

The London School of Economics and Political Sciences

Department of Government

From Utopia to Apologia:

International Normativity in the Long Nineteenth Century

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Declaration

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work other than where I have clearly indicated that it is the work of others (in which case the extent of any work carried out jointly by me and any other person is clearly identified in it). The copyright of this thesis rests with the author. Quotation from it is permitted, provided that full acknowledgement is made. This thesis may not be reproduced without my prior written consent. I warrant that this authorisation does not, to the best of my belief, infringe the rights of any third party. I declare that my thesis consists of 93284 words (including the bibliography).

Acknowledgements

Writing a Ph.D. thesis is a rite of passage to becoming a member of a (new) academic community, which defines itself through its “discipline”. One must study so much more than written arguments; for it is a journey to understand which arguments count, and which do not; and the best way to do this is to immerse oneself – almost like an ethnographer – and to listen to participants within that academic community. Listening to the “LSE Political Theory” group in the early phases of this thesis was therefore a rewarding adventure, and I am grateful to the various convenors of that group and especially: Chandran Kukathas, Christian List, Anne Phillips, Kai Spiekermann and Lea Ypi. My special thanks are reserved to Katrin Flikschuh, whose philosophical guardianship and “Kantian” brilliance have been essential to my unlocking of the treasures of the discipline. For all their love, support and serenity, I would equally like to thank Roberta Bassi as well as Isolde and Dieter Schütze. Last but not least, let me salute Miran Norderland – a follow LSE traveller and good friend – for his sharp humour and excellent company on this academic journey to an unknown destination.

Much doctoral work has often not yet entirely matured to be published; and this thesis is – unfortunately – no exception to that rule. I am acutely aware of its literary gaps and argumentative weaknesses; and complementary chapters on the “French” nineteenth century and the “settled” – positivist – twentieth century are envisaged in the future (as well as time and distance from what has already been written here) before a final version may ultimately appear. I therefore deplore the LSE’s – illiberal – philosophy of forcing everyone to publish, albeit with some delay, his or her Ph.D. thesis online. In my view, this is an attitude that further contributes to the fast-publishing mode of our times and the ever-greater presence of not-yet-ripe arguments in the academic sphere. It seems that the publishing motto of the nineteenth century prince of another discipline – *pauca sed matura* – is irretrievably lost in an university context that values short-term quantity far more than long-term quality. Can this trend be reverted? I sincerely hope so; but, in the meantime, I also apologise that this unfinished piece of work is “published” – prematurely – today.

Abstract

Having lost the theological certainties of the past, all modern scholars of international law battle to establish normative foundations for the new “law of nations”. What is the relationship between “natural law” and the “positive” international law? By the eighteenth century, the quantity of positive international law and its legal quality had become a major philosophical problem. For if positive international law existed, what was its relation to natural law and what was the “reason” behind its (presumed) status as “law”? How could international norms be “laws” if there was no “government” above the States? These questions continued, during the eighteenth century, to be generally answered in favour of natural law; while the relationship between “natural law” and the “law of nations” remained open. But ever since the French and the Kantian revolution, “rationalistic” natural law conceptions were increasingly challenged. What did step into their place to justify the binding nature of international norms during the nineteenth century?

The thesis traces the various theoretical and practical responses to this question. It argues that the nineteenth century develops its own conception of “natural law”. This however is a natural law that is neither universal nor rationalist but is instead “national” and “historicist”. The nineteenth century should therefore not be characterised as a “positivist” century in which international norms lacked a metaphysical normativity. While an “apologetic” turn towards state sovereignty ultimately takes place by the end of that century, it is only after the First World War that a new “positivistic” era of international law triumphs. In order to demonstrate this, the thesis explores the German and British philosophical and jurisprudential discourses in the long nineteenth century (1789-1914); and it thereby hopes to challenge a number of conventional views in the academic literature.

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Introduction

Utopian Beginnings

With the decline of the ideas of “empire” and “res publica christiana” in the early modern period,¹ the belief in a “universal” law is gradually replaced by legal pluralism. The apostles of State sovereignty come to deny the very existence of any supranational authority above the State and introduce a distinction that still structures our political imagination: the distinction between national and international law.² The former is the sphere of subordination *within* a sovereign State; the latter becomes the sphere of coordination *between* sovereign States. International law is henceforth no longer the (cosmopolitan) *ius gentium* of mankind;³ it becomes the *ius inter gentes* that regulates the formal interactions between sovereign states.⁴ From the perspective of this “modern” international law, a “civil law” between sovereigns leads to a contradiction. For if sovereignty is the defining characteristic of the modern State, there could be no higher “civil” authority binding states.

For Hobbes (and, following him, Pufendorf), the *ius gentium* therefore cannot be “positive law”; it can only be “natural law” whose intrinsic authority derives from divine nature.⁵ International law is nothing but the law of nature applied to nations: “the law of nations properly so called ... is nothing else, but the law of nature itself,

¹ On this point: J. N. Figgis, *Political Thought from Gerson to Grotius: 1414–1625* (Cambridge University Press, 2011).

² In the following pages, I will predominantly refer to “international law” and treat this concept as interchangeable with the older “law of nations”.

³ In antiquity, the idea of “international law” begins inside the history of the “*ius gentium*”. It is associated with “natural law”, that is: the law that is universally valid because it applies to all human beings. Roman legal theory conceptually contrasts it to the “civil law”. The latter applies within particular civil societies, whereas the “*ius gentium*” applies to all societies as *ius commune* (Gaius, *The Institutes* (Translated by: W.M. Gordon & O.F. Robinson) (Duckworth, 1988). Unlike our modern understanding, the *ius gentium* is consequently *not* the law between civil societies (or states). The *ius gentium* is the common law of all mankind; that nonetheless steps into the background whenever a society has chosen “its” domestic law. This conception of *ius gentium* identifies the latter with *private* international law; it is the law that applies to relations with foreign individuals (cf. P. Vinogradoff, *Historical Types of International Law* (Brill, 1923), 25).

⁴ Richard Zouche is often credited – albeit not by Bentham – to be one of the first modern authors to use the term “*jus inter gentes*”, that is: the “Law between Nations”. See: R. Zouche, *An Exposition of Feial Law and Procedure, or of Law between Nations, and Questions concerning the Same* (originally published: 1650; Brierly Translation, Carnegie, 1911). Vitoria had however already used the term a century earlier (W. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 25).

⁵ T. Hobbes, *Leviathan* (edited: R. Tuck, CUP 1996), 244: “Concerning the Offices of one Sovereign to another, which are comprehended in that Law, which is commonly called the *Law of Nations*, I need not say any thing in this place; because the Law of Nations, and the Law of Nature, is the same thing... And the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoid in regard of one another, dictateth the same to Common-wealths, that is, to the Consciences of Sovereign Princes and Sovereign Assemblies; there being no Court of Natural Justice, but in the conscience only, where not Man, but God reigneth[.]”

not applied to men considered simply as such but to nations.”⁶ This especially means that neither international treaties nor international custom are proper sources of international law. All “proper” international law derives from the (divine) nature of things, which must be deciphered by human reason – a task that elevates philosophical jurists into the legal conscience of the world.⁷

What are the normative qualities of this natural law? First and foremost, its verity and authority are guaranteed by God or Nature;⁸ and it is unquestionably binding “law”. This law is, secondly, “necessary” and “eternal”; and, as such, it is – thirdly – also universal: it binds “all Mankind”.⁹ For Wolff, international law thus applies to all the nations at all “civilisational” stages and to all the religions of the world.¹⁰ And the European enlightenment scholars were not simply “universalists”: by insisting on the sovereign equality of each and every nation, they were decidedly anti-imperialist too.¹¹ (Classic natural law indeed insists that, whilst a more “civilised” nation is obliged to help a less civilised one to progress and perfect itself,¹² it cannot force such progress and civilisation onto another.¹³) A utopian conception of universal solidarity can thus be found in the most popular textbook of the eighteenth century: Emer de Vattel’s

⁶ J.-J. Burlamaqui, *The Principles of Natural and Politic Law* (originally published: 1747; Liberty Fund, 2006), 174.

⁷ For an eighteenth-century example of this view, see C. Wolff, *Jus Gentium Methodo Scientifica* (translation: J. H. Drake, Clarendon Press, 1934). The work was originally published in 1749.

⁸ See, most famously: H. Grotius, *The Rights of War and Peace* – Book 1 (editor: R. Tuck; Liberty Fund, 2005), 89.

⁹ T. Hobbes, *Leviathan* (supra n.5), 244.

¹⁰ With regard to religion and the validity of international treaties, see for example, C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.7), §429: “[I]n making treaties no consideration is to be given to the religion to which the nations are devoted. (...) So nothing prevents a nation devoted to the sacred rites of the Christians from entering into a treaty with a nation Mohammedan in religion, as, for example, with Turks or Persians.”

¹¹ S. Muthu, *Enlightenment against Empire* (Princeton University Press, 2003), 1. For an excellent and nuanced analysis of the relationship between (European) international law and colonialism see the magisterial J. Fisch, *Die europäische Expansion und das Völkerrecht* (Steiner, 1984); as well as G. Cavallar, Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans?, (2008) 10 *Journal of the History of International Law* 181.

¹² C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.7), §168.

¹³ Ibid., § 169: “[I]f any nation wishes to promote the perfection of another, it cannot compel it to allow that to be done; if some barbarous and uncultivated nation is unwilling to accept aid offered to it by another in removing its barbarism and rendering its manners more cultivated, it cannot be compelled to accept such aid, consequently it cannot be compelled by force to develop its mind by the training which destroys barbarism and without which cultivated manners cannot exist. Barbarism and uncultivated manners give you no right against a nation.”

“Law of Nations” (1758).¹⁴ Vattel here defends the idea of a cosmopolitan society of mankind in the following words:

“The universal society of the human race being an institution of nature herself, that is to say, a necessary consequence of the nature of man, — all men, in whatever stations they are placed, are bound to cultivate it, and to discharge its duties. They cannot liberate themselves from the obligation by any convention, by any private association. When, therefore, the unit in civil society for the purpose of forming a separate state or nation, they may indeed enter into particular engagements towards those with whom they associate themselves; but they remain still bound to the performance of their duties towards the rest of mankind.”¹⁵

The object of this cosmopolitan “natural society established between all mankind” is to lend each other “mutual assistance” so as to help each state to attain perfection;¹⁶ and the highest duty therefore is “that *every individual nation is bound to contribute every thing in her power to the happiness and perfection of all others*”.¹⁷ This utopian solidarity is however quickly qualified. For the highest natural right of nations is the “liberty and independence” of each state.¹⁸ While states are to help each other in the perfection of mankind, they cannot be forced to help; nor can they be forced to accept any civilisational assistance:

“[T]hough a nation be obliged to promote, as far as lies in its power, the perfection of others, it is not entitled forcibly to obtrude these good offices on them. Such an attempt would be a violation of their natural liberty. In order to compel any one to receive a kindness, we must have an authority over him; but nations are absolutely free and independent. Those ambitious Europeans who attacked the American nations, and subjected them to their greedy dominion, in order, as they pretended, to civilize them, and cause them to be instructed in the true religion, — those usurpers, I say, grounded themselves on a pretext equally unjust and ridiculous. It is strange to hear the learned and judicious Grotius assert that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature, which treat their parents with inhumanity like the Sogdians. . . . Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?”¹⁹

¹⁴ E. de Vattel, *The Law of Nations* (translator: J Chitty; Johnson & Co, 1883). The book was originally published in 1758. The subtitle of Vattel’s book importantly is: “*Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*.”

¹⁵ Ibid., Preliminaries, §11.

¹⁶ Ibid., Preliminaries, §12.

¹⁷ Ibid., Preliminaries, §13.

¹⁸ Ibid., Preliminaries, §15.

¹⁹ Ibid., Book II, §7.

Could there be a clearer plea in favour of universal equality and against civilisational imperialism? And yet: one hundred-fifty years later, the “universality” and “anti-imperialism” defended by the classic “enlightenment tradition” had given way to its very opposite. By the beginning of the twentieth century, the dominant ideology within international law had come to conceive of a “European family of nations” that was entitled to exclude all non-civilised members from its scope. The older universalist conception of international law thus appears to contract during the nineteenth century;²⁰ and once some original members of the “natural” society of mankind are expelled, they become lawless “barbarous” nations that can be civilised and colonized according to a (Western) European standard of civilisation.

How did this transformation from a universal and inclusive to a regional and exclusive conception of international society come about? What were the underlying conceptual changes behind this transformation? For Charles H. Alexandrowicz – the famous proponent of the “contraction thesis” – the dramatic change in the structure of international law was caused by the rise of a “positivist” philosophy in the nineteenth century:

“In this connection it would be relevant to refer to the significant doctrinal changes at the end of the eighteenth century when the law of nations (based on the natural law ideology) was to give way to positivist tendencies which gathered momentum in the early nineteenth-century. Whatever the ideological content of natural law as the basis of the law of nations, be it natural law in the interpretation given to it by the writers of the Spanish school, by Grotius or by the lawyers of the period of enlightenment (Vattel), it had certain functional qualities which remain part and parcel of its operation in practice throughout all the changing faces of the classic period. One of them was the concept of universality of the law of nations, the other the absence of constitutivism in so far as a recognition of States or Sovereigns was concerned. (...) How constitutivism came to be established in the early nineteenth century has been tentatively discussed elsewhere. Suffice it to say that its appearance coincides with the replacement of the natural law ideology by positivism, particularly that of the Hegelian brand.”²¹

But is this really an adequate portrayal of the underlying conceptual causes triggering the transformation of international law from a universal and utopian to a European

²⁰ There has been a lively debate with regard to the “contraction thesis” in the past fifty years. Its principal proponent is C.H. Alexandrowicz, whose major contributions here are: “Doctrinal Aspects of the Universality of the Law of Nations”, (1961) 37 *British Yearbook of International Law* 506; as well as “An Introduction to the History of the Law of Nations in the East Indies” (Clarendon Press, 1967).

²¹ *Ibid.*, 9. The reference to the author’s earlier work is to “The Theory of Recognition in Fieri” (1958) 34 *British Yearbook of International Law* 176.

and apologetic international law? What does “positivism” here mean, and can Hegel really be identified with the new “positivist” philosophy?

Doubts about the “Alexandrowicz thesis” emerged early on. Building on the work of Carl Schmitt,²² the most radical critique here endorses the very antithesis to the contraction theory. Wilhelm Grewe thus writes: within the nineteenth century “primarily under British influence, *international law increased in scope to become universal*”.²³ And doubting that the jurists of the nineteenth century were “‘positivists’ in any clear sense”,²⁴ the argument has – rightly – been made that the presence or absence of international treaties between European and non-European states simply cannot provide evidence for or against the contraction thesis.²⁵ A causal relation between positivism and the decline of a universal international law has therefore been questioned, because no specifically European “positive” international law “ever existed”.²⁶ Instead of “positivism”, it has recently been counter-argued, it was the “ideology of colonialism” that formatively shaped the dominant conception of international law in the nineteenth century.²⁷ A variant of this “colonialist thesis” has finally combined colonialism and positivism into joint sinners:

“The existence of a distinction between the civilized and the uncivilized was so vehemently presupposed by positivist jurists, that the state of nature – and therefore naturalism – becomes epistemologically incoherent because lacking this central distinction. Positivist jurisprudence was so insistent on this distinction that any system of law that failed to acknowledge it was unacceptable. In crude terms, in the naturalist world, law was given; in the positivist world, law was created by human societies and institutions. Once the connection between “law” and “institutions” had been

²² C. Schmitt, *Strukturwandel des internationalen Rechts*, in: C. Schmitt, *Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik, 1924-1978* (Duncker & Humblot, 2005); and, more generally, see Schmitt’s „Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum“ (Duncker & Humblot, 1997).

²³ W. Grewe, *The Epochs of International Law* (Walter de Gruyter, 2000), 429. For an extended discussion of the “expansion thesis” and its direct confrontation with the “contraction thesis”, see Grewe’s “Vom europäischen zum universellen Völkerrecht” (1982) 29 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 449. For a brilliant critique of the Schmitt/Grewe thesis, see however: J. Fisch, *Die europäische Expansion* (supra n.11), esp. 475-499.

²⁴ M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), 131.

²⁵ J. Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press, 2018), 21: “The fact that European states signed treaties with so many non-Christian powers in the course of their global expansion does not show, pace Alexandrowicz, that they saw these treaties as foundational to the law of nations in the way that treaties within Europe were thought to be.”

²⁶ A. Orakhelashvili, *The Idea of European International Law*, (2006) 17 *European Journal of International Law* 315 at 333. For a quantitative analysis to buttress this point for the nineteenth century, see: E. Keene, *The Treaty-Making Revolution of the Nineteenth Century*, (2012) 34 *The International History Review*, 475.

²⁷ Orakhelashvili, *The Idea of European International Law* (supra n.26), 325.

established, it followed from this premise that jurists could focus on the character of institutions, a shift that facilitated the racialization by delimiting the notion of law to very specific institutions. (...) In summary, the distinction between civilised and uncivilised was a fundamental tenet of positivist epistemology and thus profoundly shaped the concepts constituting the positivist framework.”²⁸

What are we to make of these alternative explanations of the nineteenth-century transformation of international law? Should the nineteenth-century be characterised as a “positivist” century; and if so, what is the relationship between “positivism” and “colonialism”? This thesis will argue that a contraction from a universal to a regional international law really does take place, at the conceptual level, within nineteenth-century Europe;²⁹ but that this contraction was not caused by a “positivist” philosophy. The rise of a “European” conception of international law is primarily the result of an “idealist” philosophy that, while rejecting utopian rationalism, nonetheless continues to build on the idea of a “natural” society that has its own “organic” law. The most sophisticated and successful version of this communitarian vision of international law is developed by the (German) “Historical Law School”.³⁰ It is its “historicist” and “organicist” vision that captures the imagination of German and British international law scholars for the better part of the nineteenth century. All law, including international law, originates from the consciousness of people(s) – not state institutions – and in that sense the long nineteenth century is decidedly not positivist.³¹ States simply cannot dispose of international law as they wish, because international law is generally conceived of as binding law *above* the states.

What is the relationship between the “Historical School” and colonialism? The thesis argues that there is no direct – conceptual – relationship between the “historicist” contraction to a European international law and the colonialization of non-European societies at the end of the nineteenth century. The Historical School, while not as explicitly anti-imperialist as the eighteenth-century enlightenment tradition, nevertheless developed no intrinsic hierarchical or imperialist understanding of European international law. The hierarchical “superiority” that European international

²⁸ A. Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, (1999) 40 *Harvard International Law Journal* 1 at 24-25.

²⁹ In this sense also: J. Fisch, *Die europäische Expansion* (supra n.11), 288.

³⁰ For a discussion of the School, see Chapter 2 – Section 3. The rest of the thesis will refer to the “Historische Rechtsschule” simply as “Historical School”.

³¹ For an elaboration of this point, see below as well as “Conclusion: Apologetic Endings”.

law ultimately claims, at the end of the nineteenth century, was added – from the outside – by British imperial thought; and, it is only this marriage between German organicist “idealism” and British utilitarian “imperialism” that produces the European neo-colonialism at the end of the nineteenth century. Yet this however also does not mean that any “utilitarian” philosophy is implicitly colonialist. For earlier forms of British utilitarianism – espoused, for example, by Jeremy Bentham – expressly contain an anti-imperialist commitment.³²

How, then, can we best explain the intellectual causes behind the changing structure of international law during the long nineteenth century (1789-1914)? In order to answer this question, the thesis proceeds in five steps. Chapter 1 starts out with an overview of the “unsettled” eighteenth century. Three competing conceptions of international normativity will be introduced. Shadowing August Comte’s three-stages classification,³³ a “theological” conception, a “metaphysical” conception and a “positivist” conception will be contrasted; yet importantly, all three conceptions remain rooted, as we shall see below, in a universal – and, albeit to a different degree: natural law – project. The main body of the thesis will then be split into two halves – one half looking at the German, the other half exploring the British evolution(s) in the theory and practice of international law in the nineteenth century.³⁴

This division is itself a reflection of a radical “philosophical” split that takes place around 1789. For with Kant and Bentham, German “idealism” and British “empiricism” fully part company;³⁵ and this philosophical division makes it advisable

³² On Bentham and his conception of international law, see Chapter 4 – Section 1.

³³ A. Comte, *The Positive Philosophy of Auguste Comte* – Volume 1&2 (Cambridge University Press, 2009).

³⁴ For reasons of space, the thesis will consequently not explore nineteenth-century French philosophy and practice. On the relatively “underdeveloped” nature of the French legal discourse here, see: M. Koskeniemi, *The Gentle Civilizer of Nations* (supra n.24), 30: “[U]ntil late in the second half of the century, international law received no general academic treatment in France that would have been separate from a discussion of natural law. (...) French diplomats and courts were satisfied by general treaties written by foreigners – particularly those by von Martens and Klüber and the American diplomat Henry Wheaton (1785-1848) – either directly in French or translated for the French audience.”

³⁵ To quote J. W. Salmond, *Law of Nature*, (1895) 11 *Law Quarterly Review* 121 here (ibid., 137): “To the influence of Bentham and his followers is chiefly due the almost complete discredit into which in England the doctrine of natural law has fallen. Till the days of Kant on the Continent and of Bentham in England, there was no very striking discordance between English and Continental jurisprudence. It is not possible to draw any sharp line of distinction between the teaching of Hobbes, Locke, Cumberland and Blackstone on one side of the Channel, and that of Grotius, Puffendorf, Spinoza, Thomasius and Wolff on the other. All were the inheritors of the same traditions. The acceptance, however, of Kant's metaphysical theory on the one hand, and of Bentham's sceptical theory on the other, established between English and Continental juridical and ethical thought a wall of separation that has not yet been broken down.”

to explore the two emerging “national” conceptions of international law separately. Chapter 2 will consequently explore the three main German “idealist” projects and their understanding of international law; while Chapter 3, subsequently, analyses the “juristic” textbooks and practice on the European continent. Moving to the other side of the channel, Chapter 4 investigates the three main formations of British utilitarianism, with Chapter 5 exploring whether (or not) their philosophical work sediments into the textbooks of the main Anglo-Saxon jurists of the nineteenth century.

A *Conclusion* will, finally, try to bring the various strands of the four substantive chapters together; and it hopes to solve many of the questions raised in this *Introduction*. Apart from a historical and philosophical analysis of the intellectual causes that transform international law from a “utopian” into an “apologetic” project, the thesis thereby also wishes to test and challenge three standard views found in today’s academic literature:

- First, it will be argued that it is deeply misleading to characterise the nineteenth century as a “positivist” century – especially if “positivism” is used in the “contemporary” sense of that word.³⁶ For if legal positivism, minimalistically, means the rejection of an ontological link between law and morality, then much of the nineteenth century was decidedly non-positivist.³⁷ Indeed: not only can we find a strong undercurrent of (theocratic) natural law thinking in (British) international law, the (German) Historical School’s conception of law is fully based on a metaphysical conception of “law” that dismisses State positivism as an irregular interference into the organic texture of the moral-legal continuum.
- Second, the belief that there was a “radical” break in the field of international law, which splits the long nineteenth century into an (unimportant) first half and an important “short” nineteenth century (starting around 1870) is questionable.³⁸ Indeed, the view that there was a major discontinuity – among international law scholars –

³⁶ The problem with the concept of “positivity” is its indeterminate and historically contingent nature. For in the past, it has stood in to refer to such diverse matters as a “positive” divine law (Hobbes), the rationalist concept of a “voluntary law” (Vattel), the historicist idea of a customary law (Savigny); and finally, to the idea of a law issued by a human sovereign (Austin). Only the latter meaning formally disconnects law from morality; and it is in this contemporary sense that we today think of “positivism”. Positivism here coincides with “formalism” or “institutionalism”: a norm constitutes a legal norm if it is adopted according to a particular formal procedure regardless of its – god or bad – content.

³⁷ From this contemporary perspective, it is decidedly wrong to call the nineteenth-century a “positivist” century, contra S. Neff, *Justice Among Nations* (Harvard University Press, 2015), Part III.

³⁸ Contra, M. Koskenniemi, *The Gentle Civilizer of Nations* (supra n.24), 3: “radical character of the break that took place in the field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885”.

must be qualified at best and disqualified at worst. True, a new “professional” spirit comes to dominate fin-de-siècle Europe, but we shall see below that “the men of 1873” and their emphasis on a law deriving from moral consciousness, had a long tradition that started around 1815 and that finds its principal root in the German Historical School.

- Third, the view that the nineteenth century constitutes the “British age” in which Bentham’s conception of “international law” prevails and in which the older European public law is finally “universalised” is wrong on all fronts.³⁹ Yes, the term “international law” becomes dominant in the course of the nineteenth century in the English, French and Italian literature,⁴⁰ yet this is – crucially – not because of Bentham. For the nineteenth century sees, pace Bentham, the phenomenal rise of a new form of *private* international law; and it is that phenomenon that stands behind the semantic widening of the older “Law of Nations” into the younger “International Law”. Only the latter offered a suitable linguistic umbrella to contain both the public relations between states as well as the private relations between individual persons – something that the Benthamite concept of international law was unequivocally and decidedly not to do.

Last but not least, three closing thoughts about the form and method of the thesis. Each of the five chapters has adopted a “tripartite” structure. This stylistic – not philosophical – device was meant to inject balance and symmetry into the overall argument.⁴¹ Methodologically, the thesis has also tried to find a proper equilibrium between the “philosophical” and the “historical” approach to the study of international

³⁹ There is in my view an unresolved tension in Grewe’s “Epochs of International Law” periodization in that he attributes his names according to which country hegemonically dominated a certain period in the history of international law. But is that domination a *factual* domination, expressed in military or economic might; or is it an *intellectual* domination? For example, even if the Roman Empire dominates late antiquity; is its international law Roman or Greek in spirit? And if the nineteenth-century is considered the “British Age”, does that mean that British conceptions of international law dominate? We shall see below that this is decidedly not the case for the better part of the nineteenth century. Indeed, if Grewe were to follow the “spirit” of a period, then, international law within the nineteenth century is the “German Age” (albeit not in the Hegelian sense!). For an excellent recent discussion of “periodisations” in the history international law, see: O. Diggelmann, The Periodization of the History of International Law, in: B. Fassbender & A. Peters (eds.), *Oxford Handbook of the History of International Law* (OUP, 2012), 997.

⁴⁰ The German language, by contrast, has remained loyal to the older idea of a “law of nations” in its idea of a “Völkerrecht”.

⁴¹ That trichotomies will, of course, not “make” philosophy, see G. W. F. Hegel, *Elements of the Philosophy of Right* (editor: A. W. Wood; Cambridge University Press, 1991), §3 – where Hegel ridicules “Herr Hugo” (the author of a famous German textbook on Roman law) for believing that the extensive use of “trichotomies” turns jurists into philosophers.

law. This syncretism is inspired by the “Cambridge School” of intellectual history; yet my emphasis on the long-term evolution of the philosophical concept “international law”, brings it probably closer to the German *Begriffsgeschichte* tradition.⁴² I have therefore attempted to let the various authors “speak for themselves”; and the thesis is consequently rich on primary sources (with the secondary literature often relegated to the footnotes). Silently towering over the thesis, one book from the rich secondary literature must nevertheless be singled out: Martti Koskenniemi’s “From Apology to Utopia: The Structure of International Legal Argument”,⁴³ which – from an early academic age – has greatly inspired my thinking about international law. The title of this thesis pays homage to his mesmerising synthesis of philosophy, history and international law – even if I do, of course, not always agree with the conclusions of the admired author.

⁴² For an overview of the various strands within the history of ideas and “Begriffsgeschichte”, see only: E. Müller & F. Schmieder, *Begriffsgeschichte und historische Semantik: Ein kritisches Kompendium* (Suhrkamp, 2016). The most well-known representative of the “Cambridge School” is Quentin Skinner (cf. “Visions of Politics – Volume 1: Regarding Method” (Cambridge University Press, 2002)); whereas the more “philosophical” tradition is best represented in the work of Reinhart Koselleck (cf. “Begriffsgeschichten: Studien zur Semantik und Pragmatik der politischen und sozialen Sprache” (Suhrkamp, 2011)).

⁴³ Originally published in 1989, the book was re-issued in 2005 by Cambridge University Press.

The “Unsettled” Eighteenth Century

Three Competing Conceptions

Introduction

Having lost the theological certainties of the past, all early modern scholars of international law battle to identify the normative foundations of the “law of nations”.¹ What is the relationship between natural law and “positive” international law? Grotius had famously allowed for both a “natural” and a “positive” (“voluntary”) international law,² yet Hobbes (and Pufendorf) had come to deny the very existence of any “positive” international law: all international law was natural law.³ But by the eighteenth century, this view had become a major philosophical problem. Enormous social and political changes had taken place within that century, and the question therefore arose whether the relations and rules between states could also be subject to change. Yet if they could change, as they seemed to do, what normative authority would be able to validate such modifications? The undeniable existence and sheer mass of international treaties and customs had come to push “positive” law into the foreground; alas, what was its relation to “natural law” and what was the “reason” behind its (presumed) status as “law” if there was no “government” above the States? The eighteenth-century offers – unlike its predecessor – no dominant answer. It represents a “*Sattelzeit*”: a time of semantic reformation.⁴ Within that century, we thus find *both* older and newer conceptions of the normative foundations of international law co-existing with each other. This parallel existence of old and new ideas will be discussed in this preliminary chapter. It explores the unsettled foundations of international law through three distinct schools of thought, which we shall – in line with a famous nineteenth century classification – called the “theological”, the

¹ H. Steiger, “Völkerrecht”, in: O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe: Historisches Lexikon zur politisch-sozialen Sprache in Deutschland* – Volume 7 (Klett-Cotta 2004), 97 at 110: “Das Verhältnis von ‚ius naturae‘ und ‚ius gentium‘ bleibt begrifflich-theoretisch letzten Endes offen. Weder den Spaniern noch Grotius gelingt eine endgültige Klärung.“

² For the ambivalent position of Grotius in particular, see: P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France, 1983).

³ T. Hobbes, *Leviathan* (Editor: R. Tuck) (Cambridge University Press, 1996), 244: “[T]he Law of Nations, and the Law of Nature, is the same thing... [a]nd the same Law, that dictateth to men that have no Civil Government, what they ought to do, and what to avoid in regard to one another, dictateth the same to Common-wealths, that is, to the Consciences of Sovereign Princes, and Sovereign Assemblies; there being no Court of Natural Justice, but in the Conscience onely; where not Man, but God reigneth”.

⁴ On the importance of the eighteenth century as a “Sattelzeit”, see: R. Kosselleck, Einleitung, in: O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe* – Volume 1 (Klett, 2004), XV.

“metaphysical” and the “positive” school.⁵ The first continues to equate the law of nations with the law of nature and ultimately derives the “verity” and “authority” of that law from a divine source: God. The second school accepts the validity of positive international law; but in order to explain how the latter can “authorize” modifications in the natural law, it hypothesises a “voluntary” law of nations adopted by a metaphysical world republic. The third conception, finally, marginalises natural law thinking altogether and prioritises the “consensual” positive law created by States.

These three – very different – answers reverberate throughout the eighteenth-century. Section 1 starts with the oldest of the three school: the theological conception of international law. For there indeed remained strong advocates of the divine origins of the law of nations in the first half of the eighteenth century. Section 2 discusses the most elaborate “metaphysical” conception of international law in that century: Christian Wolff’s *civitas maxima*. This metaphor is meant to “triumphantly rehabilitate[]” positive law;⁶ yet loyal to the older (Hobbesian) idea of laws as commands, it is forced to construct a fictitious superior entitled to adopt “civil” laws. This conceptual link between a “superior” state and positive law is subsequently weakened by Vattel, whose work would be the gate through which positivism emerged strengthened in the second half of the eighteenth-century. This third “positivist” school plants the seed for much that was to come in the nineteenth century – the main subject-matter of this thesis.

1. The Theological School: A “Divine” Law of Nations

The early years of the eighteenth-century still stand under the controlling shadow of natural law thinking; and the towering figure here is not Hobbes but Pufendorf. Having been translated into French and English early on, Pufendorf’s naturalist system

⁵ The terminology is based on A. Comte’s three stages-theory of societal evolution, see “The Positive Philosophy of Auguste Comte – Volume 1&2” (Cambridge University Press, 2009).

⁶ E. Reibstein, *Die Dialektik der souveränen Gleichheit bei Vattel*, (1958) 19 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 607 at 608: „Ablehnung des Begriffs *ius gentium positivum* bei Pufendorf und seine triumphale Rehabilitierung bei Christian Wolff“.

indeed penetrates deep into the new century;⁷ and with it revives, even if reluctantly, a “theological” conception of international law that ultimately traces its validity to a divine command.⁸ We find a classic restatement of this natural law conception in Chapter 3 of the Second Book of Pufendorf’s “Of the Law of Nature and Nations”. Not only is a denial of the existence of a “natural” (as opposed to a “civil”) law seen as “foolish”;⁹ the ultimate origin of this natural law is anchored in God himself.¹⁰ The rules of natural law, while deducible by human reason, are always backed up by divine commands:

“[I]f these dictates of reason are to have the force of laws, it is necessary to presuppose the existence of God and His providence, whereby all things are governed, and primarily mankind. For we cannot agree with Grotius, when he says in his Prolegomena that natural laws ‘will have some place, even if we should grant-what can only be done with the greatest impiety-that there is no God, or that He does not concern Himself with the affairs of men’. For if some man should devise such an impious and idiotic theory, and imagine that mankind; had sprung from itself, then the dictates of reason could in no possible way have the force of law, since law necessarily supposes a superior.”¹¹

The divine origin of the law of nations is seen as fundamental, because “the mere authority of men does not seem able to endow these dictates with the power of obligation”.¹² Human law is merely “positive” law; and it must therefore “under all circumstances be maintained that *the obligation of natural law is of God, the creator and final governor of mankind*, who by His authority has bound men.”¹³ This divine natural law is, importantly, the sole and exclusive law that governs nations. And following Hobbes,

⁷ Jean Barbeyrac translates Pufendorf into French in 1706; and Pufendorf’s “Law of Nations” is translated into English in 1707 by Basil Kennet. For the purposes of this section, I have been using the 1734 Barbeyrac edition. On the influence of the French translation on the dissemination of natural law thinking to a cosmopolitan audience, see: S. Bisset, Jean Barbeyrac’s Theory of Permissive Natural Law and the Foundation of Property Rights, (2015) 76 *Journal of the History of Ideas* 541 at 542.

⁸ The original Latin edition of Pufendorf’s “De Jure Naturae et Gentium” (1672) had been less “theological”; yet due to the criticism by Catholic and Protestant “neo-scholastics” alike, the second edition of the book re-theologizes the argument in 1684. This is chiefly done by integrating extensive references to Richard Cumberland. On this point, see: D. Saunders, The Natural Jurisprudence of Jean Barbeyrac: Translation as an Art of Political Adjustment, (2003) 36 *Eighteenth-Century Studies* 473 at 483. It is this second “Pufendorf” that is translated by Barbeyrac and thereby brought to a broader audience. On Barbeyrac’s own natural law thinking, see: R. Hochstrasser, Conscience and Reason: The Natural Law Theory of Jean Barbeyrac, (1993) 36 *The Historical Journal* 289.

⁹ S. Pufendorf, *Of the Law of Nature and Nations: Eight Books* (translation: Oldfather, Clarendon Press, 1934), 199.

¹⁰ *Ibid.*, 202 (with express reference to Cumberland’s “De Legibus Naturae”).

¹¹ *Ibid.*, 215.

¹² *Ibid.*, 217.

¹³ *Ibid.*, 217 (emphasis added).

Pufendorf indeed denies that “*there is any other voluntary or positive law of nations which has the force of a law, properly so called*, such as binds nations as if it proceeded from superior”.¹⁴

International treaties and customs are thus not international law “proper” since they merely depend on the consent of States who do not recognize a (civil) superior above them.¹⁵

Other major eighteenth-century jurists equally place the normativity of the law of nations into the hands of God.¹⁶ A “British” version of this theological conception can – for example – be found in William Blackstone’s “Commentaries on the Laws of England”. Grounded in natural law thinking (and especially Pufendorf),¹⁷ the law of nations is here seen to emerge from the fact that men wish to live in societies but a single human society for all humankind has proved too big:

“[A]s it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations; entirely independent of each other, and yet liable to mutual intercourse. Hence arises a [new] kind of law to regulate this mutual intercourse, call “the law of nations”; which, as none of these states will acknowledge a superior in the other, cannot be dictated by either; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities[.]”¹⁸

While, seemingly, admitting treaties and customs as potential sources of international law, the law of nations is nonetheless identified as “a system of rules deductible by natural reason”.¹⁹ For since no state “will allow a superiority in the other, therefore

¹⁴ Ibid., 226 (emphasis added).

¹⁵ Ibid., 228. This last point would receive a famous critique in the form of Leibniz’s “Opinion on the Principles of Pufendorf” (1706), in which Leibniz – justly – contends that by this denial of all positive law, Pufendorf and his followers actually contradict themselves: “On the basis of this principle several learned followers of our author do not allow any voluntary law of nations whatever, for the reason, among others, that peoples cannot bring about a law by reciprocal pacts, not having the obligation rendered valid by any superior. With this argument too much is proved, namely that men cannot set up any superior for themselves by consent and agreement: which is contrary to what [even] Hobbes admits.” See: G.W. Leibniz, *Political Writings* (edited: P. Riley, Cambridge University Press, 1988), 64 at 70. For Leibniz, the voluntary law of nations derives its authority, just like the natural law, from God.

¹⁶ For example: J.-J. Burlamaqui, *The Principles of Natural and Politic Law* (Liberty Fund, 2006), 176: “[A]ll nations are with regard to one another in a natural independence and equality. If there be therefore any common law between them, it must proceed from God their common sovereign.” Divine providence equally appears to lie at the origin of G. Vico’s conception of international law; yet due to its lack of influence in the eighteenth century, it will not be dealt with here.

¹⁷ W. Blackstone, *Commentaries on the Law of England* – Volume I (Clarendon Press, 1765), 43 (with reference to Pufendorf).

¹⁸ Ibid., 43.

¹⁹ W. Blackstone, *Commentaries on the Law of England* – Volume IV (Clarendon Press, 1769), 66.

neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those *principles of natural justice*, in which all the learned of every nation agree”.²⁰ This natural law of nations is “co-eval with mankind and dictated by God himself”; and, thanks to this universality and divinity, “[i]t is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive their force, and all their authority, mediately or immediately, from this original”.²¹ For Blackstone, like for many other eighteenth century jurists and philosophers, there consequently also exist certain “criminal” offences against the law of nations;²² and the idea that each state enjoys “basic rights” equally emanates from this natural law tradition.²³

2. The Metaphysical School: A “Civil” Law of Nations

Can the law of nations change; or have the rules of nature and reason remained the same throughout history? A second school within the eighteenth century accepts that some changes in the rules of international law can occur; and the most famous eighteenth century attempt to offer a normative foundation for a “positive” international law is made by Christian Wolff.²⁴ Devoid of the Leibniz’s theological commitment,²⁵ the Wolffian system nonetheless continues to be firmly based on the idea of an “eternal and unchangeable law, which nature herself has established” and

²⁰ Ibid., 66-67 (emphasis added).

²¹ W. Blackstone, *Commentaries on the Law of England* – Volume I (supra n.17), 41 (emphasis added).

²² W. Blackstone, *Commentaries on the Law of England* – Volume IV (supra n.19), 68: “The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.” Pirates, in particular, are seen as “enemies of mankind” in that “every community hath a right by the rule of self-defense, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do” (ibid., 71).

²³ M. Vec, *Grundrechte der Staaten: Die Tradierung des Natur- und Völkerrechts der Aufklärung*, (2011) 18 Rechtsgeschichte 66.

²⁴ C. Wolff, *Jus Gentium Methodo Scientifica* (translation: J. H. Drake, Clarendon Press, 1934). The work was originally published in 1749.

²⁵ On the interesting relationship between Wolff and Leibniz, see: F. Cheneval, *Philosophie in weltbürgerlicher Bedeutung: Über die Entstehung und die Philosophischen Grundlagen des supranationalen und kosmopolitischen Denkens der Moderne* (Schwabe, 2002), esp. 196: „Die wolffsche Lehre des Völkerstaats muss als grundsätzliche Transformation der leibnizschen Gottesstaatslehre verstanden werden.“

that controls “all acts of individual men as well as those of nations”.²⁶ The law of nations is thus “undoubtedly a part of the law of nature”;²⁷ and it is consequently “a law common to all nations”.²⁸ And yet, eager to integrate some modifications, Wolff also comes to affirm a form of “civil” or “voluntary” law into his system; and in order to explain its normative status as binding law, he famously reverts to the idea of the “civitas maxima” (a). This metaphysical tradition is partly continued and partly abandoned by Vattel, who – rejecting the hypothesised great republic – comes to “relativize” international law (b).

a. Between “Natural” and “Civil” Law: Wolff and the World Republic

Wolff defines international law as “the science of that law which nations or peoples use in their relations with each other and of the obligations corresponding thereto”.²⁹ This is a universal law that makes no distinctions between “barbarous” and “civilised” or between “Christian” and non-Christian religions;³⁰ and it is a law that takes nations as they are.³¹ The core principle behind this universal law is the view that regards nations as moral persons, that is: “multitude[s] of men united into a state”. Nations are “individual free persons” that live in a “state of nature”;³² and, originally, they “used

²⁶ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), 3 (Preface).

²⁷ Wolff nevertheless admits that while the principles of the law of nature with regard to individuals and nations are the same, the application of these principles differs “in so far as the nature of a nation is not the same as human nature” (ibid., §3).

²⁸ Ibid., 5 (Preface).

²⁹ Ibid., §1.

³⁰ This “universalism” is never given up. Thus even if Wolff distinguishes between “barbarous” nations (ibid., §52) and “civilized” nations (ibid., §53), this is mainly to explain that the latter have a duty of solidarity to assist the former (ibid., §168); and he makes it absolutely clear that “if some barbarous und uncultivated nation is unwilling to accept aid offered to it by another”, “it cannot be compelled to accept such aid, consequently it cannot be compelled by force to develop”. Indeed: “[b]arbarism and uncultivated manners give you no right against a nation” and “a war is unjust which is begun on this pretext”. (ibid., §169). With regard to differences in religion in particular, we read (ibid., §263) that “[o]n account of difference of religion no nation can deny another the duties of humanity which nations owe to each other”, because “the duties which nations owe to nations do not assume identity of religion”.

³¹ Ibid., §283: “No nation has the right to extend the limits of sovereignty. For the nation which extends the limits of sovereignty, extends the sovereignty beyond its boundaries into the territories of a neighbouring nation”.

³² On this point, see especially § 269 entitled “Of the Right not to allow any nation to interfere in the government of another” and which states: “A perfect right belongs to every nation not to allow any

none other than natural law; therefore the law of nations is originally nothing except the law of nature applied to nations”.³³ This natural law is defined as the “necessary law of nations” that – while eternal and immutable – however only “binds nations in conscience”.³⁴

But just as individual men cannot live simply by the abstract laws of nature and have hence developed a positive law within the nation, “so likewise the condition of nations is such that one cannot completely satisfy in all details the natural rigour of the law of nations” and the need for a positive law therefore arises. That positive law Wolff calls – following Grotius – the “voluntary law of nations”; yet there is a fundamental change of meaning:

“But far be it from you to imagine that this voluntary law of nations is developed from the will of nations in such a way that their will is free to establish it and that freewill alone takes the place of reason, without any regard to natural law... [T]he law of nature itself prescribes the method by which the civil law is to be fashioned out of natural law, so that there can be nothing which can be criticized in it; so also the voluntary law of nations does not depend upon the free will of nations, but natural law itself prescribes the method by which the voluntary law is to be made out of natural law, so that only that may be admitted which necessity demands. *Since nature herself has united nations into a supreme state in the same manner as individuals have united into particular states, the manner also in which the voluntary law of nations ought to be fashioned out of natural law, is exactly the same as that by which civil laws in a state ought to be fashioned out of natural laws.*”³⁵

The “voluntary” law of nations is thus defined as an extension and specification of “abstract” natural law. It is vital to “concretise” and “externalise” universal natural law;³⁶ but this positive law can only be adopted by a commanding “will”.³⁷ For categorically rejecting treaties and customs as ever affecting natural law,³⁸ only a (hypostasised) world state can create a civil law of a universal character. But whence

other nation to interfere in any way in its government”; as well as § 271 – “Of the right to obtain one’s right by force”: “The right belongs to every nation to obtain its right against another nation by force, of the other is unwilling to allow that right.”

³³ Ibid., §3.

³⁴ Ibid., §4.

³⁵ Ibid. 6 (Preface, emphasis added).

³⁶ For the complex relationship between the necessary (natural) law and the positive (voluntary) law, see ibid., §22: “The voluntary law of nations is, therefore equivalent to the civil law, consequently it is derived in the same manner from the necessary law of nations, as we have shown that the civil law must be derived from the natural law in the fifth chapter of the eighth part of ‘The Law of Nature’.”

³⁷ F. Cheneval, *Philosophie in weltbürgerlicher Bedeutung* (supra n.25), 209: “Wolffs Theorie folgt logisch aus Pufendorfs Feststellung und überhaupt aus der positivistischen Rechtsauffassung, dass ein nicht von einer Obrigkeit garantiertes Völkerrecht nicht als positives Recht betrachtet werden kann.”

³⁸ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), 7 (Preface).

does this world state and its civil law come from? In a famous passage, Wolff claims it is based on the great society that exists among nations:

“Nature herself has established society among all nations and binds them to preserve society. For nature herself has established society among men and binds them to preserve it. Therefore, since this obligation, as coming from the law of nature, is necessary and immutable, it cannot be changed for the reason that nations have united into a state. Therefore society, which nature has established among individuals, still exists among nations and consequently, after states have been established in accordance with the law of nature and nations have arisen thereby, nature herself also must be said to have established society among all nations and bound them to preserve society. *If we should consider that great society, which nature herself has established among men, to be done away with by the particular societies, which men enter, when they unite into a state, states would be established contrary to the law of nature, in as much as the universal obligation of all toward all would be terminated; which assuredly is absurd.*”³⁹

Wolff here postulates the existence of a world-republic as guarantor for the validity of “positive” international law; and since the purpose of that civil society must be the same as that for individuals,⁴⁰ it follows that “nature herself has combined nations into a state”.⁴¹ This “supreme state” or *civitas maxima* is not a “universal monarchy” governing all human beings directly; it is conceived as a universal federation “whose separate members are separate nations” – not individuals.⁴² The “supreme state” is “a kind of democratic government”;⁴³ and the world state is therefore entitled to adopt “civil laws”. These civil laws are approved by a (fictitious) majority of States,⁴⁴ and they are enforced by a (fictitious) supreme commander.⁴⁵ From here it follows:

³⁹ Ibid., §7 (emphasis added).

⁴⁰ For Wolff, states – even the biggest states – are like individuals in that they cannot “perfect” themselves alone (ibid., §8).

⁴¹ Ibid., §9.

⁴² In the words of N. Greenwood Onuf, *Civitas Maxima: Wolff, Vattel and the Fate of Republicanism*, (1994) 88 *American Journal of International Law* 280 at 296: “Only by locating the *civitas maxima* at the apex of an ascending series of associations prescribed by the theory of corporations can we make sense of this proposition... Wolff’s model is the *respublica composita*.”

⁴³ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), §10 and §19. The latter paragraph continues: “The supreme state is a kind of democratic form of government. For the supreme state is made up of the nations as a whole, which as individual nations are free and equal to each other. Therefore, since no nation by nature is subject to another nation, and since it is evident of itself that nations by common consent have not bestowed the sovereignty which belongs to the whole as against the individual nations, upon one or more particular nations, nay, that it cannot even be conceived under human conditions how this may happen, that sovereignty is understood to have been reserved for nations as a whole. Therefore, since the government is democratic, if the sovereignty rests with the whole, which in the present instance is the entire human race divided up into peoples or nations, the supreme state is a kind of democratic form of government.”

⁴⁴ Ibid., §20.

⁴⁵ Ibid., §21. This second fiction is needed as all law must be issued by a superior.

“In the supreme state the nations as a whole have a right to coerce the individual nations, if they should be unwilling to perform their obligation, or should show themselves negligent in it. For in a state the right belongs to the whole of coercing the individuals to perform their obligation, if they should either be unwilling to perform it or should show themselves negligent in it. Therefore since all nations are understood to have combined into a state, of which the individual nations are members, and inasmuch as they are understood to have combined in the supreme state, the individual members of this are understood to have bound themselves to the whole, because they wish to promote the common good, since moreover from the passive obligation of one party the right of the other arises; therefore the right belongs to the nations as a whole in the supreme state also of coercing the individual nations, if they are unwilling to perform their obligation or show themselves negligent in it.”⁴⁶

But if the *civitas maxima* can adopt supreme civil laws,⁴⁷ who is sovereign? Wolff answers this question by means of the revolutionary idea of divided sovereignty: “*Some sovereignty over individual nations belongs to nations as a whole. For a certain sovereignty over individuals belongs to the whole in a state.*”⁴⁸ This conception of a divided sovereignty is not seen to undermine the freedom and independence of each nation. For in a move that parallels Rousseau’s thinking a decade later, Wolff claims that the “democratic” government of his world state ultimately preserves the “sovereignty” of each nation “since no nation by nature is subject to another nation, and since it is evident of itself that nations by common consent have not bestowed the sovereignty which belongs to the whole as against the individual nations, upon one or more particular nations”.⁴⁹ The “force” and “authority” of the civil law of nations is thus in harmony with the freedom and independence of each state.

Does Wolff accept any other sources of international law apart from the natural law and the voluntary law of nations? His “universal” international law is complemented by the “stipulative” law, which arises from international treaties;⁵⁰ and he also refers to

⁴⁶ Ibid., §13. Within the Wolffian system of divided sovereignty, it is thus possible to envisage an international criminal law because States are entitled to “punish” others (ibid., §272): “The right belongs to every nation to punish another nation which has injured it.” And within his natural law system, there also cannot be a “just war” on either side (§633): “War cannot be just on each side. For there is no just cause of war save a wrong done or likely to be done.” He nevertheless draws some boundaries around the idea of a “punitive war” (ibid., §636-639).

⁴⁷ F. Cheneval, *Philosophie in weltbürgerlicher Bedeutung* (supra n.25), 134: „Primat des Völkerrechts“.

⁴⁸ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), §15 (emphasis added).

⁴⁹ Ibid., §19. However, believing it impossible that all nations (as moral persons) could assemble together, Wolff agrees to the substitute of “right reason”, which “must be taken to be the will of all nations” (ibid., §20); and it follows that there can be a single “ruler” of the supreme state that “defines by the right use of reason what nations ought to consider as law among themselves” (ibid., §21).

⁵⁰ Ibid., §23.

customary law, based on the tacit consent of States.⁵¹ Yet importantly: neither of these two sources do constitute “real” sources of international law. For not only are stipulations “not universal but particular”; both agreements and custom simply “cannot be considered as the law of nations” “just as the private law for citizens ... is considered as having no value at all as civil law for a certain particular state”.⁵² The “private” sources of international law are consequently not producing “real” law. For the “law” within the law of treaties is only the binding norm(s) that force States to obey their promises, and these rules form part of the natural or civil law of nations. An overview of the Wolffian system of legal sources can be found in Figure 2.

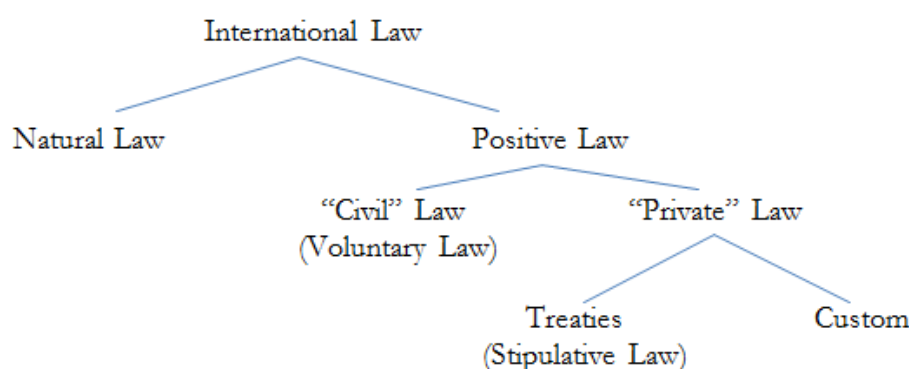


Figure 1. Wolff's Sources of International Law

b. “Relativizing” International Law: Vattel and the Voluntary Law

Vattel stands to Wolff like an apprentice to his master. Shadowing his successful predecessor, Vattel’s modest ambition was originally to simply “translate” the philosophical Wolff into practical language. Yet Vattel not only “de-scholasticises” Wolff’s work;⁵³ he famously adopts a number of very different conclusions.⁵⁴

⁵¹ Ibid., §24.

⁵² Ibid., §23.

⁵³ For an excellent analysis of the methodological shift that takes place between Wolff and Vattel, see: E. Tourme-Jouannet, *L’Emergence doctrinale du droit international classique : Emer de Vattel et l’Ecole de droit de la nature et des gens* (Pedone, 1998), 105 et seq.

⁵⁴ E. de Vattel, *The Law of Nations* (translator: J Chitty; Johnson & Co, 1883). The book was originally published in 1758.

What, then, are the similarities and differences between Wolff and Vattel? Vattel accepts a natural law of nations,⁵⁵ which he calls (following Wolff) the “necessary law of nations”.⁵⁶ He also acknowledges a positive “voluntary law of nations”;⁵⁷ yet unlike Wolff, this voluntary law is no longer seen as a “civil law” adopted by a supreme republic. The famous rejection of the Wolffian *civitas maxima* is announced at the very beginning in Vattel’s “Law of Nations” (1758):

“In the very outset of my work, it will be found that I differ entirely from Monsieur Wolf[f] in the manner of establishing the foundations of that species of law of nations which we call voluntary. Monsieur Wolf[f] deduces it from the idea of a great republic (*civitas maxima*) instituted by nature herself, and of which all nations of the world are members. According to him, the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy me; nor do I think the fiction of such a republic either admissible in itself, or capable of affording sufficiently solid grounds on which to build the rules of the universal law of nations.”⁵⁸

Vattel here forsakes the “civil” foundation of positive international law: the (hypostasized) World State. While admitting the existence of a “universal society of the human race”,⁵⁹ the latter neither implies nor demands a universal state. For even if there exists a mutual dependence between nations, nature “has not imposed on them any particular obligation to unite in civil society”.⁶⁰ The reasons for this rejection of a civil organisation among states are given as follows:

“Individuals are so constituted, and are capable of doing so little by themselves, that they can scarcely subsist without the aid and the laws of civil society. But, as soon as a considerable number of them have united under this same government, they become able to supply most of their wants; and the assistance of other political societies is not so necessary to them as that of individuals is to an individual. (...) States conduct themselves in a different manner from individuals. It is not usually the caprice or blind impetuosity of a single person that forms the resolutions and determines the measures of the public: they are carried on with more deliberation and circumspection; and, on difficult or important occasions, arrangements are made and regulations established by means of treaties.”⁶¹

⁵⁵ Ibid., Preface – vii: “There certainly exists a natural law of nations, since the obligations of the law of nature are no less binding on states, on men united in political society, than on individuals... [T]he natural law of nations is a particular science, consisting in a just and rational application of the law of nature to the affairs and conduct of nations or sovereigns.”

⁵⁶ Ibid., Preliminaries – §7.

⁵⁷ Ibid., Preliminaries – §21.

⁵⁸ Ibid., Preface – xiii.

⁵⁹ Ibid., Preliminaries – §11.

⁶⁰ Ibid., Preface – xiii.

⁶¹ Ibid., Preface – xiv. See here also Book II, §3: “Social bodies or sovereign states are much more capable of supplying all their wants than individual men are; and mutual assistance is not so necessary among them, nor so frequently required.”

Put differently: thanks to their greater strength and more rational character, states are less in need (when compared to human beings) to combine into and form a world *state*; and in the absence of such a world state, there cannot be a *civil* international law.⁶²

How will Vattel then define the relationship between the – unchanging – natural law and the – changing – positive international law? His answer, while not always clear, seems to be that “all these alterations are deducible from the natural liberty of nations”;⁶³ and for Vattel, all “positive” international law – including the voluntary law – is thus consensual law.⁶⁴ Yet the voluntary law is also considered to be “established by nature”;⁶⁵ and the states consent is here simply “presumed”. This “presumed” consent however no longer derives from an “objective” and “unified” conception of natural law (set by the *civitas maxima*). The central plank of Vattel’s voluntary law is the sovereignty of each state;⁶⁶ and the “presumed consent” idea here assumes a fundamentally different meaning when compared to the older Wolffian system. For instead of justifying a (rational) decision presumed to have been taken by the majority of states *because it is in the best interest of mankind*, the consent requirement here limits – from the very start – what *states* could have consented to: only those rules to which states *could be presumed to have consented to* can be part of the voluntary law of nations!

This Vattelien move completely disempowers the voluntary law of nations. The principle of sovereignty now demands that “no other nation can compel her to act in such or such a particular manner: for any attempt at such compulsion would be an infringement on the liberty of nations”.⁶⁷ The use of force to *legitimately* compel any

⁶² For an excellent discussion of the relation between Vattel and Wolff here, see: P. Haggenmacher, *Le Modèle de Vattel et la Discipline Du Droit International*, in: P. Haggenmacher, *Vattel's International Law from a XXIst Century Perspective* (Nijhoff, 2012), 3 esp.38-46.

⁶³ E. de Vattel, *The Law of Nations* (supra n.54), Preface – xiv.

⁶⁴ Ibid., Preliminaries - §27: “These three kinds of law of nations, the Voluntary, the Conventional, and the Customary, together constitute the Positive Law of Nations. For they all proceed from the will of Nations; the Voluntary from their presumed consent, the Conventional from an express consent, and the Customary from tacit consent; and as there can be no other mode of deducing any law from the will of nations, there are only these three kinds of Positive Law of Nations.”

⁶⁵ Ibid., Preface - xv: “The necessary and the voluntary laws of nations are therefore both established by nature, but each in a different manner[.]”

⁶⁶ Ibid., Preface – xvi.

⁶⁷ Ibid., Preliminaries - §15 and §16.

nation is neutralised;⁶⁸ and once all nations are seen as equal in relation to each other,⁶⁹ a plurality of views on what global justice requires is unconditionally accepted – including for the voluntary law of nations.⁷⁰ This normative pluralism means, in particular, that there cannot be any “just” war: “nations cannot, in their dealings with each other, insist on this rigid justice”, because “every regular war is on both sides accounted just”.⁷¹ Here, as well as in other crucial areas,⁷² the voluntary law can hence no longer be seen as the externalised “necessary” part of the law of nations. No nation is allowed to enforce the “objectively” just natural law for the benefit of all of mankind – *because there is no absolute Archimedean standpoint from which “global” justice can be judged.*⁷³

All “positive” international law, including voluntary law, is here “relativized”. The voluntary law of nations no longer stems from a (hypothesized) superior. It is reduced to that “rational” law that could have been consented to by sovereign states; and, it must therefore respect their sovereign independence. Built upon the core principle of state sovereignty, the voluntary law will, consequently, soon be reduced to a simple reflection of state practice.⁷⁴

⁶⁸ For Vattel, all rights against other nations are thus “imperfect” rights (ibid., Preliminaries – §17).

⁶⁹ Ibid., Preliminaries – §18. Like Wolff, Vattel rejects the idea that states that are “less civilised” or which have a different religion are not equal.

⁷⁰ Ibid., Preliminaries – §21.

⁷¹ Ibid., Book III – §195.

⁷² For a good discussion of some of these areas, see: F. Ruddy, *International law in the Enlightenment: The Background of Emmerich de Vattel’s Le Droit des Gens* (Oceana, 1975), 110-123.

⁷³ E. de Vattel, *The Law of Nations*, Book II - §7: “It is strange to hear the learned and judicious Grotius assert, that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature, *which treat their parents with inhumanity like the Sogdians, which eat human flesh as the ancient Gauls, &c.* What led him into this error, was his attributing to every independent man, and of course to every sovereign, an odd kind of right to punish faults which involve an enormous violation of the laws of nature, though they do not affect either his rights or his safety. But we have shewn (Book I. §169) that men derive the right of punishment solely from their right to provide for their own safety; and consequently they cannot claim it except against those by whom they have been injured. Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts? Mahomet and his successors have desolated and subdued Asia, to avenge the indignity done to the unity of the Godhead; all whom they termed associators or idolaters fell victims to their devout fury.”

⁷⁴ F.S. Ruddy, *International Law in the Enlightenment* (supra n.72), 313

c. Excursus: The “Natural” Law of Nations and Foreign Citizens

The Law of Nations is, within the eighteenth century, primarily seen as a law between sovereign states; and yet, the older “*ius gentium*” tradition also still allows for rules that apply to private individuals. Leaving the offences called “crimes against humanity” aside,⁷⁵ these rules – applicable to private persons – generally relate to the rights of foreigners living within a state other than their own.

What is the nature of these “private” international rights? For the naturalists, the law of nations forms part of natural law; and – as both Wolff and Vattel would hold – the creation of particular civil societies between some men did therefore not affect the existence of a universal society among all men. Both however accept each state’s legal sovereignty over its territory; and the general principle vis-à-vis foreigners is therefore as follows: “The ruler of a territory is not understood to allow foreigners to dwell in his territory nor stay there, except under this condition, that their actions are subject to the laws of the place.”⁷⁶ Where foreigners commit an offence, “they are to be punished in accordance with the laws of the place”;⁷⁷ and with regard to the settling of disputes, the same rule applies.⁷⁸ And yet: both Wolff and Vattel accept some limits to this rule. A private testament, made in foreign territory, for example, must be made in accordance with a foreigner’s own law, because such private acts “have no relation to

⁷⁵ For the existence of these offences, see the discussion on Blackstone (supra n.75) above. The following section will not concentrate on Blackstone but he, like most natural lawyers, followed a broad conception of international law that covered the relations between nations “and the individuals belonging to each” (W. Blackstone, *Commentaries* – Book IV (supra n.19), 66). This “private” international law included “mercantile questions, such as bills of exchange and the like”; and the resulting “law-merchant” was considered “a branch of the law of nations” (ibid., 67).

⁷⁶ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), §299. He continues: “There is no reason why you should urge that civil laws bind only members of that state in which they are promulgated; for that holds, as long as any one is outside of the territory subject to his nation, where no right over him belongs to the ruler of the territory. But entrance into alien territory produces a certain right over him which elsewhere belonged to his ruler.” For the same point, see E. de Vattel, *Law of Nations* (supra n.54), Book II – §101: “The sovereignty is the right to command in the whole country; and the laws are not simply confined to regulating the conduct of the citizens towards each other, but also determine what is to be observed by all orders of people throughout the whole extent of the state.”

⁷⁷ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), §301; and for the same conclusion, see: E. Vattel, *Law of Nations* (supra n.54), Book II – §102.

⁷⁸ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), § 302. He explains: “Nor does it make any difference that their native civil laws differ from those laws; for there is no place for their laws in the territory in which they are dwelling, since the ruler of the territory is not bound to consider their laws, but in promulgating laws in his own territory he is certainly independent of any other nation or of the ruler of any other state, as is quite plain from arguments given above and from universal public law.” For Vattel, see: “Law of Nations” (supra n.54), Book II – §103.

the alien territory” and are thus “subject to the laws of his own country”.⁷⁹ The reason for this acceptance of “foreign law” here lies in natural law: “we must hold that the power of making a will is a right belonging to man by nature, which it is understood cannot be taken from him, for the reason that he dwells for some time in the territory of some foreign nation or stays there.”⁸⁰

This natural law conception comprises and supports a phenomenon that comes to be known, in the nineteenth century as “private” international law.⁸¹ For the law of nature dictates a division of legislative and judicial competences between two competing sovereignty claims. Vattel can therefore happily integrate the older “statutes” theory that had traditionally distinguished between “local” laws and “personal” laws:

“[A]s to movable goods, specie, and other effects which he possesses elsewhere, which he has with him, or which follow his person, we ought to distinguish between the local laws whose effect cannot extend beyond the territory, and those laws which peculiarly affect the character of citizen. The foreigner remaining a citizen of his own country, is still bound by those last-mentioned laws, wherever he happens to be, and is obliged to conform to them in the disposal of his personal property, and all his movables whatsoever. The laws of this kind made in the country where he resides at the time, but of which he is not a citizen, are not obligatory with respect to him. (...) The case is quite otherwise with respect to local laws: they regulate what may be done in the territory, and do not extend beyond it. (...) The foreigner is obliged to observe those laws in the country where he makes his will, with respect to the goods he possesses there.”⁸²

These ideas, ultimately rooted in the older “naturalist” conception of international law, would not be accepted by the “positivist” scholars,⁸³ to whom we must now turn.

⁷⁹ C. Wolff, *Jus Gentium Methodo Scientifica* (supra n.24), §326.

⁸⁰ Ibid., §327. For the same solution, see E. de Vattel, *Law of Nations* (supra n.54), Book II – §110.

⁸¹ Consider the, admittedly, obscure but Savigny-like passage in §332 of Wolff “Jus Gentium”: “[I]f a contract of purchase and sale or a hypothec needs to be confirmed by judicial authority to be good, the confirmation can be obtained only from one who has jurisdiction over the place where the thing is situated, not can an action against a captious debtor, who has made a contract of a hypothec with another, be brought elsewhere than in the forum where the thing is situated, even if he has a domicile elsewhere.”

⁸² E. de Vattel, *Law of Nations* (supra n.54), Book II - § 111.

⁸³ For J.J Moser, *Erste Grundlehren des jetzigen Europäischen Völker-Rechts, in Friedens- und Kriegs-Zeiten* (Raspe, 1778), the principle of state sovereignty simply means that foreigners are fully and completely subject to the alien state in which they reside (ibid., 160); and this, correspondingly means that his “native” jurisdiction is temporarily suspended (ibid., 161). And as regards judicial acts by one sovereign, they will not have any force within the territory of another (ibid., 162). For the same denial of any “private” international law, see also: D.H.L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts – Erster Teil* (Montags, 1785), 7: “Zwar kommen im Völkerrechte auch Regeln vor, wie ein Staat sich in Anlehnung einzelner Mitglieder eines andern Staates z.B. der Emigranten, der Desserteurs etc zu verhalten habe. Allein immer wird den Bestimmungen dieser Regeln nur allein Rücksicht [comity] auf die Rechte und Verbindlichkeiten genommen, welche man dem Staate, dem diese Personen angehören, oder angehört hatten, nicht diesen Personen selbst, schuldig ist.”

3. The Positivist School: A “European” Law of Nations

With the spectacular rise of “empiricism” in the natural sciences, the “rationalist” understanding of international law, as a special branch of the law of nature, is gradually being challenged from two sides. On the one hand, a class of “professional” scholars, encouraged by Leibniz, begins to collect and systematise existing state practices; while on the other hand, a number of philosophers – most famously Kant – attack the underlying “humanist” premises of the classic law of nature and nations. The first result of this dual challenge is a mixture that accepts – empirical – differences between national laws, yet still insists on a – subsidiary – universal law that governs all peoples of the world.

A good illustration of this “mixed” solution can be found in Montesquieu. For apart from the national differences the “Spirit of the Laws” famously identifies, the law of nations – built upon the laws of nature – is considered to be universal in that it “concerns all societies”.⁸⁴ And, again, while Montesquieu admits that the *positive* international law may differ significantly (his extreme “relativist” illustration is a reference to the laws of the Iroquois – a savage tribe in North America);⁸⁵ the law of nations is meant to be based on human reason governing all societies and peoples of the earth. This ambivalence between a “universal” natural international law and a variety of different – positive – international laws can also be found in others;⁸⁶ and, as this third section will show, none of the “positivist” challengers discussed indeed denies the existence of a “natural” law of nations as such.

⁸⁴ C. de Montesquieu, *The Spirit of the Laws* (translator: A. Cohler et al.; Cambridge University Press 1989), 8. This universal natural law is founded on only two principles, namely: that “the various nations should do to one another in times of peace the most good possible, and in times of war, the least ill possible” (ibid., 7).

⁸⁵ Ibid., 8: “All nations have a right of nations; and even the Iroquois, who eat their prisoners, have one. They send and receive embassies; they know rights of war and peace: the trouble is that their right of nations is not founded on true principles.”

⁸⁶ J.-J. Burlamaqui, *The Principles of Natural and Politic Law* (translator: T. Nugent; Liberty Fund, 2006), 177: “There is certainly an universal, necessary, and self-obligatory law of nations, which differs in nothing from the law of nature, and is consequently immutable, insomuch that the people or sovereigns cannot dispense with it, even by common consent, without transgressing their duty. There is, besides, another law of nations, which we may call arbitrary and free, as founded only on an express or tacit convention; the effect of which is not of itself universal; being obligatory only in regard to those who voluntarily submitted thereto, and only so long as they please, because they are always at liberty to change or repeal it.”

a. The Decline of the Voluntary Law and the Rise of State Practice

An early example of the new “positivism” can be found in J. Moser’s “First Principles of Today’s European Law of Nations” (1778).⁸⁷ Its main premise is to present the “real” law, as opposed to the “ideal” law that can be found in “Grotius, von Wolff and Vattel”.⁸⁸ This does however not mean that Moser completely rejects the idea of natural law. For there “really” exists “*one natural and general*” international law,⁸⁹ which forms part of the law of nature “which God implanted into human nature” and which governs all human relations in its sphere.⁹⁰ However, for Moser, there also exist “*many positive or particular*” international law;⁹¹ and due to his empiricist project – as well as the self-confessed limits of his own knowledge – his textbook is confined to the “real” law as practiced in Europe.

What are the principal sources of this *positive* European international law? First and foremost, the latter must be found in “treaties”; and while none bind all the States of Europe, numerous treaties exist between a great many European states.⁹² A second – and even more important source – of the positive law of nations is seen in custom.⁹³ For while such custom should, in theory, only bind those states that created it, many customs have become generally binding as European law:

“One can however prove for all and each of the European powers that they, within their official publications, recognize a customary law between various European states, especially what has been custom for some time; and that they regard it as

⁸⁷ J.J. Moser, *Erste Grundlehren* (supra n.83). Moser considers himself to be the first to have created the idea of a “European” international law. On Moser’s empirical programme generally, see: A. Verdross, J.J. Mosers Programm einer Völkerrechtswissenschaft der Erfahrung”, (1922) 3 Zeitschrift des öffentlichen Rechts 96.

⁸⁸ J.J. Moser, *Erste Grundlehren* (supra n.83), Vorrede - §§1-2.

⁸⁹ Ibid., Chapter 1 – §3 (emphasis added).

⁹⁰ Ibid., §5. The three spheres are: „das allgemeine privat-Naturrecht“, „das natürliche allgemeine Staatsrecht“ and „das natürliche allgemeine Völkerrecht“.

⁹¹ Ibid., §15.

⁹² Ibid., §22. The subsequent paragraphs then list the best treaty-collections in which these can be found; for example: Mably’s “Droit public de l’Europe” (1758).

⁹³ Ibid., § 27.

international law with a force and binding nature and to which they voluntarily subject themselves in new cases and therefore also, in turn, against themselves.”⁹⁴

The binding nature of European international law is here firmly located in “custom”;⁹⁵ and it is through custom that Europe constitutes an “autonomous” entity that, while composed of sovereign states, has its own customary laws regulating “its” international relations. These European (positive) principles thereby stand next to a general (natural) international law; and “in thesi” will never contradict it.⁹⁶

This “positivist” project is subsequently taken up by von Martens,⁹⁷ whose textbook on the “Law of Nations” (1785) will become an international bestseller.⁹⁸ Like Moser, Martens does not deny the existence of a universal and necessary international law:

“Each national being considered as a moral being living in a state of nature, the obligations of one nation towards another, are no more than those of individuals, modified and applied to nations; and this is what is called the *natural law of nations*. It is *universal* and *necessary*, because all nations are governed by it, even against their will. This law, according to the distinction between perfect and imperfect, is perfect and external (the law of nations strictly speaking), or else imperfect and internal, by which last is understood the morality of nations.”⁹⁹

The universal natural law of nations however remains too abstract; and the common interests of nations therefore obliges them “to render it more determinate, and to depart from that perfect equality of rights”.¹⁰⁰ Such modifications are effected by treaties or custom; and the resulting law is called the “positive, particular, or arbitrary,

⁹⁴ Ibid., §28 (my translation).

⁹⁵ In this sense also, A. Verdross, *J.J. Mosers Programm einer Völkerrechtswissenschaft der Erfahrung* (supra n.87), 97.

⁹⁶ J.J. Moser, *Erste Grundlehren* (supra n.83), Chapter 1 – §21: “Die Grundsätze des allgemeinen und des europäischen Völkerrechts können wohl neben einander stehen, sollten es auch; und in thesi widerspricht man es nicht: Wenn es aber zu einzelnen Fällen kommt, collidierten sie oft gar sehr mit einander.”

⁹⁷ On Martens, see: M. Koskeniemi, *Into Positivism: Georg Friedrich von Martens (1756-1821) and Modern International Law*, (2008) 15 Constellations 189.

⁹⁸ After a first Latin edition in 1785, a French edition (1789) and a German edition (1796) are followed by an English edition in 1802. According to A. Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1954), 184 there were five subsequent French editions (1801, 1821, 1835, 1858 and 1864) – which would make Martens one of the most famous authors of the nineteenth (!) century; and yet Nussbaum rightly argues (ibid., 179) that, conceptually and historically, “von Martens belongs to the pre-Napoleonic period, during which his literary opus was virtually completed.” The following section is based in the first English edition.

⁹⁹ G.F. von Martens, *A Compendium of the Law of Nations Founded on the Treaties and Customs of the Modern Nations of Europe* (translator: Cobbett, Cobbett, 1802), 2.

¹⁰⁰ Ibid.

in opposition to the natural, universal, and necessary law”.¹⁰¹ The existence of such a positive international law cannot be doubted; but in the absence of an international code applicable to all nations, it must be found and founded through the abstraction of general principles from concrete rules:

“[I]t is clear, that what is become a law between two or three, or even the majority, of the powers of Europe, either by treaty or from custom, can produce neither rights nor obligations among others. However, by comparing the treaties that the powers of Europe have made with one another, we discover certain principles that have been almost universally adopted by all the powers that have made treaties on the same subject. It is the same with respect to custom: a custom received among the majority of the powers of Europe, particularly among the great powers (when it is not founded upon their particular constitutions), is easily adopted by other powers, as far as it can apply to them; and, in general, all nations give a certain degree of attention to the customs admitted by others, although it cannot be proved, that they have ever been admitted by themselves.”¹⁰²

These general principles make up the (positive) law of Europe.¹⁰³ They are rooted in “the resemblance of manners and religion, the intercourse of commerce, the frequency of treaties of all sorts, and the ties of blood between sovereigns”.¹⁰⁴ These social ties have created – as Vattel (and Moser) already asserted – a “society of nations and states” that, while falling short of a “state” or “republic”,¹⁰⁵ do form the moral framework within which a positive law can be found.¹⁰⁶ For some early positivist writers, this moral framework even comes to be identified as a form of “societal” natural law. Günther, consequently, distinguishes between an “original” (universal) and a “societal” (particular) natural law – with the latter based on the “nature of the society” that

¹⁰¹ Ibid., 3.

¹⁰² Ibid., 3-4. Von Martens expressly rejects the idea of a “voluntary” law of nations that is independent of the (universal) natural law of nations and the (particular) customary law (ibid., 5 – footnote): “The law of nations which Baron Wolf[f] has called voluntary, and which some other writers have called modified, does not appear to form a particular branch of the law of nations; the principles that these writers deduce from it, may be, in part at least, deduced from the external or internal universal law of nations; and the rest depend merely on custom and are simply the effect of what a nation owes to itself.”

¹⁰³ Von Martens expressly points out that this term is meant to include some states “out of Europe”, such as the United States, which have adopted the same general principles; yet he finds the term “law of civilized nations” “too vague” (ibid.).

¹⁰⁴ Ibid., 27.

¹⁰⁵ Ibid., 27 – footnote: “We may compare this society of European powers to a people before they form themselves into a state; that is to say, before they acknowledge any sovereign power over them. The states of Europe need then make but one step, to advance from the natural to the civil state, and to form themselves into an universal monarchy or republic; but this step they will never make.”

¹⁰⁶ Von Martens also mentions religion but this is not the decisive criterion to exclude – for example – the Turks from the European (Christian) law of Europe; rather, he considers that “the Turks have, in many respects, rejected the positive law of nations of which I here treat” (ibid., 5 – footnote).

various states have entered into.¹⁰⁷ This “natural” law is independent of the will of the states that compose it,¹⁰⁸ and due to the fact that a universal social and moral framework does not (yet) exist, this natural law “cannot bind all states of the globe, but only bind those which really coexist in a social community”.¹⁰⁹

What, then, is the relationship between the positive “European” law and other forms of “particular” international systems, especially when viewed against the background of a universal natural law? The scholarly position continues, in the last quarter of the eighteenth century, to follow the tolerant enlightenment tradition. Von Ompteda thus unconditionally accepts that “the merely natural law of nations will exercise its jurisdiction over *all and every people on the Earth, whether civilised or uncivilised*”; while ominously claiming – using Vattel’s idea of a voluntary law – that the “modified natural law of nations” can, by contrast, “only be considered as the basic law of all civilised nations”.¹¹⁰ But this restriction is, it seems, not meant to exclude “uncivilized” nations from the advantages of a modified natural law as such. On the contrary, it appears to allow non-European states to build their own “regional” international law.¹¹¹

A remarkable post-1789 version of this “regional” relativism can be found in the work of Robert Ward, which stands in between the eighteenth and the nineteenth century. Ward accepts the “Law of Nature as forming a part of the foundation of the Law of Nations”;¹¹² yet in line with the early positivists, he also thinks that a special and positive part is required to make that abstract law more concrete and, like them, he also thinks that for this positive part to be binding, it needs a “binding principle” validating it. That binding principle is found in “religion, and the moral system engrafted upon it”.¹¹³ Yet importantly, there is not just one such moral system but

¹⁰⁷ K. G. Günther, *Europäisches Völkerrecht in Friedenszeiten – Erster Theil* (Richterschen Buchhandlung, 1787), 14.

¹⁰⁸ Ibid., 10: „Die Verbindlichkeit des freiwilligen Völkerrechts liegt in der natur der Gesellschaft, und hängt nicht weiter von dem Willen der Völker ab, sobald sie einmal freiwillig in die Gesellschaft getreten sind.“

¹⁰⁹ Ibid., 11.

¹¹⁰ D.H.L. von Ompteda, *Litteratur des gesammten sowohl natürlichen als positive Völkerrechts – Erster Teil* (supra n.83), 18.

¹¹¹ Ibid., where von Ompteda equally clarifies that “Europe” means not the geographical but the normative concept and it therefore includes those states that have – voluntarily – adopted a European culture, like the United States.

¹¹² R. Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe – Volume I* (Butterworth, 1795), xxxi.

¹¹³ Ibid., xxxv.

various moral systems. And while these regional systems may be divided into “savage” and “civilised”,¹¹⁴ each is ultimately deemed as equal, for what matters is that the “binding principle” is accepted by the people that it governs. Next to a “Christian” Law of Nations, there thus co- exists a “Mahometan” Law of Nations and so forth.¹¹⁵

Unlike Montesquieu’s “national” relativism,¹¹⁶ Ward here offered a first “regional” relativism – a conception of positive international law that divides the world into “classes” of nations.¹¹⁷ In his own words: “[I]n fine, that what is commonly called the Law of Nations; falls far short of universality; and that, therefore, the Law is not the Law of all nations, but only of particular classes of them; and thus there may be a different Law of Nations for different parts of the globe.”¹¹⁸

b. Founding “Positive” Law: Rousseau’s “Utopian” Federalism

A second “positivist” theme within eighteenth century discussions concerns European federalism. This strand also denies that there “naturally” exists a civil government above the State; yet, unlike the ordinary “positivists”, it urges States to positively “found” such a civil law through a federal compact between them. The most celebrated eighteenth-century project propagating such a federal compact is offered by Saint-Pierre.¹¹⁹ Published around the Treaty of Utrecht (1713), his “Perpetual Peace” originally advocated a universal federation between “all the Kingdoms of the World”;

¹¹⁴ Ibid., 101.

¹¹⁵ Ibid., 102: “Now according to the whole tenor of the foregoing arguments, we say it is fair to suppose that uncivilized, as well as civilized nations believe the religious notions which inspire them, to be the dictates of their nature; and although civilized reason should demonstrate, ever so much to its own satisfaction, that uncivilized minds are wrong in their ideas, yet unless the latter agree that they are wrong, nothing satisfactory can be determined.”

¹¹⁶ Ibid., 156.

¹¹⁷ Ward lists his “classes of nations” (ibid., 139): “Thus then, distinct Classes of Nations have distinguishing Sets of customs. The North American Indians have one; The Indians of the South Sea another; The Negroes a third; the Gentoos a fourth; The Tartar Nations a fifth; The Mahometans a sixth; The Christians a sevenths, and so on.”

¹¹⁸ Ibid., xiv.

¹¹⁹ C.-I. Castel de Saint-Pierre, *Projet Pour Rendre la paix Pépétuelle en Europe* (Utrecht, 1713). Saint-Pierre had published an early version in 1711, which he had subsequently extended into this three-volume treatise. In 1729, a shorter version was published as « Abrégé du Projet de Paix perpétuelle ». The three-volume project can be found online here: <https://gallica.bnf.fr/ark:/12148/bpt6k86492n>.

but fearing this to be too utopian, the project in the end settled on Europe in the hope that “most of the Sovereigns of Asia and Africa” would in the future “desire to be received into the Union”.¹²⁰

These ideas are subsequently taken up by Rousseau, whose formally modest aim it is to make the Abbé’s work more “readable”;¹²¹ yet the Rousseauian “restatement” has been said to have treated its predecessor with “utmost freedom”.¹²² The central difficulty nevertheless remains the same: how to reconcile the internal welfare within states with the existence of external warfare between them? Following Saint-Pierre’s original project, Rousseau also confines himself to Europe; and the central question for him therefore becomes: considering that “the Powers of Europe stand to each other strictly in a state of war, and that all the separate treaties between them are in the nature rather of a temporary truce than a real peace”, how can a “public Law of Europe” be guaranteed?¹²³ The answer Rousseau gives is this:

“If there is any way of reconciling these dangerous contradictions, it is to be found only in such a form of federal Government as shall unite nations by bonds similar to those which already unite their individual members, and place the one no less than the other under the authority of the Law. Even apart from this, such a form of Government seems to carry the day over all others; because it combines the advantages of the small and the large State, because it is powerful enough to hold its neighbours in awe, because it upholds the supremacy of the Law, because it is the only force capable of holding the subject, the ruler, the foreigner equally in check.”¹²⁴

Rousseau here resumes a way of thinking that had, a decade earlier, been popularised by Montesquieu;¹²⁵ yet the author of the “Social Contract” takes this idea – unlike what others have suggested – radically further.¹²⁶ For instead of simply advising small republics to combine into a federal union so as to counterbalance the external force of

¹²⁰ Saint-Pierre, *Projet pour rendre la paix perpétuelle en Europe: Volume I* (supra n. 119), xix-xx.

¹²¹ J.-J. Rousseau, *A Lasting Peace Through the Federation of Europe and the State of War* (Translator: C.E. Vaughan; Constable, 1917). The suggestion to turn the “unreadable” three volumes into a small and readable book had, originally come from Mably.

¹²² This was the opinion of C.E. Vaughan (ibid., 7): “Rousseau has treated his original with the utmost freedom.”

¹²³ Ibid., 47.

¹²⁴ Ibid., 38-39.

¹²⁵ On the influence of Montesquieu on Rousseau, see: C. E. Vaughan, *The Political Writings of Jean-Jacques Rousseau – Volume I* (Cambridge University Press, 1915), 71 et seq.

¹²⁶ For the opposite view, see: S. Hoffmann, *Rousseau on War and Peace*, (1963) 57 *American Political Science Review* 317 at esp. 327-8.

their (dangerous) monarchic neighbours,¹²⁷ the very idea of a supranational federation is proposed as a fundamental remedy to prevent all wars. And because such a federation does not “naturally” exist, it must be “positively” founded. An “authentic federation” is here defined as “a genuine Body politic” that has “a Legislative Body, with powers to pass laws and ordinances binding upon its members”, and executive power “capable of compelling every State to obey its common resolves”; and, finally, “it must be strong and firm enough to make it impossible for any member to withdraw at his own pleasure the moment he conceives his private interest to clash with that of the whole body”.¹²⁸ What is here proposed is therefore nothing short of a “Constitution of the Federation of Europe”, whose five articles of confederation are:

“By the first, the contracting sovereigns shall enter into a perpetual and irrevocable alliance, and shall appoint plenipotentiaries to hold, in a specified place, a permanent Diet or Congress, at which all questions at issue between the contracting parties shall be settled and terminated by way of arbitration or judicial pronouncement. By the second shall be specified the number of the sovereigns whose plenipotentiaries shall have a vote in the Diet; those who shall be invited to accede to the Treaty; the order, date and method by which the presidency shall pass, at equal intervals, from one to another; finally the quota of their respective contributions and the method of raising them for the defrayal of the common expenses. By the third, the Federation shall guarantee to each of its members the possession and government of all the dominions which he holds at the moment of the Treaty, as well as the manner of succession to them, elective or hereditary, as established by the fundamental laws of each Province. (...) By the fourth shall be specified the conditions under which any Confederate who may break this Treaty shall be put to the ban of Europe and proscribed as a public enemy (...) Finally, by the fifth Article, the plenipotentiaries of the Federation of Europe shall receive standing powers to frame – provisionally by a bare majority, definitively (after an interval of five years) by a majority of three-quarters – those measures which, on the instruction of their Courts, they shall consider expedient with a view to the greatest possible advantage of the Commonwealth of Europe and of its members, all and single.”¹²⁹

Rousseau’s constitutional scheme thus envisages “civil” laws within the European federation that are adopted by a (qualified) majority of “plenipotentiaries” acting on behalf of their States. These laws ought to be enforced by executive and judicial means; and to illustrate this point further, Rousseau concentrates on Article 3 of the European Constitution – a provision that could have inspired the “Concert of Europe” half a century later. Here, he states:

“As for the dependence of all upon the Tribunal of Europe, it is abundantly clear by the same Article that the rights of sovereignty, so far from being weakened, will, on the contrary, be strengthened and confirmed. For that Article guarantees to each

¹²⁷ C. de Montesquieu, *Spirit of the Laws* (supra n.84), 131-132.

¹²⁸ J.-J. Rousseau, *A Lasting Peace Through the Federation of Europe* (supra n.121). 59-60.

¹²⁹ Ibid., 61-64.

Sovereign not only that his dominions shall be protected against foreign invasion, but also that his authority shall be upheld against the rebellion of his subjects. The prince accordingly will be none the less absolute, and his crown will be more fully assured. By submitting to the decision of the Diet in all disputes with his equals, and by surrendering the perilous right of seizing other men's possessions, he is, in fact, doing nothing more than securing his real rights and renouncing those which are purely fictitious.”¹³⁰

Such a federal scheme has never been adopted in Europe. Why? For Rousseau, the reason is not that it is not good enough but rather that “it was too good to be adopted”.¹³¹ Due to the “excessive self-love” of kings,¹³² “[n]o Federation could ever be established except by revolution”;¹³³ and this pessimistic conclusion undermines, according to Rousseau, the very desirability of the federal project. For if the only way to establish a “peaceful” federal Europe is by a war-like revolution, it is questionable “whether the League of Europe is a thing more to be desired or feared”, as “[i]t would perhaps do more harm in a moment than it would guard against for ages”.¹³⁴ And yet: from a normative viewpoint, the creation of a European federation, and by extension: a world federation, forms an essential and integral – if lost – part of Rousseau’s philosophical project.¹³⁵ The centrality of a federal treaty for his entire political philosophy indeed cannot be exaggerated,¹³⁶ because only it can solve the dilemma of a Hobbesian world characterised by plurality of egoistic states. And this problem of

¹³⁰ Ibid., 80.

¹³¹ Ibid., 111.

¹³² Ibid., 94-95.

¹³³ Ibid., 112.

¹³⁴ Ibid., 112.

¹³⁵ The famous footnote in Book III – Chapter 15 of his “Social Contract”, Rousseau had promised a deeper analysis of foreign relations and the political philosophy of “confederation” in a later work – yet he never did. For a summary of his international law writings, see however: S. Hoffmann & D. P. Fidler, *Rousseau on International Relations* (Clarendon Press, 1991). Rousseau had apparently written a length fragment on international federations – apparently some sixteen chapters (C. E. Vaughan, *The Political Writings of Jean-Jacques Rousseau – Volume I* (supra n.125), 95) that were however lost during the French Revolution; and we therefore are “left with a single sentence of the *Contrat social* – that in which we are told that Federation would have been one of the subjects treated in the *Institutions politiques*” (ibid.). For the story of the lost manuscript, see M. Windenberger, *La République confédérative des Petits États* (Picard, 1899).

¹³⁶ On how central the idea and ideal of a federation was to Rousseau, see Vaughan (supra n.125, 100): “From all this it is manifest that the doctrine of Federation, so far from being a mere offshoot, springs from the very root of Rousseau’s political ideal; that the international Contract is necessary to complete the demands of that which gives birth to each nation taken singly[.]” This view has been contested by P. Riley, *Rousseau as a theorist of national and international federalism* (1973) 3 *Publius* 5; yet for an excellent rebuttal see: D. Cullen, *Jean-Jacques Rousseau and the Case against (and for) Federalism*, in: A. Ward & L. Ward, *The Ashgate Research Companion to Federalism* (Ashgate, 2009), 137.

the incomplete – civil – contract is already discussed in the (second) “Discourse on Inequality”:

“It is easy to see how the establishment of a single Society made the establishment of all others indispensable, and how, in order to stand up to united forces, it became necessary to unite in turn. Societies, multiplying and expanding rapidly, soon covered the entire face of the earth... Civil right having thus become the common rule among the Citizens, the Law of Nature no longer obtained except between different Societies where, under the name of Right of nations, it was tempered by a few tacit conventions in order to make commerce possible and to replace natural commiseration which, losing in the relations between one Society and another almost all the force it had in the relations between one man and another, lives on only in a few great Cosmopolitan Souls who cross the imaginary boundaries that separate Peoples and, following the example of the sovereign being that created them, embrace the whole of Mankind in their benevolence. The Bodies Politic thus remaining in the state of Nature among themselves soon experienced the inconveniences that had forced individuals to leave it, and this state became even more fatal among these great Bodies than it had previously been among the individuals who made them up. From it arose the National Wars, Battles, murders, reprisals that make Nature tremble and that shock reason, and all those horrible prejudices that rank among the virtues the honour of spilling human blood.”¹³⁷

The historical foundation of the first “civil society” among human beings was thus a mixed blessing. For it now leads other groups of men to form *rival* societies; and the creation of a plurality of civil societies will indeed not eradicate the state of nature – which continues to exist between states. The modern world order of civil societies is thus a “hybrid” order; and the pessimistic conclusion behind Rousseau’s international law writing is that this hybrid order is, in fact, a *worse* state of affairs than the original “state of nature”. Because through the creation of a plurality of states “more misery and loss of life than if men had preserved their original freedom”.¹³⁸ By establishing a “hybrid order” in which law and peace exist within a state but anarchy and war between states, mankind ironically “succeeded in putting [itself] in the worst position that it was

¹³⁷ J.-J. Rousseau, *The Discourses and other early political writings* (editor: V. Gourevitch; Cambridge University Press, 1997), 173-4.

¹³⁸ The relevant passage from Rousseau’s “Émile or on Education (Penguin, 1991), 446 states: “Having thus considered every kind of civil society in itself, we shall compare them, so as to note their relations one with another; great and small, strong and weak, attacking one another, insulting one another, destroying one another; and in this perpetual action and reaction causing more misery and loss of life than if men had preserved their original freedom. We shall inquire whether too much or too little has not been accomplished in the matter of social institutions; whether individuals who are subject to law and to men, while societies preserve the independence of nature, are not exposed to the ills of both conditions without the advantages of either, and whether it would not be better to have no civil society in the world rather than to have many such societies. Is it not that mixed condition which partakes of both and secures neither? *“Per quem neutrum licet, nec tanquam in bello paratum esse, nec tanquam in pace securum.”*—Seneca *De Tranq: Animi, cap. I*. Is it not this partial and imperfect association which gives rise to tyranny and war? And are not tyranny and war the worst scourges of humanity?”

possible to discover” – “worse than if such distinctions were unknown”.¹³⁹ This ultra-pessimist position interprets the creation of *separate* states as the original sin of all political organisation.

Can Rousseau’s theory of federalism solve this normative dilemma? The internal peace within a society and the external peace between different societies can, in his view, only be achieved by a second – supranational or international – social contract.¹⁴⁰ This federal contract can *positively* create a supranational civil society; but importantly, any supranational contract can only work if certain social conditions are in place. These social preconditions may already be found in Europe,¹⁴¹ yet the absence of a “general society of mankind” will prevent an extension of the federal contract to the world.¹⁴² All talk about a world society or even a world republic is considered “utopian” thinking that turns the historical evolution of mankind on its head.¹⁴³ The traditional perception that Rousseau categorically rejects a world federation must nevertheless be qualified.¹⁴⁴ For while the historical conditions for its practical implementation are not in place, it

¹³⁹ J.J. Rousseau, *A Lasting Peace through the Federation of Europe and the State of War* (supra n.121), 127-8.

¹⁴⁰ On this point, see: Windenberger, *La République confédérative des Petits États* (supra n.135), 237: « Au Contrat social s’ajoute le Contrat international; à l’organisation des hommes au sein des sociétés civiles se superpose le République confédérative des petits États. »

¹⁴¹ “Thus the Powers of Europe constitute a kind of whole, united by identity of religion, of moral standard, of international law; by letters, by commerce, and finally by a species of balance[.]” By contrast, “[t]he nations of other continents are too scattered for mutual intercourse; and they lack any other point of union such as Europe has enjoyed”. See Rousseau, *A Lasting Peace* (supra n.121), 40 and 44.

¹⁴² In Chapter 2 of the Geneva Manuscript of his “Social Contract” – mysteriously dropped from the final version, we thus have Rousseau tell us that the word “mankind” is only a “purely collective idea, which does not assume any real unity among the individuals who constitute it” because it is not a “moral person” endowed with a “sentiment of common existence” generated through language, mutual communication or commerce. See: J.J. Rousseau, *The Social Contract and Other Later Political Writings* (translator: V. Gourevitch; Cambridge University Press, 1997), 155.

¹⁴³ This is, in my view, the meaning of the following famous passage from Chapter 2 of the Geneva manuscript (ibid., 158): “We conceive of the general society in terms of our particular societies, the establishment of small Republics leads us to think of the larger one, and we do not properly begin to become men until after having been Citizens. Which shows what one should think about these supposed Cosmopolitans who, justifying their love of fatherland by their love of mankind, boast of loving everyone so that they might have the right to love no one.”

¹⁴⁴ In this sense: G. Cavallar, ‘La société générale du genre humain’: Rousseau on cosmopolitanism, international relations, and republican patriotism, in: P. Kitromilides (ed.), *From Republican Polity to National Community*, (2003) *Studies on Voltaire and the Eighteenth Century* (Voltaire Foundation, 2003), 89 at 97: “The favourable interpretation claims that Rousseau endorsed an evolutionary approach, and a bottom-up procedure. Civic patriotism is the first and indispensable step in the evolution of a genuine love of humanity. (...) A global general will might be created by continuous republican practice.” In this sense also, F. Cheneval, *Philosophie in weltbürgerlicher Bedeutung* (supra n.25), 382: “Erst auf der Stufe supranationaler Integration wäre also die Rechts- und Staatsphilosophie wirklich abgeschlossen[.]“

does represent the ideal solution to Rousseau's political paradox. His "positivist" semi-utopianism is thus – for the time being – confined to Europe.

Conclusion

The eighteenth century is a – fascinating – battleground of old and new ideas. It is the century in which the older "utopian" ideas of a world republic finally die, and the modern international law of sovereign states is fully born.¹⁴⁵ The normative foundations of this modern international law remain, however, unsettled throughout that century; and this first – preliminary – chapter has tried to identify three distinct approaches or "schools" to the question of the nature of international law.

The "theological" approach here constitutes the oldest school of thought. It explains the validity of international law by reference to the "authority" and "goodness" of God. All law, whether natural or positive, ultimately derives its legal character and moral goodness from a divine commander that stands at the apex of the natural order of things. This theocratic conception of the law of nature is complemented by a secular conception that attempts to better justify legal change and the rise of positive law within the eighteenth century. This "metaphysical" school accepts the validity of positive law but, in order to explain how the latter can "authorize" modifications of the natural law, it is forced to root the "voluntary" law of nations in a fictitious "world republic" that can adopt legislative "civil" laws. The third school, finally, marginalises natural law thinking altogether and prioritises the "consensual" positive law created by States. All positive international law here derives its "normativity" from the consent

¹⁴⁵ The modern phrase « Westphalian state order », so often found in international relations and (American) legal scholarship is thus deeply misleading. No-one has better said it than P. Haggenmacher, *Le Modèle de Vattel et la Discipline Du Droit International* (supra n.62), 48: "Il ne s'agit nullement de nier l'immense importance politique de la paix de Westphalie qui (avec celle des Pyrénées) marque une césure dans l'histoire européenne en faisant échec aux visées hégémonique de la maison d'Autriche et en instaurant une manière de stabilité confessionnelle. Au demeurant l'objet du congés de paix n'était pas de créer de toutes pièces un nouvel ordre juridique internationale ; tout au plus rééquilibrait-on la constitution du Saint-Empire, de manière à affaiblir la position de l'empereur ... S'il est vrai qu'avec eux s'ouvrit une nouvelle époque du système des Etats européens qui vit éclore les droit international comme discipline juridique propre, ce n'est pas pout autant à ces traités qu'on le doit. A vrai dire, ceux-ci forment bien le point de départ de ce qu'on appellera au temps de Vattel, à la suite de l'abbé de Mably, 'le droit public de l'Europe fondé sue les traites' ; mais ceci est toute autre chose que le prétendu 'Westphalian Order'... Allant plus loin, il est même permis de se demander si l'on n'a pas indument projeté le modèle de Vattel un siècle en arrière."

of the States; and, while a lingering connection with natural law theories is retained, natural law is ultimately reduced to positing the basic “postulates” of practical reason (such as the binding nature of international treaties).

All three of these eighteenth-century views resurface, as the next chapter will show, in the work of Immanuel Kant. Kant originally believes, with Wolff, in the *idea* of a world state as the ultimate normative fountain of all international law; yet, in light of the empirical and normative plurality of States, Kant comes to replace the (unrealizable) ideal of a world republic with the (realizable) idea of a voluntary federation of States. This federation is not “naturally” given but must – following Rousseau – be “positively” founded. However, because States are “sovereign”, any federal union is confined to the “negative” task of maintaining peace between States and it ought not “positively” interfere into the “internal” sphere reserved to “state” law. The free federation of States would thus not have a “government”; the collectivity of States is only tasked to govern “as if” subject to a civil constitution.

But let us tread slowly. For whereas Kant rescues the metaphysical position into the nineteenth century, there are many eighteenth-century “certainties” that will be lost. First, all classic scholars, discussed above, had remained, at least to some extent, attached to some “natural law” thinking.¹⁴⁶ This “naturalist” conception was – secondly – a universal conception. (For even if a “positive” international law was confined to a particular society of states, there existed a universal natural law that applied to all peoples and cultures.) Non-European states did, in theory, enjoy the same normative status as European states under natural law; and the enlightenment spirit thus rejected a colonial project that would have justified the subjection of non-European societies on the ground that a higher civilisation could bring benefits to a lower civilisation. Finally, the eighteenth century still entertained a broad “*ius gentium*” conception of international law that included states as well as individuals. This could be seen in the normative affirmation of “crimes” against humanity, but there also existed an unarticulated theory of what would, a century later, be called “private international law”.

¹⁴⁶ For the controversy whether Rousseau is a “pure” positivist or not, see: R. Wokler, “Natural Law and the Meaning of Rousseau’s Political Thought: A correction to two Misrenderings of his Doctrine”, in G. Barber and C.P. Courtney, *Enlightenment Essays in Memory of Robert Shackleton* (Voltaire Foundation, 1988), 319. For the classic argument placing Rousseau into the natural law tradition, see: R. Derathé, *Jean-Jacques Rousseau et la Science Politique de son Temps* (Librairie Philosophique Vrin, 1992).

The “German” Nineteenth Century I

Three Idealistic Conceptions

Introduction

With the French Revolution, the eighteenth century comes to an early end; and with it, the long nineteenth century stormily begins. Inside the German Enlightenment circles, the Revolution is, at first, greeted with enthusiasm and hope. The ancient feudal world seemed to have come to an end, and a new rational one appeared to have emerged. Among the intellectual supporters of the Revolution we find Immanuel Kant, whose rationalist project – centred on human freedom – naturally aligned itself to the revolutionary principles (even if Kant categorically rejected the “right” to revolt). But a “reactionary” response soon objected to the French rationalist challenge; and the traditional sources of “authority” and “legitimacy” were actively “revived”.¹ This revival of tradition would find its most profound legal expression in the so-called Historical School.² Viewing law as the organic expression of a natural order, the Historical School stood – just like Burke in England – diametrically opposed to the idea of radical reform based on rational principles. Finally, and in between the two extremes of rational “revolution” and social “tradition” lay the legal philosophy of Georg Wilhelm Friedrich Hegel.³

What did the French Revolution mean for international law? Would the “classic” “natural law” conception survive into the nineteenth century; and if not, what would take its place? This chapter explores three post-revolutionary “German” philosophical reactions, and especially their understanding of the nature of international law. For Kant, the origin of all law remains (universal) human reason; and, as Section 1 aims to show, he thus continues to construct his conception of international (and cosmopolitan) law on the basis of an a priori rationalist system. For Hegel, on the other hand, all law ultimately derives from the state as the highest “natural” order; and with the state “absolutized”, Hegel’s philosophy has often been decried as lacking any conception of international law. Section 2 hopes to show that this picture is too broad-brushed, yet it will also confirm Hegel as the principal representative of the “un-sorry” deniers of an “objective” international law. Section 3 finally explores the philosophical

¹ F. B. Artz, *Reaction and Revolution: 1814-1832* (Harper, 1963), Chapter 3.

² In Britain, this conservative “reaction” will be led by Edmund Burke; in France, it will come to be influenced by Joseph de Maistre.

³ M. Riedel, *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* (Cambridge University Press, 1984), esp. Chapter 7.

premises of the Historical School. Steeped in German idealism, it considers each national “spirit” as the ultimate source of law; and yet its moral and ethical understanding of the nation can – surprisingly – also develop a conception of international law based on a “society” of nations.

Each of the three post-revolutionary conceptions will come to a different conclusion as to the nature and scope of international law; yet all three remain, as will be shown below, firmly rooted in a metaphysical project. For Kant, the central metaphysical “object” thus remains the rational individual; whereas for Hegel and the Historical School, a new metaphysical object is embraced: the nation-state. In a process that had, within Germany, accelerated with Herder,⁴ the nineteenth-century will indeed come to identify the nation-state as the “natural” unit of political and philosophical life. Like any natural organism, the nation is thereby seen as evolving with time; and once this evolutionary perspective is applied, a philosophy of history emerges in which human progress will be chartered in “a chain of cultivation” in which one (or few) nations come to represent the “spirit of the age”.⁵ This evolutionary viewpoint is rooted in a “romantic” or “idealist” programme; and, indeed, all three philosophical approaches discussed in this chapter ultimately form part of German idealism that permeates the entire nineteenth century.

1. Kant and the “Unsettled” Foundations of International Law

What is Kant’s philosophical position towards the nature and foundation of international law? In the early post-critical period, Kant lays out three themes that are characteristic to his legal writings. First, he expressly links – following Rousseau – the establishment of a “national” constitution “to the problem of a law-governed external relationship with other states”; indeed: the former is “subordinate” to the latter “and cannot be solved unless the latter is also solved”.⁶ Second, and again with Rousseau,

⁴ J.G. Herder, *Outlines of a Philosophy of The History of Man* (translator: T. Churchill; Johnson, 1800), 249.

⁵ Ibid., 450: “The human Race is defined to proceed through various Degrees of Civilization[.]”; and see also ibid., 453: “Thus through all the polished nations, that we have hitherto considered, or shall thereafter consider, a *chain of cultivation* may be drawn, flying off in extremely divergent curves.”

⁶ I. Kant, *Political Writings* (editor: H. Reiss; Cambridge University Press, 1991), 47.

the solution suggested is “a federation of peoples”;⁷ and since that federation is not embedded in natural law, it must – thirdly – be positively “founded”.⁸ But what sort of federation Kant envisages changes over time. There are different and contradictory answers that the Königsberg philosopher gives. One answer applies, by analogy, the solution found for civil society to international society and argues in favour of a “cosmopolitan constitution” establishing a “civil” federation above the individual states (a). But later on, this positive idea is replaced with a “negative” substitute: an international federation of free states without the power to coerce (b).

a. The “Cosmopolitan Constitution” and the World Republic

For Kant, international peace can only be established in a “federation of peoples”. In *“Idea of a Universal History with a Cosmopolitan Purpose”* (1784), this is a federation “in which every state, even the smallest, could expect to derive security and rights not from its own power or its own legal judgment, but solely from this great federation”.⁹ The latter is “a united power”, whose united will adopts world laws.¹⁰ Expressly referring to the plans by Saint-Pierre and Rousseau, this world state solution is justified by the suffering States can inflict on each other. It is this suffering that “must force the states to make *exactly* the same decision (however difficult it may be for them) as that which man was forced to make, equally unwilling, in his savage state – the decision to renounce his brutish freedom and seek calm and security within a law-governed

⁷ Kant here clearly follows Saint-Pierre and Rousseau, see: G. Cavalier, *Pax Kantiana: Systematisch-historische Untersuchung des Entwurfs “Zum Ewigen Frieden”* (1795) von Immanuel Kant (Böhlau, 1992), 33.

⁸ Like Hobbes, and unlike Wolff, the natural state is thus one of war, and peace therefore needs to be “positively” founded. However, it is in my view, wrong to argue that Kant’s international law philosophy is “an extremely Hobbesian account of the international state of nature” (R. Tuck, *The Rights of War and Peace* (Oxford University Press, 2001), 215). This seriously underestimates the intellectual debts to Wolff, Vattel and Rousseau, while it also downplays the originality of Kant’s own solution in founding the normativity of international law. For the relationship between Kant and Rousseau in the context of international law, see in particular: O. Asbach, *Internationaler Naturzustand und Ewiger Friede: Die Begründung einer rechtlichen Ordnung zwischen Staaten bei Rousseau und Kant*, in: D. Hüning & B. Tuschling (eds.), *Recht, Staat und Völkerrecht bei Immanuel Kant* (Dunscker & Humbot, 1998), 203.

⁹ I. Kant, *Idea for a Universal History with a Cosmopolitan Purpose*, in: Kant, *Political Writings* (supra n.6), 41 at 47.

¹⁰ Ibid.

constitution”.¹¹ This cosmopolitan system is “like a civil commonwealth” with a “civil constitution”, because “nature aimed at a perfect civil union of mankind”.¹²

Kant’s simple solution to creating “international” law and peace thus lies in projecting a “civic” solution into the international arena of States. States must exit the (international) state of nature and found a “cosmopolitan system” in which a “united power” legislates, executes and arbitrates over the individual “citizens”. This *civitas maxima* solution is subsequently taken up and (minimally) developed in “Theory and Practice” (1793):

“On the one hand, universal violence and the distress it produces must eventually make a people decide to submit to coercion which reason itself prescribes (i.e. the coercion of public law), and to enter into a *civil* constitution. And on the other hand, the distress produced by the constant wars in which the states try to subjugate or engulf each other must finally lead them, even against their will, to enter into a *cosmopolitan* constitution. Or if such a state of universal peace is in turn even more dangerous to freedom, for it may lead to the most fearful despotism (as has indeed occurred more than once with states which have grown to large), distress must force men to form a state which is not a *cosmopolitan* commonwealth under a single ruler, but a lawful federation under a commonly accepted international right [law].”¹³

The passage contains a number of key confirmations. First, Kant advocates the adoption of a “civil constitution” that is a “cosmopolitan constitution”. Second, this cosmopolitan constitution will involve “the coercion of public law”. Third, because the establishment of a world state is potentially dangerous for freedom if it is a state under a single ruler (universal monarchy), Kant prefers a “federation” that is: a republican commonwealth. The latter is not the “loose” federation of his late work, but “a state of international right, based upon enforceable public laws to which each state must submit (by analogy) with a state of civil or political right among individual men”.¹⁴ And to reinforce his plea for public laws, Kant not only ridicules the idea of the invisible hand in discourses on the international balance of powers,¹⁵ he also holds – against Rousseau – that the theory of a federal world state is (still) possible in practice:

¹¹ Ibid., 48 (emphasis added).

¹² Ibid., 48-51.

¹³ I. Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice’”, in: Kant, *Political Writings* (supra n.6), 61 at 90.

¹⁴ Ibid., 92.

¹⁵ Ibid: “For a permanent universal peace by means of a so-called *European balance of power* is a pure illusion, like Swift’s story of the house which the builder had constructed in such perfect harmony with all the laws of equilibrium that it collapsed as soon as a sparrow alighted on it.”

“For my own part, I put my trust in the theory of what the relationships between men and states *ought to be* according to the principle of right. It recommends to us earthly gods that maxim that we should proceed in our disputes in such a way that a universal federal state may be inaugurated, so that we should therefore assume that it *is possible (in praxi)*.”¹⁶

In conclusion: Kant’s first solution combines the idea of a world state – presumed by Wolff to be naturally existing – with the Rousseauian idea that such a state needs to be positively founded; and this founded cosmopolitan state would have to be a “federation” – presumably along the lines that Rousseau had drafted, that is: a federation that acknowledges the continued political existence of individual states as moral persons; yet one that can enforce its laws through the right to be prosecuted through a “punitive” war.

b. The Abandonment of the World Republic: Following Vattel?

Only two years after “Theory and Practice”, Kant publishes his longest essay on the foundations of international law: “Perpetual Peace: A Philosophical Sketch” (1795).¹⁷ Written in the style of a peace *treaty* between States, the very form of the essay already signals a fundamental shift in his conception of the normative foundation of international law. No longer is international law founded on a cosmopolitan constitution, it now needs to be founded on the voluntary agreement between free states.

Kant’s famous peace treaty has four components: the preliminary articles, the definite articles, the supplements, and the appendices. The preliminary articles are designed to establish the pre-conditions for peace.¹⁸ (They are “prohibitive laws”; yet, not all of

¹⁶ Ibid., 92.

¹⁷ I. Kant, “Perpetual Peace: A Philosophical Sketch”, in: *Political Writings* (supra n.6), 93. The essay is generally seen to be a personal response to the Peace Treaty of Basel (1795), concluded by Prussia and revolutionary France. The title is taken from Saint-Pierre; and the famous implicit “pun” is liberally taken from Leibniz, who had already written, commenting on Saint-Pierre, that “I am reminded of a device in a cemetery, with the words: *Pax perpetua*; for the dead do not fight any longer” (see: Leibniz, *Political Writings* (editor: P. Riley, Cambridge University Press, 1988), 183).

¹⁸ What do they state? The first article clarifies that a temporary peace to prepare for war is not valid (“No conclusion of peace shall be considered valid as such if it was made with a secret reservation of the material for a future war.”). The second article states that a State cannot acquire another one (“No

them are said to be prohibitive in a strict sense.¹⁹⁾ By contrast, the “definitive articles” positively “institute[]” peace and end “the state of nature, which is rather a state of war”.²⁰ In discussing these three articles, Kant returns to his central theme: all law is connected and forms part of a single – monistic – normative world order; but within this monistic order, there exist three constitutional levels:

“[T]he postulate on which all the following articles are based is that all men who can at all influence one another must adhere to some kind of civil constitution. But any legal constitution, as far as the persons who live under it are concerned, will conform to one of the three following types:

- (1) [A] constitution based on the *civil right* of individuals within a nation (*ius civitatis*).
- (2) [A] constitution based on the *international right* of states in their relationships with one another (*ius gentium*).
- (3) [A] constitution based on *cosmopolitan right*, in so far as individuals and states, co-existing in an external relationship of mutual influences, may be regarded as citizens of a universal state of mankind (*ius cosmopoliticum*).²¹

All public (positive) law must be based on these three “constitutions”;²² and the constitutional categories are here “not arbitrary, but necessary”: each of them on its

independently existing state, whether it be large or small, may be acquired by another state by inheritance, exchange, purchase of gift.”), because States are moral persons. The third article stipulates that standing armies are to be gradually abolished, while the fourth article criticises the credit system for financing wars (“No national debt shall be contracted in connection with the external affairs of the state.”). The fifth article prohibits violent interferences into the internal affairs of other states (“No state shall forcibly interfere in the constitution and government of another state.”), and the sixth preliminary article finally outlaws “dishonourable stratagems” (poisoning and treason) that would undermine the trust of the enemy that a future peace might be possible.

¹⁹ This is, for example, the case for the second preliminary article. This is a prohibition to treat States as “objects” capable of possession; and yet, in light of existing state practice, this prohibition is not directly effective. Kant explains: “prohibitive” laws in a wider sense “are not exceptions to the rule of justice”, but “allow for some *subjective* latitude according to the circumstances in which they are applied”. Put differently: they “need not necessarily be executed at once, so long as their ultimate purpose (e.g. the *restoration* of freedom to certain states in accordance with the second article) is not lost sight of”. Delay in applying this prohibition is permitted “as a means of avoiding a premature implementation which might frustrate the whole purpose of the article” (I. Kant, *Perpetual Peace: A Philosophical Sketch*, 97). Kant here introduces the idea of the “permissive law”.

²⁰ Ibid., 98.

²¹ Ibid., 98 - *footnote.

²² On the concept of “constitution” here, see: O. Eberl & P. Niesen, *Immanuel Kant: Zum Ewigen Frieden* (Surkamp, 2011), 208-209: „Wenn Kant sich am Ende des 18. Jahrhunderts in Friedensschrift und Rechtlehre für den Ausdruck ‚Verfassung‘ entscheidet, um den Rechtszustand nicht nur diesseits, sondern auch jenseits der Staaten zu bezeichnen, greift er ein in jüngster Zeit mehrdeutig gewordenen Konzept auf. Im hergebrachten und unspezifischen Sinne bezeichnet ‚Verfassung‘ einfach den Gesamtzustand des Gemeinwesens; im neuen, mit der Amerikanischen und der Französischen Revolution eingeführten terminologischen Sinn ist eine Verfassung dagegen ein positives Gesetz, das die Rechtsbindung aller Machthabenden Institutionen festlegt. Während das alte Verständnis ein empirisches ist, ist das neue ein normatives. (...) Sein Verfassungsbegriff für die globale Ordnung ist rechtlich-normativ, aber nicht demokratisch.“

own must be realised in order to create peace.²³ The three “complementary constitutions” are indeed mutually interlocking; and each of the three definitive articles consequently deals with one constitution:

Definite Article 1: “The Civil Constitution of Every State shall be Republican.”

Definite Article 2: “The Right of Nations shall be based on a Federation of Free States.”

Definite Article 3: “Cosmopolitan right shall be limited to Conditions of Universal Hospitality.”

Unlike the preliminary articles (which are prohibitive laws), the definite articles represent prescriptive laws. The first article thereby demands a link between the national and the international constitutions. For the requirement that state constitutions are “republican” means, *inter alia*,²⁴ that the consent of the citizens is required to declare war; and this is seen to guarantee that States will only go to war when absolutely necessary.²⁵ The second article explains the need for an international constitution as follows:

“Each nation, for the sake of its own security, can and ought to demand of the others that they should enter along with it into a constitution, similar to the civil one, without which the rights of each could be secured. This would mean establishing a *federation of peoples*. But a federation of this sort would not be the same thing as an international state. For the idea of an international state is contradictory[.] (...) But peace can neither be inaugurated nor secured without a general agreement between the nations; thus a particular kind of league, which we might call a *pacific federation (foedus pacificum)*, is required. (...) This federation does not aim to acquire any power like that of a state, but merely to preserve and secure the *freedom* of each state in itself, along with that of the other confederated. Although this does not mean that they need to submit to public laws and to a coercive power which enforces them, as do men in a state of nature.”²⁶

²³ Kant, *Perpetual Peace* (supra n.17), 99: “This classification, with respect to the idea of a perpetual peace, is not arbitrary, but necessary.” See also: I. Kant, *Metaphysical First Principles of the Doctrine of Right* (“Doctrine of Right”), in: Kant, *The Metaphysics of Morals* (edited: M. Gregor) (Cambridge University Press, 1996), §43: “So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undetermined and must finally collapse.” It is therefore misleading to state that “Kant argues that a peaceful global order can be created only by a cosmopolitan law [Weltbürgerrecht] that enshrines the rights of world citizens and replaces classical law among nations [Völkerrecht]” (J. Bohmann & M. Lutz-Bachmann, Introduction, in: *Perpetual Peace: Essays on Kant’s Cosmopolitan Ideal* (MIT Press, 1997), 1 at 2-3.

²⁴ On the very complex concept of “republicanism”, see: G. Cavalier, *Pax Kantiana* (supra n.7), 142-156.

²⁵ This idea goes back to Montesquieu, who has already argued in “The Spirit of the Laws” (editor: A. Cohler and others; Cambridge University Press, 1989) 143: “It is also against the nature of the thing for a democratic republic to conquer towns that could not enter the sphere of the democracy. (...) If a democracy conquers a people in order to govern it as a subject, it will expose its own liberty, because it will entrust too much power to the magistrates whom it sends out to the conquered state.”

²⁶ I. Kant, *Perpetual Peace* (supra n.17), 102 and 104.

The passage appears to significantly depart from Kant's earlier *civitas maxima* position in three important ways. First, he now denounces the very idea of an "international state" as a contradiction in terms. *Inter-national* law conceptually means a law *between* nations; and if there were only one international state, there would simply be no need for the second definite article. This leads to a second point. The federation of states cannot have a civil constitution that allows for laws that can be enforced by a superior authority;²⁷ and there therefore cannot be any "punitive war".²⁸ Finally: the constitution must be based on the voluntary accession of States.²⁹

The third definitive article finally deals with the cosmopolitan constitution. Substantially, it cannot – by subtraction – deal with relations within one state (Article 1), nor with relations between states (Article 2). Cosmopolitan law deals with the relationship between States and non-States. It is defined as "the right of a stranger not to be treated with hostility when he arrives on someone else's territory".³⁰ This right to hospitality is not the "*right of a guest* to be entertained" (asylum), but only the right to present oneself so as to enter into contact.³¹ Importantly, this third article contains a prescriptive and a prohibitive element.³² For while the prescriptive "shall" indicates that there be a cosmopolitan right whose normative foundation appears to lie in the idea of a *civitas maxima*,³³ that right is nevertheless limited to universal hospitality; and

²⁷ This is further spelled out in the "Doctrine of Right" (supra n.23), §54: "This alliance must, however, involve no sovereign authority (as in a civil constitution), but only an *association* (federation); it must be an alliance that can be renounced at any time and so must be renewed from time to time."

²⁸ Kant, Perpetual Peace (supra n.17), 96: "A war of punishment (*bellum punitivum*) between states is inconceivable, since there can be no relationship of superior to inferior among them."

²⁹ States should gradually crystallise around a federal "focal point" – but no forceful or permanent adhesion is allowed (ibid., 104): "For if by good fortune one powerful and enlightened nation can form a republic (which is by its nature inclined to seek perpetual peace), this will provide a focal point for federal association among the states. These will join up with the first one, thus securing the freedom of each state in accordance with the idea of international right, and the whole will gradually spread further and further by a series of alliances of this kind."

³⁰ Ibid., 105.

³¹ This right of physical *contact* is often identified with a right of economic *contract*. For an extensive discussion of Kant and international trade, see: P. Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (Cambridge University Press, 2012), Chapter 5.

³² This excellent point is made by O. Eberl & P. Niesen, *Immanuel Kant: Zum Ewigen Frieden* (supra n.22), 248.

³³ G. Cavallar, *Kant and the Theory and Practice of International Right* (University of Wales Press, 1999), 59; and see also: K. Flikschuh, *Kant and Modern Political Philosophy* (Cambridge University Press, 2000), Chapter 5: "The general united will and cosmopolitan Right".

by means of this restriction, Kant has been held to indirectly prohibit all forms of imperialism and colonialism between States and non-state “peoples”.³⁴

c. *Rousseauian Troubles: The “Antinomies” of International Right*

There is a central antinomy at the heart of Kant’s conception of international law, which he describes in *Perpetual Peace* as follows:

“There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and this from an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth. But since this is not the will of the nations, according to their present conception of international right (so that they reject in *hypothesis* what is true in *thesis*), the positive idea of a world republic cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding federation likely to prevent war.”³⁵

And in the Doctrine of Right, we read:

“Since a state of nature among nations, like a state of nature among individual human beings, is a condition that one ought to leave in order to enter a lawful condition, before this happens any rights of nations, and anything external that is mine or yours which states can acquire or retain by war, are merely *provisional*. Only in a universal *association of states* (analogous to that by which a people becomes a state) can rights come to hold *conclusively* and a true *condition of peace* come about. But such a state made up of nations were to extend too far over vast regions, governing it and so too protecting each of its members would finally have to become impossible, while several such corporations would again bring a state of war. So *perpetual peace*, the ultimate goal of the whole right of nations, is indeed an unachievable idea. Still, the political principles directed toward perpetual peace, of entering into such alliances of states, which serve for continual approximation to it, are not unachievable.” (...) Such an *association* of several *states* to preserve peace can be called a permanent congress of states, which each neighbouring state is at liberty to join.³⁶

What arguments did Kant employ to explain this antinomy between reason and reality, between theory and practice? Two aspects must here be distinguished. First, Kant employs a series of “empirical” arguments to explain why nature obstructs the creation

³⁴ G. Cavallar, *Pax Kantiana* (supra n.7), 227. On Kant and colonialism, see K. Flikschuh & L. Ypi (eds.), *Kant and Colonialism: Historical and Critical Perspectives* (Oxford University Press, 2014).

³⁵ Kant, *Perpetual Peace* (supra n.17), 105.

³⁶ Kant, *Doctrine of Right* (supra n.23), §61.

of an international state (aa); and, secondly, there exist a number of “conceptual” or normative reasons why Kant thinks there cannot be an international state (bb).

aa. Empirical Obstacles to a Universal State

For Kant, the *idea* of international law springs from the *empirical* existence of a plurality of States. For there simply would be no need for such a concept if all human beings had, from the beginnings of history, united into *one* general will under *one* constitution creating *one* State.³⁷ But this has not happened. There exists a multitude of peoples having constituted a multitude of States; and it is this *empirical* fact that gives rise to the law of nations, or better: the law *between* States (*Staatenrecht*).

But does nature not wish there to be only one state in the end? While “Theory and Practice” postulated that nature unconditionally wants an international state governed by a civil constitution, the Kantian position has changed after 1795. Kant henceforth identifies the idea of an international state with a “universal monarchy”, whose “soulless despotism” would “finally lapse into anarchy” because “laws progressively lose their impact as the government increases in range”.³⁸ Geography is here presented as an argument against the creation of (effective) law. But more importantly: nature itself has “wisely separate[d] the nations” and uses “two means to separate the nations and prevent them from intermingling – *linguistic* and *religious* differences”.³⁹ And since the social preconditions for a universal state are not fulfilled, “unlike that universal despotism which saps all man’s energies and ends in the graveyard of freedom, [perpetual] peace is created and guaranteed by an equilibrium of forces and a most

³⁷ If the physically possible (!) interaction between all human beings on the spherical earth is the reason for the assumption of an original community, why is the physically actual (!) interaction limited to States? The – perhaps – best explanation of this paradox comes from B. Ludwig, *Kants Rechtslehre* (Felix Meiner, Verlag, 2005), 131-2: “Der *empirische* (mithin zufällige) Sachverhalt, daß der Erwerbende nicht zugleich mit *allen* Erdbewohnern „in ein Praktisches Verhältnis kommt“, sondern zunächst nur mit denen, die sich mit ihm aktuell auf *dieselben* äußeren Sachen beziehen, führt dazu, daß, obgleich die *Idee* des allgemeinen Willens selbstverständlich alle praktischen Vernunftwesen einzubeziehen hat, der unmittelbar bewirkte Zustand der vereinigen Willkür nur einen Teil derselben umfaßt. Das – erst im öffentlichen Recht Thema werdende – Phänomen [!] des *Einzelstaates* hat folglich seinen systematischen Ursprung in den empirischen Bedingungen der Erwerbung äußerer Sachen, speziell des Bodens.“

³⁸ Kant, Perpetual Peace (supra n.17), 113.

³⁹ Ibid., 113-4.

vigorous rivalry”.⁴⁰ This rivalry is kept in check by nature, because “nature also unites nations” under the concept of cosmopolitan right “by means of their mutual self-interest” through “the spirit of commerce”.⁴¹ In essence: the diversity within mankind demands only a degree of unity, and that unity-in-diversity is seen in a federation of states. Nature herself would see to this – mixed – result.⁴²

bb. Normative Obstacles playing against an International State

Why would Kant nevertheless not normatively advocate the idea of a (international) State? In *Perpetual Peace*, Kant gives two reasons. Analytically, he considers the very idea of an “international state” as contradictory: “a number of nations forming one state would constitute a single nation”; “[a]nd this contradicts our initial assumption, as we are here considering the right of nations in relation to one another in so far as they are a group of separate states”.⁴³ The force behind this argument has often been misjudged.⁴⁴ For Kant’s “pure” theory of law, considers the idea of a people or “nation” in exclusively “positivist” terms: a State and its nation always coincide because a State “constitutes” the nation (and not the other way around).⁴⁵ It analytically follows that there cannot be an “inter-national” state but only a cosmopolitan state.

But why does Kant not allow for such a *cosmopolitan* state – a state in which all humanity is united into one nation? Why does he reject “the positive idea of a *world republic*” in favour of “the negative substitute in the shape of an enduring and gradually expanding

⁴⁰ Ibid., 114.

⁴¹ Ibid.

⁴² This is the essence of the “First Supplement: On the Guarantee of a Perpetual Peace”, where Kant famously writes (ibid., 108): “Perpetual peace is *guaranteed* by no less an authority than the great artist Nature herself (*natura daedala rerum*).”

⁴³ Ibid., 102.

⁴⁴ For an extensive discussion of this point, see: P. Kleingeld, *Kant and Cosmopolitanism: The Philosophical Ideal of World Citizenship* (supra n.31), 59 et seq.

⁴⁵ According to this (Hobbesian) view, a multitude constitutes itself as a “people” or “nation” through the very act of creating a civil body, that is: a state. The notion of “Staatsvolk” is here a pleonasm because “Staat” and “Volk” always coincide. This contrasts with the “organic” (or in Kant’s terminology: anthropological) view that considers the “people” as an ethnic or cultural entity that pre-exists the State.

federation”? Kant admits that states are under an obligation to leave the state of nature, which is “a non-rightful condition” that is “in itself still wrong in the highest degree”;⁴⁶ yet he accepts that the weight of that obligation on states is not the same as that imposed on individuals:

“[W]hile natural right allows us to say of men living in a lawless condition that they ought to abandon it, the right of nations does not allow us to say the same of states. For as states, they already have a lawful internal constitution, and have thus outgrown the coercive right of others to subject them to a wider legal constitution in accordance with their conception of right.”⁴⁷

And again:

“[The] difference between the state of nature of individual men and of families (in relation to one another) and that of nations is that in the right of nations we have to take into consideration not only the relation of one state towards another as a whole, but also the relations of individual persons of one state towards the individuals of another, as well as toward another state as a whole. But this difference from the rights of individuals in a state of nature makes it necessary to consider only such features as can be readily inferred from the concept of a state of nature.”⁴⁸

Unlike the extreme normative pluralism that exists when each private person judges right and wrong in the state of nature, once civil societies have been formed normative progress through “unification” has been made. In order to protect the degree of “public” order already reached, Kant thus considers that there exists a difference between the state of nature between individuals and the state of nature between states:

“The refusal by one State to enter into a civil condition with a particular State in its neighbourhood is not the same as refusing a civil condition between States as such. When, within the state of nature, a random number of persons decide to form a state, they create something ontologically different, namely an internally rightful constituted group of persons – which, as such, simply did not exist beforehand. By contrast, whenever a random number of previously distinct States join a Union of States that is itself similar to a State, nothing ontologically new has been created when compared to what had existed before. For there still exists a plurality of dis-united States – with the only difference that one State has changed its size and internal structure.”⁴⁹

In order to protect the “internal” peace – and normative unification within a State – Kant thus not only prohibits all revolutions from within, he also prohibits any other

⁴⁶ Kant, *Doctrine of Right* (supra n.23), §54.

⁴⁷ Kant, *Perpetual Peace* (supra n.17), 104.

⁴⁸ Kant, *Doctrine of Right* (supra n.23), §53.

⁴⁹ J. Ebbinghaus, *Kants Lehre vom Ewigen Frieden und die Kriegsschuldfrage*, in: “*Gesammelte Aufsätze, Vorträge und Reden* (Olms, 1968), 24 at 35 (my translation).

State from interfering into the internal affairs from without.⁵⁰ But more than that: while states are under an obligation, like individuals, to leave the State of nature; the means to achieve that end are radically different. Whereas individuals are entitled to use force to positively “found” a civil constitution, States are not allowed to establish an international constitution by means of war.⁵¹ (For a war against war is still war – and can never be “just war”;⁵² and even within the state of nature, wars of extermination or subjugation, that is wars that forcefully merge one State with another are prohibited.) Kant’s legal philosophy thus accepts States as distinct normative phenomena, and consequently rejects the violent creation of a World State.⁵³ Integration between States must be integration through law, not integration through war.

What means of leaving the state of nature among states is, then, suggested? The *exeundum* obligation expresses itself in the idea of a “social contract” that creates a league of nations. Its single aim is the protection of peace under the territorial status quo.⁵⁴ The creation of a “league” thus means no transfer of sovereign authority (as in

⁵⁰ The fifth “preliminary article” states: “No state shall forcibly interfere in the constitution and government of another state.”

⁵¹ Because international law is defined as a relation *between* States, that is: a relation between moral *persons* that are themselves no physical objects, it is clear that “the idea of the right of nations involves only the concept of an antagonism in accordance with principles of outer freedom by which each can preserve that belongs to it, but not a way of acquiring” (§57). And since States cannot “acquire” other States or their territory as “property”, the normative demand for States to enter into a cosmopolitan state is here much lower. For the same conclusion, A. Ripstein, *Force and Freedom* (Harvard University Press, 2009), 228: “[A]s Kant understands states, they do not have external objects of choice. The state does not acquire its territory; its territory is just the spatial manifestation of the state. That is why Kant joins other eighteenth-century writers in supposing that the state’s territory is more like its body than like its property.”

⁵² Kant’ Doctrine of Right distinguishes between three “rights” with regard to war: the right to go to war (§56), the right during war (§57) and the right after war (§58). But importantly: these rights are rights within the state of nature and Kant emphatically denies a (conclusive) “just war” as a contradiction in terms. It is thus wrong to claim that there is a Kantian theory of just war, and it is even unthinkable for Kant justify a humanitarian intervention, contra: F. Tesson, *A Philosophy Of International Law* (Westview Press, 1998), 56: “The Kantian thesis includes a theory of just war; it is the war wages in defense of human rights.”

⁵³ W. Kersting, *Kant über Recht* (mentis, 2004), 151: “[E]s kann kein Erlaubnisgesetz der Vernunft zur Gewaltname zum Zwecke der Errichtung eines Weltstaates geben, und daher kann sich die Befriedung durch Einzelstaatlichkeit nicht als Befriedung durch Weltstaatlichkeit vervollständigen. Es gibt im Kantischen Vernunftrecht Raum für Staatsgründungsgewalt, aber nicht für Weltstaatsgründungsgewalt.”

⁵⁴ Kant, *Perpetual Peace* (supra n.17), 97. With reference to the second preliminary article Kant writes (idid): “For in the case of the second article, the prohibition only relates to the *mode of acquisition*, which is to be forbidden hereforth, but not to the present *state of political possessions*. For although the present state is not backed up by the requisite legal authority, it was considered lawful in the public opinion of every state at the time of the putative acquisition.”

a civil constitution); and the league cannot interfere in the States' internal affairs. The social contract between States is confined to "limit" States' external sovereignty; and Kant identifies this idea with a congress of States: "Only by such a congress can the idea of a public right of nations be realized, one to be established for deciding their disputes *in a civil way, as if by a lawsuit*, rather than in a barbaric way (the way of savages), namely by war."⁵⁵

What does this "as if" formula here mean? Negatively, it may mean that the federal Congress not only lacks *legislative* and *executive* powers but equally lacks *judicial* powers.⁵⁶ Yet behind the "as if" formula may also stand a reflection that finds a parallel in Kant's treatment of "republicanism" under constitutional law. For Kant here famously accepts that, regardless of the constitutional arrangements within States,⁵⁷ republicanism can operate outside a "republic". Wherever an (enlightened) monarch governs "as if" s/he directly represented the people, republicanism is at play; and, in a similar vein, the "as if" formula with regard to a supranational "civil law" may refer to the idea that even in the absence of a "world state", a federation of states can act "in a civil way". In this ideational sense, Kant unconditionally supports the idea (!) of the world state as a regulatory ideal.⁵⁸ Not a world *government* but world *governance* here stands behind the "as if" formula.

⁵⁵ Kant, *Doctrine of Right* (supra n.23), § 61.

⁵⁶ For the opposite view, A. Ripstein, *Force and Freedom* (supra n.51), 229-30: "Because each nation has neither private purposes nor external objects of choice, the analogue of a rightful condition among states has a court but neither legislature nor executive. Such a court can resolve disputes about boundaries peacefully, but its resolution of disputes is only "as if before a court", because states can resolve their disputes peacefully by accepting the decision of a court as binding." This interpretation reduces the "as if" as pointing to the lack of an executive force enforcing a judgement.

⁵⁷ With Aristotle, Kant distinguishes between three "forms of sovereignty" (autocracy (monarchy), aristocracy and democracy); while there exist also two forms of government: republican and despotic.

⁵⁸ Kant, *Perpetual Peace* (supra n.17), 105: "There is only one rational way in which states coexisting with other states can emerge from the lawless condition of pure warfare. Just like individual men, they must renounce their savage and lawless freedom, adapt themselves to public coercive laws, and this from an international state (*civitas gentium*), which would necessarily continue to grow until it embraced all the peoples of the earth." Can the idea of the international state ever be realised? According to Cavallar, *Pax Kantiana* (supra n.7), 209 this is possible if States voluntarily consent to subjecting themselves to compulsory laws; and importantly (ibid., 211): „Kant kitisiert schließlich nie die freiwillige Stiftung einer kosmopolitischen Republik. Staaten könnten zusätzliche Schritte unternehmen, um über eine Föderation hinauszugehen, die bloß versucht, Kriege zu verhindern.“ Yet for Kant, the idea that States, as States, would be willing agents favouring a progress that would undermine their moral existence is unlikely, cf. Kant, *Perpetual Peace* (supra n.17), 105: "But since this [the world state based on voluntary association] is not the will of the nations, according to their present conception of international right (so that they reject *in hypothesis* what is true *in thesis*), the positive idea of a *world republic* cannot be realised. If all is not to be lost, this can at best find a negative substitute in the shape of an enduring and gradually expanding *federation* likely to prevent law."

This “non-institutional” solution behind this philosophy lies in a voluntary league of nations. But what stabilises this voluntary league normatively? The best answer here returns to the normative connection between internal (constitutional) law and external (international law):

“[A] state which claims immunity from international juridical coercion on the grounds of its juridical sovereignty domestically is for that reason juridically obliged to enter into rightful relations with other states: its very claim to sovereignty domestically obliges it internationally. The juridically sovereign state is a self-enforcer of its international obligations: given its juridical immunity it cannot be compelled by a higher authority but must compel itself. However, though not coercible, the obligation is not for that reason voluntarily incurred or even voluntarily discharged.”⁵⁹

A State that does not recognize the (external) sovereignty of other States undermines its own claim to (internal) sovereignty. This ingenious solution stands at the heart of Kant’s international law conception. It is a solution that dialectically synthesizes the sovereign equality of all States; and with it, the “rationalist” law tradition finds its purest form.

2. “National” Natural Law I: Hegel and State Idealism

With Hegel, the natural law tradition reaches a turning point. Dismissing the “empirical” school of the past (Hobbes) as “content without form”; while equally rejecting the “transcendental” school (Kant) as “form without content”,⁶⁰ a new approach to natural law is advocated. This new – third – approach envisages a *changing* and *concrete* conception of natural law that, in Hegel’s mind, combines form with content.

Why are all previous accounts of natural law mistaken? For Hegel, the “empirical” approach simply discovers its “natural” laws in the society that presently exists. Its “a priori” is a simple reflection of an “a posteriori”, and the empirical approach is thus charged to “lack[] any criterion whatsoever for drawing the boundary between the

⁵⁹ K. Flikschuh, Kant’s Sovereignty Dilemma: A Contemporary Analysis, (2010) 18 Journal of Political Philosophy 469 at 488.

⁶⁰ T. Burns, Hegel and Natural Law Theory, (1995) 15 Politics 27.

contingent and the necessary, between what must be retained and what must be left out in the chaos of the state of nature”.⁶¹ The “transcendental” approach, by contrast, is “completely lacking in any content of the [moral] law”. All that Kantian rationalism can produce, Hegel laments, are analytical propositions in which “the sublime capacity of pure practical reason to legislate autonomously consists in the production of tautologies”.⁶² For any “formalism” to ever produce a law “some material, some determinacy, should be posited to supply its content”;⁶³ and this material can only be provided by what Hegel calls the “ethical”.⁶⁴ Natural law is here ingeniously viewed as a synthesis of “form and content”; or better: “form through content”. And it necessarily follows that since the world, through its content, is changing, this natural law will also change!

But if natural law only “exists” where embedded within the “ethical” life, where do we find the latter? Rejecting the rationalist individualism behind all social contract theories, Hegel identifies the “ethical” with the “communities” in which individuals live – from the “family” to “civil society” up to the “State”. The nation state is posited as the highest “existing” spiritual community that human beings have – in the early nineteenth century – created; and for Hegel’s “real philosophy” it is therefore presumed to be the “absolute ethical totality”.⁶⁵ The State suddenly becomes the starting point of all law – including *natural* law.⁶⁶ For the latter can only be “abstracted” and “understood” from within a concrete ethical community and especially the highest ethical community: the State. This Hegelian conception of a “national” natural law warrants a separate analysis (a), before we take a closer look at his conception of the state in world history (b); and, finally, the Hegelian conception of international law (c).

⁶¹ G. W. F. Hegel, *On the Scientific Ways of Treating Natural Law*, in: “Political Writings” (translator: H.B. Nisbet; Cambridge University Press, 1999), 102 at 111.

⁶² *Ibid.*, 123.

⁶³ *Ibid.*, 124.

⁶⁴ *Ibid.*, 105. The entire passage reads: “[B]ecause natural law has immediate reference to the ethical [*das Sittliche*], the [prime] mover of all human things; and in so far as the science of the ethical has an existence [*Dasein*], natural law belongs to [the realm of] necessity. It must be at one with the ethical in its empirical shape, which is equally [grounded] in necessity, and, as a science, it must express this shape in the form of universality.”

⁶⁵ *Ibid.*, 140.

⁶⁶ *Nota bene*: Hegel’s “Elements of the Philosophy of Right” has the alternative title “Natural Law and Political Science in Outline”.

a. Hegel's Conception of Law: Between "Nature" and "Positivity"

Is Hegel a “naturalist” or a “positivist” when it comes to the normativity of law? While rejecting “a priori” individual rights, he nonetheless admits that solely within an ethical community can right and morality become “true”: “The sphere of right and that of morality cannot exist independently; they must have the ethical as their support and foundation.”⁶⁷ Within this communitarian philosophy, *individual* “rights” and *individual* “morality” are seen as mere abstractions from the ethical totality that is the State.⁶⁸ All law must have its ultimate foundation within the State; and yet it would be a serious mistake to qualify Hegel as a state “positivist”. For his conception of law is not “positive” or “voluntarist” but “communitarian” and “natural”: each (national) community will develop its own conception of what is “natural” to itself.⁶⁹ Hegel’s conception of law is thereby a metaphysical one;⁷⁰ and it is, as such, distinct from that offered by the “positive sciences of right”.⁷¹

What, then, is the relationship between “natural” and “positive” law? Objecting to the rationalist premise according to which natural law is categorically distinct from “positive” law, Hegel accepts their difference but argues that “it would be a grave

⁶⁷ G. W. F. Hegel, *Elements of the Philosophy of Right* (editor: A. W. Wood; Cambridge University Press, 1991), §141 (Addition). And see also: *ibid.*, §33: “Morality and the earlier moment of formal right are both abstractions whose truth is attained only in ethical life.”

⁶⁸ Hegel puts here Kant on his head. For whereas Kant’s individualist morality is founded on the idea of a moral will that must “construct” a moral and legal community via the generalising categorical imperative, for Hegel, this relation between the individual and its community is the exact opposite: the morality of the community is here “real” and existing, whereas the personal morality of an individual is nothing but an “abstraction” that has been “constructed”.

⁶⁹ Hegel expresses this idea in his “Phenomenology” as follows “all reality is in its own self, conformable to law” (“*alle Wirklichkeit ist an ihr selbst gesetzmäßig*”), see: “Phenomenology of Spirit” (translator: A.V. Miller; Oxford University Press, 1977), §150. This idea has recently been reformulated by my colleague Thom Brooks, who rightly claims Hegel to be a “natural law theorist” whose “natural” law standard is “internal”; yet it does – in my view – not necessarily follow that the “moral standards” arise “from within the law itself” (see: T. Brooks, Hegel’s Philosophy of Law, in: D. Moya (ed.), *The Oxford Handbook of Hegel* (Oxford University Press, 2017), 453 at 458). For the “internalism” is, arguably, not in relation to the positive law itself – then Hegel would be a positivist – but in relation to “reality”; and since that reality is as an expression of objective spirit, it is always a “national” reality. It is for this reason that Hegel may be considered as a “national” natural lawyer.

⁷⁰ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §2: “The science of right is a part of philosophy.”

⁷¹ Hegel’s criticism of “positive” legal science is fierce. In the essay on “Natural Law”, we thus read (supra n.61, 168): “Thus, in so far as a science of right is positive (in that it clings to opinions and insubstantial abstractions), its invocation of experience, or of its applicability, by definition, to actuality, or of sound common sense and universal attitudes, or even of philosophy, makes no sense whatsoever.”

misunderstanding to distort this difference into an opposition or antagonism”.⁷² Natural and positive law are connected; and referring to Montesquieu, this connection can – for him – be found in the “philosophical viewpoint, that legislation in general and its particular determinations should not be considered in isolation and in the abstract, but rather as a dependent moment within *one* totality, in the context of all the other determinations which constitute the character of a nation and age”.⁷³ But Hegel takes Montesquieu’s descriptive insight to a normative level: only those laws are “rational” and “right” that correspond to the national spirit (and the developmental stage in its overall evolution).

“Legality” is consequently not identified with a positive legislator. For law is not formalistically what the state legislator adopts.⁷⁴ The concept of law requires that “what is right *in itself* is posited in its objective existence”.⁷⁵ Yet dialectically, “[o]nly when it becomes law does what is [natural] right take on both the form of its universality and its true determinacy”.⁷⁶ The task of legislation is consequently to “codify” and “concretise” abstract natural rights; but again, for Hegel, this process of codification is not purely “declaratory” since it has a “constitutive” element.⁷⁷ For unlike unwritten custom, legislation allows for a better “cognition of the content in its determinate universality”.⁷⁸ The principal task of state legislation is thus to engage in “new and further determination, and with those internal concerns of the state whose content is wholly universal”.⁷⁹ This is also the reason why Hegel rejects a purely historical

⁷² G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §3.

⁷³ Ibid.

⁷⁴ Ibid.: “[A legislative] determination of right may be shown to be entirely grounded in and consistent with the prevailing circumstances and existing legal institutions, yet it may be contrary to right [unrechtlich] and irrational in and for itself, like numerous determinations of Roman civil law [Privatrecht][.]” And in § 212, we read: “In this identity of being in itself and being posited, only what is law has binding force as right. Since being posited constitutes the aspect, of existence in which the contingency of self-will and of other particular factors may also intervene, what is law may differ in content from what is right in itself.”

⁷⁵ Ibid., §211.

⁷⁶ Ibid.

⁷⁷ All law should be “external” and thus “public”; and ideally it is as rational as possible so as to be easily cognizable. For if “[t]he language of the ethical spirit of society is law” (Hegel, *Phenomenology* (supra n.69), §653), that language needs to be understood! For an excellent discussion of this point, see: M. Franklin, *Alienation and Hegel’s Justification for Codification*, (1958-59) 33 *Tulane Law Review* 133.

⁷⁸ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §211.

⁷⁹ Ibid., §298.

justification.⁸⁰ Thus, as a living organism, each state must constantly adjust its laws to the evolutionary stage in which it is in. The concept of right is always in a process of “immanent progression and production”. (And the “moving principle” behind all concepts – including the concept of law – Hegel calls “dialectic”.⁸¹)

The dialectic concept of (natural) law thereby means the following: “The Idea must continually determine itself further within itself, for it is initially no more than an abstract concept. But this initial abstract concept is never abandoned. On the contrary, it merely becomes continually richer in itself, so that the last determination is also the richest.”⁸² For example: the abstract “natural” right to property can only be understood within its specific ethical context (and indeed does not exist “concretely” without such a context);⁸³ and we can only understand what is “rational” within this right once it has progressed to the next ethical context. Rationality must be found in what is “actual”, because these are the “active” and dynamic moments in the transition between past and present: “What is actual, the shape which the concept assumes, is therefore from our point of view only the subsequent and further stage, even if it should itself come first in actuality. The course we follow is that whereby the abstract forms reveal themselves not as existing for themselves, but as untrue.”⁸⁴

The Hegelian conception of a changing (natural) law here derives from his broader epistemology. For Hegel’s foundational postulate is the unity of the phenomenal and the noumenal world.⁸⁵ And in criticising the “enlightenment” assumption of universal and eternal laws, Hegel finds that these “a priori” laws will only ever be idealised reflection of a “real existing” world; and since the principle behind this world is not stasis but change, all philosophy must be a metaphysics of change. Reconciling

⁸⁰ Ibid., §3: “When a historical justification confuses an origin in external factors with an origin in the concept, it unconsciously achieves the opposite of what it intends. If it can be shown that the origin of an institution was entirely expedient and necessary under the specific circumstances of the time, the requirements of the historical viewpoint are fulfilled. But if this is supposed to amount to a general justification of the thing itself, the result is precisely the opposite; for since the original circumstances are no longer present, the institution has thereby lost its meaning and its right [to exist].”

⁸¹ Ibid., §31.

⁸² Ibid., §32 – Addition.

⁸³ Ibid.

⁸⁴ Ibid.. It is this thought that essentially stands behind the iconoclastic – and typically misunderstood proposition that “[w]hat is rational is actual; and what is actual is rational”. For a good discussion of the famous phrase, see: E. L. Fackenheim, *On the Actuality of the Relational and the Rationality of the Actual*, (1970) 23 *Review of Metaphysics* 690.

⁸⁵ That is the whole point of the “Phenomenology of Spirit”!

“rationalism” and “empiricism”, the task of Hegelian philosophy is to look for “reason” in social life, because philosophy itself is but an “exploration of the rational” which ought to lead to a “comprehension of the present and the actual”. Instead of constructing an “empty ideal” – as Kant’s Natural Law – the aim of legal philosophy must be to find correspondence between the (rational) idea that is “actual” in concrete reality.⁸⁶ A “real philosophy” must try “to recognize in the semblance of the temporal and transient the substance which is immanent and the eternal which is present”.⁸⁷

In conclusion: whatever is rational and universal must always be found in what is real and actual; yet not all that is “real” is actual because there can be elements within the positive law that are “dead” and past their time. Positive laws can become “untrue” laws where they do no longer correspond to the spirit of the time.⁸⁸ And the famous illustration of such a “dead” positive law, Hegel offers, is none other than the Constitution of the German Empire!⁸⁹

⁸⁶ In Hegel’s “Introduction to the Philosophy of History” (translator: L. Rauch; Hackett, 1988), we thus read (ibid., 38): “As was said, nothing is more common today than the complaint that the *ideals* raised by fantasy are not being realized, that these glorious dreams are being destroyed by cold actuality. On their life-voyage, these ideals smash up on the rock of hard reality. They can only be subjective, after all; they belong to that individuality of the solitary subject which takes itself for the highest and wisest. Ideals of that sort do not belong here – for, what the individual spins out for himself in his isolation cannot serve as law for the universal reality, just as the world’s law is not for the single individual alone (who may come off much the worse for it).”

⁸⁷ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), Preface. The resemblance with Baudelaire’s famous statement in “The Painter of Modern Life” is remarkable.

⁸⁸ On this point, see: ibid., §21 (Addition): “Truth in philosophy means that the concept corresponds to reality. A body, for example, is reality, and the soul is the concept. But soul and body ought to match one another; a dead body therefore still has an existence [Existenz], but no longer a true one, for it is a conceptless existence [Dasein]: that is why the dead body decomposes. The will in its truth is such that what it wills, i.e. its content, is identical with the will itself, so that freedom is willed by freedom.”

⁸⁹ In the famous opening words of “The German Constitution”, an essay also found in “Political Writings” (supra n.61), Hegel can thus state: “Germany is no longer a state” (ibid., 6). He explains (ibid., 9): “The organisation of that body known as the German constitution took shape in [the context of] a life quite different from that which later invested it and does so now. (...) The structure in which that destiny resided is no longer supported by the destiny of the present generation, it stands without sympathy for the latter’s interests and is unnecessary to them, and its activity is isolated from the spirit of the world. If these laws have lost their former life, the vitality of the present age has not managed to express itself in laws. The vital interest of each has gone its own way and established itself separately, the whole has disintegrated, and the state no longer exists.” For Hegel, Germany thus only exists “in thought” as a “Gedankenstaat” that has no “actuality” (ibid., 41): “Germany is a state in [the realm of] thought but not in actuality, that formality and reality are separate, so that empty formality belongs to the state, whereas reality belongs to the non-existence of the state.”

b. The Spirit of War: States in World History

For Hegel, each philosophy of (natural) law will always be a reflection of its time,⁹⁰ and Hegel's own time is a time of sovereign states. In this historical stage, there is no "ethical" community that would support a world law;⁹¹ and for Hegel, a "universal monarchy" or a cosmopolitan "world republic" are "empty words" – pure abstractions without (empirical) content.⁹² The highest – existing – ethical community lives in the state; and even if Hegel postulates the existence of a "world spirit", that world spirit always governs through the states: "[t]he state is the world which the spirit has created for itself" and "[w]e should therefore venerate the state as an earthly divinity and reality".⁹³ Only through States can world history – as the development of the world spirit – take place. The world spirit indeed evolves through the medium of "National Spirits";⁹⁴ with each national spirit representing one stage in the evolution of the world

⁹⁰ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), Preface: "As far as the individual is concerned, each individual is in any case a child of his time; thus philosophy, too, is its own time comprehended in thoughts. It is just as foolish to imagine that any philosophy can transcend its contemporary world as that an individual can overleap his own time[.]"

⁹¹ There really cannot be any doubt in this point; and yet the argument that there is an international "Sittlichkeit" in Hegel has nonetheless been made, see: W.E. Conklin, *Hegel's Laws: The Legitimacy of a Modern World Order* (Stanford Law Books, 2008), 283 et seq.

⁹² G. W. F. Hegel, *The German Constitution* (supra n.89), 93: "The idea of a universal monarchy has always been an empty word. The fact that it was never implemented when the plan for it was first laid shows that it is impossible to do so, and that it is therefore an empty thought; but in any case, there can no longer be any question of it in more recent times.". On this point, see equally Hegel's "Natural Law" essay (supra n.61), 179: "[Philosophy] cannot discover this absolute shape by resorting to the shapelessness of cosmopolitanism, or to the vacuity of the rights of man or the equal vacuity of an international state or a world republic; for these abstractions and formal constructions [*Formalitäten*] contain the precise opposite of ethical vitality, and are essentially protestant and revolutionary in relation to individuality."

⁹³ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §272 (Addition). See also § 258 in which E. Gans – not Hegel – adds the famous phrase that "[t]he state consist in the march of God in the world".

⁹⁴ Ibid., §346: "Since history is the process whereby the spirit assumes the shape of events and of immediate natural actuality, the stages of its development are present as immediate natural principles; and since these are natural, they constitute a plurality of separate entities such that one of them is allotted to each nation [Volke] in its geographical and anthropological existence."

spirit.⁹⁵ With Hegel the two opposing strands of “cosmopolitanism” and “nationalism” thus reach a new nineteenth century synthesis.⁹⁶

The principal agent for the evolution of the world spirit is “war”. For Hegel, war is both “necessary” and “ethical”, because old “particularities” are dissolved and a new ideal “attains its right and becomes actuality”.⁹⁷ Solely through war can the dynamic progression of the world spirit be guaranteed – something that “perpetual peace” cannot do.⁹⁸ From Hegel’s philosophical perspective, war thus forms an integral part of history, since the disorder that it generates is instrumental in permitting new normative orders to emerge.⁹⁹ The dialectical unfolding of the world spirit is built on – and therefore requires – a plurality of States that compete in war. It is only through the competition between them that their “individuality” is guaranteed; and according to Hegel there will always be one national spirit representing the “self-development of the world-spirit’s self-consciousness”.¹⁰⁰ This national spirit temporarily assumes an “epoch-making role” – as it dominates world history for a particular epoch.¹⁰¹

In the history of the world, four principles and four epochs are identified: the Oriental world, the Greek world, the Roman world, and the Germanic world. Each of these “worlds” represents a cultural stage in the evolution and civilisation of mankind.¹⁰² (Importantly it always comprises a plurality of states that share the “natural” principle of a cultural epoch.) The “Germanic” world here stands for the principle of universal

⁹⁵ G.W.F. Hegel, *Philosophy of History* (supra n.86), 89: “The principles of the various National Spirits, progressing in a necessary series of stages, are themselves only phases of the one universal Spirit: through them, that World Spirit elevates and completes itself in history, into a self-comprehending totality.”

⁹⁶ For this excellent point, see F. Meinecke, *Cosmopolitanism and the Nation State* (translator: R. B. Kimber; Princeton University Press, 1970), 201.

⁹⁷ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §324.

⁹⁸ G. W. F. Hegel, On the Scientific Ways of Treating Natural Law (supra n.61), 141: “[W]ar preserves the ethical health of peoples in their indifference to determinate things; it prevents the latter from hardening, and the people from becoming habituated to them, just as the movement of the winds preserves the seas from that stagnation which a permanent calm would produce, and which a permanent (or indeed ‘perpetual’) peace would produce among peoples”.

⁹⁹ S. Avineri, *Hegel’s Theory of the Modern State* (Cambridge University Press, 1974), 195: “[S]ince so much of what happened in history is the outcome of war and discord rather than of harmony and co-operation, a theory which would just dismiss the means as utterly unworthy while welcoming the results, would be both a very poor theory on theoretical grounds, and hypocritical, if not outright immoral, on ethical ones.”

¹⁰⁰ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §347.

¹⁰¹ The idea of “dominance” is here “cultural” and not “political” in nature (S. Avineri, *Hegel’s Theory of the Modern State* (supra n.99), 222).

¹⁰² F. Dittmann, *Der Begriff des Volksgeistes bei Hegel* (Voigtländer, 1909).

freedom. It constitutes “history’s old age” and embraces all of Europe bound together by Christendom.¹⁰³ Hegel’s own “Philosophy of Right” is thus a philosophy of the “Christian” world, that is: the European world;¹⁰⁴ and it is through this lens that his conception of international law must be understood.

c. The Hegelian State and “its” International Law

From the “absolute” point of view of world history, there cannot be a universal international “law” standing above all states. For Hegel gives absolute priority to the “one” dominant national spirit, which means that “the spirits of other nations are without rights”.¹⁰⁵ From the “relative” point of view of individual states, as “unconscious instruments and organs” of the world spirit,¹⁰⁶ there nevertheless appears to be a form of international law. But because the highest “ethical” organism is the sovereign state, all law must be state law, and for Hegel international law is consequently nothing but “external state law”.¹⁰⁷ “International” law is here reduced to the external or “negative” side of a state’s own individuality: while it “*appears as the relation of another to another, as if the negative were something external...*” this negative relation is the state’s *own* highest moment - its actual infinity as the ideality of everything finite within it.”¹⁰⁸ A close reading of this passage locates all international law in each state’s

¹⁰³ Avineri is absolutely right to castigate Sibree’s translation of “Germanic world” with “German world” as having been responsible for misleading legions of British readers “creating the understandable but incorrect notion that Hegel was referring to German supremacy” (S. Avineri, *Hegel’s Theory of the Modern State* (supra n.99), 228). The “Germanic” world here means the world of Christendom, and preferably: the Protestant religion because Hegel believes that “[t]he Catholic religion (although like Protestantism, it is a form of Christianity) does not ascribe to the state the inherent justice and ethical status that lie in the inwardness of the protestant principle” (Hegel, *Philosophy of History* (supra n.86), 54).

¹⁰⁴ In the words of A. W. Wood, *Hegel’s Ethical Thought* (Cambridge University Press, 1990), 30: “States are therefore the “material” of world history, the concrete agents of world-historical development.”

¹⁰⁵ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), § 347.

¹⁰⁶ Ibid., §344. In the beautiful phrase of F. Meinecke, *Cosmopolitanism and the National State* (Princeton University Press, 1970), 202: “The state and the historical world as a whole lead a double existence of apparent freedom in the realm of reality and of actual servitude in the realm of the spirit.”

¹⁰⁷ E.g. G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §259 and more generally “international law” = “äußeres Staatsrecht”.

¹⁰⁸ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §323.

own will; yet because that will is posited as an “individuality”, it also requires – logically – other wills that exist outside it.¹⁰⁹

What are the principles essential to Hegel’s conception of international law? If each State is sovereign and “the absolute power on earth”,¹¹⁰ are there any *legal* principles at all? For Hegel, there surprisingly are; yet consistent with his “national” natural law thinking, these principles derive from his “phenomenology” of the state. The state, as an individuality will, can only become independent if externally recognized by other states: “Without relations with other states, the state can no more be an actual individual than an individual can be an actual person without a relationship with other persons.”¹¹¹ This principle of mutual recognition thus plays a quintessential role in Hegel’s construction of international law (and indeed in his entire phenomenology of being more generally).¹¹² The “mutuality” of the recognition is thereby crucial; and this, in particular, means that non-states need not be recognised. In § 351, of the “Philosophy of Right”, we thus read:

“The same determination entitles civilised nations to regard and treat as barbarians other nations which are less advanced than they are in the substantial moments of the state (as with pastoralists in relation to hunters, and agriculturalists in relation to both of these), in the consciousness that the rights of these other nations are not equal to theirs and that their independence is merely formal.”¹¹³

¹⁰⁹ In the words of A. von Trott zu Solz, *Hegels Staatsphilosophie und das internationale Recht* (Vandenhoeck & Ruprecht, 1932), 75: „So ist es nicht eine geschichtsphilosophisch vorgefundenen Tatsache, daß es mehrere aus dieser zu individueller Wirklichkeit vollendeten Entwicklung des Freiheitsbegriffs bestehenden Staaten gibt, sondern sie folgt notwendig aus dem Wesen der in der Wirklichkeit erscheinenden Idee selbst.“

¹¹⁰ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §331.

¹¹¹ Ibid. The famous master-slave parable here comes to mind. This idea will be repeated by E. Gans, *Naturrecht und Universalrechtsgeschichte: Vorlesung nach G.W.F. Hegel* (Mohr Siebeck, 2006), 234: „Genau wie der Mensch kann der Staat sein selbständiges Ich erst in Beziehung zu anderen Individuen vollends entfalten.“

¹¹² On Hegel’s theory of recognition more generally, see: R. B. Pippin, What is the Question for which Hegel’s Theory of Recognition is the Answer? (2000) 8 *European Journal of Philosophy* 155; as well as E. Sembou, Hegel’s Idea of a ‘Struggle for Recognition’: The Phenomenology of Spirit, (2003) 24 *History of Political Thought* 262: “Recognition is the best-known theme, and certainly the core, of Hegel’s political philosophy.”

¹¹³ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §351. For Hegel, the United States of America were then not (yet) a state; it is but a “civil society” that is not yet organised into a political state. For a general discussion of this point, see: G.A. Kelly, *Hegel’s America*, (1972) 2 *Philosophy & Public Affairs* 3.

But what about “equal” states that belong to the same stage of history? For them, the principal instrument of external state law is the international treaty;¹¹⁴ and for that instrument to work, Hegel postulates one “universal” principle of international law: the principle that international treaties must be observed (*pacta sunt servanda*). However, even this principle is brought in line with the idea of state sovereignty. For since states have remained in “a state of nature in relation to one another”, their mutual obligations will only be actualised “in their own particular wills”; and this means that international treaties will always remain contingent on these particular wills and can never be enforced as a perfect right.¹¹⁵ In the absence of a supranational power above the states, all international law is thus “subjective”:

“There is no praetor to adjudicate between states, but at most arbitrators and mediators, and even the presence of these will be contingent, i.e. determined by particular wills. Kant's idea of a perpetual peace guaranteed by a federation of states which would settle all disputes and which, as a power recognized by each individual state, would resolve all disagreements so as to make it impossible for these to be settled by war presupposes an agreement between states. But this agreement, whether based on moral, religious, or other grounds and considerations, would always be dependent on particular sovereign wills, and would therefore continue to be tainted with contingency.”¹¹⁶

For Hegel, then, there cannot be “real” or “objective” international law. All law is state law; and while there exist a natural and a positive law within the state, neither exists on the international plane. All the latter can offer are external and particular expressions of state will(s) that always remain individually entitled to determine what is in their best individual interest. An international organisation – like the Holy Alliance – cannot change this predicament, because it itself is based on an international treaty and, as such, subject to and limited by the principle of state sovereignty.¹¹⁷ Due to the absence

¹¹⁴ G. W. F. Hegel, *Elements of the Philosophy of Right* (supra n.67), §332. Custom as a rule is not expressly mentioned; even if there is an allusion to custom in the Addition to §339 by E. Gans.

¹¹⁵ Ibid, §336: “The relationship of states to one another is a relationship between independent entities and hence between particular wills, and it is on this that the very validity of treaties depends. But the particular will of the whole, as far as its content is concerned, is its own welfare in general. Consequently, this welfare is the supreme law for a state in its relations with others, especially since the Idea of the state is precisely that the opposition between right as abstract freedom and the particular content which fills it, i.e. the state's own welfare, should be superseded within it, and it is on this Idea as a concrete whole that the initial recognition of states is based.”

¹¹⁶ Ibid., §333.

¹¹⁷ Ibid., § 324, Addition (Gans): “Perpetual peace is often demanded as an ideal to which mankind should approximate. Thus, Kant proposed a league of sovereigns to settle disputes between states, and the Holy Alliance was meant to be an institution more or less of this kind! But the state is an individual, and negation is an essential component of individuality. Thus, even if a number of states join together as a family, this league, in its individuality, must generate opposition and create an enemy. Not only do

of an ethical community and international institutions, the Hegelian “system” of states consequently lacks the “normative” resources to create from within itself a “real” law that could stand above the particular wills of the states. That does not, however, necessarily mean that Hegel cannot envision a world republic; but this world republic is far beyond the present and cannot be “conceived” in terms of the “present” yet.¹¹⁸

3. “National” Natural Law II: Savigny and the Historical School

Parallel to the development of the Hegelian system, a second intellectual movement emerges in the early decades of the nineteenth century.¹¹⁹ Equally criticising the abstract rationalism behind the French Revolution, the Historical School follows Montesquieu and regards law as an expression of concrete cultural and geographic conditions; but unlike Montesquieu, it comes to single out the national history of a people as its decisive criterion for determining the “spirit” of its law.

The Historical School builds on two important eighteenth-century precursors;¹²⁰ yet it is only formally born in 1815 with the foundation of the “*Zeitschrift für die geschichtliche Rechtswissenschaft*”. Its spiritual father is Friedrich Carl von Savigny, who had started to find a synthesis between history and reason as early as 1802.¹²¹ Inspired by Kant’s methodological programme,¹²² the task of the legal scholar is said

peoples emerge from wars with added strength, but nations [Nationen] troubled by civil dissension gain internal peace as a result of wars with their external enemies.”

¹¹⁸ In this sense: S. Avineri, *Hegel’s Theory of the Modern State* (supra n.99), 207. Referring to Hegel’s formulations in his “Philosophy of History” (“The trend of the states is, therefore, towards uniformity”), Avineri claims that Hegel, in the end, “emerges with a vision of One World, united by culture and reason, progressing towards a system wherein sovereignty, though acknowledged, will wither away, and wards, though immanent, will gradually disappear”. For a criticism of this view, see however: R. Williams, *Hegel’s Ethics of Recognition* (University of California Press, 1997), 361-2.

¹¹⁹ On the (un)easy relationships between Hegel (and the Hegelians) and the Historical School, see especially S. Brie, *Der Volksgeist bei Hegel und in der historischen Rechtsschule*, (1908/09) 2 *Archive für Rechts- und Wirtschaftsphilosophie* 1 (Part I) and 179 (Part II); as well as C. Mährlein, *Volksgeist und Recht: Hegel’s Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft* (Königshausen & Neumann, 2000), 116-129.

¹²⁰ Savigny himself identified Hugo and Möser – with the former being the bête noir of Hegel.

¹²¹ See especially F. C. von Savigny, *Vorlesungen über juristische Methodologie 1802-1842* (edited: A. Mazzacane; Klostermann, 2004).

¹²² On the philosophical relation between Kant and Savigny, see: F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (Vandenhoeck & Ruprecht, 1996), 370; as well as M. Franklin, *The Kantian Foundations of the*

to “synthesise” (empirical) history and (rational) philosophy. History – not abstract speculation – offers the material basis of all law; the law within history can however only be “conceived” in the rational categories of legal philosophy. Unlike classic naturalist thinking, the Historical School thus denies that the human mind can itself derive substantive conclusions about justice; yet like Kantian rationalist thinking, it nevertheless believes in formal – juristic – reason without which the historical reality must remain unlocked. To paraphrase Kant: juristic reason without history is empty, history without juristic reason is blind. On the basis of these premises, it develops – like Hegel – a “national” conception of law that is distinct from positive law (a); yet unlike Hegel, it finds within itself the normative resources to conceive of international law (b).

a. The Historical School: The Nation as a Metaphysical Construct

What conception of law has the Historical School developed? Savigny’s pamphlet “Of the Vocation of Our Age for Legislation and Jurisprudence” notoriously dismisses the very attempt to positively “found” German law in the wake of the Vienna Congress.¹²³ One reason behind his anti-positivist stance is his dislike for the French Revolution (and its Napoleonic *Code Civil*). Yet Savigny’s criticism goes deeper. Drawing on the “romantic” approach best exemplified in Herder, he links “language” and “history” to the idea of the “nation”.¹²⁴ Law, just as language, is seen as an integral part of the

Historical School of Law of Savigny (1952) 22 *Revista Juridica de la Universidad de Puerto Rico* 66. Kantian philosophy had also inspired Hugo, who primarily used Kant to undermine classic natural law thinking, see: E. Landsberg, *Kant und Hugo*, (1901) 28 *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 670.

¹²³ F. C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr, 1828), iv. Savigny’s opponent here was the Heidelberg University Professor Thibaut. The important point to keep in mind to understand this debate is that Savigny did not argue against a “German” national law as such. He only argued against codification since he believed that Germany already had an unwritten “common” law in the form of the received “Roman law” and that that common Roman law had not disappeared with the disappearance of the Holy Roman Empire in 1806. For Savigny, it is thus not the “state” or “Empire” that stands behind the validity of law, see: F. C. von Savigny, *System des heutigen Römischen Rechts – Erster Band* (Veit, 1840), §2: “Bey der Auflösung des Deutschen Reichs behaupten nun manche Schriftsteller, daß das gemeine Recht mit seiner Basis, der Reichsstaatsgewalt, auch seine Geltung verloren habe. Diese Meinung, entstanden aus einem Missverständnis über die Natur des positiven Rechts, ist indessen ganz ohne Einfluß auf den wirklichen Rechtszustand geblieben.”

¹²⁴ J. G. Herder, *Outlines of a Philosophy of the History of Man* (translated by T. Chruchill, Johnson, 1800), esp.237: “A philosophical comparison of languages would form the best essay on the history and

“spirit” of a “people”;¹²⁵ and following Herder’s (negative) correlation between the vivacity of a language and codification, a living law must never be codified. The legal order is an “organism” whose natural growth is best reflected in “customary law”, which itself emanates from popular ethics (“Sitte”) and popular beliefs (“Volks Glaube”).¹²⁶

But if all law emanates from the spirit of a people, why can the latter not be represented by the state legislator? In order to understand Savigny’s attack on legislative positivism,¹²⁷ one must better understand his concept of the “nation”. This is not an empirical reality – say, the collection of persons living in a defined territory – but a metaphysical ideal created by history and culture.¹²⁸ It is this “idealist” concept of the nation that gives a metaphysical texture to its law:

“This, then, is the general question: what is the relationship between the past and the present, or between becoming and being? Some here hold that every age brings forth its own existence in which it freely and arbitrarily creates its world, good and happy, or bad and unhappy... According to the teaching of others, there is no such thing as a completely solitary and isolated human existence: rather, what can be regarded as single is, seen from another side, a part of a higher whole. (...) If we apply this general account of the distinction between the historical and unhistorical view to jurisprudence, it will not be difficult to determine the character of the two schools mentioned above. The historical school assumes that the material of law is given by the total past of the nation, but not by arbitrariness, so that it might happen to be this or another, but by the very essence of the nation itself and its history. The special activity of each age, however, must be directed towards inspecting, rejuvenating, and preserving this material given by inner necessity. The unhistorical school, on the other hand, assumes that the law is produced at every moment arbitrarily, by those who have legislative power, and thus quite independent of the law of the preceding period;

diversified character of the human heart and understanding: for every language bears the stamp of the mind and character of a people... the genius of a people is nowhere more displayed than in the physiognomy of their language.”

¹²⁵ Von Savigny, *Vom Beruf unsrer Zeit* (supra n.123), 11: „[D]ieser organische Zusammenhang des Rechts mit dem Wesen und Charakter des Volkes bewährt sich auch im Fortgang der Zeiten, und auch hierin ist es der Sprache zu vergleichen. So wie für diese, gibt es auch für das Recht keinen Augenblick eines absoluten Stillstands, es ist derselben Bewegung und Entwicklung unterworfen, wie jede andere Richtung des Volkes[.]“ According to H. Kantorowicz, “Volksgeist und historische Rechtsschule”, (1912) 108 *Historische Zeitschrift* 295, the direct inspiration behind the comparison between “law” and “language” for Savigny is not Herder but J. Grimm, who indeed writes an important essay in the second volume of the “*Zeitschrift für die geschichtliche Rechtswissenschaft*” entitled: “Von der Poesie im Recht”.

¹²⁶ Von Savigny, *Vom Beruf unsrer Zeit* (supra n.123), 14.

¹²⁷ It is this attack on codification that aroused Hegel’s fundamental disapproval in §211 of his “Elements of the Philosophy of Right” (supra n.67): “To deny a civilized nation, or the legal profession within it, the ability to draw up a legal code would be among the greatest insults one could offer to either; for this does not require that a system of laws with a new content should be created, but only that the present content of the laws should be recognized in its determinate universality - i.e. grasped by means of thought - and subsequently applied to particular cases.”

¹²⁸ F. Wieacker, *Privatrechtsgeschichte der Neuzeit* (supra n.122), 392-3.

only following their best conviction, as the present moment happens to bring with it.
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These youthful thoughts, written in 1815, would receive a mature refinement after 1840, when Savigny published his monumental “System of Modern Roman Law”.¹³⁰ Building on the work of his disciple Puchta, a new idea of what constitutes the “positive” law – as opposed to abstract natural law – is now defined as follows:

“The positive right lives in the common consciousness of the people, and we therefore have to call it *Volksrecht*. (...) And by assuming an invisible origin of the positive right, we must consequently renounce any documentary proof of it ... In fact, we find it everywhere, where people live together and so far as history declares that they constitute a spiritual community that expresses itself through the use of a common language. In this natural unity lies the source of all law because in the common and all-penetrating spirit we find the strength to satisfy the need recognized above.... But if we consider the people as a natural unity, and in this respect as the bearer of all positive right, we must not only think of the individuals presently contained in it; rather, that unity goes through the generations that are historically succeeding one another, and through which the present is connected with the past and the future. This stable preservation of the law is effected by tradition, and the latter is not conditioned and founded upon a sudden but a gradual generational change.”¹³¹

The “nation” is here seen as a “natural” legal unit that is itself based on a common ethnic and ethical community.¹³² It alone – not the State – is the “carrier” of all positive law.¹³³ But because the nation is a *historical* community, the *Volksrecht* cannot be determined by the “present” people alone – especially not by a “representative” legislator. The nature of a nation lies in its transcendental totality; it is a fusion of the past and present in an evolving cultural community.¹³⁴ Savigny’s conception of the

¹²⁹ F. C. von Savigny, *Über den Zweck dieser Zeitschrift*, (1815) 1 *Zeitschrift für geschichtliche Rechtswissenschaft* 1 (my translation).

¹³⁰ This eight-volume set is published between 1840 and 1849.

¹³¹ F. C. von Savigny, *System des heutigen Römischen Rechts – Erster Band* (supra n.123), §§7-8 (my translation).

¹³² On this see also G. F. Puchta, *Das Gewohnheitsrecht* (Palmsche Verlagsbuchhandlung, 1828), 134: “Der Begriff des Volks hat die natürliche Grundlage der gemeinsamen Abstammung. Diese bringt nicht allein eine leibliche, sondern auch eine geistige Verwandtschaft hervor. Daraus, daß das Volk in diesem eigentlichen Sinne des Worts ein natürliches Ganzes ist, folgt, daß es nicht auf künstlichen Wege und nicht durch freien Entschluß und Willen entstehen kann.”

¹³³ For Savigny, the state is only “the physical embodiment of the spiritual community of the people” (Savigny, *System des Römischen Rechts* (supra n.123), §9); and according to his theory, wherever there is a people there will therefore also be a state (ibid.: “Vielmehr wird jedes Volk, sobald es als solches erscheint, zugleich als Staat erscheinen, wie auch dieser gestaltet sein möge.”) However, and importantly, the state is not the origin of law (ibid., §10): „Das Recht hat sein Dasein in dem gemeinsamen Volksgeist, also in dem Gesamtwillen, der insofern auch der Wille jedes Einzelnen ist.“

¹³⁴ That this may even include the „future“ derives from Savigny, *System des Römischen Rechts* (supra n.123), §10: „daß das ideale Volk, wovon hier die Rede ist, auch die ganze Zukunft in sich schließt, also ein

nation is consequently a resolutely “metaphysical” construct; and his *Volksrecht* partakes in this metaphysical idealism. For unlike all empirical conceptions of “positive” law, the *Volksrecht* is produced “in an invisible manner, and therefore cannot be traced back to an external event or a particular point in time”.¹³⁵ The *Volksrecht* is an unwritten and unconscious law and “emanates” from an idealist source: the *Volksgeist*.¹³⁶ In the words of Puchta:

"There exists a form of law creation, which can be called the immediate one, insofar as the law here really represents the national conviction about legal freedom without any artificial medium. This natural right, as one could therefore call it, asserts itself just as naturally, namely through the influence which popular conviction exerts on the actions of the individual members of the people. These acts, in so far as they are conditioned by this influence, are called custom; and that immediate natural right, that express itself first by this influence, we tend to call customary law".¹³⁷

For Puchta (and Savigny), customary law is a kind of “natural” law that stands in stark ontological contrast to the “artificial” law produced by state institutions. The source of all customary law thereby lies in the common consciousness (*opinio juris*) of a nation.¹³⁸ This *Volksrecht* must not be confused with any collection of positive legislation or judicial judgments.¹³⁹ On the contrary, all “state laws” must always be judged against the evolving “spirit of the people”.¹⁴⁰ But who is to “find” and “decipher” this spirit? While originally a task for the people itself, with the increasing

unvergängliches Dasein hat“. In the words of F. Wicacker, *Privatrechtsgeschichte der Neuzeit* (supra n.122), 393: „Volk ist also für Savigny gar nicht die politische und gesellschaftliche Realität der geschichtlichen Nation, sondern ein idealer Kulturbegriff: die durch gemeinsame Bildung verbundene geistige und kulturelle Gemeinschaft.“

¹³⁵ Savigny, *System des Römischen Rechts* (supra n.123), §12.

¹³⁶ The first use of this concept by the historical school is by G. F. Puchta, *Das Gewohnheitsrecht* (supra n. 132), 1; and according to S. Brie, *Der Volksgeist bei Hegel und in der historischen Rechtsschule* (supra n.119), the Historical School takes the concept directly from Hegel. For Kantorowicz (supra n.125), by contrast, it is not Hegel but Montesquieu that lies at the origin of this borrowing that would become so central for the Historical School.

¹³⁷ G. F. Puchta, *Das Gewohnheitsrecht* (supra n.132), 9-10 (my translation).

¹³⁸ Ibid. 169: “Die rechtliche Überzeugung ist es, welche die Sitte bestimmt und hervorbringt, nicht umgekehrt; denn gerade jene als Bestimmung des Willens ist es, die einer Handlung das Prädikat der Sitte verleiht.“

¹³⁹ Ibid., 133 and especially 164.

¹⁴⁰ F. C. von Savigny, *Vom Beruf unsrer Zeit* (supra n.123), 127: „Unabhängig von Leibniz, aber in ähnlichen Sinne, schlägt Möser vor, durch planmäßige Sammlung wirklicher Rechtsfälle eines Landes neue Pandekten anzulegen. Beides sehr schön; nur ist eine notwendige Bedingung nicht mit in Rechnung gebracht, die Fähigkeit nämlich wahre Erfahrungen zu machen. Denn man muß das klare, lebendige Bewußtsein des Ganzen stets gegenwärtig haben, um von dem individuellen Fall wirklich lernen zu können, und es ist also wieder nur der theoretische, wissenschaftliche Sinn, wodurch auch die Praxis erst fruchtbar und lehrreich erscheint.“

complexity of the law, the task of identifying the national spirit ought to belong to the “jurists”. The “juristic estate” is to act as the “organ” of the people: it identifies the “living customary law” which guarantees the “right progress” of the nation.¹⁴¹ “Volksrecht” here becomes – just as within classic natural law thinking – ultimately “Juristenrecht”.¹⁴² The jurist is tasked to trace the existing law “back to its roots in order to discover an organic principle” so as to discover those norms that are “still alive” within the consciousness of the people.¹⁴³

What, then, is the meaning of “positive” law within the Historical School? Fundamentally, and anti-positivistically, law is not identified with state legislation but rather with organic custom (“Sitte”); and while not denying the legal quality of legislation as such, the province of legislation is reduced to “pronouncing the existing law”.¹⁴⁴ (Not the “state” but the “nation” is the creator of all law.¹⁴⁵) Strictly speaking it is not even custom as such – as an empirical and external material – *but the invisible consciousness or spirit of a nation that the Historical School sees as its sole legal source*. The consciousness of the people determines their customary being, and not their other way around!¹⁴⁶ And against this background, the Historical School cannot be classified as “positivist” because it participates, like Kant and Hegel, in an idealist project. The

¹⁴¹ Ibid., 133.

¹⁴² For a famous and polemical criticism of this development, see D. G. Beseler “Volksrecht und Juristenrecht” (Weidmann, 1843).

¹⁴³ F. C. von Savigny, *Vom Beruf unsrer Zeit* (supra n.123), 117-118. Scientific “jurisprudence”, as exercised by law professors, will thereby – in revealing the organic unity of the law – rejuvenate and even revive the *Volksrecht*; and it is for that reason that “jurists” can be described as “a new kind” of a legal source (F.C. von Savigny, *System des Römischen Rechts* (supra n.123), §14: “In dieser letzten Function erscheint die Wirksamkeit der Juristen zunächst als eine abhängige, ihren Stoff von außen empfangende. Indessen entsteht durch die dem Stoff gegebene wissenschaftliche Form, welche seine inwohnende Einheit zu enthüllen und zu vollenden strebt, ein neues organisches Leben, welches bildend auf den Stoff selbst zurück wirkt, so daß auch aus der Wissenschaft als solcher eine neue Art der Rechtserzeugung unaufhaltsam hervorgeht.”

¹⁴⁴ G.F. Puchta, *Das Gewohnheitsrecht* (supra n.132), 146.

¹⁴⁵ G. F. Puchta, *Cursus der Institutionen – Erster Band* (Breitkopf und Härtel, 1841), 29: „Aus dem bisherigen ergibt sich auch das Verhältnis des Staats zu dem Recht. Das Recht entsteht nicht erst durch den Staat, dieser setzt vielmehr ein rechtliches Bewusstsein, ein Recht schon voraus, welches zu schützen seine Hauptaufgabe ist. (...) [D]er Ursprung des Rechts liegt außerhalb des Staats[.]“. The reasons for this have been described as follows by H.-P. Haferkamp, *Die Historische Rechtsschule* (Klostermann, 2018), 109: „Ein wichtiger Einschnitt für diese Entwicklung war das Jahr 1806. Den Untergang des Römischen Rechts als geltenden Rechts vor Augen musste man sich entscheiden, ab man das antike Recht weiterhin zum primären Lehrgegenstand machte... Mit Savignys Konzept wurde der Anspruch Heutiges Römisches Recht zu lehren auch ohne staatliche Absicherungen gerettet“.

¹⁴⁶ On the connections between Savigny and German idealism, generally, see: J. Rückert, *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Verlag Rolf Gremer, 1984), esp. Part III. For a more hesitant judgment here, see: F. Beiser, *The German Historicist Tradition* (Oxford University Press, 2015), 222, who places Savigny closer to the early “romantics”.

Historical School is founded on the belief in an historical-yet-natural law that governs each nation.¹⁴⁷ It stands half-way between history and nature because it accepts, in the words of Max Weber, a “natural law of historical existence”.¹⁴⁸

b. The International Law Conception of the Historical School

If all law flows from a “national” community and not (universal) human reason, will this not mean that the Historical School must, by definition, deny the objective quality of international law? One strand of the Historical School indeed comes close to this conclusion. Because the spirit of a people – and law as its external manifestation – is most alive when its “particularity” and “individuality” are most pronounced, it follows that the more universal and abstract the law becomes, the more the nation loses its character as a people.¹⁴⁹ And following this line of argument, a universal law for all mankind cannot exist because the more the law becomes “abstracted” from a specific *Volksgeist*, the more it loses its quality as a “living” law. For Puchta, there consequently cannot be any international law “properly so called” in the absence of a “natural” *Volk*. All that exists between States is at best international morality – but nothing more.¹⁵⁰

Yet, surprisingly, this rigorous view will not become the “official” view of the Historical School. For Savigny’s position is – famously – much more nuanced; and it is his conception that became dominant in the second half of the nineteenth century.

¹⁴⁷ Savigny, “Vom Beruf unsrer Zeit” (supra n.123), 6: „Das Recht wächst also mit dem Volke fort, bildet sich aus mit diesem, und stirbt endlich ab, so wie das Volk seine Eigentümlichkeit verliert.“

¹⁴⁸ M. Weber, *Wirtschaft und Gesellschaft* (Mohr, 1972), 497: „Naturrecht des historisch Gewordenen“.

¹⁴⁹ Savigny, *Vom Beruf unsrer Zeit* (supra n.123), 116: “In der Geschichte aller bedeutenden Völker nämlich finden wir einen Übergang von beschränkter, aber frischer und lebensvoller, Individualität zu unbestimmter Allgemeinheit. Auf diesem Wege geht auch das bürgerliche Recht, und auch in ihm kann zuletzt das Bewusstsein der Volkseigentümlichkeit verloren gehen: so geschieht es, wenn bejahrte Völker darüber nachdenken, wie viele Eigenheiten ihres Rechts sich bereits abgeschliffen haben, daß sie leicht zu dem so eben dargestellten Irrtum kommen, indem sie ihr ganzes noch übriges Recht für ein *jus quod naturalis ratio apud omnes homines constituit* halten.“

¹⁵⁰ Puchta, *Gewohnheitsrecht* (supra n.132), 142: „Aber man sollte endlich einmal aufhören, wenigstens die Juristen sollten es tun, von denen zu vermuten steht, daß sie den Ausdruck Recht in seinem eigentlichen Sinne gebrauchen, - man sollte aufhören, das Recht dadurch zu entweihen, daß man Sätze mit seinem Namen belegt, für welche sich noch keine rechtliche Form der Geltendmachung gefunden hat, man sollte von einer Völker- oder Staatenmoral, aber nicht von einem Völkerrecht sprechen.“ This passage is extremely close to Austin – to be discussed in Chapter 4.

Partly paralleling the Hegelian idea that the abstract “spirit of humanity” (*Menschheitsgeist*) must always act through (a) particular nation(s),¹⁵¹ Savigny nevertheless comes to affirm the possibility of a binding and objective international law:

“If we look further at the relationship between several peoples and states existing side by side, the latter seems to us at first to be similar to the relationship of individual human beings who are brought together by chance and without being connected into a national community. (...) However, a similar community founded on a legal consciousness can also develop among different peoples and here creates positive law in the same way as is done within one people. The basis of this spiritual community will partly consist in tribal kinship, partly and predominantly in common religious convictions. International law, especially the international law of the Christian-European states, is founded on this; but it can also be discovered among the ancient peoples, as it occurs, for example, in the Roman *jus feciale*. We should also regard this international law as positive law, but for two reasons only as an incomplete legal phenomenon: firstly, because of its incompletely defined content, and secondly because it lacks the real basis on which the law of individuals within the same people is given by the state power, and in particular the judiciary...”¹⁵²

This Savignian key passage would exercise an enormous spell over the majority of German (and British) scholars in the nineteenth century. Without recourse to the older natural law ideas, it promised a “positive” international law where the latter was rooted in a “common” legal consciousness of a group of nations. This common consciousness, created by ethnic bonds or ethical convictions,¹⁵³ would forge an “international community” that could, in turn, become the medium for a positive international law. Admittedly, this positive law would be “imperfect”, due to its greater abstraction (when compared to national law); but law it was. Viewing a law-enforcing sovereign or legal sanctions as non-essential elements, law – as an organic phenomenon – naturally derives from within an existing society; and in Savigny’s

¹⁵¹ Savigny, *System des heutigen Römischen Rechts* (supra n.123), §8: „Was in dem einzelnen Volk wirkt, ist nur der allgemeine Menscheng Geist, der sich in ihm auf individuelle Weise offenbart. Allein die Erzeugung des Rechts ist eine That, und eine gemeinschaftliche That. Diese ist nur denkbar für diejenigen, unter welchen eine Gemeinschaft des Denkens und Thuns nicht nur möglich, sondern auch wirklich ist. Da nun eine solche Gemeinschaft nur innerhalb der Grenzen des einzelnen Volkes vorhanden ist, so kann auch nur hier das wirkliche Recht hervorgebracht werden, obgleich in der Erzeugung desselben die Äußerung eines allgemeinen menschlichen Bildungstriebes wahrzunehmen ist, also nicht etwa die eigenthümliche Willkür mancher besonderen Völker, wovon in andern Völkern vielleicht keine Spur angetroffen werden könnte. Nur darin findet sich eine Verschiedenheit, daß dieses Erzeugniß des Volksgeistes bald dem einzelnen Volke ganz eigenthümlich, bald aber in mehreren Völkern gleichmäßig vorkommend ist. Wie die Römer diese allgemeinere Grundlage des Volksrechts als *Jus gentium* aufgefaßt haben, wird unten gezeigt werden.“

¹⁵² Savigny, *System des heutigen Römischen Rechts* (supra n.123), §11.

¹⁵³ F. C. von Savigny, *System des heutigen Römischen Rechts – Band 8* (Veit, 1849), §348: „Der Standpunkt, auf den wir durch diese Erwägung geführt werden, ist der einer völkerrechtlichen Gemeinschaft der mit einander verkehrenden Nationen, und dieser Standpunkt hat im Fortschritt der Zeit immer allgemeinere Anerkennung gefunden, unter dem Einfluß theils der gemeinsamen christlichen Gesittung, theils des wahren Vortheils, der daraus für alle Theile hervorgeht.“

conception, this offered a foundational base for both public and private international law.¹⁵⁴ Yet crucially: outside the cultural community of States – here: the Christian states of Europe¹⁵⁵ – international “law” could only have a “purely moral character”. For the existence of a common “positive” law was contingent on a common ethical base; and that common ethical base was a regional – not a universal – phenomenon. Only where there was a common morality – and with it a common society – could there be a common law, including a common international law.

Conclusion

This chapter has presented three “idealist” philosophies that developed in Germany after the French Revolution. The contribution of Kantian rationalism here mainly lied in the destruction of the “uncritical” scholastic conception of natural law;¹⁵⁶ and after the *Alleszermalmer* had done his critical work, all that natural law could hope to do was to offer the rational categories through which historical reality could be understood from the point of view of (individual) human reason. Kant indeed accepts the historical reality of a plurality of states; and accepting the principle of state sovereignty, all his rationalist account could provide is a minimalist international law. However, for Kant, States remain under an obligation to leave the state of nature, which constitutes for him a “non-rightful condition” and a “wrong in the highest degree”;¹⁵⁷ but the demand on states is lower, when compared to individual persons, as states already represent

¹⁵⁴ Savigny’s major contribution to international law lay especially in “private international law”; and he has rightly been celebrated as “probably the most influential private international law theorist of the 19th century” (A. Mills, *The Private History of International Law*, (2008) 55 *International and Comparative Law Quarterly* 1 at 34). In the second half of the 19th century, the most influential proponent of the Historical School’s approach to (private) international law would be Mancini, whose work will be discussed in the next chapter.

¹⁵⁵ H.-P. Haferkamp, *Die Historische Rechtsschule* (supra n.145), 266-7: “Welche Neuausrichtung die Schule nun philosophisch nahm, wurde Ende der 1830er Jahre von Zeitgenossen sehr klar war genommen. Hatte das Christentum in den Schuldebatten lange keine Rolle gespielt, so erkannte man nun eine „theologisierende“ bzw. „historisch-christliche Schule“.“

¹⁵⁶ J. Schröder, *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)* (Beck, 2012), 206: “Die entscheidende Veränderung in der Geschichte des Naturrechts nach 1800 liegt also nicht darin, daß es als Wissenschaftliche Disziplin erlischt, sondern darin, daß es nicht mehr als Rechtsquelle gilt.“

¹⁵⁷ Kant, *Doctrine of Right* (supra n.23), §54.

legally constituted moral persons. There cannot, therefore, be a permissive law or postulate of practical reason to force states into founding a “World Republic”; and the normative solution that Kant therefore favours is to found “perpetual peace” on the basis of a voluntary (and regional) federation of states.

The Hegelian philosophy comes, in many respects, to the opposite conclusion. Not peace but war appears as the “actual” centre of human history.¹⁵⁸ Peace signifies stagnation; war means progress in which “national spirits” compete and the “world spirit” dialectically evolves. Hegel’s entire political philosophy is therefore a philosophy of the state; and the resulting “state idealism” cannot “objectively” conceive of an “international law”. International law is always subjective “state law”; and as external state law, the international treaty becomes the sole “authentic” source of such a law. But since the highest ethical substance is the state, treaties must always depend on the subjective wills of the states and can therefore always be – legitimately – broken. The idea of a federation of states (itself based on an international treaty), which could enforce this treaty against their will is seen as a chimerical abstract idea. Does this make Hegel a “positivist” philosopher? The answer should depend on his view vis-à-vis natural law in general; and as we saw in Section 2 above, Hegel is best seen as continuing the “natural law” tradition but confines the latter to the ethical sphere of the nation state. There simply cannot be any law, properly speaking, above the nation – and this includes positive or natural international law.

The Historical School converges and diverges, in a number of normative elements, with the Kantian and the Hegelian project (Figure 3). In line with the Hegelian programme, it attempts to abstract reason from a concrete and collective reality; yet for the Historical School this “reality” is no longer found primarily in the “actual” present but lies in the historical past. (The left-Hegelian criticism that the School would famously encounter later on is that it “legitimises the infamy of today with the infamy of yesterday”.¹⁵⁹) Like Kant and Hegel, the Historical School adopts an idealist

¹⁵⁸ F. Meinecke, *Cosmopolitanism and the National State* (supra n.96), 199: “[With Hegel], a major representative of German philosophy finally gave war an unqualified and definitive sanction, and war received its place in a world view that, more than any other before it, sought to grasp the rational order of the world.”

¹⁵⁹ K. Marx, Critique of Hegel’s Philosophy of Right (available: <https://www.marxists.org/archive/marx/works/1843/critique-hpr/intro.htm>) : “One school of thought that legitimizes the infamy of today with the infamy of yesterday, a school that stigmatizes every cry of the serf against the knout as mere rebelliousness once the knout has aged a little and acquired a hereditary significance and a history, a school to which history shows nothing but its *a posteriori*, as did the God of Israel to his servant Moses, the *historical school of law* – this school would have invented

philosophy that ultimately insists that law is dependent on morality and reason. Its “naturalist” conception of law is however neither universal and individualist (Kant), nor national and statist (Hegel). Founded on the idea of a common legal consciousness, law primarily emerges historically within national communities; yet ethical or ethnic similarities among national communities are also capable of generating an (imperfect) international law. Unlike the Kantian idea of a (European) federation of states, international law here need not be positively “founded” by states; it comes to exist “naturally” and “organically” among (similar) peoples. The Historical School therefore ought to be seen as adopting a form of “concrete” and “collective” natural law thinking.

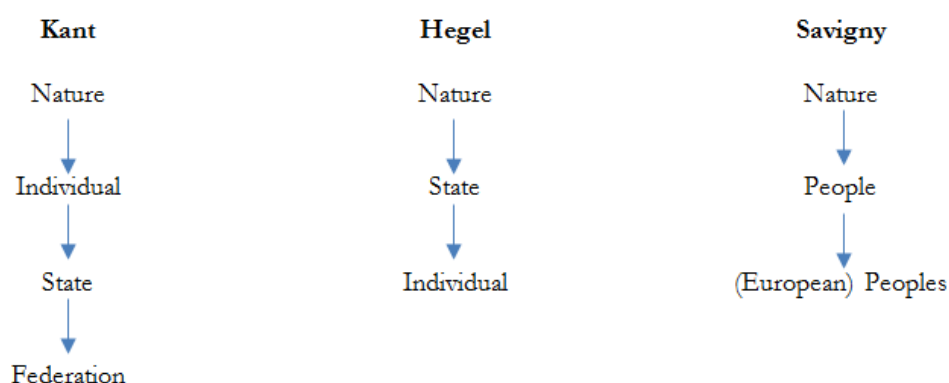


Figure 2. Three Chains of Normativity

In conclusion, all three legal philosophies, discussed in this chapter, remain embedded in a metaphysical project – that sometimes even incorporates theocratic elements.¹⁶⁰ However, unlike the eighteenth century, each abandons, in one way or another, the universalist cosmopolitanism of the earlier century. For Kant, the foundation of international law must practically start from a regional federation of states, and the

German history were it not itself an invention of that history. A Shylock, but a cringing Shylock, that swears by its bond, its historical bond, its Christian-Germanic bond, for every pound of flesh cut from the heart of the people.” Marx therefore, despite his criticism, fully sided with Hegel as against the Historical School: “The criticism of the *German philosophy of state and right*, which attained its most consistent, richest, and last formulation through *Hegel*, is both a critical analysis of the modern state and of the reality connected with it, and the resolute negation of the whole manner of the *German consciousness in politics and right as practiced* hereto, the most distinguished, most universal expression of which, raised to the level of *science*, is the *speculative philosophy of right* itself.”

¹⁶⁰ For Hegel’s panentheism, see only his “History of Philosophy” (supra n.86), 39: “This good, this Reason – in its most concrete representation – is God. God governs the world; the content of His governance, the fulfilment of His plan, is world history.”

Historical School's insistence on an ethical community underpinning all law practically restricts its conception of international law also to a non-universal community. The most radical version of this "regional" conception of international law is however developed by Hegel. For while his philosophy can describe a "subjective" international law within one group of states; Hegel gives absolute priority to the "one" dominant national spirit reigning over its epoch. Only one "regional" international law can thus exist and "the spirits of other nations are without rights".¹⁶¹

¹⁶¹ Hegel, *Elements of the Philosophy of Right* (supra n.67), § 347.

The “German” Nineteenth Century II

Three Practical Conceptions

Introduction

Within the nineteenth century, German political thinking transited from a “cosmopolitan” to a “national” conception.¹ The French victory over the (old) German Empire had shown to many – most famously Hegel – that the Empire was no more.² And even if the older – dynastic and feudal – conceptions of the “droit public de l’Europe” were to anachronistically linger on for some time, international law had become firmly associated with the law of independent and sovereign states. But what “practical” themes and principles did the international jurists of the nineteenth century discuss; and what did German jurists regard as the foundation and sources of international law?

The early decades of the nineteenth century were dominated by the reaction against “Bonapartist” imperialism; and the clearest expression of this was the “European Concert”. Based on the (dynastic) idea of legitimacy, the Concert – and within it: the Holy Alliance – embodied a defensive league that was to guarantee peace within Europe. Can this league be understood as a practical illustration of a Kantian peace federation? Section 1 wishes to show that this was *not* the case – but that the European Concert gradually developed in a “Rousseauian” direction. Yet importantly: the European Concert was only minimally the birthplace of a “European” conception of international law. That conception indeed chiefly derives, as Section 2 wishes to show, from the Historical School. It is this philosophical current – discussed in Chapter 2 – that dominates the better part of the nineteenth century. International law is here seen as only possible within a “community of states” that shares a common ethical and legal consciousness; and it is this conception that will ultimately “contract” the universalist scope of the natural law tradition(s) into a “regional” frame.

What about the Hegelian School? We shall see that elements of Hegelian thinking were integrated into the Historical School, yet it is only by the end of the nineteenth century that a neo-Hegelian strand finds its way into mainstream German international law thinking. The new “state positivism” will come to view international law as a form of

¹ F. Meinecke, *Cosmopolitanism and the National State* (translator: R. B. Kimber; Princeton University Press, 1970).

² G.W.F. Hegel, The German Constitution, in: *Political Writings* (translator: H.B. Nisbet; Cambridge University Press, 1999), 6.

external state law; and this new school eventually elevates the international treaty into the main instrument of international law. The dethroning of custom as the principal source of international law will not only dissolve the organic idea of a (European) community of states as the spiritual basis of international law. But because international treaties are themselves subject to the idea of state sovereignty, the binding nature of international law itself becomes “voluntarist”; and with it, apologetic positivism starts to take root in fin-de-siècle Germany. But let us tread slowly and begin at the beginning.

1. The European Concert: A Kantian “Federation” of States?

The conservative reaction against the French Revolution was swift to challenge the eighteenth-century foundations of international law and its “classic” doctrine of state sovereignty. In a 1791 pamphlet, the question had thus been raised whether the European powers were authorized, “under the general principles of international law”, to launch war against the French republican government;³ and the anonymous author had little hesitation: Even if one assumed, with rationalist social contract theorists, that all power originally derived from the people, once the people had transferred their sovereignty to their regent, they could not dispose or deprive him of his dynastic rights.⁴ Where this had nevertheless happened, the regents of all the civilised states of the world were under an obligation to intervene into the internal affairs of the “fallen” state:

“Among the rulers of all civilized peoples of the world there exists a tacit contract according to which they mutually guarantee each other their sovereign, governmental and dynastic rights against any unauthorized attack; and because of the inviolability and holiness of their persons they have mutually guaranteed this, and according to general international law are bound to perform it. (...) The sentence is thus entirely correct that all the potentates of Europe ought to and are bound to avenge the shame, inflicted upon them in the person of the King of France, and to restore this unfortunate monarch to his freedom and the sovereign and dynastic rights of which

³ Anonymous, *Beleuchtung der Frage: Sind die Europäischen Mächte nach dem allgemeinen Völkerrecht befugt, die neue französische Regierungs-Verfassung, so wie sie gegenwärtig eingerichtet ist, nach fruchtlos versuchten Vorstellungen mit gewaffneter Hand zu bekämpfen?* (1791).

⁴ Ibid., 17.

he has been unlawfully deprived to the extent that he will in future exercise them for the true good of his kingdom with due regard for human rights and equity.”⁵

This proposal in favour of a dynastic defence league was, of course, primarily directed against the French Revolution; yet the underlying principles were much wider. Should *monarchic* States be entitled to intervene into the internal affairs of a *republican* State; and, if so, on what normative grounds? The conservative reaction here reverted to the ancient “feudal” and “religious” conceptions of “legitimacy”; and it is in this spirit that the “Concert of Europe” and the “Holy Alliance” were conceived after the Napoleonic adventure had finally collapsed.

a. The “Concert of Europe” and the “Holy Alliance”: Birth and Evolution

Building on the 1814 Treaty of Peace and founded on the idea that the future of Europe required the various powers “to concert together”,⁶ an international congress had been called into existence in Vienna in 1815.⁷ The resulting “Final Act” was to resettle the political map of Europe comprehensively;⁸ but the idea of regular

⁵ Ibid., 22-23.

⁶ The 1814 Treaty of Peace can be found in E. Hertslet (ed.), *The Map of Europe by Treaty –Volume I* (Butterworths, 1875), 1. The idea of a “concert” can be found in the earlier Treaty of Chaumont (“Treaty of Union, Concert, and Subsidy, between Britannic Majesty and His Imperial and Royal Apostolic Majesty the Emperor of Austria”), esp. Article XVI: “The present Treaty of Defensive Alliance having for its object to maintain the equilibrium of Europe, to secure the repose and independence of its States, and to prevent the invasions which during so many years have desolated the World, the High Contracting Parties have agreed to extend the duration of it to 20 years, to take date from the day of its Signature; and they reserve to themselves, to concert upon its ulterior prolongation, 3 years before its expiration, should circumstances require it.”

⁷ Ibid., Article XXXII: “All the Powers engaged on either side in the present War shall, within the space of two months, send Plenipotentiaries to Vienna, for the purpose of regulating, in General Congress, the Arrangements which are to complete the provisions of the present Treaty.”

⁸ 1815 General Treaty between Great Britain, Austria, France, Portugal, Prussia, Russia, Spain, and Sweden – reproduced in E. Hertslet (ed.), *The Map of Europe by Treaty –Volume I* (supra n.6), 208. On the “constitutional” nature of the act, see its preamble: “The Powers who signed the Treaty concluded at Paris on the 30th of May, 1814, having assembled at Vienna, in pursuance of Article XXXII of that Act, with the Princes and States their Allies, to complete the provisions of the said Treaty, and to add to them the arrangements rendered necessary by the state in which Europe was left at the termination of the last war; being now desirous to embrace, in one common transaction, the various results of their negotiations, for the purpose of confirming them by their reciprocal Ratifications, have authorized their Plenipotentiaries to unite, in a general Instrument, the regulations of superior and permanent interest, and to join to that Act, as integral parts of the arrangements of Congress, the Treaties, Conventions, Declarations, Regulations, and other particular acts, as cited in the present Treaty.” The most important choices of the Act relate to the re-establishment of the Kingdom of Poland (albeit under Russian

congresses to solve European issues for the future would only emerge, a year later, when the final convulsions of the Napoleonic Empire had ended. This new idea manifested itself at first in a “Holy Alliance” – a treaty between (Orthodox) Russia, (Catholic) Austria and (Protestant) Prussia.⁹ The principal provisions here stated:

“Article I

Conformably to the words of the Holy Scriptures, which command all men to consider each other as brethren, the Three contracting Monarchs will remain united by the bonds of a true and indissoluble fraternity, and considering each other as fellow countrymen, they will, on all occasions and in all places, lend each other aid and assistance; and, regarding themselves towards their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect Religion, Peace, and Justice.

Article II

In consequence, the sole principle of force, whether between the said Governments or between their Subjects, shall be that of doing each other reciprocal service, and of testifying by unalterable good will the mutual affection with which they ought to be animated, to consider themselves all as members of one and the same Christian nation; the three allied Princes looking on themselves as merely designated by Providence to govern three branches of the One family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part, has in reality no other Sovereign than Him to whom alone power really belongs, because in Him alone are found all the treasures of love, science, and infinite wisdom, that is to say, God, our Divine Saviour, the Word of the Most High, the Word of Life...”

The “Holy Alliance” undoubtedly constituted the most tangible form of theocratic enthusiasm in post-Napoleonic Europe.¹⁰ But the proposed “Christianisation” of the European Concert was downright rejected by Britain. Considering the theocratic idea of a Christian commonwealth as “a piece of sublime mysticism and nonsense”,¹¹ a second peace treaty was quickly concluded: the 1815 Treaty of Alliance (“Quadruple

domination), the creation of the “Germanic Confederation”, and the fusion of the ancient United Provinces of the Netherlands with the Belgian provinces into the Kingdom of the Netherlands. Especially the last territorial choice was inspired by the idea of the “balance of power”, see Secret Articles to the First Paris Peace Treaty (Hertslet, *Map of Europe by Treaty* (supra n.6), 18), Article III: “The establishment of a just Balance of Power in Europe requiring that Holland should be so constituted as to be enabled to support her Independence through her own resources, the Countries comprised between the Sea, the Frontiers of France, such as thy are defined by the Present treaty, and the Meuse, shall be given up for ever to Holland.”

⁹ The Treaty can be found in Hertslet, *Map of Europe* (supra n.6), 317. Article III allowed for the subsequent accession by other powers; and, indeed, France would accede in 1815, the Netherlands in 1816, Saxony and Switzerland in 1817. According Hertslet, “the greater part of the Christian Powers acceded to this Treaty” (ibid., 319).

¹⁰ For the religious and cultural background against which the Holy Alliance was formed see especially Schleiermacher’s “Addresses on Religion” (1799), and Chateaubriand’s “The Genius of Christianity” (1802).

¹¹ British Foreign Secretary, Castlereagh – quoted in H. Kissinger, *A World Restored: Metternich, Castlereagh and the Problems of Peace, 1812-22* (Echo Point, 2013), 189.

Alliance’). The latter refrained from the mystical religiosity that had informed the Holy Alliance but it also re-confirmed that “the repose of Europe [was] essentially interwoven with the confirmation of the order of things”, which – founded on royal authority – was in need to be guaranteed.¹² To that effect the celebrated Article VI now stated:

“To facilitate and to secure the execution of the present Treaty, and to consolidate the connexions which at the present moment so closely unite the Four Sovereigns for the happiness of the world, the High Contracting Parties have agreed to renew their Meetings at fixed periods, either under the immediate auspices of the Sovereigns themselves, or by their respective Ministers, for the purpose of consulting upon their common interests, and for the consideration of the measures which at each of those periods shall be considered the most salutary for the repose and prosperity of Nations, and for the maintenance of the Peace of Europe.”

The four allied powers – later joined by France – here expressed their wish to “concert together” through regular congresses; and this “Congress system” became known as the “Pentarchy”. In its first decade, and chiefly as a result of the Troppau Congress, it became identified with the “legitimist” spirit of the Holy Alliance. For the Troppau “Preliminary Protocol” had set out three core principles that defended a reactionary and conservative dynasticism. In line with the first principle, States “which have experienced changes in the form of their internal government from revolution” were to be excluded from the “European alliance”. Secondly, “the respect owed to the authority of every legitimate government” meant that foreign recognition of illegal changes of government had to be refused. Finally, and most importantly, whenever any revolutionary changes would “cause other countries to fear immediate danger” and “in order to return them to the alliance”, the allied powers threatened collective intervention through “measures of coercion, whenever such coercion is required”.¹³

On the basis of these three “international” principles, the European Concert famously intervened in Italy and Spain; yet its reactionary conservatism immediately provoked – pace Burke – the liberal opposition of Britain; and for some, the original conception of the “European Concert” therefore ceased to exist by 1822.¹⁴ The Concert however

¹² Preamble to the 1815 Treaty of Alliance and Friendship between Great Britain, Austria (Prussia, and Russia) – found in Hertslet, *Map of Europe* (supra n.6), 372.

¹³ Preliminary Protocol (19 November 1820), Troppau – quoted in M. Jarrett, *The Congress of Vienna and its Legacy* (Tauris, 2013), 260.

¹⁴ W. A. Phillips, *The Confederation of Europe: A Study of the European Alliance, 1813-1823 as an Experiment in the International Organization of Peace* (Longmans, 1914), 266. For a criticism of this view, see I. Clark,

survived – albeit in a different form. For even if its “restorationist” character became defunct with the independence of Greece and Belgium;¹⁵ both situations had confirmed the “monarchical” philosophy of the Concert. The 1830 and 1848 revolutions in France, on the other hand, buried even that minimalist substance. And if the European Concert, as a “confederation” of European states under the hegemony of “Great Powers,”¹⁶ can therefore be said to survive into the second half of the nineteenth century, it was based on political principles very different to those of 1815. It is perhaps best characterised as “a new method of diplomacy – diplomacy by congress or conference”;¹⁷ whose task it is to sanction territorial changes that may affect the balance of power within Europe.¹⁸

This novel focus has two important consequences. By leaving the “internal affairs” of each state to itself, the Concert evolves into a “security confederation” that is meant to only check the external ambitions of its members. And in its exclusive task to prevent European wars,¹⁹ it comes to assume a distinctly Rousseauian flavour. But even more importantly, the European Concert comes to be seen as playing an active role in the re-construction of Eastern Europe after the Crimean War. The “Eastern Question” indeed becomes a central task – a task that engages the European continent, including the Ottoman and Russian Empires.

The Hierarchy of States: Reform and Resistance in the International Order (Cambridge University Press, 1989), 126.

¹⁵ According to T.E. Holland, *European Concert in the Eastern Question* (Clarendon Press, 1885), the Greek revolt against the Turkish Empire “was naturally distasteful to the Holy Alliance” (ibid., 4). The Alliance indeed originally insisted that Greece should remain a dependency of that Empire because the Ottoman Empire was seen as the “legitimate” government (W. A. Phillips, *The Confederation of Europe* (supra n.14), 236). This position however dramatically changed by 1830. With regard to Belgium, see only: 1831 Treaty between Great Britain, Austria, France, Prussia, and Russia, and Belgium, relative to the Separation of Belgium from Holland (E. Hertslet, *Map of Europe by Treaty*– Volume II (Butterworths, 1875, 858).

¹⁶ On the notion of “confederacy” see W. A. Phillips, *The Confederation of Europe* (supra n.14); on the notion of “collective hegemony”, see: I Clark, *Hegemony in International Society* (Oxford University Press, 2011), Chapter 4; as well as Matthias Schulz, *Normen und Praxis: Das Europäische Konzert der Grossmächte als Sicherheitsstrat, 1815-1860* (Oldenbourg, 2009).

¹⁷ R. Elrod, *The Concert of Europe: A Fresh Look at the International System*, (1976) 28 *World Politics* 159 at 162. And see also: F. H. Hinsley, *Power and the Pursuit of Peace: Theory and Practice in the History of Relations between States* (Cambridge University Press, 1967), 212: “It is one of the ironies of international history – and perhaps it is also one of the lessons – that the failure of the [Holy Alliance] marked not the end but the beginning of an age of collaboration between the Great Powers, because they then fell back on the Congress system as it had been interpreted by [the British].”

¹⁸ R. Elrod, *The Concert of Europe* (supra n.17), 162.

¹⁹ M. Schulz, *Normen und Praxis* (supra n.16), 559: „Als Hauptfunktion des Konzerts sind die Regulierung und Kontrolle der Sicherheit und des Friedens in Europa und im Orient zu erkennen.“

b. *The “Concert of Europe” and the Nature of International Law*

Did the European Concert, and the Holy Alliance, influence nineteenth century conceptions of the nature of international law? In 1804, the Russian Emperor had directly linked the idea of a European confederation with the Kantian idea of a re-foundation of international law:

“It is no question of realising the dream of perpetual peace, but one could attain at least some of its results if, at the conclusion of the general war, once could establish on clear, precise principles the prescriptions of the rights of nations. Why could one not submit to it the positive rights of nations, assure the privilege of neutrality, insert the obligation of never beginning a war until all the resources which the mediation of a third party could offer have been exhausted, until the grievances have by this means been brought to light, and an effort to remove them has been made? On principles such as these one could proceed to a general pacification, and give birth to a league, of which the stipulations would form, so to speak, a new code of the law of nations...”²⁰

The Holy Alliance had however significantly moved away from these liberal principles. And by 1815, the European Concert followed a number of normative principles that clearly went against the Kantian tradition. Not only did the *hegemonic* idea that “Great Powers” were legally entitled to intervene in the internal affairs of other states blatantly violate the sovereign *equality* of all states;²¹ the *legitimistic* idea that a republican revolution entitled such an intervention contradicted the internal sovereignty of all states. The early European Concert, and especially the Holy Alliance, were thus formed on distinctively un-Kantian principles.²²

But did they nonetheless create a “new code of the law of nations”; and if so, was the latter confined to “members” of the Concert or part of a broader evolution of international law? When Klüber’s “Europäisches Völkerrecht” first appeared in 1821,

²⁰ Quoted in: R. Albrecht-Carrie (ed.), *The Concert of Europe* (Walker, 1968), 27.

²¹ I. Clark, *The Hierarchy of States* (supra n.14), 2: “a final de jure recognition of the inequalities that had always existed de facto in the balance of power system”.

²² In the words of Rolin-Jacquemyns, *De l’étude de la législation compare et de droit internationale*, (1869) 1 *Revue de droit international et de législation comparée* 225 at 236 : « C’est ainsi que la Sainte-Alliance elle-même et les actes des Congrès qui en furent la conséquence, en organisant une espèce d’assurance mutuelle des monarchies conservatrices contre l’incendie révolutionnaire, ne furent au fond que l’idée de Kant retournée au profil de l’absolutisme, et recouverte d’un vernis mystique. »

it was still too early to answer these questions;²³ and by the time of Heffter's "Das Europäische Völkerrecht der Gegenwart" (1844), the Holy Alliance was already dismissed as a "personal" monarchic union that merely promised to enforce the – ordinary – principles of international law.²⁴ This view became subsequently dominant;²⁵ and the great majority of German jurists came to subsequently consider the Holy Alliance as a "childish" attempt to "re-Christianise" the normative foundations of international law.²⁶ The principles underlying the early European Concert were consequently downplayed as being "only an interlude" with "no lasting effect on either the question of the recognition of new States and governments or the question of intervention".²⁷

Yet the strongest voice against the Concert as the normative basis for a "new" international law came, as will be discussed in Chapter 5, from the United States. For fearful that the "old" European monarchies would attempt to restore their colonial empires in Latin America, the young American Republic came to support its Latin republican sisters. The resulting "Monroe Doctrine" thus categorically rejected the normative principles behind the European Concert for the American hemisphere. From the perspective of general international law, the European Concert must therefore be characterised as a "regional" international organisation; and it is against this "regionalist" reading that the position of the Ottoman Empire must also be judged. For while it is true that the original Concert was based on Christian values, the idea that European powers did not recognize the "Ottoman Empire" as a sovereign

²³ J. L. Klüber, *Europäisches Völkerrecht* (Cotta, 1821), 9: "Die Erschütterungen, welche unlängst den europäischen Staaten ein Vierteljahrhundert lang widerfahren sind, werden höchstwahrscheinlich manche Änderungen oder Modificationen in den Grundsätzen des positiven Völkerrechts zur Folge haben, deren Festsetzung man vergebens schon vor dem Wiener Congress erwartet hatte; doch hat man alle Ursache zu glauben, daß diese Änderungen weder so zahlreich noch so nah seyn werden, daß darum die Bekanntmachung dieses Werkes zu verschieben wäre."

²⁴ A. W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (Schroeder, 1844), 9-10. With regard to the principle of non-intervention, the "classic" rules are thus reconfirmed and here especially in the general rule that no state would be entitled to impose a particular constitution onto another (ibid., 85).

²⁵ See for example: C. Kaltenborn von Stachau, *Kritik des Völkerrechts* (Mayer, 1847), whose influential textbook characterises the Holy Alliance as a "personal union" of monarchs; and who equally downplays the European Concert as a merely institutional arrangement to enforce the "classic" principles of international law.

²⁶ J.C. Bluntschli, *Das Moderne Völkerrecht der Civilisirten Staaten als Rechtsbuch dargestellt* (Beck, 1868), 47: „mittelalterliche Vorstellung“ within the „Fürstenrechts“, „unreif und beinahe kindlich“; and later (ibid., 98): „Die heilige Allianz vom Jahr 1815, welche auf das Prinzip der christlichen Religion ein neues christliches Völkerrecht begründen will, kann nicht als modernes Völkerrecht gelten.“

²⁷ W. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 497.

member of the general society of nations runs counter to an extensive treaty practice.²⁸ When the 1856 Treaty of Peace would thus later speak of the “admission of the Sublime Porte into the European System”,²⁹ this admission was by no means a belated admission of Turkey as a moral – international – person; it was instead the recognition that Turkey was part of the “republic of Europe”, that is: a regional international organisation that subjected the European sphere to “collective” considerations.³⁰

2. “European” International Law: The Rise of the Historical School

The “European Concert” constituted a formidable – yet ultimately failed – attempt to reconceive international law. Did this mean that the older eighteenth century conceptions of international law had survived; or did the nineteenth century draw on the philosophical writings discussed in Chapter 2?

A good starting point for an answer may be Theodor von Schmalz’s “European International Law”. Writing in 1817, it followed a predominantly Kantian approach,³¹ which accepted the existence of a “natural” international law derived from a “legal metaphysics” distinct from positive contracts and custom.³² Yet this was to change dramatically. And while Klüber would still confirm the existence of a “natural”

²⁸ For an extensive discussion of the treaty relations between the Ottoman Empire and the European state system since the sixteenth century, see: T. Naff, *The Ottoman Empire and the European States System*, in H. Bull and A. Watson (eds.), *The Expansion of International Society* (Oxford University Press, 1985), 143. It might also be important to recall that the embassy of the Ottoman Empire was opened in London in 1793.

²⁹ 1856 General Treaty of Peace between Great Britain, Austria, France, Prussia, Sardinia, and Turkey (E. Hertslet, *Map of Europe by Treaty*– Volume VII (Butterworths, 1875), 1250), and especially Article VII entitled “Admission of the Sublime Porte into the European System. Guarantee of Independence of Ottoman Empire”. The provision states that the parties “declare the Sublime Porte admitted to participate in the advantages of the Public Law and System (Concert) of Europe. Their Majesties engage, each on his part, to respect the Independence and the Territorial Integrity of the Ottoman Empire; Guarantee in common the strict observance of that engagement; and will, in consequence, consider any act tending to its violation as a question of general interest”.

³⁰ In the words of T. E. Holland, *The European Concert in the Eastern Question* (Clarendon Press, 1885), the Turkish Empire was placed “under the tutelage of Europe” (ibid., 2).

³¹ T. von Schmalz, *Das Europäische Völkerrecht in acht Büchern* (Duncker und Humblot, 1817), 3: “Wie nun die Moral, als Metaphysik der Sitten, Wissenschaft der Freiheit überhaupt, so ist Ethik Wissenschaft der inneren, Rechtslehre Wissenschaft der äußeren Freiheit.”

³² Ibid., 9.

international law as the “cement” for any system of positive international law in the early 1820s,³³ this residuary natural law thinking was progressively abandoned. It was henceforth not Kant but the Historical School which, combined with Hegelian splinters,³⁴ came to offer the most successful conception of international law. For the majority of international lawyers came to accept that there existed a “natural” society among civilised states that generated a customary law that was legally binding on the States.

a. Synthesizing Hegel and Savigny: Heffter’s “European International Law”

The best representative of a new approach vis-à-vis the foundations of international law is August Heffter, whose 1844 textbook became a milestone for nineteenth century international law. Natural law thinking is here categorically rejected; and a new synthesis between the “Philosophical School” (Hegel) and the “Historical School” (Savigny) is attempted. Originally conceived as a primarily Hegelian project,³⁵ the final book takes over much more of the Historical School. For in clearly rejecting the idea that there is no international “law” apart from each individual state will,³⁶ the

³³ J. L. Klüber, *Europäisches Völkerrecht* (supra n.23), 6: “Es füllt die Lücken aus, die zu oft in einem System des positive Völkerrechts sich zeigen, und so weit ist sein Gebrauch wesentlich. Überdies dient es demselben System als Bindemittel[.]“; and see *ibid.*, 18: „Daher ist das Völkerrecht, auch das natürliche, ein Theil des öffentlichen Rechtes.“ For a similar view, see also F. Saalfeld; *Handbuch des Positiven Völkerrechts* (Osiander, 1833), 1: „Das Völkerrecht – Droit des gens, law of nations, international law – wird eingetheilt in allgemeines oder natürliches und in positives.“

³⁴ The only “pure” Hegelian in nineteenth century Germany appears to be Adolf Lasson, whose “Princip und Zukunft des Völkerrechts” (Hertz, 1871) directly applies Hegelian philosophy to international law. His denial of international law and the centrality of “war” is however generally rejected by the German mainstream – something he himself admits (*ibid.*, iii). For a softer Hegelianism. See: K. T. Pütter’s “Die Staatslehre oder – Souveränität als Princip des practischen Europäischen Völkerrechts”, (1850) 6 *Zeitschrift für die gesamte Staatswissenschaft*, 299.

³⁵ A. W. Heffter, *Das Europäische Völkerrecht der Gegenwart* (supra n.24). Heffter’s textbook was supposed to be co-authored with E. Gans – the famous “Oberhegelianer”. But Gans had suddenly died in 1839; and the book begins with a homage to his friend in which Heffter states that Gans – in true Hegelian spirit – was supposed to write about war, whereas Heffter was to write on “peace” (*ibid.*, iii: “Er wählte den Krieg und überließ mir den Frieden.”)

³⁶ *Ibid.*, v. Heffter rejects the idea that there must be a “guaranteed” sanction; and he here draws a contrast between “guaranteed law” and “free law”. For an express reference to Austin, see *ibid.*, 3 – footnote 1.

normative foundation of that law is seen in the “common” (!) consciousness that is formed within a “society” of nations:

“I find the deeper reason for all international law in the rational will of men, based on the necessity of thought, when it enters into a common consciousness. The latter not only asserts itself in the individual state as positive law... but also, and in the same way, among nations that enter into a social relationship with each other. For where there is a society, there is also a right; the State itself here becomes the rational man of the species; and if several isolated nations come together in this way, they can only exist on this normative basis[.]”³⁷

This re-foundation of international law, along the lines suggested by the Historical School, would have an important consequence: only those states that “shared” a normative consciousness could be considered as part of the same “society” in which a “common” law could develop. This legal consciousness had not developed everywhere, and international law could consequently not be “universal”.³⁸ Within Europe, on the other hand, a common society had been created on the basis of Christianity and Roman law, and a “European” international law had therefore emerged.³⁹ The central principle underling this law was the (Hegelian) idea of a mutual recognition:

“A law based on mutual recognition can only have validity among those States in which reciprocity of application is ensured and a reciprocal commerce exists, or is presumed to exist, according to the same principles... European international law, in its historical roots, is thus valid essentially only among Christian states whose common morality is guaranteed by an agreement in the highest laws of humanity and the concordant character of their state powers. On the other hand, it finds only a partial application to non-Christian states, depending on the reciprocity to be expected, unless one voluntarily wishes to make the moral principle the guiding principle of one's actions[.]”⁴⁰

This “synthesis” of Hegel’s principle of mutual recognition and Savigny’s idea of an “ethical” European community offered a new basis for international law. This new basis is decidedly not “positivist” in that it accepts an international normativity

³⁷ Ibid., vi.

³⁸ Ibid., 2: „Gibt es nun ein solches äußeres Staatsrecht überhaupt und überall? In der Wirklichkeit gewiß nicht für alle Staaten oder Völker des Erdballs. Immer hat es nur einen Theil derselben umfasst; nur in Europa und in den von hier aus gegründeten Staaten ist es in das allgemeine Bewußtsein getreten, so daß man ihm den Namen eines Europäischen gegeben hat und mit Recht noch immer geben darf.“

³⁹ Ibid., 7: „Hierin lag der Anfang eines allgemeinen europäischen Völkerrechts. Seine positiven Grundlagen waren die Grundsätze des Christentums und das Römische Recht, so weit es die Kirche nicht missbilligte; die für unantastbar, weil natürlich und göttlich, gehaltenen Regeln des Privatrechts wurden nun auch auf die Völkerrechtsverhältnisse übertragen....“

⁴⁰ Ibid., 11.

independent and above individual state wills. The primary source of international law, rooted in the common consciousness of a plurality of States, is here customary law;⁴¹ but more importantly still: the existence of a set of a priori principles is presumed. These foundational principles derive from the “internal necessity” of the existing society of states; and they are consequently equated with a “hypothetical natural law of states”.⁴² This new “organic” or “societal” natural law accepts – like the classic *ius gentium* tradition – private individuals as subjects of international law.⁴³ Individual human rights as well as a “private” international law can therefore be conceived as an integral part of international law.⁴⁴

A similar combination of Savignian and Hegelian elements can be found in Oppenheim;⁴⁵ but the subsequent triumph of the Historical School over Hegel can be found in later international jurists. Kaltenborn von Stachau thus dismisses Hegel’s denial of an international law above States outright,⁴⁶ and assuredly confirms the “normativity” of international law.⁴⁷ Locating this normativity in the “collective consciousness” of European nations, this collective normativity becomes gradually identified with “Christian” values: “*Positive international law is rightly called a Christian law. Only the Christian peoples and kingdoms have so far been able to develop their legal life to an international legal life.*”⁴⁸ But under the influence of British authors, this identification of

⁴¹ Ibid., 13.

⁴² Ibid., 12.

⁴³ Ibid., 26.

⁴⁴ Ibid., 1.

⁴⁵ H. B. Oppenheim, *System des Völkerrechts* (Kröner, 1866 - originally published in 1845). Forcefully rejecting the “old” metaphysical natural law (ibid., 1), Oppenheim also tries to find a synthesis between the “philosophical” and the “historical” school (ibid., 5). And while closer to Hegel than Heffter, he nonetheless accepts the existence of a “cosmopolitan” private law (ibid., 3): “Das Völkerrecht umfaßt die Rechtsbeziehungen der verschiedenen Staaten und auch die der Bürger verschiedener Staaten zu einander. Es enthält demnach auch das sogenannte „Weltbürgerrecht“, und das eigentliche „Allgemeine Menschenrecht.“ Part IV of Oppenheim’s textbook indeed explores this „Weltbürgerrecht“ and especially private international law (Chapter XV).

⁴⁶ C. Kaltenborn von Stachau, *Kritik des Völkerrechts* (supra n.25), 156: „Freilich gerade Hegel ist hier am schwächsten und macht vielleicht einen Rückschritt; er stellt das Völkerrecht in die Willkür der Staaten[.]“

⁴⁷ Stachau expressly rejects a conception of international law that would require a guaranteed “sanction”, ibid., 308-310: „Auch ist die Erzwingbarkeit nicht der einzige Charakter des Rechts, auch nicht sein wesentlichster. Dieser besteht vielmehr darin, dass es Norm und Ordnung für alle menschlichen Gemeinverhältnisse in allen Sphären und Dimensionen des privaten und des öffentlichen Lebens, mithin auch des sozialen Verhältnisses der Völker und Staaten untereinander, also Völker-Recht. – Der Zwang geht nun aber von der Gemeinschaft als solcher aus. Dies ist die Ordnung, die aufrecht erhalten werden soll. Das Rechtsleben ist das Gemeinleben.“

⁴⁸ Ibid., 270. What, then, is the relationship between Christian and non-Christian states? For von Stachau, this relation, while an “international” relation, is not one regulated by international law (ibid.):

the collective consciousness with a “Christian” value system is itself gradually replaced by the secular idea of a common “culture” or “civilisation”. Von Holtzendorff, for example, soon identifies the “common legal consciousness” with being member of the same “cultural community” that is itself seen as the product of a historical process of progress and civilisation.⁴⁹ And building on the work of Lorimer,⁵⁰ three classes of nations are subsequently identified.⁵¹

This “European” rejection of a universal international law would increasingly gain ground and was defended in the “standard textbooks” of the time.⁵² Importantly, the Historical School clearly affirms the “normativity” and “positivity” of international law: “The norms of international law are real legal rules; they bind all civilised states and are positive law.”⁵³ For even if there is no European “state” above the plurality of sovereign states, for the Historical School, there exists “a legislative, judicial and executive power” within the international legal order that is offered by the “community of civilised states itself”.⁵⁴

„Das allgemeine positive Völkerrecht ist einzig das christliche. Die andern Staaten haben internationale Beziehungen; diese stehen aber nicht auf der Basis des Rechts.“

⁴⁹ F. von Holtzendorff, *Handbuch des Völkerrechts* (Habel, 1885). See also F. von Liszt, *Das Völkerrecht* (Haering, 1902), 2: „Die Völkerrechtsgemeinschaft (la communauté du droit des gens, la famille des nation) wird umgrenzt durch die gemeinsame Rechtsüberzeugung, die auf der Gemeinsamkeit der Kultur und der Interessen beruht. (...) Die durch das Völkerrecht umschlossene Staatengemeinschaft ist zunächst (das ist das ideelle Moment) eine Kulturgemeinschaft.“

⁵⁰ For a discussion of this British author, see Chapter 5. According to Grewe, *Epochs of International Law* (supra n.27), 465, it was mainly von Holtzendorff who took over “the civilisation ideology, emanating from Britain”.

⁵¹ F. von Holtzendorff, *Handbuch des Völkerrechts* (supra n.49), 12: „So lange jene wesentlichen Unterscheidungen im Bewusstsein der Nationen fortbestehen, deren Merkmale durch Geschichtsforschung, Völkerpsychologie und Ethnographie als Barbarei, Halbkultur oder Zivilisation nachgewiesen werden, kann es ein allgemeines, practisches die Menschheit umfassendes Völkerrecht nicht geben.“ For a „French“ comparison, see also F. de Martens, *Traité de Droit International* (Librairie Maresco, 1883), 241-2 (with reference to J. St. Mill).

⁵² For example: F. von Liszt’s textbook (supra n.49). For a „history“ of this „standard textbook“, see: F. Herrmann, *Das Standardwerk: Franz von Liszt und das Völkerrecht* (Nomos, 2001).

⁵³ F. von Liszt, *Das Völkerrecht* (supra n.49), 6.

⁵⁴ *Ibid.*, 7.

b. The Nationality Principle and the Rise of Private International Law

The probably most important consequence of this triumph of the Historical School in Germany is the phenomenal rise of “private” international law in the second half of the nineteenth century. After all, Savigny – a private law scholar himself – had made his comments on the possibility of a legally binding international law in the context of a common private law – a *ius commune* between European States. This idea was further developed, on the European continent more generally, around the middle of the nineteenth century.⁵⁵ A vital impulse would here come from a number of Italian scholars,⁵⁶ and especially Pasquale Mancini.

The particular aim behind the “Italian School” was to elevate the principle of “nationality” to the very centre of international law. Having won early victories in the context of the Greek and Belgian independence, the nationality principle was soon seen as “a doctrine justifying the novel aspirations of the Italians”.⁵⁷ And according to Mancini,⁵⁸ the nationality principle ought to be regarded as a philosophical achievement because it can – substantively – regard each national community – as opposed to the formal category of the state – as the “elementary unit” of the science of international law.⁵⁹ Each nation is animated by a national consciousness (“*coscienza della Nazionalità*”) that grants each individual people its own legal “personality”.⁶⁰

With this change of perspective, three corollaries follow. First, each nation is always free to adopt its internal constitution; second, because of its internal sovereignty, it

⁵⁵ For an excellent historical overview, see: R. de Nova, *Historical and comparative introduction to conflict of laws* (1966) 118 *Collected Courses of the Hague Academy of International Law* 435; and more recently and more specifically on the nineteenth century: R. Banu, *Nineteenth-Century Perspectives on Private International Law* (Oxford University Press, 2018).

⁵⁶ For an overview of the Italian scene, see specifically: A. Pierantoni, *Geschichte der Italienischen Völkerrechtswissenschaft* (Manz, 1872), Part IV; and A. P. Sereni, *The Italian Conception of International Law* (Columbia University Press, 1943), Chapter IX.

⁵⁷ *Ibid.*, 157. Sereni quotes von Holzendorff, claiming in 1870, “that a history of the literature of international law in Italy is at the same time a history of the conceptions of the principle of nationality”.

⁵⁸ P. S. Mancini, *Della Nazionalità Come Fondamento Del Diritto Delle Genti*, available here: https://books.google.co.uk/books?id=dHC445QKgSQC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false. For an extensive discussion of Mancini’s conception, see A. Droetto, *Pasquale Stanislao Mancini e la Scuola Italiana di Diritto Internazionale del Secolo XIX* (Giuffrè, 1954), esp. 147-204.

⁵⁹ Mancini, *Della Nazionalità Come Fondamento Del Diritto Delle Genti* (supra n.58), 47.

⁶⁰ *Ibid.*, 38-39.

must also be able to externally demand its independence vis-à-vis foreign States.⁶¹ A third corollary would, finally, “revolutionise” the field of private international law. For Mancini now comes to reorient the law produced by a “common” ethical community alongside the principle of nationality with the effect that the territoriality principle is fundamentally undermined. Following Mancini, each state may thus be legally bound to apply *foreign* law within its territory, where persons of a different nationality are involved. Private international law becomes consequently perceived as a *legally* binding *international* law:

“[F]or centuries, the prevailing doctrine argued that every extension of national law for the benefit of foreigners and every recognition of foreign legislation was exclusively based on the voluntary comity between nations, or their express or tacit consent ... This false idea, according to which the civil condition of foreigners outside their home state as well as the legal force of a foreign law solely derived from a generous and spontaneous concession [of the host state], constituted the main obstacle to the emergence of a scientific understanding of private international law. (...) [However], the treatment of foreigners cannot depend on the comity or the sovereign and arbitrary will of each State. The science cannot but consider this treatment as a rigorous duty of international justice from which a nation cannot relieve itself without violating international law and without breaking the bond that unites the human species into a great legal community that is itself based on ... that universal society that Wolf called the “*respublica maxima gentium*”.”⁶²

This powerful affirmation of the idea of a legally binding private international law henceforth challenged the internal sovereignty of States from the private law side. For founded on the principle of nationality, it obliges states to forsake the application of their own domestic laws; and this limitation on its internal sovereignty is not regarded as a voluntary concession but as a legal obligation arising from a compulsory and binding international law. Yet according to Mancini, not all rules of private international law had such binding force; and following Wolff (and Vattel) once more, he thus distinguished between a “necessary” and a “voluntary” private international law (while also conceding a sovereign prerogative to maintain “public order”).⁶³

But despite these normative qualifications, Mancini’s conception of private international law, as a form of international law proper, quickly gained ground. The

⁶¹ Ibid., 43.

⁶² P. S. Mancini, Rapport Première Commission – Droit International Privé, (1875) 7 Revue De Droit International 329 at 334-5. See also: Fiore, *Diritto Internazioanle Privato* – Volume I (Unione Tipografico, 1888), 59: „Gli Stati, in quanto sono considerati come persone, che coesistono nella Magna Civitasm vanno soggetti alla suprema legge del diritto a della giustizzia. La società di fatto trag li Stati non sarebbe possibile, senza la società di diritto: *ubi societas ibi jus*.”

⁶³ P. S. Mancini, Rapport Première Commission – Droit International Privé (supra n. 62), 352-3.

view would, for example, be promoted by von Bar – the famous heir to Savigny in Germany. In “The Theory and Practice of Private International Law”, we indeed find one of the finest defences of the international nature of private international law:

“[T]he rules of private international law cannot possibly be dependent merely upon the arbitrary determination of particular States. The State cannot assert the competency of its own legal system in absolute independence of other States, and in the face of their sovereign rights, which are of as much weight as its own. (...) It can be demonstrated that there is to a certain extent a real *communis consensus* of civilised States, a true law of custom. (...) Of course, every State has, in the abstract, the power of denying effect within its own territory to such a law of custom. But up to that limit the general law of custom, if it can really be shown to be such, will be recognised in the individual States. A law of custom is simply the instinctive development of right, tied down to no particular form, and this instinctive development does not draw its virtue from the will of the State. We cannot admit the objection, therefore, that there can be no such thing as a general law of custom, with reference to the rules of private law, for the whole of the civilised world. (...) It would be, as a matter of principle, correct to take up public law and private international law together, under the description “international law.”⁶⁴

Private international law is here conceived as part and parcel of *international* law; and this idea of a legitimate private law sister to classic (public) international law became dominant in the final quarter of the nineteenth century.⁶⁵

But how exactly are private and public international law connected? The Historical School had originally assumed that both were coordinated branches stemming from the same tree: the legal consciousness of an international “community”. Yet this implied that both States and individuals were equally subject to international law, and by the end of the nineteenth century, this position became increasingly attacked by “public” international law scholars. The attempt was thus undertaken to derive “private” international law from “public” international law; and to argue – presupposing the existence and binding nature of “public” international law – that the latter universally “limited” the jurisdiction of each state in such a way that only one State held exclusive jurisdiction over private law matters. The most elaborate attempt

⁶⁴ L. von Bar, *The Theory and Practice of Private International Law* (translator: G. Gillespie; Green, 1892), 2, 5-6.

⁶⁵ A. Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws* (1942) 42 Columbia Law Review 189 at 194, who even goes so far as to claim that “the Law-of-Nations doctrine constituted a virtually unified conception”. “Nearly all of the leading continental writers of the period espoused the Law-of-Nations conception: in France, Weiss, Pillet and Bartin; in Germany, von Bar and Zitelmann; in Italy, Fiore and Diena; in Holland, Jitta; in Belgium, Laurent; in Switzerland, Brocher and Meili.... [S]upported by the “weight of authority” the Law-of-Nations doctrine slipped into most of the familiar civil law textbooks and commentaries. It dominated the debates in the *Institut de Droit International* and other learned societies, and it became the familiar view of the continental legal profession.” On this point, see also the overall “Conclusion – Apologetic Endings”.

in this direction was made by Ernst Zitelmann.⁶⁶ In an intellectual move, reminiscent of Kant, it was argued that the very idea of a – conclusive – private right presupposes a national and an international legal order that guarantees that right:

“If, therefore, any subjective private right is likely to be subject to the possibility that other states may also assess its existence during its practical realisation, it follows that, in order to be fully effective, the subjective right must also be recognised as existing by other states. And since, following the earlier argument, the valid existence of a subjective right is based on the legislative power of the State, this proposition arrives at the top: in order for the subjective private right to be fully effective, the legislative power of the State that conferred it must be recognized under international law. If this is the case, then, the subjective right under international law must also be regarded as existing by every foreign state ... *We must therefore adopt this maxim: only that state can confer upon me a justified claim to international recognition of a subjective private right, to which the international legal order has granted the general public power to confer the private right conferred; and likewise only that state can withdraw such private right again.*”⁶⁷

Starting from the premise that all private rights are to be conclusive rights that must be enforceable everywhere, it logically followed that “every state is obliged to refrain from interfering into the *internationally* demarcated jurisdiction of another State”.⁶⁸ For a dual jurisdiction shared by two States was “unthinkable”.⁶⁹ This “monistic” and universal solution insists on a mutually exclusive division of legislative competences between States with regard to private law; and it roots the normative basis of that division ultimately in public international law.⁷⁰ This conception of private international law delegates the validity question to public international law; and the normative nature and scope of the latter will thus inform the character and scope of the former.

⁶⁶ E. Zitelmann, *Internationales Privatrecht* – Volume I (Duncker & Humblot, 1897).

⁶⁷ Ibid., 67-68 (my translation, emphasis added).

⁶⁸ Ibid., 70 (emphasis added).

⁶⁹ Ibid., 72: „Da aber jede staatliche Rechtsmacht, im wirklich Rechtsmacht zu sein, streng genommen ausschließlich sein muß, eine Macht zweier Staaten, die inhaltlich völlig die gleiche wäre, nicht denkbar ist, so kann es auch immer nur das Gesetz eines bestimmten Staates und keines anderen sein, das vom völkerrechtlichen Standpunkt aus diese bestimmte rechtliche Wirkung, den Erwerb oder Verlust eines subjektiven Privatrechts, eintreten lassen kann.“

⁷⁰ Ibid., 73. By contrast, A. Pillet, *Principles de Droit International Privé* (Pedone, 1903) tries to utilise a form of Hegelianism (via Lorimer) and Kantianism and seems to ultimately settle for the latter (ibid., 76 – footnote 1): “Le principe général auquel aboutit notre méthode se rapproche beaucoup de la définition du droit d’après Kant, et même si l’on considère que le souveraineté est bien la liberté de l’État dans ce qu’ elle a de rationnellement intelligible et de légitime, il se confond tout à fait avec elle et peut être présentée en ces termes : c’est le principe d’après lequel la souveraineté (ou liberté) de chacun peut coexister avec la souveraineté de tous, d’après un principe général de respect de la souveraineté [...] »

Until the last quarter of the nineteenth century, the triumph of the “Historical School” and its “European” conception of international law had been almost unconditional; yet German international law also produced one major “universal” conception during this time. It is offered by Johann Caspar Bluntschli. For despite having been trained in the tradition of the “Historical School”, Bluntschli came to oppose many of its positions and replaced them with a humanistic universalism.⁷¹ He thus not only favoured the codification of international law – *pace* Savigny; more importantly, he categorically rejected the core premise underlying the Historical School: the need for a homogeneous “moral” medium as a necessary precondition for the “legal” nature of international law.

For Bluntschli, international law is a universal law that derives from the “natural bond that united all peoples into humanity”; and this especially meant that “every people” would enjoy a “natural right” to be respected as a part of humanity.⁷² International law stemmed from the “common consciousness of humanity” and thus could not be a “regional” law.⁷³ True, the “common consciousness” of humanity had yet to be fully developed and in some ways, the civilised European nations were the vanguard of this development; yet international law was nonetheless “not limited to the European society of nations”.⁷⁴ This universalist conception of international law was subsequently developed alongside – utopian – lines. For once the “common consciousness” of mankind was ripe, a World State should crown this development:

"And if mankind is, in truth, a totality, if it is animated by a common spirit, how could it not strive for the incarnation (*Verleiblichung*) of its own being, that is: to become a state? The nationally limited states only have a relative truth and validity... The perfect

⁷¹ For an analysis of Bluntschli’s international law thinking, see: B. Röben, *The Method Behind Bluntschli’s „Modern“ International Law*, (2002) 4 *Journal of the History of International Law* 249; as well as more extensively: “Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861-1881 (Nomos, 2003).

⁷² J. C. Bluntschli, *Das moderne Völkerrecht* (supra n.26), 1 and 54.

⁷³ The „binding“ nature of international treaties is here explained not on the basis of the free will of states but on the basis of the “consciousness of humanity” standing above these wills (ibid., 234): “Die Rechtsverbindlichkeit der Staatenverträge beruht auf dem Rechtsbewusstsein der Menschheit, und ist ein notwendiger Bestandteil der völkerrechtlichen Weltordnung. (...) Die Verbindlichkeit der Verträge ist selbst ein notwendiger Rechtssatz. Sie ist notwendig, weil ohne sie kein gesichert Rechtsverkehr und kein friedlicher Rechtszustand der Völker möglich wäre.“

⁷⁴ Ibid., 56: „Das Völkerrecht ist nicht auf die europäische Völkerfamilie beschränkt. Das Gebiet seiner Herrschaft ist die ganze Erdoberfläche, so weit auf ihr sich Menschen berühren.“

state however physically coincides with all humanity. The world state or empire is the ideal of mankind in progress. (...) The common consciousness of mankind is of course still caught in a dreamy state and confused in many ways. It has not yet awakened to full clarity and has not progressed to unity of will. Humanity therefore has not yet been able to develop its organic existence. Only later centuries will see the world empire be realized. (...) Until then the world empire will be an idea which many aspire to but which no one is capable of realising. But as an idea of the future, the science of jurisprudence must not overlook it. Only in this empire will the true human state be revealed."⁷⁵

Bluntschli here reconnects with the (utopian) universalism of the enlightenment tradition. The telos of the world state or the *civitas maxima* was however not shared by many.⁷⁶ Nevertheless: the idea that international law was ultimately “universal” in scope and that it should theoretically apply to all peoples had re-staked its philosophical claim; and by 1874, Bulmerincq followed suit and confidently asserted that the idea of a European or American international law was mistaken, as there only existed one – universal – international law that applied to all regions and religions of the world.⁷⁷ This universalist counter-current could however not dethrone the Historical School. The latter became nonetheless increasingly contested in the last decades of the nineteenth century when an entirely new methodological school emerged

⁷⁵ Ibid., 25-27 and 33. The „World State“ is organised along federal lines: “Zu dem Weltreich verhalten sich die Einzelstaaten, wie sich die Völker zur Menschheit verhalten. Die Einzelstaaten sind Glieder des Weltreiches und erlangen in ihm ihre Ergänzung und ihre volle Befriedigung, wie die Glieder im Körper. Das Weltreich hat nicht die Aufgabe, die Einzelstaaten aufzulösen und die Völker zu unterdrücken, sondern den Frieden jener und die Freiheit dieser besser zu schützen.“

⁷⁶ See only: A. Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (Duncker & Humblot, 1874), 5: „Nur das Völkerrecht garantiert die stete Entwicklung der Völker und Einzelnen nach ihrer Individualität, denn sein Ziel ist nicht ein Universalstaat, nicht eine *civitas maxima*, nicht ein Einheitsstaat, sondern die Aufrechterhaltung der Varietät in dem genus, der Mannichfaltigkeit in der Einheit des Menschengeschlechts und die Anknüpfung, Erhaltung und Fortbildung der in der Form von Staaten erscheinenden Völkerrechtsindividualitäten.“

⁷⁷ Ibid., 5: „Denn das Völkerrecht ist weder ein bloß europäisches, noch ein europäisch-amerikanisches, noch ein christliches-europäisch-amerikanisches, wenn auch christliche Grundsätze auf dasselbe eingewirkt und es zunächst nur eine beschränkte Geltung gehabt hat, sondern es ist für alle Völker aller Weltteile, und jeden religiösen Bekenntnisses berufen, eine gemeinsame Rechtsordnung aufzurichten, zu erhalten und durchzuführen, und weist schon jetzt Verträge europäischer und amerikanischer Staaten mit Staaten andere Weltteile und dieser unter einander, sowie Verträge der Bekenner verschiedener Religionen auf.“

3. “Neo-Hegelian” International Law: The Rise of State Positivism

The Historical School had dominated German university life for the better part of the nineteenth century. In the last quarter of that century, its philosophical grip however loosened. After 1871, its “conceptual jurisprudence” had received an “internal” critique from which it would never fully recover.⁷⁸ But more importantly still: the new school of “state positivism” had begun to stake its own claim. This new school considered, with Hegel, all law from the perspective of the “state”. The sole “empirical” source of all law was the state – not the people – because “[o]nly through the State will a people gain political and legal consciousness”.⁷⁹ All law is consequently viewed as the product of the state’s will and this “voluntarist” rationale essentially reduces law to a “command” emanating from the (legislative) will of the state. This so-called “legislative positivism” (*Gesetzespositivismus*) emerged at a time when Germany had finally obtained national unification; and this unique historical context may explain the fundamental change of purpose and methodology in German public law after 1871.⁸⁰

What are the philosophical premises of the state positivist school? The new “positivist” project finds its most celebrated expression in Bergbohm’s “Jurisprudence and Legal Philosophy” (1892).⁸¹ Within it, Bergbohm brilliantly exposed the natural law premises of the Historical School;⁸² and through it, a “pure positivism” receives its best manifestation in German public law. What does the new “positive” philosophy mean for the nature and character of international law? If all “law” must be traceable to a

⁷⁸ What I have in mind here are the works by R. von Jhering, such as: “Der Kampf ums Recht” (1872) as well as “Der Zweck im Recht” (1877) but especially “Scherz und Ernst in der Jurisprudenz” (1884).

⁷⁹ C. F. von Gerber’s „Grundzüge des deutschen Staatsrechts“ (Tauchnitz, 1880), 226.

⁸⁰ P. von Oetzen, *Die soziale Funktion des staatsrechtlichen Positivismus* (Surkamp, 1974), 254: „Diese Bindung an ein neues und geschlossenes, darüber hinaus politisch bedeutsames Verfassungswerk bestimmt ohne Zweifel die gesamte deutsche Staatsrechtswissenschaft nach 1871 und bedingt wesentliche Unterschiede gegenüber der vorangegangenen Zeit. Das Bedürfnis, allgemeine theoretische Grundsätze zu gewinnen, tritt zurück gegenüber dem Bestreben, das gegebene positive Recht angemessen zu begreifen.“ On the rise of „state positivism“ in imperial Germany generally, see: J. Schröder, *Zur Geschichte der juristischen Methodenlehre zwischen 1850 und 1933*, (2008) 13 Rechtsgeschichte 160.

⁸¹ K. Bergbohm, *Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen – Erster Band* (Duncker & Humblot, 1892). On the importance of this critique, see: D. Tripp, *Der Einfluß des naturwissenschaftlichen, philosophischen und historischen Positivismus auf die deutsche Rechtslehre im 19. Jahrhundert* (Duncker & Humblot, 1983), 277.

⁸² K. Bergbohm, *Jurisprudenz und Rechtsphilosophie: Kritische Abhandlungen* (supra n.81), §16.

legislative command backed up by a sanction,⁸³ the autonomous character of all customary law is automatically denied. The normativity of international law must instead be sought somewhere else; and it will be found in the individuality of each and every state will.⁸⁴ This Neo-Hegelian perspective catapults the international treaty into the forefront of international law; and the early “international” positivists – represented in Germany by Georg Jellinek and Heinrich Triepel – indeed come to analyse the foundations of international law through the prism of the binding nature of international treaties.

a. From Custom to Treaties: Jellinek and the New Kant-Hegel Synthesis

The renewed interest in the nature of international treaties finds a remarkable expression in Georg Jellinek’s 1880 monograph on the subject,⁸⁵ and in many ways, this short book projects a very different – new – way of thinking about international law. This novel way abruptly moves away from “custom” to “treaties”; and adopting the “positivist” spirit of German constitutional law, the foundation of all international law shifts from the collective consciousness of a plurality of states to that of the individual “State will”.⁸⁶ It is therefore no coincidence that “The Legal Nature of State Treaties” begins by invoking Hegel: in the absence of a common will above the states, the indisputable starting point for any international law rests in the “reality” and “particularity” of subjective state wills.⁸⁷

⁸³ Ibid., 546: “[E]s ist der Augenblick, wo der Rechtssatz als solcher anerkannt, sanktioniert, gesetzt wird, d.h. eben Positivität erlangt – liegt seine individuelle Entstehungsgeschichte als Rechtsatz.”

⁸⁴ Importantly, Bergbohm is the author of „Staatsverträge und Gesetze als Quellen des Völkerrechts“ (Mattiesen, 1876), which precedes and ultimately inspires G. Jellinek’s „Die rechtliche Natur der Staatsverträge“ (1880).

⁸⁵ G. Jellinek, *Die Rechtliche Natur der Staatenverträge: Ein Beitrag zur Juristischen Construction des Völkerrechts* (Hölder, 1880).

⁸⁶ For an excellent discussion of Jellinek in the context of „classic“ German constitutionalism, see: J. Kersten, *Georg Jellinek und die klassische Staatslehre* (Mohr Siebeck, 2000).

⁸⁷ G. Jellinek, *Die Rechtliche Natur der Staatenverträge* (supra n.85), 3. The express reference is to §333 of Hegel’s “Philosophy of Law”, that is: “[S]ince the sovereignty of states is the principle governing their mutual relations, they exist to that extent in a state of nature in relation to one another, and their rights are actualized not in a universal will with constitutional powers over them, but in their own particular wills. (...) There is no praetor to adjudicate between states, but at most arbitrators and mediators, and even the presence of these will be contingent, i.e. determined by particular wills.”

What does this new perspective mean for the normativity of international law? For Jellinek, all law ultimately derives from the will of the state,⁸⁸ and this must mean that all international law must also – always – be rooted in the will of each and every state. The central question therefore becomes this: is a state ever capable of externally binding itself for the future? Only if such a “self-binding” were possible, Jellinek claims, can the normativity of international law be demonstrated.⁸⁹ And reverting to the Kantian idea of the categorical imperative, he claims:

“The denial of the possibility of a self-binding will for the reason that a free will can prove its freedom even in the detachment from the decisions once made, therefore leads, when thought to its end, to a denial of morality and justice, and with it to a denial of the possibility of the idea of human community. If, therefore, the idea of a self-binding will is logically possible, it is also morally and legally necessary; legally in the sense of the idea of law, which is the indispensable precondition for an ordered community. (...) When Kant thus wishes to conclude his discussion on the binding force of treaties with the assertion that the obligation to keep a treaty is a categorical imperative, he has taken the right step in this respect.”⁹⁰

All *normative* expressions of the state, so the argument goes, are always manifestations of a self-binding will.⁹¹ The normative quality of “law” is thus not determined by whether or not a norm is backed up by a sanction; it is purely a question of whether the state “wills” to “bind” itself. But if that is the case, there simply is no categorical distinction between national and international law;⁹² as both derive their validity and limits from the “state purposes” (*Staatszwecke*). These state purposes determine every expression of the state’s will; and the state will is therefore always – whether acting internally or externally – subject to the “*rebus sic stantibus*” rule.⁹³ This however does not mean that international treaties could be broken off arbitrarily. For one of the

⁸⁸ G. Jellinek, *Die Rechtliche Natur der Staatenverträge* (supra n.85), 5: „Alles Recht ist der Wille der staatlichen Gemeinschaft[.]“

⁸⁹ Ibid., 7: „Denn nur sich selbst kann der Staat sich unterordnen und nur, wenn er sich selbst unterordnen kann, ist er im Stande, sich ein Recht nach Aussen zu setzen.“

⁹⁰ Ibid., 16-17.

⁹¹ Ibid., 27: „In jedem concreten Wollen liegt eine Beschränkung des Willens als die Fähigkeit des Wollens... Daher ist jeder Act staatlichen Wollens eine Beschränkung des Staatswillen[.]“

⁹² Ibid., 37: “Es ist damit bewiesen, dass das innerstaatliche Recht einer seiner wichtigsten Beziehungen nach an denselben angeblichen Mangeln leidet, wie das Völkerrecht und seiner Natur nach ewig leiden muss.“ The difference between the two bodies of law is seen to lie in the “moral” sanction attached to a violation, whereby the “moral guarantees” offered for state law are greater than the moral sanction that follows a breach of international law.

⁹³ Ibid., 40: „Daher trägt jeder Act des Staatswillens die Clausel: *Rebus sic stantibus* in sich.“ For an elaboration of this point, see later: E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (Mohr, 1911) to be discussed below.

purposes of the modern State is – contra Fichte – to peacefully entertain external relations with other States;⁹⁴ and from here, Jellinek makes a second Kantian move (albeit with a strongly Hegelian undercurrent) :

“Also the state can only will by raising the conditions of its realizability to the contents of the same. If the state exists, if it wants to fulfil the purposes predestined for it by its nature, it must also will the means by which this alone is possible. (...) And now it is clear that there is not the slightest conflict between the substantive-philosophical and the formal-legal justification of international law. If one of the state purposes is to communicate with other states, if the non-fulfilment of this state purpose also means an attack on the existence of the state, like the arbitrary breaking of a self-binding law, then it is a requirement that derives from the nature of the state to establish norms by which the relations of the state with the others are regulated. These norms, while arising from the nature of the state as a person which can only exist in the community of states, are nonetheless free acts of the state will. Even if it is his nature to prescribe the establishment of binding norms for relations with other states, it is his free will with which he fulfils this necessity.”⁹⁵

The source of all international law is here seen as the “free will” of each state; and international law is therefore nothing but “external state law”.⁹⁶ Yet in order to demonstrate that this external state law can grant “objective” rights to other states, Jellinek is forced to recruit a Kantian idea: the “objective nature” of an international society.⁹⁷ The idea of such an international society is thereby – unlike what the Historical School had claimed – not rooted in regional custom; rather it is viewed as a (universal) “reality” in which all states find themselves and which therefore pre-conditions how all states positively create (treaty) law.⁹⁸ It is hard to fully understand this argument but, at its heart, appears to lie a “transcendental” deduction: to negate

⁹⁴ G. Jellinek, *Die Rechtliche Natur der Staatenverträge* (supra n.85), 42: “Denn unter die Staatszwecke gehört auch, was nur zu oft ausser Acht gelassen wird, die Herstellung und Aufrechterhaltung des Verkehrs mit andern Staaten. Nur eine die reale Welt total verkennende Stubenphilosophie konnte dem Staate, besonders dem modernen Staate, Autarkie zuschreiben in dem Sinne, dass es in seinem Belieben stehe, ob er mit andern Staaten verkehren wollte oder nicht.“

⁹⁵ Ibid., 44-45.

⁹⁶ Ibid., 46.

⁹⁷ Ibid., 48: “Der Staatswille ist hier gebunden an die objective Natur der Staatenbeziehungen. Hier bewahrt der alte Satz seine Gültigkeit: *Ubi societas, ibi jus*. Es steht dem Staate formell frei, ob er in die societas eintreten will oder nicht. Hat er es aber gethan, dann hat er mit der societas auch ein jus gewollt.“

⁹⁸ Ibid., 49: “Es ist kein Naturrecht etwa, welches den Staat in diesen Fällen bindet, denn die objectiven Momente der internationalen Lebensverhältnisse und deren logische Consequenzen haben unabhängig vom Staatswillen überhaupt keine rechtliche Natur[.]“

the legally binding nature of international treaties is to deny the “objective nature” of the – postulated and a priori - international society of states.⁹⁹

Be that as it may, with Jellinek, the nature of international treaties becomes the central, if not exclusive, focus in discussions about international normativity. The replacement of custom as the primary source stems directly from the “voluntarist” emphasis on the – conscious – sovereign state. State positivism is “un-organic” and “non-communitarian”: all legal norms originate in a sovereign “command” that must be imposed from above.¹⁰⁰ Seen in this light, only “treaty law” can be of a true legal nature as external state law. And this rejection of customary law, dialectically, undermines the very idea of the older European conception of international law. For the positivist school does no longer tie the “normativity” of international law to a “regional” moral base; and Jellinek has indeed no problem in affirming the universal nature of his “objective” international law – even against Hegel himself.¹⁰¹

⁹⁹ Ibid., 58. In “Die Lehre von den Staatenverbindungen“ (originally published 1882; Keip, 1996)), Jellinek writes (ibid., 94-95): „Die natürliche Thatsache der Vielheit der Staaten verwandelt sich daher durch den Umstand, dass die einzelnen Staaten durch ihre Beschaffenheit gezwungen sind, mit einander in Verkehr zu treten, in eine Gemeinschaft und zwar in eine Rechtsgemeinschaft. Denn Gemeinschaft ist überall da vorhanden, wo es Verkehr gibt.... Keine Nation darf es wagen, den hochmütigen Hegel’schen Gedanken sich anzueignen, dass in ihr allein der Weltgeist seinen Thron aufgeschlagen habe[.]“ This rejection of Hegelian thinking seems inspired by Kantian transcendentalism. In this sense: J. Kersten, Georg Jellinek (supra n.86), 423; yet see also his critical evaluation (ibid., 434): „Es ist also weniger das kantische Sittengesetz, das Jellinek für den Staatswillen rezipieren will, als vielmehr der Autonomiegedanke eines auf sich selbst normativ reflektierenden Willens, wie ihn Kant in der Auflösung der dritten Autonomie in der Kritik der reinen Vernunft entwickelt.“

¹⁰⁰ Within the constitutional law scholarship at the time, this in particular means that the “Gesetz” replaces “custom” as the dominant legal source (J. Schröder, *Zur Geschichte der juristischen Methodenlehre zwischen 1850 und 1933*, (2008) 13 *Rechtsgeschichte* 160 at 164): “Für die historische Rechtsschule war das Gesetz ein Organ des Volksgeistes, d.h. es brachte nicht selbst wirkliches Recht hervor, sondern gab nur der vernünftigen Volksüberzeugung eine Form. Mit dem vordringenden Voluntarismus im späten 19. Jahrhundert verliert sich diese Vorstellung. Das Gesetz wird zur bloßen Willensäußerung des Gesetzgebers. Es ist nun “Wille des Staats”[.]”). For customary law this, in particular, means that its source is no longer seen in the common legal “consciousness” of the people, but following the “Gestattungstheorie”, the State must consent to all customary law to be valid (ibid., 166).

¹⁰¹ G. Jellinek, *Die Lehre von den Staatenverbindungen* (supra n.99), 95-96: “[Das Völkerrecht] umfasst all miteinander in Gemeinschaft stehenden Staaten. (...) Die in der Natur gegründete und durch das Völkerrecht zur Rechtsgemeinschaft erhobene Staatengemeinschaft ist die erste und umfasste Form einer Staatenverbindung. Sie ist die dauerndste Form der Staatenverbindung, denn sie ist unauflöslich, sie hat Bestand, so lange es eine Vielheit von Staaten gibt, also für immer.“

b. From Monism to Dualism: Triepel and the Future “Twentieth Century” Doctrine

Jellinek’s attempt to discover the nature of international law from a “positivist and “monist” conception of law had forced him to have recourse to the idea of self-limitation. But following this logic to its end, there simply cannot be an “objective” international law because even where two state wills meet through an international treaty, in the final analysis, only two “subjective” understandings of that treaty exist. This is a philosophical paradox inherent in all “individualist” (or solipsistic) accounts of law; and in order to tackle that problem, a second attempt was soon made to explain the “objective” nature of international treaties. This second attempt was made by Heinrich Triepel, whose monographic study on the relationship between “International Law and Domestic Law” (1899) would become a revered starting point for much twentieth-century international law scholarship.¹⁰²

Triepel thereby completely shares the premises of state positivism: only state wills can be source(s) of law.¹⁰³ But in opposition to Jellinek, the normativity of international law is no longer found in a single state’s will – let alone the ability of that will to bind itself.¹⁰⁴ Self-binding is relegated to the realm of morality, because, in a true Kantian spirit, the idea of a legally self-binding will is considered logically impossible (as a legal norm is, by definition, always above an individual will).¹⁰⁵ With regard to international law two corollaries follow. First, only a “common will” can become a source of international law; and not all “treaties” can create such a common will but only – some – law-making international conventions.¹⁰⁶ This common will is “superior” to and yet also a part of the sovereign state will:

¹⁰² H. Triepel, *Völkerrecht und Landesrecht* (Hirschfeld, 1899).

¹⁰³ For his critique of the Historical School, see *ibid.*, 30-31 (with reference to Bergbohm).

¹⁰⁴ *Ibid.*, 31: „Nun ist es aber sofort einleuchtend, dass dieser Wille, der für eine Mehrheit von Staaten verbindlich sein soll, nicht *einem* Staate *allein* angehören kann.“

¹⁰⁵ *Ibid.*, 77-79.

¹⁰⁶ One of the idiosyncratic distinctions that Triepel here makes is between (bilateral) “treaties” and (multilateral) “conventions”; for according to him, only the latter generate a “common will”, whereas bilateral treaties cannot create a common will because they are formed by complementary yet “different” wills (*ibid.* 46). And quoting Bergbohm, Triepel concludes that bilateral treaties can therefore never create objective international law but will always remain dependent on the subjective and individual wills of the state parties (*ibid.*, 47). “Conventions”, by contrast, are expressions of a common will in which states “will” the same object; and as such, they can create “objective” international law, see *ibid.*, 70: “Der Vertrag ist unfähig, Rechtsätze zu erzeugen, weil er seiner Natur nach nicht im Stande ist, einen Gemeinwillen hervorzubringen. Was aber der Vertrag nimmer vermag, das vermag die Vereinbarung.

“I find the reason for the binding force of international law to lie in the existence of a common will, the content of which appears to the state as the norm of its behaviour towards other states, and which is simultaneously a foreign will but also its own will, so that nothing is imposed on it that it has not imposed on itself. (...) But one thing emerges from all this with compelling necessity: such a common will cannot possibly arise, under international law, from a majority decision. (...) Since international law can only arise from an agreement and since an agreement in which all existing states participated cannot be shown to exist, there thus cannot be a generally valid international law that universally dominates all states. (...) If one may say so, there exists only particular international law, only norms that apply to two, three, many, but never to all states.”¹⁰⁷

All international law is here reduced to “particular” treaties; yet this treaty law – if based on a common consent – is seen as “objectively” binding, since states cannot unilaterally decide to breach or withdraw from a common convention. Only the common consent of all parties can dissolve states from their previous contractual obligations.¹⁰⁸ The “common” consent thus “cements” individual states together; and it alone constitutes the normative foundation of international law.¹⁰⁹ This voluntarist origin is a necessary and sufficient condition for international law because – unlike Kant – law and external force are not correlative concepts.¹¹⁰ The ability to enforce a norm is thus not an essential but merely an accidental characteristic of a legal norm; and from here, Triepel draws a second momentous conclusion. For unlike Austin’s command theory of law – to be discussed in the next chapter,¹¹¹ Triepel’s positivism accepts a law without a common sovereign. However, in order to cater for a definition of domestic law that is based on a command theory with regard to individuals, Triepel must “divide” the legal world into two spheres so as to allow for a concept of international law that does not have such a sovereign commander:

“International law and national law are not only different parts of the law; they are different legal systems. They are two circles that at most touch but never intersect. From our point of view, it is a complete contradiction to let international law be at the same time national law or vice versa. (...) If a state encounters, in international law, a will different from its own, albeit one which it helped to build, then this source is

Die Staaten können objektives Recht schaffen, wenn sie eine Regel vereinbaren, nach der sich ihr künftiges Verhalten dauern bestimmen soll.“

¹⁰⁷ Ibid., 82-84.

¹⁰⁸ Ibid., 88-89.

¹⁰⁹ Triepel consequently rejects the idea that “custom” can be an independent source of international law (ibid., 98).

¹¹⁰ Ibid., 107: „Kant’s bekannter Satz: „Recht und Befugnis zu zwingen bedeuten einerlei“ ist, wenn er wörtlich verstanden sein will, falsch. Gerade das Gegenteil ist wahr.“

¹¹¹ For an explicit discussion of Austin’s theory, see ibid., 135-136.

fundamentally different from the one from which national law flows, namely a law set by it alone for all that it thinks it controls.”¹¹²

The normativity of international law and the normativity of national law are thus posited to be radically different: the sphere of international law is the sphere of “coordination” of independent state wills; the sphere of national law is the sphere of “subordination” under a unilateral – sovereign – will.¹¹³ And this legal “dualism” allows Triepel to speak of international “law” as much as national “law” – even though both systems of law do not share the same characteristics!

This abandonment of a monistic philosophy that had been part of both the natural lawyers and the Historical School (and that had indeed still informed Hegel’s and Jellinek’s thinking), has important consequences. First, it categorically rejects the idea that individuals are – like states – subjects of international law; and this, in particular, means that there cannot be a “private” international law.¹¹⁴ Secondly, while not denying that there exists a relationship between the two legal orders, the dualist answer principally disconnects national and international law.¹¹⁵ Living in different spheres, normative conflicts are no longer possible and breaches of international law become – legally and morally – “immunised” from within national law. International law is what states do – nothing more, nothing less.

Conclusion

The nineteenth century is the century during which the “professionalisation” of international law begins its victorious course. By the end of that century, discussions about the nature of international law almost exclusively belong to “professional”

¹¹² Ibid., 111 and 133.

¹¹³ At some point Triepel seems to be suggesting that the two spheres also have a distinct material content (ibid., 19): „Völkerrecht und Landesrecht müssen, wenn sie verschiedenen Quellen entstammen, verschiedenen Inhalt haben“; yet at a later stage this is relativised, (ibid., 111): dualism „bedeutet nicht ohne Weiteres, dass jeder Satz völkerrechtlicher Herkunft allein schon um seiner Provenienz willen ungeeignet sei, Inhalt eines landesrechtlichen Satzes, etwa eines Gesetzes zu werden“.

¹¹⁴ Ibid., 24.

¹¹⁵ Ibid., especially 256-259.

jurists. This move from “philosophers” to “lawyers” did however not immediately trigger a move from metaphysical “constructivism” to positive “empiricism”. Indeed, for the better part of the German nineteenth century, a metaphysical approach to international law did prevail. True, the older ideas of natural law had lost all academic credentials and the attempt to “re-theologise” international law through the Holy Alliance had failed early on. But with the rise of the Historical School, a different “communitarian” and “spiritual” metaphysics came to dominate the academic scene.

For the Historical School, the key source behind all law is the legal “consciousness” that a “society” generates. Wherever a society exists, there also exists law. This however means – as we saw in Chapter 2 – that there can be a “positive” international law as long as it is rooted in the common morality among states.¹¹⁶ The lack of a sovereign or an “institutional” machinery to enforce international law is not seen as a fatal problem. All that matters is that there is a society,¹¹⁷ and affirming the “reality” of moral similarities among “civilised” states, the moral bonds within a “European” society are seen as strong enough to make international law “like” national law. One important consequence of this “societal” conception of international law is that it can expressly acknowledge a “private” law side. International law thus applies to individuals when they came into contact with foreign legal orders; and this conception of private international law, as a legitimate sister of public international law, becomes and remains dominant in Europe until 1914.¹¹⁸

The gradual decline of this way of “organic” and “societal” thinking starts around after 1870; and two famous proponents of the new positivism were discussed in Section 3. Georg Jellinek should, despite some passages to the contrary, be ranked among the state positivists that begin to reshape German legal thinking after the foundation of the German Empire. His conception of international law is firmly rooted in the idea

¹¹⁶ F. von Liszt, *Das Völkerrecht* (supra n.49), 9: „Das Völkerrecht beruht auf der übereinstimmenden Rechtsüberzeugung der Kulturstaaten, soweit sich diese zur Erklärung des gemeinsamen Rechtswillens verdichtet hat. Diese Erklärung äußert sich zum weitaus größeren Teile als Rechtsübung, zum kleineren als ausdrückliche Rechtssatzung.“)

¹¹⁷ C. Kaltenborn von Stachau, *Kritik des Völkerrechts* (supra n.25), 310: „Auch ist die Erzwingbarkeit nicht der einzige Charakter des Rechts, auch nicht sein wesentlichster. Dieser besteht vielmehr darin, dass es Norm und Ordnung für alle menschlichen Gemeinverhältnisse in allen Sphären und Dimensionen des privaten und des öffentlichen Lebens, mithin auch des sozialen Verhältnisses der Völker und Staaten untereinander, also Völker-Recht. – Der Zwang geht nun aber von der Gemeinschaft als solcher aus. Dies ist die Ordnung, die aufrecht erhalten werden soll. Das Rechtsleben ist das Gemeinleben.“

¹¹⁸ See footnote 65 above; and see also T. Niemeyer, “Internationales Privatrecht” in „Deutschland unter Kaiser Wilhelm II – Erster Band“ (Hobbing, 1914), 346.

of state sovereignty; and that idea leads him to view all law as an emanation of a defined state will. For international law, this means, in particular, that its main source cannot be (unconscious) custom but its normativity must lie in conscious expressions of state wills, that is: international treaties. How can he justify the binding nature of a treaty under the premise of state sovereignty? For Jellinek, just as for Hegel before him, the binding nature of international law stems from each state itself; yet this is ultimately not enough, and Jellinek thus tries to revert to Kantian transcendentalism to ground the normativity of international law.

A more successful “state positivist” construction of international law emerges a few decades later. Writing at the dawn of the twentieth century, Heinrich Triepel is the true founding father of the continental “positivists” of that future century. His dualistic theory insists that the foundations of international and national law are fundamentally different. This separation thesis radically rejects the (monistic) view of the unity of all law – a view that had been part of both the natural law philosophers as well as the Historical School. This dualist perspective soon spread from Germany to Italy,¹¹⁹ and from there to other parts of the world. Importantly however: for Triepel international “conventions” – based on a common will – are “objectively” binding; and they therefore cannot be renounced or broken by an individual state claiming a change of circumstances or simply a changed will. Yet even this last normative limit will subsequently be abandoned by E. Kaufmann. Writing in 1911,¹²⁰ Kaufmann’s study on the “*rebus sic stantibus*” clause (probably inspired by the 1908 Annexation of Bosnia and Herzegovina by the Austro-Hungarian Empire),¹²¹ thus criticises Triepel for having severely misunderstood the normative nature of international treaties.¹²²

¹¹⁹ For Italy, see especially: D. Anzilotti, *Il Diritto Internazionale nei Giudizi Interni* (Zanichelli, 1905), esp.41: „Di qui un duplice criterio di distinzione e di contrapposizione fra il diritto internazionale ed il diritto interno. Anzitutto per la diversa volontà che li pone in essere: il diritto internazionale emana della volontà collettiva di più stati, mentre le norme giuridiche interne sono sempre l’emanazione della volontà di uno stato... In secondo luogo per la diversa specie dei rapporti regolati: le norme giuridiche internazionali regolano i rapporti di enti coordinati ed autonomi, uniti in una comunità priva di organizzazione giuridica, e perciò prescindono affatto dall’esistenza di ogni potere sopra di essi, mentre le norme giuridiche interne regolano rapporti che si svolgono nel seno di società giuridicamente organizzate, e perciò contengono implicita un’idea di preminenza e di subordinazione, un *imperium* della collettività sopra i consociati.” For a discussion of Anzilotti, see also: A. P. Sereni, *The Italian Conception of International Law* (supra n.56), 214-5 as well as 225: “Through Donati and Anzilotti the Italian school accepted and developed the dualist theory expounded by Triepel in his fundamental work, *Völkerrecht und Landesrecht* (1899). International order and national orders are absolutely separate.”

¹²⁰ E. Kaufmann, *Das Wesen des Völkerrechts und die Clausula Rebus Sic Stantibus* (Mohr, 1911).

¹²¹ Ibid., 31-38.

¹²² Ibid., 161.

The nature of international treaties is henceforth rooted in and subject to the absolute priority of each and every state will.¹²³ Each state stays permanently “above its treaties”;¹²⁴ and the binding nature of international treaties must thus always find a limit in the sovereign interest of each state.¹²⁵ This “Neo-Hegelianism” here comes to deny the objective normativity of all international law.

¹²³ Ibid., 179 (with express reference to Hegel).

¹²⁴ Ibid., 181.

¹²⁵ Ibid., 204: “Alle Staatsverträge haben als Verträge des Koordinationsrechts eine immanente Grenze: sie sollen und wollen nur binden, solange die Macht- und Interessenlage, die zur Zeit des Abschlusses bestand, sich nicht so ändert, daß wesentliche Bestimmungen des Vertrages mit dem Selbsterhaltungsrecht der kontrahierenden Staaten unvereinbar werden.“ And, *ibid.*, 220: “Es muß also dabei bleiben, das *alle* völkerrechtlichen Verträge der [rebus sic stantibus Klausel] unterliegen.“

The “British” Nineteenth Century I

Three Utilitarian Conceptions

Introduction

For many British onlookers, the French Revolution had proven the danger of abstract rationalism turning into revolutionary terror. And the subsequent philosophical “reaction” would, just as on the European continent, take one of two – opposite – directions. A conservative reaction here insisted on the need to “restore” the ancient order; and the best representative of this “British” restoration is Edmund Burke whose reflections on the French revolution reached an enormous audience within and without Great Britain.¹ Steeped in an early “historicist” natural law thinking,² Burke countered the abstract rationalism of the French Jacobins with a “dynastic” conception of the “order things” that even advocated a counterrevolutionary intervention into France.³ The fiercest attack on abstract rationalism, whether or not in French colours, however did not come from the “conservative” camp. It came from a group of self-styled “reformers”: the utilitarian philosophers. Their criticism was directed at all forms of “natural law” thinking, which they reproached for its social conservatism and speculative metaphysics.

The founder of this second – reformist – current is Jeremy Bentham. His “critical” project had originally begun as a challenge to the standard “natural law” account within British jurisprudence: Blackstone’s “Commentaries on the Laws of England”. Published in the later part of the eighteenth century, and saturated with references to Grotius and Pufendorf, the “Commentaries” famously held that all law emanated from the “law of nature” and that it was the legislator’s and the judges’ sole task to “discover”, by means of “reason”, what the law demanded in each particular circumstance.⁴ The first attack on such metaphysical thinking was launched in

¹ E. Burke, *Reflections on the Revolution in France* (Penguin, 1968).

² On Burke’s conception of natural law generally see P. Stanlis, *Edmund Burke and the Natural Law* (University of Michigan Press, 1958). With regard to international law, one of the best descriptions of his values and beliefs has come from J. Davidson, *Natural Law and International Law in Edmund Burke*, (1959) 21 *The Review of Politics* 483–491: “He believed that such a community actually existed among the nations of Europe, made effective by a similarity in religion, social structure, customs, and intellectual outlook.” And *ibid.*, 493: The European commonwealth from which he derived the laws governing the behavior of its constituent nations was for Burke a historical fact rather than a theory. The thread of law in Burke always leads back to the society out of which it is spun.”

³ J. Welsh, *Edmund Burke and International Relations* (St. Martin’s Press, 1995), 115.

⁴ W. Blackstone, *Commentaries on the Law of England* – Volume I (Clarendon Press, 1765), 39–41.

Bentham's "A Fragment on Government" (1776).⁵ Designed as a critical companion to Blackstone's "Commentaries", this (very) uncharitable "book review" already contains the heart of Bentham's radical critique: the "naturalistic" failure to distinguish between "is" and "ought". Blackstone was charged with having committed the conservative fallacy that "every thing is as it should be";⁶ and yet, as Section 1 wishes to show, the Benthamite attack was not confined to the conservative natural law vision. His empiricist utilitarianism equally charged the French revolutionary rationalists for relying on natural law as "non-sense on stilts".

The impact of Bentham's utilitarian philosophy on nineteenth-century Britain is hard to exaggerate; and it has even been claimed that "[a]lmost all jurisprudential territory traversed during the nineteenth century bore the stamp of Bentham".⁷ This view is, as the next chapter will subsequently show, not correct as regards international law. Indeed, there is little, if anything, that Bentham here imprinted. This enormous gap within the utilitarian project would partly be narrowed by the second generation of utilitarian thinkers: James Mill and John Austin. Their "positivist" definition of what the "law" is, discussed in Section 2 here, famously cast a doubt over the very nature of international law – culminating in the outright denial of international law as law proper. But, again, apart from this "analytical" critique of international law, the theoretical contribution of utilitarianism to discussions about the normative foundations of international law also remained minimal. The only – dubious – British contribution would here be offered by a third-generation utilitarian: John Stuart Mill. Mill's "civilisational" liberalism finally gave the utilitarian project a distinctly "imperialist" dimension that will be analysed in Section 3.

⁵ J. Bentham, *A Fragment on Government*, in: "The Works of Jeremy Bentham" – Volume 1 (editor: J. Bowring; Tait, 1838-1843), 221. The work's subtitle is "An examination of what is delivered, on the subject of government in general in the introduction to Sir William Blackstone's Commentaries". It is a "fragment" that was originally part of a broader project entitled "A Comment on the Commentaries". The entire manuscript reads like a terrible – and personal – book review.

⁶ For this point, see: P. Schofield, Jeremy Bentham's 'Nonsense upon Stilts', (2003) 15 *Utilitas* 1 at 3.

⁷ C. Sylvest, *International Law in Nineteenth-Century Britain*, (2005) 75 *British Yearbook of International Law* 12. But see: P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 2009), 70: "Bentham's influence on the substantive law was more dramatic than his influence on legal theory, partly because there was very little writing which could properly be called legal theory." ; as well as D. Lyons, *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Oxford University Press, 1991), 7: "[Bentham] was always more concerned to apply his utilitarianism than to analyse or defend it."

1. Bentham's "Utilitarianism" and the Nature of International Law

All legal and moral considerations must, according to Bentham, begin with the fundamental distinction between what the law "is" and what the law "ought to be".⁸ The *historical* and *empirical* existence of law has to be categorically distinguished from its *normative* and *ethical* value; and even the latter must not be measured against "traditional" conceptions of the public good; instead, all normative value must ultimately derive from the "rationalist" principle of utility. The manifesto for this "positivist" revolution is published in 1789 – the year of the French Revolution – and is entitled "Introduction to the Principles of Morals and Legislation".⁹ Within it, Bentham espouses a positivist philosophy in a dual sense: for not only is "law" itself regarded in a positivistic manner; morality and ethics are themselves "positively" founded on the basis of the principle of utility! In order to better explain this dual positivism let us look at it in some detail first (a), before a second section explores its potential for into international law (b).

a. Bentham's Dual Positivism: Positive Morality, Positive Law

Conceptions of morality and ethics will generally have a metaphysical foundation that may itself be rooted in religion. But rejecting all traditional (metaphysical) definitions of community and happiness, Bentham advances an "empirical" counter-definition: "Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in

⁸ Bentham, *A Fragment on Government* (supra n.5), 229: "To the province of the Expositor it belongs to explain to us what, as he supposes, the Law is: to that of the Censor, to observe to us what he thinks it ought to be. The former, therefore, is principally occupied in stating, or in inquiring after facts: the latter, in discussing reasons."

⁹ The book had however been privately printed in 1780; and a revised version was finally published in 1823.

view.”¹⁰ Ethics is here given a new “positive” foundation: the principle of utility. The principle, also known as the “greatest happiness principle”, postulates that the sole ethical standard behind all public (and private) acts should always be “the greatest happiness of the greatest number”.¹¹ Denouncing the existence of “natural” communities – there are only natural persons – as metaphysical fictions,¹² the only ethical standard is that of *private* individuals. This individualistic “hedonism” – for that is what it is – reduces the “public good” to the collection of individual wills. These “private” wills can be scientifically measured and subsequently aggregated;¹³ and the “art” or “science” of legislation consists in codifying the aggregate result.¹⁴ Good law must thus always and regularly be “codified”, because regular codification “actualises” the preferences of its subjects and reforms whatever “customary” law has been inherited from the past.

Should the author of these – radical – ideas not warmly welcome the French Revolution? Whilst the “rationalist” potential of the principle of utility was not lost on

¹⁰ J. Bentham, *An Introduction to the Principles of Morals and Legislation*, in: “The Works of Jeremy Bentham – Volume 1” (editor: J. Bowring; Tait, 1838-1843), 84 at 143: “It may here be asked, how it is that upon the principle of private ethics, legislation and religion out of the question, a man’s happiness depends upon such parts of his conduct as affect, immediately at least, the happiness of no one but himself: this is as much as to ask, What motives (independent of such as legislation and religion may chance to furnish) can one man have to consult the happiness of another? by what motives, or (which comes to the same thing) by what obligations, can he be bound to obey the dictates of probity and beneficence? In answer to this, it cannot but be admitted, that the only interests which a man at all times and upon all occasions is sure to find adequate motives for consulting, are his own. Notwithstanding this, there are no occasions in which a man has not some motives for consulting the happiness of other men. In the first place, he has, on all occasions, the purely social motive of sympathy or benevolence: in the next place, he has, on most occasions, the semisocial motives of love of amity and love of reputation. The motive of sympathy will act upon him with more or less effect, according to the bias of his sensibility: the two other motives, according to a variety of circumstances, principally according to the strength of his intellectual powers, the firmness and steadiness of his mind, the quantum of his moral sensibility, and the characters of the people he has to deal with.”

¹¹ For an excellent study of the origins of this phrase within Bentham’s writings, see: R. Shackleton, “The Greatest Happiness of the Greatest Number: The History of Bentham’s Phrase”, (1972) 90 *Studies on Voltaire and the Eighteenth Century* 1461. For an extensive definition within Bentham’s “Principles of Morals and Legislation”, see *supra* n.10, 1: “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness. I say of every action whatsoever; and therefore not only of every action of a private individual, but of every measure of government.”

¹² *Ibid.*, 2. “The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what?—the sum of the interests of the several members who compose it.”

¹³ *Ibid.*, especially Chapters IV-V.

¹⁴ *Ibid.*, especially Chapter XIX, IV.

the French revolutionaries,¹⁵ Bentham himself famously disagreed with the *justification* behind French revolutionary rationalism. In his “Anarchical Fallacies” (1795), a fierce attack is thus launched.¹⁶ Using the weapons of analytic philosophy,¹⁷ Bentham vehemently criticised the natural law conception behind human rights. A good example of Bentham’s formal style and substantive criticism can be found in his discussion of Article II of the (proposed) French Revolutionary Constitution. Stating that “[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man”, Bentham holds:

“More confusion—more nonsense,—and the nonsense, as usual, dangerous nonsense. The words can scarcely be said to have a meaning: but if they have, or rather if they had a meaning, these would be the propositions either asserted or implied:— 1. That there are such things as rights anterior to the establishment of governments: for natural, as applied to rights, if it mean anything, is meant to stand in opposition to legal—to such rights as are acknowledged to owe their existence to government, and are consequently posterior in their date to the establishment of government. 2. That these rights can not be abrogated by government: for can not is implied in the form of the word imprescriptible, and the sense it wears when so applied, is the cut-throat sense above explained. (...) How stands the truth of things? That there are no such things as natural rights—no such things as rights anterior to the establishment of government—no such things as natural rights opposed to, in contradistinction to, legal: that the expression is merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to that sort of error that leads to mischief—to the extremity of mischief. (...) That which has no existence cannot be destroyed—that which cannot be destroyed cannot require anything to preserve it from destruction. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.”¹⁸

¹⁵ The French revolutionaries indeed thought that Bentham shared their views and made him, on the basis of his “Introduction to the Principles of Morals and Legislation”, an honorary citizen!

¹⁶ J. Bentham, *Anarchical Fallacies*, in: “The Works of Jeremy Bentham – Volume 2” (editor: J. Bowring; Tait, 1838-1843), 489. David Armitage has pointed to an even earlier pamphlet against the American Declaration of Independence, see: Bentham’s “Short Review of the Declaration” to be found in: D. Armitage, *The Declaration of Independence: A Global History* (Harvard University Press, 2007), 173.

¹⁷ J. Bentham, *Anarchical Fallacies* (supra n.16), 497: “The logic of it is of a piece with its morality:—a perpetual vein of nonsense, flowing from a perpetual abuse of words,—words having a variety of meanings, where words with single meanings were equally at hand—the same words used in a variety of meanings in the same page,—words used in meanings not their own, where proper words were equally at hand,—words and propositions of the most unbounded signification, turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be;—the same inaccuracy, the same inattention in the penning of this cluster of truths on which the fate of nations was to hang, as if it had been an oriental tale, or an allegory for a magazine:—stale epigrams, instead of necessary distinctions,—figurative expressions preferred to simple ones,—sentimental conceits, as trite as they are unmeaning, preferred to apt and precise expressions,—frippery ornament preferred to the majestic simplicity of good sound sense,—and the acts of the senate loaded and disfigured by the tinsel of the playhouse.”

¹⁸ *Ibid.*, 500.

The idea of natural law in general, and natural rights, in particular is denounced as “execrable trash”.¹⁹ There cannot be “rights” outside “civil society” and civil law. “*Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights”.²⁰ The language of imaginary right is said to even have real – anarchical – consequences:

“The revolution, which threw the government into the hands of the penners and adopters of this declaration, having been the effect of insurrection, the grand object evidently is to justify the cause. But by justifying it, they invite it: in justifying past insurrection, they plant and cultivate a propensity to perpetual insurrection in time future; they sow the seeds of anarchy broad-cast: in justifying the demolition of existing authorities, they undermine all future ones, their own consequently in the number. (...) For such is the difference—the great and perpetual difference, betwixt the good subject, the rational censor of the laws, and the anarchist—between the moderate man and the man of violence. The rational censor, acknowledging the existence of the law he disapproves, proposes the repeal of it: the anarchist, setting up his will and fancy for a law before which all mankind are called upon to bow down at the first word—the anarchist, trampling on truth and decency, denies the validity of the law in question,—denies the existence of it in the character of a law, and calls upon all mankind to rise up in a mass, and resist the execution of it.”²¹

These negative consequences would get worse and worse. Merely “prejudicial to the growth of knowledge” at first, the French Revolution had offered a “practical comment” on the language of natural rights, and the very use of the idea of natural law was therefore “already a moral crime” that is “hostile to the public peace”.²² The great “reformer” Bentham thus arrives, somewhat ironically, at the very same conclusion as the great British conservative: Edmund Burke! However: what does Bentham’s radical rejection of natural law thinking mean for his conception of the “law of nations”? Let us look at this specific question in the next section.

¹⁹ Ibid. See also the uncharitable attack on Article I and especially the idea that social distinctions should be based on “common utility” – something potentially close to Bentham.

²⁰ Ibid., 523.

²¹ Ibid., 496 and 498.

²² Ibid., 524.

b. *Utilitarianism and Bentham's "International Law"*

If the idea of a “right” or “law” is a “positive” phenomenon that can only exist in “civil society”, what does this mean for the Benthamite conception of a law of nations? If all law must be civil law, can there be a law above States? Surprisingly, Bentham thinks there can be; and insisting on a new term that aims to divorce the “universalist” natural law undertones associated with the term “law of nations”,²³ he calls this part of his jurisprudential analysis “international” law or international jurisprudence. This international jurisprudence is distinguished from “universal” jurisprudence;²⁴ and it is equally distinguished from “internal” jurisprudence.²⁵ What, then, is international jurisprudence? Unlike Blackstone’s broader definition, Bentham gives it a restrictive state-centred scope that excludes all private individuals, including the sovereign acting in a private capacity:

“Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re natâ*, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*.”²⁶

²³ The famous footnote in the “Principles of Morals and Legislation” reads (supra n.10, 149) : “The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence. The chancellor D’Aguesseau has already made, I find, a similar remark: he says that what is commonly called *droit des gens*, ought rather to be termed *droit entre les gens*.”

²⁴ Bentham calls “universal jurisprudence” those legal matters that apply to all nations; and – what is often overlooked – he believes that there indeed exist matters that fall within this sphere (ibid. 149): “That the laws of all nations, or even of any two nations, should coincide in all points, would be as ineligible as it is impossible: some leading points, however, there seem to be, in respect of which the laws of all civilized nations might, without inconvenience, be the same. To mark out some of these points will, as far as it goes, be the business of the body of this work.” For an analysis of this Benthamite “jurisprudential cosmopolitanism”, see: D. Armitage, *Foundations of Modern International Thought* (Cambridge University Press, 2013), 176-7.

²⁵ Bentham, *Principles of Morals and Legislation* (supra n.10), 149.

²⁶ Ibid.

Importantly, and unlike later doubts,²⁷ international law, as the law between sovereign states, is affirmatively seen as “existing” in a treatment of the positive law (expository jurisprudence) as well as in the form of future principles of legislation (censorial jurisprudence).²⁸ And Bentham himself would try his hand at being an – unauthoritative – “legislator of the world”.²⁹ His “Principles of International Law” (1789),³⁰ published only after his death, indeed offer a fascinating – if often disappointing – insight into Bentham’s thinking. What are the principles that – should – govern international law? The object of international law must, in line with Bentham’s utilitarian positivism, be the “common and equal utility of all nations”.³¹ But what is it; how can it be calculated; and in what way does it differ from the “national” utility found within states? The complex answer he gives us deserves to be quoted in full:

“The end of the conduct which a sovereign ought to observe relative to his own subjects,---the end of the internal laws of a society,---ought to be the greatest happiness of the society concerned. (...) The end of the conduct he ought to observe towards other men, what ought it to be, judging by the same principle? Shall it again be said, the greatest happiness of his own subjects? Upon this footing, the welfare, the demands of other men, will be as nothing in his eyes: with regard to them, he will have no other object than that of subjecting them to his wishes by all manner of means. He will serve them as he actually serves the beasts, which are used by him as they use the herbs on which they browse---in short, as the ancient Greeks, as the Romans, as all the models of virtue in antiquity, as all the nations with whose history we are acquainted, employed them. Yet in proceeding in this career, he cannot fail always to experience a certain resistance---resistance similar in its nature and in its cause, if not always in its certainty and efficacy, to that which individuals ought from the first to experience in a more restricted career; so that, from reiterated experience, states ought either to have set themselves to seek out---or at least would have found, their line of least resistance, as individuals of that same society have already found theirs; and this will be the line which represents the greatest and common utility of all nations taken

²⁷ On Bentham’s subsequent doubts as to the quality of international jurisprudence as “law” properly speaking, see: H.B. Jacobini, *Jeremy Bentham and the Fashioning of “International Law”*, (1984) 78 *American Journal of International Law* 405 at 417.

²⁸ In a footnote in Bentham’s “Principles” we read (supra n.10, 150): “Of what stamp are the works of Grotius, Puffendorf [sic], and Burlamaqui? Are they political or ethical, historical or juridical, expository or censorial? Sometimes one thing, sometimes another: they seem hardly to have settled the matter with themselves. A defect this to which all books must almost unavoidably be liable, which take for their subject the pretended law of nature; an obscure phantom, which, in the imaginations of those who go in chase of it, points sometimes to manners, sometimes to laws; sometimes to what law is, sometimes to what it ought to be.”

²⁹ P. Schofield, *Jeremy Bentham: Legislator of the World*, (1998) 51 *Current Legal Problems* 115.

³⁰ J. Bentham, *Principles of International Law*, in: “The Works of Jeremy Bentham2 – Volume 2 (editor: J. Bowring; Tait, 1838-1843), 535. The “Principles” consist of four separate essays, namely: (1) “Objects of International Law”, (2) “Of Subjects, or of the Personal Extent of the Dominion of the Law”, (3) “Of War, considered in respect of its Causes and Consequences”, and (4) “A Plan for an Universal and Perpetual Peace“. Especially the last essay is often seen through a “utopian” lens.

³¹ *Ibid.*, 536.

together. The point of repose will be that in which all the forces find their equilibrium, from which the greatest difficulty would be found in making them to depart.”³²

The passage suggests a number of explicit and implicit assumptions that need unpacking before further analyzing the author’s explanation. First, an “imperial” utility according, to which the greatest utility is achieved in the interest of one single nation, is straightforwardly rejected.³³ However, secondly, the idea of a “cosmopolitan” utility is equally rejected. For instead of taking individual utility as the basic ingredient for the calculation of utility in a “cosmopolitan” State, international utility is calculated on the basis of the common utility of nations – as individual collectivities.³⁴ The principle of utility does, consequently, not apply to humanity as such; it only applies to nations. (This intellectual inconstancy ultimately prevents utilitarianism from realizing the “cosmopolitan” potential that is inherent in its moral individualism;³⁵ and Bentham’s utilitarianism has therefore – rightly – been accused of being “parochial”.³⁶) Thirdly,

³² Ibid., 537-538.

³³ In his fourth essay, Bentham actively counsels Britain and France to “[g]ive up all the colonies” and to “[f]ound no new colonies” (ibid., 548). On Bentham as a critic of empire, see: J. Pitts, *A Turn of Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, 2005), Chapter 4: “Jeremy Bentham: Legislator of the World?”.

³⁴ Bentham himself seems to have realised that the assumption of a “nation” as a moral “person” contradicted his own – negative – views on legal fictions and in particular his “positivist” view that the idea of a moral “community” was but a fiction; and so he now leaves this point open (ibid., 539: “Will it [a nation] be said that it has its person? Let us guard against the employment of figures in matter of jurisprudence.”); and yet almost all of the essays are based on the existence of nations as autonomous moral persons; and, in my view, Bentham here thus fundamentally betrays his own “individualists” utilitarianism. For Bentham’s state-based international law, see especially: E. Nys, *Notes Inédites de Bentham sur le droit international* (1885) 1 L.Q. Rev. 225.

³⁵ Admittedly, Bentham mentions in his “Comment on the Commentaries” (J.H. Burns and H.L.A. Hart (eds.), *The Collected Works of Jeremy Bentham: A Comment on the Commentaries and A Fragment on Government* (Oxford University Press, 1977), 36) that such a world state might not be impossible: “States there are in the world: we see it. Nay, says [Blackstone], have but a little patience and I will prove it to you: ay and commonwealths and nations into the bargain. His argument is that it is *impossible* the world should be all in one state. Improbable enough indeed I should suppose it but I pretend not to understand like him what is impossible, nor should I much want to know that one thing (if it be so) is impossible, for the sake of knowing that another thing *is*, which I see with my own eyes.”. However, the argument is nowhere elaborated, and indeed just seems to be one of the many contrarian positions taken just to contradict Blackstone.

³⁶ In this sense, see: D. Lyons, *In the Interest of the Governed* (supra n.7), 24-27, esp. 26: “And this is striking, for a parochial principle has potentially significant implications. The interests of a powerful nation might tragically conflict with the interest of mankind at large, and once committed to testing acts by the interest of the agent’s community could therefore find himself endorsing conduct detrimental to the welfare of mankind as a whole. A parochial political philosophy would have frightening possibilities in the realm of international relations.” For a criticism of that view, see: J.H. Burns, *Happiness and Utility: Jeremy Bentham’s Equation*, (2005) 17 *Utilitas*, 46 who has claimed that the reference to “the common and equal utility of all nations” would imply “a ‘universalism’ capable of transcending whatever ‘parochialism’ Bentham’s principle of utility may sometimes seem to sustain” (ibid., 52). The major

in the absence of an international “legislature”, there simply is no way to scientifically calculate and aggregate “national” utilities and the only way of “finding” the common utility for all nations is therefore to engage in a Kantian-style thought experiment. Each nation should anticipate the general good on the basis of *a priori* international principles. To quote Bentham on this last point:

“[I]n order to regulate his proceedings with regard to other nations, a given sovereign has no other means more adapted to attain his own particular end, than the setting before his eyes the general end---the most extended welfare of all the nations on the earth. So that it happens that this most vast and extended end---this foreign end---will appear, so to speak, to govern and to carry with it the principal, the ultimate end; in such manner, that in order to attain to this, there is no method more sure for a sovereign than so to act, as if he had no other object than to attain to the other;---in the same manner as in its approach to the sun, a satellite has no other course to pursue than that which is taken by the planet which governs it.”³⁷

And having identified five utilitarianist “objects” of international law,³⁸ Bentham finally concludes:

“Expressed in the most general manner, the end that a disinterested legislator upon international law would propose to himself, would therefore be the greatest happiness of all nations taken together. In resolving this into the most primitive principles, he would follow the same route which he would follow with regard to internal laws. He would set himself to prevent positive international offences---to encourage the practice of positively useful actions. (...) In the same manner, he would regard as a negative offence every determination by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than would produce evil to itself. (...) The thread of analogy is now spun; It will be easy to follow it. There are, however, certain differences. A nation has its property---its honour--and even its condition. It may be attacked in all these particulars, without the individuals who compose it being affected. (...) Among nations, there is no punishment...”³⁹

problem with this objection is however that it the aggregation of national utilities is not “universalistic” but “international” (even in Bentham’s own terminology)!

³⁷ Bentham, *Principles of International Law* (supra n.30), 538.

³⁸ Ibid., “1. The first object of international law for a given nation:---Utility general, in so far as it consists in doing no injury to the other nations respectively, having the regard which is proper to its own well-being. 2. Second object:---Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being. 3. Third object:---Utility general, in as far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations. 4. Fourth object:---Utility general, in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations. (...) 5. Fifth object:---In case of war, make such arrangements, that the least possible evil may be produced, consistent with the acquisition of the good which is sought for.” The first objects are clearly inspired by Blackstone (supra n.4), 66: “This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in times of war, as little harm as possible[.]”, who had himself been inspired by Montesquieu. On Montesquieu’s conception of international law, see Chapter 1.

³⁹ Ibid.

What are we to make of all this? It is hard to distill much sense from Bentham's apodictic and changing assembly of points.⁴⁰ The central proposition, especially within the last passage, however seems to be that the principle of utility, while applicable analogously, would need to be adjusted to the "international" sphere on the ground that nations differ from individuals. But no argument or reason is given; and not much else can be deduced. With the exception of Bentham's utopian "Plan for an Universal and Perpetual Peace", there simply are no substantive guidelines that Bentham's philosophy offers for international law. Bentham's utilitarianism indeed, disappointingly, seems to settle for a purely formalist project: the future of international law is thus purely seen in international "codification" – a word coined by this tireless inventor of neologisms.⁴¹ In sum: not much consistency or thought appears to have been given to international law by the founding father of British utilitarianism; even if the subject remained of some interest until his death in 1832.

2. From Legislative Utilitarianism to Analytic Positivism

Bentham's authority within Britain had remained marginal until the early decades of the nineteenth century; yet his fame dramatically rose once popularised and refracted in the work of the second generation of utilitarians. This second generation played "a crucial intermediary role in the transformation of the utilitarian tradition";⁴² and with regard to international law and jurisprudence, it has even been claimed – by none other than Bentham's own editor – that "it was almost solely in the great article by Mr. Mill on the "Law of Nations" in the *Encyclopædia Britannica*, that the public could find a distinct account of the utilitarian theory of International law".⁴³ The Mill article had indeed taken up a number of Benthamite themes; but more importantly still, it can be seen as the founding stone of what was to become British "analytical" jurisprudence.

⁴⁰ On Bentham changing views on international law, see: J. Pitts, *Boundaries of the International* (Harvard University Press, 2018), 144-145.

⁴¹ Bentham, *Principles of International Law* (supra n.30), 540.

⁴² J. Pitts, *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton University Press, 2005), 104.

⁴³ J.H. Burton, Introduction to the study of the Works of Jeremy Bentham, in: "The Works of Jeremy Bentham – Volume 1" (editor: J. Bowring; Tait, 1838-1843), 1 at 75. The great irony here of course is that Mill's article did not (!) use the Benthamite neologism "international law" but instead referred the older concept of the "law of nations"!

This tradition of legal positivism received, a decade later, its classic formulation in the work of John Austin – the first “professional” legal philosopher within the United Kingdom.

a. James Mill and the “Empirical” Foundations of International Law

James Mill plays a “transformative” role in the British utilitarian tradition. For while elaborating many of Bentham’s terms and ideas, the interpretation and meaning given to them oftentimes moves into directions unintended or unforeseen by the founder of utilitarianism. An excellent illustration of Mill’s “transformative” role is the development and refinement of Bentham’s “theory” of international law. Mill’s treatment of the subject will henceforth cast a serious doubt on the legal quality of that type of law.⁴⁴ In his “Law of Nations” (1825),⁴⁵ the discussion of the nature of international law is indeed placed into the following novel intellectual frame:

“In the meaning of the word Law, three principal ideas are involved; that of a Command, that of a Sanction, and that of the Authority from which the command proceeds. Every law imports, that something is to be done; or to be left undone. But a Command is impotent, unless there is the power of enforcing it. The power of enforcing a command, is the power of inflicting penalties, if the command is not obeyed. And the applicability of the penalties constitutes the Sanction. There is more difficulty in conveying an exact conception of the Authority which is necessary to give existence to a law. It is evident, that it is not every command, enforced by penalties, to which we should extend such a title. A law is not confined to a single act; it embraces a class of acts; it is not confined to the acts of one man; it embraces those of a community of men. And the authority from which it emanates must be an authority which that community are in the habit of obeying. (...) The conditions, which we have thus described, may all be visibly traced, in the laws which governments lay down for the communities to which they belong. There we observe the command; there the punishment prescribed for its violation; and there the commanding authority to which obedience is habitually paid. Of these conditions how many can be said to belong to any thing included under the term Law of Nations?”⁴⁶

⁴⁴ Admittedly, Bentham had himself raised some doubts about the very quality of international law as law (“Principles of Morals and Legislation” (supra n.10), 150: “With what degree of propriety, rules for the conduct of [sovereign states] can come under the appellation of laws, is a question that must rest till the nature of the thing called a law shall have been more particularly unfolded.”), Bentham however never pursued or analysed his line of thought in much depth. It therefore appears that he ultimately held that there was such a thing as international law (M.W. Janis, *Jeremy Bentham and the Fashioning of “International Law”*, (1984) 78 *American Journal of International Law* 405 at 411-2).

⁴⁵ [J. Mill], *Law of Nations*: Reprinted from the Supplement to the Encyclopaedia Britannica, available here: <https://oll.libertyfund.org/titles/mill-law-of-nations>.

⁴⁶ [J. Mill], *Law of Nations* (supra n.45), 3.

All the defining elements of an analytical positivism – whose classic definition would be given by Austin a few years later – are already here; yet the answer that Mill gives with regard to the normative or “legal” quality of international law remain ambivalent. For whereas he clearly denies that nations could “command” other nations,⁴⁷ a complex and nuanced answer is given to the question whether or not nations can be “sanctioned” or “punished” for violations of international law. True, the reality and efficacy of an ordinary penal sanction is denied;⁴⁸ yet Mill still considers that international law is not “without force and influence”.⁴⁹ And reverting to the intellectual tradition of Bentham’s utilitarianism, we read:

“That the human mind is powerfully acted upon by the approbation or disapprobation, by the praise or blame, the contempt and hatred, or the love and admiration, of the rest of mankind, is a matter of fact, which, however it may be accounted for, is beyond the limits of dispute. Over the whole field of morality, with the exception of that narrow part which is protected by penal laws, it is the only power which binds men to good conduct, and renders man agreeable and useful to man. (...) When persons, who have been educated in a virtuous society, have, from their infancy, associated the idea of certain actions with the favourable sentiments, and with all the advantages which flow from the favourable sentiments of mankind; and, on the other hand, have associated the idea of certain other actions with the unfavourable sentiments, and all the disadvantages which flow from the unfavourable sentiments of mankind; so painful a feeling comes in time to be raised in them at the very thought of any such action, that they recoil from the perpetration of it, even in cases in which they may be perfectly secure against any unfavourable sentiments, which it might be calculated to inspire. It will, we apprehend, upon the most accurate investigation, be found, that this is the only power to which we can look for any considerable sanction to the laws of nations;—for almost the only species of punishment to which the violation of them can ever become amenable: it is the only security, therefore, which mankind can ever enjoy for the benefit which laws, well contrived for this purpose, might be calculated to yield.”⁵⁰

Two important conclusions are here drawn. First: since the human mind is “acted upon” by feelings of moral pleasure and pain, morality itself can provide an effective

⁴⁷ Ibid., 4: “It is therefore clear, that the term Command cannot be applied, at least in the ordinary sense, to the laws of nations.” Bentham’s conception of law was here wider than a pure command or imperative theory of law because it allowed for “permissive laws”, see: H.L.A. Hart, *Bentham’s of Laws in General*, (1971) 2 *Cambrian Law Review* 24.

⁴⁸ [J. Mill], *Law of Nations* (supra n.45), 4: “If it be said, that several nations may combine to give it a sanction in favour of the weak, we might, for a practical answer, appeal to experience. Has it been done? Have nations, in reality, combined, so constantly and steadily, in favour of the law of nations, as to create, by the certainty of punishment, an overpowering motive, to unjust powers, to abstain from its violation? For, as the laws against murder would have no efficacy, if the punishment prescribed were not applied once in fifty, or a hundred times, so the penalty against the violations of the law of nations can have no efficacy, if it is applied unsteadily and rarely.”

⁴⁹ Ibid., 5.

⁵⁰ Ibid., 6-7.

sanction vis-à-vis “illegal” human conduct. International law may therefore be “law” in situations where there is such a moral sanction; yet this is only possible – secondly – if people are “educated in a virtuous society” that has taught them to associate international wrongs with “so painful a feeling” that “they recoil from the perpetration of it”. What types of societies will be able to generate this – moral – sanction? Only those societies that are capable of guaranteeing “man’s dependence upon the sentiments of others”! International law will consequently only fully operate, as law, “in countries, the rulers of which are drawn from the mass of the people, in other words in democratical countries”,⁵¹ whereas it cannot be guaranteed in despotic societies.

Mill here ingeniously connects the normativity of international law to the efficiency of moral sanctions, which is – in turn – dependent on the nature of the internal government within national societies. This “utilitarian” proposition thus converges with the Kantian thought that there is a connection between international law and the (internal) “republican” constitution of states that it is supposed to govern.⁵² And importantly: Mill’s utilitarianism – albeit conditionally – confirms the “legal” quality of international law. For in democratic or liberal societies, there exists an internal morality that guarantees a “public opinion” that will morally sanction violations of international law. However, unlike natural law thinking à la Blackstone, there is no “natural” link between the (formal) quality of international law as “law” and its moral “substance”. International law is not binding because it stems from a moral “ought” but because it “is” effective in triggering an empirical – moral – sentiment.

b. John Austin and the Denial of International Law

Mill’s relative affirmation of the legal nature of international law derived from his emphasis on the “sanction” aspect within his tripartite definition of “law”. This –

⁵¹ Ibid., 8-9. With regard to “monarchical” or “aristocratic” societies, Mill considers that the moral sanction attached to violations of international law only operates to “a very low degree” (ibid).

⁵² However, unlike Kant’s normative universalism, the nineteenth century will draw a dramatically different conclusion from this connection. For once the quality of international law, as law, is seen as depending on the “democratic” or “civilised” status of nations, it can only have force – as law – between such nations. For this point, see below.

fundamentally – changes into an absolute denial in the positivist revolution caused by another contemporary utilitarian: John Austin.⁵³ Thoroughly inspired by Hobbes’ philosophical ontology, Austin’s “The Province of Jurisprudence Determined” (1832) henceforth focused on the “command” element within the positivist theory of law. For Austin, “[e]very *law* or *rule*... is a *command*.”;⁵⁴ and since “the term *superiority* (like the terms *duty* and *sanction*) is implied by the term *command*”,⁵⁵ the identification of laws with sanctions becomes side-lined.⁵⁶ The simplified definition of what are legal rules is thus condensed to “*laws* emanate from *superiors*”;⁵⁷ and where the command is issued by a human superior, its laws are positive laws.⁵⁸

This re-fashioning of Mill’s older definition into a pure command theory has significant consequences for the province of jurisprudence:

“The science of jurisprudence (or, simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness. Positive morality, as considered without regard to its goodness or badness, might be the subject of a science closely analogous to jurisprudence. I say ‘might be’ since it is only in one of its branches (namely, the law of nations or international law), that positive morality, as considered without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner. (...) The science of ethics (or, in the language of Mr. Bentham, the science of deontology) may be defined in the following manner. - It affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation.”⁵⁹

With this, Austin famously comes to clinically distinguish between “positive jurisprudence”, “positive morality”, and “ethics”. The former two sciences deal with “positive” rules, that is: rules that empirically “exist”, whereas “ethics” relates to rules that “ought” to exist in the future. For both types of positive rules – “legal” as well as “moral” rules – their ethical “goodness or badness” is said to be irrelevant, as an

⁵³ The legal philosopher John Austin (1790-1859) was the holder of the first chair of jurisprudence at the newly founded University College London; a neighbour of Bentham and a friend of James Mills; and who would also later on tutor J.S. Mill.

⁵⁴ J. Austin, *The Province of Jurisprudence Determined* (editor: W. Rumble; Cambridge University Press, 1995), 21.

⁵⁵ *Ibid.*, 30.

⁵⁶ *Ibid.*, 118: “Every sanction properly so called is an eventual evil annexed to a command.”

⁵⁷ *Ibid.*, 30.

⁵⁸ Importantly, however, Austin also recognizes the existence of the “laws of God” or the “Divine law” (*ibid.*, 38: “The Divine laws, or the laws of God, are laws set by God to his human creatures. As I have intimated already, and shall show more fully hereafter, they are laws or rules, properly so called.”).

⁵⁹ *Ibid.*; 112-113.

“ought” cannot affect an “is”.⁶⁰ And with this utilitarian denial of ethical “essentialism” as regards the question of legality, Austin becomes the true father of a “pure theory of law”.⁶¹

The true Austinian innovation is however the conceptual invention of the idea of “positive morality”. Lying between present-day “laws properly so called” and what future laws “ought” morally to be, positive moral rules are defined as rules that *actively* propose or restrain a certain behaviour; and the two famous illustrations Austin gives are customary law in general,⁶² and “international law” in particular. Both constitute “positive” – that is humanly created – rules that “sanction” certain types of conduct; but in the absence of a superior authority, these rules are not “commands” and therefore not laws “properly so called”. For international law, this quickly follows from the very idea that it constitutes a law between sovereign states in which – by definition – states do not recognize a superior:

“Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.”⁶³

⁶⁰ To make his point clearer, Austin here expressly criticises Blackstone (ibid, 159): “In another passage of his 'Commentaries,' Blackstone enters into an argument to prove that a master cannot have a right to the labour of his slave. Had he contented himself with expressing his disapprobation, a very well-grounded one certainly, of the institution of slavery, no objection could have been made to his so expressing himself. But to dispute the existence or the possibility of the right is to talk absurdly. For in every age, and in almost every nation, the right has been given by positive law, whilst that pernicious disposition of positive law has been backed by the positive morality of the free or master classes.”

⁶¹ In this sense, G. Radbruch, *Anglo-American Jurisprudence through Continental Eyes*, 52 L. Q. Rev. 530 (1936), 531: “What the Continent achieved only after long byways through historical and philosophical systems of many kinds, was suddenly created by Austin fifty years earlier; but it must be added that his work had no great influence upon later Continental development.”

⁶² It is often forgotten that Austin also considered the English “common law”, as conceived by Blackstone, as a form of positive morality. For Blackstone, the common law was rooted in natural law in which judicial decisions were only evidence of that (natural) common law. For Austin, by contrast, only judge-made law is “law”. On this point, see “Conclusion: Apologetic Endings” below.

⁶³ Austin, *Province of Jurisprudence Determined* (supra n.54), 171.

In essence: since States, as political communities, do not recognize a superior authority above them, international law must be equated with “public opinion”; and, in clear opposition to James Mill, these rules are no longer seen as “legal” *because* they are sanctioned by public opinion; but, on the contrary, because they are *only* sanctioned by public opinion, they become reduced to rules of “positive morality”. This classification of international law as positive morality carries – of course – no deontological judgement: Austin simply acknowledges their “existence” – not their moral essence – as “posited” human rules; and he unambiguously chastises classic international law scholars for having confused positive morality as it “actually obtain[s]” among nations with international morality “as it ought to be”.⁶⁴

What, however, is Austin’s position with regard to international “ethics”? Due to his “positivistic” focus on “jurisprudence”, very little is discussed in “The Province of Jurisprudence Determined”. Indeed, unlike his utilitarian predecessors, there is no reformist zeal within him; and apart from Austin’s “theological utilitarianism”,⁶⁵ not much “utilitarian” philosophy can be found either.⁶⁶ Only at the very end of the book, do some passages reveal his thinking on international “utility”:

“The proper purpose or end of a sovereign political government, or the purpose or end for which it ought to exist, is the greatest possible advancement of human

⁶⁴ Ibid., 160: “Grotius, Puffendorf [sic], and the other writers on the so-called law of nations, have fallen into a similar confusion of ideas: they have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Gottingen, who died only a few years ago, is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp, the first who has distinguished the rules which ought to be received in the intercourse of nations, or which would be received if they conformed to an assumed standard of whatever kind, from those which are so received, endeavoured to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.”

⁶⁵ On this point, see W. Rumble, *Nineteenth-Century Perceptions of John Austin Utilitarianism and the Reviews of The province of Jurisprudence Determined* (1992) 3 Utilitas, 199 at 211, who rightly points out that for Austin, the principle of utility “provides the index to the tacit commands of God”. This had, to some extent, already been true for Bentham, *Principles of Penal Law*, in: J. Bowring (ed.), *The Works of Jeremy Bentham – Volume 1* (Tait, 1838), 365 at 412: “But if we presume that God wills anything, we must suppose that he has a reason for so doing, a reason worthy of himself, which can only be the greatest happiness of his creatures. In this point of view, therefore, the divine will cannot require anything inconsistent with general utility.”

⁶⁶ This did not prevent J.S. Mill for praising the book for its service to the utilitarian “cause”, see: J.S. Mill, *Austin’s Lectures on Jurisprudence* (1832), in: “The Collected Works of John Stuart Mill” – Volume XXI (editor: J. Robson; University of Toronto Press, 1984), 51 at 57: “Mr. Austin is a strong partisan of the doctrine which considers utility as the test or index to moral duty. Though he has stated some, he has omitted others of the essential explanations with which we think that this doctrine should be received; but he has treated the question in a most enlarged and comprehensive spirit, and in the loftiest tone of moral feeling, and has discussed certain branches of it in a manner which we have never seen equalled.”

happiness: Though, if it would duly accomplish its proper purpose or end, or advance as far as is possible the weal or good of mankind, *it commonly must labour directly and particularly to advance as far as is possible the weal of its own community*. The good of the universal society formed by mankind, is the aggregate good of the particular societies into which mankind is divided: just as the happiness of any of those societies is the aggregate happiness of its single or individual members. *Though, then, the weal of mankind is the proper object of a government, or though the test of its conduct is the principle of general utility, it commonly ought to consult directly and particularly the weal of the particular community which the Deity has committed to its rule. If it truly adjust its conduct to the principle of general utility, it commonly will aim immediately at the particular and more precise, rather than the general and less determinate end*. It were easy to show, that the general and particular ends never or rarely conflict. Universally, or nearly universally, the ends are perfectly consistent, or rather are inseparably connected.”⁶⁷

Sadly, this proof is never offered.⁶⁸ And indeed: just as Bentham’s utopian utilitarianism had failed to apply the principle of utility to humanity as such, Austin equally rejects its application beyond sovereign states. The principle of utility only works through the medium of nation states; and the greatest happiness of mankind is consequently defined as the aggregate sum of happiness among States. Seeing that this is not quite the same as the common happiness of the universal community of mankind, Austin is forced – not unlike Bentham before him – to take refuge in a *petitio principii*: the presumed harmony between national and universal objects of government. Hidden in a long footnote at the end of “The Province of Jurisprudence Determined”, we therefore read:

“To advance as far as is possible the weal or good of mankind, is more generally but more vaguely its proper purpose or end: To advance as far as is possible the weal of its own community, is more particularly and more determinately the purpose or end for which it ought to exist. Now if it would accomplish the general object, it commonly must labour directly to accomplish the particular: And it hardly will accomplish the particular object, unless it regard the general. Since, then, each of the objects is inseparably connected with the other, either may be deemed the paramount object for which the sovereign government ought to exist. We therefore may say, for the sake of conciseness, that its proper paramount purpose, or its proper absolute end, is ‘the greatest possible advancement of the common happiness or weal:’ meaning indifferently by ‘the common happiness or weal,’ the common happiness or weal of its own particular community, or the common happiness or weal of the universal community of mankind.”⁶⁹

The “cosmopolitan” potential in the utilitarians’ emphasis on individuals and their consequent rejection of “natural” human communities remains here, once more, unredeemed. Instead of drawing the radical – and logical – conclusion that the scope

⁶⁷ Austin, *Province of Jurisprudence Determined* (supra n.54), 242.

⁶⁸ For Austin, the proof belongs to the realm of “ethics” and not “jurisprudence” and thus falls outside the ambit of his own project (ibid).

⁶⁹ Ibid., 243.

of the principle of utility must be cosmopolitan in that all human interests are calculated by a cosmopolitan legislator that guarantees the greatest happiness for all members of humanity, “states” remain, strangely, regarded as quasi-natural communities endowed with their own – autonomous – normative interests. The radical individualism – this core element of British utilitarianism – is thus confined to national contexts only; perhaps because the empirical world is seen as composed of sovereign states.⁷⁰ Austin’s analytical positivism consequently remains, just as Bentham’s earlier version, “parochial” in nature.

3. From Analytic Positivism to Liberal Imperialism

The classic utilitarian tradition had, until Austin, remained within a form “national” framework; and, with its focus on the “command” element within law, the normativity of international law had come to be denied. A third generation of utilitarians – especially John Stuart Mill – partly resumes this programme.⁷¹ International law continues to be seen with suspicious eyes as a “falsely-called” law;⁷² and Mill also applies the greatest happiness principle solely to national communities – and not to the world of humanity as such.⁷³

⁷⁰ Austin’s theory of sovereignty is an “empirical” and not a “normative” theory. Sovereignty is defined as follows (ibid., 166): “[T]he notions of sovereignty and independent political society may be expressed thus. - If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent.” The essence of sovereignty and political society is seen as the „habitual obedience“ to a – supreme – superior that may happen to differ – as an empirical matter – between different nations.

⁷¹ For a generally discussion of J.S. Mill’s international thought see now G. Varouxakis, *Liberty Abroad: J.S. Mill on International Relations* (Cambridge University Press, 2017).

⁷² J.S. Mill, *Vindication of the French Revolution*, in “The Collected Works of John Stuart Mill” – Volume XX (editor: J. Robson; University of Toronto Press, 1985), 317 at 345.

⁷³ The passage that is often quoted to show Mill’s “anti-cosmopolitanism” can be found in his book on “Utilitarianism” (in: “The Collected Works of John Stuart Mill” – Volume X (editor: J. Robson; University of Toronto Press, 1985), 203 at 247): “Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right. No one has a moral right to our generosity or beneficence, because we are not morally bound to practise those virtues towards any given individual. And it will be found with respect to this as with respect to every correct definition, that the instances which seem to conflict with it are those which most confirm it. For if a moralist attempts, as some have done, to make out that mankind generally, though not any given individual, have a right to all the good we can do them, he at once, by that thesis, includes generosity and beneficence within the category of justice.”

However: in stark contrast to the earlier utilitarian traditions;⁷⁴ Mill no longer extends his doubts to “imperial” arrangements. The older Benthamite “anti-imperialism” is dropped, and utilitarian thinking now comes to embrace British colonialism. This utilitarian imperialism is often called “liberal” or “civilisational” imperialism.⁷⁵ Its underlying idea is that through a benign and “enlightened” despotism over “backward” peoples, their happiness will be better served in the long run; and in this indirect way, the common good of humanity will generally be served. For international law, this means that the rules that it contains should not be applied indistinctively; and taking up his father’s connection between international law and the internal constitution of a society, Mill now firmly draws a line between “civilised” and “barbarian” societies. But let us begin by exploring Mill’s general views on the nature of international law first (a), before analysing his utilitarian philosophy with regard to British imperialism (b).

a. Mill’s General Position on the Nature of International Law

Sharing the views of his former tutor, John Austin, serious doubts about the legal character of international law are equally voiced by Mill. What is the law of nations? Since it is not a legislative command, it is a “falsely-called law” that is best seen as morality. For Mill, then, “[t]he law of nations is simply the custom of nations”. This customary law has “grown up like other usages, partly from a sense of justice, partly from common interest or convenience, partly from mere opinion and prejudice.”⁷⁶ International law is a relative mix of theoretical principles and practical conveniences that, due to their changing nature, cannot be regarded as static. On the contrary, following utilitarian logic, international law must be subject to progress and improvement; and from here a radically relativistic conclusion is drawn: “[w]hat is

⁷⁴ This view of the older utilitarians can be found in Bentham, and especially his 1793 essay “Emancipate Your Colonies”. On Bentham’s anti-imperialist view, see especially: J. Pitts, *A Turn to Empire: The rise of Imperial Liberalism in Britain and France* (Princeton University Press, 2005), Chapter 4.

⁷⁵ For an excellent analysis, see: E. Sullivan, *Liberalism and Imperialism: J.S. Mill’s Defense of the British Empire*, (1983) 44 *Journal of the History of Ideas* 599. Mill, it is here claimed, “became the most prominent of the mid-nineteenth century defenders of empire and the most important influence on the generation of liberal imperialists who followed him” (ibid., 605).

⁷⁶ S. Mill, *Vindication of the French Revolution* (supra n.72), 345.

called the law of nations is as open to alteration, as properly and even necessarily subject to it when circumstances change or opinions alter, as any other thing of human institution”.⁷⁷

But if international law changes over time, and with the times, what are the engines of change? In the absence of a formal legislature or judiciary capable of repealing international norms, change in international law will need to be effected by *violations* of existing rules: “The improvement of international morality can only take place by a series of violations of existing rules[.]”⁷⁸ Each epoch and era is tasked to develop its own “customary” principles; and just as the “old” international principles, established by the 1815 Vienna Congress, have been repealed by “new” principles in the 1820 and 1830s, so the present age would need to find its own international principles. This utilitarian philosophy of progress and change is subsequently applied to international treaties concretely. Rejecting Kantian ethics in general,⁷⁹ Mill’s philosophy of change here allows him to relativize the binding nature of treaties by insisting that they can be broken when the societal preconditions on the basis of which they were concluded have changed:

“In 1814 and 1815, a set of treaties were made by a general Congress of the States of Europe, which affected to regulate the external, and some of the internal, concerns of the European nations, for a time altogether unlimited. These treaties, having been concluded at the termination of a long war, which had ended in the signal discomfiture of one side, were imposed by some of the contracting parties, and reluctantly submitted to by others. Their terms were regulated by the interests, and relative strength at the time, of the victors and vanquished; and were observed as long as those interests and that relative strength remained the same. But as fast as any alteration took place in these elements, the powers, one after another, without asking leave, threw off, and were allowed with impunity to throw off, such of the obligations of the treaties as were distasteful to them, and not sufficiently important to the others to be worth a fight. The general opinion sustained some of those violations as being perfectly right; and even those which were disapproved, were not regarded as justifying a resort to war.”⁸⁰

Mill’s utilitarian philosophy, when applied to international law, thus pragmatically admits that interests change and that states, as masters of international law, are themselves able to make changes to the principles and rules of international law. Thus:

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Mill, *Utilitarianism* (supra n.73), 249.

⁸⁰ J.S. Mill, *Treaty Obligations* (1870), in “The Collected Works of John Stuart Mill” – Volume XXI (editor: J. Robson; University of Toronto Press, 1984), 314 at 343-4.

while international treaties ought generally to be binding, there nonetheless are “treaties which never will, and even which never ought to be permanently observed”.⁸¹ For Mill, only two principles states should thus always be followed for international treaties: “abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept”; and, secondly, conclude treaties “only for terms of years”.⁸² International treaties are – like all international law - temporal and situational; and this includes the question of war and peace.⁸³

Mill will soon develop his changing and situational concept of international law in a second direction – a direction that comes to deny the very existence of a universal international law for all peoples and states. It is indeed only a small step from Mill’s “situational” international law to the idea that its norms should depend on the level of “civilisation” the nations involved have.

b. British Utilitarianism and Civilisational Imperialism

The idea that human societies can be divided into various stages of (economic) evolution had been part of the Scottish enlightenment. In Adam Smith’s “Lectures on Jurisprudence”, we thus read that mankind passes through “four distinct states”: the age of hunters, the age of shepherds, the age of agriculture, and the age of commerce.⁸⁴ From here derives a division of the world into “barbarous and uncivilised” states, especially in Africa and Asia,⁸⁵ and the civil commercial societies of Europe.⁸⁶ Mill had

⁸¹ Ibid., 345.

⁸² Ibid., 346.

⁸³ For Mill’s complex relations to “war”, see: G. Varouxakis, *Liberty Abroad* (supra n.71), Chapter 6.

⁸⁴ A. Smith, *Lectures on Jurisprudence* (Liberty Fund, 1982), 14.

⁸⁵ A. Smith, *Wealth of Nations* (Oxford University Press, 1993) 30: “All the inland parts of Africa, and all that part of Asia which lies any considerable way north of the Euxine and Caspian seas, the ancient Scythia, the modern Tartary and Siberia, seem in all ages of the world to have been in the same barbarous and uncivilized state in which we find them at present.”

⁸⁶ On the concept of “civilisation”, see J. Starobinski, *The Word Civilization*, in: “Blessings in Disguise; or, The Morality of Evil” (Harvard University Press, 1993), 1 at 4: “Ferguson, influenced by lectures given by Adam Smith in 1752, seems to have been the first to use the word *civilization* in English.”

himself worked on the idea of “civilisation” since 1836;⁸⁷ and he built on this political economy tradition when he subsequently crafted his changing conception of international law onto societies that differed in their civilisational degree.

In his “Few Words on Non-Intervention” (1859),⁸⁸ Mill thus began to contend a categorical distinction between the international principles governing civilised nations and those principles that would have to govern situations in which one party was of a “high” and the other of a “low” stage of civilisation.⁸⁹ Within the former situation, “civilised peoples” are seen to be “members of an equal community, like Christian Europe”, whose independence and sovereignty will need to be respected. Intervention into their internal affairs is, as a general rule, legally prohibited.⁹⁰ Yet the same principles could, on the other hand, not apply to the relationship between civilised and uncivilised states:

“To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into, however it may be with those who, from a safe and irresponsible position, criticise statesmen. Among many reasons why the same rules cannot be applicable to situations so different, the two following are among the most important. *In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules...* In the next place, nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that

⁸⁷ J.S. Mill, *Civilisation* (1836), in: “The Collected Works of John Stuart Mill” – Volume XVIII (editor: J. Robson; University of Toronto Press, 1977), 117 at 120: “We shall on the present occasion use the word civilization only in the restricted sense: not that in which it is synonymous with improvement, but that in which it is the direct converse or contrary of rudeness or barbarism. (...) In savage life there is no commerce, no manufactures, no agriculture, or next to none: a country rich in the fruits of agriculture, commerce, and manufactures, we call civilized. (...) In savage life there is little or no law, or administration of justice; no systematic employment of the collective strength of society, to protect individuals against injury from one another; every one trusts to his own strength or cunning, and where that fails, he is generally without resource. We accordingly call a people civilized, where the arrangements of society, for protecting the persons and property of its members, are sufficiently perfect to maintain peace among them; *i.e.* to induce the bulk of the community to rely for their security mainly upon social arrangements, and renounce for the most part, and in ordinary circumstances, the vindication of their interests (whether in the way of aggression or of defence) by their individual strength or courage.”

⁸⁸ J.S. Mill, *A Few Words on Non-Intervention* (1859), in: “The Collected Works of John Stuart Mill” – Volume XXI (editor: J. Robson; University of Toronto Press, 1984), 109.

⁸⁹ *Ibid.*, 118.

⁹⁰ *Ibid.*, 122: “[T]he answer I should give to the question of the legitimacy of intervention is, as a general rule, no.” Interestingly, this rejection is – in line with the pragmatic nature of utilitarian thought – not rooted in a principle but rather in “utilitarian” considerations (*ibid.*): “The reason is, that there can seldom be anything approaching to assurance that intervention, even if successful, would be for the good of the people themselves. The only test possessing any real value, of a people’s having become fit for popular institutions, is that they, or a sufficient portion of them to prevail in the contest, are willing to brave labour and danger for their liberation.” Mill nevertheless accepts a number of exceptions to the principle of non-intervention among civilised states, for example: assistance to a legitimate self-defence (*ibid.*, 123). For an excellent analysis of this position that places Mill’s argument in the context of the “Italian Question”, see: G. Varouxakis, *Liberty Abroad* (supra n.71), Chapter 4.

they should be conquered and held in subjection by foreigners. Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to theirs.”⁹¹

The classic principles of international law are, it follows, be confined to civilised nations (as only they will reciprocate), while conquest and interference into the internal affairs of “barbarian” societies is justified so long as they have not formed nations or states.⁹² The central question thus becomes: what is the dividing line between “civilised” and “barbarian” states? For Mill, a people will be civilised “where the arrangements of society for protecting the persons and property of its members, are sufficiently perfect to maintain peace among them”;⁹³ and more importantly still, the accurate test of civilisation is “the progress of the power of co-operation”.⁹⁴ Only a division of labour within a society under which each individual has learnt to sacrifice some portion of its will “for a common purpose” signals an “organized combination” that grants independence and nationality to each other.⁹⁵ For peoples or societies that have not reached this stage, international law and – more generally – the ordinary principles of morality should not apply:

“It is, perhaps, hardly necessary to say that [Mill’s harm principle] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great, that there is seldom any choice of means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end, perhaps otherwise unattainable.”⁹⁶

Since non-civilised societies have not reached human “maturity” – a maturity that would entitle them to decide on their own what was in their best interest – it is in their (!) best interest to have a guardian (and protector) to lead them on their path to

⁹¹ J.S. Mill, *A Few Words on Non-Intervention* (supra n.88), 118-9.

⁹² Ibid, 119: “A violation of great principles of morality it may easily be; but barbarians have no rights as a *nation*, except a right to such treatment as may, at the earliest possible period, fit them for becoming one.”

⁹³ J.S. Mill, *Civilisation* (supra n. 87), 120.

⁹⁴ Ibid., 122.

⁹⁵ Ibid., 122-3.

⁹⁶ J.S. Mill, *On Liberty*, in “The Collected Works of John Stuart Mill” – Volume XVIII (editor: J. Robson; University of Toronto Press, 1977), 213 at 224.

civilisation. But why should a “mother country” do this and, for example, maintain its colonies? Jeremy Bentham, and before him Adam Smith, had strongly advised Britain to emancipate its colonies; yet John Stuart Mill, arrives at the opposite conclusion: “though Great Britain could do perfectly well without her colonies, and though on every principle of morality and justice she ought to consent to their separation... there are strong reasons for maintaining the present slight bond of connexion”.⁹⁷

What are these reasons? Four main reasons are offered. The most important of which builds on – but ultimately perverts – a Kantian idea: a colonial empire represents a step “towards universal peace, and general friendly co-operation among nations”, because “[i]t renders war impossible among a large number of otherwise independent communities”. (This replaces the Kantian idea of peace among free states with the distinctively un-Kantian idea of peace within a colonial empire.⁹⁸) In a similar vein, and secondly, colonialism is said to serve a benign economic function as it “keeps the markets of the different countries open to one another” and therefore assists international trade – which, according to British dogma, serves everyone.⁹⁹ The third reason is specific to the mother country: through its colonial possessions, Britain would have added “moral influence and weight in the councils of the world” – a benefit that would also radiate to the rest of the world as Britain, among all states of the world, “best understands liberty”.¹⁰⁰ But there is a – fourth – reason that is particularly strong with regard to colonies whose population has not yet reached “a sufficiently advance state”. For unlike the colonies that can govern themselves, these backward colonies

⁹⁷ J.S. Mill, *Considerations on Representative Government*, in “The Collected Works of John Stuart Mill” – Volume XIX (editor: J. Robson; University of Toronto Press, 1977), 317 at 565.

⁹⁸ Mill expressly rejects the idea of a federation of free states in favour of an unequal empire. Considering the possibility of an “imperial federation” along the U.S. American lines he finds (*ibid.*, 564): “Countries separated by half the globe do not present the natural conditions for being under one government, or even members of one federation. If they had sufficiently the same interests, they have not, and never can have, a sufficient habit of taking counsel together. They are not part of the same public; they do not discuss and deliberate in the same arena, but apart, and have only a most imperfect knowledge of what passes in the minds of one another. They neither know each other’s objects, nor have confidence in each other’s principles of conduct. Let any Englishman ask himself how he should like his destinies to depend on an assembly of which one-third was British American, and another third South African and Australian. Yet to this it must come, if there were anything like fair or equal representation; and would not every one feel that the representatives of Canada and Australia, even in matters of an imperial character, could not know, or feel any sufficient concern for, the interests, opinions, or wishes of English, Irish, and Scotch? Even for strictly federative purposes, the conditions do not exist, which we have seen to be essential to a federation. England is sufficient for her own protection without the colonies; and would be in a much stronger, as well as more dignified position, if separated from them, than when reduced to be a single member of an American, African, and Australian confederation.”

⁹⁹ *Ibid.*, 565.

¹⁰⁰ *Ibid.*

“must be governed by the dominant country” so as to “facilitate[] their transition to a higher state of improvement”.¹⁰¹

This “civilisational” imperialism is further explained as follows:

“There are, as we have already seen, conditions of society in which a vigorous despotism is in itself the best mode of government for training the people in what is specifically wanting to render them capable of a higher civilization. There are others, in which the mere fact of despotism has indeed no beneficial effect, the lessons which it teaches having already been only too completely learnt; but in which, there being no spring of spontaneous improvement in the people themselves, their almost only hope of making any steps in advance depends on the chances of a good despot. Under a native despotism, a good despot is a rare and transitory accident: but when the dominion they are under is that of a more civilized people, that people ought to be able to supply it constantly. (...) Such is the ideal rule of a free people over a barbarous or semibarbarous one.”¹⁰²

Mill’s defence of a liberal imperialism here present the “British” alternative to Kant’s vision of a free federation of states. His civilisational imperialism would, as the next chapter will show, come to exercise a strong hold on British international lawyers within the last quarter of the nineteenth-century (and here in particular on John Westlake).¹⁰³ But before we see this in practice, let us conclude this theoretical chapter.

Conclusion

This chapter has tried to offer a panoramic overview of the British philosophical landscape during the nineteenth century – a landscape that is dominated by three generations of utilitarian thinkers. Utilitarianism constitutes, by no means, the sole and exclusive philosophical school influencing the Victorian “public moralists”,¹⁰⁴ yet after

¹⁰¹ Ibid., 567.

¹⁰² Ibid., 567. In the following pages, Mill explains how best to govern a colony – whether directly through a British cabinet minister or not; and – with regard to India – concludes (ibid., 573): “It is not by attempting to rule directly a country like India, but by giving it good [native] rules, that the English people can do their duty to that country; and they can scarcely give it a worse one than an English Cabinet Minister[.]”.

¹⁰³ On the J. Westlake’s relationship to J.S. Mill, see: G. Varouxakis, *Liberty Abroad* (supra n.71), 40-42.

¹⁰⁴ S. Collini, *Public Moralists: Political Thought and Intellectual Life in Britain, 1850-1930* (Oxford University Press, 1993).

Bentham, “continental” and British philosophy had – especially with regard to moral and legal philosophy – fundamentally parted ways:

“To the influence of Bentham and his followers is chiefly due the almost complete discredit into which in England the doctrine of natural law has fallen. Till the days of Kant on the Continent and of Bentham in England, there was no very striking discordance between English and Continental jurisprudence. It is not possible to draw any sharp line of distinction between the teaching of Hobbes, Locke, Cumberland and Blackstone on one side of the Channel, and that of Grotius, Pufendorf, Spinoza, Thomasius and Wolff on the other. All were the inheritors of the same traditions. The acceptance, however, of Kant's metaphysical theory on the one hand, and of Bentham's sceptical theory on the other, established between English and Continental juridical and ethical thought a wall of separation that has not yet been broken down.”¹⁰⁵

This breakdown into two philosophical worlds, while not complete,¹⁰⁶ manifests itself in a number of stark differences between the “European” and the British view on the nature and role of international law. Rejecting all “natural law” thinking, the utilitarians simply cannot accept any a priori anchorage for international law; and lacking an empirical legislator that could bundle the preferences of mankind, all that Bentham can ultimately suggest is to ameliorate the formal qualities of international law through clarification and codification via international treaties. The subsequent attempt, by James Mill, to “found” international normativity on public opinion was equally frail, because it was still based on the idea of legal sovereignty of each and every nation. With John Austin, analytical positivism, then, finally arrived at its logical and infamous conclusion: international law is, strictly speaking, not law but “positive morality”. All human law must be adopted by a sovereign; and since states do not acknowledge a sovereign above them, there cannot be any international law.

With John Stuart Mill, British utilitarianism takes – arguably – its most distinctive shape. Mill thereby both continues and rejects elements of the two earlier utilitarian generations. He shares the Austinian doubt as to the normativity of international law; and by reducing it to a special form of custom and morality, he expressly acknowledged a dynamic conception of international law that accepts that each epoch and place must develop its own legal principles. Combining Bentham’s reformist zeal with his father’s civilisational ambitions, Mill comes to elaborate a liberal imperialist philosophy. For in contrast to the Kantian idea of a federation of free states, the best option to prevent

¹⁰⁵ J. W. Salmond, *Law of Nature*, (1895) 11 *Law Quarterly Review* 121 at 137.

¹⁰⁶ On the influence of Hegelianism in England, see J.H. Muirhead, *How Hegel came to England*, (1927) 36 *Mind* 423.

war and create international order is seen in an ever-greater empire of states led – of course – by an enlightened Great Britain.

Once this “imperial” conception is combined with an evolutionary standard of civilisational progress, a new fundamental distinction emerges: there exists an international law of civilised states that is different from an international law of non-civilised states. Two major reasons were produced to justify this result. According to the first, non-civilised states cannot “reciprocate”, because moral obligations and sanctions are regarded as not having the same “moral” force within “savage” societies. However, and more importantly still: in line with the principle of utility, the “highest” civilisation is seen as naturally entitled to govern – and advance – those peoples that are lagging behind the “present” stage of humanity. Part and parcel of liberal imperialism is thus a “particularistic” universalism. For in seeing one nation or a family of nations – here: the United Kingdom and the British Empire – as the highest civilisation on earth and considering mankind as “one not because it [is] everywhere the same, but because the differences represent[] different states in the same process”, the idea of human progress gets converted from a “social theory into a moral and political one”.¹⁰⁷ A hierarchy of states comes to be established, and that hierarchy ultimately justifies advanced states to lead and teach non-civilised states in the general interest of humanity as a whole.

¹⁰⁷ J. W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge University Press, 1968), 98.

The “British” Nineteenth Century II

Three Practical Conceptions

Introduction

Despite Bentham's ferocious attack, by the turn of the nineteenth century, two "natural" law traditions – one absolute, one relative – continued to be commonplace among British international jurists. The former – absolute – conception can for example be found in the work of James Mackintosh, whose "Discourse on the Study of the Law of Nature and Nations" (1799) is an often overlooked monument to classic scholarship.¹ Building on the work of Blackstone, international law here continues to be conceived of as a "Law of Nature and Nations" that applies to states as well as private individuals,² and which evenly governs "the universal commonwealth of the human race".³ This law of nature is thereby "discoverable by natural reason" and must be "considered as a law" adopted by the "great Legislator of the universe for the guidance of his creatures to happiness".⁴

A relativistic conception of natural law, by contrast, can be found in the work of Robert Ward – briefly discussed in Chapter 1.⁵ It may be recalled that Ward accepts the "Law of Nature as forming a part of the foundation of the Law of Nations".⁶ But in line with other eighteenth century positivists, he also thinks that a special and positive law is required to make that abstract law more concrete; yet for this positive part to be binding, it normatively needs a "binding principle". For Ward, that binding principle is found in "religion, and the moral system engrafted upon it";⁷ and with it, he conceived of a different international legal orders that apply to different "classes" of nations.

It is perhaps surprising that these two brilliant voices would not come to influence the early decades of the British nineteenth century. But Britain had never been too "academic" or "professional" when it came to law; and unlike the rich and long-standing traditions of legal publicists on the (European) continent, British international

¹ J. Mackintosh, *Discourse on the Study of the Law of Nature and Nations* (Lincoln's Inn, 1790).

² *Ibid.*, 3.

³ *Ibid.*, 7.

⁴ *Ibid.*, 9.

⁵ R. Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe* – Volume I (Butterworth, 1795).

⁶ *Ibid.*, xxxi.

⁷ *Ibid.*, xxxv.

law writing had remained shockingly underdeveloped by the beginning of the nineteenth century.⁸ Writing in 1839, the first English “systematic” textbook on the law of nations could thus justly lament:

“It is indeed singular that, in the multiplicity of works which are published on almost every subject, we have never had a systematic treatise on the Law of Nations by an English writer. There are two productions on this subject in our language, both of which I should be proud to claim as belonging to our literature, but both are written by Americans ... The fact of the systematic writers on the Law of Nations having been all foreigners, is, I think, chiefly attributable to the similarity of the method of studying the Law of Nations, and that adopted in the study of the Roman Law, the basis of jurisprudence on the continent.”⁹

Systematic and doctrinal writing on international law had indeed, for centuries, been overshadowed by “empirical” philosophy.¹⁰ When international law therefore subsequently became a subject of some academic interest, the main “British” ideas originated, at first, from the other side of the Atlantic. For the young United States of America had heavily relied on international law when establishing itself in the world; and the scholarly tradition of Vattel, Montesquieu and Blackstone had been continued in this new Anglo-Saxon member of the international community. A first section will consequently start with the early American conception of international law. Yet, as we shall see in Section 2, this incorporation of American ideas was superseded by an extensive reception of the German Historical School, whose metaphysical premises come to generally dominate British international law in the second half of the nineteenth-century. This metaphysical “transplant” is however only one part of the story. For the liberal imperialism – principally developed by J. S. Mill – would, in a third step, superimpose a utilitarian “British” conception of international law that would become dominant by the end of the nineteenth century.

⁸ One reason behind this intellectual absence was the lack of a wider university culture, especially for jurisprudence and law. In the words of A. Carty, *19th Century Textbooks and International Law* (Cambridge PhD thesis, 1972), 277: “Legal education in the universities was almost non-existent.” Up to the early decades of the 19th century, it seems therefore plausible to consider Vattel’s “Law of Nations” to have remained the dominant textbook in Britain (J. Pitts, *Boundaries, Boundaries of the International: Law and Empire* (Harvard University Press, 2018), 119. For a brief history of the English Vattel editions, see the 2008 Liberty Fund edition by B. Kapossy and R. Whatmore (ibid., xxi-xxii), which is itself based on the 1797 English edition. A newly commented – and swiftly famous – edition of Vattel would be published in 1834 by Joseph Chitty.

⁹ O. Manning, *Commentaries on the Law of Nations* (Milliken and Clark, 1839), v-vi.

¹⁰ See only: R. Woolhouse, *The Empiricists* (Oxford University Press, 1988); and S. Priest, *The British Empiricists* (Routledge, 2007).

1. Early US American Scholarship on “International Law”

The celebrated legal authority in the early decades of the young American republic had remained the “British” Blackstone, whose “Commentaries” were reprinted and annotated by George Tucker with special references to the United States.¹¹ A first truly “American” discussion of international law can be found in Kent’s “Commentaries on American Law” (1826).¹² Inspired by an understanding of the United States as itself founded upon the principles of international law,¹³ the very first part of Kent’s exposition of American (!) law is dedicated to “Law of Nations”. This celebrated mind,¹⁴ looking at the “foundations” of international law, here tried to find a “pragmatic” middle ground between naturalism and positivism:

“There has been a difference of opinion among writers, concerning the foundations of the law of nations. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; while others have insisted that it was essentially the same as the law of nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the law of nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence... There is a natural and a positive law of nations.”¹⁵

This syncretic view looked back at the eighteenth-century positivists that had elevated the positive law of nations to the same normative rank as natural law. And paralleling James Mill, international law is seen as “a code of present, active, durable, and binding obligation” whose sole “efficient sanction” is found to lie in “public opinion”.¹⁶ There

¹¹ St. G. Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws of the Federal Government of the United States; and of the Commonwealth of Virginia* (Carr, 1803).

¹² J. Kent, *Commentaries on American Law* (Halsted, 1826). The title is of course again evocative of Blackstone’s “Commentaries”.

¹³ The book is divided into three parts: Part I deals with the “Law of Nations”, Part II then deals with the “constitutional jurisprudence” of the United States, while Part III explored the “municipal law of the several states”.

¹⁴ On Kent’s prestige, see M.W. Janis, *The American Tradition of International Law: Great Expectations 1789-1914* (Clarendon Press, 2004), 26: “In the early decades of the New Republic, when lawyers commanded the heights of American’s political and intellectual terrain, no jurist was more generally revered than James Kent (1763-1847), Chancellor of the State of New York and Professor of Law at Columbia.”

¹⁵ J. Kent, *Commentaries on American Law* (supra n.12), 2.

¹⁶ Ibid., 169. With subsequent editions, the influence of analytic positivism becomes more pervasive, especially in the English editions. See only J.T. Abdy, *Kent’s Commentary on International Law* (Steven and Sons, 1866), 6-10 and esp. 7 “[O]f the body of International Law we never can predicate that its

is however a second compromise between naturalism and positivism that Kent suggests. For while granting that there exists a universal natural law that “is equally binding in every age, and upon all mankind”; this universal natural law must be distinguished from the “regional” phenomenon of positive international law:

“[T]he Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves. They form together a community of nations united by religion, manners, morals, humanity and science, and united also by the mutual advantages of commercial intercourse, by the habit of forming alliances and treaties with each other, of interchanging ambassadors, and of studying and recognizing the same writers and systems of public law.”¹⁷

A “special” European international law is here posited; and unlike many an earlier positivist, this particular “European” law is not grounded in the special – empirical or social – union between European states that had, in Vattel’s words, turned Europe into a kind of “republic”. A normative union of values is identified; and the particular identification of European particularism with Christianity appears to have come from Robert Ward, whose work Kent had most assuredly studied.¹⁸

This “normative” conception of a European law of nations allowed the United States – geographically far remote from Europe – to explain why it could partake in (and benefit from) the customs and laws of the old continent. The United States could thus rightly invoke the European “authorities” to defend its international rights. Yet in one important way, the “New World” quickly opposed the old one. For with the emergence of the European Concert and the Holy Alliance in post-Napoleonic Europe (discussed in Chapter 3), the young American Republic could not accept the monarchic principle; and in what became known as the “Monroe Doctrine”, the United States insisted:

rules are commands; we cannot assert that they shall be obeyed, because they have through long observance grown into a sort of law; we can only say they ought to be obeyed because of their long observance and of their consequent utility. Hence, fourthly, neither the law of God, nor positive rules of morality, not the law of nature (whatever that may be) can be considered as the source or foundation of International Law[.]”

¹⁷ J. Kent, *Commentaries on American Law* (supra n.12), 3-4.

¹⁸ Robert Ward is quoted already in Lecture 1 (ibid., 4) and when Kent comes to assert that of all causes “the most weight is to be attributed to the intimate alliance of the great powers as one Christian community”, he has heavily relied on Ward.

“In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy to do so. (...) With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. (...) The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments... We owe it, therefore, to candor and to the amicable relations existing between the United States and those powers to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. (...) It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord.”

The United States here conscientiously objected to the idea, underlying the original European Concert, that any change of regime (or the balance of power) on the European continent would entitle the European states to interfere into the affairs of the American continent(s). Insisting on the independence and sovereignty of each state under classic international law,¹⁹ any such intervention within the American “hemisphere” was to be considered an unfriendly act. This “Monroe Doctrine” would become a cornerstone of “American” international doctrine and clearly articulated the pro-republican and anti-colonial feelings of the young United States.²⁰

Be that as it may, for the first generation of American jurists the “European” law of nations had remained complemented by a universal – natural – law of nations. This universalist naturalism was however subsequently dropped by the second generation of US American publicists. A profoundly “particularistic” solution can indeed be found in the thought of Henry Wheaton – whose 1836 “Elements of International Law” was to influence Anglo-Saxon thinking for almost a century.²¹ Consciously and confidently using Bentham’s neologism as referent for his subject, this “nineteenth-

¹⁹ See only: H. Wheaton, *Elements of International Law* (Caray, Lea & Blanchard, 1836), 86-94; and see already J. Kent, Commentaries on American law (supra n.12), 24: “And it is not to be doubted that the government of the United States had a perfect right in the year 1822, to consider as it then did, the Spanish provinces in South America as legitimate powers, which had attained sufficient solidity and strength to be entitled to the rights and privileges belonging to independent states.”

²⁰ It would take some time before the “two spheres” doctrine would become operative in practice; see: D. Perkins, *The Monroe Doctrine: 1826-1867* (John Hopkins Press, 1933); and resistance came especially from the British government (ibid., 5): “The policy of the British government was indeed very far from accepting the doctrine of the two spheres, or American hegemony in the New World. In the course of the fifteen years which followed on the Doctrine, the British took possession, or repossession as might be claimed, for the Falkland Islands, and extended their already existent interests in Central America.”

²¹ The influence of Wheaton’s “Elements of International Law” can hardly be exaggerated. In addition to the editions Wheaton published himself, posthumous American edition by W.B. Lawrence and R.H. Dana ran alongside separate English and French editions. Italian, Chinese and Japanese editions started to be published after 1860.

century Vattel” was well- informed about English positivist thinking.²² And without revealing his sources too much, he quickly came to deny the existence of universal natural law of nations:

“There is ... no universal immutable law of nations, binding upon the whole human race – which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and pagan have recognised in theory or in practice... If there be any such universal law acknowledged by all nations, it must be that of reciprocity, of amicable or vindictive retaliation, as the case may require the application of either. The ordinary *jus gentium* is only a particular law, applicable to a distinct set or family of nations, varying at different times with the change in religion, manners, government, and other institutions, among every class of nations. Hence the international law of the civilized, Christian nations of Europe and America, is one thing; and that which governs the intercourse of the Mohammedan nations of the East with each other, and with Christians, is another and a very different thing.

The international law of Christendom began to be fixed about the time of Grotius, when the combined influence of religion, chivalry, the feudal system, and commercial and literary intercourse, had blended together the nations of Europe into one great family. This law does not merely consist of the principles of natural justice applied to the conduct of states considered as moral beings. It may, indeed, have a remote foundation of this sort; but the immediate visible basis on which the public law of Europe, and of the American nations which have sprung from the European stock, has been erected, are the customs, usages, and conventions observed by that portion of the human race in their mutual intercourse.”²³

While the first paragraph was undoubtedly influenced by Montesquieu (and Ward),²⁴ what was the intellectual inspiration behind the second paragraph? Both Blackstone and Kent had already referred to the idea of the consent of “civilised” nations; and having consulted Ward’s earlier treatise on the history of international law, Wheaton’s identification of “civilisation” with “Christendom” had also been in the air. But the reference to the “family” of European nations and its “customs, usages, and conventions” had a third – and decisive – source that had remained unrevealed. This

²² While a diplomat in London, Wheaton had met Jeremy Bentham as well as his editor, John Bowring; and according to Lawrence (*ibid.*, lxi), Bentham exercised a strong influence on Wheaton. We indeed find references to Bentham and Austin already in Wheaton’s 1836 edition. Referring to Bentham’s “Morals and Legislation”, we thus read (*ibid.*, 46): “A distinguished writer upon the science of law has questioned how far the rules which have been adopted for the conduct of independent societies of men, or sovereign states, in their mutual relations with each other, can with strict propriety be called *laws*.” And quoting an extensive passage of “one of his disciples”, the Austinian theory of law as command is imported into international law (*ibid.*, 47 with reference to Austin’s “Province of Jurisprudence determined”).

²³ *Ibid.*, 44-45 (reference is made to Grotius and Montesquieu but also Ward).

²⁴ The key influence is Montesquieu who is referred to as saying that “every nation has a law of nations – even the Iroquois, who eat their prisoners, have one”, and a footnote explains (*ibid.*, 44): “Montesquieu deduces the peculiar law of nations prevailing among different races from their peculiar moral and psychological circumstances, in the same philosophical spirit with which he traces the origin and history of the civil laws of different nations.” However, as the second part of the first paragraph shows, Wheaton also borrowed from Ward, whose work on the “History of the Law of Nations in Europe” was cited.

this source came to the fore in later editions of the “Elements”.²⁵ For after having once more paid his respects to “[t]hat very distinguished legal reformer, Jeremy Bentham” (as well as “one of his disciples”),²⁶ Wheaton here continues:

“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. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists... According to Savigny: “there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe... International law may therefore be considered as a positive law, but as an imperfect positive law, (*eine unvollendete Rechtsbildung*), both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law....”. International law, as understood among civilized nations, may be defined as consisting of those rules of law. conduct which reason deduces, as consonant to justice, *from the nature of the society, existing among independent nations[.]*”²⁷

Wheaton here expressly acknowledged his intellectual debt to the German Historical School and in particular Savigny. (He was likely to have encountered the latter when stationed as American ambassador in Berlin between 1835 and 1846.) This influence places Wheaton into a “middle position between positivists and naturalists”,²⁸ because – like the German Historical School – he simultaneously rejects core elements of both naturalism and positivism. For while discarding the idea of a universal and unchanging natural law, he equally rejects the Austinian idea that there is no “positive” international law. The foundation of – positive – international law is, following the Historical School, seen in the “society” or “family” of nations (a new metaphor that would make an enormous career in the second half of the nineteenth-century). And

²⁵ H. Wheaton, *Elements of International Law* (editor: W. B. Lawrence; Little Brown, 1855).

²⁶ *Ibid.*, 18.

²⁷ *Ibid.*, 16 and 20. This idea of “ubi societas ibi jus est” as the foundation of international law had already been suggested by Heffter’s “Das Europäische Völkerrecht” to whom Wheaton expressly refers (*ibid.*, 14-16).

²⁸ R. Lesaffer, Roman Law and the Early Historiography of International Law: Ward, Wheaton, Hosack and Walker, in: T. Marauhn, & H. Steiger (eds.), *Universality and Continuity in International Law* (Eleven, 2012), 149 at 163.

with that, the philosophical precepts of German “idealism” were absorbed into American international law.²⁹

2. Victorian Legal Scholarship in Nineteenth Century Britain

a. “Natural Law” Thinking: From Christian Morality to Divine Law

The traditional starting point for a distinctively “British” conception of international law is often set by O. Manning’s “Commentaries on the Law of Nations”.³⁰ Drawing on the classic “European” and the modern American authors,³¹ it came to expressly reject Austinian positivism and its denial of the legal quality of international law.³² For Manning, there exists a law of nature; and that law is “identical with the will of God”.³³ What is the will of God? The will of God is to make mankind happy; and the foundation of the “Law of Nations” is therefore rooted in British utilitarian ideas:

“Every thing around us proves that God designed the happiness of his creatures. It is the will of God that mankind should be happy. To ascertain the will of God regarding any action, we have therefore to consider the tendency of that action to promote or diminish human happiness. The right application of this principle, commonly known as the principle of utility, is identical with the law of nature, the laws prescribed by human nature being obviously the laws tending to human happiness. (...) The bringing this principle into general circulation is due to the writings of Bentham, and constitutes his real claim to be regarded as an improver of the science of morals. Bentham's classifications may be regarded as unnecessary, and his works may, and probably will, fall into disuse; but the benefit he conferred on moral science should never be forgotten. He was the propagator of a doctrine of which he expressly

²⁹ It has been pointed out that Wheaton’s third edition subsequently came under the influence of Hegel, especially in respect to the theory of recognition, see C. H. Alexandrowicz, *The Theory of Recognition in Fieri*, (1958) 34 *British Yearbook of International Law* 176 at 195-6.

³⁰ O. Manning, *Commentaries on the Law of Nations* (Milliken, 1839). For a contextualisation of Mannings’s work, see: A. Carty, *19th Century Textbooks* (supra n.8), 279 et seq.

³¹ Manning refers to von Martens, Klüber, Dumont and Ompteda and, of course, also to Kent and Wheaton. He singles out Martens as the most important influence (ibid, 39: “[p]erhaps the most valuable writer on the law of nations”); yet he is also wonderfully harsh on the “Germanic” erudition of Klüber (ibid., 41: “It is a curious specimen of the results of a class of minds, little known in this country, but of which many examples are found in Germany, minds which are stored with an astonishing, and even uselessly abundant, collection of materials, but which seem to have no power of making a proper application of these materials. With the erudition of a German professor, Klüber has the faults of the cloister, as well as its advantages; his reading his most profound, but his mind seems to have been formed wholly by books.”).

³² John Austin is extensively disused and rejected (ibid., 5): “But my objection is that the world *law*, which has, in our language, so long been employed in a much wider sense, should, by a single writer, be declared to be only “properly” used with this restricted meaning.”

³³ Ibid., 58.

disclaims being the originator; but it is to him that we owe the common use of the most correct, and readiest, test of moral action.”³⁴

Heavily influenced by William Paley (and Robert Ward),³⁵ Manning believed that “Christianity reveals to us a general system of morality” and that “[i]t is as an ‘authoritative publication of natural religion’ that Christianity must be looked to in international relations”.³⁶ This contrast strikingly with the “relativist” Ward, because the “law” of Christianity is no longer seen as solely imposing positive obligations on *Christian* nations; it is “the *law of nature* – obligations from which none can be exempt”.³⁷ This new form of Christian “universalism” can also be detected in Phillimore’s “Commentaries Upon International Law” (1854).³⁸ Here, the “precepts of Natural Law” are considered to be “obligatory upon Heathen States in their intercourse with each other” and much more so “are they binding upon Christian Governments in their intercourse with Heathen States”.³⁹ The “principles of international justice” thus assume a strong “theocratic” flavour, which is directly reflected in the sources of international law. For Phillimore, they are:

1. “The Divine Law, in both its branches – namely: The principles of Eternal Justice implanted by God in all moral and social creatures, of which nations are the aggregate, and of which governments are the International organs -
2. The Revealed Will of God, enforcing and extending these principles of Natural Justice.
3. Reason, which governs the application of these principles to particular cases, itself guided and fortified by a constant reference to analogous cases and to the written reason embodied in the text of the Roman Law, and in the works of Commentators thereupon.
4. The universal consent of Nations, both as expressed (1) by positive compact or treaty, and (2) as implied by usage, custom and practice[.]”⁴⁰

This mix of divine law and positive international law can also be found in Halleck’s “International Law” (originally published 1861 in the United States and widely read in

³⁴ Ibid., 58-59.

³⁵ The former was famous for his “Natural Theology or Evidences of the Existence and Attributes of the Deity” (1802), while the latter had published his “Inquiry into the Foundation and History of the Law of Nations” (1795).

³⁶ O. Manning, *Commentaries on the Law of Nations* (supra n.9), 65.

³⁷ Ibid., 67.

³⁸ R. Phillimore, *Commentaries upon International Law* (Johnson, 1854).

³⁹ Ibid., 60.

⁴⁰ Ibid., 86.

the United Kingdom).⁴¹ Here we read one of the standard accounts of the new religiosity found during the Victorian age:

“The rules which ought to regulate the conduct of nations in their mutual intercourse are undoubtedly deduced, in part, from reason and justice, and from the nature of society existing between independent States or bodies politic; and, in part, from usage, and the agreements or compacts entered into between different nations. This difference in the nature and origin of these rules has led text-writers to divide international law into different branches. The most common of these general divisions is, into the natural law of nations, and the positive law of nations. The first of these branches has been subdivided into the Divine law, and the application of the law of God to States. The second branch has also been subdivided into the conventional law of nations and the customary law of nations.”⁴²

The divine law is understood as “the rules of conduct prescribed by God to his rational creatures, and revealed by the light of reason, or the sacred scriptures”, which are – following Grotius – conceived of as “natural law”.⁴³ This natural law must however oftentimes be modified when applied to states; and it will therefore – following Vattel – need to be complemented by a positive law of nations in the form of international treaties and international custom.⁴⁴ The relationship between the two sources is thereby – quoting Phillimore extensively – characterised as follows:

“The necessity of mutual intercourse is laid in the nature of states, as it is of individuals, by God who willed the State and created the individual. The intercourse of nations therefore gives title to international rights and duties, and these require an international law for the regulation and enforcement. That law is not enacted by the will of any common superior upon earth, but it is enacted by the will of God; and it is expressed in the consent, tacit or declared, of independent nations. (...) custom and usage, moreover, outwardly express the consent of nations to things which are *naturally*, that is, by the law of God, binding upon them. But it is to be remembered that, in this latter case, usage is the effect and not the cause of the law.”⁴⁵

Let us finally look at the most “idiosyncratic” illustration of the re-Christianisation of international law in Victorian Britain. It can be found in the work of James Lorimer.⁴⁶ This closet Hegelian considered the law of nature to be “realised in the relations of

⁴¹ The following editions were, respectively, published in 1878 (second edition), 1893 (third edition), 1908 (fourth edition). I will be quoting from the second edition: S. Baker, *Halleck's International Law* – Volume I (Paul, 1878).

⁴² *Ibid.*, 42.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, 44.

⁴⁵ *Ibid.*, 45.

⁴⁶ J. Lorimer, *The Institutes of The Law of Nations* – Volume I (Blackwood, 1883).

separate nations”, and his entire Law of Nations is centred on the (Hegelian) doctrine of recognition: “The law of nations is the realisation of the freedom of separate nations by the reciprocal assertions and recognition of their real powers”.⁴⁷ Lorimer subsequently links the idea of the “reciprocating will” to religious creeds and here in particular: Christianity.⁴⁸ This link is expressed in the following words:

“It is Christianity alone which, in opening humanity a new avenue to knowledge of God’s will, and of those ultimate and absolute laws which lie behind and beyond all religions, does not close the avenue to this knowledge which nature has opened to mankind. In claiming to be a direct revelation to humanity, it does not repudiate the indirect revelation through humanity. On the contrary, it is on its coincidence with the latter, so far as the latter goes, that Christianity mainly bases its claim to our further acceptance. Its divinity is guaranteed to our nature by the divinity which addresses us thought our nature.”⁴⁹

These few illustrations from the first and second half of the nineteenth century should be enough to caution any attempt to characterise British international law during this period as significantly shaped by Austinian “positivism”. On the contrary, British thinking retained a strong natural law undercurrent during the whole nineteenth century;⁵⁰ and, as we shall see in the next section, an even stronger rebuttal of the Austinian conception of international law came from a second intellectual revolution in the second half of the nineteenth century. This second anti-positivist impulse comes from the German Historical School and the rise of the “British” Historical School.

⁴⁷ Ibid, 1 and 3. For Lorimer’s Hegelian leanings, see: J. Lorimer, *The Institutes of Law* (Clark, 1872), where Hegel is discussed, inter alia, on pages 2, 19, 22, 36, 63, 74, 114, 240, 246, 267, 275, 281, and 443.

⁴⁸ J. Lorimer, *The Institutes of The Law of Nations* (supra n.46), 113.

⁴⁹ Ibid., 114.

⁵⁰ For a similar “naturalism”, see only: A. Polson, *Principles of the Law of Nations* (Griffin, 1848), 3: “The law of nations is ... is of course *based* in the main on the principles of the law of nature”; as well as H. S. Maine, *International Law: The Whewell Lectures* (Murray, 1890), esp. 32: “There has been a difference of opinion among writers concerning the foundation of the Law of Nations. It has been considered by some as a mere system of positive institutions, founded upon consent and usage; While others have insisted that it was essentially the same as the Law of Nature, applied to the conduct of nations, in the character of moral persons, susceptible of obligations and laws. We are not to adopt either of these theories as exclusively true. The most useful and practical part of the Law of Nations is, no doubt, instituted or positive law, founded on usage, consent, and agreement. But it would be improper to separate this law entirely from natural jurisprudence, and not to consider it as deriving much of its force and dignity from the same principles of right reason, the same views of the nature and constitution of man, and the same sanction of Divine revelation, as those from which the science of morality is deduced. There is a natural and a positive Law of Nations.”. Finally, see also T. Twiss, *The Law of Nations* (Clarendon Press, 1884), 146-157. For a remarkable Ph.D. thesis aiming to unearth the “vibrant natural law discourse in nineteenth century Britain”, see: G. Costello, *Natural Law and Natural Rights in Nineteenth Century Britain* (Ph.D. Thesis, University of Sydney, 2014).

b. Historicist Thinking: The Rise of the British Historical School

A seismic shift in the British conception of international law seems to have occurred after 1848. A harbinger of this development is a series of articles published in the “Law Review and Quarterly Journal of British and Foreign Jurisprudence”.⁵¹ Inspired by German writers on the subject – and particularly by Heffter – a new way of conceptualising “positive” international law is here suggested. This positive law is “real” law,⁵² whose normative basis is now described as follows:

“[I]f, guided by observation and experience, we pass from the contemplation of individuals, living together in civil society, to the contemplation of such individuals, so associated and congregated, as constituting so many separate communities or states, we find, that among the latter also, as among the former, certain juridical or legal relations exist, or arise, in certain circumstances, anterior to, and independent of, any exercise of the national will; either internally in legislative enactment and executive administration, or externally in acts either unilateral, without any joint consent, or bilateral, involving the consent of others, such as conventions or treaties. And many, if not most, of these juridical or legal relations, and the concomitant or consequent rights and obligations, are simple and obvious, and are almost intuitively perceived or apprehended, and almost instinctively felt, by the ordinary population generally of whom states are composed. *They come to exist in the consciousness or conviction of the people, just in the same manner, in which M. de Savigny shows the private rights and obligations of individuals living in civil society are unfolded, in the gradual progress of the internal jurisprudence of states.*”⁵³

The common “consciousness” of a people or peoples is here seen as the foundation of positive international law; and with this spectacular introduction, customary law moves to the centre-stage in discussion of the normativity of international law in

⁵¹ Five instalments are published between 1848 and 1850 in various issues of the “Law Review and Quarterly Journal of British and Foreign Jurisprudence”. The author remains anonymous yet indirectly reveals himself, in the fourth instalment, as James Reddie – the author of “An Historical View of the Law of Maritime Commerce” (Blackwood, 1841), who would later also publish “Inquiries in International Law: Public and Private” (Blackwood, 1851).

⁵² [J. Reddie], *International Law*, (1848) 9 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 22 at 34: “The guarantees or sanctions of international law are more slender, more feeble, than those of public or constitutional law, and much more insecure than those of internal private law. But this difference does not affect or alter the essence or nature of the right, or law. It is, in a great measure, the consequence of the less advanced state of the cultivation of the juridical relations of nations, which might obviously be greatly promoted by the establishment of proper and improved tribunals or courts of international law, judiciously constructed, and wisely and impartially directed or conducted, in a similar way to that, in which internally, in states, the common consuetudinary law is improved and matured. The want of such more powerful guarantees or sanctions, as belong to internal private civil law, or to the internal criminal law of states, does not at all take from the fundamental rules of international law their character of judicial or legal principles.”

⁵³ *Ibid.*, 36 (emphasis added).

Britain.⁵⁴ But importantly, and just as the German Historical School had argued, it is not custom as an “empirical” phenomenon that is the foundation of law (because an “is” cannot imply an “ought”); the true foundation of international law is the “ratio juris” underlying custom:

“In short, to render the acts of individuals, however often repeated, fit to create a rule of common law, they must have inherent in them certain essential requisites. For ascertaining these requisites, we shall, as we have just said, appeal to the internal common law generally of the civilized nations of Europe. And this we are enabled to do with comparatively less difficulty, from the aid afforded by the very learned and scientific treatises recently published by two of the latest and most eminent writers on internal private law, M. Von Savigny of Berlin, and the late Prof. Puchta of Leip[z]i[g]. (...) Such appears to be the doctrine laid down by the latest and ablest continental lawyers, with regard to the juridical or legal effect of contracts between private individuals living in civil society, as affording or not affording evidence of a rule of the internal Common consuetudinary law of states, as administered to the individuals of whom they are composed. And no valid reason appears to have been assigned why the same doctrine should not be held applicable to the same individuals, when viewed in their collective capacity, as constituting a people or state.”⁵⁵

With these words, British international law comes under the spell of Savigny and the German Historical School.⁵⁶ For in an effort to oppose the utilitarian positivists, and

⁵⁴ Ibid., 43 (emphasis added): “It has indeed been argued, that there is an absurdity in propounding custom or usage, which is the mere repetition of the same or similar actions in succession, as the foundation of Law and Right. (...) But we do not here proceed on the supposition of the mere successive repetition of the same or similar acts, having of itself, or giving, much juridical value or legal validity. *Along with M. Von Savigny and the late acute Professor Puchta, we view the long, successive, uninterrupted, and uniform repetition of the act, which constitutes the usage or custom, as clearly indicating and affording satisfactory evidence of the existence of the notion and feeling of right or legality in the consciousness and conviction of the great majority of the population, of whom the assemblage of nations is composed. In the uniformity of a long continued and permanent mode or course of action, we recognise its common root, as opposed to mere accident or chance - the firm belief of the people.* And custom is thus the sign or mark, by which we recognise positive or established law, not its original foundation.”

⁵⁵ [J. Reddie], *International Law*, (1849) 11 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 26 at 37 and 40.

⁵⁶ On the general influence of Savigny on British law during this period, see: P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge University Press, 2009), 72 et seq., who points especially to John Reddy, James Reddie’s son who had been a graduate of Göttingen and here become familiar with the ideas of the German historical school and whose writings popularized the ideas in England in addition to his father’s work. With the translation of Savigny’s “*System des heutigen Römischen Rechts*”, the Historical School would indeed exercise a profound effect on British international law. See only R. Phillimore, *Commentaries upon International Law* (Johnson, 1854; Butterworths, 1871); but most importantly: H.S. Maine whose “*Ancient Law*” (Murray, 1861) celebrated the historical method associated with Savigny. See also: A.C. Boyd (ed.), *Wheaton’s Elements of International Law* (Stevens, 1878), 19: “According to Savigny: “there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe... The progress of civilization, founded in Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part.”; and equally, T. Twiss, *Law of Nations* (Clarendon Press, 1884), 161: “Savigny has observed, that “there may exists

especially the Austinian denial of international law,⁵⁷ British international law takes a decisively “German” turn. For if international society – and not the State – is seen as origin and fountain of all law, then there can be an international law even without an international state:

“It is sometimes said that there can be no law between nations because they acknowledge no common superior authority, no international executive capable of enforcing the precepts of International Law. This objection admits of various answers: First, it is a matter of fact that states and nations recognize the existence and independence of each other; and out of a recognized society of nations, as out of a society of individuals, Law must necessarily spring. The common rules of right approved by nations as regulating their intercourse are of themselves, as has been shown, such a law. Secondly, the contrary position confounds two distinct things; namely, the physical sanction which law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of right; the error is similar in kind to that which has led jurists to divide moral obligations into perfect and imperfect.”⁵⁸

between different Nations a common consciousness of Right similar to that which engenders the Positive Law of a particular Nation...”

⁵⁷ Almost all British textbooks published in the second half of the 19th century reject Austinian positivism. The principal criticism here is that Bentham’s and Austin’s definition of law is “universal” and “unhistorical”, see: J. Reddie, *Inquiries Elementary and Historical in the Science of Law* (Longman, 1840), 90-91: “[T]he jurists of the analytical school, while they have, in reality, not done much towards the promotion of the science of law, by the mere enunciation of the proposition, that general utility, or the greatest happiness principle, is the foundation of law ... appear rather to overrate the advantages of their prophesizing. They seem to despise the instruction to be derived by the legislator from the experience of past ages, as recorded in history. In their excessive generalization, as remarked by M. Savigny and M. Comte, they divest law of its actual, individual, or particular character, of its national originality[.]”. This criticism is subsequently picked up by Maine’s “Ancient Law” (supra n.56), 7: “Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his “Fragment on Government,” and Austin, in his “Province of Jurisprudence Determined,” resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, not even a distinct author of law, is contemplated or conceived of.” Finally, and closer to the end of the nineteenth century, see also: W.E. Hall, *Treatise On International Law* (Clarendon Press, 1890), 15: “But it is now fully recognised that the proper scope of the term law transcends the limit of the more perfect examples of law. To what extent it transcends them is not equally certain. The various ideas of law formed in different societies and times, and the various groups of customs which have been obeyed as law, have probably not yet been sufficiently compared and analysed, and until an adequate comparison and analysis have been made, no definition or description of law can be regarded as final.”; as well as J. Westlake, *International Law – Part I* (Cambridge University Press, 1910), 8-11 (dealing with “Austin’s Limitation of the term “Law””). On the appeal of Savigny, as the champion of “conservatism”, to counter the reformist potential of the utilitarian positivism, see P. Stein, *Legal Evolution* (supra n.56), 72.

⁵⁸ R. Phillimore, *Commentaries upon International Law* (supra n.38), 91.

Stating the mainstream British conception of international law in the second half of the nineteenth century, Westlake – one of the most famous British international lawyers during that time – could confidently state: “[i]nternational Law, otherwise called the Law of Nations, is the law of the society of states or nations”; and “when international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the society of men, and a law of the society of states sufficiently like state law”, or in other words: “ubi societas ibi just est”.⁵⁹

This new emphasis on the “society of nations”, as the origin of international law, placed custom at its normative centre;⁶⁰ and with this new centre, the Austinian challenge was met by emphasising that customary law did not need to rely on a political sovereign for its adoption or enforcement. It “naturally” and “unconsciously” developed and was equally naturally and unconsciously enforced within the international society of states. In a retrospective summary of the philosophical zeitgeist, we thus read:

“Almost from the beginning of the science of the Law of Nations the question has been discussed whether the rules of International Law are *legally* binding... And during the nineteenth century Austin and his followers take up the same attitude. They define law as a body of rules for human conduct set and enforced by a sovereign political authority. If indeed this definition of law be correct, the Law of Nations cannot be called law. (...) However, this definition of law is not correct. It covers only the written or statute law within a State, that part of the Municipal Law which is expressly made by statutes of Parliament in a constitutional State or by some other sovereign authority in a non-constitutional State. It does not cover that part of Municipal Law which is termed unwritten or customary law. There is, in fact, no community and no State in the world which could exist with written law only. Everywhere there is customary law in existence besides the written law. This customary law was never expressly enacted by any law-giving body, or it would not be merely customary law.”⁶¹

⁵⁹ J. Westlake, *International Law* (supra n.57), 1, 6-7.

⁶⁰ For Westlake the only two “real” sources of international law are therefore custom and reason (ibid., 14): “Custom and reason are the two sources of international law.” The idea that “reason” is a direct source is thereby not primarily a reference to classic natural law but mainly a reference to the “synthetic” method of the (German) historical school in which “reason” abstracts and perceives general principles from custom (ibid., 14-15): “Reason is a source of international law not only for the seekers after international right, who will appeal to reason as a check on custom, but for all, and for two causes. First, the rules already regarded as established, whatever their source, must be referred to their principles, and their principles extended to new cases, by the methods of reasoning proper to jurisprudence, enlightened by a sound view of the necessities of international life. Secondly, the rules as yet established, even when so applied and extended, do not cover the whole field of international life, which is constantly developing in new directions. Therefore from time to time new rules have to be proposed...” In the true tradition of the (German) Historical School, Roman law will here be the best guide in many cases (ibid. 15). Treaties, by contrast, are relegated to mere “evidence” of a consented practice or customary rule (ibid., 16).

⁶¹ L. Oppenheim, *International Law: A Treatise* – Volume I (Longmans, 1912), § 2. When it comes to Austin’s objection that customary law only becomes „law“ when it is „recognized“ by a State court as such, Oppenheim objects (ibid): „Courts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition...”.

Pace Austin, international law thus positively exists – as law – in the form of international custom; and it is even seen as a system of positive norms that can be externally enforced.⁶² This general acceptance of the metaphysical premises of the Historical School in British international law writing should – in theory – have one important consequence: the idea of an international law among private individuals; yet, as we shall see in the next section, this conclusion is – unlike continental European scholarship – not drawn. Following an American constitutional law scholar, British “private international law” would remain embedded in a different conceptual world.

c. Conceptions of Private “International” Law: An Enclave of State Positivism

The rise of the Historical School had, as we saw in Chapter 3 for Germany, reignited the idea of a *ius commune* that also applied to private individuals. “Private” international law came to be seen as a natural complement to (classic) “public” international law – with both branches equally rooted in a common international society with its own legal consciousness. This “European” conception of private international law, while making some early inroads,⁶³ would however never prevail within the Anglo-American world.

⁶² Ibid., §9: “Is there a common consent of the community of States that the rules of international conduct shall be enforced by external power? There cannot be the slightest doubt that this question must be affirmatively answered, although there is no central authority to enforce those rules. The heads of the civilised States, their Governments, their Parliaments, and public opinion of the whole of civilised humanity, agree and consent that the body of rules of international conduct which is called the Law of Nations shall be enforced by external power, in contradistinction to rules of international morality and courtesy, which are left to the consideration of the conscience of nations. And in the necessary absence of a central authority for the enforcement of the rules of the Law of Nations, the States have to take the law into their own hands. (...) But a weak law is nevertheless still law, and the Law of Nations is by no means so weak a law as it sometimes seems to be.”

⁶³ See here, particularly: J. Reddie, *Inquiries in International Law: Public and Private* (Blackwood, 1851), 447–458 and esp. 456: “So far, we apprehend, private international law does not rest upon the *comitas* or courtesy, or upon the mere consent of nations, but may be legitimately enforced by such physical means as such states have at their disposal. Not does it seem necessary for the true independence and welfare of nations, to push their exclusive right of sovereignty so far as seems to be done by the jurists of the present day, or to make private international law entirely dependent for its existence on the consent of each separate nation.” But more importantly still, see R. Phillimore, *Commentaries upon International Law – Volume IV: Private International Law* (Benning, 1861), x: “I cannot help expressing a hope that the Treatises of such jurists as those of Puchta and Savigny, which have the merits without the defects of German erudition, may one day become familiar to English lawyers.”; as well as *ibid.*, 9: “The writer upon International Law is bound to draw the distinction which has been mentioned between *Comity* and Law. But having done so, and shown on what terms *Comity* is admitted to govern the legal relations

Here, a fundamentally different view gained prominence – mainly thanks to two towering constitutional law scholars who regarded private international law as nothing but external state law.

The founding father of the “American” approach to private international law – or, as it would henceforth be called following his suggestion: “conflict of law” – is Joseph Story. This Supreme Court Justice and Harvard Law School Professor published his most significant work in 1834 under the Blackstone-Kent-inspired title “Commentaries on the Conflict of Laws”.⁶⁴ Bemoaning the lack of a systematic treatise in English, and criticising “[t]he civilians of continental Europe” for their overly “theoretical distinctions” and “metaphysical subtleties”,⁶⁵ the basic principle governing the new discipline was to be this:

“[I]t is an essential attribute of every sovereignty, that it has no admitted superior, and that it gives the supreme law within its own dominions on all subjects appertaining to its sovereignty. What it yields, it is its own choice to yield; and it cannot be commanded by another to yield it as matter of right. And, accordingly, it is laid down by all publicists and jurists, as an incontestable rule of public law, that one may with impunity disregard the law pronounced by a magistrate beyond his own territory. (...) The jurisprudence, then, arising from the conflict of the laws of different nations, in their actual application to modern commerce and intercourse, is a most interesting and important branch of public law. (...) This branch of public law may, therefore, be fitly denominated private international law, since it is chiefly seen and felt in its application to the common business of private persons, and rarely rises to the dignity of national negotiations, or of national controversies.”⁶⁶

This view fundamentally challenged the idea of a private “international” law on two fronts; and this dual challenge also had two important corollaries. First, by not accepting any authority above the State, there simply could be no “international law” properly speaking; and the essential question was therefore not to what extent national law was in conflict with international law but, rather, to what extent domestic *national* law was in conflict with foreign *national* law. Secondly, the national law to decide whether foreign law was to apply was not private but *public* law because it determined to what extent public authorities had to apply foreign law instead of domestic law.

of the subjects of different States, he may and ought to insist that the *jus gentium*,” like the *jus inter gentes*, is built upon the hypothesis of a common law for a Commonwealth of States[.]”

⁶⁴ Originally published by Hillard & Gray in 1834. In the following, I will use the second edition: J. Story, *Commentaries on the Conflict of Laws* (Little and Brown, 1841).

⁶⁵ *Ibid.*, 10.

⁶⁶ *Ibid.*, 8-9.

Once this new perspective is accepted, the fundamental starting point for all “conflict of law” principles becomes the principle that “every nation possesses an exclusive sovereignty and jurisdiction within its own territory”; and that “whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent”.⁶⁷ The decision to allow foreign law to apply within the domestic territory was thus a sovereign question for each state to decide.⁶⁸ And yet: Story did not deny that there were moments, when a State ought to recognize and apply foreign law within its territory. However, *this was not a legal obligation but derived from moral “comity”*;⁶⁹ and – quoting Vattel – this duty of “comity” was for each State to judge for itself.⁷⁰

This “sovereigntist” view quickly became dominant in the United States,⁷¹ and it profoundly influenced a British scholar of constitutional law: Albert Venn Dicey. The

⁶⁷ Ibid., 23-24. For Story, there is also no difference between “property” and “personal” laws (ibid.19 and 23).

⁶⁸ Ibid., 7: “It is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only, while they remain therein. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them[.]”

⁶⁹ Ibid., esp. 29-38. Story here draws extensively on the seventeenth-century Dutch scholar Ulrich Huber, whose main work on “De Conflictu Legum” had also inspired Story’s title. On Story’s misreading of Huber, see however: A. Watson, *Joseph Story and the Comity of Errors* (University of Georgia Press, 1992).

⁷⁰ Story, *Commentaries on the Conflict of Laws* (supra n.64), 35: “It is, therefore, in the strictest sense, a matter of the comity of nations, and not of any absolute paramount obligation, superseding all discretion on the subject. Vattel has with great propriety said; “That it belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it; of what it can, or cannot do; of what is proper, or improper for it to do. And of course it rests solely with it to examine and determine, whether it can perform any office for another nation, without neglecting the duty, which it owes to itself.””

⁷¹ H. Wheaton, *Elements* (1855 Lawrence Edition, supra n.25), 113-4: [A]ll the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. (...) There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States — ex comitate, ob reciprocam utilitatem.”. See also F. Wharton, *A Treatise on the Conflict of Laws* (Kay, 1881), 1: “Private International Law is that branch of the law of a country which relates to cases more or less subject to the law of other countries. It is a law, and hence binding; but it is binding, so far as concerns England and the United States, not because it has been enacted as a code, nor because all its parts have been definitely settled by prior decisions, but because, like other parts of the common law, it is ascertained as a local interference from the conditions of each case.” For a counter-current here, see however: D. Dudley Field, *Draft Outlines of an International Code* (Baker & Voorhis, 1872) – almost half of which deals with “private international law” as international law and whose Article 8 states: “The First Book has two Divisions. The first Division, entitled Public International Law, contains the rules respecting the relations of nations to each other and to the members of other nations. The second, entitled Private International Law, contains the rules respecting the relations of the members of a nation to the members of other nations.”

very title of Dicey's *"The Law of England with Reference to the Conflict of Laws"* left no doubt as to his views on the normative character of this type of law.⁷² While subtly critical of the term "conflict of laws",⁷³ the concept of "private international law" was unacceptably wrong.⁷⁴ Following Story's lead, all private "international" law was but (external) "national" law! The national "conflict of laws" rules thus simply reflected each nation's choice whether (and to what extent) to impose its domestic law on "foreigners". For English courts, the central criterion for such a choice was thereby the idea of "acquired rights".⁷⁵

Methodologically, Dicey also thought that the European scholars had gotten it all wrong. For the "theoretical method", especially the one developed by Savigny and Bar, had blurred the line between "is" and "ought". "What each author attempts to provide

⁷² A. V. Dicey, *A Digest of the Law of England with reference to The Conflict of Laws* (Stevens and Sons, 1908). For a wonderful discussion of the importance of this book, see: G. W. Bartholomew, Dicey and the Development of English Private International Law, (1959) 1 *Tasmanian Law Review* 240.

⁷³ Dicey, *Conflict of Laws* (supra n.72), 13: "The defect, however, of the name is that the supposed "conflict" is fictitious and never really takes place. If English tribunals decide the matter in hand, with reference to the law of Portugal, they take this course not because Portuguese law vanquishes English law, but because it is a principle of the law of England that, under certain circumstances, marriages between Portuguese subjects shall depend for their validity on conformity with the law of Portugal."

⁷⁴ Ibid., 14: "The words 'private international law' should mean, in accordance with that use of the word 'international' which, besides being well established in ordinary language, is both scientifically convenient and etymologically correct, a private species of the body of rules which prevails between one nation and another. Nothing of the sort is, however, intended; and the unfortunate employment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science. Nor does the inaccuracy of the term end here. It confounds two classes of rules which are generically different from each other. The principles of international law, properly so called, are truly "international" because they prevail between or among nations; but they are not in the proper sense of the term "laws", for they are not commands proceeding from any sovereign. On the other hand, the principles of private international law are "laws" in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, e.g., England or Italy, in which they prevail ; but they are not "international," for they are laws which determine the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation."

⁷⁵ The famous shift from international comity to acquired (foreign) rights is made at *ibid.*, 25: "English judges, and the same thing holds good of, for instance, French or German judges, never in strictness enforce the law of any country but their own. Upon the occasions on which they are popularly said to enforce a foreign law, what they do, in reality, is, as already pointed out, to enforce not a foreign law, but a right acquired under the law of a foreign country. This distinction may appear at first sight a useless subtlety, but due attention to it removes difficulties which have perplexed both text-writers and Courts. At least half of the perplexities which have obscured the treatment by jurists of the law as to the enforcement of foreign judgments arise from the failure to appreciate this distinction. Thus it has been thought an anomaly that the Courts of one country, e.g., England, should enforce the judgments given by the Courts of another country, e.g., Italy, or, in other words, that tribunals acting under the authority of the King of England should enforce the commands of the King of Italy. What has not been noticed is that when A brings in England an action against X on an Italian judgment, our Courts are called upon to enforce not the judgment of the Italian Court, i.e., the command of the King of Italy, but the right acquired by A under an Italian judgment to the payment of a debt by X." The US American author J. H. Beale in his *"A Treatise on The Conflict of Laws or Private International Law – Volume I"* (Harvard University Press, 1916) would adopt and popularise Dicey's doctrine of "vested rights".

is a statement of the principles which ought, as a matter of consistency and expediency, to guide the judges of every country when called upon to deal with a conflict of laws”;⁷⁶ yet this was not what the law “is” and only the “positive method” could avoid this problem:

“The positive method is followed by a whole body of authors, among whom Story is the most celebrated. (...) This school starts from the fact that the rules for determining the conflict of laws are themselves " laws " in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. Story, therefore ... [did] not practically concern [himself] with any common law of Europe, but make it the object of their labours to ascertain what is the law of a given country with regard to the extra-territorial operation of rights. (...) But whatever be the limits imposed on the scope of their inquiries by writers who follow the positive method, the object of their labours is always in character the same. Their aim is to ascertain what are the rules contained in the law of a given country with regard to a special topic, namely, the extraterritorial recognition of rights. Hence it follows that these authors ought not, in so far as they act consistently with their own method, to attempt the deduction of the rules of private international law from certain general and abstract principles, for their aim is to discover not what ought to be, but what is the law.”⁷⁷

The positive method here denies, just as Austin had done for public international law, the very existence of any private “international” law. There was no such law; all there was were “statutory enactments and the judicial decisions” that were adopted by each national legal order.⁷⁸ The “only sound method for an English lawyer who attempts to write on private international law” was therefore “to follow judicial example and look exclusively to the sources of information recognized by the Courts”.⁷⁹ Private international law was thus not only national law, it was positive law in the pure Austinian sense – a law that was neither natural nor customary but solely expressed in the authoritative decisions and commands of the British legislature and courts.

3. The “Imperial” Dimension of British International Law

With the exception of private international law, British conceptions of public international law had remained loyal to a historicist account that wholeheartedly

⁷⁶ Dicey, *Conflict of Laws* (supra n.72), 17.

⁷⁷ Ibid., 19.

⁷⁸ Ibid., 20.

⁷⁹ Ibid., 23.

rejected analytical positivism and which embraced the “idealist” premise that law will “naturally” grow within a “society” of states. The question however remained whether a “European” international law could recognize the normative existence and equivalence of other “particular” societies of states. A “regional” relativism had indeed, as we saw in Chapter 1, embryonically emerged by the end of the eighteenth century. It was, most poignantly, reflected in the work of Robert Ward (mentioned at the beginning of this chapter). Yet by the middle of the nineteenth century, a fundamental change of perspective took hold of British philosophers; and soon, the legal justifications for a new “imperialist” reading of international law followed.⁸⁰ This new “imperialist” perspective transforms the “relativist” particularism – still found in Ward – into a “universalist” particularism that is based on an absolute criterion of human progress.

How did this happen? With the rise of evolutionary anthropology,⁸¹ “civilised” societies had come to assume that there was a hierarchical chain of being in which other societies reflected lower evolutionary stages when measured against the – absolute and universal – European standard of civilisation.⁸² And this point of view would have profound consequences on the beneficiaries of international law. For integrating J.S. Mill’s philosophical project, international law was now given an imperialist dimension that came to disenfranchise all “primitive” states outside the (European) society of civilised nations. The relationship between Mill’s liberal imperialism and doctrinal international law in the second half of the nineteenth century is not always easy to disentangle but this third section aims to show whatever conceptual logic there is in the development of this new – and very British – conception of international law.

⁸⁰ The conventional starting date for the new wave of “formal” imperialism is often set around the 1870s, and is therefore identified as a “late Victorian” phenomenon. See: J.A. Hobson, *Imperialism: A Study* (Nisbet, 1902); as well as H.L. Wesseling, *The European Colonial Empires, 1815-1919* (Longman, 2004). This view that modern imperialism starts around the 1870s has however been qualified by the “informal” imperialism thesis propounded by J. Gallagher and R. Robinson, *The Imperialism of Free Trade* (1953) 6 *The Economic History Review* 1.

⁸¹ J. W. Burrow, *Evolution and Society: A Study in Victorian Social Theory* (Cambridge University Press, 1968), Chapter 4: “The Laws of Nature and the Diversity of Mankind”.

⁸² *Ibid.*, esp. 98: “[Evolutionary theories] offered a way of reformulating the essential unity of mankind, while avoiding the current objections to the older theories of a human nature everywhere essentially the same. Mankind was one not because it was everywhere the same, but because the differences represented different stages in the same process.”

a. *The European “Family of Nations” and its Standard of Civilisation*

The idea of evolutionary stages in the development of human societies had been part of British moral philosophy since the Scottish Enlightenment. Within the nineteenth century, two representatives of this kind of thinking had been James and John Stuart Mill. With the publication of Darwin’s “Origin of Species” in 1859 and Maine’s “Ancient Law” in 1861, this perspective suddenly gained prominence. British international law scholars thus came to reject the core idea of eighteenth-century international law: the “sovereign equality” of all states. While, admittedly, all human societies were – once – equal, human progress had been confined to a small number of particular societies:

“[A]fter the epoch of codes the distinction between stationary and progressive societies begins to make itself felt. It is only with the progressive that we are concerned, and nothing is more remarkable than their extreme fewness. In spite of overwhelming evidence, it is most difficult for a citizen of western Europe to bring thoroughly home to himself the truth that the civilisation which surrounds him is a rare exception in the history of the world. (...) One set of usages has occasionally been violently overthrown and superseded by another; here and there a primitive code, pretending to a supernatural origin, has been greatly extended, and distorted into the most surprising forms, by the perversity of sacerdotal commentators; but, except in a small section of the world, there has been nothing like the gradual amelioration of a legal system.”⁸³

With Maine’s famous distinction between “stationary” and “progressive” societies, the perception becomes increasingly accepted that evolution and “progress” has been confined to a small set of (Western) European states. The rest of the world – excluding those parts already “civilised” by European settlers – has, by contrast, remained within its “original” or “primitive” condition. Projected onto international law, there is consequently only one most “advanced” society of nations in which the most “ameliorated” international law has organically grown. This hierarchical view will soon come to mean the following:

“Strictly speaking, there is not one International Law, but several. Wherever a group of peoples are compelled by local contiguity or other circumstances to enter into relations with each other, a set of rules and customs is sure to grow up among them, and their intercourse will be regulated thereby. The rules will differ at different times and among different groups. Their nature will be determined by the ideas current upon the subject of international intercourse and the practices permissible in warfare. (...) But though there are several systems of International Law, there is but one important

⁸³ Maine, *Ancient Law* (supra n.56), 22-23.

system, and to it the name has been by common consent appropriated. It grew up in Christian Europe, though some of its roots may be traced back to ancient Greece and ancient Rome. It has been adopted in modern times by all the civilized states of the earth.”⁸⁴

The “European” society of states and “its” international law is here portrayed as a universalistic standard in-becoming. For if the European standard is the most advanced standard, each society that wishes to interact with the Western world will have to eventually conform to this standard. This – ironically – means that by the end of the nineteenth century a dialectic form of “universalism” is reborn that abandons the “relativistic” idea of different-yet-equal “classes” of states in favour of re-confirming the existence of a “universal international community”;⁸⁵ yet unlike the universal community of mankind, posited by natural law theorists, this universal community is considered incomplete. For Oppenheim, to give just one example, it indeed cannot yet be said that “the dominion of the Law of Nations extends as far as humanity itself”.⁸⁶ For the “universal” law of civilised nations is still confined to a few states; and while it grows organically, it will only eventually include all nations:

“There is no doubt that the Law of Nations is a product of Christian civilization. It originally arose between the States of Christendom only, and for hundreds of years was confined to these States. (...) But from about the beginning of the nineteenth century, matters gradually changed. (...) Thus the membership of the Family of Nations has of late necessarily been increased, and the range of the dominion of the Law of Nations has extended beyond its original limits. This extension has taken place in conformity with the basis of the Law of Nations. As this basis is the common consent of the civilised States, there are three conditions for the admission of new members into the circle of the Family of Nations. A State to be admitted must, first, be a civilised State which is in constant intercourse with members of the Family of Nations. Such State must, secondly, expressly or tacitly consent to be bound for its future international conduct by the rules of International Law. And, thirdly, those States which have hitherto formed the Family of Nations must expressly or tacitly consent to the reception of the new member.”⁸⁷

The older relativist conception of different “classes” of states having *each* developed their own (regional) international law order is here categorically rejected. There exists only *one* “universal” international law whose community membership is however dynamic. The family of nations – this organic community of values – was originally

⁸⁴ T.J. Lawrence, *The Principles of International Law* (Heath, 1898), 4.

⁸⁵ L. Oppenheim, *International Law: A Treatise* (supra n.61), §7.

⁸⁶ Ibid., §26 (referring to Bluntschli as an illustration).

⁸⁷ Ibid., §§26-27.

confined to European states alone but since has expanded to include the “Christian states which grew up outside Europe”; and it even received the Turkish Empire in 1856.⁸⁸ Henceforth, international law has therefore “ceased to be a law between Christian States only”; and the question of civilisation has stopped to be a purely “religious” question.⁸⁹ But what, then, determines the standard of civilisation? For Oppenheim, this appears to be predominantly a question of economic development.⁹⁰ (For others – following Mill – the standard of civilisation depends on the existence of a local government able to guarantee basic legal protections.⁹¹) Importantly, however, even where that “European” standard of civilisation has been reached, membership in the (European) family of nations is not – at least not for Oppenheim – automatic. On the contrary, employing the Hegelian idea of mutual recognition, “[a] State is and

⁸⁸ Ibid., §28. With regard to the Turkish Empire, Oppenheim refers to Article 7 of the 1856 Peace Treaty of Paris; with regard to Japan, he believes that it only obtained full membership at the end of the nineteenth century.

⁸⁹ For other non-Christian states, Oppenheim is more doubtful (ibid., § 103): “Doubtful is the position of all non-Christian States except Turkey and Japan, such as China, Morocco, Siam, Persia, and further Abyssinia, although the latter is a Christian State, and although China, Persia, and Siam took part in the Hague Peace Conferences of 1899 and 1907. Their civilisation is essentially so different from that of the Christian States that international intercourse with them of the same kind as between Christian States has been hitherto impossible. And neither their governments nor their populations are at present able to fully understand the Law of Nations and to take up an attitude which is in conformity with all the rules of this law. There should be no doubt that these States are not International Persons of the same kind and the same position within the Family of Nations as Christian States.”

⁹⁰ Ibid., § 7: “As the civilised States are, with only a few exceptions, Christian States, there are already religious ideas which wind a band around them. There are, further, science and art, which are by their nature to a great extent international, and which create a constant exchange of ideas and opinions between the subjects of the several States. Of the greatest importance are, however, agriculture, industry, and trade.”

⁹¹ J. Westlake, “Territorial Sovereignty, especially with Relation to Uncivilised Regions”, in “The Collected Papers of John Westlake (editor: L. Oppenheim; Cambridge University Press, 1914), 131; where we read (ibid., 143): “Civilisation is a term which has often occurred during the last few pages, and we must try to give ourselves an account of what for the present purpose we mean by it. We have nothing here to do with the mental or moral characters which distinguish the civilised from the uncivilised individual... When people of European race come into contact with American or African tribes, the prime necessity is a government under the protection of which the former may carry on the complex life to which they have been accustomed in their homes[.]” In this sense also: W.E. Hall, *Treatise on International Law* (supra n.57), 55: “[I]nternational law is a product of the special civilisation of modern Europe, and is intended to reflect the essential civil and facts of that civilisation so far as they are fit subjects for international rules. Among these facts is the existence in almost all states of a municipal law, consonant with modern European ideas, and so administered that foreigners are able to obtain criminal and civil justice with a tolerable approach to equality as between themselves and the subjects of the state. International law therefore contemplates the existence of such law and such administration; and a state, professing to be subject to international law, is bound to furnish itself with them. If it fails to do so, either through the imperfection of its civilisation, or because the ideas, upon which its law is founded, are alien to those of the European peoples, other states are at liberty to render its admission to the benefits of international law dependent on special provision being made to safeguard the person and property of their subjects.”

becomes an International Person through recognition only and exclusively”.⁹² And in the absence of such “international personality” (granted as a membership right by the family of nations), the equality principle will simply not apply.⁹³

b. Imperial International Law and the Question of Colonialism

The (re-)introduction of a distinction between “insiders” and “outsiders” in the international legal system had important “practical” consequences. For by the end of the nineteenth century, this “British” vision of international law comes to deprive “uncivilised” societies of their status and rights under international law. In its most extreme case, it conveniently produced a legal justification for the subjection and colonization of non-civilised peoples. The philosophical theory behind this British “imperialist” international law had been offered by J.S. Mill.⁹⁴ Mill’s “pedagogical” project had indeed actively argued in favour of placing uncivilised nations under the “nonage” of civilised states:

“[T]here is such a thing as political nonage; for, though barbarians may be old children, those of them who belong to capable races are simply the children of the great human family. Their childishness cuts them off from international rights only for a time; but whilst it subsists it cuts them off as effectually as the childishness of a promising child cuts it off from municipal or political rights. The right of underdeveloped races, like the right of underdeveloped individuals, is a right not to recognition as what they are not, but to guardianship – that is, the guidance – in becoming that which they are capable, in realizing their special ideals.”⁹⁵

A more complex legal justification of this form of liberal imperialism has come from the pen of Westlake – a fervent admirer of Mill’s work:

“The form which has been given to the question, namely *what facts are necessary and sufficient in order that an uncivilized region may be internationally appropriated in sovereignty to a particular state?* implies that it is only the recognition of such sovereignty by the members of the international society which concerns us, that of uncivilized natives international law takes no account. This is true, and it does not mean that all rights

⁹² Oppenheim, *International Law: A Treatise* (supra n.61), §71. Oppenheim expressly rejects the idea of a de facto – automatic – recognition: “It is generally agreed that a new State before its recognition cannot claim any right which a member of the Family of Nations has towards other members.”

⁹³ Ibid., §115. “The equality before International Law of all member-States of the Family of Nations is an invariable quality derived from their International Personality.”

⁹⁴ On J. S. Mill’s liberal imperialism, see Chapter 4 above.

⁹⁵ J. Lorimer, *Institutes of the Law of Nations* (supra n.46), 157.

are denied to such natives, but that the appreciation of their rights is left to the conscience of the state within whose recognized territorial sovereignty they are comprised, the rules of the international society existing only for the purpose of regulating the mutual conduct of its members.”⁹⁶

But the most radical “colonial” conclusion is drawn by Lawrence:

“[E]ven the attainment by the original inhabitants of some degree of civilization and political coherence has not sufficed to bar the acquisition of their territory by occupancy. All territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius* and therefore open to occupation. The rights of the natives are moral, not legal. International Law knows nothing of them, though International Morality demands that they be treated with consideration.”⁹⁷

More moderate British (German) voices, on the other hand, considered that “backward” states could not simply be “occupied” as if they were *terra nullius*.⁹⁸ Their “weakness” should turn them into “protectorates”; and the institute of the “protectorate” becomes indeed the central “institution” during this “neo-colonial” phase of European international law.⁹⁹ Long established and originally applied among “civilised” states, protectorates were developed to account for a situation wherein a small state requested permission to come under the protection of a more powerful one. The protectorate state here retained its “internal” sovereignty, while its “external” sovereignty was transferred to a more powerful foreign state. This “feudal” arrangement now experienced a renaissance, when it came to apply “by analogy” to uncivilised regions of the world. Westlake explains:

“[I]n recent times a practice has arisen by which in such regions civilized powers assume and exercise certain rights in more or less well defined districts, to which rights and districts, for the term is used to express both the one and the other, the name of a protectorate is given by analogy. The distinctive characters of those rights are, first, that they are contrasted with territorial sovereignty, for, as far as such sovereignty extends, there is the state itself which has acquired it and not a protectorate exercised by that state; secondly, that the protectorate first established excludes all other states

⁹⁶ Westlake, *Territorial Sovereignty, Especially with Relation to Uncivilised Regions* (supra n.91), 138.

⁹⁷ Lawrence, *The Principles of International Law* (supra n.84), 146.

⁹⁸ Oppenheim, *International Law: A Treatise* (supra n.61), §221: “even although such State is entirely outside the Family of Nations, is not a possible object of occupation, and it can only be acquired through cession or subjugation.” This was true for (tribal) societies that had not yet formed a state; wherever there existed some form of government, a state had come into existence and could not simply be absorbed. In light of these – much more moderate – “German” views, when compared to British contemporaries, it is surprising that M. García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press, 2013), 104 claims that Oppenheim’s doctrine was “a far more radical promoter of neo-colonialization” than his contemporaries. This evaluation is, in my view, untenable.

⁹⁹ On the idea of the “protectorate”, see M.F. Lindley, *The acquisition and government of backward territory in international law* (Negro University Press, 1969), Chapter XXIII: “Protectorates”.

from exercising any authority within the district either by way of territorial sovereignty or of a protectorate—that is to say, while it lasts, for the question remains whether a protectorate, like an inchoate title to territorial sovereignty, is not subject to conditions and liable to forfeiture on their non-fulfilment ; thirdly, that the state enjoying the protectorate represents and protects the district and its population, native or civilised, in everything which relates to other powers.”¹⁰⁰

The novel idea of the “colonial” protectorate represents a synthesis of two previously irreconcilable ideas. For while formally acknowledging the statehood of an uncivilised community, the essential aim behind this new type of protectorate is the future annexation of a state-turned-colony.¹⁰¹ The legal institution thus acknowledges the “inchoate title of territorial sovereignty” to the protector; and in a semantic perversion of its original meaning, the name “protectorate” no longer serves to signal the protection of an indigenous community from others; it is rather the protector itself that wishes to see itself protected against outside interference into “its” – future – colony. It is thus “[a]n essential feature of the colonial protectorate is that it is recognized by the other members of the International Family as giving to the protecting Power the right, as against themselves, to take steps in the direction of annexing the protected territory to its dominions.”¹⁰² The “colonial protectorate”, chiefly a British invention, soon becomes the standard model for the formal colonial expansion in the last quarter of the nineteenth century.¹⁰³ Its status is famously “codified” in the 1885 General Act of the Berlin Conference in West Africa.¹⁰⁴

¹⁰⁰ J. Westlake, *Territorial Sovereignty, Especially with Relation to Uncivilised Regions* (supra n.91), 182-3.

¹⁰¹ This is, in my view, picked up by Oppenheim who is critical of extending the idea of the protectorate to states outside Europe; and who clearly and critically sees the institution, when applied to non-Christian states as a preliminary form of colonisation (Oppenheim, *International Law: A Treatise* (supra n.61), §94).

¹⁰² Lindley, *The acquisition and government of backward territory in international law* (supra n.99), 183: “No one has better expressed this new “colonial” meaning in English than Hall: “States may acquire rights by way of protectorate over barbarous or imperfectly civilised countries, which do not amount to full rights of property or sovereignty, but which are good as against other civilised states, so as to prevent occupation or conquest by them, and so as to debar them from maintaining relations with the protected states or peoples.”

¹⁰³ C.H. Alexandrowicz, *The Afro-Asian world and the law of nations*, (1968) 123 *Collected Courses of the Hague Academy of International Law* 117 at 191. For a historical analysis, see: A. Porter, *European Imperialism, 1860-1914* (Macmillan, 1994).

¹⁰⁴ Especially: Articles 34 and 35. For an extensive discussion of the meaning of these provisions, see: Westlake, *Territorial Sovereignty, Especially with Relation to Uncivilised Regions* (supra n.91), 163-193; and see also: J. Fisch, *Africa as terra nullius: The Berlin Conference and International Law*, in: S. Forster et al (eds.), *Bismarck, Europe and Africa: The Berlin Conference 1884-1885* (Oxford University Press, 1988), 347 at 364.

Conclusion

Leaving the American debate aside, three major strands emerge in British discourses on the nature of international law in the nineteenth century. First, there – surprisingly – remains a lively natural law conception that has however shed its secular-rationalist character in favour of a Christian-moralist one. A second discourse begins around the middle of the nineteenth century. This second conception of international law roots its normativity in the “society of states”; and – inspired by the (German) Historical School – all law is seen to emerge from the collective consciousness and common culture of nations. Law is an organic phenomenon that naturally springs to life within every society: *ubi societas, ibi ius*; and because there exists a “society” of nations, there equally exists international law. Thirdly, and finally, there exists a strand of utilitarian positivism; yet neither Bentham nor Austin succeed in marshalling much support among British international jurists during the nineteenth century. For even if Bentham’s utilitarianism occasionally informs legal scholarship here, his ideas – including his call for international codification – do not become mainstream; and the same holds even more true for the Austinian philosophy of international “law”.

It is therefore profoundly misleading to claim that British international jurists, even if only in latter part of the nineteenth century, “were most influenced by John Austin, the foremost spokesman for positivism”.¹⁰⁵ In no part of that century was Austin taken too seriously – at least not by international law scholars; on the contrary, by the end of that century, Austinian positivism had become a pseudo-theory that British international lawyers instinctively rejected.¹⁰⁶ The still often-claimed proposition that British international law debates during the nineteenth century are predominantly a

¹⁰⁵ A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004), 44).

¹⁰⁶ M. Koskenniemi, *The Gentle Civiliser of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), 51: “In the last years of the century, international lawyers routinely responded to the Austinian criticism by noting that law does not only come down by sovereign enactments but equally from the spontaneous functioning of society.” This view is equally shared by D. Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, (1996) 65 *Nordic Journal of International Law* 385 at 401: “Broadly comparing the Austin/Bentham cite in theoretical chapters from, say 1840 through 1890, we find nineteenth century scholars relatively untroubled by Austin’s assertion that international law is not law “properly so called.”... In a sense, Austin had not yet become a challenge, let alone the central challenge, and international legal philosophy had not become a tradition of polemical response.”

discourse on “positivism” is thus fundamentally mistaken. For “positivism” and “historicism” are – as the overall “Conclusion” will show in greater detail below – very distinct normative philosophies, whose sole overlapping consensus lies in the rejection of abstract and utopian natural law thinking.¹⁰⁷ And once we consider the historical school as a distinct philosophy of international law, the “British” nineteenth century turns out to be a German one!¹⁰⁸

There is however one particularly British element that needs to be added to the German historicist paradigm. For British international law comes to cement a distinction between “civilised” and “uncivilised” states that would have a profound effect on the scope of international law in the last quarter of the nineteenth century. The primary losers of this “contraction” in the personal scope of international law were thereby not China, the Ottoman Empire and Japan (which all are re-included, relatively quickly, once they have embraced the “Western” standard of civilisation);¹⁰⁹ the principal losers of the new “imperialist” character of international law are the “barbarous” societies of Africa. And following the – dramatic – expansion of the British Empire, whose size doubles in the second half of the nineteenth century, other European states feel the need to also expand their spheres of economic and political influence. (For Lenin, the new “European” imperialism indeed stemmed directly from the “capitalist” competition over the world market.¹¹⁰) This “European” colonialism encountered, at first, some spirited US American opposition; yet at the turn of the twentieth-century, the “New Imperialism” had equally captured the United States.¹¹¹

¹⁰⁷ Contra, J. Pitts, *Boundaries of the International* (supra n.8), who argues that despite their fundamentally different outlook, the positivists and the historical school shared a fundamental similarity (ibid., 153) “I trace Maine’s historicist critique of Austinian positivism and revisit the debate between analytic and historical jurisprudence to argue that behind that apparently deep divide was a shared historical narrative that united aspirational scientific and universal claims about humanity as such, encapsulated in the paradoxical assertion that Europeans uniquely exemplified certain universal human tendencies or qualities, including social progress[.]”

¹⁰⁸ On this point, see the general conclusion of the thesis below.

¹⁰⁹ For an excellent discussion of China generally, see G. W. Gong, *The Standard of ‘Civilisation’ in International Society* (Clarendon Press, 1984), Chapter 5: “The Standard of ‘Civilization’ and the Entry of China into International Society”.

¹¹⁰ On the relationship between capitalism and imperialism, see V. Lenin, *Imperialism: The Highest Stage of Capitalism* (Penguin Classics, 2010).

¹¹¹ An academic precursor to this development is D. Dudley Field, *Draft Outlines of an International Code* (Baker, 1872), Article 77: “A nation has for itself and each of its members the right to explore and colonize any territory not within the territorial limits of a civilized nation.”

Neither Benthamite utilitarianism nor Austinian positivism could have arrived – at least not directly – at this new formal “imperialist” conception of international law. For they simply lack the normative resources to envisage the distinction between “civilised” and “barbarous” states. These earlier utilitarianisms were “individualist” and “non-essentialist” philosophies that were also – in principle – not committed to a specific set of “civilised” values. The principle of utility and the principle of habitual obedience are, normatively, agnostic as to the degree of “civilisation” of the sovereign. The relationship between “positivism” and “imperialism” is therefore not as straightforward as some would have us believe.¹¹² Nevertheless, there are elements of philosophical complicity. For not only could the principle of utility be (ab)used to explain why “civilised” nations might make better use of the territory and resources than an indigenous and “barbarous” people; even the imposition of a “higher” culture could, theoretically, be characterised as serving the general “civilisational” interest of humanity as a whole. And analytical positivism helped here too: for in drawing a categorical distinction between morality and law, it ultimately arrived at the very same conclusion as liberal imperialism: there cannot be a “natural right” to sovereign independence, as questions of sovereignty, are political and not legal questions.

Be that as it may, the best way to explain the rise of formal imperialism in the last quarter of the nineteenth century is to see it as a combination of two – independent – elements. The (German) Historical School’s emphasis on a “regional” international law combined with (British) liberal imperialism and thereby created a particularistic universalism that came to explain and justify why “underdeveloped” societies in the rest of the world could and should be excluded from the legal rights granted by international law.

¹¹² Viewed from this perspective, it is therefore mistaken to argue along the lines of A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (supra n.105), esp. 61.

Conclusion

Apologetic Endings

The Story Thus Far: International Law until 1914

In the transition from the eighteenth to the twentieth century something peculiar seems to happen to the normative foundation and personal scope of international law. Starting from a natural law conception that is “rationalist” and “universal”, and which originally denies the very existence of positive international law, one hundred-fifty years later the exact opposite view prevails. Now, the existence of a natural law is generally denied: all international law must be “positive” law; and far from its “universal” scope and “utopian” ambitions, international law has become “European” and “apologetic”. How did this transformation happen? If nature and history abhor radical changes, what conceptual process was here at play? This thesis has tried to answer this question; and in its methodological approach, it has attempted to steer a synthetic middle course between (German) idealism and (British) empiricism. *For all philosophical thought without history is empty; all history without philosophical concepts is blind.* In light of that “Kantian” programme, this *Conclusion* will first evaluate the results encountered in the previous five chapters; and, in a second step, it will then test the three conventional beliefs that it set out to challenge in the *Introduction*.

We started in Chapter 1 with a retrospective analysis of the eighteenth century as a “*Sattelzeit*”.¹ It is a time of semantic restructuring in which three normative conceptions of international law co-exist and compete: a “theological” conception, a “metaphysical” conception, and a “positivist” conception. Surprisingly, each of the three conceptions can still be found, in one way or another, within the long nineteenth century;² yet according to the academic “standard” account, it is the third conception – positivism – that comes to dominate.³ Our close analysis of the philosophical theory and jurisprudential practice within Germany and Britain must qualify this conventional wisdom.

¹ On the importance of the eighteenth century as a “*Sattelzeit*”, see: R. Kosselleck, Einleitung, in: O. Brunner et al. (eds.), *Geschichtliche Grundbegriffe* (Klett, 2004) – Volume 1, XV.

² A “theocratic” understanding of international law can still, to some extent, be found in the “Holy Alliance”; as well as in some of the British jurists discussed in Chapter 5.

³ For this traditional classification, see: A. Nussbaum, *A Concise History of the Law of Nations* (Macmillan, 1954), esp. 175-250; and more recently: S. Neff, *Justice among Nations: A History of International Law* (Harvard University Press, 2014), Part III: “A Positive Century (1815-1914)”.

German philosophy indeed remains firmly embedded in an idealist project that – after Kant – manifests itself however in two main variants (Chapter 2). On one side stands Hegel’s absolute idealism, which develops a “natural law” conception based on the state as the ultimate (and divine) unit of social organisation; and having posited the state at the apex of all normativity, Hegel unsurprisingly comes to deny the “objective” normativity of international law. The Historical School, on the other hand, is able to envisage a normative order above that state; yet it insists on its being rooted in a *moral* community that is *socially* constituted. All law here derives from a metaphysical source: the “spirit” of people(s); and while this spirit will primarily speak to one people, the Historical School can envisage a moral community above the nation. A “family” of culturally similar and socially connected nations will form an international society that, in turn, will be the moral cradle for its own customs and laws.

We saw in Chapter 3 that this – historicist – legal philosophy becomes dominant in the juristic imagination in Germany for the better part of the nineteenth century; and, as Chapter 5 has – perhaps surprisingly – shown, the same holds true for much of the British nineteenth century. Instead of Bentham and Austin – these British princes of utilitarian positivism – it is Savigny and the German Historical School that come to decisively shape British conceptions of international law in the nineteenth century.⁴

This however is not the complete picture. For by the end of the nineteenth century, a renaissance of Hegelianism triggers a methodological revolution in German public law that – via Jellinek and Triepel – would also significantly change the German conception of international law in the twentieth century. International law here assumed a “positivist” streak, because according to these Neo-Hegelians, all law must find its normative origin in a state will. Not only is there no universal – natural – law of nations; there also cannot be any regional – historical – customary law above states. All international law is “particular” law based on the state will(s); and the primary instrument of this – positive – international law is the international treaty.

Yet this – extreme – form of state positivism, emerging at the very end of the nineteenth century, has little influence in Great Britain. For Westlake (and originally Oppenheim) stay embedded within the older (German) conception of the community or family of nations and which continues to see custom as the principal source of

⁴ The exception to this rule, discussed in Chapter 5, is the British conception of private international law, where Austin did, arguably, play a significant role.

international law. The “speciality” of British international law in the nineteenth century is therefore decidedly not its “positivist” conception; rather, and as we saw in Chapter 5, it comes to develop a “colonialist” vision of the European family of nations. Inspired by the liberal imperialism of John Stuart Mill, this “British” conception assumes a “hierarchical” dimension that is eventually (ab)used to “disenfranchise” non-European peoples from their membership in the society of nations. And sadly, after 1880, this British colonial conception goes mainstream in Europe, including Germany.⁵

But let us take a step back: what does it all mean; and, what about the three conventional beliefs the thesis wished to challenge? The three received ideas listed in the *Introduction* were: first, the belief that the nineteenth century should be characterised as a “positivist” century; secondly, the belief that there was a radical break in the conception of international law around 1870; and, thirdly, the belief that the nineteenth century should be characterised as the “British” century shaped by a Benthamite conception of international law.

Let us start with the first view. If the Historical School dominates nineteenth century discussions on the normativity of international law, should it be characterised as part of a “naturalist” or a “positivist” project; or, is it a – third and different – way of thinking about law that deserves its own classification? In line with Kantian “naturalism”, the Historical School starts out from a conception of “private law”; yet unlike Kant, it does not derive its private law system from a “rationalist” and “individualist” but an “organicist” and “collectivist” base. This conception looks at the past, but it is also dynamic and evolving – a contrast that clearly distinguishes it from all “naturalist” philosophies that imagine an “eternal” and “static” law. And whereas “rationalist” accounts locate the ultimate source of all law in human reason and consciousness – with each individual human being representing the universal community of mankind, for the Historical School all law derives from the collective consciousness of particular moral communities of people(s).

⁵ There is no (formal) “colonial” international law in Germany (or Italy and France) until late in the nineteenth century. The continental European rejection of the colonial idea is well summed up by H. Bonfis, *Manuel de Droit International Public* (Rousseau, 1905), 312: “Le respect des droits d’indépendance et de souveraineté intérieure des tribus barbares est enseigné par Heffter, Klüber, G.F. de Martens, Pradier-Fodéré, Gérard de Rayneval, Ortolan, Salomon, etc.” On Bismarck’s late conversion to the colonial idea, see H.L. Wesseling, *The European Colonial Empires: 1815-1919* (Pearson, 2004), 135. On Mancini’s late colonialism, see: T. Scovazzi, *Pasquale Stanislao Mancini e la teoria italiana del colonialismo*, (1995) 78(3) *Rivista di Diritto Internazionale* 677.

This position however clearly distinguishes the Historical School from legal positivism too. For unlike the latter, it is “consciousness” not “being” – pace Marx – that is seen as the source of all law; and it is for that reason that (philosophical) “jurists” and not (empirical) legislators come to be seen as the principal organs of law-making. Indeed: one of the main differences between the Historical School and legal positivism lies in their fundamentally different conception of the relation between a “people” and its “state”. For whilst the state remains alien and external to the historicist account of law, it constitutes the normative centre of all positivist philosophies. Instead of a customary law created *outside* and *without* state institutions, all law is here reduced to “institutional” or formal state law; and, in the utilitarian logic, the legislator simply aggregates the individual preferences of (hedonistic) individuals that happen to have formed a “state people”.⁶

	Idealism		Realism
	Rationalists	Historicists	Positivists
<i>Principal Law</i>	Natural Law	Customary Law	Institutional Law
<i>Ultimate Source</i>	Individual Consciousness	Collective Consciousness	(Organised) State Will
<i>Temporal Orientation</i>	Future	Past	Present
<i>Ontological Character</i>	Rationalist	Organicist	Voluntarist
<i>Founded on</i>	Universal (Natural) Community	Particular (Natural) Communities	No (Natural) Communities

Table 1. Overview

The philosophical premises of the Historical School are thus very different from both the “rationalist” and the “positivist” schools (Table 1). The Historical School here stands between “idealism” and “realism”; and distinct from rationalism and positivism, it should consequently not be seen as a “Grotian” mixture that combines elements of both; but, rather, as a third and distinct conception of normativity whose special characteristics are ontologically different from either of the two other philosophical

⁶ Once again: the fundamental difference between the “Historical School” and “State Positivism” is that for the former, the “people” is a “natural” unit, whereas for the latter it is a “constructed” unit. Technically, the “Staatsvolk” only comes into existence positively, that is with the creation of a state and the “people” in this sense do not exist outside a state.

schools. Once this is recognised, the conceptual changes that take place in the foundations of international law in the long nineteenth century can be described as a two-stage process in which “rationalism” gives way to “historicism” and “historicism” is, in a much later second step, substituted by “positivism” at the turn of the twentieth century.

The best surface indicator of this two-step transformation is the changing hierarchy of sources through which international law is produced. For in line with the transformation of the overall philosophical project, these normative sources change in order and importance. The “rationalist” project clearly prioritises human reason, as deciphered by philosophical jurists, such as Wolff; while custom and treaties are not “real” international law. The emergence of “customary law”, as an independent and formal source of international law, is then a nineteenth century achievement of the Historical School.⁷ Yet while becoming its central source, the *Juristenrecht* retains – while not unchallenged – its status as a formal source of law. The importance of custom is however eclipsed with the rise of state positivism, which – at the beginning of the twentieth century – places the international treaty at the very centre of all international law.⁸ Seen from the philosophical perspective of state voluntarism, international treaties are the best expressions of sovereign state wills, with “custom” being relegated

⁷ P. Guggenheim, *Contribution à l'histoire des sources du droit des gens*, (1958) 94 *Collected Courses of the Hague Academy of International Law* 1 at 52; as well as A. D'Amato, *The Concept of Custom in International Law* (Cornell University Press, 1971), 47: “Prior to the nineteenth century, no writer had addressed himself to the details of custom-formation. But then, in that century, Puchta and Savigny took the first step[.]”. For both Guggenheim and D'Amato, the modern “twentieth century” version is born with François Génys’s “Méthode d’interprétation et sources en droit privé positif” (1899).

⁸ For Triepel’s criticism of the Historical School’s emphasis on “legal consciousness” as the origin of international normativity, see: H. Triepel, *Völkerrecht und Landesrecht* (Hirschfeld, 1899), 30: “Wenn das Recht das Produkt eines Willens ist, so ist ... es unzulässig, eine „Rechtsüberzeugung“ oder ein „Rechtsbewusstsein“ als Quelle des Rechts, in Sonderheit des Völkerrechts hinzustellen. Dem Ideenkreise der sogenannten historischen Rechtsschule entstammend und für die Rechtsquellentheorie zunächst des Landesrechts in einschneidender Weise verwertet, haben diese Begriffe auch in der Lehre des Völkerrechts als internationales oder gemeinsames Rechtsbewusstsein, internationale, gemeinschaftliche Rechtsüberzeugung der Staaten oder gar der Menschheit gastlich Aufnahme gefunden - , eine Adoption, die weder glücklich noch notwendig gewesen ist. Wie nahe diese und ähnliche Anschauungen mit der angeblich schon längst überwundenen naturrechtlichen Theorie zusammenhängen, ist erst neuerdings, wie mir erscheint überzeugend, nachgewiesen worden.” For the classic statement that custom, like international law generally, is merely positive morality that is only transmuted into a legal rule when adopted by a sovereign legislature or a judge, see: J. Austin, *The Province of Jurisprudence Determined* (editor: W. Rumble; Cambridge University Press, 1995), 35.

into to a secondary – less “conscious” – “treaty”.⁹ The respective hierarchy of sources, within each of our three philosophical projects, can be found in Table 2.

Rationalism	Historicism	Positivism
Jurists (natural law)	Custom	Treaties
<i>Treaties</i>	Jurists (general principles)	Custom
<i>Custom</i>	<i>Treaties</i>	<i>Jurists (teachings)</i>

Table 2. Legal sources (auxiliary sources in italics)

These shifts in the sources of international law also tell us something about the “contraction thesis” by Charles Alexandrowicz – briefly discussed in the *Introduction* to the thesis. For whatever is seen as the *primary* and *foundational* source of international law determines whether international law is considered to be “universal” or “regional” in scope (Figure 3).

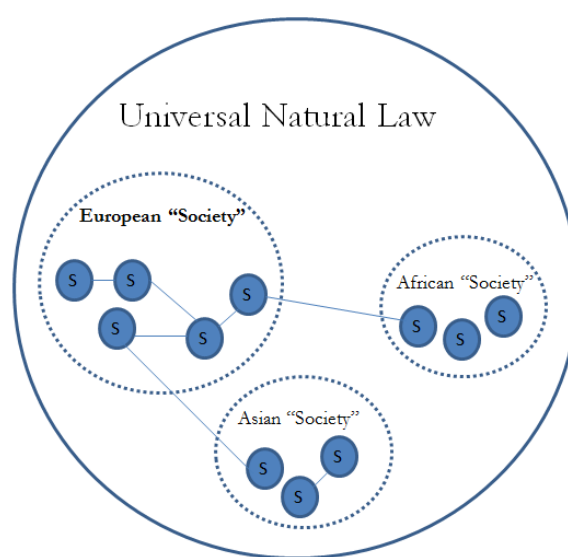


Figure 3. Universal and Regional Conceptions

The transition from a (universal) natural law to custom thus leads to a “regionalisation” and “contraction” of international law, since custom is, by nature, a regional rather than a universal phenomenon. By contrast, the emphasis on international treaties

⁹ A. D’Amato, *The Concept of Custom in International Law* (supra n.7), 50: “Custom is a tacit treaty, binding only those states which have tacitly consented. Custom, in the respective writings of Anzilotti, Corbett, and Strupp, amounts only to a uniting of wills of independent states.”

reintroduces – pace Alexandrowicz – a universal element, wherever treaties between two or more “classes” or “families” of nations can be found. One could even take this a step further and argue that positivism simply lacks the *intrinsic* normative resources to arrive at a (regional) conception of international law. It cannot, for example, itself distinguish between “civilised” and “barbarous” societies. The “exclusionary” normative element must here always come from somewhere else – an external “metaphysical” premise – be it Hegel’s dominant national spirit(s) or Mill’s civilisational philosophy.

What about the second conventional view: the belief that there was a “radical” break in the way international law is conceptualised around 1870? One of today’s brilliant academic voices here justified his major work on the short nineteenth century with the “sense that earlier accounts of the profession’s pedigree failed to give an adequate sense of the radical character of the break that took place in the field between the first half of the nineteenth century and the emergence of a new professional self-awareness and enthusiasm between 1869 and 1885”.¹⁰ For Koskenniemi, the creation of the “Institute of International Law” in 1873 constitutes a foundational moment symbolising the true beginning of the modern discipline of international law.¹¹ To recall, the core provision within the Institute’s Statute here states as follows:

“The Institute of International Law is an exclusively scientific association, and with no official character. Its objects are -

- (1) To favour the progress of International Law by seeking to become the organ of the legal conscience [consciousness] of the civilised world.
- (2) To formulate the general principles of the science, as well as the rules that result from it, and to spread the knowledge of it.
- (3) To give its aid to any serious attempt at gradual and progressive codification.
- (4) To endeavour to procure the official recognition of such principles as shall have been recognised as being in harmony with the requirements of modern society.”¹²

¹⁰ M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, 2001), 3-4.

¹¹ Ibid., esp. 39-47. On the origins of the Institute, see: R. Yakentchouk, *Les origines de l’Institut du Droit international*, (1973) 77 *Revue general de droit international* 373.

¹² For a reprint of the original statute, see: J. Lorimer, *The Institute of International Law Founded at Ghent, in: Studies National and International – Being Occasional Lectures Delivered in the University of Edinburgh, 1864-1889* (Green, 1890), 77 at 82. The translation of the French “conscience” into “conscience” in paragraph 1 was a choice, perhaps a mistake by Lorimer, as the French equally stands for “consciousness” – a term devoid of the moralist connotations within “conscience”. According to Koskenniemi, far from being a mistake, the ambivalence of the French “conscience” as both a rationalist and a moralist concept, stands behind the Institute and the “Victorian” moralistic flavour of the period of international law from 1870-1960.

The establishment of the Institute undoubtedly marked a crucial and critical moment in the gradual realisation of professional self-consciousness within the growing community of international jurists; yet a closer textual reading of its objectives also demonstrates their embeddedness in an earlier nineteenth-century tradition. For example: the idea that “jurists” were to act as the “organ” of the legal “consciousness” clearly reflected a “historicist” philosophy. In fact, it combined two central ideas of the Historical School, namely, that the “legal consciousness” constitutes the – idealistic – foundation of all “positive law” and, secondly, the particular idea – to quote Savigny – that “the estate of jurists” represents the best organ to record the “living customary law and thus for true progress”.¹³ With Mancini, as one of the founding members of the Institute, it is indeed not surprising that this philosophical programme entered into the mission statement of the newly established “organ” of international law; and this intimacy with the Historical School also best explains the importance of private(!) international law within the early life of the Institute.

However, something important had changed around 1870. For the Savignian pessimism with regard to codification had given way to a feeling of professional optimism – best represented by Mancini’s rejoinder to Savigny in “Of the Vocation of our Century for the Reform and Codification of International Law”.¹⁴ This belief in the ability to formulate general principles from custom and to codify international law through “law-making” conventions set a new trend in the codification of international law. (Some have traced the trend all the way back to Bentham,¹⁵ but a more convincing starting point is the Lieber Code that was to inspire two founding members of the Institute: Johann Kaspar Bluntschli and David Dudley Field.¹⁶) It is this optimistic hope in the “constructivist” power of codification and the – in retrospect – naïve optimism to “procure the official recognition of such principles” that marks, with Koskenniemi, a new beginning. And yet: it marks, in a dialectical sense, not necessarily the beginning of something new but the beginning of an end. For the codification of

¹³ F. C. von Savigny, *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Mohr, 1828), 133.

¹⁴ P.S. Mancini, *Della Vocazione del Nostro Secolo per la Riforma e la Codificazione del Diritto delle Genti* (Civelli, 1874), esp. 48.

¹⁵ E. Nys, The Codification of International Law, (1911) 5 *American Journal of International Law* 871.

¹⁶ For a wonderful overview of the various codification efforts, see: R.P. Dhokalia, *The Codification of Public International Law* (Manchester University Press, 1970). And for the nineteenth century specifically, see E. Augusti, Peace by Code: Milestones in the Codification of International Law, in: T. Hippler & M. Vec, *Paradoxes of Peace in Nineteenth Century Europe* (Oxford University Press, 2015), 37.

international law is, ultimately, a “positivistic” and “apologetic” project that starts to shift the normative foundations of international law from the “common consciousness” of mankind to the express “consent” of sovereign States. The Institute of International Law here became – counterintuitively – a collaborative force in a movement that will eventually undermine its founding principle: the moral “consciousness” or “conscience” as the principal normative force behind international law.

What about the third – and final – conventional view? Is the nineteenth century really best characterised as a “British” century dominated by the Benthamite conception of “international law”? Chapter 5 has already answered to this question negatively, but let me here try to give a more positive answer. In the course of the nineteenth century, the older denomination “law of nations” becomes indeed gradually replaced – albeit not in Germany – by the newer term “international law”. And while Wheaton had dutifully cited Bentham for the English translation of the Latin *ius inter gentes*,¹⁷ the conceptual genealogy and path towards success has a very different trajectory. The causes for this success are thereby fundamentally opposed to the Benthamite project of international law (who, it may be recalled, introduces the term to stand for *public* international law, as a law between sovereign states).¹⁸

For the new concept’s triumph is mainly due to the spectacular rise of the idea of *private* international law in the second half of the nineteenth century.¹⁹ And the reason for this success is simple: unlike the older “law of nations” denomination, the term “international law” offered a semantic umbrella to cover both “public” and “private” law as two equal branches of the same international tree. This “continental” conception has already been discussed in Chapter 3 with regard to Germany, but let me also quote (despite the missing discussion of the “French” nineteenth century in the present thesis) one of the most influential French texts here:

“International law (*jus gentium*) is the set of principles accepted by civilized and independent nations to regulate the relations that exist or may arise between them and to decide on conflicts between the laws and various practices that govern them. International law is divided into public and private law. International public law (*jus*

¹⁷ H. Wheaton, *Elements of International Law* (Caray, Lea & Blanchard, 1836), 36 – footnote 2.

¹⁸ See Chapter 4 – Section 1 above.

¹⁹ Joseph Story has been said to be the first to use the term (“Commentaries on the Conflict of Laws” (Little and Brown, 1841), 9); yet within Germany, it is Wilhelm Schäffner’s “Entwicklung des internationalen Privatrechts” (Sauerländer, 1841); and in France it will be Jean-Jacques Gaspard Foelix’s “Traité du Droit International privé” (Joubert, 1843) that popularise the term.

gentium publicum) regulates nation-to-nation relations; in other words, it has as its object conflicts of public law. Private international law (*jus gentium privatum*) is the set of rules by which conflicts between the private law of different nations are judged; in other words, private international law consists of the rules relating to the application of a State's civil or criminal laws in the territories of a foreign State.”²⁰

The rise and success of the term “international law” is consequently not due to Bentham or the “British” conception of international law (which rejects the idea of a private “international” law altogether). It is rather the “continental” conception of international law, and especially the German Historical School, that allows private international law to become a legitimate sister of public international law.²¹ In essence: the success of the notion of “international law” is thanks to its widening to include private – international – law and not to the Benthamite narrowing to public relations between states!²²

Yet it is, perhaps, also this link between “private” and “public” international law that may partly explain why the historicist conception of international law was ultimately so vulnerable to the exclusionary and colonial philosophy offered by British imperialism. For the fusion of private and public international law means that *both* should, in principle, be subject to the same normative principles; and that, in particular, means that moral dissimilarities within States may have external effects with regard to

²⁰ Ibid., 1-2. Nussbaum goes even so far as to claim that “the Law-of-Nations doctrine constituted a virtually unified conception” and that “[n]early all of the leading continental writers of the period espoused the Law-of-Nations conception: in France, Weiss, Pillet and Bartin; in Germany, von Bar and Zitelmann; in Italy, Fiore and Diena; in Holland, Jitta; in Belgium, Laurent; in Switzerland, Brocher and Meili” (A. Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws* (1942) 42 *Columbia Law Review* 189 at 194).

²¹ On the importance and influence of the German Historical School on (French) Private international law, see: A. Pillet, *Principes de Droit International Privé* (Pedone, 1903), 12: « Les travaux de l'école allemande ont surtout été remarquables à cet égard et les noms de Schaeffner, de Waechter, de Savigny, de Brocher, de de Bar, pour ne citer que les plus connus, ont le droit d'être honorés comme ceux des fondateurs et des plus illustres représentants de cette école aux progrès de laquelle il semble bien que l'avenir de notre science soit dorénavant lié. »

²² In terms of the dominant “ideas” of the age, Grewe’s identification of the nineteenth century as the “British” century is thus wrong (W. Grewe, *The Epochs of International Law* (De Gruyter, 2000), 429: “In respect of the development of international law in the nineteenth century this constellation had the effect that, on the one hand and primarily under British influence, international law increased in scope to become universal.”) For not only is the Benthamite idea of “international law” not at all prevalent on the continent, where the broader conception of public and private international law prevails; more importantly, on a substantive level, Grewe is mistaken to identify Britain as the intellectual centre behind the international law thinking within this historical epoch. Britain remains an “imperial” thinker and as such is not at all behind a “universalist” conception of international law that enfranchise the rest of the globe. In the words of Koskenniemi, *The Gentle Civilizer of Nations* (supra n.10), 34: “An Empire is never an advocate of an international law that can seem only an obstacle to its ambitions. The persistent British refusal to underwrite a legal system of collective intervention in the legitimist cause may have been justified by a genuine aversion against absolutism -- but the absence of common rules or agreed procedures also automatically played into its hands.”

their membership in the “society of nations”.²³ The existence of a “capitulation” system, or extraterritorial consular jurisdiction generally, here suddenly comes to signal the absence of a common “civilisational” base that, in turn, becomes evidence of why a foreign state cannot be part of the (European) family of nations.²⁴ The link between private and public international law, then, subtly undermines the sovereign equality of states because the existence of a different private law – say a different family law – comes to be a reason why – say Islamic states – cannot be members of the European family of nations.

The Story Beyond 1914: Outlook and Trend(s)

What would the twentieth century bring? The long nineteenth century ends in a cataclysmic catastrophe: the First World War. This war – unlike any other within the nineteenth century – fatally damages the belief that a common legal “consciousness” could itself guarantee the binding nature of international norms. International treaties had been violated;²⁵ and the idea of a “family of nations” in which a common standard of civilisation would “civilise” the Great War had been shattered. The shock that states “really” acted like Hobbesian wolves triggered several reactions three of which shall briefly be mentioned. These three intellectual responses will remain – in the first third of the twentieth century – unsuccessful “utopian” projects that flounder when the post-1918 settlement itself collapses under the weight of its political contradictions

²³ This point is well made by Westlake, *A Treaties on Private International Law* (Maxwell, 1858), 144: “In other words, the extraterritorial acceptance of rights founded on territorial laws can only exist as between countries which resemble each other in the leading characters of their civilization, and none of which departs in any considerable degree from the average standard of those characters. We could not, for instance, recognize polygamy in Christian Europe or America, on the ground that the plural marriages were contracted in Turkey and by Turks. In this manner, the principle of the law of the parties marks as it were the limits of this department of legal science. It is when the conditions fail for applying its ordinary rules, from a contact with places where no law has yet been enacted, or with populations not within the jural community it supposes, that this principle, suppressed in general, emerges to supply the defect with all the force which it possessed in the infancy of law. The following cases however still mark its occasional employment even in Christendom.”

²⁴ One of the best expressions of this link between private and public international law is here offered by E. Root, *The Basis of Protection to Citizens Residing Abroad*, (1910) 4 *American Journal of International Law* 517 at 521.

²⁵ I. Hull, *A Scrap of Paper: Breaking and Making International Law during the Great War* (Cornell University Press, 2014).

and rising economic pressures.²⁶ The three inter-war phenomena I am thinking of here are: (1) the rise of “universal” international institutions; (2) the brief revival of “natural law” theories to counter state positivism; and (3) the emergence of the neo-Kantian idea of the unity of all law.

Let me only look briefly at the first – and most significant – phenomenon: the creation of the “League of Nations”. The latter initiates the “move to institutions” that would become the hallmark of the twentieth century.²⁷ Predominantly an Anglo-Saxon project,²⁸ the League was principally open to all sovereign States and territories.²⁹ Its main aim was to “promote international cooperation and to achieve international peace and security” by imposing international obligations that were to be monitored by the League.³⁰ The birth of permanent institutions to “represent” the international community was a major step in the formal “organisation” of the world. (This also famously included the creation of a judicial world organ: the “Permanent Court of International Justice”.³¹) The League was quickly seen as of a “sui generis” nature;³² and from a substantive point of view, it offered a panoply of path-breaking innovations. Vaguely reminiscent of the European Concert in the early nineteenth century, the League Covenant had declared “[a]ny war or threat of war” to be “a matter

²⁶ On the various internal contradictions specifically, see C. S. Maier, *Recasting Bourgeois Europe: Stabilization in France, Germany, and Italy in the Decade after World War I* (Princeton University Press, 2015).

²⁷ D. Kennedy, *The Move to Institutions*, (1987) 8 *Cardozo Law Review* 841. For early discussions of the League, see P.E. Corbett, *What is the League of Nations*, (1924) 5 *British Yearbook of International Law* 119; as well as: F. Bleiber, *Der Völkerbund* (Kohlhammer, 1939).

²⁸ D. Kennedy, *The Move to Institutions* (supra n.27) 909 and 922.

²⁹ According to Article 1(2) of the League Covenant, the League was open to “[a]ny fully self-governing State, Dominion or Colony” and thus constituted a potentially (!) “universal” institutional project. The major absentees among the original members were (defeated) Germany and (communist) Russia which joined only later on; but more importantly still was the rejection of the League by the United States.

³⁰ *Ibid.*, Preamble and Article 2.

³¹ *Ibid.*, Articles 13 and 14.

³² L. Oppenheim, *The League of Nations and Its Problems: Three Lectures* (Longmans, 1919), 18 and 22: “Many people think that it would be possible to do away with war for ever, and they therefore demand a World State, a Federal State comprising all the single States of the world on the pattern of the United States of America. (...) I believe that these demands go much too far and are impossible of realisation. A Federal State comprising all the single States of the whole civilised world is a Utopia... Yet while a Federal World State is impossible, a League of Nations is not, provided such league gives itself a constitution, not of a state-like character, but one sui generis. What can be done is this: the hitherto unorganised Family of Nations can organise itself on simple lines so as to secure, on the one hand, the absolute independence of every State, and, on the other hand, the peaceful co-existence of all the States.”

of concern to the whole League” and asked its members to submit a dispute that could not be settled by diplomacy to arbitration or judicial settlement.³³

Normatively, the League was nevertheless firmly part of a new “positivist” project. While it was meant to be a “universal” treaty unlike any other;³⁴ the “sources” of international law had not been radically reformed or rearranged. For even if Oppenheim was to speak of “international legislation” as a new source instigated by the League,³⁵ there were no real “legislative” matters for which the League was responsible – except, ironically, for “those colonies and territories which as a consequence of the late war ha[d] ceased to be under the sovereignty of the States which formerly governed them and which [were] inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world”.³⁶ The League here assumed the performance of “a sacred trust of civilisation” under which the colonies of the defeated parties were under its “mandate” and taken under its “tutelage”.³⁷

But apart from this “colonial” legislation, the general sources of “classic” international law were confirmed and codified. They were and are:

- “1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. ... the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law...”³⁸

³³ League of Nations Covenant, Articles 11 and 13.

³⁴ For the “primacy” of the League Covenant over all inter-se agreements of its Members, see *ibid.*, Article 20: “The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings inter se which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.” However, Article 21 expressly recognized the co-existence of “regional understandings like the Monroe doctrine” that would not be affected by the League.”

³⁵ Oppenheim, *The League of Nations* (supra n.32), 41. He however admits to using the term “in a figurative sense only” (*ibid.*); and equally grants that “International Statutes cannot be created by a vote of the majority of States but only by a unanimous vote of all the members of the Community of civilised states” (*ibid.*, 44).

³⁶ League of Nations Covenant, Article 22 (1).

³⁷ *Ibid.*, Article 22 (2). Importantly, the mandate system was confined to some – not all – colonies; and while the principle of (national) self-determination was to become a cornerstone of the post-1918 world; the international effort to decolonise the world would have to wait until after the World War II.

³⁸ Article 38 Statute of the Permanent Court of International Justice.

The priority of international treaties over international custom here formally announced the “positivist” victory over the custom-oriented Historical School; while the reference to “general principles of law recognized *by civilised nations*” consolidated, albeit indirectly, the nineteenth-century division into civilised and uncivilised countries and indeed confirmed the formal “imperialist” character of international law that had informally emerged in the last quarter of the nineteenth century.³⁹ Leaving the ambiguous third source aside,⁴⁰ a fourth – subsidiary – source was still seen in the “teachings” of international legal scholars; yet there seems no shying away from the conclusion that the League wholeheartedly subscribed to a “positivist” project in which the States themselves took control over the sources of “their” law and in which the individual consent requirement triumphed over all non-voluntary forms of international law.⁴¹

With the League, three phenomena become – it will be argued in the future – “the” defining characteristics of the twentieth century. These three characteristics are: the rise of “nationalism”, the consolidation of “colonialism”, and the triumph of “positivism”. The principle of “nationality”, born in the nineteenth century but still predominantly rejected in public international law,⁴² was to rise to general prominence in the first half of the twentieth century. (Ironically, at the same time, the “shift from idealism to realism” led private international law scholars to increasingly embrace the Anglo-American “conflict of law” conception.⁴³) And it is also the twentieth century

³⁹ G. Schwarzenberger, *The Standard of Civilisation in International Law*, (1955) *Current Legal Problems* 220.

⁴⁰ On the origins of this third “ambiguous” source as a compromise between “naturalists” and “positivists”, see: P. Guggenheim, *Contribution à l’histoire des sources du droit des gens* (supra n.7), 76-79.

⁴¹ For anecdotal evidence, see only the Jellinek-like conception of international law by the Permanent Court of International Justice in the Case of the “S.S. Wimbledon”: *Britain et al. v. Germany*, (1923) PCIJ Series A01, para.35: “The Court declines to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.”

⁴² See only: A. Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (Duncker & Humblot, 1874), 66. Even Mancini would later relativize his views, see: H. Raschhofer, *Volk und Staat in der italienischen Rechtstheorie des 19. Jahrhunderts*, (1936) 6 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 538; as well already P. Fiore, *Aggregazioni Legittime Secondo Il Diritto Internazionale: Esame Critico Del Principio Di Nazionalità* (Paravia, 1879).

⁴³ T.M. Boer, *Living Apart Together: The Relationship between Public and Private International Law*, (2010) 57 *Netherlands International Law Review* 183.

in which colonialism assumes its “international” and “scientific” character.⁴⁴ The most important normative development within the following century however is the move to “institutions”, briefly mentioned above, and the spectacular triumph of international law positivism.

This “positivistic” triumph is often traced back – at least in the British literature – to Oppenheim, whose textbook has a most impressive afterlife in the twentieth century.⁴⁵ We however saw in Chapter 5 that Oppenheim had originally remained within the older nineteenth-century German historicist tradition; yet his subsequent vocal positivism came to stand for “the absolute renunciation of a natural law foundation”.⁴⁶ With it came the belief that “the method to be applied by the science of international law can be no other than the positive method”;⁴⁷ and that international law was but a collection of treaties and customs in which even the most foundational principles – like *pacta sunt servanda* – are nothing but custom to be codified in the future.⁴⁸ This “positivist” project was, at first, not shared by many continental scholars;⁴⁹ yet with the predominance of Anglo-American “realist” thinking in the twentieth century, the triumph of positivism was sealed. The twentieth century becomes “the” positivist

⁴⁴ M. Koskeniemi, The legacy of the nineteenth century, in: D. Armstrong, Routledge Handbook of International Law (Routledge, 2011), 141 at 144: “Colonialism began as a “science” only within the mandates system of the League of Nations in the 1920s and then in theories of “development” in the 1950s and thereafter.”

⁴⁵ On the afterlife of Oppenheim’s international law treatise, see: W. M. Reisman, Lassa Oppenheim’s Nine Lives, (1994) 19 Yale Journal of International Law 255.

⁴⁶ M. García-Salmones Rovira, *The Project of Positivism in International Law* (Oxford University Press, 2013), 80. The famous passage within Oppenheim’s “The Science of International Law: Its Task and Method” ((1908) 2 American Journal of International Law 313 at 329) reads: “We know now-a-days that it is impossible to find a law which has its roots in human reason only and is above legislation and customary law.”

⁴⁷ Ibid., 333.

⁴⁸ Ibid., 349. For his idea that the answer to the question why treaties are binding lies in custom, see: M. Schmoeckel, The Internationalist as a Scientist and Herald: Lassa Oppenheim, (2000) 11 European Journal of International Law 699 at 701. According to Kingsbury, Oppenheim here breaks with Westlake and adopts a course that will make him the “real” founding father of British international law positivism in the twentieth century, see: B. Kingsbury, Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law, (2002) 13 European Journal of International Law 401, esp. at 409.

⁴⁹ This reaction is, perhaps, best exemplified by the post-1914 international law conceptions of Louis Le Fur, who revives a “natural law” theory of international law (« La théorie du droit naturel depuis le XVII siècle et la doctrine moderne », (1927) 18 Collected Courses of the Hague Academy of International Law 259.

century in which British empiricism and American “realism” provide the dominant “world spirit”.⁵⁰

It is through the prism of the “short” twentieth century (1918-1989) that we tend to look back. This “retrospective” however often leads to anachronistic fallacies in which we project the “present” into the “past” and in which the rich traditions of the nineteenth century are unceremoniously buried. Yet the nineteenth century is not the twentieth century! It was a century filled with naturalist and idealist thinking and, as such, a “metaphysical” – not a positivist – century. It starts early with a utopian “practical” project – the French Revolution – and two (semi-)utopian philosophers: Kant in Germany and Bentham in Britain.⁵¹ Yet a century and a half later, this theoretical and practical utopianism has been almost entirely replaced, at least at the international level, by a positivistic professionalism that even in its codification ambitions is “apologetic” in nature. For to codify the past or present is not to construct a better future.

⁵⁰ ... at least within the “First World”! For the “Soviet” approach to international law in the “second world”, see: G.I. Tunkin, *Theory of International Law* (Harvard University Press, 2014).

⁵¹ Bentham is, after all, a radical reformer whose “positivism” is not to codify the past; and in his positivist rationalism, he endorses a “constructive” semi-utopian project.

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