern empires. With these travellers came their law(systems), which collided with the laws of the other rulers, more than it had done in the previous centuries. Now a greater degree of money and power was at stake.

In the beginning, that is before the trading companies started to coordinate these money and power flows, Europeans had started to make use of the services of other people, specialized in trading overseas. Europe needed East Indian spices and other Asian goods, and therefore co-operated with the Islamic traders, who held the monopoly of trade and navigation between the Indonesian Islands, India and the Red Sea. As seen in the previous Chapter, the relations between the Christian and Muslim states was in a continuing state of hostility, flaring up every now and then. Any transaction with the 'infidels' required special papal permission. It was the city state of Venice that already in 1345 acquired the first permission to maintain relations with Islamic trade centres. Only when the Portuguese destroyed this monopoly, trade became open for other European nations as well. And they gladly made use of the opportunity. Where nowadays international trade seems to be the major hurdle for uniting Europe/USA and Asia, Alexandrowicz describes the almost harmonic situation that:

> no legal or theological theory was able to stand in the way of the natural expansion of European-Asian relations, mainly dicated by the increasing demand for Asian merchandise in Europe[1].

Most of the trade relations were guided through the work of the *trading companies*:

> Though these companies were separate legal entities they were endowed by their sovereigns with authority to exercise rights of external sovereignty to the effect that their transactions with other independent powers created rights and duties in the law of nations[2].

Their governments were held responsible for their actions, and if a wrong would be done against the company, its government was judged to be justified in acting on behalf of the company. Some of the companies may have started as private companies, but in general

1 Alexandrowicz, C.H., "Some Problems of the History of the Law of Nations in Asia", Indian Yearbook of International Law, (1963, pp. 3-11) at p. 6.
2 Alexandrowicz, C.H., "Freitas versus Grotius", British Yearbook of International Law, 1959 (pp. 162-182), at p. 163.

all of them sooner or later were government controlled in one sense or another. Thus, for example;

> whatever the [British] East India Company held it held mediately as an organ of the state, was implied by parliamentary interference with the company from its commencement in 1773, and was expressed in the subsequent renewals of the company's charter[3].

In this way, the trading companies formed the first 'stable' and continuing contacts between European and Asian powers. However, they were not only endowed with rights from their respective rulers. Additionally, they acted on powers delegated to them by local rulers:

> Thus the English East India Company received in 1765 the diwanee of Bengal, Bihar and Orissa which gave it the position of a vassal of the Mogul Empire, and the Governor of the French East India Company in Pondicherry was for some time a Grand Officer of the Empire[4].

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The Company was a 'zamindar' of the Mughal empire, and they could conclude treaties on their own, with the local chiefs. It should be noted that even though the Company acquired rights of its own, they were acquired under obligation, basically "(...) British sovereignty was under Indian sovereignty which was the original one"[5]. It was not till 1813 that the British formally asserted *their* sovereignty *over* India by an Act of Parliament. This was mainly the formalization of a fact, as the Company had already been the legal sovereign of India for some time. However, that situation was confined to territories *not* being territories of the Emperor himself. As Kemal puts it:

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3 Westlake, J., Chapters on the Principles of International Law (Cambridge: University Press, 1894), p. 193.

4 Alexandrowicz, C.H., European-African Confrontation: Study in Treaty Making (Leiden: A.W. Sijthoff, 1973), p. 42.

5 Kemal, R., "The Evolution of British Sovereignty in India", Indian Yearbook of International Affairs, 1957, vol. VII (pp. 143-171), at p. 154.

> (A) conscious attempt was made to wipe out the Emperor's importance, but as the British were alive to the ghost of reverence that existed in the immense shadows of public opinion, active and hostile to the British, it was recommended that the Emperor be allowed to sink gradually into insignificance. The terminology of addressing the Emperor was modified so as to recognise superiority, not vassalage or allegiance[6].

The position of 'legal sovereign', as that of the Company can be described, was therefore one that was based on treaties, regardless of their form. Because:

> India was neither a colony whose occupation by British subjects would have implied the extension of British sovereignty, nor was it the area of a conquest to make India entirely dependent on the prerogative of the Sovereign of Great Britain[7].

But, before the British ruled India, as many other colonial powers did in their respective colonies, the situation was rather different. In the beginning the relations between the Eastern countries and the newcomers into their territories were of a more mutual kind.

> It is (...) during this period that the law of nations was in the process of gradually developing into a self-contained legal discipline (...). The European powers, in their contacts with East Indian Sovereigns, often discovered a similarity of ideas with them as far as principles of inter-State relations were concerned (...). The details of mutually agreed principles of inter-State dealings can be ascertained from the texts of treaties and documents relating to diplomatic negotiations which took place before and after their conclusion[8].

Once the Europeans discovered these similarities, it was not difficult (after the initial troubles were overcome) to initiate relations. And it was on an equal level that these relations took place:

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6 Kemal, note 5, p. 159.
7 Kemal, note 5, pp. 160-161.
8 Alexandrowicz, C.H.., Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967), pp. 1-2.

> European Vice-Roys and Governors in the East Indies had to set up court to be able to maintain proper relations with local courts such as those of the Mogul Emperors and other Indian Sovereigns, the Kings of Siam, Persia, Ceylon, Burma and the Indonesian Rulers. This was bound to increase the status of the [East India Trading] Companies which in fact became State-like entities, an anticipation of the development of international law which was to follow in the 20th century when States ceased to be the only legal persons in international law[9].

Some differences could already be noticed in the way this mutual trade commenced: Alexandrowicz, in his article regarding the political writer Justi, points to the distinction in trade forms that Justi makes. On the one hand, there is *'Passivhandel'*, if a country's trade is mainly based on the actions of foreign merchants who carry on their business in that country. On the other hand, one can find *'Activhandel'*, when foreign merchants do not engage in trade with foreigners in their own country, but instead their business is trading abroad. Alexandrowicz points to the fact that in so far as the Asian countries engaged in *Activhandel* they:

> enjoyed generally a record of carrying out their activities in other Asian countries in accordance with the principles of the law of nations. Their merchants were known to engage in foreign trade without the extension of their dealings from commerce to politics. On the other hand, European traders who came to Asian countries, tended to convert their commercial activities into more ambitious operations of a political nature[10].

Whereas the Asian traders usually observed the 'ancient customs' and allowed the settlements of foreign traders to govern themselves, with their own set of rules. And a similar attitude was taken with the European newcomers. It was the Europeans who

9 Alexandrowicz, note 4, p. 42.
10 Alexandrowicz, C.H., "A Treatise by J.H.G. Justi on Asian Government", in International Law and World Order, Weston, H.B., Falk, R.A., D'Amato, A.A. (St. Paul, Minnesota: West Publishing Co., 1980), pp. 136-142, at p. 137.

introduced a new dimension, as still can be said about international law today. "Just as in national law, political considerations can also determine much of the content of international law"[11].

§3: The Peace of Westphalia: Balance of Power

Some writers place the beginning of these mutual relations, and thus the beginning of modern international law, on a more fixed date, namely the Peace of Westphalia in 1648, when the 30-years lasting war between most of the European countries ended. The Thirty Years' War was basically a religious conflict between Protestants and Catholics. The Peace brought an end to it, by:

> establishing the equality between Protestant and Catholic states and by providing some safeguards for religious minorites (...). The principle of religious equality was placed as part of the peace under an international guarantee[12].

Tolerance for religious minorities, that is to say mainly the Protestants within Christianism, was accepted. On the political field the Peace had effects as well:

> In short, the Peace of Westphalia testified to the rapid decline of the Church (...) and to the de facto disintegration of the [Holy Roman] Empire; by the same token it recorded the birth of an international system based on a plurality of independent States, recognizing no superior authority over them[13].

It even affected international relations. As the Christian nations now were united under the banner of Christianity, and no longer fighting among themselves, an united stand could be taken:

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11 Dixon, M. & McCorquodale, R., Cases & Materials on International Law (London: Blackstone Press Limited, 1995), p. 5.
12 Gross, L. (ed.), International Law in the 20th Century (New York: Appleton-Century-Crofts, 1969), p. 27.

> Characteristically, important publications on the history of international law have taken the Peace of Westphalia as the starting point (...). (T)he Peace is a landmark in the development of international law[14].

Or even more so:

> In this order of ideas it has been affirmed that the Peace of Westphalia was the starting point for the development of modern international law. It has also been contended that it constituted 'the first faint beginning of an international constitutional law' and the first instance 'of deliberate enactment of common regulations by concerted action'[15].

It formed the basis for a new Family of Nations:

> To it is traditionally attributed the importance and dignity of being the first of several attempts to establish something resembling world unity on the basis of states exercising untrammeled sovereignty over certain territories and subordinated to no earthly authority[16].

It physically consisted of two documents (because of the signing taking place in both Münster and Osnabrück at the same time) declaring peace. It brought an international status for a lot of small state-like entities within the Holy Roman Empire. Additionally, the Peace provided an opportunity for European countries to develop themselves further. England became a large sea power, France became a cultural power as well, and The Netherlands had to be recognized by their former arch-enemy Spain, as an independent country. In fact, "(i)n international law, public as well as private, the Dutch took the lead all over the world"[17]. This way, it is contended, an international balance of power was created (both within the Holy Roman empire and between the empire and the

13 Cassese, A., International Law in a Divided World (Oxford: Clarendon Press, 1986), p. 37.
14 Nussbaum, A., Concise history of the Law of Nations (New York: The Macmillan Company, 1958), p. 115.
15 Gross, note 12, p. 31.
16 Gross, note 12, p. 25.
17 Nussbaum, note 14, p. 117.

neighbouring countries), that was lacking in the centuries before. It might have slowly evolved, but before 1648 the principle of *balance of power* had not been exercised on such a large scale[18]. Already during the Renaissance (13th, 14th century) the idea of a 'political equilibrium' was thought only to be brought about by the freedom of all states, placing a bomb under the structure of the Holy Roman Empire. The ideas that had emerged during the Reformation and the Renaissance, were given expression in the Peace. The idea of a Christian Commonwealth (in the centuries before), of a Pope and an (Holy Roman) Emperor working together, was replaced with the more realistic and up to date idea of:

> all states form(ing) a world-wide political system or that, at any rate, the states of Western Europe form a single political system. This new system rests on international law and the balance of power, a law operating between rather than above states and a power operating between rather than above states[19].

The adagium *cuius regio, eius religio* became the leading idea; religion was supposed to be kept out of politics and each prince should decide on his own the religion of his people.

> (The Peace) marked man's abandonment of the idea of a hierarchical structure of society and his option for a new system characterized by the coexistence of a multiplicity of states, each sovereign within its territory, equal to one another, and free from any external earthly authority[20].

Thus, one of the opponents of the imbalance of power created by the institutions of Emperor and Pope, Bartolus of Sassoferrato "drew a fine distinction between the *de jure* overlordship of the Emperor and the *de facto* existence of *civitates superiorem non*

18 Alexandrowicz points out that "the principle of the balance of power in the East Indies (Asia) is discussed by Reynal and Justi", indicating that they were influenced, and influenced European thinking, by ideas that were already very much alive in, e.g., the Asian region. See Alexandrowicz, C.H., "Kautilyan Principles and the Law of Nations", British Yearbook of International Law, (1965-66, pp. 301-320), at p. 319.

19 Gross, note 12, p. 34.

recognoscentes"[21]. He did, however, still recognize the Emperor as worldy lord, but more at an idealistic level. This way the idea that the entire human race was one single society, one Family of Nations, and was further promoted by famous international law writers like Vitoria, Suarez and Gentili, and of course Grotius. The ideas were not new though, but can be traced back to ancient Rome, and are partially based on the writings of the Stoa:

> They [the Stoa] denied, on the one hand, the claim of the Emperor to exercise temporal jurisdiction over princes, and affirmed, on the other, the existance of an international community governed by international law[22].

We will now take a closer look at these 'founding fathers' of international law, and with that, at the beginning of *jus gentium*, or the law of nations.

§4: The Law of Nations according to Grotius, Naturalists and Positivists

> Vitoria, Vasquez, Gentili, Suarez, Grotius, and all the other Renaissance and post Renaissance writers whose efforts produced the first systematized 'law of nations', were attempting to influence the conduct of rulers. Their purpose was to pursuade sovereigns not to go to war except for grave reasons defined in advance and, if war nevertheless came, to wage it in accordance with fixed rules. Their method of persuasion was not the express or tacit threat of force which law, in the common modern sense of that term, holds over its subjects. It was rather a voluminous argumentation composed of many interwoven appeals – appeals to reasoned expediency, to pity, to the sense of nobility, to the hope of salvation (...).
> From the beginning the jurists – even those who were also professional theologians – sought a broader base for their international precepts than the direct law of God (...).
> Something more than theology and moral philosophy was needed if their juristic systems were to exercise any special influence in affairs of State. The third element was found in *jus gentium*. This, together with the closely related *jus naturale*, soon

20 Gross, note 12, pp. 33-34.
21 Gross, note 12, p. 35.
22 Gross, note 12, p. 37.

> overshadowed divine law in formulations of a law of nations. But the recognition of two main sources or forms brought lasting confusion into the literature of the subject[23].

The Christian religion, as it had been playing such an important role throughout the centuries before, lost a large part of its influence on legal thinking. Divinity was replaced by logic, a logic that was inspired by the ancient societies, though, as we saw before, even the logic of the ancients was anything but devoid of religion. It was just that now the distinction between worldly and spiritual matters was made more clear. Or was it? A summary of the ideas of the major writers is appropriate.

Grotius (1625)

Briefly, it can be said that Grotius[24] seems to agree with the naturalist writer Vitoria, on *jus gentium* being the same as natural law. According to Corbett, though:

> (i)n so far as his scattered reflections can be logically reconciled, the upshot appears to be that in the view of Grotius natural law was also law of nations unless a contrary consensus could be proved[25].

Grotius divides law in two different types. First there is *jus aequatorium*, restoring a person into the state he was before a wrong happened to him. The second type is called *jus rectorium*, which confers legal rights. *Jus rectorium* may be either imposed by nature, or imposed by will in which case it is called *jus voluntarium*. However, when the conferred rights have been violated, only natural law can undo the damage, which is why *jus aequatorium* is a form of natural law. *Jus voluntarium* can be split into divine and human law. Human law is subdivided into that of the state (*civile*) and that of nations (*gentium*). Grotius further divides *jus gentium* into that which is truly law and that which

23 Corbett, Percy E., Law and Society in the Relations of States (New York: Harcourt, Race and Company, 1951), pp. 20-21.
24 See further, regarding the discussion of Grotius versus Freitas.
25 Corbett, note 23, p. 23.

only produces a certain effect, "like that of primitive law"[26]. That which is truly law is supposed to be one with natural law. The latter one only depends, and differs, with the will of the society. Grotius' *jus gentium* is a voluntary law (*jus voluntarium*), as opposed to the natural law (of nations) which deals with the international relations of states. He focuses mainly on the natural law, though he always mentions the voluntary rules as well.

Naturalism

Naturalism is, according to most naturalist writers, near to impossible to describe. Though in general one could state that "natural law is (...) a convenient name for indicating the ground of obligation of law"[27]. That ground being closest of all schools to the divine element in law. Vitoria (1532), one of the earliest naturalist writers "describes *jus gentium* as being either *jus naturale* or a derivative of *jus naturale*"[28]. At another point he indicates that *jus gentium* has alternative sources, one being *jus naturale*, and the other being "the consensus of the major part of the world"[29]. If these two conflict, Vitoria more or less accepts the view taken in the Justinian *Corpus juris*, i.e. that consensus will prevail. His contemporary, Suarez (1612), also recognizes natural law as part of an eternal law, *lex aeterna*, which cannot be affected by a state behavior (of accepting it or not). However, he states that *jus gentium*, even though closely related to natural law, is in fact man-made: "It evolves principles in the form of usages observed by all or most civilized peoples"[30]. Interestingly enough, Suarez indicates that because of this worldly character of *jus gentium*, it can also contain wrong elements (as opposed to natural law), but these are still law. Therefore "(t)he positive law of the state is the application of natural law in the sphere of fleeting material reality"[31]. Suarez similarly declared:

> The rational basis (...) of this phase of law consists in the fact that the human race howsoever many the various peoples and kingdoms into which it may be divided,

26 Westlake, note 3, p. 42.
27 Strakosch, H., "Natural Law: An Aspect of its Function in History", Indian Yearbook of International Affairs, 1960-61, vol. 9-10 (pp. 3-21), at pp. 3-4.
28 Corbett, note 23, p. 21.
29 Corbett, note 23, p. 21.
30 Corbett, note 23, p. 22.
31 Strakosch, note 27, p. 12.

> always preserves a certain unity (...) enjoined the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation (...)[32].

A more 'radical' stand was taken by Pufendorff (1672). He sees natural law as the only governing element in the conduct of states. The principle of peace[33] is the most important condition, as it is supposed to be man's natural condition, derived directly from God's will. Custom therefore is *not* law. Here we find a difference with Vitoria and Suarez, who agreed with each other that man made law is in fact possible, and emerges from either "state usages" or "consensus of the major part of the world". Pufendorff's theory is based on the assertion of Hobbes, that:

> natural law is to be divided into natural law of individuals and of States, and that the latter is the Law of Nations (...). [But] Pufendorff adds that outside this natural Law of Nations no voluntary or positive Law of Nations exists which has the force of real law[34].

Furthermore, consent (obviously) does not play any role in Pufendorff's theories. That was very hard to uphold, as:

> the role of consent, whether explicit in treaty or tacit in custom, was increasingly emphasized in subsequent doctrine, while reliance upon natural law declined. This was the trend towards positivism, which was to become marked in the eighteenth century[35].

32 Suarez, as quoted in Gross, note 12, p. 38.
33 He divides it into four separate general principles, namely: (1) to refrain from injuring one who is not himself doing injury; (2) to suffer every man to enjoy his possessions; (3) to perform promises faithfully (or in the Latin phrase, *pacta sunt servanda*); and (4) to promote the advantage of others so far as more particular obligations admit.
34 Oppenheim, L., edited by H. Lauterpacht, International Law – A Treatise (London: Longmans, Green & Co. Ltd., 1966), p. 95.
35 Corbett, note 23, pp. 25-26.

Among other learned writers that adhered to naturalism are, e.g., Thomasius, Hutcheson, Rutherford and Barbeyrac. Regardless of their efforts, the idea of naturalism was slowly influenced and even replaced by the emerging positivistic thought.

Positivism

In contradiction to most of the naturalists, positivists *do* recognize the existence of a positive law of nations (being the result of custom and treaties), and consider it more important than the natural law of nations (the existence of latter is even denied by some positivists). Positivist thought emerged in the 18th century, and was strongly settled in the academia by the 19th century. Among the first positivists writers are the German scholars Rachel and Rextor, both of whom published their main works at the end of the 17th century. Rachel defined the law of nations as:

> the law to which a plurality of free States are subjected, and which comes into existence through tacit or express consent of these States (...). According to him [Rextor] the Law of Nations is founded on custom and express agreements[36].

One of the earliest positivist writings, Ayala's *De Jure et Officiis Bellicis et Disciplina Militari libri tres*, was published in 1582. In it Ayala describes *jus gentium* as that what is added to the natural law by consent. He realizes for instance, that according to the natural law all men are free, but that this is restricted by slavery, introduced by *jus gentium*. Law however, is law, and in that sense even the laws upholding slavery are to be followed. We can thus see that the natural law idea was mixed with positive elements. State consensus or practice became increasingly important as a source of law. See for instance the works of Gentili (1598), who considered *jus gentium* as a particular form of divine law. Even though violations often occurred, it did not make it (*jus gentium* that is) less law according to his views, "we are not seeking out facts, nor do we establish law

36 Oppenheim, note 34, p. 96.

from facts. On the contrary, we examine facts in the light of the law and forejudge what is to be done"[37]. Gentili referred to the Stoic teachings when he stated that:

> the whole world formed one state, and that all men were fellow citizins and fellow townsmen, like a single herd feeding in a common pasture. All this universe which you see, in which things divine and human are included, is one, and we are members of a great body. And, in truth, the world is one body[38].

With Suarez, Zouche (1650) also divided *jus gentium* into two different parts, "one being the common content of many legal systems (...), the other being the law observed in the relations between princes and peoples"[39]. Both the parts are governed by principles emerging from natural reason; the accent though is on practice, or customary law, whether it is ancient Roman and Greek practice, or the opinions of Grotius. Zouche can therefore be named as one of the earliest adherents of a more 'pure' positivist school of thought.

The clear emergence of positivism came in the beginning of the 18th century, when for instance Cornelis Van Bynkershoek (1737) stressed the importance of treaties, practice and juristic opinions. *Jus gentium* according to him is the combination of reason and precedent, which are linked together inseparably. There is no absolute law of nature. Practice had become more important. "The 'reason' upon which he relies is his own shrewd judgment of what is most expedient in the general interest"[40]. However, he did mention the point that this reason might have emerged from a certain state of nature that existed before human institutions (but, unlike the naturalists and the early positivists, that 'certain state of nature' is not a given fact anymore). In any case, reason comes first, and practice fills up the possible gaps:

37 Quoted in Corbett, note 23, p. 24.
38 Gentili, A. as quoted in Gross, note 12, p. 37.
39 Corbett, note 23, p. 26.
40 Corbett, note 23, p. 28.

> In the law of nations no human authority can prevail against reason, but where reason is doubtful, as is often the case, that law must be judged of by nearly constant practice (*ex perpetuo fere usu*)[41].

Like Moser, Van Bynkershoek refers to a lot of treaties as evidence for customary rules. In this sense his writings have become essential elements for identifying legal codifications from that time period. As he says himself on the topic of treaties:

> I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another, rather than from the testimony of any poet or orator, Greek or Roman: verily they are the worst teachers of public law. They serve more to display erudition than to furnish authority. The authority of those who transact affairs in the sight of all men, and who have learnt wisdom from what has happened before, weighs more with me. They are in the habit of concluding treaties on the footing of the practice of nations. Not that I would pay deference even to their authority without reason, but that, where reason is on the same side, I value them more than a pack of poets and orators[42].

We can see that the earlier come back of the Roman and Greek ideas, as propelled by the Renaissance, was replaced by an even more scientific approach, in which the "poetry" and the display of "erudition" did not find any place; at least not in the legal sciences[43]. Codified materials like treaties formed, after the more metaphysical concept of reason, the most important source for the 'practice of nations'. However, Van Bynkershoek adds

41 Westlake, note 3, p. 67.
42 Westlake, note 3, pp. 68-69.
43 We might point out that romantic and other 'less scientific' notions were still very much alive, though not in the field of legal studies. One of the strongest proponents of more impulse-led ideas is for instance *the Sturm und Drang* movement in Germany, in the first half of the 19th century, having its effects mostly on non-scientific literature and poetry. Compare, e.g., the works of Goethe and Stiller. The latter in his poem *An die Freude* (Ode to joy), later used by Beethoven, gives the famous line *Alle Menschen werden Brüder*, all men will be brothers. Which, perhaps drawing the connection a bit to far, is also supposed to be one of the guiding lines of the Freemasonry. Already in 1717 the first Masonic Lodge was established in London, striving to create harmony among mankind, no matter which religion one adheres to. These currents in society are easily overlooked if one focuses only on the positivistic legal thought.

the nuance that he values existing and contemporary treaties over older treaties, as he desires what is "practically useful"[44].

Another strong proponent of the upcoming positivist movement, was Moser (1780). He claimed that he did not write about philosophical law of nations, but merely about that which actually takes place in practice. He saw himself as an observer of the customary conduct of states. His books (published in the late 18th century) are therefore of great value for the positive law of nations, as he more or less codified the existing practices. He indicates that all the writers on natural law, be it Grotius, Pufendorff or Vattel, contradict each other on numerous occasions. Therefore:

> (t)he first and most important norm by which European sovereigns conduct their affairs is to be found in their treaties. The second norm is custom; and, since it is only for very few inter-State transactions that rules are laid down in express treaty form, there is no difficulty in understanding how great is the scope and the value of customary practice in the European law of nations[45].

In this way, Moser and his followers created the tone of the 19th century doctrine. In their "search for a successor to natural law as the general source of authority, one of the assumptions of the 'naturalists' still forms common ground for most of the schools engaged. That is the assumption of a 'society of nations'".[46] The law of nations (where ever it came from, or whatever it is) is the law of that society.

Other positivist writers, like Georg Friedrich Martens (1787), did not deny the existence of a natural law, and they especially refer to it in cases were there is a gap in the positive law. Though the basic focus point is this positive law, which they find in international treaties and custom. In general the 19th century witnessed the naturalist or semi-naturalist legal writings almost completely disappearing from the European scholar-scene.

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44 Westlake, note 3, p. 68.
45 Corbett, note 23, p. 34.
46 Corbett, note 23, p. 35.

Grotians

The Grotians take a mid position between the positivists and the naturalists[47]. The name would indicate that they adhere to Grotius' thoughts in every aspect, however there are certain nuances. They *do* stress the distinction between the natural law and the voluntary law of nations, but where Grotius thought the natural law was the more important one of the two forms, the Grotians claim equal importance for both natural and voluntary law. The majority of the legal writers of the 17th and 18th century were more or less followers of Grotius' works, but two of them have acquired a strong reputation of their own, Wolff and Vattel. "Few names which have been great in their day have sunk deeper into oblivion than that of Wolff (...)"[48].

The German Christian Wolff (1749) in his works (published in the middle of the 18th century) focuses on the duty of citizens of a state to do everything possible to promote the common good and maintain their 'association' with the state. The state on its part has to maintain itself as that association, and has to try and keep that bond and prevent destruction. From these obligations Wolff extracts the *natural* right of both men and state to do those things necessary to (respectively) keep the association together and prevent destruction, and even a right to those actions which are necessary for perfecting themselves.

> The legacy of Wolff to international law is this doctrine of abstract rights, or of rights to things inherent in persons and states and determining their mutual relations in

47 Though this does not have to be a rigid classification, see for instance Wright, who classifies Wolff and Vattel as naturalists. It should be obvious from the previously discussed that the transition from naturalist-like thought to positivist-like thought was not an event that happened in a day. Instead, the distinction between naturalists and positivists was not at all clear, not to the learned writer in that time, nor to the student of law today. Certain crucial elements can be found in the work of the discussed writers, which enables one to make a distinction between them, but the bottom line is that the mutual influence and 'mixing' of thought is the more realistic situation that should not be forgotten while reading about these men. See Wright, Quincy, The Role of International Law in the Elimination of War (Manchester: University Press, 1961).

48 Westlake, note 3, p. 70.

> respect to those things, put in place of the doctrine that rights flow from the disposition made of things by law[49].

He further explains his concept of the existence of a so called *civitas gentium maxima*, or a World State formed by all the other states together, which in importance outweighs the separate states. This World State forms a limitation on the Family of Nations. As all states have certain natural rights, the situation is very realistic that the pursuit of these rights might lead to international conflicts. Wolff tries to solve this by claiming that the natural rights are imperfect in this sense, and therefore cannot (always) be enforced. Here we see one of the most characteristic signs of natural (and Grotian) law, that states are not supposed to hurt each other, whereas in positivism custom or even national law can form an exception, and allow international hostilities.

With Vattel (1758) a division of the law of nations, *jus gentium*, plays an important role as well. He divides it into two parts, the first being the necessary part (or natural law, *jus naturale*), and the second being the voluntary part (or *jus gentium voluntarium*).

> The first, which is unmodified natural law, is binding only on the conscience. The second, which is derived from the presumed, implied or explicit consent of States, is binding in relation to other men and creates rights between them[50].

This might be construed as a division between law and morals, but Vattel instead comes up with a natural society of all men:

> It is of the essence of civil society (...) that each member has surrendered[51] part of his rights to the body social and that there is an authority capable of commanding all the members, of giving them laws and constraining those who refuse to obey. Nothing of

49 Westlake, note 3, p. 72.
50 Corbett, note 23, p. 30.
51 Compare also the theories of the French philosopher and writer Jean-Jacques Rousseau: Each citizen is supposed to have agreed to a metaphysical 'contrat social', surrendering his rights to the collectivity of all citizens together, which is the State.

> the sort can be conceived or supposed to exist between nations. Each sovereign State claims to be independent of all the rest, and is so in fact[52].

This voluntary law of nations is being observed, because the necessary natural law dictates this. The voluntary law is of a lower level, but not less important:

> It must never be forgotten that this voluntary law of nations, admitted by necessity and to avoid greater evils, does not give the unjust belligerent a true right capable of justifying his conduct and reassuring his conscience, but only the external effect of his right and impunity among men[53].

The legality of warfare is independent for all the partaking states, as all of the partaking states may find themselves just, as opposed to the others. Therefore none of the states can be a judge over the others. "It follows that in every doubtful case both must be regarded as acting lawfully, at least as far as external effects are concerned and until a decision is reached"[54].

The concept of *jus gentium*, or the law of nations, had changed from the original Roman meaning of civil law applying in cases between Romans only, to a law applying to all countries. As we have seen the different writers had as many different opinions as well. Most of them find some link with a 'given' set of principles, or natural law, whatever the source be. This is clearly the legacy of the religion dominated law systems of the centuries before. This natural law is the powerful element that influences the worldly law, which is created by and among men. Here we see the positivist viewpoint coming into the picture, linked with the influence of science (starting with the Renaissance in the 13/14th century and onwards), and the (very relative!) loss of field by religion (one of the reasons being the split between Protestant and Catholics), and new political methods in the form of secularism, Machiavellianism and Cartesianism:

52 Quoted in Corbett, note 23, p. 30.
53 Quoted in Corbett, note 23, p. 33.
54 Quoted in Corbett, note 23, p. 32.

> The extremist rationalism of Cartesian stamp brought with it the abandonment of realism in legal thinking. An inner structural and purely logical consistency was carried to the point where it completely obliterated that other aspect of law which we have seen playing such an important role in earlier systems of natural law: its function of order in a really existing society[55].

This way "(h)umanistic principles of justice had given way to mechanistic rules of order"[56]. But that time had not come yet, for the moment natural law was still the ruling school of thought. And the divine origin of the natural law meant that it also pursued and exhibited a divine harmony, based on the equality of all people(s). How was this put into practice?

§5: The Law of Nations and International Practice: General

Obviously a nice thought, this 'single society' idea, but when the Europeans came to the East Indies they had to find a solution to the problems that they encountered. And the main legal problem was that of *classification*. The moment they arrived, they were dealing with the power of a foreign ruler, but to what extent should they accept the edicts and commands of this ruler as their own? To what extent should they abide? Was he a sovereign as their own ruler was? To say that the world is one is quite easy, but what rules govern all the differences that still exist?

Basically, as we have seen, trade-interests were the foremost reason for the Europeans to travel to these countries. This made them practical and adapt to the situation, especially when dealing with vast and historical empires. In regard to the dealings with China, it was difficult to obtain an equal level of negotiations, because the Emperor of China considered himself (and was considered) to be above these mere state-officials coming from Europe, and would only deal with regal representatives. In 1792, the British sent

55 Strakosch, note 27, p. 19.
56 Wright, note 47, p. 22.

their emissary Lord Macartney to China, intending to establish an embassy. Alexandrowicz gives us an insight:

> The intended embassy was announced to the Chinese authorities by three commissioners of the East India Company who had been selected to regulate affairs in Canton. They were asked to deliver a letter from the Chairman of the Court of Directors (Sir Francis Baring) to the Chinese Viceroy in Canton in which Sir Francis stated that 'His most Gracious Sovereign being desirous of cultivating the friendship of the Emperor of China, and of improving the connection, intercourse and good correspondence between the Courts of London and Pekin, and of increasing and extending the commerce between their respective subjects, had resolved to send his well-beloved cousin and counsellor Lord Macartney (...) as his Ambassador Extraordinary and Plenipotentiary to the Emperor of China, to represent his person (...)' and to establish 'a perpetual harmony and alliance between them'[57].

The reasons for establishing this embassy are obvious. The British King in his private instructions to his ambassador, stated that "a greater number of his subjects, than of any other Europeans, had been trading, for a considerable time past, in China"[58]. It was for this (economic) reason that the King acknowledged that:

> a free communication among whom *civilisation* had existed, and the arts been cultivated, through a long series of ages, with fewer interruptions than elsewhere, was well worthy, also, of being sought by the British nation[59].

As Alexandrowicz further writes:

> Excluding any intention of conquest or territorial aggrandisement the King stated further that he had been anxious 'to enquire into the arts and manners of countries,

57 Alexandrowicz, C.H., "The Continuity of the Sovereign Status of China in International Law", Indian Yearbook of International Affairs, 1956 (pp. 84-94), at p. 86.
58 Alexandrowicz, note 57, p. 87.
59 Alexandrowicz, note 57, p. 87.

> where *civilisation* had been improved by the wise ordinances and virtuous examples of their sovereigns, through a long series of ages' (...), and finally that being 'at peace with all the world, no time could be so propitious for extending the bounds of friendship and benevolence, and for proposing to communicate and receive the benefits which must result from an unreserved and amicable intercourse between such great and *civilised* nations as China and Great Britain'[60].

Not everybody felt the same way. Lord Napier recommended in 1835 "to extort a treaty 'which shall embrace the public and private interests of all civilised nations who may be induced to trade with that people'"[61]. Obviously, Lord Napier did not see the Chinese as civilized. And he goes on to say that if the Chinese Emperor should refuse to sign the treaty, "we should 'remind him he is only an intruder', alluding to his (i.e. the Chinese Emperor's) Tartar descendence"[62]. Lord Napier did not succeed in getting his way, and after his withdrawel the trade relations with China improved. Indicating that even though opinions were not unified, and voices could be heard that were echoed in the later centuries even stronger, still the general tendency was one of equality.

In regard to the Mughal Emperor things were a bit easier, as "his ideological rigidity was certainly not comparable to that of the Emperor of China"[63]. He was seen as a high ranking Sovereign. And in that sense "the idea of the Ruler's sovereignty proved reconcilable with the requirements of inter-State intercourse on a footing of equality"[64]. It is not strange therefore, that Alexandrowicz notices that with regard to this 'inter-State intercourse' (be it with China or India) an universal law applied, the law of nations, *jus gentium*. Not a law of civilized nations, nor of peace loving or other nations, simply a law of *all* nations. The main reasons might be of an economic nature, combined with more metaphysical natural law ideas, but that does not diminish the fact that it was the continuing pattern of behaviour among states. Using case material, Alexandrowicz illustrates that this was clear in several other instances as well. E.g., when a case arose

60 Alexandrowicz, note 57, pp. 87-88.
61 Alexandrowicz, note 57, p. 89.
62 Ibid.
63 Alexandrowicz, note 8, p. 17.

against a British Governor-General, who had committed unproportional action against a local ruler, the Raja of Benares. In a plea contra the Governor-General Edmund Burke stated:

> Now I will refer your Lordships - having contended, as we do contend, that the law of the nations is the law of India as well as Europe, because it is the law of reason and the law of nature (...) recognized and digested into order by the labour of learned men - to Vattel book I cap. 16 (...)[65].

Vattel argues in his book[66] that states can enter into agreement with each other, where one state is more powerful than the other, but if the more powerful states exerts more influence/power then it is allowed according to their agreement[67], the less powerful state may consider the agreement broken, and act accordingly. The terms used by Burke could not be more clear as to the extent of the law of nations! Burke went on:

> Then we contend in favour of (the Raja), in favour of the right of natural equity, of the law of nations (...) we contend that (the Raja) would have established in the opinion of the best writers of the law of nations a precedent against him for violation of the agreement if he did submit to it (...) instead (...) he did that which his safety and his duty bound him to do[68].

So, even though the Raja was, or had come to be placed more or less under British rule, his sovereignty to a great extent was still (to be) respected. "What he was entitled to expect was a right to proper classification in the hierarchy of authority within the Indian

64 Alexandrowicz, note 8, p. 17.
65 Alexandrowicz, note 8, p. 22.
66 Droit des Gens (1758), see the previous paragraph.
67 Compare the Kautilyan notion of 'the law of the fish', according to which the stronger fish swallows the weaker one. Alexandrowicz remarks that this is not the only occasion where Western scholars seem to be influenced by the ancient Indian works: "there is no reason to doubt that some of the European writers (Vattel, Justi, de Martens) who became familiar with Eastern State practice formulated their views on sovereignty *inter alia* under the impact of that practice", see Alexandrowicz, note 18, at pp. 305, 307. Yet, writers like Fenwick argue that the Chinese and Indian legal notions "had no perceptible influence upon the body of law that came to be formulated in Western Europe". See Fenwick, C.G., International Law (Bombay: Vakils, Feffer and Simons Private Ltd., 1967), p. 6.
68 Alexandrowicz, note 8, p. 22.

empire"[69]. These views were not only those of Burke, but were ideas that had been developed both in Europe as well as in the East Indies (by writers like for instance Kautilya):

> The idea of sovereignty (as vested in the Ruler) was deeply ingrained in Asian tradition, particularly in India and in those parts of the East Indies in which Hindu civilization had prevailed for centuries[70].

Anglo-Mughal relationships in this time period are therefore worth examining. We briefly mentioned it before already, that the position of the Mughal Emperor was not as 'divine' as that of the Chinese emperor, which made initial contact easier for the European powers coming to the Indian continent. Yet, the vastness and the power of the Mughals should certainly not be underestimated. The 16th, 17th and 18th centuries, or the:

> period between the reign of Emperor Akbar and Emperor Aurangzeb saw the greatest expansion of the Empire and one of the most remarkable episodes during this period, an episode which helps to illustrate the legal nature of relations between India and the West, was the embassy of Sir Thomas Roe to the Court of Agra[71].

Alexandrowicz points to the influence of writers like the previous mentioned Alberto Gentili, who, in his monograph *On Embassies* repeated what we can only describe as the general trend, the basis for all inter-state action and non-action. Namely that:

> the law of nations applied to all independent nations of the world, whether they were Christian or not. Non-Christian States enjoyed full sovereignty and exercised the right of sending and receiving ambassadors, and in this respect Gentili quoted instances from Asian State practice, referring particularly to Islamic powers and to Persia[72].

69 Alexandrowicz, note 8, p. 22.
70 Alexandrowicz, note 8, p. 28.
71 Alexandrowicz, C.H., "Mogul Sovereignty and the Law of Nations", Indian Yearbook of International Affairs, 1955 (pp. 316-324), at p. 316.

It was in this context that Sir Thomas Roe came to Emperor Jehangir after leaving England in 1615. The universal law of nations was accepted among all. Even in Europe learned writers adhered to this law of nations, under the broad banner of naturalism. There was of course Vattel (and the other mentioned writers), but ideas of equal sovereignty were also to be found in the works of Bodin, whose "classification of Sovereigns, whether in Europe or in Asia, includes vassal Rulers to whom he assigns a defined and protected position in the heterogeneous network of inter-State relations"[73]. Bodin's theory of sovereignty "may be regarded as marking the end, on the doctrinal level, of the efforts to throw off the overlordship of the Emperor and vindicate the independence of states"[74]. It should be clear though that this was not without opposition, as imperialist (European) writers still continued to support the divine character of the (Holy Roman) Emperor, and therefore the absolute impossibility of abandoning the 'given' rights of the Emperor.

These (European and Asian) ideas on the existence of complete *de facto* independence of a state, meant that the state at the same time had *de jure* sovereignty whether or not it was formally recognized by any other state. That is in contrast to the general international law idea at the present day, that a 'state' can *only* join the international society as a state, if it is recognized by the existing powers[75]. An idea which is basically the product of positivistic thought, as it emerged more strongly in the 19th and 20th century[76]. Yet, in these (previous) centuries, the theory of recognition was still a different one[77]:

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72 Alexandrowicz, note 71, p. 317.
73 Alexandrowicz, note 8, p. 31.
74 Gross, note 12, p. 36.
75 See for instance the *Tinoco Arbitration* (UK v Costa Rica) Case (1 RIAA 1923, 369). Judge Taft: "Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations (...). The non-recognition by other nations (...) is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such (...)".
And also, e.g., the EC Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union (December 1991, 4 EJIL 1993, 72): "The Community and its Member States (...) affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations".
As quoted in Dixon&McCorquodale, note 11. See further *Chapter V.*
76 See further *Chapter IV.*
77 See the next paragraph.

> The *de facto* birth of a State had meant its legal birth in the eyes of the universalist law of nations, and had implied membership of the family of nations irrespective of religion or civilisation[78].

As seen clearly in Vattel's *Droit des Gens*, or as can be deducted from most of the grotian and/or naturalist writers, a state became sovereign simply because it considered itself to be independent. To give one state, or several specific states, the (one could say divine) right to judge the 'sovereignty' of another state, would be completely opposite to this idea. Considering this, it is not strange that Alexandrowicz comments that:

> the legal position of Asian Powers before the nineteenth century and their vested rights must be judged on the basis of pre-positivist law which knew nothing of recognition as a condition of sovereignty within the family of nations (...). (Therefore) (i)t seems probable that Sir Thomas Roe went to India with Gentilian notions of the law of nations and that diplomatic intercourse between England and the Mogul Empire was established on the assumption that both Powers were members of the familiy of nations and that there was no need of mutual formal recognition[79].

The embassy of Sir Thomas Roe thus serves as an example, that in general the diplomatic exchange and the treaty making (procedures) between European and Asian countrieswas well established. "(A)nd it was obvious that mutual dealings took place on a basis of reciprocal acknowledgement of sovereignty and of the principles of the law of nations"[80].

§6: The Law of Nations and International Practice: Recognition

How did the contemporary concept of recognition emerge from or beside these rather contrary naturalist ideas on the sovereignty of states in the 16th, 17th and 18th century? Once again, we need to stress that things did not change overnight. Instead, the continuing influence of factors mentioned elsewhere, gradually changed the perception

78 Alexandrowicz, note 71, p. 317.
79 Alexandrowicz, note 71, p. 318.
80 Alexandrowicz, note 71, p. 319.

on the existence of states. The changing of the legal concept of recognition of states was one of the most influential results. Alexandrowicz gives us an insight as to why this happened.

In the 18th century writers like Justi (1703-1771) contended that the succession of monarchs (whether in a hereditary or elective monarchy) was not a matter that could be validly challenged by other states. In his view the monarch could not:

> concede to other rulers the *right to recognition* as this would mean intervention and result in submission which would stultify the fundamental rights of States to equality guaranteed by the law of nature and nations (...). As his [the monarch's] legal status does not depend on foreign powers, the problem of recognition does not in principle arise[81].

The only exception to this rule being that if a particular rank or title of an elective monarch is begotten from outside the state itself, that is to say from an actual concession of foreign powers, recognition is accepted. Furthermore, recognition by third states can also take place as a *fait accompli*. According to Justi:

> foreign powers are said to be under the duty to 'recognize' elective rulers, the duty lying in the acknowledgement of situations of fact and in the respect for the significance and the consequences which the law of nations ascribes to them. The term 'recognition' means here an act declaratory in nature[82].

It merely constitutes a formal act on behalf of the other states, without affecting the status of the 'recognized' state within the international Family of Nations. Justi then concludes his ideas on recognition with the comment that his argumentation is based on the law of nations and nature, and does not emerge from what he calls 'State prudence'. State prudence in his eyes *emanates* from the law of nations (it could not be expected

81 Alexandrowicz, C.H., "The Theory of Recognition In Fieri", British Yearbook of International Law, 1958 (pp. 176-198), at pp. 177-178.
82 Alexandrowicz, note 81, p. 180.

otherwise in those times), but is very closely linked with political expediency, which in practice plays an important role in the (absence of the) necessity of recognition of rulers. This indicates a difference between the (theoretical) law of nations, and the political practice, though in Justi's work this difference does not play an important role. For us, however, it is essential to notice it, as in time this difference will become more essential.

Johann Christian Wilhelm von Steck, a contemporary of Justi, focussed on the recognition of states, as opposed to Justi's examination of the recognition of rulers/ governments. Independence of states, according to Von Steck, is achieved in a threefold process: First of all the "formal and solemn declaration of independence from the mother State"[83]. The most important example being the *Declaration of Independence of North America* in 1776. Secondly, "the mother State should be induced (peacefully) or compelled (by arms) to renounce its sovereignty, to accept the separation and thus to recognize the independence of the new State"[84]. In the third and last phase, the difficult problem arises of that of relations between the new state and third powers. Von Steck argues that once the mother state recognizes the country to be an independent and new state, third power recognition does *not* play any role:

> They must then treat it as a free and sovereign people and it is not in their discretion to concede or to refuse these qualities as they did not have any overlordship over them. If the overlordship of the mother State comes to an end, other nations have no right to force the new State back into submission which would obviously amount to intervention in its affairs. 'In the eyes of all other [States] it is thanks to the natural equality of nations free and independent'[85].

However, Von Steck also points out that third powers cannot recognize a new state, before the mother state has renounced its own sovereignty, which would otherwise imply unfriendly intervention on the part of those third powers towards the mother state. With Justi, Von Steck is a follower of the so called *Legitimist School*, considering the release

83 Alexandrowicz, note 81, p. 181.
84 Alexandrowicz, note 81, p. 181.
85 Alexandrowicz, note 81, p. 182.

of a new state by its mother state an essential element for the new state to achieve its independence and sovereignty. And, in general there is nothing that third states can do to interfere with this process of achieving sovereignty, as it is basically an internal process. Recognition as a constructive act is not at all in the picture. Even though with Von Steck already a form of recognition has emerged, namely that by the mother state.

In the late 18th century and in the beginning of the 19th century, Justi and Von Steck's ideas found adherers in prominent lawyers such as Martens and Klueber. Martens agrees with Von Steck that:

> Recognition as a constructive act is not conceded and as declaratory act it is in principle superfluous. The legitimization of a new State or Sovereign takes place from within and third powers are bound to act in accordance with facts which determine at the same time the position in internal (municipal) law as well as in the law of nations[86].

Klueber on the other hand states that:

> Sovereignty is acquired by a State either at its foundation or at the time when it legitimately rids itself of dependence in which it found itself previously. To be valid, it needs no recognition or guarantee by any foreign power provided that its possession is not imperfect. However, it may be prudent to have it recognized expressly or tacitly and to obtain the guarantee of one or more third powers[87].

Prudence plays a very important role in Klueber's ideas. In general, he says, recognition as a constructive act is unnecessary, but *prudence* may require that third states recognize the new state, from a political point of view. According to Alexandrowicz, Klueber defines prudence as:

86 Alexandrowicz, note 81, pp. 186-187.
87 Alexandrowicz, note 81, pp. 187-188.

> 'convenance de la politique' in inter-State relations. It is obvious that he does not conceive recognition as a constructive or constitutive act, whether in relation to the past or to his own period, but views it as a declaratory act dictated by the requirements of political expediency[88].

Justi had argued (a century before) that recognition emerged from the natural law of nations and was not based on state prudence. Sharing similar ideas with Justi (that recognition is not thought to be a necessary element for attaining sovereignty by a state), we can see that Klueber and with him other writers do state however, that obtaining recognition is a smart move from a political point of view. Even if legally there is still no reason to do so. It is a delicate change, but the increasing importance added to this political expediency forms the bond with the next phase, where recognition became a more selective process.

A similar reasoning to Klueber's, was argued by Friedrich Saalfeld, another (beginning of the) 19th century writer. His value for the definition of recognition and its appliance in the international field, is stressed by Alexandrowicz:

> The importance of his [Saalfeld's] opinion lies *inter alia* in a joint discussion of sovereignty and recognition. He observes that 'in order to consider the sovereignty of a State as complete in the Law of Nations, there is no need for its recognition by foreign powers; though the latter may appear useful, the de facto existence of sovereignty is sufficient'[89].

Saalfeld thus contends that the way the state has acquired its sovereignty, has no influence on its recognition by third powers, and in this way does not differ much from the earlier discussed writers. Yet, Saalfeld further observes that the tendency exists of looking into the legitimacy of the changes in the Family of Nations. Whether it be in the form of new governments, or new states.

88 Alexandrowicz, note 81, p. 188.
89 Alexandrowicz, note 81, p. 189.

> (This) appears here as a discretionary power which would enable the existing States to judge new situations by legitimist tests and to approve or disapprove of them irrespective of the compelling force of facts. This is constitutivism with a vengeance, a solution totally different from that proposed by the early positivist writers for the adjustment of political changes[90].

Thus, the way of achieving sovereignty is left to the state itself, but whether or not it is duly recognized as a sovereign state, depends on the wishes of the other states. Even if Saalfeld sees it as 'just a tendency'. Yet, with these ideas, a new international legal order was proposed for recognizing states and governments in a constructive manner.

Henry Wheaton, 19th century writer and contemporary of Klueber *cum suis*, writes in his own work that "sovereignty is acquired by a State either at the origin of the civil Society of which it consists or when it separates itself lawfully from the community of which it previously formed a part and on which it was dependent"[91]. Continuing, Wheaton claims that independence by a new state *cannot* be achieved, as long as this independence is not acknowledged by other powers. This form of a constitutive theory of recognition, was not completely definite in Wheaton's work, as he left few gaps. He states that "while *de facto* independence of a State is sufficient to establish *internal* sovereignty, its *external* sovereignty 'may require *recognition* of other States in order to render it perfect and complete'"[92]. Here Wheaton divides sovereignty into internal and external. The external aspect is not derived from within the new state, and therefore needs certain action which has to be taken by the Family of Nations member states. This is recognition in its purest form, and should definitely not be seen as mere acknowledgement (as we could see in the ideas of earlier writers), and in this way Wheaton discards any form of *defactoism.* Wheaton was one of the first writers to actually define these two 'forms' of sovereignty, and his definitions formed the basis for the:

90 Alexandrowicz, note 81, p. 190.
91 Alexandrowicz, note 81, p. 192.
92 Alexandrowicz, note 81, p. 194.

> later writers of the positivist school (to) then define the new international 'caste system' (...). (Which) considered the old Christian powers of Europe as the nucleus of the family of nations[93].

Inspired by Wheaton, another step (even) further is taken by Hegel, as Alexandrowicz shows us:

> Hegel derives the legal existence of a new State from the will of the existing powers. Their consent is not only at the basis of international law as such, it also determines membership in the Family of Nations. This constituted a deviation from the views of the earlier positivists who did not envisage an extension of the theory of consent of States to the field of recognition of States and governments[94].

With Hegel the de facto-basis of sovereignty was completely abandoned, and instead a combination of positivism with constitutivism emerged. This influenced Wheaton to such an extent, that he (later on) leaves his idea of homogeneous sovereignty, and makes the external sovereignty depended on the consent of states. *Defactoism* only continues with regards to the internal sovereignty, which still is purely a matter of the state itself, and does not form any concern of the (externally) recognizing powers. But, by no means was a single theory of recognition developed, which led Alexandrowicz to comment:

> Whether the theory of recognition has since outgrown its formative stage if viewed in a wider perspective may still be doubtful. State practice and the divergent views of writers present up to our day a confusing picture out of which no satisfactory measure of common opinion seems capable of emerging. In a way the theory of recognition seems still to be *in fieri*[95].

For our present look on the history of international law, the importance lies in the fact that with the emerging of *certain* ideas on the limitation of (external) state sovereignty,

93 Alexandrowicz, note 1, at p. 8.
94 Alexandrowicz, note 81, p. 195.
95 Alexandrowicz, note 81, p. 198.

an easier way was found to limit the Family of Nations to only a small group of states. It was this idea that formed the basis for the European power politics. All of the countries to the east of Turkey found themselves in a rather awkward situation:

> (S)tates outside European civilization must formally enter into the circle of law-governed countries. They must do something with the acquiescence of the latter, or some of them, which amounts to an acceptance of the law in its entirety beyond all possibility of misconception[96].

This way, most of the countries outside of Europe were left behind, deemed to be not 'law-governed'. "Those which vanished into oblivion had to wait for their re-birth in one or another form until the end of the second world war. But those which survived had to submit to the consequences of the ideological changes conceived in Europe"[97].

We will now go back to the 16th, 17th and 18th centuries, and examine once again how this situation changed.

§7: Grotius versus Freitas

Hugo de Groot, or Grotius as he is better known, is undoubtedly one of the world's greatest jurists, and not only of his time. Born in Holland in 1583, he started studying law in Leiden at the age of eleven, and took his degree of Doctor of Laws at Orleans, France, at the age of fifteen.

> Since a Law of Nations was now a necessity, since many principles of such a law were already more or less recognised and appeared again among the doctrines of Grotius, since the system of Grotius supplied a legal basis to most of those international relations which were at the time considered as lacking such a basis, the book of

96 Anand, R.P., "Rôle of the 'New' Asian-African Countries in the Present International Legal Order", American Journal of International Law, 1962 (pp. 383-406), at p. 384, quoting Hall, W.E., A Treatise on International Law (1917).
97 Alexandrowicz, note 1, at pp. 8-9.

> Grotius obtained such a world-wide influence that he is correctly styled the 'Father of the Law of Nations[98].

The book that the quote refers to is Grotius' *De Jure Belli ac Pacis*, published in 1625. Before that he had already written his (anonymously published in 1609) *Mare Liberum* in which he points to the:

> existence of organized political entities in the East Indies which he considers independent and sovereign. Thus he states: 'These Islands of which we speak, now have and always have had their own Kings, their own government, their own laws and their own legal systems'[99].

These and other ideas of Grotius were not immediately accepted. As we have seen, the natural law concepts were still firmly rooted in academic and legal circles, although, certain postivistic sounds could be heard. Not only that, but *Mare Liberum* mainly dealt with the seizure of a Portuguese vessel in the Straits of Malacca by the Dutch East India Company. Therefore, it has to be borne in mind that Grotius was mainly a lawyer trying to find arguments for his government. And, also important, arguments specifically against the enemy, i.e. the Portuguese. Thus, stressing his function as a lawyer, we find that:

> Grotius (also) endorsed the institution of slavery, one basis on which the foundation of capitalism was being established in Europe, emphasising that both international law and lawyers are a product of their times[100].

As we will see Grotius adopted principles that had already been used by Spanish writers, agitating against their own king. He abandoned his own (*Mare Liberum*) ideas later on though when he came to London to defend the claims of the Dutch East India Company against the English newcomers in India. Whatever the reasons, at least the idea existed

98 Oppenheim, note 34, pp. 84-85.
99 Alexandrowicz, note 8, p. 45. Grotius refers to the islands of Java, Ceylon and the Moluccas, and basically all islands in the East Indies the Dutch were arguing about with the Portuguese.
100 Chimni, B.S., International Law and World Order (A Critique of Contemporary Approaches) (New

that the East Indies were not *terra nullius*, but "were under local sovereign authority and it did not matter whether this authority was Christian, Hindu, Buddhist or Muslim"; or as Grotius puts it "Christians, whether of the laity or of the clergy, cannot deprive infidels of their civil power and sovereignty merely on the ground that they are infidels"[101]. Exactly because of these powers of the East Indian rulers, their legal systems etc., Grotius considered those sovereigns capable of entering into diplomatic and trade relations with the European powers. The rationality of these statements becomes more clearer when Grotius points out that though the foreign rulers have their own sovereignty, this does not disable the right of others (that is the Dutch) to "access (...) their territories on the basis of the natural law right to general freedom of trade"[102] deriving from the universal law of nations. The blade cuts in two (favourable!) ways. Alexandrowicz points out that Grotius got some of these arguments from the main opponent of the Portuguese, namely the Spanish, who:

> had made it clear that relations between nations, whether Christian or non-Christian, must be governed by principles of justice. Franciscus de Vitoria and his successors in Spain expressed the conviction that the Christian Faith cannot be made a pretext for the exploitation of nations with an 'inferior' civilisation. Grotius adopted this principle and applied it to Indo-Portuguese relations[103]. He also advocated complete freedom of relations between nations all over the world[104].

The main argument of the Spanish scholars (by whom Grotius was inspired) was that self-governing political bodies existed already on the American continent, and which were entitled to face outside aggression in cases of self-defence. Vitoria therefore points out that the Spanish were allowed to go to the Americas and establish relations with the existing communities, but that they at the same time had no right whatsoever "to occupy

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Delhi: Sage Publishers, 1993), p. 225.
101 Alexandrowicz, note 8, p. 46.
102 Alexandrowicz, note 8, p. 49.
103 As opposed to the Spanish who applied it in the context of their relations with the Americas.
104 Alexandrowicz, C.H., "Grotius and India", Indian Yearbook of International Affairs (1954, p. 357-367), at p. 359.

their lands, to disturb their peaceful existence and impose their rule or faith on them". He then continues:

> It would be harsh to deny to those, who have never done any wrong, what we grant to *Saracens* (...) who are the persistent enemies of Christianity. We do not deny that these latter peoples are true owners of their property, if they have not seized lands elsewhere belonging to Christians[105].

Grotius emphasizes that similar organized political bodies exist in India and Asia, and that therefore the Portuguese cannot occupy those territories on the title of seizing of *terra nullius*. The 'value' of Grotius lies in the fact that he thus:

> adapted the the (old) Law of Nature to fill the vacuum created by the extinction of the supreme authority of [the Holy Roman] Emperor and [the] Pope (...). (And) developed a system of international law which would equally appeal to, and be approved by, the believers and the atheists, and which would apply to all states irrespective of the character and dignity of their rulers[106].

But, the Portuguese came with an answer in the form of *De Justo Imperio Lusitanorum Asiatico*, by Franciscus Seraphin de Freitas. Freitas, defending the Portuguese and keeping the huge Portuguese (trade)interests in the East Indies in mind, also claimed a right of access to the foreign territories. He realized, with Grotius, that there were numerous problems as to treaty making and the sovereignty of foreign rulers, and goes on to admit that some of the Portuguese lands in the East Indies were based on the title of conquest. Freitas justifies this by saying that although the Portuguese first acquired rights by concluding treaties with local rulers, in case of a breach of such a treaty the Portuguese were compelled to go to war. And their war was a *bellum justum*, that is a justified war against the Islam. The Portuguese 'right of access' to the East Indies was thus not, like in Grotius' work, based on a natural right to trade, but on the right to

105 Alexandrowicz, note 104, pp. 359-360. Alexandrowicz refers to Vitoria's work Reflectiones de Indis Noviter Inventis, edited by E. Nys (in Classics of International Law by J.B. Scott, 1917), p. 333.
106 Gross, note 12, p. 31.

propagate the Christian faith and, basically, fight Islam. However, Freitas claims this right of justified war, of the usage of the title of conquest, only for the Portuguese, being the true defenders of the Christian faith[107]. In order to limit access to foreign countries, he argued that foreign rulers have sovereignty, and on the basis of this can exclude foreigners from entering their territory and/or engaging into trade relations. Only the Portuguese have the right to override this sovereignty, on the basis of defending the true faith[108]. And not (compare Grotius) on the basis of a natural right to trade, which, according to Freitas, does not exist. 'Defending the true faith' does *not* mean that the Portuguese have the right to compel people to convert to Christianity, it does however mean that they must be able to at least preach it. Therefore, when a local ruler resists this right to preach, the Portuguese can infringe on his sovereignty.

In a sense the Dutch had actually agreed to the legality of this argument. In 1613 they had a conflict with the English about their rights in the Indonesian Islands. The English adopted the viewpoint that all countries had equally free access to the East Indies, as based on the law of nations. The Dutch on their part replied that this was true, but that the universal freedom of the law of nations could be limited by "special arrangements"[109]. Grotius obviously could not discard the argument of the English that easily, as he basically argued the same. He therefore replied that the Dutch relied on treaties with the local rulers, and that the "contract extinguished the liberty of the law of nations"[110]. As a result, Grotius later statements and writings were carefully formulated, to prevent contradiction.

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107 Freitas argues that only the Portuguese are the 'true defenders', as the other European powers do not react to the Islamic threat. E.g., the Portuguese King Emmanuel had called for an anti-Islamic crusade in Asia, but the other European countries did not respond in the way he might have wanted. This non-action on their part meant, according to Freitas, that it was solely up to the Portuguese to protect the Christian legacy.

108 Yet, in practice the "(a)nti-infidel ideology was hardly followed up (...) as the Portuguese concluded treaties with East-Indian powers, whether Muslim or Hindu", Alexandrowicz, note 1, at pp. 5-6, also referring to the treaty collection in Judice Biker's *Colleçao de Tratados*. The fact that the Portuguese wanted to create their own monopoly, was most probably the main thrust behind the plea for their, and only their, right to override the local ruler's sovereignty on the basis of defending the Christian faith.

109 Alexandrowicz, note 2, pp. 165-166.

110 Alexandrowicz, note 2, p. 166.

The bottom line is that both Grotius and Freitas acknowledged the existence of independent and politically organized societies in Asia. According to Alexandrowicz, most of the scholars agreed with this view:

> The majority of the classic writers followed the opinion of St. Thomas Aquinas (as expressed in his *Summa Theologica*) that dominion was based on *jus humanum* and should not be obscured by the distinction between Christian and non-Christian religion and civilization which was based on *jus divinum* and was irrelevant to sovereignty as to a temporal matter[111].

Both of them mainly agreed on (the application of) legal principles dealing with the acquisition of territory. The disagreement between the two learned writers consists of their different views regarding the conception of *bellum justum* and conquest (and then in particular with regards to the Islamic world).

Grotius responded in 1627 in one of his letters. He mentioned Freitas' work, and suggested that "(...) some one of our judges should be sought out and the duty delegated to him [i.e. Freitas]"[112]. This was a very sarcastic remark, as Grotius wrote this when he had been tried and imprisoned by the people he had defended so vigourously in the years before (later Grotius escaped from Holland to France, where he became the Swedish ambassador in Paris).

Despite the arguments brought forward by Grotius and the Spanish scholars, there were also writers that saw things in a slightly different way; opinions that grew stronger in time. We have already seen the postivitic tendencies among contemporary writers[113], and will once again quote Van Bynkershoek:

111 Alexandrowicz, note 2, p. 166.
112 Alexandrowicz, note 2, p. 162.
113 See the paragraph *The Law of Nations according to Grotius, Naturalists and Positivists.*

> (T)he law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilised.

This distinction that would play a greater part in the 18th and 19th century had thus already been made, it was however not (yet) the ruling opinion. Grotian and naturalist thought influenced both kings and 'normal' men. Montesquieu hinted at the upcoming changing of the tide as well, when he said that:

> even the Iroquis, who eat their prisoners, have one [i.e. a form of international law]. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles[114].

In practice rulers still operated on a certain level of equality, in accordance with the mutually accepted universal law, regardless of differing opinions. As the King of Atchen (Sumatra) wrote to Queen Elizabeth, he wanted "(...) to hold and keepe true and faithful league with her accordinge to the comendable course and law of nations"[115]. A tradition that could already be noticed in 1535, when King Francis I of France wrote to Pope Paul II, justifying the treaty France had signed with the Ottoman Empire, that:

> (t)he Turks (..) are not outside human society (...). It would mean that we ignore the links which nature established among human beings; but they all have the same origin; whatever relates to human beings cannot be strange to other human beings. If nations are divided among themselves, it is not nature which separates them but tradition and usages (...). Differences of religion and cultural tradition cannot destroy the natural association of mankind[116].

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114 Both quoted in Anghie, A., "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law", Harvard International Law Journal, 1999, 40 (pp. 1-80), at p. 23 and note 73 on that page.

115 Quoted in Alexandrowicz, note 8, p. 34.

116 Quoted in Anand, R.P., New States and International Law (Delhi: Vikas Publications, 1972), p. 15, and Alexandrowicz, note 1, at p. 4.

Clearly, we can see in this statement, as Alexandrowicz points out to us, that religion and civilization do not matter when it comes to the "universality of the family of nations"[117]. Even though most of this 'equality' was based on economic reasons, as we have seen with Grotius' arguments. The need for trade compelled the European rulers to make certain kneebows to their foreign overseas counterparts. These kneebows "rested on the *de jure* recognition of what existed de facto in the international field"[118]. Their true identity shines through in Freitas' reaction to Grotius' *Mare Liberum*, even though Freitas recognizes the foreign rulers' sovereignty as well. The fact however that he argues for an allowable breach of this sovereignty on a religious basis indicates a different nature. Alexandrowicz summarizes:

> Among all motives for the which the Portuguese engaged in their exploratory adventure in the East, the religio-political seem to dominate over all other considerations. (...) The claim to free access to the East Indies (...) must therefore be understood against the background of the primary objective of the Portuguese, to undercut the vital supply lines of Islam in the East and to weaken the military potential of the Ottoman Empire threatening the centres of Christian Europe[119].

This perhaps became more clear when finally, at the end of the 18th century, the European companies became superfluous because they had fulfilled their missions, and they made way for colonial administrations. "Great trading companies (...) had stimulated overseas trade, colonial rivalry, and naval wars; and had induced treaties and practices defining the freedom of the seas and the rights of neutrals"[120].

The trading companies, having attained the usage rights over the foreign territories, left this 'bounty' to pass into the hands of their succesive governments. From mere visitors, to trading foreigners, to vassals of the local rulers, the companies had become the ruler to rule the ruler. And the tone was set:

117 Alexandrowicz, note 1, at p. 5.
118 Anand, note 116, p. 14.
119 Alexandrowicz, note 8, p. 54.
120 Wright, note 47, p. 22.

> While European-Asian trade was still expanding, European egocentricity left the Sovereigns of the East-Indies, which had largely contributed to the prosperity of the European economy, outside the confines of 'civilization' and international law shrank to regional dimensions though it still carried the label of universality[121].

This was not a trend in the Asian countries alone. Both in the West (the Holy Roman Empire) and in the East (e.g., the Mughal Empire) the rulers of the big empires were reduced to mere symbols. Thus:

> After Emperor Aurangzeb's death a gradual process of emancipation of local rulers, viceroys and governors was set into motion by the force of events, and the Emperor's suzerainty declined throughout the eighteenth century. Nevertheless it subsisted as a formal institution of legal significance. Here lies the analogy between the Imperial institutions in Europe and in India. Throughout the eighteenth century both were deprived of effectiveness while remaining legal symbols[122].

This did not mean that the Emperor, especially in the East, did not have any real value anymore. On the contrary, even though contemporary historians might consider the Mughal Emperor nothing but "an empty shell", he still represented and constituted the unity of the great Indian empire, as the formal power. "This conviction about the value of the surviving Mughal legalistic principle also prevailed among European Powers who had joined in the local game of power politics"[123]. All of the East India Companies, whether Dutch, English or French, traded with the empire and established themselves, only on the basis of a formal acknowledgement by this Emperor. The so called Imperial grant was the seal of approvement.

The situation between Western and Eastern empires differs, when it comes to the final outcome, and even the imperial grant lost its significance. As Europe:

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121 Alexandrowicz, note 8, p. 2.
122 Alexandrowicz, note 71, p. 320.
123 Alexandrowicz, note 71, p. 321.

> finally witnessed the establishment of a Concert of Powers with its own Public law, no such Concert of Indian Powers or any Public Law of India or Asia ever emerged out of the turmoil of events. The last vestiges of Mogul suzerainty as a formal legal institution disappeared at the close of the eighteenth century and with the disintegration of the Empire from within, its sovereignty in the framework of the family of nations was lost[124].

With the apparent downfall of the Mughal empire, different voices within the British East India Company could be heard. On the hand one there were they who:

> advocated the ultimate establishment of English rule by title of conquest (...). The adherents to the second school of thought favoured a policy of strengthening the Emperor in relation to his vassals and in this way of terminating the prevailing lawlessness (...) (:) (T)he stability and solid dignity of regal government must have infinitely greater weight with Asiatick Princes than the fluctuating unsteaady resolves of a company of private men (...)[125].

In fact, the position of the Emperor was upheld. It was not till 1842-3 that paying homage to the Mughal Emperor was finally forbidden by the British. During the Great Mutiny the position of the Mughal Emperor was to be restored, but the successor to this legendary dynasty was tried in 1857, after the rising had failed. His trial:

> testifies to the survival, until the middle of the nineteenth century, of the legal status of a dynasty which had more than a century earlier lost its grip on Indian and Asian politics[126].

Ironically enough, this was at the same time combined with what is called one of the greatest moments in European history, the French Revolution. *Liberté, Égalité et Fraternité*, Freedom, Equality and Brotherhood, were the leading principles. The

124 Alexandrowicz, note 71, p. 322.
125 Alexandrowicz, note 71, pp. 322-323, also quoting J. Morisson.
126 Alexandrowicz, note 71, p. 324, quoting Westlake.

National Assembly declared in 1790 "that the French nation renounced wars of conquest and would never use force against the liberty of any people". And in 1792:

> that France was ready to come to the aid of all peoples who might wish to recover their liberty, and (...) would treat as enemies every people who, refusing liberty and equality or renouncing them, might wish to retain, recall, or treat with a prince or the privileged classes[127].

With regard to international law this was reflected in the so called Declaration of the Law of Nations (*Déclaration du droit des gens*), submitted in 1795 by the constitutional bishop to the French Convention. In the first article of the Declaration, the bishop:

> affirms the 'state of nature' existing among nations and the universal morality which is their bond. He then proceeds to develop the corollaries in twenty articles, including the inalienability of the sovereignty of each nation; the right of each nation to organize and change its government; the recognition of an attack upon the liberty of one nation as an offense against all other nations; the subordination of the interests of the individual nation to the 'general interests of the human race'; and other, mostly high-flown and vague, tenets[128].

The Declaration was *not* excepted by the Convention. However, the Convention had given itself some principles that they held quite high. Among these were "the renunciation of wars of conquests and of attacks upon the liberty of other nations, and the profession of the principle of nonintervention"[129].

The Napoleonic period (1799-1815), however, proved that the European countries among themselves could not abide to these lofty ideas ("little respect was exhibited for

127 Fenwick, note 67, p. 16.
128 Nussbaum, note 14, p. 119.
129 Nussbaum, note 14, p. 119.

international law, and this applies not only to Napoleon"[130]), let alone to other countries outside of Europe. Depressing voices could be heard:

> Mankind are happier in a state of inequality and subordination. Were they to be in this pretty state of equality they would soon degenerate into brutes; they would become Monboddo's nations; their tails would grow (...) All would be losers were all to work for all: they would have no intellectual improvement. All intellectual improvement arises from leisure; all leisure from one working for another[131].

The European monarchs worked together to keep their kingdoms, and they succeeded for at least another few years.

§8: Africa

In Africa the situation was similar, though in general there is less archive material available, because of improper classification[132]. Already as early as in 1157 a commercial (trade) treaty was concluded between European Christian powers and a North African state, *in casu* between Pisa and Tunisia. At that time the Arabic influence was still supreme, but that changed with the Turkish conquest of Egypt in 1517. In regard to the situation under the Turkish ruler, it can be said that it was the same as with many an Eastern ruler. That is to say that rights were given by the local ruler, in whatsoever form, to the foreign (European or Turkish) ruler (or his trading company). However, in the 17th century the Turkish rule became more and more ineffective, which created the double situation:

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130 Nussbaum, note 14, p. 120.

131 Cassese, note 13, p. 55, quoting Roswell, J., The Life of Johnson (London, 1980), and stating that "James Burnett, Lord Monboddo (1714-99), Scottish judge and anthropologist, put forward the idea that men could be descended from monkeys".

132 Alexandrowicz in his book on the European-African Confrontation, points to this. He mentions that it is basically the French material that is available, but that this "is hardly representative of the remainder of Africa which had its own political traditions". Other materials have not been published. Thus, "(t)he scarcity of treaty material originating from the pre-nineteenth century period compels the historian of international law to look to other historical sources, including the works of some of the classic writers". See Alexandrowicz, note 4, p. 9.

> of the *de jure* suzerain rights of Turkey recognised by the European powers, and the *de facto* position which allowed the same European States to conclude treaties with North African States, notwithstanding their *de jure* vassal status which could not be enforced by the Suzerain. Reference in these treaties to Ottoman capitulations must have been made *ex abundanti cautela* to make sure that minimum standards of treatment of European merchants would be observed in North Africa[133].

The African states were accepted as real states, i.e. they could have international rights, and could be bound by international duties, even though they were still called "Barbary States". Grotius quotes a case from a Paris Tribunal, in which the plaintiffs (French nationals) had lost goods to the defendants (Algerian nationals), while being engaged in maritime warfare. The (French) judge dismisses the claim of the Frenchmen, stating that the goods where acquired in the course of war. Alexandrowicz claims that:

> Thus Grotius implicitly recognised the Algerians as capable of waging war in the meaning of the law of nations, and we must assume that he must have attributed to the North African States and to States in a similar position the quality of statehood and sovereignty[134].

The concluded treaties were mainly one of two kinds; either a commercial concessions treaty, or a peace treaty. In the commercial treaties the local African ruler gives permission to the European trading companies involved, to operate their business in his state. Further rules regarding payment of debts and customs were also often regulated. The second type of treaty, the peace treaty:

> was concerned with the settlement of political problems and questions of trade and they contained clauses relating to (:)
> 1) cessation of hostilities (mainly naval warfare);
> 2) the liberation of prisoners (including questions of ransom);

133 Alexandrowicz, note 4, p. 18.
134 Alexandrowicz, note 4, p. 19.

3) the restitution of prizes including questions of piracy;
4) the privileges of consuls;
5) the protection of missionaries and freedom of religion;
6) problems of navigation and
7) the duties connected with the law of neutrality[135].

The French and the Portuguese were the first European states to settle themselves in Africa. "The French initiated normal treaty relations with the North African States as soon as the latter started emancipating themselves from Ottoman suzerainty in the 17th century"[136]. An impressive political and cultural history is what the Portuguese found: Grotius, in his mentioned work *De Jure Belli ac Pacis*, describes two Empires in Africa, namely that of Egypt and that of Ethiopia. He compares them with the Persian Empire, and states that the Persian King might have absolute power, but was not quite above the law. A similar situation applied to Egypt and Ethiopia:

> Its characteristic features were centralised power in the Sovereign who governed through an influential military and bureaucratic machinery, without establishing a feudal hierarchy (...).
> The second great influence in the field of evolution of statehood made itself felt in the African continent after the progress of Islam of Egypt to the borders of Spain and into the heart of the Iberian Peninsula (...). Islamic influence helped to consolidate the internal structure of the State and brought a definite code of inter-State relations to Africa[137].

Even though in general the Islamic attitude towards inter-state relations was based on the so called *jihad* (or war against infidels), it still very much relied on the *pacta sunt servanda* – principle.

135 Alexandrowicz, note 4, p. 20.
136 Alexandrowicz, note 4, p. 9.
137 Alexandrowicz, note 4, p. 11.

> It [the principle] guaranteed the functioning of a mechanism of diplomatic exchanges, it admitted external trade and jurisdictional concessions for foreigners, it respected certain laws of war (e.g. the ransoming of prisoners of war) and it proved in course of time flexible enough to modify its own original harshness which had characterised the first centuries of Islamic conquest[138].

One of the earliest treaties between an European state and an African state (or state like entity), was the treaty between Portugal and the Kingdom of Monomotapa (Mvenemetapa) in the 17th century (1629 to be precise), the latter being a ruler in the form of a priest-king:

> The treaty establishes suzerain-vassal relations between the King of Portugal and the Ruler of Monomotapa (...). It may here be emphasised that one of the characteristic differences between Portuguese overseas policy on the one hand and the policy of the Dutch, the English and the French on the other, was the nature of their approach to suzerain-vassal connexions and the treaty making which accompanied them. For, the Portuguese (unlike other Europeans) came to Africa and later to Asia as servants of the Crown and not as employees of trading companies (...). The King of Portugal came through his military and civil officers into direct contact with foreign Sovereigns particularly through his Governors and the Vice-Roy at Goa (...).
>
> On the whole the conception of vassalship was applied by the Portuguese in a flexible way. It left the vassal practically with internal autonomy and with a measure of external sovereignty[139].

As has already been discussed above, the Portuguese treaties did not only focuss on the delivery of goods, but also for a very large part on the propagation of the Christian faith. And that included the attempts to reduce Islamic influence. They contained "the characteristic anti-Islamic discriminatory clause stipulating the explusion of 'all Moors from the Kingdom'"[140]. In general, the relationship between African and European rulers

138 Alexandrowicz, note 4, p. 12.
139 Alexandrowicz, note 4, pp. 14-15.
140 Alexandrowicz, note 4, p. 16.

continued to be one of at least partial equality. In a treaty concluded in 1628, both the contracting parties (being the Ruler of Algeria and the King of France) are called "Emperors", and the King of France refers to Ruler of Algeria as "Mon très cher et parfait ami"[141]. Another treaty (of 1631) gives the French ambassador in Morocco juridiction in dispute cases between French subjects residing in Morocco. Vice versa the same applied to the Moroccon ambassador in France. It is important to highlight these provisions once again, as we will see that in the following centuries the (existence of) equality of relations will be denied by European writers. Alexandrowicz stresses that:

> The provisions of these treaties are of fundamental importance for the history of the law of nations, for they prove that the distinction between civilised and non-civilised countries made by the positivist school of international law in the 19th century has no basis in historical source material[142].

Other interesting treaties include the French-Tunisian treaty of 1665, which dealt with that disputes between French subjects in Tunisia were to appear before the Ruler, not the French consul. The treaty of 1685 gave a separate provision for disputes, stating that regarding disputes between French nationals and Turks or Moors on the other, Tunisian jurisdiction was to apply. However, normal judges were excluded from that jurisdiction, as it was limited to the Council of the Dey (the name for the Tunisian ruler), in the presence of the French consul. Similar stipulations were adopted in later treaties as well. In a later treaty, that of 1824, the jurisdiction was not limited to the Ruler anymore, but instead a mixed court examined the case. The court existed of an equal number of French and Tunisian merchants. In case of a tie, the case was referred to the Dey. However, the Dey had to take his decision in agreement with the French consul. Half a century later, in 1881, the French established a protectorate in Tunisia. With it, eventually consular jurisdiction was abolished. Alexandrowicz notes that "(w)e can see how the decline of Tunisia was reflected in the gradual modification of the capitulatory regime"[143].

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141 Alexandrowicz, note 4, p. 20.
142 Alexandrowicz, note 4, p. 21, see further under *Chapter III: International Law in the 19th Century.*
143 Alexandrowicz, note 4, p. 25.

With regard to Algeria, the treaty with France in 1684 gave the French consul jurisdiction in disputes between French nationals only. Mixed disputes were to be submitted to the Council of the Pasha (i.e. not to ordinary judges). Similar provisions can be found in later treaties, as well as in treaties between Algeria and other European powers (e.g., in a treaty between Algeria and the City of Hamburg of 1751, the Algeria-Denmark treaty of 1772 and the Algeria-Spain treaty of 1786).

> It can be seen from all the above treaties that they adopted basically the same jurisdictional solution but the formulations of the provisions was not always the same, and emphasis was put in some treaties on the special treatment of criminal cases or on the presence of the European Consul in local proceedings in all cases involving nationals of his country[144].

Similar treaties were also concluded between the kingdom of Morocco and European powers. E.g., the treaty between France and Morocco of 1631;

> which gave the Moroccan Ambassador in France capitulatory jurisdiction. Article XII of this treaty gives jurisdiction in mixed disputes in Morocco to Moroccan judges and it states that the judgments passed by the court (...) will be carried out without complaint in France and the same applied reciprocally in case of judgments passed in mixed disputes in France. The position remained the same in French-Moroccon treaties concluded later (...)[145].

In general, these provisions testify to the equality between the African countries and their European counterparts with which they entered into treaties. Other provisions in those treaties (e.g., regarding diplomatic relations, maritime and commercial affairs etc.) do the same. But as Alexandrowicz tells us:

144 Alexandrowicz, note 4, p. 26.
145 Alexandrowicz, note 4, p. 26.

> In the 19th century the situation changed and discriminatory provisions appeared in treaties between European powers and the surviving North African States. For example in the British Moroccan treaty of 9th December 1856 limitations were imposed 'on the rights of the Moroccan Government to determine its own rates of customs duties and other charges imposed on or in connexion with the importation of products of the United Kingdom and its dependent territories into the Shereefian Empire (...)'.
>
> We may add that international law had by then reverted to some of the tenets of the classic law of nations on the coexistence of States with different religions or civilisations[146].

As with the Europeans in Asia, it was through the actions of the trading companies that these kind of limitations were placed upon the local rulers. The Africa Companies had the same endowed rights as the East India Companies. Firstly, to engage in trade matters in a specific region and to establish an administration in that territory, which would be under its control, and secondly so called delegated sovereign rights. The latter rights allowed the Companies to play a role in the international field, as it gave them external legal capacity to act on behalf of its sovereign.

> The exercise of rights of external sovereignty was under the strict control of the national government of the country which granted the charter. The degree of such control varied from country to country. English Companies were less restricted by government control than French or German Companies. It was also characteristic that the European Companies operating in Africa had not the full exercise of the active and passive right of legislation. On the other hand the East India Companies exercised such right to the fullest extent during the 17th and 18th centuries, a fact testifying to the high level of Asian diplomacy[147].

146 Alexandrowicz, note 4, p. 28.
147 Alexandrowicz, note 4, p. 41.

As said before with regards to the East India Companies, it should be noted that the Companies in Africa as well, were not acting solely on delegated sovereign rights by *European* rulers. They had similar sovereign rights delegated to them by the local African rulers as well.

> The Sultan of Zanzibar appointed the British East Africa Company his Wakil or plenipotentiary which was reminiscent of the appointment by the Mogul Emperor of the English East India Company as his Wakil at the end of the 18th century. In 1842 the Sultan of Zanzibar delegated similar powers to the Italian East Africa Company and the Company administered some of the Sultan's territories on the mainland of Afrcia 'in the name of His Highness the Sultan, and under his flag'[148].

In general the larger part of the African rulers accepted that the European trading companies were able to receive such sovereign rights from their side, or 'passiv-legitimation' as it is called. However, sometimes this would also be explicitly laid down in the form of a treaty.

> Thus the Sultan of Gandu declared in the treaty of 1894 with the Royal Niger Company[149] that he recognised 'that the Company received their powers from the Queen of Great Britain and that they are Her Majesty's Representatives to me. I will not recognise any other white nation because the Company are my help'[150].

§9: Liberia

Liberia formed a special case within the foreign associations operating on the African continent. In 1816 a special Committee was formed in Washington, to repatriate those people of African origin, living in the USA, who had obtained their freedom after the abolition of slavery. The Committee to this extent acquired land on the Pepper Coast of Upper Guinea, where it established a settlement. The settlers elected their own officers,

148 Alexandrowicz, note 4, p. 43.
149 Originally called the National African Company.
150 Alexandrowicz, note 4, p. 43.

who in turn were under the control of the so called Governor of the Colonisation Society, and his Council. The Colony had a charter which granted the Society the right to veto all laws proclaimed by the Governor and his Council. In 1846 preparations were intitiated to give self-governance to the settlers, and to give them rights of (exercising) internal and external sovereignty. Independence followed in 1847, and Liberia became the first fully democratic state of the African continent. Article V S.13 of the Liberian Constitution of 1847 stated that:

> the great object of forming these colonies being to provide a home for dispersed and opressed children of Africa, and to regenerate and enlighten this benighted continent, none but persons of colour shall be admitted to citizenship in this Republic[151].

It was this Christian background, with Euro-American influence that allowed Liberia, together with the republic of Haiti, to join the 18th/19th century Eurocentric Family of Nations long before any other African or Asian state was allowed to do so.

§10: Discriminatory Clauses

As has been mentioned in one or two instances above, the European powers in Asia (and Africa) were quite keen to keep every other European country away from 'their' operating field. In the treaties they concluded with local rulers, they wanted to incorporate a way which could exclude other powers from enjoying the same benefits. According to Alexandrowicz the solution was found in the so called *discriminatory clauses*, which came to play a very important role in the ongoing power politics. Every European country engaged in activities in the East, whether it was England, The Netherlands or Portugal, resulted to the usage of these clauses. The Portuguese were the first to come to India, and as they wanted to keep their pole position, they were also the first to adjust their treaties, and exclude all the other European nations from any commerce with the Indians. The first of these treaties were concluded already in the early 16th century. Obviously the other European countries did not respond well, as:

151 Alexandrowicz, note 4, p. 44.

> Such a pretension was no less iniquitous than chimerical (and) was treated with contempt; and the other nations agreed to consider any acts of violence in support of it, as just grounds for making war against the Portuguese[152].

Scholars like Grotius and Vattel agreed, and saw these Portuguese policies as a violation of the law of nations, infringing not only the rights of the other European powers, but of the Asian communities with which these treaties had been concluded, as well.

About a century later the Dutch came to India, and as could have been expected, they eagerly made use of discriminatory clauses themselves, mainly aimed against the still in India residing Portuguese. As can be seen, for instance, in the treaty between the Dutch and the Zamorin of Calicut of 1604, where it was explicitly stated that it was negotiated "with a view to the expulsion of the Portuguese"[153]. Similar provisions could be found in the later treaty of 1663 with the Raja of Cochin.

Though the Indonesian Islands fall outside the scope of this dissertation, a small detour at this moment might be helpful to illustrate the content of discriminatory clauses. As is well known, the Dutch by the second half of the 17th century were very well established in the islands. In 1667 they concluded a treaty with the Paduca Siri Sultan Hassan-Oudin, the King of Macassar. It contains some 'fine' examples of discriminatory clauses. For instance in Article VI were the King (of Macassar) undertook to expel all the Portuguese and their families, without any exception. The same applied to the English. Adding to this, the King would not allow any other European nations into his regions. Article VII consists of a free trade clause for the Dutch (the Dutch East Company that is), to the exclusion of all other European nations, as well as other Indian nations through whom the Europeans where likely to act. It is clear that these conditions are unubiquitous discriminatory clauses. If the King would not be able to enforce all of this prohibitions properly, the Dutch would give the "necessary assistance".

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152 Alexandrowicz, C.H., "The Discriminatory Clause in South Asian Treaties in the Seventeenth and Eighteenth Centuries", Indian Yearbook of International Affairs, 1957 (pp. 126-142), at p. 128.
153 Alexandrowicz, note 152, p. 129.

> (T)he Dutch were not content to issue unilateral measures but made the local vassal a party to the prohibitions enforced against other Europeans. This transposition of European power politics from Europe to Asia was gradually to gather momentum[154].

Vattel described the opinion of that time, by writing that the monopoly treaties with their discriminatory clauses were acceptable, but only if made in the general interest of mankind, in which case they would not violate the law of nature (nations). That is to say, if the prices of the goods bought/sold as a result of the treaties were reasonable, the treaty could exclude other nations. Vattel writes on treaties with non-Christians that:

> the law of nature (nations) alone regulates the treaties of nations: the difference of religion is a thing absolutely foreign to them. Different people treat with each other in quality of even and not under the character of Christians or of Mohammetans (...)[155].

These treaties were basically of an economical nature, though slowly political and military provisions were inserted as well, like the above mentioned 'necessary assistance' clause. In the treaty of 1763 between the English and the Nabob of Bengal, Meer Jaffier Ally Khan, the latter agreed that if the French would enter his territories, he would not allow them to build fortresses or other fortifications, hold lands etc. In 1765, two years later, the Nabob died, and his son Najim al Dowlah took over. On reinstating him as Nabob, the English (East India Company) made him declare not to let any (other than the English) Europeans in his service. The ones that were there already were to be dismissed immediately.

In 1782 a treaty was signed between the English and the Peshwa Madhoo Row Pundit Purdhan (of the Mahrattas), to celebrate "perpetual friendship and alliance". Article XIII is very interesting as the Peshwa in it states that he "will hold *no intercourse of friendship* with any other European nations"[156]. This could indicate that the English actually tried to create an unequal alliance by limiting the sovereignty of the other party to the treaty, in

154 Alexandrowicz, note 152, p. 130.
155 Alexandrowicz, note 152, p. 132 (quoting Vattel's Droit des Gens, p. 194).
156 Alexandrowicz, note 152, p. 135. Italics added.

this case the Peshwa. According to Vattel such an unequal alliance is an alliance between parties whose status differ. He further divides them into unequal alliances that either impair the sovereignty of one of the parties, or they that do not. Alexandrowicz here gives the example that the obligation to go to war against a *certain other country* does not impair the sovereignty of the country that undertakes such an obligation. However, the obligations to go to war *against all other countries* does form a breach on that country's sovereignty. Does this 'no intercourse' clause form a similar breach? Alexandrowicz holds the answer to this question to be of great importance, as it would indicate the legal position of many Asian rulers at that period. Referring to Vattel and other writers he claims that the above mentioned clause, pointing to a *specific* group of nations (namely, the European ones) *does not* impair the sovereign status of the local ruler in the eyes of the law of nations, or within the Family of Nations. He continues:

> At least this is the position if judged by European standards and thus we must come to the conclusion that in spite of all the above treaty limitations the Asian powers in question, who lost their sovereignty in the *nineteenth* century, must in principle be considered sovereign according to the *eighteenth* century rules of the law of nations[157].

One of the main reasons for this gradual loss of sovereign status is, according to Alexandrowicz, exactly the long term effect of these discriminatory clauses, which reduced the local rulers from rulers to vassals, and from vassals to mere (exploitable) subjects.

§11: Summary

The 16th, 17th and 18th centuries are witness to the system of international law that prevailed until the 19th century. As discoveries by the European countries led to interaction with vast empires in the East, solutions had to be found for solving the differences between them, or at least bridging the gap in a mutually acceptable way.

157 Alexandrowicz, note 152, pp. 136-137.

'Mutually acceptable', because the Europeans realized very well that these empires were governed by sovereign rulers which were one in the line of the many rulers before them. The great territories of China, India and the Indonesian Islands were not easily to be taken. Alexandrowicz refers to Justi, who:

> states that he is aware of the many shortcomings of government in Asian countries but that the balance of power generally prevailing within them allowed to classify them as civilized States, not inferior to European notions of civilisation[158].

In the beginning there were no problems; conquest was not the initial idea of the countries that visited them. Portugal, Spain, The Netherlands and England were not looking for territorial expansion, they only had their trade interests in mind. After the initial decades of introducing, and 'courting the court' with ambassadors, other envoys, gifts and letters with extensive flattery, international relations were taken to a level higher. Trading companies started to emerge, often controlled by their respective European governments, but in practice operating with a very high degree of independence. These actions started what were called for instance in The Netherlands, the Golden Age. Yet as the trade was blooming and the relations with the foreign rulers became quite friendly, enmity was on the rise as well. First of all, this occurred between the Europeans themselves. Greed was the ruling vice. With discriminatory clauses to protect their connections with the foreign ruler against other countries, and by more drastic means as actual warfare between for instance the Dutch and the Portuguese. Though one of the positive effects of this was the literary warfare that was held between the 'advocates' of these countries, Grotius and Freitas respectively. This led to some rather extensive works in which both learned writers give examples and theories which now have become quite valuable for our understanding of the time period under examination. Second of all, the content of the relations between the Europeans and the Asian and African rulers changed as well. According to Alexandrowicz:

158 Alexandrowicz, note 10, p. 141.

> Trade monopolies led from power economics to power politics, and the contracting Asian country tended to be cut off from relations with other countries. Once this point was reached, it was only one step to depriving the particular Asian community of its sovereign status[159].

Whether this changing thought among learned writers and scholars was the reason for this change in approach, or whether it was the other way round, does not make much of a difference. The fact is that the initial, century old, ideas of mutual cooperation, a level of equality, summarized in the Family of Nations-thought and its law of nations, was quickly being replaced by a very self-centered form of law. Self-centered around the European nations. A mixture of natural law combined with forms of man-made legal rules formed the previous system that had worked for centuries, and kept a natural balance between all the nations. The religious aspect of law was the ruling element in the ancient times and in the beginning of the Middle Ages. Thereafter the influence of religion diminished, but the divine-element still played a role in the thought of natural law. It was the equal creation of men that continued to be the basis for the man-made law. 19th Century positivism completely took away any divinity of law, and with that the natural God given equality, be it between men or states. It replaced this system, slowly, with the idea that only rules given by the sovereign can be legal rules as such. And, to make matters worse, sovereign were only those countries being part of the Family of Nations. Recognition by certain countries was required to enter the Family of Nations. It was this concept of recognition, of approval by the European countries, that finally turned the barrel upside down. This way, (new) criteria were needed to examine who could be a member of the family. The European countries set the rules now.

159 Alexandrowicz, note 10, p. 138.

CHAPTER IV: INTERNATIONAL LAW IN THE 19TH CENTURY

§1: Introduction

In this Chapter we will take a closer look at the emergence of colonialism, and how it turned out to be the final stroke of death to an universal Family of Nations. Equality between the European countries and their colonies was out of the question, though some remnants of the previous centuries remained. The emperors of China and India, to whom the East India traders once bowed their heads, were turned into puppets; symbols of glorious times but without any real power. Colonialism was the practice, but in theory a justification was needed as well. We mentioned positivism in the Chapter before, now we will examine how it provided the basis for this colonialism, even though further justifying criteria were required. We will see how the 'benchmark' turned from 'civilization' to plain 'power', and how the depressing results can still be witnessed on a contemporary map of the African continent.

§2: Changing thought: Positivism and Colonialism

> For the colonizing elites, Eurocentrism was an important means for creating and maintaining an esprit de corps. It also facilitated inter-state political communication. Eurocentric habits of thought and perspectives made possible the rise and spread of a typically European international law, confined to what Westlake called 'civilized nations'[1].

With "Eurocentrism", writers like Baxi indicatw the acceptance, or at least the idea, of an European invariable or even superior "framework for enquiry".

1 Baxi, Upendra, "Some Remarks on Eurocentrism and the Law of Nations", in Anand, R.P., New States and International Law (Delhi: Vikas Publications, 1972).

> In its most acute form Eurocentrism has led to needless denigration of indigenous traditions of the colonized nations. But in its milder and more persuasive form it had led to a continuing indifference to these traditions even in the scholarly discourses[2].

In the 16th, 17th and to a lesser extent the 18th century, the ideas of state sovereignty and equality within the universal law of nations (as we saw above), were well accepted. However, this came to be overshadowed by the colonialistic approaches adopted by the European states, the former trade partners of the foreign sovereigns. Such can be seen in the system of capitulations "under which certain states were compelled to accord to aliens privileges that put them beyond the realm of law and outside the jurisdiction of the territorial state"[3].

We have seen in the previous Chapter that the capitulations were basically a courtesy extended by the local rulers to the European community of traders in the Asian and African states. Yet, the greatness of this legal sign (compare modern private international law[4]) was mistaken by the Europeans as a sign of weakness. With this change in attitude, "bourgeois international law shrank from an universal law of nations to being a Christian law of nations. The colonies became objects of international law with no voice in shaping the law[5]. Some writers ascribe this change in attitude to the surge of *nationalism* that emerged in and after the French Revolution, thus forming the justification for territorial conquest[6]. Though already before the French Revolution things had slowly started changing.

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2 Ibid., p. 4.

3 Anand, R.P., "Rôle of the 'New' Asian-African Countries in the Present International Legal Order", American Journal of International Law, 1962, vol. 56 (pp. 383-406), at p. 384.

4 Most of the different national systems of private international law, contain rules on which law to apply, and under the jurisdiction of which court. That is to say, if a national of one country marries the national of a second country, in the latter country, private international law states which law should govern the marriage. There are different possibilities, depending on which law doctrine is commonly used in that country. For instance, the national law of the husband, the law of country where the marriage is performed, the law of the wife, and so on. This way, we can see similarities with the capitulations: the national law of a country determining which law has to be applicable in cases involving foreigners.

5 Chimni, B.S., International Law and World Order (A Critique of Contemporary Approaches) (Delhi: Sage Publishers, 1993), p. 230.

6 O'Connell, D.P., "Territorial Claims in the Grotian Period", in Alexandrowicz, C.H. (ed.), Grotian Society Papers 1968 – Studies in the History of the Law of Nations (The Hague: Martinus Nijhoff, 1970) (pp. 1- 15), at p. 1.

Alexandrowicz tells us that Grotius and other writers realized the sovereignty of the Asian and African nations, and that the law of nations between these countries and the European countries, was one of reciprocity. Writers like:

> Puffendorf, Vattel and other(s) (...) expressed later the same views. It is only after the establishment of Western colonial rule in Asia (whether by conquest or treaty) that writers of International Law started denying Sovereignty to these rulers and communities. Their views (if accepted) cannot have any retrospective effect. The classic law on the matter had been clear beyond doubt[7].

The previous naturalistic approach (compare Grotius and Freitas as well[8]) of law, was more and more changed by a *positivistic approach.* This helped to "rationalise the use of force against the non-European world by recognising that war and non-military pressure was a prerogative of sovereignty"[9]. Positivism and naturalism were gradually combined by jurists, who noted that even though some form of an universal natural law applied to all states (without a distinction between civilized and non-civilized), "this system had to accomodate a considerable and emerging body of positive law specific to Europe"[10]. This was an ongoing trend, until finally it led the 'renowned' writer Oppenheim to declare in 1908 that "we are no longer justified in teaching a law of nature and a 'natural' law of nations"[11]. Positivism was there to stay.

The effect on international law was that in these circumstances, only the positive rules for assistance "in the maintenance of order, by regulating war and stabilizing the balance of

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7 Alexandrowicz, C.H., "Grotius and India", Indian Yearbook of International Affairs, (1954, pp. 357-367) at p. 367.

8 Though there were obviously differences between the two of them, the basis of their rule of law was respectively based in an universal law of nations as such, and a religous founding shaping the former. Thus both forms of reasoning incorporated an already 'given' set of natural rules, which formed the basis for the 'human' law. Positivistic thought completely erased the pre-existence of any rules other than the man made law.

9 Chimni, note 5, p. 230.

10 Anghie, A., "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law", Harvard International Law Journal, 1999, 40 (pp. 1-80), at p. 12.

11 Oppenheim, "The science of International Law: Its Task and Method", 2 American Journal of International Law, 313, 328 (1908), quoted in Anghie, note 10, p. 13.

power"[12], were focussed upon. The principles of justice or the natural law principles, were more or less ignored. Or as Alexandrowicz puts it:

> The Family of Nations, governed by its own law, became in the XIX century a closed society which proved unwilling to open its doors to newcomers. Colonial possessions were then considered a fait accompli. The European powers as well as the United States did not look to the past to justify their title to these possessions[13].

Basically, as Alexandrowicz tell us, the argument was that the Europeans in the African and Asian countries did not submit themselves to the jurisdiction of those countries, but instead were governed by their own laws, upheld by their consuls. This they held as "evidence of the inferior civilisation of the receiving countries and of the superior (Christian) civilisation of the countries whose nationals came to reside in Asia or Africa". Furthermore, the Europeans, seeing themselves as the superior civilization, used this power to admit, or not admit, other countries to the Family of Nations. In 1856, e.g., Turkey was admitted to the Family of Nations "but its position within that Family was still considered as anomalous 'because her civilisation was deemed to fall short of that of the Western States. It was for that reason that the Ottoman capitulations remained in force until 1923'"[14].

And even when Turkey, and other countries like Japan, Siam and Persia were recognized as having some form or another of civilization, it still was not the same as in the European countries, because their civilization 'level' "has grown up by degrees, and populations have become included in it among whom it did not originate (...). Even where its normal reign is assured, political, religious or other excitements may rouse the

12 Wright, Q., The Role of International Law in the Elimination of War (Manchester: University Press, 1961), pp. 17-18, where he also adds that "it is generally recognized that international law, today, must provide both rules of order and principles of justice to facilitate these two processes (...) of (...) outlawing war altogether through collective security action (...) and (...) (giving) attention to principles of justice to facilitate peaceful settlement of disputes". This finds its basis, according to Wright, in the history of international law.

13 Alexandrowicz, note 7, p. 357.

14 Alexandrowicz, C.H., Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967), p. 21, referring to Oppenheim-Lauterpacht's views in Oppenheim's *International Law* (paragraphs 28 and 318).

passions to break through the crust which has been formed over them"[15]. In this way, the positivistic thought allowed Europeans powers to violate principles of what was earlier called the *universal* law of nations. The (theory of) sovereignty of foreign states was no longer holy, but was replaced by a "standard of civilisation", which was not even a real standard, but crooked and used in a biased way. It could be advanced because the European states had already achieved a large amount of power in some countries in the East Indies, in any case it was also a 'necessity', because of the threat of large powers outside Europe. These "non-European great powers some of which were not Christian (for instance, Turkey and Japan) (...) provided the ideological justification for declaring the barbarous and semi-civilised colonial world outside the pale of operation of the law of nations"[16]. The effect being that:

> (t)he conquest of non-European peoples for economic and political advantage was the most prominent feature of this period, which was termed by one eminent historian, Eric Hobsbawm, as the 'Age of Empire'[17].

These empires were built on exploitation of Asian and African resources, which "led to the growth of European capitalism and enabled the great industrial revolution to take place in Europe"[18]. The old ways of differentiating between the European countries and their Asian and African counterparts, were difficult to uphold. Christianity as a criterium did not suffice anymore, as "(t)here were even Christian countries which suffered from the consequences of civilisational discrimination as for instance the Empire of Ethiopia"[19]. Other criteria were therefore needed. Positivism provided the basis for this conquest. There was a distinction to be now made between so called *civilized* and *non-*

15 Westlake, J., Chapters on the Principles of International Law (Cambridge: University Press, 1894), p. 104.
16 Chimni, note 5, pp. 230-233.
17 Anghie, note 10, p. 2.
18 Anand, note 1, p. 26. This on its turn led to the development of permanent (trading) organisations, forming the start for the big international agencies we have today: "After the breakdown of mercantilism and the triumph of liberal economy in the nineteenth century a multilateral network of world trade revealed the existence of a world trading community as its social background". See Alexandrowicz, C.H., International Economic Organisations (The Library of World Affairs, no. 19) (London: Stevens & Sons Limited, 1952), p. 1.
19 Alexandrowicz, note 14, p. 22.

civilized states. The first being the Family of Nations, which consisted mainly of the European states and their 'family' (the North-American continent for instance). The latter being all the other countries. The (lack of) sovereignty was part of this distinction. The civilized countries were sovereign, the non-civilized were not. And vice versa: only the sovereign countries could be civilized. The practices of the earlier centuries were ignored or even said to be non-existent:

> Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin[20].

The rules that mattered, those of the sovereigns of the civilized countries, were to be discovered by examining the actual practice of those sovereigns, and the laws and rules they created. Only its outcome was seen as law. The bottom line was, that whatever form of sovereignty you might call the 'supreme' one, it mostly in practice meant the control over territory. Once a state would have territorial control, it would be seen as the sovereign power. Now, the 'problem' that jurists faced with this theory was that there were a lot of 'uncivilized' Asian and African states that in fact did exert effective power/control over their territories; in continuation of what we saw as the situation of the centuries before. This 'problem' was 'solved' by focussing on the society as sovereign. It was argued by the positivist writers that even though Asian and African countries might have a form of sovereignty, they were *still* to be excluded from having the same powers as the European states, because they did not meet the "criteria of membership in civilized international society"[21]. Westlake writes that it is possible though to recognize some form of "advancement" among these countries:

> When a new country is formed by a civilised state into a colony, the title to land in it may sometimes be deduced by the proprietors from a situation of fact which existed

20 Wheaton, H., Elements of International Law, Ch. 1.11, quoted in Anghie, note 10, p. 23.
21 Anghie, note 10, p. 28.

> before the civilised government was established (...). This will be the case where the colony was formed among natives of some advancement, or where its formation was preceded by the settlement of the pioneers of civilisation [sic][22].

Some of the bigger "Asiatic empires" could thus be classified as civilized countries, as they had effective governments in the eyes of their European counterparts, but for the most the larger areas of the Americas and Africa were not included:

> Can the natives furnish such a government or can it be looked for from the Europeans alone? In the answer to that question lies, for international law, the difference between civilisation and the want of it. (...) (W)here ever the native inhabitants can furnish no government capable of fulfilling the purposes fulfilled by the Asiatic empires (...), the first necessity is that a government should be furnished. The inflow of the white race cannot be stopped where there is land to cultivate, ore to be mined, commerce to be developed, sport to enjoy, curiosity to be satisfied (...). Accordingly international law has to treat such natives as uncivilised[23].

Only when states were recognised as such, i.e. according to the 'civilized' criteria, could they be players in the international field. This was something new, because the matter of recognition had not existed in the centuries before[24]. Alexandrowicz noted that the Asian states were being reduced from century old members of the Family of Nations, and found themselves in "an ad hoc created legal vacuum which reduced them from the status of international personality to the statues of candidates competing for such personality"[25]. This became clear at the so called Congress of Vienna in 1815, when a few great European powers formed "an exclusive club", which they called the Concert of Europe. They saw themselves as the "guardians of the European community and executive directors of its affairs[26]. The Treaty that was the outcome of the Congress, defined the

22 Westlake, note 15, pp. 134-135.
23 Westlake, note 15, pp. 141-143.
24 *See Chapter III, §6: The Law of Nations and International Practice: Recognition.*
25 Alexandrowicz, "Mogul sovereignty and the Law of Nations", p. 318, quoted in Anand, note 1, p. 19.
26 Anand, note 1, p. 19.

European political map for half a century to come. The rest of the world was left out of play. Suffice it to say that:

> (s)uch a change in the law which was supposed to be based on the consent of Powers in disregard of the universalist conception of natural law, was hardly supported by the consent of all the nations of the world, particularly in Asia[27].

Why would it? The Family of Nations that had existed so long before, comprising of *all* nations, now had become identical with the very limited Concert of Europe[28]. Asian states were made clear that they could only enter if the Concert states would deem them to be fit. Europe now was more united then ever before, and had established its school of thought firmly as the one and only law of nations, the one and only international law. But these "rules of order and principles of justice which under conditions of balance of power had contributed unusual stability and prosperity to Europe were not similarly effective throughout the world"[29].

The great Chinese empire was defeated by the British in the war that was ended by the Treaty of Nanking in 1842. China not only ceded Hong Kong to Britain, but was also forced to open five major Chinese ports. This treaty was followed by the Tientsin Treaty of 1858, which mainly dealt with jurisdictional questions (imposing a form of jurisdiction based on the nationality of the parties, i.e. British laws for the British). This was nothing new with regard to China's status in international law, for Article II of this treaty deals with the exchange of ambassadors and so on "in accordance with the universal practice of great and friendly nations"[30]. This would mean that it still was the European power that sought recognition from China, and not the other way round. Similar treaties concluded with other European countries in the same time period show the usage of identical terms.

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27 Alexandrowicz, C.H., "Mogul Sovereignty and the Law of Nations", Indian Yearbook of International Affairs, (1955, pp. 316-324) at p. 318.

28 Even within the Concert only the major powers played a role. Alexandrowicz: "(...) (T)he minor European powers had to be content with the passive role assigned to them by the great powers", Alexandrowicz, C.H., "Some Problems of the History of the Law of Nations in Asia", Indian Yearbook of International Affairs, (1963, pp. 3-11) at p. 7.

29 Wright, note 12, p. 24.

30 Alexandrowicz, C.H., "The Continuity of the Sovereign Status of China in International Law", Indian

> In spite of certain limitations imposed on China in these treaties, they all stipulated the exchange of envoys in accordance with the law of nations and for the establishment of mutual diplomatic relations. Whatever the constraints which China had to suffer in connection with all these arrangements, the express treaty provisions relating to diplomatic intercourse testify to China's uninterrupted sovereign status in the law of nations[31].

In some cases this was even supported by very clear statements as to the status of China. For instance in Article I of the China-America treaty of 1858, dealing with concessions to foreign powers, by the Chinese Emperor. In which case the Emperor:

> 'has by no means relinquished the right of eminent domain or dominion' over the territories in question. According to Article II 'any privilege or immunity in respect to trade or navigation within the Chinese dominions which may not have been stipulated for by the treaty, shall be subject to discretion of the Chinese Government and may be regulated by it accordingly (...)' (...) Finally Article VIII stated that 'the United States, always disclaiming and discouraging all practices of unnecessary dictation and intervention by one nation in the affairs or domestic administration of the other do hereby disclaim and disavow any intention or right to intervene in the domestic administration of China (...)'[32].

Alexandrowicz sees this as a sign that the position of China as a member of the family of civilized nations was not an issue. At least, it was not so at the end of the 18th century, or even later. The Western countries (and also Japan) obtaining privileges and concessions from China, at the same time tried to achieve mutual diplomatic relations on the basis of equality. China thus in fact did not have to seek the recognition of any one, or any state, but was in the comfortable position where others sought her recognition instead. For Alexandrowicz "(t)hese mutual acts of recognition (...) were no more than acknowledgments of facts and can hardly be interpreted as acts of admissions to the

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Yearbook of International Affairs, (1956, pp. 84-94) at p. 91.

31 Alexandrowicz, note 30, p. 91.

32 Alexandrowicz, note 30, pp. 91-92.

family of nations of which China was one of the most ancient members"[33]. It was not till 1902 that China signed the so called Mackay Treaty with Great Britain, which "marked the beginning of the end of the period of limitations when (...) (Great Britain) promised the abandonment of the privilege of jurisdictional extraterritoriality"[34].

The sovereign status of China could therefore be seen to be a continuing factor, even though the 'rough' 19th century left its marks. However, it was mentioned earlier, that China is an example of the continuation of the earlier practices, which were deemed to be international law. Unfortunately, China forms a rare example. Most of the other Asian and African countries suffered a different fate, as their position was not a strong as the Chinese empire. We saw in the previous Chapter that the Mogul emperor gradually turned into a puppet. As the influence of the British grew stronger, the actual position of ruler of the empire turned more and more into a mere formal institution and existed by grace of the British. As with the Chinese emperor, the tributes from the side of the British continued, but:

> (s)uch tribute, if it can be so called, had no greater significance than the presents which down even to our times [i.e. the end of the 19th century] Burma and Siam have sent to the court of Pekin. All that can be said is that a nation less conservative of old usages than the English would have sooner discontinued the practice[35].

The British Resident in Delhi became more important than the emperor:

> As the first half of the nineteenth century progressed and the power and arrogance of the British grew, so the Resident came to act less and less like ambassador to the Great Mogul, and more and more like the Mogul's paymaster and overlord[36].

33 Alexandrowicz, note 30, p. 93.
34 Alexandrowicz, note 30, p. 93.
35 Westlake, note 15, p. 197.
36 Dalrymple, W., City of Djinns – A Year in Delhi (London: Flamingo, 1994), p. 98.

This led some writers to comment on the superiority of 'European international law', which law was therefore not directly applicable to the Asian and African countries, as the situations of "chronic misgovernment and anarchy" did not take place in Europe:

> (I)t does not and scarcely can be imagined as occuring in the international society of the white race, and therefore it cannot be expected that the law of that society shall provide for it. But it is unhappily a case by no means unknown among those states of other civilisations with which the white race is compelled to be in contact, and this is one of the causes why the primary rules of international law cannot be extended without limitation to the intercourse resulting from such contact[37].

In other words; because the European powers 'had' to interact with the Asian and African countries, certain rules had to be taken into account. But this, according to the 19th century writers, was not an easy thing. International law could not directly work, as the other civilizations had different ideas on how to run a society, contrary to the ideas of the European rulers. The latter supposedly being the 'right' ones.

Finally, however, in 1856, at the Treaty of Paris, the adagium 'if you can't beat them, join them' was more or less followed, by 'introducing' Turkey (the Ottoman empire) into the Family of Nations (though after the Peace of Westphalia in 1648, already a treaty had been signed between the Holy Roman Empire and Turkey. It becoming a member of the Family of Nations was 'a step further'). This was obviously "(o)ne of the greatest paradoxes"[38] as the Ottoman empire was already centuries old. The same reasoning was also applied to Japan, which was recognized as a more or less civilized nation, but only after it had defeated Russia and China in war. This made it clear that the "chief criterion or standard of civilization was *power*"[39]. It led a Japanese diplomat to make the remark:

37 Westlake, note 15, p. 198.
38 Alexandrowicz, note 27, at p. 318.
39 Anand, note 1, p. 21. Bold added.

> We show ourselves at least your equals in scientific butchery, and at once we are admitted to your council tables as civilized men[40].

§3: The Berlin Conference: The Scramble for Africa

> The nineteenth century history of European-African relations can be divided into the pre-confrontation period and the period of the confrontation proper during the last two decades of the century[41].

The period of confrontation had its height in the Berlin Conference. This Family of Nations was still a select group of basically Western powers, though a bit expanded (basically because of the slightly shifting of global power) with countries like Turkey and Japan. That became clear once again when this group[42] assembled in 1884-5 at Berlin, where the 'Africa-problems' were to be resolved. These problems mainly consisted of rivalry and quarrels between the Western states about who 'owned' what. The Conference led to the carving up of Africa, not taking into account the cultural, economic or other differences ('are there any?' was not the question in Berlin), but just what led to a general pleasing among the Western states. The objectives of the Conference were threefold:

1) Liberty of trade in the Basin and in the Delta of the Congo;
2) Application to the Congo and the Niger of the principles adopted by the Congress of Vienna of 1815 relating to freedom of navigation upon international rivers;
3) Definition of the formalities to be observed in order that any new occupation of territory upon the African coasts should be deemed to be effective[43].

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40 Röling, see above, p. 27, quoted in Anand, note 1, p. 21.
41 Alexandrowicz, C.H., European-African Confrontation: Study in Treaty Making (Leiden: A.W. Sijthoff, 1973), p. 29.
42 The participating countries were: Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, The Netherlands, Portugal, Russia, Spain, Sweden and Norway, Turkey and the United States.
43 Alexandrowicz, note 41, p. 46.

The main articles of the Berlin Act (being the result of the Conference) were articles 34 and 35. Article 34 states that:

> any power which henceforth takes possession of a tract of land on the coasts of the African Continent outside its present possessions, or which being hitherto without such possessions, shall acquire them, as well as the Power which assumes a Protectorate there, shall accompany the respective act with a notification thereof addressed to the other Signatory Powers of the present Act, in order to enable them, if need be, to make good any claims of their own.

Article 35 states that:

> the Signatory Powers of the present Act recognise the obligation to ensure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights and, as the case may be, freedom of trade and of transit under the conditions agreed upon[44].

The Act, in general, deals with the acquiring of land in the coastal areas of Africa (see article 34), and of the effective occupation thereof (see article 35). The fact that it was not extended to the whole of Africa, was because of the mere "ground that so little was known of the interior of Africa"[45].

When the Europeans first came to Africa, they brought with them the law of nations based upon natural law, but as we saw previously, this made way for more positivistic thought in the 19th century. It has to be clear though that the continuing European actions in Africa were *not* occupationary actions of *territorium nullius*. Therefore, the word 'occupation' as used above in the Berlin objectives, should not be seen as occupation by an unilateral act, but instead in consequence of the acquisition from African rulers. Already under the natural law doctrines Africa was seen as a continent with its own

44 Ibid.
45 Alexandrowicz, note 41, p. 4.

States and state-like entities, as with Asia (as we saw before). Therefore, European countries had to obtain derivative title deeds, which had to be negotiated according to the existing rules of international law. The Berlin Conference was an effort to intervene to this emerging 'scramble for Africa'.

This brought some interesting legal problems with it as well. For instance, what was the new legal position of the African rulers? We have seen that before the 'scramble' started, in the 17th and the 18th century, the positions between European and African rulers was more one of equality. At least, that was the reality of the treaties. By examining the provisions regarding these relations in later treaties, we can get some idea of the things that had changed.

Some writers did not agree with this 'equal' concluding of treaties, i.e. they doubted the legal quality of the local rulers to be a party:

> (N)o document in which such natives are made to cede the sovereignty over any territory can be exhibited as an international title, although an arrangement with them, giving evidence that they have been treated with humanity and consideration, may be valuable as obviating possible objections to what would otherwise be a good international title to sovereignty. And this is reasonable. A stream cannot rise higher than its source, and the right to establish the full system of civilised government, which in these cases is the essence of sovereignty, cannot be based on the consent of those who at the utmost know but few of the needs which such a government is intended to meet[46].

Interestingly enough, this opinion was proclaimed only a decade after the initial conference. It seems to voice the general thought of the 19th century, but the legacy of the centuries before could not and was not ignored that easily. For one, the 'scramble' already shows that it was not just a situation of 'grab as much as you can'. The rules of international law were to be applied instead:

46 Westlake, note 15, p. 144.

> As treaties transferred certain rights from the African to a European entity, whether territorial or other rights, it was important to make sure that the African transferor was the bearer of such rights and capable of transferring a valid title to the transferee. Rights transferred in this way could be public or private rights but it was essential that the Ruler had sovereign powers, i.e. powers in public law, external and internal. In other words it was essential the European Sovereign-transferee should receive rights capable of being enjoyed in international law and valid vis-a-vis other powers[47].

Compare for instance the statement of one of the rulers in the Gambia region, who cessioned the Island of Lemain to the British: "Whereas all sovereignty of the said Island at present lies in us and has been handed down to us by our ancestors"[48]. The island was cessioned. This also points to the awareness that local rulers were the legal and practical sovereigns, otherwise the legal instrument of cession would not even have been necessary. The Europeans and the Africans in this sense more or less shared the similarity in ideas on sovereignty:

> While the theological or metaphysical background of divinity and dynasty might have been different, both European and African (as well as Asian) Rulers were in approximate agreement as to their capacity of transferring and receiving sovereign rights and as to the nature of the transaction which conveyed a title in international law (...). (I)n practice sovereignty meant from the European as well as the African point of view all round independence, internal and external[49].

This could be stretched a bit though. Often conflicting statements would be made. For instance, if one African ruler claimed to have full sovereignty over a piece of territory, which that ruler would cede to the European power, another African ruler would claim similar sovereignty over the same piece of territory. In most cases the European representatives (obviously!) chose to uphold the capacity of the ceding ruler. Determining

47 Alexandrowicz, note 41, p. 30.
48 Alexandrowicz, note 41, p. 30.
49 Alexandrowicz, note 41, p. 32.

whether or not a ruler would have the capacity to transfer rights to an European power, presented a lot of complicated problems within international law.

In a number of cases the question of legal capacity arose. E.g., in certain arbitration cases between Portugal and Great Britain. In the *Island of Bulama* Arbitration of 1870[50] the British claimed to have a legal title of cession to the Island. However, as the chiefs who ceded the island to the British were, in practice, under Portuguese control, the title was held to be invalid. Similarly, in the *Delagoa* Arbitration of 1875[51], the British had obtained territories from the chiefs in the Delagoa Bay. But yet again, the chiefs turned out to be under Portuguese overlordship. The title was considered to be invalid, as the chiefs did not have the legal capacity to transfer the territory. Yet another example was given in the *Barotse* Arbitration[52], were a definition was given of paramount and dependent rulers:

> A Paramount Ruler is he who exercises governmental authority according to (customary law), that is by appointing subordinate Chiefs or by granting them investiture, by deciding disputes between those Chiefs, by deposing them where circumstances call for it and by obliging them to recognise him as their Paramount Ruler[53].

This led the arbitrator to recognise the paramount rule of 'Levanika', the Barotse ruler, over certain areas, thus rejecting the claims of other regions/tribes.

Summarizing the statements in treaties between African and European rulers, it can be said (referring to Alexandrowicz) that:

> while in some treaties the capacity of the Ruler was expressed in a positive way, by emphasis on the sovereignty of the Ruler and his right to act and to transfer a title, in

50 The award was given by Ulysses Grant, President of the United States.
51 The award was given by Macmahon, President of France.
52 The award was given by the King of Italy.
53 Alexandrowicz, note 41, p. 34.

> other treaties (particularly French treaties) the formulation tended to be negative, the Ruler stating that he was not dependent on any extraneous control[54].

The most characteristic element of the scramble for Africa, however, was the fact that in reality the different claims regarding the legal capacity of African rulers were multiple. It was not merely a legal battle between the different African rulers, but even more between the different European powers that were standing behind them. And even if the African ruler would be deemed to have legal capacity, then still the question arises in what way a treaty could be concluded *legally*? The times were full of changing ideas, and as Alexandrowicz says:

> (T)here existed several conceptions in international law, the classic rule of the law of nations according to which freedom of consent was sacrosanct, the positivist concept according to which a measure of compulsion would not invalidate a treaty just as war remained for Sovereigns a legitimate medium of settling international disputes, and finally modern international law, i.e. law which tended to revert to the classic concept. M.F. Lindley in his work on the acquisition of territory in colonial areas states in relation to the 19th century positivist concept that 'a cession (which) was agreed to by the weaker State from fear of the stronger does not (...) render it of no effect in law'[55].

Lindley raises the question though, whether or not morality and natural justice form enough resistance against this kind of behaviour, and what to do if the stronger state indeed misused its position. However, that was not a question with which the stronger states would have been bothered. The same question was raised at the Berlin Conference by the American representative, John Kasson, though it did not get the response it deserved. Kasson then made his 'Declaration', intending it to be added to the Protocol of the Final Act of the Conference. According to Kasson:

54 Alexandrowicz, note 41, p. 36.
55 Alexandrowicz, note 41, p. 46, also quoting from M.F. Lindley.

1) Modern International Law steadily follows the road which leads to the recognition of the right of native races (African communities) to dispose freely of themselves and of their hereditary soil. Conformably to this principle my Government would willingly support the more extended rule on which should apply to the said occupation (of territory) in Africa, a principle looking to the voluntary consent of the natives of whose country possession is taken (by treaty) in all cases when they may not have provoked the act of aggression.
2) I do not doubt the Conference is agreed upon the significance of the preamble. It only indicates the minimum of essential conditions to be fulfilled to justify a demand for the recognition of an occupation. It is always possible that an occupation may be made effective by acts of violence which are outside the principles of justice, of national and even of international rights[56].

This Declaration shows the American view on 'modern international law', though in the end the final Act of the Conference was not ratified by the United States. Thus, the principle of voluntary consent was not laid down in the Act, but "it must be assumed that the principle (...) was at least tacitly accepted by the Conference"[57].

The practice *before* the Conference is evidence to this, viz., the majority of the treaties show some form or another of a 'consenting with'-article. The Royal Niger Company, for instance, used standard clauses in their treaties. The declarations required special witnesses, and was constructed as follows:

> We, the undersigned, are witnesses to the marks (signatures) of the (Chiefs) and also vouch for their understanding what they have signed (...). (We) do hereby declare that the foregoing agreement was duly and correctly explained to the (Chiefs) and they fully understood it (...).

56 Alexandrowicz, note 41, p. 47.
57 Alexandrowicz, note 41, p. 47. Westlake differs: "(A)n importance has sometimes been attached to treaties with uncivilised tribes, and a development has sometimes been given to them, which are more calculated to excite laughter than argument", Westlake, note 15, p. 150.

> [The witnesses] solemnly declare that the Kings and Chiefs (...) have in our presence affixed their (marks) (...) of their own free will and consent [58].

Similar practices were followed by the British, Germans and French alike. Some of the treaties were even concluded with the help of special interpreters who assisted in translating the treaty. Thus:

> The solemnities, the attitude to negotiation, insistance on a written text, all testify to the awareness of the binding nature of treaties. Moreover, though the contracting parties may not have exactly understood each other's legal and political institutions, they obviously acted on the presumptions of treaty law which allowed them to assure a continuity of legal control over territory and people and formalised the changes in sovereignty and excluded the danger of anarchy[59].

Another effect of the scramble was that the European powers tried to put discriminatory clauses in their treaties. Before the second half of the 19th century there had not been such a confrontation in Africa as yet. It has taken place mainly in the East Indies where the Dutch, Portuguese, French and the English tried to exclude one another from their bounty. Only once the 'scramble' had started "it gathered momentum to such an extent that a treaty war on the East Indian pattern was not feasible". The Western states tried to obtain titles to territory as quickly as possible, "without engaging in the strategy of manipulating particular treaty stipulations as media of competition". If the African state was turned into a protectorate or a vassal state, it was not so much the effect of a slow process of submission of the local ruler to the European one (as in Asia), but instead "by the immediate conclusion of a treaty of protection (a policy applied by the Portuguese even in the East Indies)"[60].

We have seen that the African rulers were thought to be legally competent, and that treaties were regarded as general instruments of international law. The situation in the

58 Alexandrowicz, note 41, p. 48, quoting E. Hertslet.
59 Alexandrowicz, note 41, p. 52.
60 Alexandrowicz, note 41, p. 55.

17th and 18th century was therefore one of international treaties being entered into between Europeans and Africans on a level of (some) equality. This changed in the 19th century, when the treaties not only ceded land to the European powers, but turned the African countries into protectorates:

> Protectorates and Capitulations are institutions of international law which were originally conceived as instruments for equal application to all member States of the Family of Nations. The Protectorate means a split of sovereignty and its purpose is to vest in the Protector rights of external sovereignty while leaving rights of internal sovereignty in the protected entity. In this way the Protector shelters another entity against the external hazards of power politics[61].

The protectorate is not part of the protector state, and thus is not bound automatically by treaties that the latter engages in. That is one of the differences between protectorates and suzerain-vassal relationship. Though in reality a lot of European-African treaties stipulated that with the protectorate a suzerainty was established as well. "Legal terminology was obviously not a significant weapon in the colonial officer's professional armory"[62]. Among the classic writers the protectorate was seen as a member of the Family of Nations, and the protector state was not allowed to breach the limits of its rights with regards to the protectorate[63].

The British concluded quite a number of treaties of protection in the beginning of the 19th century, and basically all of them established the abovementioned classic type of protectorate. When the British wanted to establish a similar situation in Opobo, the Ruler of Opobo asked the meaning of 'protectorate'. Consul Hewitt (the British representative in West Africa) answered:

> The Queen (of Great Britain) does not want to take your country or your markets but at the same time she is anxious that no other nation should take them; she undertakes

61 Alexandrowicz, note 41, p. 62.
62 Alexandrowicz, note 41, p. 62.
63 See the quote of Vattel with regard to the Warren Hastings case (*supra*).

> to extend her gracious power and protection which will leave your country still under your government; she has no wish to disturb your rule (...)[64].

Similarly, in the *King v. Earl of Crewe* Case, one of the judges said about the protectorate:

> The one common element in Protection is prohibition of all foreign relations except those permitted by the protecting state[65].

The language is the protection-treaties is mainly one of negativity, i.e. prohibiting the African ruler to do certain things (e.g., to go to war without the consent of the European power), thus restricting the external sovereignty of the African state in different ways. Interestingly, Alexandrowicz deducts the following from these practices:

> The negative clause which appears in various forms in treaties establishing Protectorates testifies to the fact that the Ruler must have possessed all the external powers which subsequently he was prohibited to exercise (...). It is difficult to see what other powers he should have possessed to be considered a Sovereign in the meaning of international law. Even when the negative clause took away from him his external powers, he still kept his internal sovereignty and this was frequently stipulated in treaties of protection. This particular clause may be called the internal sovereignty preservation clause or non-interference clause[66].

So, the negative clause actually indicated that the local rulers did have their own sovereignty, and maybe even more important, that this was recognized by their Western 'guests'. A similar reasoning was applied to the the custom of using discriminatory clauses, as discussed in the previous Chapter. To strengthen this, in most French-African treaties the non-interference clause is specifically mentioned, stipulating that the French

64 Alexandrowicz, note 41, p. 63.
65 Alexandrowicz, note 41, p. 63; *King v. Earl of Crewe* Case, see 1910 AC 588.
66 Alexandrowicz, note 41, p. 67.

would not interfere with certain affairs of the specified African ruler. The French Minister of Foreign Affairs, Guizot:

> threw light on the term 'sovereignty' used in treaties of protection when he declared that sovereignty acquired by France in these treaties was *external* sovereignty; it could not mean interference in the internal sovereignty of the contracting African ruler. (...) (T)his opinion was the same as that expressed by the British Government, e.g. in a statement by Consul Hewitt to the Ruler of Opobo[67].

Having said all of this, we can see that the African protectorates did not deviate much from the idea of protectorates under traditional international law of nations at that time. Even though protectorates were subject to notification, they were *not* open to occupation, as this obviously would violate both the protector's duties, and the protectorate's rights[68]. However, this classical protectorate turned into a *colonial protectorate*, when most of the positivist lawyers at the end of the 19th century started redefining it. Article 34 of the Berlin Conference stated that to establish a protectorate, the other signatories of the Berlin Act had to be notified. These other European states could then raise objections:

> If no objections were raised, the signatories were presumed to have agreed to the right of the notifying power to deal with the protected African country *beyond*[69] the traditional notions of the institution of Protectorate. It was understood that the notifying power had *carte blanche* to interfere also with the internal sovereignty of the protected country with a view to absorbing it by annexation[70].

But, according to international law then and now, the arrangements made by the European powers at the Berlin Conference, could not transcend the signatories of the

67 Alexandrowicz, note 41, p. 69.
68 See the abovementioned articles 34 and 35 of the Berlin Conference.
69 Italics added.
70 Alexandrowicz, note 41, p. 69.

Berlin Act. That is, it only bound them[71]. Thus, the *carte blanche* arrangement had more political than legal relevance.

> (I)t was legally meaningless vis-a-vis the contracting [African] Ruler or even illegal if a breach of treaty was envisaged[72]. Intention of annexation was irrelevant in international law. The 'Colonial Protectorate' was bound to remain a shadow of a legal institution which could neither take shape by intention nor by actual annexation. In the first case it was a political expectancy, in the second case there was no more room for any protectorate[73].

Another example of this situation, the change from the 16th, 17th and 18th century into the 19th century, is the instrument of *capitulation*[74]. As mentioned, Alexandrowicz defines both protectorates and capitulations as international law institutions, "originally conceived as instruments for equal application to all member States of the Family of Nations"[75]. Like the capitulations in the East Indies, in Africa these capitulations slowly started affecting the local ruler's sovereignty as well. Even though in the begin period of European-African interaction, the capitulations were agreed upon on a footing of equality. Only in the 19th century they "degenerated (...) into instruments of inequality reflecting the decline of the Ruler's status. The capitulatory provisions in African treaties appear in fact as a barometer of equality or inequality of relations"[76]. The classic law of nations governed the early capitulatory treaties. The stipulation of juridictional provisions, was the most common one (i.e. stating that the jurisdiction in cases between foreign nationals, e.g., Frenchmen, in another country, e.g., Morocco, was limited to the – French – consul in Morocco). In the 19th century this gradually changed. In the beginning, both civil and criminal disputes between foreign nationals in an African country, were within the jurisdiction of their respective consul in that country only. For instance, mixed disputes could go to a mixed court, or they could go to the African ruler,

71 To put it in the Latin phrase: *pacta tertiis nec nocent nec prosunt.*
72 Compare Vattel.
73 Alexandrowicz, note 41, p. 71.
74 See *Chapter III: International Law in the 16th, 17th and 18th Century.*
75 Alexandrowicz, note 41, p. 62.
76 Alexandrowicz, note 41, p. 83.

but with an appeal to an (higher) European authority, the Governor. Yet, as time progressed, and the law of nations became limited to a few states, so did the capitulations become instruments for those few.

§4: Liberia

As we have seen, Liberia is another interesting case. It was founded with American help to repatriate people who had been taken as slaves from the African continent. This American/Christian background helped it to be recognized not only as a state (in the middle of the 19th century), but as a part of the Family of Nations as well. It still, however, was in danger of becoming a protectorate. The French were very anxious to offer protection to Liberia. The USA, being closely involved in the birth of Liberia, was not happy with this. On several occasions they made it clear to the French, that the USA would not tolerate any Great Power to stand in the way of what had been achieved so far in and with Liberia. When the French finally entered Liberia in 1887, the USA stated that they felt justified to apply their good offices on behalf of Liberia, and the US Minister in Paris would be acting as a conciliatory medium. In the end Liberia did escape the general African fate of becoming a protectorate, as it concluded a treaty with France, settling some of their (territorial) disputes.

§5: Summary

Summarizing, it can be said that the institute of the protectorate, as for that matter capitulations, could have been a 'constructive' factor in the confrontation between Europe and Africa; a lot of African powers explicitly asked for European protection, as the scramble continued. Alexandrowicz concludes, that if both the parties had stuck to the actual texts and terms of the protection treaties:

> (t)he transfer of external sovereignty could have served the purpose of effecting the entry of the African continent into the Family of Nations (...).

> [But:] (i)t has been shown that the Europeans introducing into the texts of treaties of protection their own legal vocabulary, caused considerable confusion in the emplyoment of terms. Thus while all the 19th century treaties establishing dependencies were treaties of protection, the term suzerainty was frequently used or it was stipulated that 'sovereignty' had been transferred to the European powers (...).
> It has been often maintained that the Africans did not understand international law in detail but we may wonder whether European colonial negotiators had grasped the meaning of the law (.:.).
> [Therefore:] The transformation of the classic protectorate into the colonial protectorate was in its essence not a legal but a political development[77].

The difference between Africa and the East Indies in this case being, that in the East Indies the European powers scrambled for spices and (other) trade monopolies, but in Africa the scramble was on for territorial titles. Further, in the East Indies we find many more conflicts between the separate European states, while in Africa it seemed to be a "collective operation". The Berlin Conference clearly showed this, and was yet another phase in the history of colonialism. Western countries were not satisfied with the power situations, but tried to safeguard their interests by attempting "to establish a firm and clear framework for the management of the colonial scramble that otherwise threatened to exacerbate inter-European rivalries"[78].

The increasing and overwhelming influence of positivism made it easy for the European countries to use certain criteria for limiting the scope of the family and law of nations. As stated, the main criterium was *civilization*, as opposed to the general Family of Nations that had existed in the centuries before, where civilization as a 'dividing term' was non-existent. The 'civilization' used in the 19th century, was in practice given the meaning of 'power'. This power was a Machiavellistic kind of power, in the sense that the more the sovereign had a grip on his country, military apparatus etc., the more 'civilized' the country was. This remained so towards the end of the 19th century[79], though the content

77 Alexandrowicz, note 41, p. 80.
78 Alexandrowicz, note 41, p. 4.
79 See the mentioned Berlin Conference.

of power now shifted more and more towards *industrialization*. The term "civilized nation" began to mean "advanced nation" or "industrial and commercial nation" or a state which "was able and willing to protect adequately the life, liberty, and property of foreigners"[80]. In other words, this meant that the industrial state was not only able to create vast amounts of production goods in its country, but also draw materials needed for this production from its colonies, and sell the end-products in these foreign markets as well. As a result, "(s)urplus capital provided the chief incentive and became the dominant force in early twentieth-century imperialism[81]. And:

> The industrial revolution which took place in Europe in the late eighteenth century created a gap between Europe and non-European States; in the nineteenth century the latter were left far behind and were gradually conquered by the former or at any event fell under their domination. Thus, in the nineteenth century, a previously universal international community narrowed to a European one[82].

Anyway, regardless of the criterium to decide who could become a part of the Family of Nations, the common factor was still that it were only the European countries that could decide whether or not a country was civilized in this or anyother sense.
We can find a 'nice' example in the British reaction to the Hague Conference of 1899, where expanding bullets ("causing gaping wounds and appalling suffering") were prohibited. Britain maintained that these could still be manufactured in Calcutta, for local usage:

> The enemies whom Britain encountered were not armies from the European countries who had signed the St. Petersburg Declaration [of 1868, prohibiting the use in times of war of explosive projectiles under 400 grammes weight], but 'fanatical natives', 'savages', and 'barbarians'. The difference was deemed substantial: 'civilised man is

80 Schwarzenberger, G., "The standard of civilisation in international law", in Current Legal Problems vol. 8, p. 220 (1955), quoted in Anand, note 1, p. 23.
81 Moon, P.T., Imperialism and World Politics, p. 25 (1927), quoted in Anand, note 1, p. 27.
82 Cassese, A., International Law in a Divided World (Oxford: Clarendon Press, 1986), p. 39, referring to the ideas of writers like Van Leur, Alexandrowicz and Mushkat.

> much more susceptible to injury than savages (...) the savage, like the tiger, is not so impressionable, and will go on fighting even when desperately wounded'[83].

Resistance among countries suffering from these kind of ideas, had come up stronger already in the second half of the 19th century. The famous Calvo-clause was formulated by the Argentine jurist Calvo to counter:

> legal and political interventions of western capital exporting countries, which often constituted the pretext or the occassion for armed expeditions, strong political pressure, or other forms of interference[84].

It did not have that much effect, and neither did the efforts of an other Latin-American, the Foreign Minister of Argentina, Luis Drago, in the beginning of the 20th century. He argued that "financial troubles and the consequent need to postpone payment of debts [of Latin-American countries to Western countries], was no justification for foreign military intervention"[85]. Obviously, this wasn't received with too much enthusiasm by the European and Northern American powers.

It has to be said, that as a nuance to the positivist trends of the 19th century, opposing schools of thought had emerged as well, though with regards to colonial matters positivism carried the most influence. Rousseau's General Will of the People, the German Historic school's romantic ideas, and Hegel's "pantheistic dynamism", "attacked not only rationalistic natural law but rejected the very idea of a rationally conceivable and objective basis of law"[86].

As a summarizing quote, we refer to Westlake, who categorized the international society (writing in 1894) as follows:

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83 Quoted in Spiers, E.M., "The use of Dum Dum bullets in Colonial Warfare", The Journal of Imperial and Commonwealth History (1975), 6-7, quoted in Cassese, note 82, p. 49.
84 Cassese, note 82, p. 50.
85 Cassese, note 82, p. 51.
86 Strakosch, H., "Natural Law: An Aspect of its Function in History", Indian Yearbook of International Affairs, 1960-61, vol. 9-10 (pp. 3-21), at p. 20.

> The international society to which we belong, and of which what we know as international law is the body of rules comprimises – *First*, all European states. These, as explained in speaking of the Peace of Westphalia, form as system intimately bound together by the interests of its members. Concert is another word to express a system in this sense (...).
>
> *Secondly*, all American states. These, on becoming independent, inherited the international law of Europe, (...) and they are as necessary parties as the European states for its further development (...).
>
> *Thirdly*, a few Christian states in other parts of the world, as the Hawaiian Islands, Liberia and the Orange Free State. The same cannot be said of all Christian states, for instance of Abyssinia[87].

All the other states were excluded.

87 Westlake, note 15, pp. 81-82.

CHAPTER V: INTERNATIONAL LAW IN THE 20TH CENTURY

§1: Introduction

In Chapter V we will examine how the countries that had gone from independent members of the Family of Nations to mere colonies of a narrow European Family of Nations, finally got rid of the colonial rule, and established themselves once again as sovereign states. We will further see how the concept of 'recognition' (linked with colonialism and positivism) has changed, though not as radically as one might have expected. The post World War II era has shown a remarkable flow of new legal and political instruments, supporting the cause of the new countries. We will take a closer look at a few. The term 'development', and its content, is of essential importance, as it indicates the essence of the new Family of Nations, one where the divide is between developed and developing countries. The *Island of Palmas Arbitration* Case[1] and the *Rights of Passage* Case[2] are two international legal cases that deserve closer observation as well; they show us how the present day legal society deals with the law from the past, which is especially interesting with regard to the colonial period.

§2: Independence and the New Family of Nations

In the 20th century most of the former colonies got back their freedom, and became independent. This was not an easy process though, and the results were not always that welcome either. Alexandrowicz points out the tragedy:

> The Family of Nations of the XX century opened its doors to newcomers from the continent of Asia, but their admission has been not infrequently treated as the opening chapter of their international career as if Asia had been a political vacuum in past centuries. The modern democratic organization of Asian countries has no doubt

1 *Island of Palmas* Case (The Netherlands v United States), 2 RIAA (1928), 829.
2 *Rights of Passage over Indian Territory* Case (India v Portugal), ICJ Reports, 1960, 6.

> embodied Western patterns of government but this has little bearing on their cultural and even political traditions[3].

In the beginning of the 20th century basic rules of international law were codified in, e.g., the London Declaration, the Conventions of Geneva and The Hague Conventions, which:

> sought to mitigate war and to prevent its spread, but not generally to eliminate it (...). International law consisted mainly of positive rules of order, though arbitral tribunals had utilized general principles of justice in dealing with particular disputes, especially those concerning boundaries, freedom of the seas, the protection of nationals abroad, and reparation for injuries[4].

At the Hague Conferences in 1899 and 1907, Turkey, China, Japan, Persia and Siam were admitted (at the former), as well as the Latin American Republics (at the latter), where the famous (earlier mentioned) Calvo and Drago doctrines were developed[5]. Though this 'new' international law was not confined to Christianity or European countries anymore, the colonial system still continued and it was not till the First World War that things started changing more rapidly:

> For the first time the Community of Nations sought to organize itself so as to master changing conditions in the interest of values deemed essential to human happiness and progress[6].

The 19th century balance of power was broken down by new means of communication and war, the upcoming of both fascism and communism, and the emerging new industrial

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3 Alexandrowicz, C.H., "Grotius and India", Indian Yearbook of International Affairs (1954, pp. 357-367) at p. 357.
4 Wright, Q., The Role of International Law in the Elimination of War (Manchester: University Press, 1961), p. 24.
5 Or as Anand puts it: "the new Latin American states challenged much of the then existing legal order at the Hague Conference of 1907. It is clear that the Latin American contribution to international law has added greatly to its strength, vigor and authority". See Anand, R.P., "Rôle of the 'New' Asian-African Countries in the Present International Legal Order", American Journal of International Law, (1962, vol. 56, pp. 383-406), at p. 391.
6 Wright, note 4, p. 25.

powers of the United States and Japan. Communism and the subsequent Soviet revolution greatly influenced the international community. The Soviet Union[7] was the first state "openly to oppose the economic and ideological roots of other States and of international relations"[8]. The two World Wars and the Interbellum brought about a more rapid shift in power situations, the coming and downfall of power'blocks' and changing thoughts, which we will examine now.

World War I

World War I was supposed to be the 'war to end all wars', and in that sense no means were spared to win. Even more than in the Napoleonic wars, neutral rights were impaired; unilateral declaration of seas and/or other territory to be a "military area" (by the British) or a "Kriegsgebiet" (by the Germans). The sinking of the British liner the Lusitanius on 7th May, 1915, torpedoed without previous warning, is the most infamous example. The French philosopher Jean-Jacques Rousseau described war as a contest between governments only. That was changed by WWI, where 'war' came to stand for 'total warfare'. This did not mean, however, that international law was abandoned. In general, diplomatic rights were maintained, and the parties involved in the war claimed to live up to their duties under the Geneva (Red Cross) Convention, The Hague Peace Convention, and other international agreements, even though in practice this could be a different situation. What was clear though, was that Europe no longer formed the most important part of the world community. Together with the rising power of the United States of America, and the Soviet Union on the other side, Europe was denoted and became merely *one* of the world powers.

> The decline of Europe made itself felt in the field of economic, military, and political power, but also in that of culture and ideology. Europe's pivotal role in the previous centuries as the world's store-room of values, institutions, political concepts, standards

7 The revolution (the most influential one of the two – the October revolution) took place in 1917, but only in 1923 was the formal name of the Union of Soviet Socialist Republics used.
8 Cassese, A., International Law in a Divided World (Oxford: Clarendon Press, 1986), p. 57.

of behaviour, came to an end[9].

As noted above, the (formation of the) Soviet Union marked an important event in international thinking. We have seen in the previous Chapter that states like Turkey, China, Persia and Siam had to a certain extent become members of the (European) international community. But they were greatly if not completely influenced by their links with the Christian European countries, and the market economy that these countries had imposed on them. The Soviet Union did not follow this pattern. Instead, it proclaimed an ideology radically different from the 'mainstream'. Regarding its influence on international law, it adhered to the following principles:

1) The self-determination of peoples, which was to be applied to all peoples, especially those in Europe and the colonies.
2) The substantive equality of states, i.e. as opposed to the legal equality. This would imply that, for instance, economic coercion on weaker states was directly frowned upon by the USSR.
3) Socialist internationalism, or the aiding of the working class and socialist political parties in any state.
4) The partial rejection of international law. All existing international legal norms and rules were deemed to be capitalistic, and therefore naturally contradicting the socialist ideals. Previous treaties (signed under the tsarist regime) were denounced. Yet, the Soviet Union was not completely against international law as such:

> (I)ndeed, it could not have done so without becoming an outcast in the world community: one cannot be a member of a social group and at the same time dismiss all its rules; at least some of them must be complied with (...). The USSR (...) tacitly or expressly bowed to a great many international standards[10].

9 Cassese, note 8, p. 57.
10 Cassese, note 8, p. 59.

Furthermore, a lot of (customary) rules regarding diplomatic immunities, respect for state sovereignty and so on were upheld by the USSR as well. The bottom line however, was that the Soviet Union's attitude in general was not seen to be beneficial for the existing international law regime. One could point out that this attitude did not give the USSR such a long life, but the fact is that even if the USSR could not survive as such, it efforts (extreme or not) caused an international legal stir, effects of which can still be noticed today. Its actions led, directly or indirectly, to the revision of international legal rules and changed international custom. By ways of stressing the self-determination of peoples and the equality of states, it formed an inspiration for a lot of European colonies, wanting to break free. In a legal sense, the resistance against international treaties that were 'forced', e.g., by colonial powers, had a major influence on the thinking of the developing countries as well.

Interbellum

The Interbellum formed a new beginning:

> What is striking about the new period following the first world conflagration is that disparity and domination were no longer taken for granted. The view that these should be suppressed or gradually tempered became strong[11].

Yet, unequal relations continued, but acceptance was no longer an automatism. Among the South-American and Asian leaders disgruntled voices could be heard, and Western countries were made very aware of the tensed situation.

The League of Nations, established by the Covenant, was a first attempt to change the existing situation (or perhaps better: to reflect the changing situation!), and come to a more realistic Family of Nations. However, "its centre of gravity throughout its existence continued to remain in Western Europe"[12]. Thus not only excluding countries to the east

11 Cassese, note 8, p. 56.
12 Anand, R.P., New States and International Law (Delhi: Vikas Publications, 1972), p. 24.

of Europe, but the United States on the other side were also absent. The system that the League proposed was one of (gradual imposed) restraints on use of force by states, which to many seemed the best way to prevent another war or similar gruesome hostilies. Immediately after WWI these ideas were shared by most countries, uniting the poor and the rich. Yet, as time passed, the enforcement measures turned out to be highly ineffective, and only strengthened the return of traditional power politics:

> Differences between member States, the lack of co-operation, the fact that the League gradually became a political instrument of the UK and France only, along with its inherent institutional deficiencies – all these account for its failure. A number of States resorted to force without being the subject of military sanctions or at any rate without the League bringing about a satisfactory settlement[13].

Combined with this was the economic crises that emerged in the United States after the 'gay and roaring twenties', and spread to and through Europe, and little attention was paid to issues that were more or less seen as too far away. With these crises;

> a rapid decline began (...). The first major defeat of the League resulted from Japan's invasion of Manchuria in 1931. When the League finally took a stand duly protecting China, at least in words, Japan in 1933 gave notice of her withdrawal from the League, retaining, however, her 'mandates' in the North Pacific. By a nice piece of legalistic irony, Japan continued to send in her innocuous 'annual reports', politely refusing their further discussion (...). The fatal blow to the prestige of the League was its retreat before Fascist Italy after Mussolini's invasion and conquest of Abyssinia (1936). As an instrument of political action, the League was terminated by the outbreak of World War II, except that in December, 1939, it expelled Soviet Russia because of her aggression against Finland. Russia's hostility, which resulted from this action, prevented a reconstruction of the League[14].

13 Cassese, note 8, p. 61.
14 Nussbaum, A., Concise history of the Law of Nations (New York: The Macmillan Company, 1958), p. 253.

Another world war was inevitable.

World War II

The Second World War formed the culmination of these problems; and after it, situations had changed hugely:

> World War II manifested, even more decisively than World War I, the obsoleteness of the old international law. The rules of war and neutrality were more flagrantly violated than they had been in the earlier war[15].

Europe was desillusioned, the Americans were boosting their economy even further with aiding one half of Europe, and the Russians were expanding their influence-zones in the other half. War was obviously incompatible with civilization, as the new weapons (with the atom bomb as complete anti-climax) constituted 'total war'. And what did civilization itself mean after a war that was so gruesome? It meant, according to some writers, the end of colonial imperialism, where the nation state had become idolized to such an extent that it resulted in long and tiresome wars. Nazism was the final effect of this doctrine, and surely the most extreme[16].

Jawaharlal Nehru, India's much respected and praised leader after India's independence, said in 1956:

> The spirit of the present age is opposed to any kind of domination of one over the other, whether it is national domination, economic, class or racial. There is a strong urge to resist this kind of domination[17].

15 Wright, note 4, p. 26.
16 Van der Molen, G.H.J., "Alberto Gentili and the universality of international law", in Indian Yearbook of International Affairs, vol. xiii, pp. 37-38 (1964), quoted in Anand, note 12, p. 21.
17 Cassese, note 8, p. 56, quoting from Mende, J., Conversations with Mr Nehru (London, 1956), p. 44

World War II had shaken the world, and made it wake up from utopian dreams, only to realize that:

> The barbarities of Nazi persecutions and massacres developed a demand to subordinate national sovereignty to human rights. The awareness of great and increasing differences in standards of living created a conviction in both the developed and the under-developed countries that political stability required a reduction of these economic differences[18].

Or, as another writer puts it:

> Nazi law is the *reductio ad absurdum* of the irrationalism which had become the metaphysical foundation of so much of European legal thought since the rejection of rationalistic natural law at the turn of the eighteenth and nineteenth centuries[19].

The term 'civilization' was very difficult to uphold, with the burden of the centuries before weighing heavy on the shoulders of the developed countries. "This somewhat lofty attitude of living under a State organized after the manner of the States of Europe seemed natural enough in the late nineteenth century, though its survival in the term 'civilized states' may cause some embarrassment now"[20]. Instead, 'civilized states' came to be replaced by the famous '*peace-loving*' nations, which formed the basis for the post World War II established United Nations. Civilization still remained very important though, but not everybody could agree that the UN represented such countries:

> One is completely mistaken, if one looks upon the United Nations as an organization that represents 'civilized peoples'. It is an organization in which barbarians and semi-barbarians have the upper hand. The main characteristic of the evolution of the United

18 Wright, note 4, p. 27.
19 Strakosch, H., "Natural Law: An Aspect of its Function in History", Indian Yearbook of International Affairs, 1960-61, vol. 9-10 (pp. 3-21), p. 5.
20 Jennings, R.Y., The Acquisition of Territory in International Law (Manchester: Manchester University Press, 1963), p. 20.

> Nations is not the civilization of barbarians. On the contrary, it is the barbarization of the entire United Nations[21].

In general though, the idea of 'peace-loving' nations, opened the door to a really universal Family of Nations, one that had not been witnessed in the last threehundred years, or perhaps even one that was more universal than ever. The colonial empires came down[22].

> Indeed, the collapse of that (colonial) political power system will one day be seen as by far the most important result of the Second World War. The reverberations of it will change conditions for life and work in every corner of the world and will in a decisive way determine world development till the end of this century and even beyond. Its importance cannot be overestimated. We have as yet only seen the beginning of its world-shaking effects; and (...) we have by means of biased scientific approaches protected our minds from grasping the seriousness of what has happened and what will happen[23].

§3: Recognition in the 20th Century

But, as these 'new' states arose from the ashes of the colonial empires, were they immediately recognized to be members of this new and much praised Family of Nations? In other words, was the concept of constitutive recognition, as it emerged with positivism in the 19th century, still alive? And if it was, was it not obstructing the new Family of Nations?

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21 Anand, note 12, p. 67, quoting Röling's example of a statement of a Dutch member of Parliament returning home after attending an UN General Assembly session (*supra*).
22 See Cassese, note 8, p. 67: "Syria and Lebanon were granted independence in 1945 and 1946 respectively; India and Pakistan became formally independent in 1947; in 1948 the state of Israel was founded, and Burma became independent; an independent status was granted to Libya in 1951, to Tunisia, Morocco, Sudan and Ghana in 1956, to the Federation of Malaya in 1957, and to Guinea in 1958".
23 Cassese, note 8, p. 66, quoting Myrdal, G., "The Worldwide Emancipation of Underdeveloped Nations", in Assuring Freedom to the Free (Detroit, 1964), p. 99.

In the *Tinoco Arbitration* Case[24] (1923), Judge Taft dealt with the recognition issue. He stated:

> (I)t is urged that many leading Powers refuse to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations.
> (...) The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such.

Alexandrowicz had pointed out to us[25] that the theory of recognition presented past and present writers with many problems. In the 19th century recognition was almost completely of the constitutive kind:

> (A)ccording to which the political act of recognition on the part of the other States is a precondition of the existence of legal rights. In the more extreme version this amounts to saying that the very existence of a State may depend on the political decision of other States[26].

Though in the *Tinoco Arbitration* Case the arbitrator points to the necessity of acceptance by other states, that is only because such acceptance forms important evidence of the real existence of such a state. In other words, the state can come into existence on its own, but that has to be proven, and one of the most obvious ways is by pointing to the recognition by other states. This is similar to what we have seen in the reasoning of 18th/19th century

24 *Tinoco Arbitration* Case (Great Britain v Costa Rica), 1 RIAA (1923) 369. Frederico Tinoco came to power in Costa Rica after a *coup d'état*. His government concluded several contracts with British corporations. After his retirement in 1919, all the old contracts were nullified. Great Britain made claims for injuries. The preliminary issues dealt with the status of Tinoco regime in international law. See Dixon, Martin & McCorquodale, Robert, Cases & Materials on International Law (London: Blackstone Press Limited, 1995), pp. 170-171/

25 See *Chapter III, §5: The Law of Nations and International Practice: Recognition.*

26 Brownlie, I, "Recognition in Theory and Practice", British Yearbook of International Law, 1979, 197,

writers like Klueber and Saalfeld (and to a certain extent Justi as well). Recognition is not needed for a state to be born, yet it could be a political requirement. Does this mean that in the 20th century the constitutivism dissappeared as quickly as it emerged in the 19th century?

> The most fashionable theory in twentieth-century doctrine has been the 'declaratory' theory. Brierly has expressed its essence in the following passage:
> 'The better view is that the granting of recognition to a new state is not a 'constitutive' but a 'declaratory' act; it does not bring into legal existence a state which did not exist before. A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them *as* a state. The primary function of recognition is to acknowledge as a fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognizing state's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse'[27].

This combines well with the *Tinoco Arbitration* Case, in the sense that it makes it clear that states exists, simply because they think they exist (the continuing influence of Descartes' *cogito ergo sum*, now extended to state-level!), even though they have not been recognized by the other states. This would be the same as Wheaton's *internal* sovereignty. But where Wheaton and other 19th century writers saw *external* sovereignty as a constituting factor for the state's full existence, the above mentioned view seems to regard recognition by states as mere *evidence* to an already existing situation. It is therefore that Brownlie continues with saying:

> None the less the idea that an issue of statehood or government (the criterion of effectiveness) involves the mere acknowledgement of a fact is really too simple. Certainly, questions of fact are foremost: but the legal criteria have to be *applied* and

quoted in Dixon&McCorquodale, note 24, p. 169.
27 Brownlie, quoted in Dixon&McCorquodale, note 24, pp. 168-169.

> this may call for some rather nice assessments (...). Such an assessment involves elements of appreciation and the choice of a point in a crescent process: in other words the choice is, to a degree and unavoidably, arbitrary (...). All this having been said, it is necessary to recognize certain elements of truth in the constitutivist approach (...). In many situations the facts which have to be subjected to legal evaluation involve a process and the court or foreign ministry official or other decision maker has to make a more or less arbitrary appreciation of the question of statehood or effective government. To this extent recognition involves an element of authoritative choice or 'certification'[28].

One of the most recent examples in this matter, is the break up of the Socialist Federal Republic of Yugoslavia, where four of the six former republics were admitted to the United Nations as new and independent states (namely, Croatia, Slovenia, Bosnia-Hercegovina and Macedonia). The other two, Serbia and Montenegro, claimed that they continued to be members of 'Yugoslavia' as a member of the United Nations, with the 'slight' change of name into the Federal Republic of Yugoslavia. The Security Council examined this matter, and considered that Serbia and Montenegro could not continue the former Socialist Federal Republic of Yugoslavia's membership[29]. However, the fact that UN membership as such is denied, does not say anything about the statehood of a country. When Serbia and Montenegro were involved in the *Genocide* Case[30], the International Court of Justice seemed to have accepted their statehood, regardless of whether or not they were accepted as (state) members in the United Nations. This perhaps becomes more clear, when we examine the European Community's stand on the former Yugoslavian Republics. In 1991 the EC made a declaration on the guidelines on the recognition of the new states in Eastern Europe and the Soviet Union:

28 Brownlie, quoted in Dixon&McCorquodale, note 24, p. 169.
29 See Security Council Resolution 777 (1992), 19 December 1992, quoted in Dixon&McCorquodale, note 24, p. 148.
30 *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, (Bosnia-Hercegovina v Yugoslavia (Serbia & Montenegro)) ICJ Reports 1993, p. 325, quoted in Dixon&McCorquodale, note 24, p. 149.

[The Ministers] have adopted the following guidelines on the formal recognition of new states in Eastern Europe and in the Soviet Union:

'The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, have constituted themselves on a *democratic basis*, have accepted the *appropriate international obligations* and have committed themselves in good faith to a *peaceful process and to negotiations*[31].

Therefore, they adopt a common position on the process of recognition of these new states, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;
- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes[32].

Additionally, a specific declaration on Yugoslavia was accepted by the EC. In it, the EC requested the Republics *to apply for recognition, on fulfilment of the above mentioned guidelines*:

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31 Italics added.

32 *EC Declaration on the Guidelines on Recognition of New States in Eastern Europe and the Soviet Union*, December 1991, 4 European Journal of International Law (1993), 72, quoted in Dixon&McCorquodale, note 24, pp. 171-172.

> The Community and its member States also require a Yugoslav Republic to commit itself, prior to recognition, to adopt constitutional and political guarantees ensuring that it has no territorial claims towards a neighbouring Community State and that is will conduct no hostile propaganda activities versus a neighbouring Community State, including the use of a denomination which implies territorial claims[33].

This seems to be a very clear form of constitutivism; a case where one group of countries prescribes the rules for another group of countries, if the latter wants to be recognized as states by the former.

> They [the EC] *appear* to require 'candidates' for recognition to meet conditions of a subjective and peculiarly Euro-centric nature. This has led some commentators to argue that the constitutive theory of recognition is gaining ground. However, an alternative view is that these guidelines represent the EC's minimum standards for the opening of inter-State relations, and that they are not intended to qualify the right of these entities to objective statehood. (....) (T)his may illustrate the difference between the achievement of international personality (e.g., statehood) and its effective exercise in the international community (...). These cases are fine examples of how recognition can be a powerful political tool, even though the recognition issue may be dressed up purely [as] a matter of law[34].

Another example of this form of prescription of rules, is the opposite, non-recognition. In 1965 the Security Council imposed "a legal duty not to recognise the 'illegal regime' [in Southern Rhodesia]. It had been preceded by other resolutions (notably SC Res 216 (1965), 12 November 1965) which had called for non-recognition and thereby set the standard for future action"[35]. It becomes clear from this and everything else said, that recognition still plays a very important role in the international society, but on a different level. The constitutivism of the 19th century seems to have been tamed down, and

33 *EC Declaration on Yugoslavia*, 16 December 1991, 4 European Journal of International Law (1993), 72, quoted in Dixon&McCorquodale, note 24, p. 172.
34 Dixon&McCorquodale, note 24, p. 173.
35 Ibid.

previous opinions of a state being able to control its own birth (so to say), are more general. Yet, as has been pointed out as well, the declaratory theory is too simple for the present day. Even if a state is able to claim on its own that it is indeed a state (the internal sovereignty), it seems that its external sovereignty might sometimes be doubted. That is not a completely correct statement though. The mentioned examples show us, that sometimes states are not taken as states, but the reason for that is a different one than the lack of recognition. E.g., in the matter regarding the UN membership of Serbia and Montenegro. A similar approach can be applied to the European Community's guidelines on recognition. Even though they very clearly state that the rules laid down by the European Community (i.e. the acceptance of certain international documents, etc.), it may be recognition on a different level. The fact that the ICJ accepted Serbia and Montenegro as states in the *Genocide* Case, indicates that their statehood is untouched. The EC's demands for recognition therefore are *not* so much demands for recognition as a state *per se*, but recognition in a broader way. That is to say, on other fields as well, perhaps recognition as developed states, recognition as democratic states, and so on. But the main recognition (as a state) is not necessary; the state forms itself. It is only state prudence, as Klueber called it, that could simplify things for a new state, if it gets itself recognized.

This being said, we can see that the issue of recognition, the issue of state or non-state, has not become much clearer. True, it seems that the constitutive theory has lost field, and now operates on a new level, a second level. The first level being the domain of the declaratory theory: it is the state itself that declares statehood. However, Alexandrowicz pointed this confusement out to us, as there still is no consensus on the topic of recognition, even though the above mentioned elements can be distilled out of state practice. Even if the declaratory theory is applicable to the formation of new states, the fact that, for instance, the European Community can demand from these new states "appropriate international obligations", still forms a huge barrier for new states to participate on a direct and equal level with other states. They might now be recognized as states, but the effects of being 'an equal state' are taken from them in another way.

§4: New States and Development

As we have seen, after the Second World War most of the former colonies became independent, and were recognized as these 'new' states. To aid their independence, and support them in the post-independence processes, several important international legal instruments emerged, such as the Nuremberg Charter (1945), the United Nations Charter (1945), the Constitutions of UNESCO and other Specialized Agencies, the Universal Declaration of Human Rights (1948), the Genocide Convention (1948), the Uniting for Peace Resolution (1950) and the Declaration on the granting of Independence to Colonial Countries and People (1960). New principles were laid down in these declarations and conventions[36]:

a) First of all, the *outlawing of war*; for instance, if countries involved in an armed conflict would not accept a cease-fire, under the Charter they would be considered not legally equal in the sense that the not-accepting country would be defined to be an agressor. Other countries cannot stay neutral, but have the duty not to assist the agressor and not to hamper the defender.
b) The *self-determination of peoples*, linked with the heritage of colonialism, became (and still is) very important. Colonialism was abolished, and *all* states were to be equal under international law.
c) *Respect for human rights*, or to put it simply: "The state is for man, not man for state"[37].
d) The *personality of international organizations*; i.e. the United Nations as the community of nations constitutes a legal personality within international law. The International Court of Justice thus "found that the United Nations is entitled to demand reparation from a state – even a non-member – reponsible for injury to a United Nations agent"[38].

36 See Wright, note 4, pp. 27-29.
37 Wright, note 4, p. 28.
38 Wright, note 4, p. 29, referring to the *Reparation for Injuries Suffered in the Service of the United Nations* (*Count Bernadotte* Case), I.C.J. Reports, 1949, pp. 174, 183.

To a certain extent, this can be linked to the re-discovery of natural law after the Second World War. We have seen the positivistic trend slowly forming the ruling school of thought from the 19th century onwards, but the mentioned nazi-atrocities (positivism considered nazi rules to be law as well) brought about a change; "The democratization of the international society has become almost complete"[39]. "Almost", because even after the terror of World War II, and even after the codifying of the UN Charter, old ideas still remained very much alive, though perhaps smoothened and adjusted to the post-war era, glimpes of a limited universality could still be found:

> [Verzijl:] International law (...) not only is the product of the conscious activity of the European mind, but has also drawn its vital essence from a common source of beliefs, and in both of these aspects it is mainly of Western European origin[40].
>
> [Röling:]There is no doubt about it: the traditional law of nations is a law of European lineage[41].
>
> [Kunz:] Our international law is a law of Christian Europe. It has its roots in the Respublica Christiana of medieval Europe (...). It is based on the value system of the occidental culture, on Christian, and often Catholic values[42].
>
> [Oppenheim:] International Law as a law between sovereign and equal States based on the common consent of those States is a product of modern Christian civilisation, and may be said to be about four hundred years old[43].

Even though Oppenheim continues that the roots of this international law can be found in ancient history, he stretches that "it is well known that the conception of a Family of Nations did not arise in the mental horizon of the ancient world. Each nation had its own

39 Anand, note 12, p. 25.
40 Verzijl, J.H.W., International law in historical perspective, 1968, pp. 435-436, quoted in Anand, note 12, p. 6.
41 Röling, B.V.A., International Law in an expanded world, 1960, quoted in Anand, note 12, p. 7.
42 Kunz, J.L., The changing Law of Nations, 1968, quoted in Anand, note 12, p. 7.
43 Oppenheim, L., edited by H. Lauterpacht, International Law – A Treatise (London: Longmans, Green

religion and gods, its own language, law and morality[44]. But, he then continues to give an extensive examination of respectively the Jews, the Greeks and the Romans. These remarks have been used elsewhere in this work, but the point to notice here is that Oppenheim leaves *any* other civilisation completely out of the picture. Thus making it very easy to conclude that international law emerged solely from the people considered to be the ancestors of the Western civilisations. The conclusion of all the mentioned writers can be summarized as follows:

> (W)ith the entry of the Near Eastern and Far Eastern states into the hitherto exclusive European community, followed in turn by former African colonies, new forces, new ideals, new policies have had to be taken into account and as far as possible assimilated with the principles and customs of the Western World. The upheavel resulting from the Second World War in a sense forced the assimilation, and the older members are now confronted with the problem of creating within the new larger community of nations a unity of principles and of concrete objectives out of which an effective rule of law may be developed[45].

All of these writers note that after World War II, the newly independent states took hold of this international law. But it is a process of "assimilation", where the state loses its own identity (as opposed to "integration", where its own identity is kept), in trying to conform to the universal standards set by the developed world. The 'new' countries are seen taking "as the highest and, indeed, as universal values certain fundamental ideas created and elaborated by the West"[46]. This is being used as proof for the continuing dependence of non-Western nations on ideas so fundamental, that even though these new ('new'?) states are trying to free themselves of the West, they can still not do without the Western universal thought. A former Dutch Prime Minister, after WWII, said:

& Co. Ltd., 1966), p. 72.
44 Ibid.
45 Fenwick, C.G., International Law (Bombay: Vakils, Feffer and Simons Private Ltd., 1967), p. 4.
46 Verzijl, see above, quoted in Anand, note 12, p. 8.

> that only Christian nations were capable of distinguishing between justice and injustice, between wars that were forbidden, and wars that were not. He seriously doubted if a Mohammedan or a Hindu could grasp the essence of aggression. Such a judgment, he felt, could only be given by states with a Christian culture[47].

And, as we have seen before, these Christian states have certainly given the Asian and African countries an idea of their "essence of aggression". Nehru, with regard to these Western thoughts, told the United Nations General Assembly:

> May I say, as a representative from Asia (...) that the world is something bigger than Europe, and you will not solve your problems by thinking that the problems of the world are mainly European problems?[48].

> [Anand:] (T)he exploitation of the poor countries still continues through subtle and sophisticated means and under an economic order which is merely a continuation of the hated colonial era. Although colonialism has died a natural death, the international framework of the old order has been kept intact by the more pragmatic and self-confident colonial Powers. The 'White man's burden', in respect of the impoverished, conquered, and humiliated natives of the Third World continues through the developed countries' superiority and dominant voice in the international economic system[49].

In the West itself, different thoughts could also be heard, e.g., by R. Ago, who holds that:

> international law evolved even earlier [than in the 11th century], namely in the ninth century, when three 'different worlds' began to coexist and to have international relations: the French-Lombard regime empire of Charlemagne, the Byzantine, and the Islamic empire: hence, for Ago, the origin of the international community has not been

47 Quoted in Anand, note 12, p. 9.
48 Jawaharlal Nehru's Speeches, 1958, p. 319, quoted in Anand, note 12, p. 9.
49 Anand, R.P., International Law and the Developing Countries – Confrontation or Cooperation (New Delhi: Banyan Publications, 1986), pp. 105-106.

> exclusively Christian, but pluralist and multicultural; indeed as early as the ninth century, it encompassed three different civilizations[50].

> [Bedjaoui:] The face of yesterday's interdependence is familiar. Economic interdependence was imposed by means of organized legal dependence. It was a time of 'one-way solidarity', that of 'the wolf and the lamb', or even of 'horse and rider'. These times are not yet past, and it is possible all the time to uncover forms of false solidarity, 'whereby the devotees of the established order have no ambition, in the words of the 'Leopard', but to change in order to keep everything'[51].

Though some writers think 'these times' are not indefinite:

> Yet despite the enormity of the tasks and the gaping chasm between what has been done and what remains to be achieved, I believe the sediment of hundreds of years of inequality and oppression can be washed away[52].

A separate category is formed by the socialist writers. They broadly divide the history of the world in phases of different states, varying from 'slave states' (the "ancient world"), to 'feudal states', to 'capitalist states' (from approximately 1789), to 'socialist states' (starting in 1917) and finally the change from capitalism to socialism[53].

Yet, all the opinions in the West and those in the East put aside, the majority of the states and writers do agree that there is a continuing trend of solidarity towards less fortunate countries, to help them socially and economically. Important factors strengthening this development are:

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50 Cassese, note 8, p. 37, giving a summary of Ago's ideas as stated in Ago, R., "Pluralism and the origins of the international community", Indian Yearbook of International Law, 3 (1978), 3ff & "The first international communities in the Mediterranean world", British Yearbook of International Law, 53 (1982), 213ff.

51 Bedjaoui, M., Towards a new international economic order (New York: Holmes and Meier Publishers, 1979), p. 246, quoting from Jazairi, I., Le concept de solidarité internationale pour le Développement, p. 25.

52 Cassese, note 8, p. 375.

53 Cassese, note 8, p. 37, referring to works of Korowin, E., and lawbooks of the former German Democratic Republic.

1) The (gradual) crumbling down of the colonial empires, which made it clear that the 'new' countries were in urgent need of assistance.
2) The increasing impact of socialist thought created a (forced) awareness among Western countries. As we saw above socialism pointed to the discrepancies in the European countries socio-economic systems, and to their legacy regarding the developing countries, ex-colonies.
3) The developing countries themselves stood up for claiming better living conditions, and more influence in international relations.
4) With the worldwide and statewide viewpoint that war and armed conflicts should be outlawed, the realisation that economic and social conflict formed the basis for these conflicts, also solidified the 'solidarity-thought' among the developed countries.

One of the declarations that perhaps captured the post-WWII ideas most clearly, is the 1960 *Declaration on the Granting of Independence to Colonial Countries and People*[54]. In which the General Assembly claimed to be:

> Recognizing the passionate yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence (...).
> Recognizing that the peoples of the world ardently desire the end of colonialism in all its manifestations.

And therefore it declared "alien subjugation, domination and exploitation" to be contrary to the United Nations Charter; it further claimed self-determination a right that all peoples have and that all countries still being in trust or non-self-governing should become independent immediately.

The Declaration was obviously a welcome signal towards the developing countries, and those still under 'protection'. However, and here we touch upon a still continuing debate, this and other (following) declarations contained no real legally enforceable rights or

54 UN General Assembly Resolution 1514 (XV), 14th December 1960, taken from T.M.C. Asser Instituut, Studiemateriaal Elementair Internationaal Recht (The Hague: Stichting Europacentrum, 1993), p.62.

duties. It merely created an awareness or pointed to the existence of such an awareness among the members of the General Assembly.

A similar weakness can be attributed to another important declaration, 14 years later, namely the *Declaration on the Establishment of a New International Economic Order*[55]. The oil crisis the year before had seriously worried the Western countries, and strengthened developing countries in general to make more bold demands. This Declaration basically proclaims the efforts of the members of the General Assembly to work towards a 'new international economic order', based on principles as equity and co-operation, thus trying to "eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development (...)". The main goals of the NIEO can be summarized as follows[56]:

1) Actual control (full sovereignty) by developing countries of their own natural resources, which is linked with the concept of expropriation/naturalisation and control of multinational corporation activities.
2) Developing countries should be able to set up their own associations of primary commodities producers.
3) In order to favour developing countries, measures should be taken to support them, e.g., in the form of multilateral commodity-agreements.
4) Developed countries should also support the technical-weak countries with transfer of modern technology, so they can develop themselves.
5) Other forms of 'traditional' assistances (economic or technical) should also be continued, but it is made clear that this should be done without conditions attached, and in respect of the national sovereignty.

'Development' became a goal for the 'developing countries', and the developed countries were supposed to help them. Yet, the concept of 'development' was not free of the ghosts

55 Res. 3201 (S-IV), 1 May 1974, in Anand, R.P. (ed.), Salient Documents in International Law (New Delhi: Banyan Publications, 1994), pp. 369-374.
56 See Cassese, note 8, pp. 365-366.

of the past, though one would suppose the two world wars would have changed things. Instead, development came to be defined more or less as:

> the process to pave the way for replication in most of Asia, Africa and Latin America of the conditions that were supposed to characterize the more economically advanced nations of the world – industrialization, high degrees of urbanization and education, technification of agriculture, and widespread adoption of the values and principles of modernity, including particular forms of order, rationality and individual orientation[57].

'Development' was not an objective way of measuring the status of a country. "Like 'civilization' in the nineteenth century, 'development' is the name not only for a value, but also for a dominant problematic or interpretive grid through which the impoverished regions of the world are known to us"[58]. Development as such seems to have lost its importance. "It could be argued that if development is losing its grip it is because it is no longer necessary to capital's strategies of globalization, or because the rich countries simply no longer care"[59].

Once again, all of this applied as well to a third 'milestone' in post WWII international codifications, the so called *Charter of Economic Rights and Duties of States* (CERDS), of 1974[60], which was a result of the UN Conference on Trade and Development (UNCTAD) of 1972. It shares the same language as the Declaration on the Establishment of a New International Economic Order, as it wants to promote *inter alia* the "collective economic security for development (...) genuine co-operation (...) normal economic relations". See also for instance Article 13 (sub 1):

> Every State has the right to benefit from the advances and developments in science and technology for the acceleration of its economic and social development.

57 Escobar, A., Anthropology and development (Oxford: Blackwell Publishers, 1997), p. 496 of UNESCO document 154/1997.
58 Escobar, note 57, p. 504, quoting from Ferguson, I., The Anti-Politics Machine: Development, Depoliticization and Bureaucratic Power in Lesotho (Cambridge: Cambridge University Press, 1990), p. xiii.
59 Escobar, note 57, p. 512.

CERDS combined lofty language with almost divine ideals, yet all the doubts voiced by the developed countries seem to come true. No real legal obligations could be extracted from the texts, and thus rather few major changes took place. The UNCTAD mockingly came to be known as "Under No Circumstances Take A Decision"; even though most international writers consider CERDS to be part of international law:

> There is no doubt (...) that it expresses not only the economic need but the juridical conscience of a very large section of the international community and cannot easily be ignored[61].

Robert McNamara, in 1977 President of the World Bank, already said:

> The truth is that in every developing country the poor are trapped in a set of circumstances that makes it virtually impossible for them either to contribute to the economic development of their nation, or to share equitably in their benefits.
> They are condemned by their situation to remain largely outside the development. It simply passes them by.
> Nor are we talking here about an insignificant minority. We are talking about hundreds of millions of people. They are what I have termed the absolute poor: those trapped in conditions so limited by illiteracy, malnutrition, disease, high infant mortality, and low life expectancy as to be denied the very potential of the genes with which they were born. Their basic human needs are simply not met[62].

Instead, there was another trend that came to replace the feeble quest for development. With the Stockholm Declaration of 1972[63] international concern regarding the environment (in the broadest sense) was voiced. Twenty years later this concern was still very much alive, and was extended with the so far slowly dying away concept of

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60 GA Res. 3281 (XXIX), in Anand, note 55, pp. 375-390.
61 Anand, note 49, p. 115.
62 Cassese, note 8, pp. 372-372, quoting McNamara, R.S., Statement to the Board of Governors of the Bank (Washington D.C., 1972), pp. 3-4.
63 *Stockholm Declaration on the Human Environment* 1972, Report of the UN Conference on the Human Environment, 11 ILM 1416 (1972), quoted in Dixon&McCorquodale, note 24, pp. 537-538.

development at the Rio Conference[64]. The term 'sustainable development' appeared in the World Commision on Environment and Development's report in 1987[65]:

> (I)n order to balance the competing claims of preservation of the environment made by many developed states against the desire for development by the developing states. This means that development can occur but in a manner and by methods which do not compromise the ability of future generations to meet their own needs[66].

'Sustainable development' was codified in the 1992 Rio Declaration[67], but its definition was left to be interpreted by states themselves, as well as by the Commission for Sustainable Development, which had to become one of the main players in achieving sustainable development worldwide. Still, the results are far from satisfactory for the developing countries:

> Rich nations now benevolently impose a straitjacket of traffic jams, hospital confinements and classrooms on the poor nations, and by international agreement call this 'development'. (...) The rich export outdated versions of their standard models[68].

This is not only a critical note towards developed countries, but to developing countries themselves as well, as for most of them the state of (under)development is a situation which they are mentally stuck in. That is to say, they are more focussed on their present position, and the arguments they use, that they forget that the actual aim is to get out of that situation:

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64 *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, 31 ILM 876 (1992), quoted in Dixon&McCorquodale, note 24, pp. 539-541.
65 Titled "Our Common Future", see GA Res. 38/161, December 1983, quoted in Dixon&McCorquodale, note 24, p. 522.
66 Dixon&McCorquodale, note 24, p. 528.
67 See Principle 1 of the Rio Declaration: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature". And Principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Quoted in Dixon&McCorquodale, note 24, p. 539.
68 Cassese, note 8, p. 374, quoting Illich, I., "Outwitting the 'Developed Countries'", in Underdevelopment and Development, ed. H. Berstein (London, 1978), pp. 357, 359, 361.

> (T)he belief is now growing that an altogether different model of development is needed, which has been called 'self-reliant' or 'independent' development. It is based on options and methods devised by the needy countries themselves and, even more important, on actions primarily undertaken by those countries, in an effort to promote development 'from inside' (e.g. through agrarian reform or the more rational exploitation of agriculture[69].

§5: India

In 1947 India became (once again) an independent country, and joined the family of sovereign nations. This not only led to a series of political, economical and even cultural problems, but legal problems as well. Its Constitution is largely based on the Irish Constitution, and holds principles that promote social and economic progress. Among them is Article 51, relating to international law and relations. Which "states that the State shall endeavour to 'foster respect for international law and treaty obligations in the dealing of organised peoples with one another (...)'"[70].

According to Alexandrowicz, the difference made between 'international law' and 'treaty obligations' most probably indicates that 'international law' points to international customary law. 'Organised peoples' consists of;

> apart from sovereign States, self-governing communities which have not secured recognition by the family of nations, yet may have the capacity to conclude certain treaties, mainly of a non-political character such as trade agreements, conventions in matters of transport, and so on[71].

In general, India can be seen to have adopted the common law principles, as introduced into India by the British. The fact that India became independent, and a new Constitution

69 Cassese, note 8, p. 374.
70 Alexandrowicz, C.H., "International Law in India", International & Comparative Law Quarterly, (1952, pp. 289-300) at p. 291.
71 Alexandrowicz, note 70, at pp. 294-295.

was written, does not affect the usage of the English concepts, nor the legal tradition that accompanies them. Even though the political base might have been changed more radically, from a legal point of view continuation among legal rules often occurs. This brings us to the general question whether or not (treaty) law from earlier centuries is always accepted nowadays as continuing legal rules. For that we have to take a closer look at two cases, the first of these being the *Island of Palmas* Arbitration.

§6: The Island of Palmas Arbitration[72]

The *Island of Palmas* Arbitration gives us an insight in the (early) 20th century viewpoints on the centuries before, and the way international law from that era is being regarded.

The dispute itself arose in 1906, between United States and The Netherlands. Basically the United States contended that the island had become part of the United States by cession (from Spain), even though The Netherlands had already occupied it. Both countries agreed to submit the dispute for arbitration. The claim of the USA was that it had got the island by cession, and that Spain in its turn had obtained an original by occupation. The USA argued that:

> 'the effect of the act is to be determined by the law of the time when it was done'. It was conceded that discovery in the twentieth century did not have the same consequences as discovery in the sixteenth and seventeenth centuries. It was maintained that in the early period title based on discovery was of 'unquestioned validity'[73].

Some authors describe this as being an element of the rule against retroactive laws, and in that sense it might even be seen as a general principle of law, being especially important

72 *Island of Palmas* Case (The Netherlands v United States), 2 RIAA (1928), 829.
73 Jessup, Ph. C., "The Palmas Island Arbitration", American Journal of International Law, vol. 22, 1928 (pp. 735-752), at p. 737 and note 11 on that page.

because of the long life of states[74]. The Netherlands agreed to this, i.e. that the original Spanish title should be judged according to the then existing rules of international law. But, The Netherlands government denied that this could be done in this case, as "no generally recognized principles of international law can be said to have existed in those remote periods of history [sic]". But continued that:

> a title to territory is not a legal relation in international law whose existence and elements are a matter of one single moment (...) the changed conceptions of law developing in later times cannot be ignored in judging the continued legal value of relations which, instead of being consummated and terminated at one single moment, are of a permanent character[75].

This is referred to as the doctrine of *intertemporal law*, meaning that in this case earlier acquisitions by force cannot be judged by the later developed international law, but should be judged by the laws at that time. Judge Huber agreed with this standpoint:

> It is admitted by both sides that international law underwent profound modifications between the end of the Middle-Ages and the end of the 19th century, as regards the rights of discovery and acquisition of uninhabited regions or regions inhabited by savages or semi-civilized peoples. Both parties are also agreed that a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or fails to be settled. The effect of discovery by Spain is therefore to be determined by the rules of international law in force of the first half of the 16th century – or (to take the earliest date) in the first quarter of it, i.e. at the time when the Portuguese or Spaniards made their first appearance in the Sea of Celebes (...)[76].

He then made the distinction between the *creation of rights* and the *existence of rights*. As already said with regards to the creation of rights, the international law from the time

74 Jennings, note 20, p. 28.
75 Jessup, note 73, p. 739.
76 Jennings, note 20, p. 29.

of creation has to be taken into account. But with the "continued manifestation", that is the 'existence' of the right, the evolution of international law has to be dealt with. Huber points out that:

> International law in the nineteenth century, he continues, laid down the principle, already nascent, that 'occupation' as a basis of a claim to territorial sovereignty, must be effective[77].

In that sense it could be argued that the Spanish had abandoned the island, the occupation therefore being not effective anymore. Of course, certain nuances have to be applied. First of all, the occupation does not need to extent to every corner of the territory, as that in some cases is not realistic. Secondly, the United States for one argued that the *intention* to abandon formed an essential element of abandonment, as was also the theory in Roman law. Grotius says something similar:

> (I)n virtue of the *jus gentium* one is to be understood as having captured a thing who retains it in such a way that the original possessor has lost probable expectation of regaining it, or so that the thing has excaped pursuit (...). (O)ccupation of territory is not equivalent to capture, for mere possession is not secure possession[78].

After abandonment the island would become a *res nullius* and it could be acquired by anyone else. But, the USA claimed, the acts upon which The Netherlands relied did not show either Spanish abandonment of the island, or knowledge on the part of Spain of the Dutch 'occupation'. The Americans further denied the Dutch East India Company of having the legal capability of acquiring any title in international law, however the arbitrator did not agree:

> The acts of the *East India Company* (...) in view of occupying or colonizing the

77 Jessup, note 73, p. 739.
78 O'Connell, D.P., "Territorial Claims in the Grotian Period", in Alexandrowicz, C.H. (ed.), Grotian Society Paper 1968 – Studies in the History of the Law of Nations (The Hague: Martinus Nijhoff, 1970) (pp. 1- 15), at p. 9 and note 20 on that page.

> regions at issue in the present affairs must, in international law, be entirely assimilated to acts of the Netherlands State itself[79].

The arbitrator in a short note gives his opinion on the Family of Nations, and from it we can make out that the limited view of this family still continued in the beginning of the 20th century:

> As regards contracts between a State or a Company (...) and native princes or chiefs of peoples *not recognized as members of the community of nations*, they are *not*, in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties. But, on the other hand, contracts of this nature are not wholly void of indirect effects on situations governed by international law; if they do not constitute titles in international law, they are none the less facts of which that law must in certain circumstances take account[80].

In the end, the arbitrator upheld the Dutch title of sovereignty, which was deemed "acquired by continuous and peaceful display of State authority during a long period of time going probably back beyond the year 1700"[81]. The principle of intertemporal law thus seems to be established quite well in international law:

> It can be now regarded as an established principle of international law that in such cases the situation in question must be appraised, and the treaty interpreted, in the light of the rules of international law as they existed at the time, and not as they exist today[82].

Yet sometimes states try to evade the principle and its consequences. India in the *Rights of Passage* Case claimed that the Portuguese title based on conquest could not be seen as valid:

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79 Jessup, note 73, p. 744 and note 45 on that page.
80 Dixon&McCorquodale, note 24, p. 293.
81 Dixon&McCorquodale, note 24, p. 285, Italics added.
82 Brownlie, I., Principles of Public International Law (Oxford: Oxford University Press, 1973), p. 129,

> If any narrow-minded, legalistic considerations – considerations arising from international law as written by European writers – should arise, those writers were, after all, brought up in an atmosphere of colonialism. I pay all respect due to Grotius, who is supposed to be the father of international law, and we accept many tenets of international law. They are certainly regulating international life today. But the tenet which says, and is quoted in support of colonial powers having sovereign rights over territories which they won by conquest in Asia and Africa is nog longer acceptable. It is an European concept and it must die[83].

Maybe not realising that the denial of validity of certain 'old' treaties, could also apply to all other ones concluded in those time periods. And thus basically diminishing the legal capacity of the Asian rulers. Which is why the *Right of Passage* Case deserves a closer look as well.

§7: The Rights of Passage Case[84]

A further indication of changing thought, not only in the opinion of writers, was brought about by the *Rights of Passage* Case (India versus Portugal), before the 'newly' established International Court of Justice. Portugal asked the Court to recognize its rights between the Portugese territory of Damao (on the west coast of India) and the Portugese enclaves of Dadra and Nagar-Aveli. It basically wanted the rights of passage over Indian territory, in order to safeguard the sovereignty of its territories. Portugal based its claims (*inter alia*) on a treaty concluded between them and the Marathas. The Court therefore had to answer to primary questions:

1) whether the negotiations between the Portuguese and the Marathas had resulted in the conclusion of a valid treaty and if the answer was in the affirmative;

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quoting Sir Gerald Fitzmaurice in British Yearbook of International Law, vol. 30, 1953, at p.5.

83 Jennings, note 20, p. 31, quoting India in the Security Council; Mr. Jha's speech on December 18, 1961 (see Council Verbatim Records, S/PV. 987, at p. 26).

84 *Rights of Passage over Indian Territory* Case (India v Portugal), ICJ Reports, 1960, 6.

2) whether sovereignty over the enclaves had been transferred to Portugal justifying a right of passage through Maratha (later British and now Indian) territory[85].

The Court decided as follows:

> In support of its claim Portugal relies on the Treaty of Poona of 1779 and on *sanads* (decrees) issued by the Maratha ruler in 1783 and 1785, as having conferred sovereignty on Portugal over the enclaves with the right of passage to them. India objects on various grounds that what is alleged to be the Treaty of 1779 was validly entered into and never became in law a treaty binding upon the Marathas. The Court's attention has, in this connexion, been drawn *inter alia* to the divergence between the different texts of the Treaty place before the Court and the absence of any text accepted as authentic by both parties and attested by them or by their duly authorised representatives. The Court does not consider it necessary to deal with these and other objections raised by India to the form of the Treaty and the procedure by means of which agreement upon its term was reached. It is sufficient to state that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing in the Indian Peninsula, should not be judged upon the basis of practices and procedures which have since developed only gradually. The Marathas themselves regarded the Treaty of 1779 as valid and binding upon them, and gave effect to its provisions. The Treaty is frequently referred to as such in susequent formal Maratha documents, including the two *sanads* of 1783 and 1785 which purport to have been issued in pursuance of the Treaty. The Marathas did not at any time cast any doubt upon the validity or binding character of the Treaty[86].

It can be said that according to the majority of the judges the treaty of 1779 was actually:

> an international agreement fully valid according to the law in force at the time of its conclusion. First of all, it was concluded by two entities which possessed international

85 Alexandrowicz, C.H., Introduction to the History of the Law of Nations in the East Indies (16th, 17th and 18th Centuries) (Oxford: Clarendon Press, 1967), p. 4.
86 Alexandrowicz, note 85, p. 5.

> legal personality. Both parties to the treaty considered themselves bound by its provisions. The law applicable to them was the law of nations of the eighteenth century and the Court emphasized particularly that the validity of the treaty cannot be judged by *ex post facto* law which has 'since developed only gradually'[87].

The Court indicated that universality of international law existed and continued to exist, and that at the present day we cannot make a judgment with 'contemporary international law' on treaties concluded several centuries ago, which were held by the concluding parties at that time, for valid.

> (I)t provided a valuable stimulus for the reconsideration of outstanding problems of the history of the law of nations, particularly those relating to European-Asian relations before the nineteenth century[88].

The Portuguese claim was upheld in the sense that civil access was allowed, even though there might have been some doubts about the treaty (there were two different versions), but at least the claim could be based on the local custom (of passage) that had been there for quite some time. So, as Alexandrowicz points out to us:

> The legal nature of relations between sovereign communities within the Family of Nations must be judged by the law in force at the time of its actual application to these relations. If the law changes, questions of intertemporal law may arise as it happened in the Island of Palmas Arbitration but the legal nature of relations at a previous period of history can never be assessed by ex post facto law. However, this is exactly in what many international lawyers tend to indulge in their appreciation of inter-State relations outside the European continent in past centuries[89].

From this it appears (applied to the *Rights of Passage* Case) that the Maratha state had a legal personality, as they were able and deemed able to conclude the treaty. If this applied

87 Alexandrowicz, note 85, p. 6.
88 Alexandrowicz, note 85, p. 4.
89 Alexandrowicz, note 3, p. 357.

to the Marathas, it would only be logical to state that it most probably applied to a host of other state(like entities) as well. As would be the effect of the *universal* law of nations.

§8: Summary

The 20th century could be called one of the most 'diverse' centuries, in a sense that it has left the world *himmelhoch jauchzend und zum Tode betrübt*, to quote Goethe. It was the century of the devastating effects of two world wars and numerous international conflicts, but at the same time also of the League of Nations, the United Nations and the independence of countries that for centuries had been colonies of the Western states. What to make of it all? As we have seen, the end of the 19th century and the beginning of the 20th, knew a form of *fin de siècle* optimism reflected in the Hague Conferences. Limitations on warfare were made, but turned out to be bitterly ineffective. The First World War made the world wake up to the reality that the old situation of European countries, being the mighty and powerful rulers of the world, was no more. Dissenting voices in the colonies, and former colonies, became stronger. Yet, all that emerged was yet again a weak echo of what was actually needed. And in retrospect the Second World War could not have come as a surprise. It was only after this war, with the emerging of the United Nations, and the independence of the colonies, that a more decisive change appears to have been made. UN Assembly Declarations regarding independence of colonies, the distribution of resources and knowledge, economic rights and duties, were supposed to straighten out the crooked situation created in the late 18th and 19th century. As the *Rights of Passage* Case, and the *Island of Palmas* Arbitration show us, the idea of examing situations that occurred in the previous centuries on the basis of international law as it applied at that time, has been fully accepted as a legal doctrine. Perhaps it feels a bit awkward to extend this principle of intertemporal law not only to the 16th, 17th and 18th centuries international law, but also to the colonial biased law of the 19th. Yet that is the price one has to pay for the stability of positivism. More or less the same problem came up with nazi-law from the Second World War, but that has been brushed aside by creating the concept of international crimes. One cannot help but wonder, how come these international crimes were not applied to the attitude of the former colonial masters?

With the independence of the now so called 'developing world', a major step towards a new universal Family of Nations has been made. The constitutive recognition theory, a product of 19th century positivism, was limited. The influence of natural law theories became stronger after the Second World War. True, the existence of states is in theory not bound to the approval of a selected group of states. But the practice shows that on a newly created level another form of approval does play an important role. States can be left out of play if they do not adhere to democratic principles, or have ratified certain international obligations. There are, however, no general international rules to govern this. Instead, it is left to political decision makers. The practice differs from the theory. As Fenwick writes, when he describes the ancient Greek codes of war:

> An elaborate code, based upon the universal law and supported by treaties, governed the conduct of hostilities, prescribing many rules in mitigation of the severity of interstate conflicts. But in actual practice the laws of war were as little able to restrain the Greeks as to restrain belligerents in more modern times[90].

It is just adament to the human nature. Strangely enough, despite all that has been said so far, among some contemporary Western writers we can still read opinions voiced one or two centuries ago as well. Which brings us back to the beginning of the dissertation, where we noticed that among most Western writers the opinion rules that international law began in Europe, Christian Europe to be more precise. But this time the rest of the world is in a stronger position to openly doubt that.

90 Fenwick, note 45, p. 7.

CHAPTER VI: CONCLUSION

Trying to narrate and decipher the history of international law is not an easy task. First of all, the sheer amount of time that has passed forces the writer to limit himself to the events that he finds important, drawing in the subjective factor. Secondly, the 'discovered' history depends on the sources a writer uses. All writers, not a single one excluded, write from their own background, ideas, culture and so on. Trying to get an objective historical picture is an effort made in vain. But is this reason to despair, or to desist from efforts to do history? While we may not get all the situations and all the ideas right, we can create a progressive framework for looking towards the future. Indeed, perhaps history has no value other then to help us create a positive future; the lessons from the past ought to help us not make the same mistakes again.

The history of international law as interpreted by Alexandrowicz, offers one among many possible interpretations of its history. It is one that is influenced by Asian perspectives, and which in turn influenced the manner of doing history in Asia. It offers the background in which to think about the continuing divide between developed and developing countries, as Alexandrowicz points to the crucial link between colonialism and the history of the law of nations. But it is an history that seems to have been forgotten. With most international lawyers and scholars from the West subscribing to the idea that international law was born out of Christian civilization, there is not much room left for other sources. On the other hand, developing countries and the non-Christian world constitute the majority part of humankind. To understand their present situation, it is necessary to examine their past in the way they experienced it. Alexandrowicz helps us do this.

The history of international law, or the law of nations, has often been described to have evolved from the practices of Christian European states. At the end of the 18th, and beginning of the 19th century, according to this narrative, it was extended to the American continent, and later to the Christian Republics of Haiti and Liberia. Only in 1856 was a non-Christian state, the Ottoman Empire, admitted to the very limited Family of Nations,

also called the Concert of Europe. Other Asian states followed much later, still struggling with the burdens of colonialism.

This narrative denies any value to states and peoples outside of Europe, and to the situation before Christianity became the religion of Europe. We have seen that among the early Asian peoples, treaties were already concluded. In ancient India, extensive codes of law existed, dealing with rules of war and peace, and other aspects of inter-state behaviour. The Vedas and the Epics formed the first works of a faint political and legal character. Kautilya's *Arthasastra*, according to Alexandrowicz, is one of the most significant sources indicating the principles of inter-sovereign conduct in India. Furthermore, it had a clear influence on European writers as well. Within the Chinese domains, there was much intercourse between the different rulers, and the tradition of sending and receiving envoys was already established, and combined with elaborate ceremonials. We have mentioned the ideas of Confucius for a Grand Union of Chinese States as well. Yet the centuries that followed, in which two new religions emerged, Christendom and Islam, were mostly characterized by long periods of warfare and hostilities between East and West. It was not until the 15th and 16th centuries, when the Europeans 'discovered' the great empires of India and China with their wealth and knowledge, that more steady bonds were forged. Interestingly, the initial relations ranged from submission by the Europeans (e.g., the Chinese considered foreigners to be unequal to them, as did the ancient Greeks) to a high level of equality. The 16th, 17th and 18th centuries were, as Alexandrowicz has extensively documented, characterized by this equality. In this period, natural law doctrines became the ruling school of thought. Writers like Grotius, Vitoria and Suarez declared (more or less) the law to be of divine origin, which was not necessarily limited to Christianity. This was *jus naturale*, the natural law, which was either closely linked to, or even the same as *jus gentium*, the law of nations. Peace and equality were the principles that governed the law of nations. The Family of Nations which abided by this law of nations was therefore a family consisting of equal members. True, the scholars admitted, there were numerous differences between states all over the world, but they were all created equal in the face of God. Grotius pointed to the fact that organized political entities existed in the East Indies, which he (as

many others) considered to be sovereign and independent, with their own government, laws and legal systems.

The European trading companies that had started operating in the countries of Asia and Africa, were often established by the respective European governments. In practice however they had a very high degree of independence. As with regard to the Asian and African states, they were often given special privileges by the local rulers. The regime of capitulations thus allowed the Europeans to apply their own set of (national) rules to their conduct, and placed them outside the law of the country. Among the European states themselves, relations were not that friendly. They tried to exclude one another from the lucrative trade routes, and establish trade monopolies by means of discriminatory clauses in the treaties with the local rulers. The extensive discussions between Grotius and Freitas (respective legal council for The Netherlands and Portugal) that were a result of this, revealed that the Family of Nations treated each state on an equal plane, as Alexandrowicz has analysed. Differences between states were admitted, but these did not affect the state's statehood. Unfortunately, the European states eventually did establish successful monopolies, which, as Alexandrowicz writes, led from power economics to power politics. And from here it was only a small step to erasing the sovereignty of Asian and African states. The hospitality of the local rulers came to be easily misused by the Europeans.

The universal Family of Nations that had formed the basis for at least a few centuries of mutual cooperation and understanding, was now quickly replaced by an Eurocentric one. European states tried to dominate their Asian and African counterparts. Alexandrowicz shows that the legal language changed to such an extent that eventually the treaties introduced the possibility of sanctions (to be imposed by the Europeans in case of treaty breach), and that 'military aid' by the European treaty-partners came to be included as well. Frequently it was stipulated that the local ruler's sovereignty was transferred to the European state, and thus sovereign states were turned into European colonies, as was mostly the case in Africa. In Asia, the Indian and Chinese empires were kept alive for longer periods of time, but in practice they were mere puppets of the European rulers.

The emergence of positivistic thought in the 18th and especially in the 19th century formed the theoretical foundation for the colonial practices. Under natural law theories, all countries had been equal, all had been members of the God given Family of Nations. Positivism changed this. Of course, legal theories did not change overnight. The examination of the works of several writers and scholars has shown us that the change was a slow and gradual one. In its purest form, as we can see in the 19th century, positivism denied the divine element, and therefore saw no reason for accepting equality among states. Positivists maintained that rules of international law were only to be discovered by carefully studying the actual behaviour of states, and the institutions and laws that those states created. Statehood required sovereignty, and the European states could not deny that at least some of the Asian and African countries were sovereign as well. Alexandrowicz mentioned the fact that the local (African) rulers transferred their sovereignty to the Europeans, which, according to him, clearly implied that sovereignty was recognized by the European states. So, instead, the criterion of civilization was brought into play. Only if a state was civilized it could now be a member of the Family of Nations. And vice versa, it was only the Family, that is the European states and the United States, that decided whether or not a state was civilized. Suffice it to say, African and Asian countries were not included, i.e. with the exception of some small Christian states, like Haiti and Liberia. Thus, it was not so much a matter of civilization (a new concept, compared to the centuries before) as of power politics. That is to say, power (military and economic) formed the major thrust of the limited international society. States that wanted to join this Family of Nations had to be recognized by the self-proclaimed civilized nations of Europe. Recognition had played no role in the centuries before; Alexandrowicz' examination of the works of writers like Justi, testifies to this. Most of the European writers had seen the mere will of a state as sufficient to become a state. Slowly, this changed as well. External sovereignty could not be achieved alone, but depended on the approval of the European states. Positivism, recognition theories, the European Family of Nations and colonialism, they all combined into one giant knife dividing the world into two parts: independent and colonized.

The Berlin Conference held in 1884-5 witnessed 'the scramble for Africa'. The European powers argued at the Conference about the rules for occupation. As with the Asian countries, capitulations had given the European states too much free space. At the same time, with industrialization process speeding up, European countries found themselves in a strong position, with cheap natural resources and large markets in their colonies. But the tide was slowly changing, and in the colonies, after almost two centuries of colonial exploitation, dissenting voices became louder. The Hague Conferences at the turn of the 19th century echoed some of these voices, and outside Europe, e.g., in South America, learned writers and statesmen demanded change. The October Revolution, two disastrous World Wars, the rise of the United Nations after the Second World War, and above all the struggles of colonial peoples for independence, ushered in that change. The end of colonialism led to the independence of countries that for centuries, prior to being colonized, had been great powers themselves. Unfortunately, the structural colonial damage turned out to be quite hard to undo. 'Development' of the newly independent countries became a major issue, and formed the criterion to divide the world once again, now into developed and developing countries. Some writers argue that this was the unconscious desire of Western countries to maintain their position, and that in practice international law had not only to embody Western legal thinking, but also the living norms of Buddhist, Hindu, Muslim and Confucian countries of Asia and Africa.

But the instruments that are supposed to help the developing countries (for example, the numerous General Assembly declarations) contain no real legally enforceable rights or duties. Furthermore, it seems that the colonial practices still continue. We may recall how previously recognition played an important role in becoming a member of the Family of Nations. Today, as we can see from the break up of Yugoslavia, European states still demand certain formal criteria for a form of 'second level' recognition. That is, in theory a state still emerges on its own, but in order to become a member of certain communities (like the European Union), demands may have to be met. It fell outside the scope of this dissertation to examine the matter fully, but from the few examples we could gather these kind of political demands continue to keep an artificial divide between states. On the other hand, as Alexandrowicz has pointed out, "(r)ecognition as a political act could be

made more or less independent of the game of power politics, a step essential for the consolidation of the international society"[1].

We further saw that international law from the centuries before is accepted as international law as such, as Alexandrowicz shows, discussing the doctrine of intertemporal law. The treaties between the European states and their Asian and African counterparts are accepted as valid, and they have to be judged according to the law in force at the time. Indirect or even direct denial of the validity of such treaties, as had happened in the 19th century, is out of the question.

All of this combined, we can conclude the following. The universal Family of Nations did indeed exist, and incorporated both European, African and Asian nations. The governing law was the law of nations, or *jus gentium*, the law that was common to all, and closely linked to natural law. It had its basis in the religious belief of equality of men and of their states. With religion becoming less and less important, and the focus on science and intellect, the way was cleared for positivistic thought to replace the natural law theories. True, Christianity was still very important in Europe (and outside of Europe), but it was the emergence of power politics combined with positivism that limited the Family of Nations. It was only the European nations and linked countries, that could form the ruling family. To be a member, a state had to be recognized by this group. All the other 'countries' were either colonized, or left out of play. It took well over a century to change these attitudes, until finally the colonies regained their independence, and it was admitted that international law did once govern relations between equal states. This, however, did not restore the old situation. Equality among states was laid down in important international documents, but the damage done in the centuries of colonialism could not be turned back that easily. The gap now consisted of the differences between developed and developing countries. The awareness of these differences led and still leads to a continuing flow of international (legal) documents that should help narrow the divide. Yet, the lack of real (enforceable) measures, and the existence of rules, e.g.,

1 Alexandrowicz, C.H., "The Quasi-Judicial Function in Recognition of States and Governments", American Journal of International Law, 1952 (pp. 631-640) at p. 640.

regarding recognition, still is a serious barrier to forming a real universal and equal Family of Nations. It is Alexandrowicz, among others, who created this awareness with his work, in order for us not to forget the past, and to use it instead to create a better future.

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