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British Utilitarianism after Bentham: Nineteenth-Century Foundations of International Law II

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Abstract

What are the legal principles of British utilitarianism in the long nineteenth century; and what conception(s) of international law do they offer? The celebrated founder of the utilitarian school is Jeremy Bentham, who categorically rejects all metaphysical natural law thinking by insisting that all positive law ought to be adopted by a legislature. But in the absence of a world legislature, what did this mean for the positivity and normativity of international law? Surprisingly, Bentham and a second generation of utilitarian thinkers can affirm the legally binding nature of international law; yet with John Austin, a radical 'sovereigntist' critique subsequently casts doubt over the nature of international law as law 'properly so called'. This infamous scepticism would have a profound impact on British international thought in the twentieth century; yet in the nineteenth century, the ideas of a third-generation utilitarian became more prominent: the liberal philosophy of John Stuart Mill. Mill's 'relativist' and 'civilisational' conception of international law thereby gave the utilitarian project a specifically imperialist dimension that will be analysed, both in its utilitarian-philosophical and practical-legal dimensions. The article however also explores two other legacies of British utilitarianism, namely: the rise of international codification and the emergence of a specifically British conception of private international law during the nineteenth century.

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Keywords

Utilitarianism – Jeremy Bentham – James Mill – John Austin – John Stuart Mill – positivism – imperialism – colonialism – codification – conflict of law

1 Introduction: Two British 'Reactions' to the French Revolution

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

For many British onlookers, the 1789 Revolution had demonstrated rationalism's unfettered potential for political anarchy; and a first philosophical reaction thus insists on the need to restore the ancient order. The great representative of this early British 'restoration' is Edmund Burke, whose reflections on the French Revolution gained an immense reputation within and without Great Britain.[1] Steeped in natural law thinking,[2] Burke sternly objected to the Jacobins' radicalism and opposed it with his backward-looking conception of the 'order things'. All law and order here primarily derive from customs and conventions in a moral community; and since such a moral community existed within Europe, the 'commonwealth' of European states had also generated its own form of public (international) law.[3] That common law of Europe was dynastic in content and binding in form – and it was therefore morally and legally enforceable against recalcitrant states.

A second British response to the 'principles of 1789' came, by contrast, from the opposite philosophical direction: the empirical-individualistic radicalism of Jeremy Bentham. The latter's critique of the very concept of law was directed at all forms of 'natural law' thinking, whether dynastic-historical (Blackstone) or rational-individualistic (Kant). The future impact of Bentham and what will become known as his utilitarian philosophy on Britain is hard to exaggerate; and it has even been claimed that '[a]lmost all jurisprudential

1 Burke, Edmund. *Reflections on the Revolution in France* (London: Penguin, 1968). An early German translation of this work is done by Friedrich Gentz.

2 On Burke's conception of natural law generally, see Stanlis, Peter. *Edmund Burke and the Natural Law* (Ann Arbor: University of Michigan Press, 1958).

3 With regard to Burke's conception of international law, see the classic studies by Davidson, James. 'Natural Law and International Law in Edmund Burke'. *The Review of Politics* 21(3) (1959), 483–494; and Stanlis, Peter. 'Edmund Burke and the Law of Nations'. *American Journal of International Law* 47(3) (1953), 397–413.

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territory traversed during the nineteenth century bore the stamp of Bentham'.[4] With regard to international law, this view is, as Section 2 will show, not quite correct. For apart from inventing the neologisms 'international law' and 'codification', there is little that Bentham here directly imprinted.

The normativity of international law only becomes a central interest (and problem) to the second and third generations of British utilitarians; and their normative conceptions will be analysed in Section 3. James Mill here offers first moral foundations, which would however subsequently be cast into doubt by John Austin's sovereigntist definition of law. Austin's infamous denial of international law as law 'properly so called' would have a profound impact on British international thought in the twentieth century. Yet during the long nineteenth century, it is rather the ideas of a third-generation utilitarian that become more dominant: the liberal philosophy of John Stuart Mill. Mill's 'relativist' and 'civilisational' conception of international law gave the utilitarian project a specifically imperialist dimension that will be analysed in Section 4. The practical-legal dimension of this first utilitarian legacy will be discussed in Section 5 together with two other potential legacies, namely: Jeremy Bentham's indirect impact on the rise of international codification and John Austin's direct influence on a specifically British conception of private international law during the nineteenth century. A *Conclusion* will finally try to answer the question whether, especially through Bentham, the nineteenth century can be characterised as the 'British age'.

2 Bentham's 'Empirical Positivism' and International Law

Bentham's legal project begins and ends with the categorical distinction between what the law 'is' and what the law 'ought to be'.[5] The empirical and historical existence of legal norms must be distinguished from their normative and ethical value. The famous manifesto for this empirical revolution is published in 1789, the year of the French Revolution, under the title 'Introduction to the Principles of Morals and Legislation'.[6] It categorically rejects all naturalist metaphysics and introduces an empirical positivism in a dual sense. For not only is all 'law' regarded as something that needs to be positively adopted

4 Sylvest, Caspar. 'International Law in Nineteenth-Century Britain'. British Yearbook of International Law 75 (2005), 9–70, 12.

5 Bentham, Jeremy. 'A Fragment on Government', in *The Works of Jeremy Bentham*, vol. 1, ed. John Bowring (Edinburgh: Tait, 1838–1843), 221–295, 229.

6 Bentham, Jeremy. 'An Introduction to the Principles of Morals and Legislation', in *The Works of Jeremy Bentham*, vol. 1, ed. John Bowring (Edinburgh: Tait, 1838–1843), 84–154.

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through legislation; 'morality' itself would also need to be positively founded. What would this mean for the nature and normativity of international law? Let us explore this question in two steps.

2.1 *Utilitarian Anti-Metaphysics: Positive Morality, Positive Law*

Most conceptions of morality will have metaphysical foundations of what is 'good' or 'evil'. But rejecting all metaphysical traditions, Bentham famously proposes his utilitarian counter-project: '*Ethics at large may be defined, the art of directing men's actions to the production of the greatest possible quantity of happiness, on the part of those whose interest is in view.*'[7] Ethics is here given a new positive foundation: the principle of utility. The principle, also known as the 'greatest happiness principle', postulates that the sole ethical standard for all public (and private) acts should always be 'the greatest happiness of the greatest number'.[8] And denouncing the existence of 'natural' communities as metaphysical fictions,[9] the only ethical unit that ought to matter for the Benthamite project are *private* individuals. This conception of morality or ethics therefore reduces the public good to a collection of private wills; and since these individual wills can be statistically aggregated,[10] the 'art' or 'science' of legislation is tasked to codify the cumulative result.[11]

Should the author of these radically democratic ideas not warmly welcome the French Revolution? Whilst the rationalist potential of the principle of utility was not lost on the French revolutionaries,[12] Bentham tempestuously disagreed with their normative programme. In his 'Anarchical Fallacies' (1795), a bitter attack was thus launched on the legal conception behind the French Revolution.[13] Its natural law philosophy is denounced as 'execrable trash', because there simply cannot be 'rights' outside civil society: '*Right,* the

7 Ibid., 143 (emphasis added).

8 For an excellent study of the origins of this phrase, see: Shackleton, Robert. 'The Greatest Happiness of the Greatest Number: The History of Bentham's Phrase'. *Studies on Voltaire and the Eighteenth Century* 90 (1972), 1461–1482.

9 Bentham, *An Introduction* 1838–1843 (n. 6), [2]: 'The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? – the sum of the interests of the several members who compose it.'

10 Ibid., especially chapters IV–V.

11 Ibid., especially chapters XIX and IV.

12 The French revolutionaries, it might be remembered, thought that Bentham shared their views and made him, on the basis of his 'Introduction to the Principles of Morals and Legislation', an honorary citizen!

13 Bentham, Jeremy. 'Anarchical Fallacies', in *The Works of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh: Tait, 1838–1843), 489–534.

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substantive *right,* is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come *imaginary* rights'.[14] For Bentham, the language of natural rights itself had 'anarchist' consequences;[15] and to him, therefore, its very use was 'already a moral crime' and 'hostile to the public peace'.[16] Ultimately, the great reformer Bentham thus, ironically, arrives at the very same conclusion as his great conservative contemporary: Edmund Burke.

2.2 *Utilitarianism and Bentham's 'International Law'*

But if all 'law', adopted by a formal legislature, can only positively exist in civil society, can there be a law above nations? Surprisingly, Bentham thinks there can be. But rejecting the natural law undertones of the older expression 'law of nations',[17] he calls this part of his jurisprudential project 'international' law or jurisprudence. This international jurisprudence is distinguished from 'universal' jurisprudence,[18] as well as 'internal' jurisprudence.[19] And unlike Blackstone's broader definition,[20] Bentham defines international law in a restrictive and state-centred manner that categorically excludes all private individuals and their transnational relations:

> Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has

14 Ibid., 523.

15 Ibid., 496 and 498.

16 Ibid., 524.

17 The famous footnote in Bentham, *An Introduction* 1838–1843 (n. 6), 149: 'The word *international,* it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations:* an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence.'

18 Bentham calls 'universal jurisprudence' those legal matters that apply to all nations; and – what is often overlooked – he believes that there exist matters that fall within this sphere, ibid. 149. For an analysis of this Benthamite 'jurisprudential cosmopolitanism', see Armitage, David. *Foundations of Modern International Thought* (Cambridge: Cambridge University Press, 2013), 176–177.

19 Bentham, *An Introduction* 1838–1843 (n. 6), 149.

20 On Blackstone's eighteenth-century conception of international law, see briefly Schütze, Robert. *From Utopia to Apologia: International Normativity in the Long Nineteenth Century* (London: LSE Thesis, 2019), 16–17.

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> any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re nata*, to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. *There remain then the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed* international.[21]

Importantly, and unlike later doubts,[22] international law is here affirmatively seen as *existing* law; and it is consequently treated as positive law (expository jurisprudence) as well as in the form of future principles of legislation (censorial jurisprudence). As regards the latter, Bentham would indeed himself try his hand at being a 'legislator of the world';[23] and his 'Principles of International Law' (1789),[24] published only after his death, offer a fascinating – albeit often disappointing – insight into Bentham's 'censorial' thinking.

What are the principles that *should* govern international law? The object of international law is, in line with Bentham's utilitarian ethics, the 'common and equal utility of all nations'.[25] But what is this common utility; how can it be calculated; and in what way does it differ from the 'national' utility found within states? The complex answers he gave deserve to be quoted in full:

> The end of the conduct which a sovereign ought to observe relative to his own subjects, – the end of the internal laws of a society, – ought to be the greatest happiness of the society concerned. … The end of the conduct he ought to observe towards other men, what ought it to be, judging by the same principle? Shall it again be said, the greatest happiness of his own subjects? Upon this footing, the welfare, the demands of other

21 Bentham, *Introduction* 1838–1843 (n. 6), 149 (emphasis added). On Bentham's conception of international law as a law exclusively dealing with state relations, see also Janis, Mark W. 'Jeremy Bentham and the Fashioning of "International Law"'. *American Journal of International Law* 78(2)(1984), 405–418.

22 On Bentham's doubts as to the positive quality of international jurisprudence as 'law' properly speaking, see ibid., 417; yet Bentham never analyzed this skeptical line of his thought in much depth.

23 Schofield, Philip. 'Jeremy Bentham: Legislator of the World'. Current Legal Problems 51(1)(1998), 115–147.

24 Bentham, Bentham. 'Principles of International Law', in *The Works of Jeremy Bentham*, vol. 2, ed. John Bowring (Edinburgh: Tait, 1838–1843), 535–571. The 'Principles' consist of four separate essays, namely: (1) 'Objects of International Law', (2) 'Of Subjects, or of the Personal Extent of the Dominion of the Law', (3) 'Of War, considered in respect of its Causes and Consequences', and (4) 'A Plan for an Universal and Perpetual Peace'.

25 Ibid., 536.

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> men, will be as nothing in his eyes: with regard to them, he will have no other object than that of subjecting them to his wishes by all manner of means. He will serve them as he actually serves the beasts, which are used by him as they use the herbs on which they browse – in short, as the ancient Greeks, as the Romans, as all the models of virtue in antiquity, as all the nations with whose history we are acquainted, employed them. Yet in proceeding in this career, he cannot fail always to experience a certain resistance – resistance similar in its nature and in its cause, if not always in its certainty and efficacy, to that which individuals ought from the first to experience in a more restricted career; so that, from reiterated experience, states ought either to have set themselves to seek out – or at least would have found, their line of least resistance, as individuals of that same society have already found theirs; and this will be the line which represents the greatest and common utility of all nations taken together.[26]

The passage contains a plethora of explicit and implicit assumptions. Three are particularly important. First, an *imperial* utility, according to which the greatest utility is achieved for the benefit of one single nation, is straightforwardly rejected.[27] Second, the idea of a *cosmopolitan* utility is also rejected. For instead of taking the individual interests of every human being as the elementary unit for a calculation of utility in a cosmopolitan world, Bentham's international utility is calculated on the basis of the greatest happiness of all *nations* – as natural collectivities or groups of individuals.[28] The principle of utility does, consequently, not apply to humanity as such; and it is this – unaccounted – internal inconstancy that prevents utilitarianism from realizing the cosmopolitan potential inherent in its radical democratic individualism. Bentham's utilitarianism has therefore – rightly – been accused of being strangely 'parochial'.[29]

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26 Ibid., 537–538.

27 In his fourth essay, Bentham actively councils Britain and France to '[g]ive up all the colonies' and to '[f]ound no new colonies', ibid., 548. On Bentham as a critic of empire, see Pitts, Jennifer. *A Turn to Empire: The Rise of Imperial Liberalism in Britain and France* (Princeton: Princeton University Press, 2005), chapter 4.

28 Bentham himself seems to have realized that the idea of a 'nation', as a moral 'person', contradicted his own – negative – views on legal fictions and in particular his 'positivist' view that the idea of a moral 'community' was but a fiction (ibid., 539: 'Will it [a nation] be said that it has its person? Let us guard against the employment of figures in matter of jurisprudence.'); and yet almost all of the essays are based on the existence of nations as autonomous moral persons!

29 In this sense, see: Lyons, David. *In the Interest of the Governed: A Study in Bentham's Philosophy of Utility and Law* (Oxford: Oxford University Press, 1991), 24–27, esp. 26. For

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Thirdly, in the absence of an international legislature, there simply is no manner to scientifically aggregate national utilities. The only way of finding the greatest common utility for all nations is therefore to engage in a Kantian-style thought experiment: each nation should anticipate the general good on the basis of *a priori* international principles. To quote Bentham:

> [I]n order to regulate his proceedings with regard to other nations, a given sovereign has no other means more adapted to attain his own particular end, than the setting before his eyes the general end – the most extended welfare of all the nations on the earth. So that it happens that this most vast and extended end – this foreign end – will appear, so to speak, to govern and to carry with it the principal, the ultimate end; in such manner, that in order to attain to this, there is no method more sure for a sovereign than so to act, as if he had no other object than to attain to the other; – in the same manner as in its approach to the sun, a satellite has no other course to pursue than that which is taken by the planet which governs it.[30]

And having identified five utilitarian objects of international law;[31] Bentham concludes:

> Expressed in the most general manner, the end that a disinterested legislator upon international law would propose to himself, would therefore be the greatest happiness of all nations taken together. In resolving this into the most primitive principles, he would follow the same route which

a criticism of that view, see: Burns, James H. 'Happiness and Utility: Jeremy Bentham's Equation'. *Utilitas* 17(1) (2005), 46–61, who has claimed that the reference to 'the common and equal utility of all nations' would imply 'a "universalism" capable of transcending whatever "parochialism" Bentham's principle of utility may sometimes seem to sustain', ibid., 52).

30 Bentham, *Principles of International Law* 1838–1843 (n. 24), 538.

31 Ibid., '1. The first object of international law for a given nation: – Utility general, in so far as it consists in doing no injury to the other nations respectively, having the regard which is proper to its own well-being. 2. Second object: – Utility general, in so far as it consists in doing the greatest good possible to other nations, saving the regard which is proper to its own well-being. 3. Third object: – Utility general, in as far as it consists in the given nation not receiving any injury from other nations respectively, saving the regard due to the well-being of these same nations. 4. Fourth object: – Utility general, in so far as it consists in such state receiving the greatest possible benefit from all other nations, saving the regard due to the well-being of these nations. … . 5. Fifth object: – In case of war, make such arrangements, that the least possible evil may be produced, consistent with the acquisition of the good which is sought for.'

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> he would follow with regard to internal laws. He would set himself to prevent positive international offences – to encourage the practice of positively useful actions. … In the same manner, he would regard as a negative offence every determination by which the given nation should refuse to render positive services to a foreign nation, when the rendering of them would produce more good to the last-mentioned nation, than would produce evil to itself. … The thread of analogy is now spun; it will be easy to follow it. There are, however, certain differences. A nation has its property – its honour – and even its condition. It may be attacked in all these particulars, without the individuals who compose it being affected. … Among nations, there is no punishment … .[32]

What are we to make of Bentham's early utilitarian project of international law? It is hard to distil a coherent conception from his apodictic and chaotic assembly of points,[33] but his central proposition seems to be that the principle of utility, while analogously applicable in the international sphere, requires adjustment in the international sphere because nations differ from individuals. Yet no convincing argument is offered to elaborate or justify this important distinction; and, perhaps with the exception of Bentham's 'Plan for a Universal and Perpetual Peace', there simply are no guidelines that Bentham's utilitarian philosophy offers as to the formal foundations and substantive content of international law. On the contrary, it disappointingly comes to centre on a purely formalist project: the future of international law is exclusively seen in international 'codification' – a word itself coined by this tireless and tiresome inventor of neologisms.[34] Not international custom but international treaties here become the primary instrument of international law.

3 Beyond Bentham: Later Utilitarian Conceptions of International Law

Bentham remained relatively obscure in the early decades of the nineteenth century; yet his reputation gradually increased through the works of others. A second generation of British utilitarians here played 'a crucial intermediary

32 Ibid.

33 For a similar criticism, see Koskenniemi, Martti. *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (Cambridge: Cambridge University Press, 2021), 682.

34 Bentham, *Principles of International Law* 1838–1843 (n. 24), 540.

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role in the transformation of the utilitarian tradition';[35] and with regard to international law, it has been claimed – by none other than Bentham's own editor – that 'it was almost solely in the great article by Mr. [James] Mill on the "Law of Nations"' through which the British public first encountered 'the utilitarian theory of International law'.[36] James Mill indeed set the founding stone of what was to become a 'moral' foundation of international law (3.1). This new normativity, embedded within the broader utilitarian project, received an analytic re-formulation by John Austin a decade later (3.2). The latter would now deny the legal nature of international 'law' by reducing it to positive morality. This legal scepticism was however partly relativised by John Stuart Mill, who is by far the most important representative of a third generation of British utilitarianism (3.3.)

3.1 *James Mill and the 'Moral' Normativity of International Law*

James Mill plays a transformative role in the British utilitarian tradition; and an excellent illustration of this critical role is his treatment of Bentham's conception of international law. In Mill's 'Law of Nations' (1825),[37] the discussion of the nature of international law is indeed placed into a fundamentally novel analytical frame that now approaches the subject with some analytical rigour:

> In the meaning of the word Law, three principal ideas are involved; that of a Command, that of a Sanction, and that of the Authority from which the command proceeds. Every law imports, that something is to be done; or to be left undone. But a Command is impotent, unless there is the power of enforcing it. The power of enforcing a command, is the power of inflicting penalties, if the command is not obeyed. And the applicability of the penalties constitutes the Sanction. There is more difficulty in conveying an exact conception of the Authority which is necessary to give existence to a law. It is evident, that it is not every command, enforced by penalties, to which we should extend such a title. A law is not confined to a single act; it embraces a class of acts; it is not confined to the acts of one man; it embraces those of a community of men. And the authority from which it

35 Pitts, *A Turn to Empire* 2005 (n. 27), 104.

36 Burton, John. H. 'Introduction to the study of the Works of Jeremy Bentham', in *The Works of Jeremy Bentham*, vol. 1, ed. John Bowring (Edinburgh: Tait, 1838–1843), 5–83, 75. The subtle irony here, of course, is that Mill's article did not use the Benthamite neologism 'international law' but instead referred the older concept of the 'law of nations'!

37 [Mill, James], *Law of Nations*: Reprinted from the Supplement to the Encyclopaedia Britannica, available at: https://oll.libertyfund.org/titles/mill-law-of-nations (last accessed on 12 April 2023)

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> emanates must be an authority which that community are in the habit of obeying. … The conditions, which we have thus described, may all be visibly traced, in the laws which governments lay down for the communities to which they belong. There we observe the command; there the punishment prescribed for its violation; and there the commanding authority to which obedience is habitually paid. Of these conditions how many can be said to belong to any thing included under the term Law of Nations?[38]

Many of the essential elements of British analytic positivism, whose Austinian refinement will be discussed in Section 3.2 below, are already here; but the answer Mill gives with regard to the legal quality of international law still remained ambivalent. For whilst denying that nations could 'command' other nations,[39] an uncertain response is given to the question as to whether nations can be 'sanctioned' or 'punished' for violations of international law. The efficacy of an ordinary penal sanction is, of course, unequivocally denied;[40] though Mill nevertheless considers that international law is not 'without force and influence'.[41] And invoking the spirit of Bentham's utilitarianism, we crucially read:

> That the human mind is powerfully acted upon by the approbation or disapprobation, by the praise or blame, the contempt and hatred, or the love and admiration, of the rest of mankind, is a matter of fact, which, however it may be accounted for, is beyond the limits of dispute. Over the whole field of morality, with the exception of that narrow part which is protected by penal laws, it is the only power which binds men to good conduct, and renders man agreeable and useful to man. … When persons, who have been educated in a virtuous society, have, from their infancy, associated the idea of certain actions with the favourable sentiments, and with all the advantages which flow from the favourable sentiments

38 Ibid., 3.

39 Ibid., 4: 'It is therefore clear, that the term Command cannot be applied, at least in the ordinary sense, to the laws of nations.'

40 [Mill], *Law of Nations* (n. 37), 4: 'If it be said, that several nations may combine to give it a sanction in favour of the weak, we might, for a practical answer, appeal to experience. Has it been done? Have nations, in reality, combined, so constantly and steadily, in favour of the law of nations, as to create, by the certainty of punishment, an overpowering motive, to unjust powers, to abstain from its violation? For, as the laws against murder would have no efficacy, if the punishment prescribed were not applied once in fifty, or a hundred times, so the penalty against the violations of the law of nations can have no efficacy, if it is applied unsteadily and rarely.'

41 Ibid., 5.

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> of mankind; and, on the other hand, have associated the idea of certain other actions with the unfavourable sentiments, and all the disadvantages which flow from the unfavourable sentiments of mankind; so painful a feeling comes in time to be raised in them at the very thought of any such action, that they recoil from the perpetration of it, even in cases in which they may be perfectly secure against any unfavourable sentiments, which it might be calculated to inspire. *It will, we apprehend, upon the most accurate investigation, be found, that this is the only power to which we can look for any considerable sanction to the laws of nations;—for almost the only species of punishment to which the violation of them can ever become amenable: it is the only security, therefore, which mankind can ever enjoy for the benefit which laws, well contrived for this purpose, might be calculated to yield.*[42]

Two important conclusions are buried in this complex prose. First, since the human mind is 'acted upon' by feelings of moral pleasure and pain, *morality* itself provides an effective sanction vis-à-vis illegal human conduct. International law therefore can be 'law' in situations where there positively exist such moral sanctions. However, this is, secondly, only possible where people are 'educated in a virtuous society' that taught them to associate international wrongs with 'so painful a feeling' that 'they recoil from the perpetration of it'.

What types of societies can generate this – moral – sanction? Only those societies that are capable of guaranteeing 'man's dependence upon the sentiments of others'; and international law will therefore, according to Mill, only operate *as law* 'in countries, the rulers of which are drawn from the mass of the people, in other words in democratical countries'.[43] Interestingly, Mill here, consequently, links the normativity of international law to the kind of internal government within national societies; and his thinking thus, fascinatingly, converges with the Kantian belief that international law ought to be built on the 'republican' internal state constitutions it is supposed to govern.[44] For only in democratic or liberal societies, there exists an internal morality that generates a public opinion that can morally 'sanction' violations of international law.

42 Ibid., 6–7 (emphasis added).

43 Ibid., 8–9. With regard to 'monarchical' or 'aristocratic' societies, Mill considered that the moral sanction attached to violations of international law would only operate to 'a very low degree', ibid.

44 On Kant and his international law philosophy, see 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.

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This line of argument turns natural law thinking on its head: for international law is, according to the utilitarian logic, not binding because it derives from a moral 'ought'; on the contrary, because international law 'is' effective in triggering an empirical – moral – sentiment, international law constitutes positive law.

3.2 *John Austin and the 'Sovereigntist' Critique of International Law*

A first and second generation of utilitarians could, as we saw above, affirm the legal quality of international law as law from within their empirical-positivist conception of law. This affirmation, however, was to be fundamentally challenged by John Austin.

Thoroughly inspired by Hobbes' sovereigntist philosophy, Austin's 'The Province of Jurisprudence Determined' (1832), comes to deemphasize the sanctions-element and to reemphasise the command-element within utilitarian positivism. For Austin, '[e]very *law* or *rule* … is a *command*';[45] and since 'the term *superiority* (like the terms *duty* and *sanction*) is implied by the term command',[46] the identification of laws with sanctions becomes side-lined.[47] The simplified definition of what legal rules are is consequently this: '*laws* emanate from *superiors*';[48] and where the command is issued by a human superior, these laws are positive laws.[49]

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

> The science of jurisprudence (or, simply and briefly, jurisprudence) is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness. Positive morality, as considered without regard to its goodness or badness, might be the subject of a science closely analogous to jurisprudence. I say 'might be': since it is only in one of its branches (namely, the law of nations or international law), that positive morality, as considered without regard to its goodness or badness, has been treated by writers in a scientific or systematic manner. … The science of ethics (or, in the language of Mr. Bentham,

45 Austin, John. *The Province of Jurisprudence Determined*, ed. Wilfrid Rumble (Cambridge: Cambridge University Press, 1995), 21.

46 Ibid., 30.

47 Ibid., 118: 'Every sanction properly so called is an eventual evil annexed to a command.'

48 Ibid., 30.

49 Importantly, however, Austin also recognized the existence of the 'laws of God' or the 'Divine law', ibid., 38: 'The Divine laws, or the laws of God, are laws set by God to his human creatures. As I have intimated already, and shall show more fully hereafter, they are laws or rules, properly so called.'

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> the science of deontology) may be defined in the following manner. – It affects to determine the test of positive law and morality, or it affects to determine the principles whereon they must be fashioned in order that they may merit approbation.[50]

And with this, Austin comes to analytically distinguish between three distinct normative phenomena: 'positive jurisprudence', 'positive morality', and 'ethics'. The former two sciences deal with *positive* rules, that is: rules that empirically exist, whereas ethics relates to metaphysical rules that ought to exist in the future. For both types of positive rules – law and morality – their ethical goodness or badness is said to be irrelevant, as an 'ought' cannot affect an 'is'. With this radical denial of ethical essentialism, all intrinsic connection between legal form and ethical substance is cut; and Austin therefore is the true father of a 'pure theory of law'.[51]

The major Austinian innovation thereby is his idea of 'positive morality'. Lying between present-day 'laws properly so called' and what future laws ought morally to be, positive moral rules are defined as rules that *actively* propose or restrain a certain behaviour. The two celebrated illustrations Austin here gives are customary law in general,[52] and – important for our purposes – international law in particular. Both constitute a set of positive – that is humanly created – rules that sanction certain types of conduct; but in the absence of a superior authority, these rules are not commands, and therefore not laws 'properly so called'. For international law, this logically follows from the very idea that it constitutes a law between *sovereign* states that do not recognize a superior:

> Society formed by the intercourse of independent political societies, is the province of international law, or of the law obtaining between nations. For (adopting a current expression) international law, or the law obtaining between nations, is conversant about the conduct of independent political societies considered as entire communities: *circa negotia et causas gentium integrarum*. Speaking with greater precision, international law, or the law obtaining between nations, regards the conduct of sovereigns considered as related to one another. And hence it inevitably

50 Ibid.; 112–113.

51 In this sense, Radbruch, Gustav. 'Anglo-American Jurisprudence through Continental Eyes'. *Law Quarterly Review* 52(4) (1936), 530–545, 531.

52 It is often forgotten that Austin also considered the English customary 'common law', as conceived by Blackstone, as a form of positive morality.

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> follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author. As I have already intimated, the law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[53]

In essence, then, since States, as political communities, do not recognize a superior authority above them, international law is nothing but 'public opinion'. Intriguingly, and in direct opposition to James Mill, international law is here no longer seen as 'law' *because* it is sanctioned by public opinion; on the contrary, because it is *only* sanctioned by public opinion, it becomes reduced to nothing but positive *morality*! This classification of international law as non-legal morality carries of course no deontological judgement: Austin here simply acknowledges the existence of international norms as 'posited' human rules; and he unambiguously chastises classic international law scholars for having confused positive morality as it 'actually obtain[s]' among nations with international morality 'as it ought to be'.[54] International morality is not international ethics.

3.3 *John Stuart Mill and the 'Relativistic' Nature of International Law*

With Austin, the legal nature of international law had come to be questioned; and a third generation of utilitarians – especially John Stuart Mill – resumes

53 Austin, *Province of Jurisprudence Determined* 1995 (n. 45), 171.

54 Ibid., 160: 'Grotius, Puffendorf [sic], and the other writers on the so-called law of nations, have fallen into a similar confusion of ideas: they have confounded positive international morality, or the rules which actually obtain among civilized nations in their mutual intercourse, with their own vague conceptions of international morality as it ought to be, with that indeterminate something which they conceived it would be, if it conformed to that indeterminate something which they call the law of nature. Professor Von Martens, of Gottingen, who died only a few years ago, is actually the first of the writers on the law of nations who has seized this distinction with a firm grasp, the first who has distinguished the rules which ought to be received in the intercourse of nations, or which would be received if they conformed to an assumed standard of whatever kind, from those which are so received, endeavored to collect from the practice of civilized communities what are the rules actually recognized and acted upon by them, and gave to these rules the name of positive international law.'

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this programme.[55] International law here continues to be seen, suspiciously, as a 'falsely-called' law.[56] And yet, there also reappears a more affirmative conception of international law as law: 'The law of nations is simply the custom of nations'; and this customary law has 'grown up like other usages, partly from a sense of justice, partly from common interest or convenience, partly from mere opinion and prejudice.'[57] This hybrid mixture of theoretical principles and practical conveniences is however not static; on the contrary, according to Mill, it must itself be subject to progress and improvement. And from this, Mill's relativistic conception of international law is born: '[w]hat is called the law of nations is as open to alteration, as properly and even necessarily subject to it when circumstances change or opinions alter, as any other thing of human institution'.[58]

What are the engines of this normative change within international law? In the absence of a supreme legislature capable of repealing or amending international legal norms, normative changes are, Mill provocatively argues, effected by *violations* of existing rules: 'The improvement of international morality can only take place by a series of violations of existing rules[.]'[59] Each historical epoch will, consequently, develop its own legal principles; and just as the old international principles established, for example, by the 1815 Vienna Congress had been repealed by new principles in the 1820s and 1830s, so each age would find and follow its own international law.

To offer a more concrete illustration of this evolutionary normativity, Mill subsequently applies his 'relativism' to international treaties specifically. Starting from a categorical rejection of Kantian formalism,[60] Mill here quickly questions the generally binding nature of (international) treaties by insisting that they can be legally broken when the societal preconditions on which they were based have changed. To quote him in his own words:

55 For a general discussion of J. S. Mill's international thought, see now Varouxakis, Georgios. *Liberty Abroad: J. S. Mill on International Relations* (Cambridge: Cambridge University Press, 2017).

56 Mill, John Stuart. 'Vindication of the French Revolution', in *The Collected Works of John Stuart Mill*, vol. XX, ed. John M. Robson (Toronto: University of Toronto Press, 1985), 317–364, 345.

57 Ibid.

58 Ibid.

59 Ibid.

60 Mill, John Stuart. 'Utilitarianism', in *The Collected Works of John Stuart Mill*, vol. X, ed. John M. Robson (Toronto: University of Toronto Press, 1985), 203–259, 249.

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> In 1814 and 1815, a set of treaties were made by a general Congress of the States of Europe, which affected to regulate the external, and some of the internal, concerns of the European nations, for a time altogether unlimited. These treaties, having been concluded at the termination of a long war, which had ended in the signal discomfiture of one side, were imposed by some of the contracting parties, and reluctantly submitted to by others. Their terms were regulated by the interests, and relative strength at the time, of the victors and vanquished; and were observed as long as those interests and that relative strength remained the same. But as fast as any alteration took place in these elements, the powers, one after another, without asking leave, threw off, and were allowed with impunity to throw off, such of the obligations of the treaties as were distasteful to them, and not sufficiently important to the others to be worth a fight. The general opinion sustained some of those violations as being perfectly right[.][61]

This utilitarian relativism admits that national interests can change (*rebus sic stantibus*); and it therefore argues that States, as masters of international law, must themselves be able to make changes to the normative principles and rules of international law. While international treaties thus generally ought, as a rule, to be binding in time, there nevertheless are 'treaties which never will, and even which never ought to be permanently observed'.[62] Two utilitarian principles should, according to Mill, always be followed when states conclude international treaties. First, 'abstain from imposing conditions which, on any just and reasonable view of human affairs, cannot be expected to be kept'; and, secondly, conclude treaties 'only for terms of years'.[63] International treaties are therefore – like all international law generally – temporal and situational instruments. This normative relativism extends to questions of war and peace;[64] but most importantly of all, it extends to the very question which international rules apply to which types of human societies.

61 Mill, John Stuart. 'Treaty Obligations (1870)', in *The Collected Works of John Stuart Mill*, vol. XXI, ed. John M. Robson (Toronto: University of Toronto Press, 1984), 314–348, 343–344.

62 Ibid., 345.

63 Ibid., 346.

64 For Mill's complex relations to 'war', see Varouxakis, *Liberty Abroad* 2017 (n. 55), chapter 6.

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4 Utilitarianism and Colonialism: John Stuart Mill's Liberal Imperialism

Is there a historical or conceptual connexion between (British) utilitarianism and (British) colonialism? Jeremy Bentham had remained a sceptical anti-imperialist, who himself favoured decolonisation.[65] Yet with James Mill, a more pro-colonial approach gained prominence among the utilitarian philosophers.

Mill thereby formally agreed with Bentham that there were no economic advantages that the mother country could derive from its colonies.[66] But ever since his 'History of British India' (1817),[67] a civilisational paternalism entered into British utilitarian thinking.[68] For believing Indian society to be on a lower stage of civilisation, Mill considered 'the English government in India with all its vices, [as] a blessing of unspeakable magnitude to the population of [India]', because 'even the utmost abuse of European power [was] better … than the most temperate exercise of Oriental despotism'.[69] It light of the 'backward' nature of these 'rude' societies, it was Britain's moral duty to bring progress and civilisation to India – even if that was against its own national interest.[70]

How would this colonial aspect be developed by later utilitarians? John Austin's analytical positivism here offered hardly any intellectual support;[71] and it was indeed only through the work of James Mill's son that this colonial dimension of British utilitarianism was further developed. John Stuart Mill's

65 Bentham, Jeremy. 'Emancipate Your Colonies!' (1793), in *The Works of Jeremy Bentham*, vol. 4, ed. John Bowring (Edinburgh: Tait, 1838–1843), 407–418.

66 For this point, see especially Mill's Encyclopedia Britannica article on 'colonies', in Mill, James. *Essays* (London: Innes, 1825), chapter V.

67 For the purposes of this article, I have used the 1817 three-volume edition published by Baldwin, Cradock, and Joy.

68 The two classical studies here are Forbes, Duncan. 'James Mill and India'. *Cambridge Journal* 5 (1951–52), 19–33; as well as Stokes, Eric. *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

69 Mill, James. Edinburgh Review (January 1810, 149 and 171), quoted in Winch, Donald. *James Mill. Selected Economic Writings* (Edinburgh: Oliver & Boyd, 1966), 383–395.

70 This dichotomy between duty and interest may partly resolve the contradictory messages between Mill's writings on India and his later Encyclopedia Britannica entry on 'Colonies'. For the argument that this tension is never adequately resolved, see Majeed, Javed. 'James Mill's "The History of British India" and Utilitarianism as a Rhetoric of Reform'. Modern Asian Studies 24(2) (1990), 209–224.

71 There is, in my view, very little – if any – imperialist thinking in John Austin's work. For while it is true that he denies a society 'political' status, wherever its majority is 'not in a habit of obedience to one and the same superior', there seems to be no argument that such societies could, therefore, be 'legally' colonized by foreigners, see Austin, *Province of Jurisprudence Determined* 1995 (n. 45), esp. 170–179. For an elaboration of this point, see infra n.155.

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thinking thereby developed in three main stages.[72] Having first concentrated on the *economic* advantages of British colonialism for the mother country specifically, these economic advantages were, in a second stage, claimed to be universal utilitarian benefits for humanity as such.[73] During a third stage, finally, economic consideration were gradually replaced by moral ones, with the latter emphasising especially the civilisational benefits for 'backward' societies. This Millian imperialism has fittingly been called 'civilisational' or 'liberal' imperialism.[74]

With a close eye on India, like his father,[75] Mill had worked on the idea of civilisation since 1836.[76] And equipped with his relativist conception of international law, discussed in Section 3.3 above, he began to make, in his 'Few Words on Non-Intervention' (1859),[77] a categorical distinction between those international principles governing civilised nations and those legal principles governing situations in which one party was of a 'high' and the other of a 'low' stage of civilisation.[78] Within the former situation, civilised peoples were seen to be 'members of an equal community, like Christian Europe', whose independence and sovereignty would need to be respected. Intervention into their internal affairs was, as a rule, legally prohibited.[79] By contrast, the same legal

72 For an excellent discussion of Mill's evolving ideas on colonialism, see Bell, Duncan. 'John Stuart Mill on Colonies'. *Political Theory* 38(1) (2010), 34–64.

73 Mill, John Stuart. 'Principles of Political Economy Volume II', in *The Collected Works of John Stuart Mill*, vol. III, ed. John M. Robson (Toronto: University of Toronto Press, 1965), 963: 'To appreciate the benefits of colonization, it should be considered in relation, not to a single country, but to the collective economical interests of the human race.'

74 For a classic early analysis, see Sullivan, Eileen. 'Liberalism and Imperialism: J. S. Mill's Defense of the British Empire'. *Journal of the History of Ideas* 44(4) (1983), 599–617. In the last decades, the literature on Mill's imperialism has grown significantly, see especially: Mehta, Uday Singh. *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought* (Chicago: University of Chicago Press, 1999); and Pitts' magisterial 'A Turn to Empire: The Rise of Imperial Liberalism in Britain and France' 2005 (n. 27).

75 Mill, John Stuart. 'Writings on India', in *The Collected Works of John Stuart Mill*, vol. XXX, ed. John M. Robson; Toronto: University of Toronto Press, 1990).

76 Mill, John Stuart. 'Civilisation (1836)', in *The Collected Works of John Stuart Mill*, vol. XVIII, ed. John M. Robson (Toronto: University of Toronto Press, 1977), 117–147.

77 Mill, John Stuart. 'A Few Words on Non-Intervention (1859)', in *The Collected Works of John Stuart Mill*, vol. XXI, ed. John M. Robson (Toronto: University of Toronto Press, 1984), 109–124.

78 Ibid., 118.

79 Ibid., 122: '[T]he answer I should give to the question of the legitimacy of intervention is, as a general rule, no.' Mill nevertheless accepts a number of exceptions to the principle of non-intervention among civilised states, for example: assistance to a legitimate self-defence (ibid., 123).

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principles ought not, according to Mill, to apply to the relationship between civilised and uncivilised states:

> To suppose that the same international customs, and the same rules of international morality, can obtain between one civilized nation and another, and between civilized nations and barbarians, is a grave error, and one which no statesman can fall into, however it may be with those who, from a safe and unresponsible position, criticise statesmen. Among many reasons why the same rules cannot be applicable to situations so different, the two following are among the most important. *In the first place, the rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules … . In the next place, nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered and held in subjection by foreigners*. Independence and nationality, so essential to the due growth and development of a people further advanced in improvement, are generally impediments to theirs. The sacred duties which civilized nations owe to the independence and nationality of each other, are not binding towards those to whom nationality and independence are either a certain evil, or at best a questionable good.[80]

The classic principles of international law are, consequently, confined to civilised nations only (as only they will reciprocate), while conquest and interference into the internal affairs of 'barbarian' societies could be justified so long as they had not formed modern nation-states.[81]

The essential question, then, becomes this: what is the dividing line between 'civilised' and 'barbarian' states? For Mill, a people will be civilised 'where the arrangements of society for protecting the persons and property of its members, are sufficiently perfect to maintain peace among them';[82] and more importantly still: the accurate test of civilisation is 'the progress of the power of co-operation'.[83] Only the division of labour within a society under which each individual has learnt to sacrifice some portion of its will 'for a common purpose' signals an 'organized combination' that grants independence

80 Mill, *A Few Words on Non-Intervention* 1984 (n. 77), 118–119 (emphasis added).

81 Ibid, 119: 'A violation of great principles of morality it may easily be; but barbarians have no rights as a *nation*, except a right to such treatment as may, at the earliest possible period, fit them for becoming one.'

82 Mill, *Civilisation* 1977 (n. 76), 120.

83 Ibid., 122.

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and nationality to each other.[84] A regards those peoples or societies that have not yet reached this stage, international law and – more generally – the ordinary principles of morality cannot apply. To quote Mill once more:

> It is, perhaps, hardly necessary to say that [Mill's harm principle] is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury. *For the same reason, we may leave out of consideration those backward states of society in which the race itself may be considered as in its nonage. The early difficulties in the way of spontaneous progress are so great, that there is seldom any choice of means for overcoming them; and a ruler full of the spirit of improvement is warranted in the use of any expedients that will attain an end, perhaps otherwise unattainable*.[85]

Since 'barbarous' societies have not yet reached human 'maturity', it is therefore in their best interest to have a guardian (and protector) that leads them alongside the path to civilisation. Indeed, all backward societies 'must be governed by the dominant country', in a trusteeship of sorts, so as to 'facilitate[] their transition to a higher state of improvement'.[86] This 'civilisational' imperialism is, then, further justified as follows:

> There are, as we have already seen, conditions of society in which a vigorous despotism is in itself the best mode of government for training the people in what is specifically wanting to render them capable of a higher civilization. There are others, in which the mere fact of despotism has indeed no beneficial effect, the lessons which it teaches having already been only too completely learnt; but in which, there being no spring of spontaneous improvement in the people themselves, their almost only hope of making any steps in advance depends on the chances of a good despot. Under a native despotism, a good despot is a rare and transitory

84 Ibid., 122–123.

85 Mill, John Stuart. 'On Liberty', in *The Collected Works of John Stuart Mill*, vol. XVIII, ed. John M. Robson (Toronto: University of Toronto Press, 1977), 213–310, 224 (emphasis added).

86 Mill, John Stuart. 'Considerations on Representative Government', in *The Collected Works of John Stuart Mill*, vol. XIX, ed. John M. Robson (Toronto: University of Toronto Press, 1977), 317–577, 567.

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> accident: but when the dominion they are under is that of a more civilized people, that people ought to be able to supply it constantly. The ruling country ought to be able to do for its subjects all that could be done by a succession of absolute monarchs, guaranteed by irresistible force against the precariousness of tenure attendant on barbarous despotisms, and qualified by their genius to anticipate all that experience has taught to the more advanced nation. Such is the ideal rule of a free people over a barbarous or semibarbarous one.[87]

Foreign or imperial government is here seen as 'a legitimate mode of government in dealing with barbarians, provided the end be their improvement'.[88]

But what happens once these 'backward' societies have reached 'a sufficiently advance state'? For Mill, all dependencies 'composed of people of similar civilization to the ruling country', like Canada or Australia, are capable of representative government and should be offered 'home rule'. Yet unlike Bentham, no emancipation is envisaged: 'though Great Britain could do perfectly well without her colonies, and though on every principle of morality and justice she ought to consent to their separation… there are strong reasons for maintaining the present slight bond of connexion'.[89]

Three main reasons are offered for this 'federal' imperialism. The most important of which converges with, but ultimately perverts, a Kantian idea: a colonial empire represents a step 'towards universal peace, and general friendly co-operation among nations', because '[i]t renders war impossible among a large number of otherwise independent communities'.[90] This replaces the Kantian idea of peace among free states with the distinctively un-Kantian idea of peace within a colonial empire.[91] In a similar vein, secondly, imperialism is

87 Ibid., 567. In the following pages, Mill explains how best to govern a colony – whether directly through a British cabinet minister or not; and – with regard to India – concludes, ibid., 573: 'It is not by attempting to rule directly a country like India, but by giving it good [native] rules, that the English people can do their duty to that country; and they can scarcely give it a worse one than an English Cabinet Minister[.]'

88 Mill, *On Liberty* 1977 (n. 85), 224.

89 Mill, *Considerations on Representative Government* 1977 (n. 86), 565.

90 Ibid.

91 Mill expressly rejects the idea of a federation of free states in favour of an unequal empire. Considering the possibility of a real 'federation' along the US American lines he finds, ibid., 564: 'Countries separated by half the globe do not present the natural conditions for being under one government, or even members of one federation. If they had sufficiently the same interests, they have not, and never can have, a sufficient habit of taking counsel together. They are not part of the same public[.]'

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said to serve a benign economic function as it 'keeps the markets of the different countries open to one another' and therefore assists international trade – which, according to British dogma, serves everyone.[92] Thirdly, and specifically addressed to the mother country: through its colonial possessions, Britain would gain 'moral influence and weight in the councils of the world' – a benefit that would also radiate to the rest of the world as Britain, among all states of the world, 'best understands liberty'.[93] British imperialism here brings British liberty; and with British liberty, the greatest happiness of the greatest number will be achieved.

5 Utilitarian Legacies in Nineteenth-Century International Law

The nineteenth century is the century in which the professionalisation of international law begins its victorious course. By the end of that century, discussions about the nature of international law belong, almost exclusively, to professional jurists; yet this move from 'philosophers' to 'jurists' did not immediately trigger an equivalent move from metaphysical 'idealism' to positive 'empiricism'. Instead, and as shown elsewhere,[94] the better part of the (European) nineteenth century belongs to (historicist) idealism and its emphasis on a moral 'society of nations' governed by customary law.

Can the nineteenth century, then, be described as the 'British age' in which the Benthamite conception of international law prevails and in which the old 'European public law' is finally 'universalised'?[95] This view is, in my view, wrong on all fronts.[96] Yet there are three legacies that British utilitarianism potentially bequeathed to nineteenth century international law. They are: the rise of the idea of international codification (Section 5.1), the rise of a British conception of private international law (Section 5.2), and the rise of 'civilisational' justifications for European imperialism (Section 5.3.). Each of these three developments might be linked to one particular utilitarian author presented above, and shall be discussed in turn.

92 Ibid., 565.

93 Ibid.

94 Schütze, Robert. 'German Idealism after Kant: Nineteenth Century Foundations of International Law'. *Journal of the History of International Law* 25(1) (2023), 105–141.

95 This is Grewe's famous historical characterization of the nineteenth century, see Grewe, Wilhelm. *The Epochs of International Law* (Berlin: De Gruyter, 2000), part IV.

96 For an extensive criticism of the 'Grewe thesis', see Schütze, *From Utopia to Apologia* 2019 (n. 20).

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5.1 *Jeremy Bentham and the Rise of the Idea of International Codification*

Can the rise of international codification projects during the nineteenth century be linked to Jeremy Bentham? Bentham indeed advocated, in numerous places, the preparation of a 'universal' international code.[97] (And, as we saw in Section 2, he had also encouraged the 'homologation of unwritten laws which are considered as established by custom' as well as the conclusion of 'new conventions' to avoid international conflicts and wars.[98]) Fundamentally, an international code would thereby have to be complete and – even if drafted by a private person, like himself – would necessarily require the formal adoption by the sovereign legislature(s) so as to become law.[99]

For international law, this aspect of the Benthamite codification project becomes especially clear in James Mill's 'Law of Nations':

> It is perfectly evident, that nations will be much more likely to conform to the principles of intercourse which are best for all, if they have an accurate set of rules to go by, than if they have not. In the first place, there is less room for mistake; in the next, there is less room for plausible pretexts; and last of all, the approbation and disapprobation of the world is sure to act with tenfold concentration, where a precise rule is broken, familiar to all the civilised world, and venerated by it all. How the nations of the civilized world might concur in the framing of such a code, it is *not* difficult to devise. They might appoint delegates to meet, for that purpose, in any central or convenient place; where after discussion, and coming to as full an understanding as possible upon all the material points, they might elect some one person, the most capable that could be found, to put these their determinations into the proper words and form, in short, to make a draught of a code of international law, as effectually as possible *providing for all the questions*, which could arise, upon their interfering interests, between two nations. … . *It should then be referred to the several governments, to receive its final sanction from their approbation*[.][100]

97 Bentham, Jeremy. 'General View of a Complete Code of Laws', in *The Works of Jeremy Bentham*, vol. 3, ed. John Bowring (Edinburgh: Tait, 1838–1843), 155–210.

98 For a discussion of this point, see section 2.2. above.

99 Vanderlinden, Jacques. 'Code et codification dans la pensée de Jeremy Bentham'. *Tijdschrift voor Rechtsgeschiedenis* 32(1) (1964), 45–78.

100 [Mill], *Law of Nations* 2023 (n. 37), 27 (emphasis added).

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In the course of the nineteenth century, Bentham would be credited as the 'first theorist' of international codification;[101] yet his influence is not unqualified. For while his intellectual imprint on various Anglo-Saxon codification projects can be presumed, his idea of an international congress of national delegates drafting an international code that required to be officially 'sanctioned' by States was not an idea that all European jurists shared.

A good example is Francis Lieber – a German who had emigrated to the United States, where he famously drafted the first modern military code during the American Civil War. The so-called 'Lieber Code' (1863) provided an enormous inspiration for other European jurists in the second half of the nineteenth century.[102] Yet Lieber was intellectually closer to Kant than to Bentham and 'had no desire for a codification by the governments'; instead, 'he demanded the approval of this law by science, *without any official character*'.[103] It was in that very spirit that Lieber had opposed David Dudley Field's suggestion for a Bentham-like international code to be adopted by national governments.[104] Lieber, on the contrary, suggested the creation of an 'Institute of International Law' that would bring together the most important jurists of international law to settle the unresolved questions of international law *scientifically*.[105]

This scepticism towards official codification *by states* was shared by Johann Bluntschli, who had enthusiastically taken up Lieber's project in Europe.[106] Bluntschli had written a textbook attempting to 'codify' modern international

101 Nys, Ernest. 'Codification of International Law'. *American Journal of International Law* 5(4) (1911), 871–900, 876; and for a wonderful overview of the various codification efforts in international law over time, see Dhokalia, Ramaa D. *The Codification of Public International Law* (Manchester: Manchester University Press, 1970).

102 Nys, Ernest. 'Francis Lieber – His Life and his Work, Part I'. *American Journal of International Law* 5(1) (1911), 84–117; as well as 'Francis Lieber – His Life and his Work, Part II'. *American Journal of International Law* 5(2) (1911), 355–393.

103 Ibid., 390 (emphasis added).

104 In a letter to a friend, Lieber wrote that he was 'unqualifiedly averse to Field's idea of having a code of the Law of Nations drawn up, and then trying to make governments adopt it'. The reason was this: 'The strength, authority, and grandeur of the law of nations rests on, and consists in, the very fact that reason, justice, equity speak through men "greater than he who takes a city" – single men, plain Grotius; and that nations, and even Congresses of Vienna, cannot avoid hearing, acknowledging, and quoting them.' Quoted in Scott, James Brown. 'The Gradual and progressive Codification of International Law' *American Journal of International Law* 21(3) (1927), 417–450, 422.

105 On Lieber's role in the conception of the Institute, see Rolin-Jaequemyns, Gustave. 'De la nécessité d'organiser une institution scientifique permanente pour favoriser l'étude et les progrès du droit internationale'. *Revue de Droit International et de Législation Comparée* 5 (1873), 463–494.

106 Röben, Betsy. *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861–1881* (Baden-Baden: Nomos, 2003).

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law, and this textbook would constitute the most comprehensive 'codification' effort till 1868. This was, however, again codification-by-science not codification-by-congress,[107] even if Bluntschli appeared less critical towards the latter than Lieber. However, all that states were here allowed to do was to formally acknowledge the 'necessary' (natural) law of humankind.[108] That the 'voluntary' international law was, by contrast, to be codified solely be qualified jurists was also supported by Pasquale Mancini, who had memorably announced – as a rejoinder to Savigny – that the age of international codification had arrived.[109] Following Lieber and Bluntschli, and opposed to the 'misery of empiricism', Mancini therefore also argued that codification should take place through 'the collective authority' of the 'representatives of the noblest science' of international law.[110]

For these three continental European jurists, the best collective organ to express the discipline's authority was the Institute of International Law – founded in 1873 as an 'exclusively scientific association and with no official character'.[111] One of the tasks of the Institute, though not the most prominent one, was 'to give its aid to any serious attempt at gradual and progressive codification';[112] and in subsequent years, the Institute would undeniably play a vital role in the preparation of international law codifications.[113]

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107 Bluntschli, Johann C. *Das moderne Völkerrecht der civilisierten Staten als Rechtsbuch dargestellt* (Nördlingen: Beck, 1868). The German subtitle, emphasising the (scientific) 'textbook' presentation of the material, was translated into French and English as 'codified', yet this underplays its rational-idealist connotations. This 'treatise' approach to codification can also be found in Pasquale Fiore's 'International Law Codified' (1890).

108 Bluntschli, Johann C. *Bedeutung und die Fortschritte des modernen Völkerrechts* (Berlin, Lüderitz, 1866), 10.

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

110 Ibid., 6 and 43.

111 For an English 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.

112 Ibid. article 1(3). According to Rolin-Jaequemyns, the task of codification had been controversial when the Statute was drafted; and codification was therefore ranked below two other objectives, Rolin-Jaequemyns, 'Institution Scientifique Permanente' 1873 (n.105), 487). The task of codification was however central to a second organization that was founded at the same time: the Association for the Reform and Codification of the Law of Nations (1873). The Association was chiefly an US American project that was supported by 'Benthamites', such as David Dudley Field.

113 With regard to 'public' international law, the most famous late nineteenth-century codifications were the 1899 and 1907 Hague Conventions. For the various intellectual influences behind these Conventions, see Dhokalia, *The Codification of Public International Law* 1970 (n. 101), 87–109.

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What sort of codification philosophy did the Institute follow? During its founding ceremony, Mancini had placed it 'at an equal distance from the virtuous Utopians who hope for the immediate and permanent abolition of war' and 'the timid souls, without faith in the moral progress of humanity, who are struck by [the] state of things'.[114] Thus situated between 'utopia' and 'apologia' – between 'ought' and 'is' – the Institute thus followed its first President's belief that 'to engage successfully in the study of this science, one must be neither exclusively a philosopher nor exclusively a jurist', neither Bentham nor Montesquieu.[115] A gradualist and progressive middle path towards codification by international jurists was thus to be preferred.[116]

5.2 *John Austin and the Rise of British 'Private International Law'*

Can the emergence of a specifically British conception of private international law in the nineteenth century be linked to British utilitarianism? Jeremy Bentham's restrictive definition of international law had, as we saw in Section 2, already excluded all matters 'private' from its scope.[117] Yet with the emergence of the Historical School in mid-century Britain, this early utilitarian definition did not immediately prevail.

An early marker of this German anti-utilitarian influence is James Reddie's 'Inquiries in International Law Public and Private' (1851). According to Reddie, private international law was emphatically both 'international' and 'law' in that 'the independence and sovereignty of states do *not* entitle them to establish such laws and issue such orders within their own territories with regard to foreigners as they may think fit'.[118] With Savigny, private international law was thus conceptualised as an equal and coordinate sister of public international law: '[W]e thus place the principles of private, as well as public international law, as being co-ordinate with, or on the same level of footing with,

114 Opening Remarks on the Founding of the Institute, as quoted in Abrams, Irwin. 'The Emergence of the International Law Societies'. *Review of Politics* 19(3) (1957), 361–380, 375.

115 Rolin-Jaequemyns, Gustave. 'De l'étude de la législation comparée et du droit international', *Revue de Droit International et de Législation Comparée* 1 (1869), 1–17, 2–3. On Bentham, Rolin-Jaequemyns speficially added, (ibid, 9): ' Si la métaphysique de Bentham est vicieuse ou incomplète, sa méthode de critique légal n'en a pas moins donné lieu aux plus admirables résultats.'

116 For this approach to international codification somewhere between Bentham and Savigny, see Oppenheim, Lassa. *International Law: A Treatise*, vol. 1 (New York: Longmans, 1912), 35–44.

117 On this point, see section 2.2. above.

118 Reddie, James. *Inquiries in International Law: Public and Private* (Edinburgh: Blackwood, 1851), 461 (emphasis added).

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the principles of the private common law in civil societies or states[.]'[119] This Savignian position also resurfaced in Twiss;[120] and it was equally taken up by Phillimore.[121]

These German historicist inroads were, however, not uncontested. Inspired by the American constitutional law scholar Joseph Story, Westlake's 'Treatise on Private International Law or the Conflict of Laws' (1858) already registered some opposition.[122] But the decisive move against German historicism and in favour of an (Austinian) state-positivism is T. E. Holland's 'Elements of Jurisprudence' (1880).[123] The final chapter of this late nineteenth-century textbook would deeply influence one of the most important legal scholars of Victorian Britain: Albert Venn Dicey. Loyally following Holland's lead, Dicey's 'The Law of England with Reference to the Conflict of Laws' (1896) indeed considered the very idea of a 'private international law' as fundamentally misconceived.[124] Endorsing Bentham, international law could only exist between sovereign nations; and equally endorsing Austin, such a 'law' was in fact no law in a proper sense:

> *The words 'private international law' should mean, in accordance with that use of the word 'international' … a private species of the body of rules which prevails between one nation and another*. Nothing of the sort is, however, intended; and the unfortunate employment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science. Nor does the inaccuracy

119 Ibid., 456 and 462 (emphasis added).

120 Twiss, Travers. *Two Introductory Lectures on the Science of International Law* (London: Longman, 1856), 54–55.

121 Phillimore, Robert. *Commentaries upon International Law: Private International Law or Comity* (London: Benning, 1861), iv-x.

122 Westlake, John. *A Treatise on Private International Law or The Conflict of Laws* (London: Maxwell, 1858).

123 Holland, Thomas E. *Elements of Jurisprudence* (Oxford: Clarendon Press, 2nd ed. 1882). For Holland's praise and admiration of John Austin and his puzzlement about Austin being unknown in Germany, see ibid., vi–viii.

124 The following will draw on the second edition: Dicey, Albert V. *A Digest of the Law of England with Reference to the Conflict of Laws* (London: Stevens and Sons, 1908). The express references to Holland's 'Elements' are plenty throughout the work and Dicey specifically thanks Holland, ibid., viii: 'To my friend and colleague Professor Holland, also, I am under intellectual obligations of a special character. My whole conception of private international law has been influenced by views expressed by him, not only in his writings but in his conversation.'

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> of the term end here. It confounds two classes of rules which are generically different from each other. *The principles of international law, properly so called, are truly 'international' because they prevail between or among nations; but they are not in the proper sense of the term 'laws', for they are not commands proceeding from any sovereign.* On the other hand, the principles of private international law are 'laws' in the strictest sense of that term, for they are commands proceeding from the sovereign of a given state, e.g., England or Italy, in which they prevail; but they are not 'international', for they are laws which determine the private rights of one individual as against another, and these individuals may, or may not, belong to one and the same nation.[125]

All that private international law could be, if it wanted to be positive law, was therefore (external) *national* law. The 'conflict of laws' rules, established by each state, here only reflected each sovereign state's choice whether, and to what extent, to impose its domestic laws on foreigners. This state-positivism had, according to Dicey, clear epistemological advantages. For the 'theoretical method', advocated by continental European authors, such as Savigny, had unjustifiably blurred the line between *is* and *ought*: 'What each author attempts to provide is a statement of the principles which *ought*, as a matter of consistency and expediency, to guide the judges of every country when called upon to deal with a conflict of laws';[126] yet this was not what the law *is*. Only the 'positive method' could avoid this problem:

> This [positivist] school starts from the fact that the rules for determining the conflict of laws are themselves 'laws' in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. [Positivist writers] do not practically concern themselves with any common law of Europe, but make it the object of their labours to ascertain what is the law of a given country with regard to the extra-territorial operation of rights. … Hence it follows that these authors ought not, in so far as they act consistently with their own method, to attempt the deduction of the rules of private international law from certain general and abstract principles, for their aim is to discover not what ought to be, but what is the law.[127]

125 Ibid., 14–15 (with extensive reference to Holland's 'Jurisprudence', emphasis added).
126 Ibid., 17.
127 Ibid., 19.

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This specifically British conception of a conflict-of-laws not only denied the very existence of private *international* law; all transnational customary remnants of the (Continental) historicist tradition of 'private international law' were here scarified in favour of a national-empiricist project that merely recorded the 'statutory enactments and the judicial decisions' within each national legal order.[128]

5.3 *John Stuart Mill and Rise of Civilisational Justifications for European Imperialism*

Can the rise of civilisational justifications for European neo-colonialism at the end of the nineteenth century be linked to John Stuart Mill?

Until the middle of the nineteenth century, many international law scholars had remained profoundly critical towards imperialism;[129] and many European states, including Germany and Italy, had till then hardly shown any interest in colonial exploits.[130] Even France, having lost (almost) all of its colonial possessions following the Napoleonic wars, had remained cautious about a new colonial empire until much later in the nineteenth century.[131]

Great Britain, by contrast, had remained a formidable imperial power; and in the last third of the nineteenth century, it even began to increasingly transform its informal commercial hegemony into formal imperial structures, especially in Africa.[132] This transformation from informal to formal imperialism however required new philosophical justifications – many of which could now be found in the work of John Stuart Mill. For Mill's relativist conception of international law could not only be used to explain why 'uncivilised' societies

128 Ibid., 20.

129 For a good overview of the main anti-imperialist 'publicists' until the late nineteenth century, see Lindley, Mark. *The Acquisition and Government of Backward Territory in International Law* (London: Longmans, 1926), 12–17.

130 For a classic historical account of German imperialism, see Henderson, William O. *Studies in German Colonial History* (London: Class, 1962), which traces its formal beginnings to 1884. Italian colonialism, by contrast, is often said to start in 1869. For a recent account here see Scovazzi, Tullio. 'The Italian Approach to Colonialism: The First Experiences in Eritrea and Somalia', in *A History of International Law in Italy*, ed. Giulio Bartolini (Oxford: Oxford University Press, 2020), 334.

131 Pitts, *Turn to Empire* 2005 (n. 27), part III: 'Liberals and the Turn to Empire in France'. On France's 'informal' empire after 1815, see Todd, David. *A Velvet Empire: French Informal Imperialism in the Nineteenth Century* (Princeton: Princeton University Press, 2021). France's formal neo-imperialism is often dated to around 1871, see Brunschwig, Henri. *French Colonialism 1871–1914: Myths and Realities* (London: Pall Mall, 1966).

132 Robinson, Ronald and Gallagher, John. *Africa and the Victorian: The Official Mind of Imperialism* (London: Macmillan, 1961).

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had no equal status in international law; it additionally offered, as we saw in Section 4, new justifications for the colonisation of 'barbarian' societies.

It is this *British* liberal imperialism that was, in the last quarter of the nineteenth century, taken up by French,[133] German,[134] and Italian discourses.[135] For Europe's great powers had started to fiercely compete over rival colonial ambitions.[136] And had it still seemed, in 1874, that colonialism was an 'anachronism' left to Great Britain 'as its natural monopolist'; two decades later, many European powers had come to believe that 'about half of the globe, in its savage or barbaric condition, was in need of methodical and persevering action by all civilised peoples'.[137]

The philosophical credo behind this 'new' European colonialism emerges most clearly and collectively in the 1885 'General Act' concluded at the Berlin (Congo) Conference. Organised to counter the unilateral expansion of the British Empire specifically,[138] European States here insisted on general

133 With regard to France, Pitts has argued that 'grandeur' originally proved a stronger justification than the liberal idea of France's 'civilizing mission'; yet she finds that the latter did become a key justification in the last decades of the century – with the British Empire operating as a rival and model during this time, Pitts, *Turn to Empire* 2005 (n. 27), esp. 200–219. In one of the most influential nineteenth-century French accounts, Mill's ideas indeed played a major, if not predominant, role, see Leroy-Beaulieu, Paul. *De la colonisation chez les peuples modernes* (Paris: Guillaumin, 1891).

134 For example Geffcken, Heinrich. 'L'Allemagne et la question colonial'. *Revue de Droit International et de Législation Comparée* 17 (1885), 105–131, which draws expressly on John Stuart Mill's ideas (and Geffcken was also the author of a book on the British Empire). According to Grewe's 'Epochs' 2000 (n. 95), 455 and 465, it was however mainly von Holtzendorff who took over 'the civilization ideology, emanating from Britain'.

135 For example Pasquale Mancini's work was deeply influenced by Mill's liberal imperialism, see Segrè, Claudio G. 'Beggar's Empire: Ideology and the Colonialist Movement in Liberal Italy'. *Proceedings of the Meeting of the French Colonial History Society* 4 (1979), 174–183. On Mancini's imperialism generally, see Scovazzi, Tullio. 'Pasquale Stanislao Mancini e la teoria italiana del colonialismo'. *Rivista di Diritto Internazionale* 78(3) (1995), 677–706. And for the general influence of British sources with regard to imperial questions, see also Catellani, Enrico. 'Gli imperialismi d'oggi e l'equilibrio politico del domaini'. *Revista Coloniale* 1(3) (1906), 329–354.

136 This is not to say that there were no critics of the idea of the civilising mission in the (late) nineteenth century. For an excellent overview here, see: Fitzmaurice, Andrew. 'Scepticism of the Civilising Mission in International Law', in *International Law and Empire: Historical Explorations*, eds. Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (Oxford: Oxford University Press, 2017), 359–384.

137 Leroy-Beaulieu, *Colonisation chez les peuples* 1891 (n. 133), i.

138 Fisch, Jörg. 'Africa as terra nullius: The Berlin Conference and International Law', in *Bismarck, Europe and Africa: The Berlin Conference 1884–1885*, eds. Stig Förster, Wolfgang J. Mommsen and Ronald Robinson (Oxford: Oxford University Press, 1988), 347–375, 349–350.

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conditions to be fulfilled before any further colonisation of the African continent could take place.[139] The liberal 'justifications' for this were 'to regulate the conditions most favourable to the development of trade and civilisation in certain regions of Africa', 'to obviate the misunderstanding and disputes which might in the future arise from new acts of occupation', while being 'concerned, at the same time, as to the means of furthering the moral and material well-being of the native populations'.[140] Especially the last-civilizational-justification was repeated in Article 6 of the General Act, wherein all signatory states committed themselves to 'instructing the natives and bringing home to them the blessings of civilization'.[141]

The 1885 General Act thereby appeared to assume that 'the native populations ought *not* to be considered outside the community of international law'; yet because 'they were not in a position to defend their own interests', European States were 'obliged to assume in respect to them the position of a guardian (*tuteur officieux*)'.[142] But if the native peoples were not 'outsiders' to international law, could their land be occupied as *territorium nullius*? This question received different theoretical answers;[143] but, in practice, it was generally denied.[144] In light of Europe's 'civilising' mission, military conquest was also considered morally and practically unacceptable;[145] and to better align

139 The two key provisions here are articles 34 and 35 of the 1885 General Act.

140 Ibid., preamble.

141 In the words of de Martens, Fedor. 'La conférence du Congo à Berlin et la politique coloniale des états modernes' *Revue de Droit International et de Législation Comparée* 18 (1886), 113–150, 124 (with reference to Seeley's 'The Expansion of England'): 'En se chargeant de la création des colonies, l'État modern assume également la mission difficile de civiliser les populations barbares des territoires occupés, et de répandre dans leur sein la culture européenne.'

142 Report of the Working Committee of the 1885 Berlin Conference (quoted in Lindley, *Backward Territory in International Law* 1926 (n. 129), 327 (with reference)).

143 For an excellent discussion here, see Fitzmaurice, Andrew. 'Liberalism and Empire in Nineteenth-Century International Law'. *American Historical Review* 117(1) (2012), 122–140.

144 Alexandrowicz, Charles H. 'The Role of Treaties in the European–African Confrontation in the Nineteenth Century', in *The Law of Nations in Global History*, eds. David Armitage and Jennifer Pitts (Oxford: Oxford University Press, 2017), 259–302, 260: '[T]he African continent could not, under any circumstances, have been considered *territorium nullius*. It had for millennia been covered by a network of state organisations[.]' For the same point, see also Fisch, 'Africa as terra nullius' 1988 (n. 138), 359.

145 Fiore, Pasquale. 'Du protectorat colonial et de la sphère d'influence (Hinterland)'. *Revue générale de droit international public* 14(1) (1907), 148–159, and he concludes, ibid., 157: 'Le droit de coloniser se justifie par le but poursuivi: l'extension par le monde de la civilisation, l'établissement de la suprématie du droit et des principes supérieures de la justice, la nécessité d'établir une certaine proportion entre l'importance de la population des États civilises et l'étendue des territoires utilises à la satisfaction de leur besoins.'

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colonialism and liberalism, a new legal instrument suddenly came to the fore: the (colonial) protectorate.[146]

Originally created in pre-modern times, the protectorate had been devised to account for situations wherein a small state requested the protection of a more powerful one (to prevent being conquered by a third state in the future). The protected state here retained its 'internal' sovereignty, while its 'external' sovereignty would be relinquished through a protectorate treaty. In the wake of the 1885 Berlin Conference, this legal arrangement now experienced a reformation when it was, by analogy, applied to uncivilised regions outside Europe. Unlike discovery or conquest, the normative foundation of the colonial protectorate was, formally, a treaty between the natives and the coloniser.[147] This 'treaty' solution however created a number of complex difficulties, which the colonial protectorate was meant to solve:

> It is to avoid these difficulties that the colonising States have resorted to the expedient of the protectorate. In this way, and without waiting for the independence of the tribes living in certain regions, while leaving them subject to the supreme authority of their chiefs, they exercise their civilising activity over these tribes in order to gradually improve their economic, social and political conditions and to guide them in such a way as to enable them to enjoy the benefits of civilisation. This kind of protectorate is what is called the colonial protectorate: it can be established over the natives by means devoid of all violence, and which gradually leads them to voluntarily recognise the superiority of the nations which actually surpass them in culture, prestige and strength.[148]

146 According to Fisch, '[u]ntil the Berlin Conference the protectorate had been of little interest in legal doctrine', but thereafter, it became 'probably the most important instrument for the establishment of the Europeans in Africa', Fisch, 'Africa as *terra nullius*' 1988 (n. 138), 364 and 366. For the link between the 'civilising mission' and the 'colonial protectorate', see also Pillet, Antoine. 'Des droits de la puissance protectrice sur l'administration intérieure de l'état protégé'. *Revue générale de droit international public* 2(6) (1895), 583–608, 585: '[L]a mission de civilisation … constitue la seule justification plausible de la supériorité par lui prétendue. C'est en vue de cet objet qu'a été créée la théorie moderne du protectorat. L'État civilisé se présente à l'État moins civilisé comme un tuteur, comme un instituteur, comme un guide.'

147 Alexandrowicz, 'The Role of Treaties in the European–African Confrontation in the Nineteenth Century' 2017 (n. 144); and more recently: van der Linden, Mieke. *The Acquisition of Africa (1870–1914): The Nature of International Law* (Leiden: Brill, 2016), 215: 'The main modes for European States to acquire African territory were bilateral treaties effecting cession and establishing protectorates, more specifically colonial protectorates.'

148 Fiore, 'Du protectorat colonial' 1907 (n. 145), 151 (with abundant references to Westlake).

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The colonial protectorate, it goes without saying, also offered new legal advantages for the colonisers, as John Westlake explains:

> In the general haste to partition the globe effective occupation was beginning to seem to slow a process. If a complete title could only be gained by means of it, at least it might be possible for a power to put in a provisional claim to a region before it suited its policy even to enter on the gradual process of effective occupation. For this purpose the name of protectorate was extended to cases where the only possible subject of protection was a native population living in that primitive social condition ... . These are the colonial protectorates, and the name had the double advantage of giving a flavour of international law to a position intended to exclude other states before such exclusion could be placed on the ground of duly acquired territory, and at the same time of allowing that position to be abandoned with less discredit than attaches to the abandonment of sovereignty, if the country should be found less valuable or its retention more costly than had been hoped.[149]

The colonial protectorate thus constituted a liberal-imperialist synthesis of two previously irreconcilable ideas: the 'civilised' state (in)formally acknowledged the original sovereignty of the 'uncivilised' society to be protected,[150] especially when a 'treaty' was concluded; yet the new protectorate's essential aim was the future assimilation of the state-turned-colony. In a semantic perversion of its classic meaning, the name 'protectorate' here no longer serves to exclusively refer to the protection of the weaker (indigenous) society; it is also the protector that wishes to see itself protected against other potential interferences into 'its' – future – colony.

6 Conclusion: British Utilitarianism and the Nineteenth Century

What philosophical premisses and conceptions did British utilitarianism offer to international law in the nineteenth century; and what would be their legacy?

149 Westlake, John. *International Law – Part* I (Cambridge: Cambridge University Press, 1910), 122.

150 Johnston, W. Ross. *Sovereignty and Protection: A Study of British Jurisdictional Imperialism in the Late Nineteenth Century* (Durham: Duke University Press, 1973).

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Fundamentally, all utilitarians are empiricists – not idealist – that identify (positive) law with state institutions. The key source behind all law is always legislation, because only state legislatures can scientifically aggregate citizens' individual preferences to offer the greatest happiness to their greatest number. All non-state sources of law, by contrast, are viewed as metaphysical constructs that ought *not* be given legal status. The utilitarian legal project thus radically declasses not only (rationalist) natural law but also, and importantly, all customary law. Especially Bentham and Austin consider, in the word of Schauer, 'the very idea of customary law [as] essentially a contradiction in terms'.[151] For international law this means that only international treaties can be seen as proper sources of international law.

What will this mean for the normativity of international law in general? The grandfather of British utilitarianism, Jeremy Bentham, categorially denied all *a priori* anchorage for international law. Yet in the absence of a world legislator, what could guarantee its 'positive' and binding nature? Bentham's ambivalence with regard to this question, discussed in Section 2, is disappointing. Indeed, all that Bentham ultimately offers is the hope to ameliorate the formal qualities of international law through codification by treaty. Surprisingly, and from the very beginning, the Benthamite project thereby also revealed itself as non-cosmopolitan: for instead of applying his utilitarian individualism to the international sphere (by disaggregating nations into atomised humanity), Bentham accepts the 'natural' existence of nations as collective 'persons'.[152] Bentham's international law is indeed a law between nations that emphatically and expressly excludes all private individuals.

The first serious utilitarian attempt to explain the normativity of international law is made by James Mill. Mill thereby draws on public opinion or public morality to affirm its legal quality; and for him (as for Bentham), international law can therefore be proper 'law' in situations where its breach provokes a moral sanction. Yet because this is only possible where people are 'educated in a virtuous society',[153] only those societies that are capable of provoking an

151 Schauer, Frederick. 'The Jurisprudence of Custom'. *Texas International Law Journal* 48(3) (2012/13), 523–534.

152 The same 'methodological' nationalism can be found in Austin, *Province of Jurisprudence Determined* 1995 (n. 45), 242 (emphasis added): 'The good of the universal society formed by mankind, is the aggregate good *of the particular societies into which mankind is divided*: just as the happiness of any of those societies is the aggregate happiness of its single or individual members.' (emphasis added). It is, in my view, therefore wrong to overemphasize Bentham's and Austin's methodological individualism, *contra* Koskenniemi, *To the Uttermost Parts of the Earth* 2021 (n. 33), 682–685.

153 [Mill], *Law of Nations* (n. 37), 7.

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empirical moral sanction – that is: civilised societies – can guarantee and benefit from international law. The exclusionary potential of this moral-empiricist understanding of international law would soon be developed. As John Stuart Mill would later put it: '[T]he rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate. They cannot be depended on for observing any rules[.]'[154] The scope and binding nature of international law is henceforth linked to a (European) civilised society, which simultaneously guarantees the enforcement and legal character of international law.

With John Austin, a radical sovereigntist critique cast a serious doubt over the nature of international law; and his state-positivist scepticism would have a profound impact on British international thought in the twentieth century. However, in the nineteenth century, the ideas of another utilitarian become more dominant instead: the liberal philosophy of John Stuart Mill. This third-generation utilitarian thereby continues and rejects elements of the earlier utilitarian traditions. Mill shares Austin's doubt as to the proper legal quality of international law; but his most distinctive contribution here is nevertheless a relativist positive conception of international law. This relativist conception accepts that each epoch and place will develop its own international legal principles; and it can, therefore, clearly distinguish between legal principles governing 'civilised' states and legal principles governing 'non-civilised' societies.

In stark contrast to Bentham's anti-imperialism, J. S. Mill thereby comes to embrace a civilisational philosophy that defends an ever-greater empire of states (led by the liberal Great Britain) in which under-developed or 'immature' societies are placed under the 'protection' and 'tutelage' of that empire. Neither Bentham's proto-utilitarianism, nor Austin's analytical positivism, did arrive at this imperialist conclusion. For neither the utility principle nor the principle of habitual obedience are directly or substantively concerned with the degree of civilisation of human societies. Especially the relationship between (Austinian) positivism and liberal imperialism is, therefore, not as immanent as some have claimed.[155] In fact, as Section 4 has argued, the link

154 Mill, *A Few Words on Non-Intervention* 1984 (n. 77), 118.

155 Two decades ago, a direct and essentialist relationship was identified by Anghie, Anthony. 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law'. *Harvard International Law Journal* 40(1) (1999), 1–80. This position is however, in my view, fundamentally mistaken for several reasons. Descriptively, it assumes that Austinian positivism prevailed in the international law discourses in the nineteenth century – something that is historically inaccurate (see Schütze, *German Idealism after Kant* 2023 (n. 94)). Normatively, it is also difficult to agree, with Anghie's 'Finding the Peripheries', that '[w]ithin the axiomatic framework of [Austinian] positivism, which

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between utilitarianism and imperialism is not (Austinian) legal positivism but (Millian) civilisational moralism.

It is this *moral* imperialism that comes to justify the neo-colonial ambitions of Britain at the end of the nineteenth century; and this British model subsequently spread across Europe. The clearest collective manifestation of this European civilisational imperialism is the 1885 General Act though which the colonial protectorate becomes a core legal institution during this period. However, and as we saw in Section 5, British utilitarian thinking would also come to influence other aspects of nineteenth-century international law. These influences are, nevertheless, less comprehensive and less direct. For Bentham's original codification project is profoundly refracted in the work of Lieber, Bluntschli and Mancini; and the Austinian conception of private international law, as national 'conflict-of-laws', would, within nineteenth-century Europe, remain a predominantly British phenomenon.

In conclusion, then, can the nineteenth century be described as the 'British age' in which Bentham's conception of international law prevails and in which a 'European public law' is 'universalised'? Bentham's term 'international law' indeed becomes dominant in the course of the nineteenth century, yet this is – in my view – not because of Bentham's conception of international law. It is, *contra* Bentham, the phenomenal rise of the modern form of *private* international law that accelerates the semantic departure from the older 'Law of Nations'.[156] For the wider term 'international law' offered a new and better linguistic umbrella to both contain public and private international relations – something that Bentham's conception of international law was expressly opposed to! Similarly, while there undoubtedly were universal elements in the utilitarian project, the nineteenth century is, when compared to its predecessor not expanding the scope of international law. On the contrary, the century's emphasis on the foundational nature of legal custom, created by a (European) society of nations, shrinks its formerly rationalist-universal scope into a

decrees that European states are sovereign while non-European states are not, there is only one means of relating the history of the non-European world, and this the positivists proceed to do: it is a history of the civilising mission, the process by which peoples of Africa, Asia, the Americas, and the Pacific were finally assimilated into a European international law' (ibid., 7). This is however mistaken, because Austinian positivism would generally *not* deny the internal sovereignty of non-European states if habitual obedience to a 'primitive' sovereign existed, even if the latter was 'barbaric' and 'uncivilised'. There simply is, in my view, no civilisational imperialism that forms part of Austin's analytic project; and it is therefore categorically wrong to claim that the distinction between civilised and uncivilised societies was 'a fundamental tenet of [Austinian] positivist epistemology', ibid., 25.

156 Schütze, *German Idealism after Kant* 2023 (n. 94).

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historicist-regional one. British utilitarianism is here a positivist-universalist counter-project to the German idealism that shaped nineteenth-century international law.

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