

Index

Adams, John Quincy (Secretary of State

1817–1824; President 1824–1828)—	"lex" and "jus," 29–31, 49
furious at Romp verdict (1817), 97	notion of "just war," 30–31
rejects international policing (1818), 126	apparently influenced Sir William Scott,
rejects international tribunal (1823), 126,	112
156	Arend, Anthony C., 149 note 26
admiralty tribunals—	Aristotle—
established in England in fourteenth	and "logic," 5 note 8
century, 33	and "natural" law, 7, 16, 57, 62, 185
apply "universal" substantive law, 33, 90	and "positive" law, 7-8, 62, 83
and Richard Zouche, 52	and "sociological" law, 7-8, 57, 132, 178
and Sir Leoline Jenkins, 55	and "justice," 7-8, 12, 83, 185
and Cornelisz van Bynkershoek, 59-60	Rhetoric, 5 note 8, 22
apply jus gentium, not jus inter gentes, 61,	influence on Pufendorf, 41
63-65, 66, 90, 104	influence on Suarez, 49-50
define "piracy" as political offense	rejects universality of jus gentium, 7, 12,
(1693), 62-63	16, 83, 112, 151
in Blackstone, 64	influence on Philip Jessup, 144
in American Articles of Confederation	Austin, John—
(1777), 71-72	founder of modern "positivism,"
in American Constitution (1787), 72	138-139
jurisdiction over "piracy" in England, 84	difficulties describing constitutional law
jurisdiction over "piracy" in America, 86	and international law, 200
retain jus gentium language, 97, 150	Austria, Austro-Hungarian Empire—
Story as judge (La Jeune Eugénie), 102-104,	at London Conference (1817), 115
110	at Aix-la-Chappelle (1818), 118
British precedent persuasive in America,	at Verona (1822)—
106	agrees to Convention subject to French
British restrict authority (Le Louis),	consent, 120
110-115	Mediterranean power, but not in
British deny Haitian authority, 129-130	tropics, 120-121
Aldrich, George H., 179 note 16	Metternich not a moralist, 121
"alien tort claims," see Judicature Act of	and Hans Kelsen, 139
1789	and Kurt Waldheim, 175-176
Alvarez, José E., 145 note 23	
ambassadors—	Balladore Pallieri, Giorgio, 170 note 1
responsibility of sending state, 66-67	Barak, Aharon, 20 note 35
responsibility of receiving state, 67–68	Bassiouni, M. Cherif, 177 note 11
subject to receiving state law, 53-54,	Belgium-
67-68	legislation extending jurisdiction to
Aquinas, St. Thomas—	adjudicate criminal activities by
definition of "law," 16-17, 187-188	foreigners, 182
	-

definition questioned, 17-18



Bentham, Jeremey—	responds to Russian "positivism," 118
replaces "law of nations" with	moral fervor derided by Metternich, 121
"international law," 68	proposes treaty with United States (1818),
Berlin, Sir Isaiah, 205 note 51	125
Berman, Harold, 16 note 30, 18 note 33	Casto, William R., 66 note 66
Best, Geoffrey, 171 note 5	Cavers, David F., 34 note 56, 135 note 160
Blackstone, Sir William—	Cicero, Marcus Tullius—
supports universal "law of nations,"	and "logic," 5
64-65	defines "true law" as morality, 8-9, 30
and "offences against the law of	and "reason," 10, 30
nations," 66-67	influence on St. Thomas Aquinas, 17
and foreign ambassadors, 67	asserts "true law" to be universal, 8-9,
confusions noted by Bentham, 68	33-34
categories ignored in Articles of	influence on Pufendorf, 41
Confederation, 70–71	civil law, see Roman law
influence on James Madison, 74-75	Coke, Sir Edward, 33 note 55, 53 note 47,
categories adopted in American	67-68
Constitution, 72–73	Coll, Alberto, 149 note 26
resulting confusion in America, 73,	"comity"—
74-75	as used by Lord Mansfield, 131–133
	compared to constitutional law, 133-134
reflected by Hamilton, 78-79	in private international law, 134
categories adopted by Story in La Jeune	
Eugénie, 103	mis-defined by Story, 135
categories re-examined by Story and	makes lawyers and judges into
others, 190–191	legislators, 147
Blakesley, Christopher, 168 note 59	requires a coming together, <i>cp.</i> music,
Bok, Sisela, 11 note 21	204-205
Bork, Robert, 200 note 50	international community as comity of
Bosch, William J., xiv	nations, 162, 206
Bosnia—	common law crimes—
Serbs not represented in UN, 147	abolished in American federal law by
war either internal or international, 167	1816, 87, 168
see also Yugoslavia	conflict of laws, choice-of-law-
Buergenthal, Thomas, 196 note 40	inconsistent with dominant "naturalist"
Burley, Ann-Marie, 66 note 66	theories, 34
Bynkershoek, Cornelisz van—	inherent in American slave-trade
defines "piracy," 59–60	decisions, 107
impliedly denies "universal"	discussed, 131ff.
jurisdiction, 60	roots in ancient conceptions of
and "universal" jurisdiction over	authority, 130–131, 136
"pirates," 60	applied by Lord Mansfield in 1760, 131
and Scots privateers, 60	and "comity," 132–134
	systematized by Joseph Story, 134–135
"Calvo clause," 159–160, 161	part of "positivist" orientation, 136-137
Cançado Trindade, A. A., 161 note 49	inconsistent with "incorporation"
Canning, George (British Foreign Secretary	theory, 152
1822-1827)—	inconsistent with jus gentium theory, 191
instructs Wellington before Verona	impact on models of the international
(1822), 118	legal order ignored by modern
upset by French adamancy, 119	theorists, 199–200
proposes slave trade be analogized to	provides simple, unifying conception,
"piracy," 119-120	205
Castlereagh, Lord (British Foreign Secretary	Crawford, James, 180 note 18
1812-1822)—	crime, "universal"—
seeks treaties to abolish slave trade, 115	asserted about 1,000 BC, 1
at London Conference (1817), 115	"piracy" as, 84, 88-89, 91-92
at Aix-la-Chappelle (1818), 116ff.	international traffic in slaves as, 105-107



INDEX 217

and exhaustion of local remedies rule in distinguished from jurisdiction, 23, 92, international claims, 158ff. and "jurisdiction to adjudicate," 23, 116, in PCIJ, 161-162 156 rejected in current approaches to an and choice-of-law, 177ff. international criminal court, 167-169 ignored in current approaches to human "custom" as "law," 13 rights crises, 168 implicit in 1949 Geneva Conventions, 171-172 D'Amato, Anthony A., 141 note 15 divine lawshould limit effectiveness of German "universal jurisdiction" legislation, assertedly universal, 3 a branch of "natural law," 7, 13 178-180 defined, 13, 187 would help anti-"terrorist" efforts, in the model posed by St. Thomas 180-181 Aquinas, 16-18, 48-49 implicit in current legal order, 190-191, rejected in Europe as relevant to secular 205-206 authority by 1648, 18, 35 Dupuy, René-Jean, 170 note 1 rests on "human" interpretation, 25, 57 Eco, Umberto, 5 note 6 accepted within its own sphere by statesmen, 27 enforcementdivides into "moral" naturalism and cooperation envisaged, 3-4, 119-120 "amoral" positivism in sixteenth 'natural" law not directly enforceable by "positive" means, 19-20, 27-28, 53, century, 35 reflected by Pufendorf, 38 187, 194 and "forum non conveniens" in civil cases, in laws of inheritance, 117, 188 23 asserted to require British to stop and "human rights" of criminal international traffic in slaves, 128 mentioned by John Austin, 138 defendant, 23-24, 172 inherent in conception of "positive law," treated ambiguously by Prince of Dor and Zakar-Baal, 13, 163 32, 200 in Pufendorf's notion of "law," 38-42 in fatwa against Salman Rushdie, 181 in Wolff's notion of "law," 45 used to justify "apartheid," 202 Doctors' Commons, see Law Officers of the in Coke, 53, 65, 68 and mala in se (universal crimes to Coke), Crown Dor, Prince of-53 maintains secular authority, 2 in Bynkershoek, 60 territorial conception of jurisdiction, 163 in Wooddeson, 61 requires positive legislation in Britain, and conflict of laws, 131 accepts divinity of Amon-Re but denies 62, 63 authority of Wen-Amon, 3-4 in Blackstone, 64-65, 66-67 "dualism," "dualist"and laws of war, 70-71, 182, 201 of foreign penal law refused by United defined, 64 assumed by Gouverneur Morris, 73-74 States, 105, 106, 176 adopted by Constitutional Convention, cooperation rejected by European states, 77.83 115-124, 127-128 cooperation rejected by United States, assumed by American Supreme Court, 125-127, 166 96, 105 ignored by American Executive Branch, cooperation rejected by British, 126, 78-79, 96**-**97 165-166 of foreign civil law rationalized, 131-132, American legal model since 1825, 107-108 in French approach to slave trade, 123 by political and moral pressures in Wheaton's approach to slave trade, ("comity"), 132 in Lauterpacht, 142-143 offenses in former Yugoslavia, 147 slowly entered American tradition, 135 International Criminal Court proposal versus "monism" and "incorporation," criticized, 147-149, 166, 167-169 150ff.



enforcement (cont.)—	yields "visitation" rights to Britain
by "truth" commissions, 173–175	(1831), 124, 127 note 143
of foreign penal law by Germany, 177–178	nuclear tests in the Pacific (1974, 1995), 194–195
German approach limited, 178–180	withdraws submission to ICJ, 195
Belgian approach traditionally correct,	Franck, Thomas M., 114 note 114
182	Friedmann, Wolfgang, 154 note 35
responsibilities of states in the current order, 198	Frowein, Jochen Abr., 171 note 2
see also jurisdiction to enforce	Gaius, Roman jurist c . 165 AD—
equity—	defines ius (jus) civile and ius (jus) gentium,
judicial discretion, 16	12
defined, 26-28	great influence, 151
in Wooddeson (Luke Ryan case), 60-61,	justifies "Enlightenment" naturalism,
74 Wooddeson view criticized, 61-62	164 genocide—
Law Officers include in "law of nations,"	Convention of 1948, 156
63	universal "jurisdiction to adjudicate"
Law Officers exclude from jus inter gentes,	rejected by states, 156
63-64	Gentili, Alberico (seventeenth century
in PCIJ and ICJ statute, 140–141	Italo-English jurist)—
	early "positivist"-"dualist," 51
Falk, Richard A., 175 note 9	ignored by Zouche, 52
Federalist Papers, 75–76, 78–80	Germany—
Ferrand, Max, 72 note 7, 99 note 79	language and "law," 29
Fitzmaurice, Sir Gerald, 199 note 46	Samuel von Pufendorf's jurisprudence,
Forsyth, Murray, 11 note 23	36 Christian Walff's "Surrama State"
France—	Christian Wolff's ''Supreme State,'' 43–44
and definition of "law," 29	"Divine law" of race and inheritance, 18,
language of Vattel and Burlamaqui, 45-46, 48	117, 149, 188
immigration law cited by Vitoria as jus gentium, 49	asserts "jurisdiction to adjudicate" all "universal" offenses, 177–182
treaty with Britain 1713, 58	see also Prussia
alliance with United States (1778), 70, 81	Glenn, Elias (District Attorney, Baltimore,
alliance "repealed" by United States	1818), 96
(1798), 77	Glennon, Michael, 114 note 114
defends de Longchamps (1784), 79-80	Gottlieb, Gidon, 184 note 26, 200 note 48
authorized to license privateers in	grace, see equity
America, 81	Green, Leslie C., 133 note 155, 198 note 44
commissions Henfield (1793), 81	Gross, Leo, 18 note 33, 141 note 15, 192
licenses Danish privateer (Charming Betsy), 93-94	note 32, 195 note 39 Grotius, Hugo–
slave trader released (La Jeune Eugénie),	defines "bellum justum," 30
102–103, 107, 110	describes legal order, 30
has exclusive jurisdiction over vessel	,
flying its flag in time of peace (Le Louis,	Haiti (Hayti)—
Darnaud), 106, 108-109, 111, 114-115	Britain denies universal jurisdiction,
at London Conference (1817), 115–116	129-130
at Aix-la-Chappelle (1818), 116	Hamadei case, 93 note 57, 177 note 13, 181
refuses to join anti-slave-trade alliance,	Hamilton, Alexander—
119–120, 122–123	concerned about states entangling
Canning dismayed at refusals, 119	federation in legal disputes with
at Verona (1822), slanged by Wellington,	foreigners, 78–79
120 considers Britain hypocritical, 122–123	concerned about state jury biases, 79 concerned about "neutrality," 81
takes "positivist" position, 123–124	helps prosecution in Henfield case, 81
rates Positivite Position, 120 121	r- r



INDEX 219

Hart, H. L. A., 32 note 53 adopts "positivist" model of the legal order, 161-162 Henfield, Gideon (American privateer abandons "positivist" model of the legal 1793)accepts letters of marque from France, order, 192-194 costs paid for ICJ abandoning positivist model, 194-195 tried in United States for common law International Law Association, 179 note 15 crimes under jus gentium, 81 acquitted by jury, 82 International Law Commission (ILC), see United Nations Herodotus, 14 note 27 Hobbes, Thomas, 42 note 16, 186 note 29 Janis, Mark, 136 note 161, 141 note 13, 176 Hohfeld, Wesleyinvents useful vocabulary, 31, 32 note 10 value-free "positivist," 32 Jay, John (American statesman)-'monist" view, 76-77 Holland, see Netherlands Holmes, Oliver Wendell, Jr., 25, 55 monist views rejected by American Holt, J. C., 129 note 148 Congress, 77 rejected by jury in Henfield case, 82 "Holy Alliance" – supports "legitimacy" of governments, Jefferson, Thomasneutral in Henfield case, 82 96, 117 viewed as hypocritical regarding slavery, Jenkins, Sir Leoline (Privy Counsellor to Charles II)opinion regarding Scots privateers, 56 UN Security Council compared, 146 authority rejected by Great Britain, focuses on authority, 56-57, 165 United States and American colonies legal disputes between sovereigns of Spain, 146 frequently left unresolved, 56, 58 ignores jus gentium theory, 65, 165 Huff, Toby E., 16 note 30 Jessup, Philip Caryl, 143-145 human rightsassertedly "natural" and "universal," 14 Judicature Act of 1789 (United States), 66 undifferentiated sources of "law," 14, 20 jurisdiction to adjudicatein US Constitution's "fair trial" in the Restatement of the Foreign Relations Law of the United States, 23 provisions and "due process," 23-24 not considered by Coke, 53-54 assumed "universal" value, 149 "rights" in the "legal" order, or "moral" and seventeenth-century privateering, 56, 58, 60 order?, 156-157 violated in former Yugoslavia, 166, 172 in Bynkershoek, 59-60 of accused in international tribunals, lacking over foreign ambassadors, 68, 80 derived through "natural law" 167, 168-169, 172 reasoning, 57, 68 in Council of Europe Conventions, 170 issue in de Longchamps case, 79-80 in regional conventions, 171 of accused under German law, 178 restricted by United States Supreme Court, 90-91, 93 of accused under 1949 Geneva limits American jurisdiction over Conventions, 179-180 'piracy" cases despite "universal" of accused foreigners before municipal courts, 179, 190 prescription, 87-89, 90-92, 164-165 advanced using positive law, 196, 205 limits British jurisdiction over foreign "slave trader," 105-106, 111ff. and jus standi, 109, 116, 180-181, 193 imperial law-Egyptian, 3, 35 limits American jurisdiction over foreign "slave trader," 106, 108-109 Spain and Portugal, 35 limitations of British enforcement and piracy, 108-109 individuals' acts violating "neutrality" frustrate Castlereagh, 115-116, 118 made statutory crime in United States limitations force major shift in (1794), 82 note 32 Wheaton's theories of law, 125 limited in Genocide Conventions of 1948, International Court of Justice (ICJ)-Statute (1920, 1945), Article 38, 140

140-141

"equity" distinguished from "law,"

and "human rights" of a defendant, 168,

172



220 INDEX

restricted in "Calvo" clause, 158-161 jurisdiction to adjudicate (cont.)could be extended if "monist" foreign penal law in Germany, 178, pretensions were abandoned, 178, 181-182 German approach limited, 178-179 Belgian approach traditionally correct, extensions limited by "dualist" system, 182 see also enforcement ignored in two recent cases, 181 jurisdiction to prescribeasserted by Belgium, 182 in earliest records, 1-2, 163 not fully analyzed by jurists yet, 197 and the laws of war, 198-199 categories, 23, 24 limitations inherent in choice-of-law limited, 24 limits acknowledged in 1713, 57–58 theory, 205 distinguished from jurisdiction to Jurisdiction to enforceadjudicate, 68, 87 ancient concept, 2 unclear limits in United States at least territorial, 3, 67, 163 Constitution, 83 cooperation envisaged, 3, 118, 119-120 held limited by the United States distinguished from jurisdiction to Supreme Court in "piracy" cases, adjudicate, 22-23 and "forum non conveniens" in civil cases, 87-89, 90-92, 110, 164-165 believed unlimited in "piracy" cases, and "human rights" of criminal 89-90, 91 limits held in British case cited by United defendant, 23-24, 172 States Supreme Court, 106 in Pufendorf's notion of "law," 39-40, held limited by the United States 41-42, 45 in Wolff's notion of "law," 45 Supreme Court in "slave trade" case, in Coke, 53, 65, 67-68 106-107 held limited in British law, 110-114 and mala in se (universal crimes to Coke), British limits asserted against Haiti, 129-130 positive obligations to exercise, 57-58 in Bynkershoek, 59-60 and conflict-of-laws theory, 134-135 primarily territorial, 164-165 in Wooddeson, 61 and "truth" commissions, 173-174 requires positive legislation in Britain, over acts of nationals abroad, 177-178 62, 64-65 over acts of foreigners with "effects" in Blackstone, 64-65, 66-67 within the prescribing state, 177-178 distinguished in England from over "universal" crimes, 178-180 substantive prescriptions by 1710, 68 German approach inconsistent with legal and laws of war, 71, 198 order, 178-179, 181-182 considered universal for violations of jus Belgian limits, 182 gentium, 84, 88-89 jus gentiumassumed in American "piracy" defined by Gaius, 12 legislation, 85-87, 91, 92 Gaius's definition adopted by Justinian, Wheaton denies universality except for 'piracy," 89-90 model rejected by Suarez, 36, 50-51 universality denied by Supreme Court in applied narrowly by Pufendorf, 39-41 all criminal cases except where defendant has no nationality, 88, 90 adopted broadly in eighteenth-century jus gentium/mala in se universality rejected Europe, 42 applied broadly by Wolff, 43-44 in United States, 108-110 identified with jus inter gentes by Vattel, 46 denied by Britain in "piracy" cases, in Burlamaqui, 48 114-115 denied by Britain in slave-trading case, applied by Vitoria to justify Spanish conquests in America, 49 110ff. basic premises rejected by Suarez, 50-51, in Lauterpacht, 143 offenses in former Yugoslavia, 147 international criminal court proposal ignored by Gentili, 51 distinguished from jus inter gentes by criticized, 147-149, 166-168, 168ff. not universal in Genocide Convention, 156 Zouche, 52, 77



INDEX 221

applied by Coke, 53, 65, 67 rejected in practice by Jenkins, 56-57 rejected in eighteenth-century European treaty practice, 57-58 impliedly rejected by Bynkershoek, 59-60 assumed fundamental by Wooddeson, 61-74 denied in practice by seventeenthcentury statesmen, 67-68 denied by Law Officers of the Crown in middle of eighteenth century, 63-64 applied restrictively by Blackstone, 64, 66-67, 78 basis for federal "tort" jurisdiction in American Judicature Act of 1789, 78 distinguished from "international law" by Bentham, 68, 97 assumed fundamental by American statesmen of the founding generation, 70-71, 72, 82-84 in American Articles of Confederation, debated at American Constitutional Convention, 70ff. views of James Madison, 72-73, 74-76 views of Gouverneur Morris, 73-74, 85 views of James Wilson, 73-74, 84, 115 views of John Jay, 76-77 views of Alexander Hamilton, 77-79, 81 in de Longchamps case, 79-80 in Henfield case, 81-82 and "comparative law," 82-83 irrelevant to British "Piracy" Act of 1700, assumed in American Piracy Act of 1790, rejected as basis for federal jurisdiction in Wiltberger case, 1820, 87-88 supported by Wheaton despite Wiltberger case, 88-90 in substantive "prize" law, 90 in American Piracy Act of 1819, 91, 92 unworkable in American piracy cases, background to American municipal legislation (The Charming Betsy), 93-95 eroded beyond repair by John Marshall, 94, 95-96 and revolution, 95-96 not addressed in American Neutrality Act of 1794, 96 restricted to "piracy" cases, 97 asserted to make traffic in slaves universally criminal, 103 applied by Joseph Story in La Jeune

rejected by John Marshall in The Antelope, 104-106 rejected in Darnaud case, 108-110 applied narrowly in Le Louis, 111, 112 interpreted to allow slave trade in Le Louis, 112-114 interpreted to forbid revolution, 117 rejected by statesmen as a source of substantive law, 118-124 rejected by Wheaton as a source of substantive law, 125 rejected by the United States as a basis for international tribunals, 125-127 asserted by Britain as basis for both international tribunals and substantive law, 124-129 rejected by Britain as basis for universal adjudicatory authority, 128-130 superseded by choice-of-law theory, influence of Lord Mansfield, 131-133 influence of Joseph Story, 134-135 and John Austin, 138-139 in the Statute of the Permanent Court of International Justice and the International Court of Justice, 140, 141-142, 199 revived by Sir Hersch Lauterpacht, 142-143, 200 revived by Philip C. Jessup, 143-144 found inapplicable in real case by Jessup, basis for current initiatives, 146-147 current initiatives likely to fail, 147-149 persists in language of admiralty and prize, 150 persists in language of some pre-1834 cases, 150-151 weaknesses pointed out by Aristotle, Suarez and Pufendorf, 151 persists in scholars' yearning for objective evidence of universal standards, 151-152 persists in minds of people seeking authority at the expense of statesmen, 152 - 154"jus" distinguished from "lex," 29-30 jus inter gentesdefined in French by Vattel, 46 defined by Burlamaqui, 48 defined by Zouche, 52 distinguished from jus gentium, 77 analyzed by Law Officers to forbid "denial of justice"; not to forbid injustice, 63 Blackstone confuses with jus gentium,

64-65, 66-68

Eugénie, 103-104



jus inter gentes (cont.)—	Lauterpacht, Sir Hersch—
protects foreign ambassadors, 67-68	analyzes "general principles of law,"
Bentham suggests: "international law,"	141-143, 200
68-69	"law" defined etymologically, 29–30
makes treaties binding, 70-71	"law of nations," see jus gentium, jus inter
and American Constitutionalists, 70ff.	gentes
and James Madison, 72–73, 74–76	Law Officers of the Crown—
and John Jay, 76–77	reject jus gentium logic, 62-63
and de Longchamps case, 79-80	adopt "non-discrimination" as basis for
source of "neutrality" obligations	substantive law of international
(Henfield), 8	claims, 63-64, 78
source of American Neutrality Act of	"legitimacy"—
1794, 82 note 32	defensible "political" principle, 117
part of "law of nations," 83, 85	Lewis, Walker, 97 note 68
and Wheaton, 89	"lex" distinguished from "jus," 29-30
and American "prize" adjudications, 90	Luard, Evan, 148 note 25
and American separation of functions,	Eddid, Evan, 140 note 25
	Madison James
95-96, 109	Madison, James-
replaced by "international law," 97	records of the Constitutional
analyzed by Sir William Scott (Le Louis),	Convention, 72
111, 112	notion of "felony," 72–73
distinguishes from jus gentium, 112,	views criticized, 73
114-115	confused by "law of nations" category,
Castlereagh tries to incorporate jus	74-76
gentium, 115-116	impliedly adopts "dualist" view, 75, 76
Castlereagh abandons incorporation, 120	Maier, Harold, 135 note 160, 196 note 40
Wheaton abandons incorporation,	mala in se—
125–126, 130	ambassadors not immune from
and "comity," 137–134	jurisdiction to adjudicate, 53, 65, 67-68
and Austin, 138–139	notion inconsistent with Bynkershoek's
and Lauterpacht, 141–143	approach to "piracy," 59-60
survives as "international law" today,	distinguished from mala prohibita, 67
189-190	irrelevant to Ambassadorial immunities,
jus standi—	68
and "jurisdiction to adjudicate," 114-115,	Mansfield, Lord (William Murray,
156-157	1705-1793)—
"just war"—	decides "slavery" cannot legally exist in
to St. Thomas Aquinas, 30–31	England (Somersett's case), 98
to Hugo Grotius, 30	applies "foreign" law as "law of
Justinian's Institutes and Digest, c.533 AD—	
	England," 131, 132–133
great influence, 135, 151	distinguishes jus gentium from "comity,"
influence deplored by Joseph Story, 135	133
inspires "objective" natural law theories,	Story adopts conclusions, 134
83, 151	Marshall, John (1755–1835, Chief Justice of
incorporates Gaius's definitions of jus	the United States 1801–1835)—
gentium and jus civile, 12	denies American jurisdiction in absence
	of legislated directive (Palmer), 88, 90
Kelsen, Hans-	asserts American jurisdiction over
"law" as "authority," 31	stateless defendant (Klintock), 88
international law as "monist" system, 139	holds "law of nations" informs
and "recognition," 21 note 326	municipal legislation (Charming Betsy),
Klintock (foreigner convicted of "piracy" for	93-95
fraudulent capture of a Danish vessel	denies lawfulness of acts of
in 1820), 88	"unrecognized' rebels (Romp), 95-96
precedent for jurisdiction in "terrorism"	dualist model disputed by political
cases, 181	leaders, 96-97
Latham, R. T. E., 96 note 72	applies dualist-positivist model to



INDEX 223

international slave trade (Antelope), Mandate held "illegal," 193 ICI actions, 192-194 construed to deny "incorporation" of Nanda, Ved, 177 note 11 "international law" into municipal "natural law"law, 92-95, 150 as a single concept, 14 in Aristotle, 7–8, 10, 16, 48, 57 as "justice," 7–8, 9 reasoning overwhelms contemporaries, 150, 151, 153 denies enforcement to "foreign" penal as sociology, 8, 11, 48, 132, 178, 187 as physical "laws," 6–7, 8, 16, 48, 187 as morality or ethics, "true law," 8–9, 30, law, 105, 176 Meron, Theodor, 179 note 16 'monism," "monist"-187-188 as "divine law," 13 defined, 76-77 assumed by John Jay, 76-77 as custom, 13 rejected by United States (1798), 77 assertedly universal, 13-14, 33-34, 48 adopted by Wheaton, 88-89 and overlapping normative orders, 14-15 restricted by Wheaton, 89 dominates theory (1648-1834), 35-36, not revived in America by later prize 190-191 in Pufendorf, 36ff. cases, 89-90 adopted in American piracy cases, 91-92 inherent in "positivism," 15 Kelsen's "monism," 139, 166 note 56 St. Thomas Aquinas's conception, 16-17, in the international legal order, 151-152 adopted by United Nations for Bosnia, impliedly rejected by statesmen, 19, 156-157 27-28, 189-190 reflected in some arbitral opinions, inherent in legal writing, 19 157-161 in Wolff, 43-45 in PCIJ, 161-162 in Vattel, 46-48 inconsistent with current distribution of in Burlamagui, 48 legal authority in the world, 166-169 considered to be "objective," 48, 83, 132, misleads human rights activists, 191 168-169, 172-173 denied by Suarez, 50-51 adopted by German legislation, 178 ignored by Gentili, 51 adopted in anti-"terrorist" legislation, in Zouche, 52-53 180-182 applied to criminal law by Coke, 53, 65, Moore, George Edward, 11 note 23 moral reasoningignored by Jenkins, 56-57, 65 "golden mean," 10 basis for "jurisdiction to adjudicate," 57 single value, 10 as evidenced by history, 57, 189 value weighing, 11 irrelevant to constitutional authority, 57 definitional, 11 in Wooddeson, 61 Morison, Samuel Eliot, 86 note 36 ignored by Law Officers of the Crown, 63, Morris, Gouverneur (American 65 in Blackstone, 64-65, 67 Constitutionalist)criticizes Constitution draft regarding and slavery-"offenses against the law of nations," views of Joseph Story, 103, 107 views of Sir William Scott, 111ff. 73 - 74urges "dualist" model of society, 73-74, views of Lord Castlereagh, 115-116 views of the Bishop of London, 128 underlies "comity" to Lord Mansfield, 132 dualist view misunderstood by Madison, underlies conflict of laws to Story, 134 dualist view impliedly adopted by defined by Austin, 138 Madison, 76 supposedly applied by "objective" dualist views adopted by American lawyers in contemporary tribunals, Congress, 77 and "property," 164 and "piracy," 164–165 "violations" subject to positive "pardon," 174 music, as expression of culture, 204-205 Namibia (South West Africa)-South African Mandate, 192-194



224 INDEX

"natural law" (cont.)-

inconsistent with criminal law

enforcement, 177ff. not applied by International Court in the South West Africa case, 192-193 Netherlandsand Hugo Grotius, 30 and Scots privateers, 56 and Cornelisz van Bynkershoek, 59-60 issue letters of marque to Luke Ryan, 61 treaty with United States upheld, 81-82 win independence from Spain (1648), 136, 188-189 normative orders and sub-ordersnatural law, 6ff., 13-15 positive Law, 15ff. Nussbaum, Arthur, 45 note 25, 52 note 43, 53 note 46 O'Brian, Patrick, 15 note 28 Occam's Razordefined, 5 applied to naïve positivism, 22 applied to naïve naturalism, 25 compels "dualism," 152 supports the authority of a state to reject arbitral awards, 158 obstructs "monist" model of international adjudication, 171-713 supports municipal criminal law, obstructs international criminal law model, 176ff., 181-182 Occam, William of, 5-6 Ogilvie, R. M., 67 note 68

Palmer case ("piratical" taking of a foreign vessel held outside American jurisdiction in 1818), 88, 90, 91-92 Palmerston, Lord (Henry John Temple, British Foreign Secretary 1830-1834, 1835-1841, 1846-1851)denies authority of Hayti to arrest British ships accused of slave trade, 129-130 Parry, Clive, 155 note 36 Permanent Court of International Justice, see International Court of Justice Petrie, Donald A., 61 note 57 Peukert, Wolfgang, 171 note 2 Pfeffer, Leo, 77 note 17 viewed differently by "naturalists" and "positivists" in Europe, 19 example of "universal offense," 24

assumed to violate natural law, 28

Scottish privateers in 1674-1675, 55-56

and jurisdiction to adjudicate, 57, 89-90

Onuma, Yasuaki, 9 note 17

treated as municipal offense by Bynkershoek, 59-60 cannot be malum in se to positivists, 60 considered universal offense by Bynkershoek, 60 views of Wooddeson, 61 in case of Luke Ryan, 61 Irish privateers of 1693 considered not pirates by Law Officers of the Crown, 62-63 defined by British legislation, 1700, 63, Blackstone categorizes as "offence against the law of nations," 65 in American Articles of Confederation, in American Constitution of 1787, 73-74 discussed at American Constitutional Convention, 73-74 views of James Madison, 75 and mutiny, 84 defined by American legislation of 1790, American legislation criticized, 86-87 and John Paul Jones, 86 and Latin American "rebels," 86, 95-97 as "common law crime" in America, 87-88, 91 and American killers (Wiltberger), 87-88, not "universal" offense in United States Supreme Court (Palmer), 88, 90 "universal" offense in United States Supreme Court (Klintock), 88, 110 Wheaton considers sole "common law" offense, 89-90, 91 purportedly defined by American legislation in 1819, 91, 92, 107-108 American legislation of 1819 upheld (Smith), 91-92 American legislation of 1819 considered doubtful (1982), 92 probably undefinable today, 92-93 British analogize slave trade (1824), 98 analogy to slave trade denied in America (Darnaud), 108-110 assumed to be "universal offense," 110 analogy to slave trade by foreigners denied by British (Le Louis), 111-113 analogy to slave trade urged by Castlereagh, 116 analogy to slave trade urged by Canning, analogy to slave trade rejected by European powers, 120-124 analogy to slave trade disputed by Wheaton, 125, 130



INDEX 225

to Enlightenment jurists, 163-164 and "dualism," 107 French approach to slave trade, 122–123 Enlightenment approach fails in America, 164-165 in Wheaton, 130 Enlightenment approach rejected in and conflict-of-laws theory, 134, 136, England, 165-166 152 Platoin Austin, 138-139 and "reality," 5 note 6 and "logic," 5 note 7 in Kelsen, 139 in the Statute of the PCIJ and ICJ, ideal Republic controlled by "guardians," 139-141 in Jessup, 143-144 118, 154 and official authority, 57, 153, 185-186 denigrated in twentieth-century Crito, 9 note 16 writings, 145 Gorgias, 186 defended, 146, 149 Laws, 5 note 7 inherent in the Genocide Convention of Phaedrus, 5 note 7 1948, 156 and "rule" regarding exhaustion of Protagoras, 9 note 16 Portugaldomestic remedies in international bypasses Papal authority in sixteenth law, 158-161 in cases before the PCII, 161-162 century, 35 anti-slave trade treaty with Britain capable of grappling with current issues, (1817), 116170ff. objects to multilateral convention (1817), and the laws of war, 171-713 116, 120 in recent German legislation, 177-178 applicable to "terrorism," 180–181 abandoned by ICJ, 192–195 not represented at Verona (1822), 123 refuses to abandon slave trade (1839), 122, 127-128 costs paid by ICJ for abandoning a "positive law"positivist approach to the legal order, defined, 15 195 illogical "natural" basis, 15 re-adoption of fundamental positivism in St. Thomas Aquinas, 16-18 recommended, 196-198, 205-206 'equality'' as a "positive law" concept, prize (maritime law of war)as universal private law (jus gentium), 64, dominant in statecraft since 1648, 19, 53, 90, 129 65-66, 190-191 in Blackstone, 64 search for "legislator," 20 as jus inter gentes, 67-68 relationship to reality, 21 in American Articles of Confederation and "equity," 27-28 (1777), 71to Grotius, 30 in American Constitution (1787), 72 reduces all "law" to "authority," 31–32 element in "divine law," 13, 35 Hamilton concerned about national biases, 77-78 dismissed by Pufendorf, 38 cannot hear "criminal" case (Coolidge), in Zouche, 53 descriptive rather than normative, 54 French decision pertinent to American in Jenkins's analyses, 56-57 law (Charming Betsy), 94 note 60 in the settlement of Utrecht (1713), 58 reflects jus gentium language, 97, 150 in Bynkershoek, 59-60 value of vessel a perquisite of arrestor if moderated by "equity" in England, 61 criminal law so decrees, 102 fundamental to Law Officers of the value of vessel a perquisite of captor only Crown, 62, 63 if capture was correct (La Jeune Eugénie), ignored by Blackstone, 64-67 to James Madison, 72-73 can justify condemnation of vessel and "law of nations," 83-84 (Antelope), 104, 105 ignored by American Congress in international tribunal rejected (1907), "piracy" legislation of 1819, 91 not evidence of "trend" in the law of to John Marshall, 105, 106-107 claims, 159-160 ignores "natural" law of property, fundamental to United States Supreme Court, 106-108 164-165



Deutseis	"nositivist" ronly at Varona (1922)
Prussia—	"positivist" reply at Verona (1822), 121–122
treaty with United States upheld, 81	121-122
at London Conference (1817), 115	
"positivist" at Aix-la-Chappelle (1818),	Scelle, Georges, 152 note 31
116, 118	Scharf, Michael, 174 note 7
"positivist" at Verona (1822), 122	Scott, Sir William (British admiralty
see also Germany	judge)—
Pufendorf, Samuel von—	Story disagrees with decision in Le Louis,
contributions to legal theory, 35ff., 82	103
influence on Wolff, 44	decides slave trade does not violate jus
notion of "imperfect rights," 37, 44, 47,	gentium (Le Louis), 111-114
154	denies jus gentium is part of jus inter
rejects general jus gentium theory, 41, 151	gentes, 111, 115
rejects general jus gentium theory, 41, 151	
0 ' 147.17 4	Wheaton concurs in conclusion of Le
Quine, W. V., 4 note 6	Louis, 125
	reasoning adopted by Palmerston,
"reason"—	129–130
different kinds distinguished, 9–12	arguments unanswerable in nineteenth
"rectification" defined, 180	century, 151, 153
revolution-	Sheehan, Jeffrey, 180 note 17
could be forbidden by jus gentium, 117	Silesian Loan Crisis—
cannot be forbidden by jus inter gentes, 117	Law Officers' Opinion, 63
"right reason (recta ratio)"-	slavery, slave trade–
and morality/ethics, 10-11	Aristotle defends as "natural," 8, 48
and "objectivity," 12	Wheaton considers immoral, not illegal
in St. Thomas Aquinas, 17, 187–188	89
in Christian Wolff, 44	efforts to criminalize international
	and the same of th
in Cicero, 8–10, 11–12, 30, 187	traffic, 97ff.
irrelevant to Westphalian legal order,	held inconsistent with English law
189	(1772), 97–98
Robertson, David W., 74 note 10	slave trade made criminal in Britain
Roman law—	(1807), 98
distinguishes jus civile from jus gentium,	in American Constitution, 98–101, 156,
12-13, 63, 164	165-166
in Pufendorf, 39	American anti-slave-trade legislation,
in Zouche, 52	101-102
expertise of Law Officers of the Crown,	America asserts universal jurisdiction to
62-63	adjudicate (La Jeune Eugénie), 102-103
requires ambassadorial immunities, 67	America rejects universal jurisdiction to
cannot forbid revolution, 117	adjudicate (Antelope, Darnaud), 104-107
rejected by Story, 135	108-110
misunderstood by Jessup, 144	Britain rejects universal jurisdiction to
a source of "incorporation" theory, 151	adjudicate (Le Louis), 111-115
see also Gaius, Cicero	Castlereagh's efforts to end trade,
Romp (vessel of the "Baltimore pirates" in	115-118
1817), 95–97	Canning and Wellington's efforts,
Rosenberg, Tina, 174 note 8	118-124
Rushdie, Salman–	British attempts to establish an
Iranian divine/criminal law applied to,	international tribunal rejected by
181	United States, 124–127
Russia—	British attempts to establish an
cited by Marshall as equal to Geneva in	international tribunal rejected by
law, 107	France, 127
at London Conference (1817), 115-116	British attempts to establish an
at Aix-la-Chappelle (1818), 118	international tribunal rejected by
"positivist" reply to Castlereagh (1818),	Portugal, 127
118	Haitian attempts to assert universal



INDEX 227

jurisdiction to adjudicate rejected by frequently cited by Gentili, 51 ignored by Zouche, 52 Britain, 129-130 ignored by American constitutionalists, 77 analogy to "piracy" rejected by Wheaton, influence on Sir William Scott, 112, 115 and German assertions of universal ignored by Story, 134-135 Szaszy, Istvan, 177 note 11 jurisdiction to adjudicate, 181 and human rights today, 143, 190 "terrorism," "terrorists"-Smith, John (captain of American slave positive legislators, 20 trader), 104 Smith (convicted of "piracy" jure gentium in not bound by treaties to which they are not directly parties, 171, 180-181 1820), 91-92 held by some to violate universal South Africa, see Namibia "natural" international law, 181–182 South-West Africa, see Namibia could be suppressed using positive law, Spain, Spanishbypasses Papal authority in sixteenth 196-197 Textor, Johann Wolfgang, 62 note 58 century, 35 Vitoria supports "rights" in America by Thucydidesquoted on customary law, 13-14 jus gentium theory, 49 Suarez rejects jus gentium theory, 49-51 Trimble, Phillip, 90 note 48 legal interests defended by Gentili, 51 "truth" commissions, 174-176 and Latin American independence Tuchman, Barbara, 66 note 65 struggles, 86, 95, 146 vessels taken by United States privateers, United Nations (UN)-Charter principles, 142, 146-147 95-97, 104 merchants claim slaves (Antelope), 104, Jessup denigrates lack of universal membership, 144 106-107 Bosnian Serbs not represented, 147 agrees to abolish slave trade (1817), 115 lax in enforcing slave-trade laws, 118 General Assemblyadvised by International Law loses legal authority in Dutch Republic (1648), 136, 188-189 Commission, 180 and Namibia, 193-194 Stein, Torsten, 93 note 57, 77 note 13, 181 Secretary-General (Kurt Waldheim), note 19, 181 note 21 175-176 Story, Joseph-Security Councilsystematized "conflict of laws" theory, and former Yugoslavia, 147, 156-157, 34, 134-136, 152 supports "common law crimes," 87, 91, and Namibia, 193 147, 153 expands assertions of authority, 147, holds "piracy" to be a crime under the 156-157, 194, 195 "law of nations" (Smith), 91-92 despises slavery and the slave trade, International Law Commissionmoves towards "rectification" 99-100 holds slave trade violates "law of nations" rationale, 180 (La Jeune Eugénie), 102-103, 115 see also International Court of Justice disagrees with Scott (Le Louis), 103, 115, 150 note 28 Vattel, Emerich depublishes in the vernacular, 45-46 avoids appeal of slave-trade case, 103-104 draws no distinction between jus gentium concurs in holding slave trade does not violate "law of nations" (Antelope), and jus inter gentes, 46 considers the state to be a "moral 105-106 person," 47 denies existence of jus gentium, 134, 135 identifies "law" with "morality," 47-48 misunderstands "comity," 135 as "incorporationist," 151, 153 cited often by American constitutionalists, 45 note 25, 154 inspires "choice-of-penal-law," 176 Vitoria, Francisco (sixteenth-century Suarez, Francisco-Spanish jurist)influences Pufendorf, 36 defends Spanish conquistadores on the rejects jus gentium theory, 36, 50-51, 151, basis of jus gentium, 49



228 INDEX

Waldheim, Kurtostracism as moral remedy, 175-176 Wen-Amon (priest)idol stolen in Dor, 1-2 buys cedar in Lebanon, 2-3 and "naturalism," 6, 35 and conflict of laws, 131 "universal"-monist model, 151 illustrates conflicting models of "law," 153, 163 Westphalia, Peace of (1648)and restructuring of the concept of the international legal order, 18, 35, 136, 189 period between and defeat of Napoleon, and sovereign equality under law, 35-36 implies positivist-dualist constitution, 115, 136, 168, 189 universal jurisdiction inconsistent with, 136-137, 168, 178-179, 197-198 Wheaton, Henryargues universal jurisdiction to adjudicate in "piracy" cases, 88-89, 130 considers "piracy" a "common law" offense, 89, 130 denies universal jurisdiction to adjudicate in non-piracy common law cases, 89, 91 denies universal jurisdiction to adjudicate in slave-trade cases, 125-127, 130 regards the international legal order as fundamentally dualist-positivist, 130 despises slavery and the slave trade, 151 conclusions undercut international criminal court proposals today, 156, Wilson, James (American constitutionalist)urges "monist" model of society, 73-74,

distinguishes jus gentium from jus inter gentes, 115 Wiltberger (American acquitted of "piracy" 1820) conviction for "piracy" reversed for lack of prescriptive jurisdiction 1820, 87-88 Wheaton interprets case narrowly, 88-89 case cited, 91, 92, 110 Wirt, William (Attorney General, 1817-1824)prosecutes "Baltimore Pirates," 96 Wittgenstein, Ludwig, 4 note 6 Wolff, Christian, 43-45 Wooddeson, Richarddefines "law of nations," 60-61 confuses universal law with national discretion to do "justice," 61-62, 74, 203

Yugoslavia-

UN Security Council and atrocities in, 147, 156–157, 172 international criminal tribunal, 147, 156–157, 166, 172 Genocide Convention inapplicable, 156 and laws of war, 167, 171–172 tribunal likely to be ineffective, 172, 183

Zakar-Baal, ruler in Lebanon—
sells cedar to Wen-Amon, 2, 3
accepts divinity of Amon-Re but denies
authority of Wen-Amon, 3
secular conception of law, 163
Zouche, Richard (seventeenth-century
British admiralty judge and scholar)—
defines jus gentium and jus inter gentes,
52
founder of modern positivism, 53
ignored by American Constitutionalists,

85