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German Idealism after Kant: Nineteenth-Century Foundations of International Law

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Abstract

What are the legal principles of German idealism in the long nineteenth century; and what conception(s) of international law do they offer? Opposing Kantian rationalism and its formalist law, two idealist reactions do emerge in the early decades of the nineteenth century. The first is offered by Hegel whose conception of state law will make him the principal representative of the future deniers of an objective international law. The second reaction comes from the German Historical School, whose moral and legal understanding of the people(s) does – on the contrary – develop a positive conception of international law based on a 'society' of nations. How, and to what extent, were these two idealistic approaches reflected in the international law textbooks of the age? This article investigates this question and finds that it is unquestionably the Historical School that came to dominate international law thinking in the long nineteenth century – and that not just in Germany but also in Italy and Great Britain. The nineteenth century is thus decidedly, under the influence of Savigny and the Historical School, a metaphysical century centred on an intrinsic connection between morality and law.

Keywords

German idealism – nineteenth century – Hegel – Savigny – Historical School – natural law – positivism – custom – private international law

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1 Introduction: Two Legal 'Reactions' to Kantian Rationalism

With the French Revolution, the eighteenth century comes to an early end; and with it, the long nineteenth century stormily begins.

Among the famous supporters of the Revolution is Immanuel Kant, whose critical project had crushed older scholastic conceptions of natural law.[1] After the *Alleszermalmer* had done his work, all that natural law could hope to do was to offer the formal categories through which empirical reality could be understood from the point of view of (individual) human reason. As regards international law, Kant thereby accepts the historical reality of a plurality of states; and, based on the principle of state sovereignty, all his critical account could provide is a minimalist conception of international law. Morally, for Kant, States however remain under an obligation to leave the state of nature, which constitutes for him a 'wrong in the highest degree'.[2] But there is, importantly, no permissive law or postulate of practical reason to force states into founding a 'World Republic'; and the normative solution Kant therefore comes to favour is 'perpetual peace' founded on the basis of a voluntary (and regional) federation of states.

A reaction to this rationalist and formalist reading of all law – including international law – however soon emerged.[3] A revival of tradition and legitimacy in the early decades of the nineteenth century found its first profound expression in the Historical School of Jurisprudence (in short: 'Historical School') and its founding father: Friedrich Carl von Savigny. Considering law as the spiritual expression of a natural order, the Historical School here stood – just like Burke in England – diametrically opposed to societal reform based on rationalist principles.[4] Law is rooted in the moral traditions of a collective

1 Schröder, Jan. *Recht als Wissenschaft: Geschichte der juristischen Methodenlehre in der Neuzeit (1500–1933)* (Munich: C. H. 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.' ('The decisive change in the history of natural law after 1800 is therefore not that it ceases to exist as a scientific discipline, but rather that it is no longer considered a source of law.').

2 Kant, Immanuel. 'Metaphysical First Principles of the Doctrine of Right ('Doctrine of Right')', in *The Metaphysics of Morals*, ed. Mary Gregor (Cambridge: Cambridge University Press, 1996), 1–143 para. 54.

3 Artz, Frederick B. *Reaction and Revolution: 1814–1832* (New York: Harper, 1963), chapter 3.

4 In Britain, this conservative reaction will be led by Edmund Burke. On Burke's conception of natural law generally see Stanlis, Peter. *Edmund Burke and the Natural Law* (Ann Arbor: University of Michigan Press, 1958). With regard to international law specifically, see Davidson, James. 'Natural Law and International Law in Edmund Burke'. *The Review of Politics* 21(3) (1959), 483–494.

people and can only be found in the historic past. A second reaction to Kantian formalism however also emerged at the same time. Here, in between the two extremes of rationalist revolution and social tradition lay the legal philosophy of Georg Wilhelm Friedrich Hegel.[5] For the famous German idealist, all law derived from the state as the highest natural order; and with the state thus absolutized, Hegel's philosophy appeared unable to generate normative foundations for a binding law between states.

What are the underlying legal principles of both expressions of post-Kantian German idealism; and what conception(s) of international law do they offer? Building on my analysis of Kant's eighteenth-century conception of international law,[6] this article aims to answer this question in three steps. Section 2 briefly introduces Hegel and his conception of state law as an early representative of the future deniers of an objective international law. Section 3 then turns to the philosophical and legal premises of the German Historical School and its normative conception of international law based on a (European) 'society' of nations. How were these two distinct nineteenth-century philosophies reflected in the international law textbooks of the age? Section 4 investigates this aspect and shows that, among the two post-Kantian idealisms, it is unquestionably the Historical School that comes to dominate much of that century – and that not just in Germany but also in Italy and Great Britain. The nineteenth century is thus decidedly not an 'Austinian' century; on the contrary, under the influence of German idealism, it is a metaphysical century insisting on an intrinsic connection between (international) morality and (international) law.

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',[7] a novel approach to natural law is here advocated. This new – third – approach

5 Riedel, Manfred. *Between Tradition and Revolution: The Hegelian Transformation of Political Philosophy* (Cambridge: Cambridge University Press, 1984), esp. chapter 7.

6 Schütze, Robert. 'The "Unsettled" Eighteenth Century: Kant and his Predecessors', in *Globalisation and Governance: International Problems, European Solutions*, ed. Robert Schütze (Cambridge: Cambridge University Press, 2018), 11–40.

7 For an excellent analysis of this point, see Burns, Tony. 'Hegel and Natural Law Theory'. *Politics* 15(1) (1995) 27–32.

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 indicted to 'lack[] any criterion whatsoever for drawing the boundary between the contingent and the necessary, between what must be retained and what must be left out in the chaos of the state of nature'.[8] 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'.[9] For any 'formalism' to ever produce a law 'some material, some determinacy, should be posited to supply its content';[10] and this material can only be provided by what Hegel calls the 'ethical'.[11] Natural law is here ingeniously viewed as a synthesis of form *and* content; or better: form *through* content.

But if natural law only exists when embedded within the 'ethical' life, where do we find the latter? Rejecting the rationalist individualism behind all social contract theories, especially those of the enlightenment, Hegel identifies the ethical with the communities in which individuals live – from the 'family' to 'civil society' up to the 'State'. The state is thereby posited as the highest 'real' 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'.[12] The State consequently becomes the starting point of all law – including *natural* law.[13] For all law can only be 'abstracted' and 'understood' from within a concrete ethical community and especially the highest ethical community: the State.

But what does this mean for international law? Let us try to answer this question by looking at Hegel's conception of the state in world history first

8 Hegel, Georg W. F. 'On the Scientific Ways of Treating Natural Law', in *Political Writings*, Laurence Dickey and Hugh Nisbet (Cambridge: Cambridge University Press, 1999), 102–180, 111.

9 Ibid., 123.

10 Ibid., 124.

11 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.'

12 Ibid., 140.

13 Nota bene: Hegel's 'Elements of the Philosophy of Right' has the additional title 'Natural Law and Political Science in Outline'.

(2.1); before we specifically turn to the 'Hegelian' conception of international law (2.2).

2.1 *States in World History: Evolution and the Spirit of War*

For Hegel, each philosophy of (natural) law will always be a reflection of its time,[14] and Hegel's own time is a time of sovereign states. In this historical stage, there is no ethical world community that would support a world law;[15] and for Hegel, a 'universal monarchy' or a cosmopolitan 'world republic' are thus 'empty words' – pure form without (empirical) content.[16] The highest – existing – ethical community exists in the state; and even if Hegel postulates the existence of a 'world spirit', that world spirit always governs through 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.'[17] 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';[18] with each national spirit representing one stage in the evolution of the world spirit.[19] With Hegel the two opposing modernist strands of cosmopolitanism and nationalism thus reach a new nineteenth century synthesis.[20]

14 Hegel, Georg W. F. *Elements of the Philosophy of Right*, ed. Allen Wood (Cambridge: Cambridge University Press, 1991), 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[.]'

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

16 For this point, see only Hegel, 'On the Scientific Ways of Treating Natural Law' 1999 (n .8), 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.'

17 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 272 (Addition).

18 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.'

19 Hegel, Georg W. F. *Introduction to the Philosophy of History*, ed. Leo Rauch (Indianapolis: Hackett, 1988), 89.

20 For this excellent point, see Meinecke, Friedrich. *Cosmopolitanism and the Nation State* (Princeton: Princeton University Press, 1970), 201.

For Hegel, the principal agent for the evolution of the world spirit is, notoriously, war.[21] War is both 'necessary' and 'ethical', because old 'particularities' are dissolved and a new ideal 'attains its right and becomes actuality'.[22] Solely through war can the dynamic progression and evolution of the world spirit be guaranteed – something that a Kantian 'perpetual peace' cannot do.[23] From Hegel's philosophical perspective, war forms a necessary part of history because the disorder that it generates is instrumental in permitting new normative orders to emerge.[24] The dialectical unfolding of the world spirit is consequently built on – and therefore requires – a plurality of States that compete in war. It is only through the competition between states that their individuality is guaranteed; and there will always be one national spirit representing the 'self-development of the world-spirit's self-consciousness'.[25] This national spirit temporarily assumes an 'epoch-making role' – as it dominates world history for a particular era or epoch.[26]

2.2 *The Hegelian State and 'Its' International Law*

From the absolute point of view of world history, it follows, there cannot be a universal international law standing above all states. For Hegel gives absolute priority to one dominant national spirit, which means that 'the spirits of other nations are without rights'.[27] From the relative point of view of individual states, as 'unconscious instruments and organs' of the world spirit,[28] on the other hand, there nevertheless *appears* to be a form of international law. But because the highest ethical substance is the sovereign state, all law must be state law, and for Hegel international law is consequently nothing but 'external state law'.[29] International law is here reduced to the external or negative

21 On the centrality of war as an agent of progress within Hegel's philosophy, see Avineri, Shlomo. 'The Problem of War in Hegel's Thought'. *Journal of the History of Ideas* 22 (4) (1961), 463–474.

22 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 324.

23 Hegel, 'On the Scientific Ways of Treating Natural Law' 1999 (n. 8), 141.

24 Avineri, Shlomo. *Hegel's Theory of the Modern State* (Cambridge: Cambridge University Press, 1974), 195.

25 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 347.

26 The idea of dominance is here 'cultural' and not 'political' in nature, see Avineri, *Hegel's Theory of the Modern State* 1974 (n. 24), 222.

27 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 347.

28 Ibid., § 344. In the beautiful phrase of Meinecke, *Cosmopolitanism and the National State* 1970 (n. 20), 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.'

29 E.g. Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 259 and more generally 'international law' = 'äußeres Staatsrecht'.

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.'[30] A close reading of this passage locates all international law in each state's own will; yet because that will is posited as an 'individuality', it also requires – following Hegel's logic – other wills that exist outside it.[31]

What are the principles essential to Hegel's conception of international law? If each State is sovereign and 'the absolute power on earth',[32] are there any *legal* principles between states at all? For Hegel, there surprisingly are; yet consistent with his national 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.'[33] This principle of mutual recognition plays a quintessential role in Hegel's construction of international law (and indeed in his entire phenomenology of being more generally).[34] 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

30 Ibid., § 323.

31 In the words of Trott zu Solz, Adam von. *Hegels Staatsphilosophie und das internationale Recht* (Göttingen: Vandenhoeck & Ruprecht, 1932), 75: 'So ist es nicht eine geschichtsphilosophisch vorgefundene 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.'

32 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 331.

33 Ibid. This idea will be repeated in Gans, Eduard. *Naturrecht und Universalrechtsgeschichte: Vorlesung nach G. W. F. Hegel* (Tübingen: Mohr Siebeck, 2006), 234: 'Genau wie der Mensch kann der Staat sein selbständiges Ich erst in Beziehung zu anderen Individuen vollends entfalten.'

34 On Hegel's theory of recognition generally, see Pippin, Robert B. 'What is the Question for which Hegel's Theory of Recognition is the Answer?'. *European Journal of Philosophy* 8(2) (2000), 155–172.

> that the rights of these other nations are not equal to theirs and that their independence is merely formal.[35]

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;[36] 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*). Importantly, 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.[37] 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.[38]

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 sphere. All the latter can offer are external and particular expressions of state will(s) that always and unreservedly remain entitled to determine what is in their best individual interest. An international organisation – like the Holy Alliance in the early nineteenth century – cannot change this predicament, because it itself is based on an international treaty

35 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 351.

36 Ibid., § 332. Custom as a rule is not expressly mentioned; even if there is an allusion to custom in the Addition to § 339 by Gans.

37 Ibid., § 336. For an interesting analysis of this point, see Spitra, Sebastian M. 'Normativität aus Vernunft: Hegels Völkerrechtsdenken und seine Rezeption'. *Der Staat* 56(4) (2017), 593–619, 599.

38 Hegel, *Elements of the Philosophy of Right* 1991 (n. 14), § 333.

and, as such, subject to and limited by the principle of state sovereignty.[39] Due to the absence of an ethical community and international institutions,[40] the Hegelian 'pluriverse' of states consequently lacks the normative resources to create, from within itself, an objective law that could stand above the particular wills of the states.[41] That conclusion does not, however, necessarily mean that Hegel cannot envision a world republic. Yet this world republic cannot be a 'state';[42] and lying beyond the present time and ideas, it cannot yet be 'conceived' in terms of the present.[43]

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.[44] Equally criticising the abstract rationalism behind the French and Kantian revolutions,

39 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 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.'

40 Especially the reference to the 'Sitten der Nationen' in § 339 of Hegel's 'Philosophy of Right' is sometimes seen as a kernel of international normativity or ethical life; yet the better view here insists that the latter remains foreign to his general system. For this point, see especially Dellavalle, Sergio. 'The Plurality of States and the World Order of Reason: On Hegel's Understanding of International Law and Relations', in *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 352–378, 363.

41 In the words of Dellavalle (ibid., 359): 'As a result of the material dimension of the world … states form a *pluriverse*, never merging into a *universe*.'

42 For this excellent point, see Avineri, 'The Problem of War in Hegel's Thought' 1961 (n. 21), 469: '[I]f states, in the plural, cease to exist, there cannot, by definition, remain a state in the singular.'

43 Pointing to Hegel's 'Philosophy of History', 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 wars, though immanent, will gradually disappear', see Avineri, *Hegel's Theory of the Modern State* 1974 (n. 24), 207.

44 On the (un)easy relationship between Hegel (and the Hegelians) and the Historical School, see especially Brie, Siegfried. *Der Volksgeist bei Hegel und in der historischen Rechtsschule* (Berlin: Rothschild, 1909); as well as Mährlein, Christoph. *Volksgeist und Recht: Hegel's Philosophie der Einheit und ihre Bedeutung in der Rechtswissenschaft* (Würzburg: Königshausen & Neumann, 2000), 116–129.

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 moral 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;[45] yet it is only officially 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 search for a synthesis between history and reason as early as 1802.[46] Originally inspired by Kant's methodological programme,[47] the task of the legal scholar is said 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 earlier naturalist thinking, the Historical School here denies that the human mind can itself derive substantive conclusions about justice; yet like the Kantian project, it believes in formal – juristic – reason without which the historical reality must remain unlocked. On the basis of these premises, Savigny develops, like Hegel, an idealistic conception of law that is distinct from positive law (3.1); yet, unlike Hegel, this idealist conception finds within itself the normative resources to conceive of an objective international law above state wills (3.2).

3.1 *The Historical School: The Nation as a Metaphysical Construct*

What philosophical conception of law did the Historical School develop? Savigny's pamphlet 'Of the Vocation of Our Age for Legislation and Jurisprudence' famously dismissed the attempt to positively institute German law in the wake of the Vienna Congress.[48] Law like language was here conceived as an integral part of the 'spirit' of a people;[49] and following Herder's negative

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

46 See especially Savigny, Friedrich C. von. *Vorlesungen über juristische Methodologie 1802–1842* (Frankfurt: Vittorio Klostermann, 2004).

47 On the philosophical relation between Kant and Savigny, see Wieacker, Franz. *Privatrechtsgeschichte der Neuzeit* (Göttingen: Vandenhoeck & Ruprecht, 1996), 370; as well as Franklin, Mitchell. 'The Kantian Foundations of the Historical School of Law of Savigny'. *Revista Juridica de la Universidad de Puerto Rico* 22(1) (1952–53), 64–89.

48 Savigny, Friedrich C. von. *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Tübingen: Mohr, 1828), iv.

49 Ibid., 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 absolutes Stillstands, es ist derselben Bewegung und Entwicklung unterworfen, wie jede andere Richtung des Volkes[.]'

correlation between the vivacity of a language and its codification, a living law ought, according to Savigny, never to be codified. A legal order is here seen as an 'organism', whose natural growth is best reflected in customary law that itself emanates from popular ethics ('Sitte') and popular beliefs ('Volksglaube').[50]

But if all law emanates from the spirit of a people, why can the latter not authentically be expressed by the state legislator? In order to understand Savigny's attack on legislative positivism,[51] one needs to understand his concept of the 'nation'. This does not refer to an empirical reality but, instead, to a metaphysical ideal created by history and culture;[52] and it is this idealist understanding 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; only following their best conviction, as the present moment happens to bring with it.[53]

50 Ibid., 14.

51 It is this attack on codification that aroused Hegel's fundamental disapproval in § 211 of his 'Elements of the Philosophy of Right' (n. 14): '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.'

52 Wieacker, *Privatrechtsgeschichte der Neuzeit* 1996 (n. 47), 392–393.

53 Savigny, Friedrich C. von. 'Über den Zweck dieser Zeitschrift'. *Zeitschrift für geschichtliche Rechtswissenschaft* 1 (1815), 1–17, 1 (author's translation).

These youthful thoughts, written in 1815, received a mature refinement in 1840, when Savigny published his monumental 'System of Modern Roman Law'.[54] Building itself on the work of his disciple, Georg Friedrich Puchta,[55] the new conception of what constitutes 'positive' law – as opposed to abstract natural law – is henceforth given 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.[56]

The nation is consequently seen as a natural legal community that is, itself, based on a common ethnic and ethical community.[57] It alone – not the

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

55 Puchta had originally been influenced by Hegel from whom he is likely to have taken the idea of the 'Volksgeist'; yet in the course of his career he came to prefer Savigny's distinct historical idealism. For a short biographical sketch, see Haferkamp, Hans-Peter. 'Georg Friedrich Puchta (1798–1846)', in *Festschrift 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin: Geschichte, Gegenwart und Zukunft*, eds. Stefan Grundmann, Michael Kloepfer, Christoph G. Paulus, Rainer Schröder and Gerhard Werl (Berlin: De Gruyter, 2010), 229–239.

56 Savigny, Friedrich C. von. *System des heutigen Römischen Rechts*, vol. 1 (Berlin: Veit, 1840), §§7–8 (author's translation).

57 On this point, see also Puchta, Georg F. *Das Gewohnheitsrecht* (Erlangen: 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 künstlichem Wege und nicht durch freien Entschluß und Willen entstehen kann.'

State – is the 'carrier' of all law.[58] And because the nation is a *historical* community, the *Volksrecht* cannot be determined by the present people alone – and especially not by its representative legislator. The nature of a nation, on the contrary, lies in its transcendental totality; it is a fusion of its historical past and contemporary present and even includes its future, as an evolving cultural organism.[59] Savigny's conception of the nation is consequently a 'metaphysical' conception; 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.'[60] It is an unwritten and unconscious law that emanates from an idealist source: the *Volksgeist*.[61] 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.[62]

For Puchta (and Savigny), customary law is consequently a type of natural law that stands in ontological contrast to the artificial law produced by state institutions. The source of all customary law thereby lies in the consciousness (*opinio juris*) of a nation. Strictly speaking, then, it is idealistically not 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*.[63] Who

58 For Savigny, the state is only 'the physical embodiment of the spiritual community of the people' (Savigny, *System des Römischen Rechts* 1840 (n. 56), § 9); and the state is therefore not the origin of law (ibid., § 10).

59 That this metaphical conception of the nation may even include the 'future' derives from Savigny (ibid., § 10): 'daß das ideale Volk, wovon hier die Rede ist, auch die ganze Zukunft in sich schließt, also ein unvergängliches Dasein hat.'

60 Ibid., § 12 (author's translation).

61 The first use of this concept by the historical school appears to have been made by Puchta, *Das Gewohnheitsrecht* 1828 (n. 57) via Hegel.

62 Ibid., 9–10 (author's translation).

63 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.'

is to decipher the spirit of the nation? Originally seen to be a task for the people itself, with the increasing complexity of the law, the task of identifying the national spirit comes to belong to the 'jurists'. The 'juristic estate' must act as the 'organ' of the people: it identifies the 'living customary law' which guarantees the 'right progress' of the nation.[64] *Volksrecht* thus becomes – ironically just as within classic natural law thinking – *Juristenrecht*.[65] The jurist, as academic scholar, is tasked to trace the existing law 'back to its roots in order to discover an organic principle' and to so identify those norms that are 'still alive' within the consciousness of the people.[66]

3.2 *The International Law Conception of the Historical School*

If all law flows from the collective consciousness of a concrete people and not individual human-cum-universal reason, will this not mean that the Historical School must deny the normative quality of international law? One strand of the Historical School indeed comes close to this conclusion: because the spirit of a people and its law 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.[67] The more the law becomes abstracted from a specific *Volksgeist*, the more it loses its quality as a living law; and for Puchta, there consequently cannot be any international law 'properly so called'. All that exists between States is at best international morality – but nothing more.[68]

Yet, surprisingly, this rigorous conclusion will not become the official position of the Historical School. For Savigny's view is – famously – much more nuanced; and it is his conception that ultimately becomes dominant in the second half of the nineteenth century. Strangely paralleling the Hegelian idea that the abstract 'spirit of humanity' (*Menschheitsgeist*) must always act though (a)

64 Ibid., 133.

65 For a famous polemical criticism of this development, see Beseler, Georg. *Volksrecht und Juristenrecht* (Leipzig: Weidmann, 1843).

66 Savigny, *Vom Beruf unsrer Zeit* 1828 (n. 48), 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 (Savigny, *System des Römischen Rechts* 1840 (n. 56), § 14).

67 Savigny, *Vom Beruf unsrer Zeit* 1828 (n. 48), 116.

68 Puchta, *Gewohnheitsrecht* 1828 (n. 57), 142: '[M]an 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.'

particular nation(s),[69] Savigny nonetheless 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 ...[70]

This Savignian key passage was to exercise an enormous spell over the majority of German (and non-German) scholars in the nineteenth century. Without recourse to the older natural law ideas, it promised a 'positive', 'objective' and 'real' international law wherever it was rooted in a common legal consciousness of a group of nations. This moral consciousness, created by ethnic bonds or ethical convictions,[71] 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 distance and abstraction from the ordinary people (when compared to national law); but law it was. Indeed, in Savigny's conception, it succeeded in offering a solid foundational base for both public and private international law. Yet crucially: outside the cultural community of States – here: the Christian states of Europe – international

69 Savigny, *System des heutigen Römischen Rechts* 1840 (n. 56), § 8.

70 Ibid., § 11 (author's translation).

71 Savigny, Friedrich C. von. *System des heutigen Römischen Rechts*, vol. 8 (Berlin: Veit, 1849), §348: 'Der Standpunkt, auf den wir durch diese Erwägung geführt werden, ist der einer völkerrechtlichen Gemeinschaft der miteinander 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.'

law could only have a 'purely moral character'. For the existence of any 'positive' international law was contingent on a common societal base; and that common ethical base was a regional – not yet a universal – phenomenon. Only where there was a common (international) morality – and with it a common (international) society – could there be a common (international) law.

4 International Law Textbooks: Germany, Italy, and Great Britain

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 jurists. The move from 'philosophers' to 'lawyers' did however not immediately trigger a move from metaphysical 'constructivism' to positive 'empiricism'. Nonetheless, the older – dynastic or religious – conceptions of the 'droit public de l'Europe' were soon gone; and international law was henceforth overwhelmingly associated with the law of independent and sovereign *states*.

What, then, did international jurists regard as the foundation and sources of international law? Let us look at this question by quickly delving into three national textbook discourses: the German discourse (4.1.), the 'Italian School' (4.2.), and the British discourse (4.3.) – with each of these discourses linked to a distinctive disciplinary development for international law during the long nineteenth century.

4.1 *The German Discourse and the Rise of 'European' International Law*

A good starting point for German professional writing at the beginning of the long nineteenth century is Theodor von Schmalz's 'European International Law' (1817), which still followed a predominantly Kantian approach.[72] And even in the early 1820s, Klüber continued to affirm the existence of a natural international law as the necessary 'cement' for any system of positive international law.[73] This natural law thinking was, however, progressively abandoned in the 1830s and 1840s. From then on, it is the Historical School, combined

72 Schmalz, Theodor von. *Das Europäische Völkerrecht in acht Büchern* (Berlin: Duncker & Humblot, 1817), 3: 'Wie nun die Moral, als Metaphysik der Sitten, Wissenschaft der Freiheit überhaut, so ist Ethik Wissenschaft der inneren, Rechtslehre Wissenschaft der äußeren Freiheit.'

73 Klüber, Johann L. *Europäisches Völkerrecht* (Stuttgart: Cotta, 1821), 6 and 18.

with Hegelian splinters,[74] that comes to offer the most successful conception of international law in Germany.

The best representative of this new approach is August Heffter, whose 1844 textbook became the standard treatise for much of the nineteenth century.[75] 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,[76] the book, in the end, owes much more to the Historical School. For in clearly rejecting the idea that there is no international law apart from individual state wills,[77] the normative foundation of international 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[.][78]

74 The only 'pure' Hegelian international lawyer in nineteenth-century Germany appears to be Adolf Lasson, whose 'Princip und Zukunft des Völkerrechts' (Berlin: Hertz, 1871) directly applies Hegelian philosophy to international law. His denial of international law is however generally rejected by the German mainstream.

75 Heffter, August W. *Das Europäische Völkerrecht der Gegenwart* (Berlin: Schroeder, 1844). For a recent analysis of the book, especially in light of Hegelian thought, see Hueck, Ingo J. 'Pragmatism, Positivism and Hegelianism in the Nineteenth Century: August Wilhelm Heffter's Notion of Public International Law', in *East Asian and European Perspectives on International Law*, eds. Michael Stolleis and Masaharu Yanagihara (Baden-Baden: Nomos, 2004), 41–55. For its relationship to Savigny, on the other hand, see Nuzzo, Luigi. 'History, Science and Christianity. International Law and Savigny's Paradigm', in *Constructing International Law: The Birth of a Discipline*, eds. Luigi Nuzzo and Miloš Vec (Frankfurt: Vittorio Klostermann, 2012), 25–50.

76 Heffter's textbook was supposed to be co-authored with Eduard Gans – the famous 'Oberhegelianer'. But Gans had suddenly died in 1839; and the book therefore 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.'). On Gans' own conception of internatioal law, see Kieselstein, Jana. *Eduard Gans und das Völkerrecht* (Frankfurt: Peter Lang, 2009).

77 Ibid., v. Heffter rejects the idea that there must be a guaranteed sanction for international law to be law; and he drew a contrast between 'guaranteed law' and 'free law'. For an express reference to Austin, see ibid., 3, fn. 1.

78 Ibid., vi (author's translation).

This re-conceptualisation of international law, along the lines suggested by the Historical School, had 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; and international law could consequently not be universal (as a common consciousness had not developed everywhere) but only regional. Within Europe such a common society had, it was thought, been long created on the basis of Christian values and Roman law, and a European international law had therefore emerged.[79] The core philosophical premise underling this European international law was, interestingly, 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[.][80]

This synthesis of Hegel's principle of mutual recognition and Savigny's idea of an ethical European community offered an eclectic normative foundation for international law. The primary source of international law, rooted in the common consciousness of a plurality of States, was thereby customary law;[81] but the existence of a set of a priori principles was equally presumed. These apriorist principles derived from the 'internal necessity' of the existing society of states; and they are consequently equated with a 'hypothetical natural law of states'.[82] This new 'organic' or 'societal' international law accepts – like the classic *ius gentium* but unlike Hegel – private individuals as subjects of

79 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 geründeten 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.'

80 Ibid., 11 (author's translation).

81 Ibid., 13.

82 Ibid., 12.

international law.[83] Individual human rights, as well as a 'private' international law (to be discussed in section 4.2), can thus be conceived as an integral part of international law.

This early combination of Savignian and Hegelian elements can also be found in Oppenheim;[84] yet the historical approach increasing wins the day in the later part of the century. Kaltenborn von Stachau thus dismisses Hegel's denial of an international law above States outright,[85] and expressly confirms, despite the absence of formal sanctions, the positive 'normativity' of international law.[86] Locating this normativity in the collective consciousness of European nations, this moral normativity becomes gradually identified with 'Christian' values;[87] but under the influence of British authors especially, this religious identification becomes itself increasingly replaced by the secularised equivalent of a common 'civilisation'. Von Holtzendorff, for example, therefore comes to identify the common legal consciousness underlying international law with being member of a 'cultural community' that is itself seen as the product of a historical process of progress and civilisation.[88]

By the turn of the twentieth century, the new German standard textbook on international law sums up the situation succinctly: the international community is bounded by its common legal consciousness; and the community of states, bounded by international law, is primarily a cultural community.[89] Based on the idealist premises of the Historical School, this conception 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

83 Ibid., 26.

84 Oppenheim, Heinrich B. *System des Völkerrechts* (Stuttgart: Kröner, 1866 [1845]). Forcefully rejecting the old metaphysical natural law (ibid., 1), Oppenheim also tried to find a synthesis between the 'philosophical' and the 'historical' school (ibid., 5). For an analysis of Oppenheim's work, see Stolleis, Michael. 'Heinrich Bernhard Oppenheim (1819–1890): Rechtsphilosophie und Völkerrecht um 1848', in *Naturrecht und Staat in der Neuzeit*, eds. Jens Eisfeld, Martin Otto, Louis Pahlow and Michael Zwanzger (Tübingen: Mohr Siebeck, 2013), 503–518.

85 Stachau, Carl Kaltenborn von. *Kritik des Völkerrechts* (Leipzig: Mayer, 1847), 156: 'Freilich gerade Hegel ist hier am schwächsten und macht vielleicht einen Rückschritt; er stellt das Völkerrecht in die Willkür der Staaten[.]'

86 Ibid., 308–310.

87 Ibid., 270.

88 Holtzendorff, Franz von. *Handbuch des Völkerrechts* (Berlin: Habel, 1885). According to Grewe, Wilhelm. *The Epochs of International Law* (Berlin: De Gruyter, 2000), 465, it was mainly von Holtzendorff who took over 'the civilization ideology, emanating from Britain'.

89 Liszt, Franz von. *Das Völkerrecht* (Berlin: Haering, 1902), 2. For a 'history' of this 'standard textbook', see Herrmann, Florian. *Das Standardwerk: Franz von Liszt und das Völkerrecht* (Baden-Baden: Nomos, 2001).

law.'[90] For even if there is no European 'state' above the plurality of sovereign European states, there nonetheless exists 'a legislative, judicial and executive power' within the international legal order that is offered by the 'community of civilised states itself'.[91] It is this idealist conception that, despite the emergence of a Neo-Hegelian school of state positivism around 1870,[92] dominates German international law thinking in the second half of the nineteenth century.

4.2 *The 'Italian School' and the Rise of Private International Law*

Apart from the rise of a European conception of international law, the probably most important consequence of this triumph of the Historical School was the phenomenal rise of a new conception of private international law in the second half of the nineteenth century. After all, Savigny 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, all across Europe, around the middle of the nineteenth century.[93]

A vital impulse would here come from a number of Italian scholars,[94] especially Pasquale Mancini. The particular aim behind the 'Italian School' was thereby to elevate the principle of nationality to the very centre of international law. According to Mancini,[95] the nationality principle ought to be

90 Liszt, *Das Völkerrecht* 1902 (n.89), 6 (author's translation).

91 Ibid., 7 (author's translation).

92 The new 'state positivism', ushered in by German constitutional law scholars around 1870, will re-conceptualize international law as a form of external state law so as to sublimate the (external) sovereignty of the new German state. On this new school, see Schütze, Robert. *From Utopia to Apologia: International Normativity in the Long Nineteenth-Century* (London: LSE Thesis, 2019), 99–106. It is thus, in my view, an act of historical foreshortening, at least to some extent, to read the ideas of Jellinek, Triepel and Kaufmann back into the nineteenth century international (!) law discourse, as Koskenniemi does in his 'The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960' (Cambridge: Cambridge University Press, 2001), chapter 3.

93 For an excellent historical overview, see Nova, Rodolfo de. 'Historical and Comparative Introduction to Conflict of Laws'. *Recueil des cours de l'académie de droit international de La Haye* 118 (1966), 435–621; and more recently and specifically on the nineteenth century: Banu, Roxana. *Nineteenth-Century Perspectives on Private International Law* (Oxford: Oxford University Press, 2018).

94 For an overview of the Italian scene, see especially Sereni, Angelo Piero. *The Italian Conception of International Law* (New York: Columbia University Press, 1943); and more recently Bartolini, Giulio, ed. *A History of International Law in Italy* (Oxford: Oxford University Press, 2020).

95 Mancini, Pasquale S. *Della nazionalità comme fondamento del diritto delle genti* (Turin: Tipografia Eredi Botta, 1851). For an extensive discussion of Mancini's conception, see Droetto, Antonio. *Pasquale Stanislao Mancini e la scuola italiana di diritto internazionale del secolo XIX* (Milan: Giuffrè, 1954), esp. 147–204; and even more recently Nuzzo, Luigi.

regarded as a philosophical achievement because it can – substantively – conceive each national community, as opposed to the formal category of the state, as the elementary unit of the science of international law.[96] Each nation is thereby animated by a national consciousness ('coscienza della Nazionalità') that grants each individual people its own legal personality.[97]

From this perspective, three corollaries follow. First, each nation is always free to adopt its internal constitution; second, because of its internal sovereignty, it must also be able to externally demand its independence vis-à-vis foreign States.[98] A third corollary would, finally, revolutionise the field of private international law. For Mancini 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 Wolff called the 'respublica maxima gentium'.[99]

'Das Nationalitätsprinzip: der italienische Weg zum Völkerrecht', in *Les conflits entre peuples: De la résolution libre à la résolution imposée*, eds. Serge Dauchy and Miloš Vec (Baden-Baden: Nomos, 2011), 103–122.

96 Mancini, *Della nazionalità comme fondamento del diritto delle genti* 1851 (n. 95), 47.

97 Ibid., 38–39.

98 Ibid., 43.

99 Mancini, Pasquale S. 'Rapport première commission – Droit international privé'. *Revue de droit international* 7 (1875,) 329–363, 334–335 (author's translation). See also Fiore, Pasquale. *Diritto internazionale privato*, vol I (Turin: Unione Tipografico, 1888), 59–60:

This powerful affirmation of the idea of a legally binding private international law challenges 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 to foreign nationals; and this limitation on their internal sovereignty is not regarded as a voluntary concession but as a legal obligation arising from a compulsory and binding international law.[100] 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.[101]

This conception of private international law, as a form of international law proper, quickly gained ground. The 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' (1892), we can indeed find one of the finest defences of the international and legal 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

'Gli Stati, in quanto sono considerati come persone, che coesistono nella Magna Civitas, vanno soggetti alla suprema legge del diritto a della giustizzia. La società di fatto tra gli Stati non sarebbe possibile, senza la società di diritto: *ubi societas ibi jus*.... *Ciascun Stato è autonomo e indipendente entro i limiti però fissati dal diritto*' (emphasis added).

100 Diena, Giulio. 'La conception du droit international privé d'après la doctrine et la pratique en Italie'. *Recueil des cours de l'académie de droit international de La Haye* 17 (1927), 343–447, esp. 351.

101 Mancini, 'Rapport Première Commission' 1875 (n. 99), 352–353.

> of principle, correct to take up public law and private international law together, under the description 'international law'.[102]

Private international law was 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.[103] One of the most fundamental consequences of this private-cum-public conception of international law is the unquestioned inclusion of (natural) persons as subjects of international law. For the Italian school of international law, this inclusion is best represented in Fiore's 'International Law Codified and its Legal Sanction' (1890–1915),[104] where we succinctly read: 'Man must be considered as a person of the *Magna civitas*; as such he is a subject of law in his relations with international law.'[105]

4.3 *The British Discourse and the Rise of 'Liberal Imperialism'*

What about British doctrinal conceptions of international law during the nineteenth century? Leaving the eclectic and multifaceted aspects of Victorian legal scholarship aside,[106] a seismic shift in the British textbooks occurred after 1848. A harbinger of this development was a series of articles published in the 'Law Review and Quarterly Journal of British and Foreign Jurisprudence'.[107] Inspired by German writers on the subject – and particularly by Heffter – a new way of conceptualising positive international law was here suggested. Despite the

102 Bar, Ludwig von. *The Theory and Practice of Private International Law* (Edinburgh: Green, 1892), 2, 5–6.

103 Nussbaum, Arthur. 'Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws'. *Columbia Law Review* 42(2) (1942), 189–206, 194.

104 Fiore, Pasquale. *Il diritto internazionale codificato e la sua sanzione giuridica* (Turin: Unione Tipografico Editrice, 1890). The book ran into a fifth Italian edition (1915) and was translated into a number of languages. I will quote from the (posthumous) English translation of the fifth edition 'International Law Codified and its Legal Sanction' (New York: Baker, 1918).

105 Ibid., 108.

106 For a brief discussion of the eclectic strands of British Victorian scholarship, see Schütze, *From Utopia to Apologia* 2019 (n.92), 147–159.

107 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 reveals himself, in the fourth instalment, as James Reddie – the author of 'An Historical View of the Law of Maritime Commerce' (London: Blackwood, 1841), who would later also publish 'Inquiries in International Law: Public and Private' (London: Blackwood, 1851).

absence of sanctions, international law was real law,[108] whose normative basis was 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.*[109]

The common consciousness of a people or peoples comes thus to be seen as the foundation of international law; and with this, customary law quickly moves to centre-stage in almost all discussions of the normativity of international law in Britain.[110] But importantly, in line with the German Historical School, it is not custom as such, as an empirical phenomenon, that lies at the foundation

108 Reddie, James. 'International Law'. *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 9(1) (1848), 22–49, 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.'

109 Ibid., 36 (emphasis added).

110 Ibid., 43 (emphasis added): '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.'

of law (because an 'is' cannot generate an 'ought'); the true foundation of international law is the 'ratio juris' underlying a 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*.[111]

With these words, British international legal discourse comes under the spell of Savigny and the Historical School.[112] For in an effort to oppose the utilitarian positivists, and especially the Austinian denial of international law as law properly so-called,[113] British international law takes a decisively German turn.

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111 Reddie, James. 'International Law'. *Law Review and Quarterly Journal of British and Foreign Jurisprudence* 11(1) (1849), 26–41, 37 and 40 (emphasis added).

112 With the translation of Savigny's 'System des heutigen Römischen Rechts', the Historical School would exercise a profound effect on British international law. See only Phillimore, Robert. *Commentaries upon International Law* (Philadelphia: Johnson, 1854 / London: Butterworths, 1871); but most importantly Henry S. Maine whose 'Ancient Law' (London: Murray, 1861) celebrated the historical method associated with Savigny. See also Boyd, Alexander C., ed. *Wheaton's Elements of International Law* (London: Stevens, 1878), 19: 'According to Savigny …'; and equally, Twiss, Travers. *Law of Nations* (Oxford: Clarendon Press, 1884), 161: 'Savigny has observed, that "there may exists between different Nations a common consciousness of Right similar to that which engenders the Positive Law of a particular Nation …".' On the general influence of Savigny on British law during this period, see Stein, Peter. *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press, 2009), 72 et seq.

113 Almost all British textbooks published in the second half of the 19th century mechanically reject Austinian positivism. The principal criticism here was that Austin's definition of law was 'universal' and 'unhistorical', see only: Reddie, James. *Inquiries Elementary and Historical in the Science of Law* (London: Longman, 1840), 90–91: '[T]he jurists of the

For if international *society* – and *not* the State or its institutions – is seen as origin and fountain of all law, 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.[114]

Restating the conventional British conception of international law in the second half of the nineteenth century, Westlake could thus 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'.[115] This new emphasis on the 'society of

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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' (n. 112), 7. See also Hall, William E. *Treatise On International Law* (Oxford: Clarendon Press, 1890), esp.15; as well as Westlake, John. *International Law – Part I* (Cambridge: Cambridge University Press, 1910), 8–11 (dealing with 'Austin's Limitation of the term "Law"'). Measured against this evidence, it is therefore profoundly misleading to claim that British international jurists were, during the nineteenth century, 'most influenced by John Austin, the foremost spokesman for positivism', see Anghie, Antony. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004), 44. This is historical nonsense.

114 Phillimore, *Commentaries upon International Law* 1854/1871 (n. 112), 91.

115 Westlake, *International Law* 1910 (n. 113), 1, 6–7.

nations' met the Austinian challenge 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 enforced, in the same natural and unconscious manner, within the international society of states. In a brilliant 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.[116]

Pace Austin, international law positively existed – as law properly so-called – in the form of international custom; and it is equally seen as a system of positive norms that can be externally enforced.[117] This general acceptance of the

116 Oppenheim, Lassa. *International Law: A Treatise*, vol. 1: Peace (New York: 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 that '[c]ourts of justice having no law-giving power could not recognise unwritten rules as law if these rules were not law before that recognition ...'

117 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.'

metaphysical premises of the German Historical School in British international law writing should – in theory (and as was discussed in section 4.2.) – have had one important consequence: the idea of an international law among private individuals; yet, this conclusion is – unlike continental European scholarship – not drawn within the British legal order. For following an American constitutional law scholar, British private international law remained embedded in a different conceptual world.[118]

Within the British discourse, on the other hand, we also uncover the most objectionable dimension that the regionalisation of international law, discussed in section 4.1, ultimately supports. For the (re-)introduction of the division between the European 'civilised world' and the rest into the international legal imagination had important practical consequences. Chiefly inspired by British utilitarianism, a liberal imperialist vision of international law here comes to deprive 'uncivilised' societies of their rights under international law; and in its most extreme form, its imperialist ideas produced a justification for the colonization of less-civilised peoples. Especially John Stuart Mill's civilisational imperialism actively favoured the placing of uncivilised nations under the 'nonage' of civilised states.[119] And Westlake, a fervent admirer of Mill's work, would soon offer the legal justifications for British imperial colonialism.[120] One of the most radical colonialist conclusions is however 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.[121]

118 For an overview here, see Schütze, *From Utopia to Apologia* 2019 (n. 92), 155–159.

119 In a classic textbook of the age, this idea is positively endorsed, see Lorimer, James. *Institutes of the Law of Nations*, vol. 1 (Edinburgh: Blackwood, 1883), esp. 157.

120 Westlake, John. 'Territorial Sovereignty, especially with Relation to Uncivilised Regions', in *The Collected Papers of John Westlake*, ed. Lassa Oppenheim (Cambridge: Cambridge University Press, 1914), 131–193.

121 Lawrence, Thomas J. *The Principles of International Law* (Boston: Heath, 1898), 146.

More moderate British (German) voices, on the other hand, considered that 'backward' states could not simply be occupied as if they were *terra nullius*.[122] Their backwardness should rather turn them into a 'protectorate'; and this legal institute indeed becomes the central institution during this neo-colonial phase of European international law.[123]

5 Conclusion: The Historical School and its Nineteenth Century

What legacy did German idealism offer to the nineteenth century? The short answer this article has proposed is this: not Hegel (nor Austin) and state positivism, but Savigny and the Historical School.

What is the meaning of 'real' law for the Historical School? Fundamentally, law is not primarily identified with state institutions and their actions – whether in the form of national legislation or international treaties. The key source behind all law is legal custom; or better: the (rationalised) consciousness behind custom that every society generates. Against this background, the Historical School cannot be classified as positivist in the Austinian sense because it participates, like Hegel (and Kant), in an idealist project.[124] In the words of Max Weber, the Historical School is founded on a 'natural law of historical existence'.[125]

This means that there can be a 'real' international law as long as it is rooted in the common *morality* among states. The lack of a sovereign or an institutional machinery sanctioning international law is not at all fatal for the normativity and reality of international law. All that matters is that there is a society; and affirming the reality of such a moral and normative society among 'civilised' states, the European society is seen as strong enough to assimilate international law to national law. One consequence of this European conception of international law is that it can expressly acknowledge, like the classical

122 Oppenheim, Lassa. *International Law: A Treatise* 1912 (n. 116), § 221: 'even although such State is entirely outside the Family of Nations, it is not a possible object of occupation, and it can only be acquired through cession or subjugation.'

123 Lindley, Mark F. *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926).

124 On the connections between Savigny and German idealism generally, see brilliantly Rückert, Joachim. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny* (Ebelsbach: Verlag Rolf Gremer, 1984), esp. part III.

125 Weber, Max. *Wirtschaft und Gesellschaft* (Tübingen: Mohr, 1972), 497: 'Naturrecht des historisch Gewordenen'.

ius gentium tradition, a private law side. International law is seen to apply to individuals when they come into contact with foreign legal orders. In parallel to this vertical broadening of the subjects of international law inside Europe (and the civilised world), however, a significant horizontal narrowing of international legal subjects takes place. For the second implication of a European conception of international law is, ultimately, the legal disenfranchisement of outside or non-civilised states that could, henceforth, become victims of European colonialism.

If the picture presented in this article is correct, must the nineteenth century not be characterised as an 'idealist' -metaphysical as opposed to a 'positivist' -empirical century? The Historical School ultimately derives legal normativity from the moral consciousness of particular people(s); and this position clearly distinguishes it from empiricist positivism. For unlike the latter, it is 'consciousness' not 'being' – that is: the *Volksgeist* not custom – that is seen as the normative fountain of all law; and it was for this reason that (academic) jurists and not (empirical) legislators came to be regarded as the principal organs of law-making. One of the striking differences between the (Savignian) Historical School and (Hegelian) state positivism thus lies in their fundamentally different conceptions of the relationship between a 'people' and its 'state'. For the Historical School, and unlike modern positivist accounts, the state remains alien and external to the historicist account of law. The Historical School indeed stands between the utopian 'rationalism' of the eighteenth century and the apologetic 'positivism' of the twentieth century; and distinct from both rationalism and positivism, it should be seen as having a third and distinct conception of normativity. This third form of normativity emerges in the early nineteenth century and comes to prevail in the international law discourses in the second half of that century in Germany, Italy and Britain.

Was there, then, no radical break in the way international law is conceptualised around 1870? Martti Koskenniemi has famously justified his work on the short nineteenth century with his '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.'[126] In particular, the creation of the 'Institute of International Law' in 1873 is markedly seen as a foundational moment symbolising the true beginning of the modern discipline of international law.[127]

126 Koskenniemi, *The Gentle Civilizer of Nations* 2001 (n.92), 3–4.

127 Ibid., esp. 39–47. On the origins of the Institute, see Yakemtchouk, Romain. 'Les origines de l'Institut du droit international'. *Revue general de droit international* 77(2) (1973), 373–423.

But to helpfully recall, the core provision within the Institute's Statute stated 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.[128]

The establishment of the Institute undoubtedly marked a critical moment in the professionalisation of the discipline; yet a closer textual reading of its objectives also demonstrates its 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 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'.[129] With Mancini, as one of the founding members of the Institute, it is therefore hardly 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 critical importance of private(!) international law within the early life of the Institute.[130]

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128 For a reprint of the original statute, see Lorimer, James. '*The Institute of International Law Founded at Ghent',* in *Studies National and International – Being Occasional Lectures Delivered in the University of Edinburgh, 1864–1889* (Edinburgh: Green, 1890), 77–87, 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'.

129 Savigny, *Vom Beruf unsrer Zeit* 1828 (n. 48), 133.

130 It is, in my view, indeed rather the *private* (international) law side that stands behind the professionalisation and reconceptualization of international law in the nineteenth century; yet this is an aspect that is (almost) totally absent from Koskenniemi's 'Gentle Civiliser of Nations'.

However, something important did change around 1870. For the Savignian pessimism with regard to codification now gave way to a feeling of professional optimism that is perhaps best represented by Mancini's belated rejoinder to Savigny in 'Of the Vocation of our Century for the Reform and Codification of International Law'.[131] His belief in the ability to adequately formulate general principles from custom set a new trend in the codification of international law. (Some have mistraced this trend all the way back to Bentham,[132] but a more convincing starting point is the Lieber Code that was to inspire two further founding members of the Institute: Johann Kaspar Bluntschli and David Dudley Field.[133]) It is this optimistic hope in the timeliness and constructivist power of codification as well as the – in retrospect – naïve idealism to 'procure the official recognition of such principles' that marks a new beginning. Yet dialectically, and against Koskenniemi, it marks not the beginning of something new; on the contrary, it only marks the beginning of an end![134] For the process of codification entailed the apologetic danger that the consciousness of mankind, the substantive moral-cum-legal object of codification, is not seen as merely confirmed but rather as formally validated, and thus surreptitiously replaced, by the formal will of sovereign States. And once all rationalist apriorism (Kant) or historical idealism (Savigny) is dropped from the idea of codification, all that remains is treaty-making and a positivistic voluntarism (Hegel) that celebrates the sovereign state and 'its' international law.

This transition to modern (state) positivism will take place in the twentieth century and cannot be recounted here. The nineteenth century, by contrast, is a metaphysical century. It is a century built on the social 'morality' behind all law, and especially customary law – an idealist premise that will be mortally wounded in 1914.

131 Mancini, Pasquale S. *Della vocazione del nostro secolo per la riforma e la codificazione del diritto delle genti* (Rome: Civelli, 1874), esp. 48.

132 Nys, Ernst. 'The Codification of International Law'. *American Journal of International Law* 5(4) (1911), 871–900.

133 For a brilliant overview of the various codification efforts, see Dhokalia, Ramaa P. *The Codification of Public International Law* (Manchester: Manchester University Press, 1970).

134 For a similar conclusion, see also Hunter, Ian. 'About the Dialectical Historiography of International Law'. *Global Intellectual History* 1 (1) (2016), 1–32. I am grateful to one of the anonymous reviewers for having pointed me to this piece.

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