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‘Victorian’ Traditions: British International Law Scholarship, 1830–1914

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Abstract

What are the philosophical and normative orientations of British international law scholarship during the Victorian era? This article explores and answers this question in three complementary steps. It begins with an analysis of the ‘public’ international law textbooks after 1830 to show that, instead of a single legal tradition, there coexisted three competing traditions during this period: a ‘naturalist’, an ‘historicist’ and a ‘voluntarist’ tradition. These three Victorian traditions will, in a second step, be studied in the context of ‘private’ international law—a discipline that developed and received its name during this period. A third section finally offers a detailed examination of the transformative work of Lassa Oppenheim, which straddled the Victorian nineteenth century and the ‘modern’ twentieth century. In revisiting the normative project(s) of Victorian international law, the article hopes to critique three prominent views in the contemporary academic literature. The first view holds that voluntarist State positivism exercised a dominant influence on British international law scholarship after 1830; a second view has claimed, relatedly, that during this period an idiosyncratic ‘English’ approach to international law emerged; and a third view has famously suggested that there was a ‘radical’ break in the discipline of international law around 1870.

Keywords: international law; natural law; Historical School; positivism; nineteenth century; Savigny; Westlake; Oppenheim; Koskenniemi

1. Introduction: a British Victorian tradition?

Was there a specifically ‘Victorian’ tradition of international law in nineteenth-century Britain? At the start of that century, two naturalist traditions—one absolute, one relative—had continued to circulate among British scholars. The former tradition can be found in James Mackintosh’s *Discourse on the Study of the Law of Nature and Nations* (1799)—an oft-overlooked monument to classic scholarship.¹ A more relativist

¹ J Mackintosh, *Discourse on the Study of the Law of Nature and Nations* (Lincoln’s Inn 1799). The book was reprinted several times in the first half of the nineteenth century.

conception of natural law, by contrast, is given voice in the work of Robert Ward,² who conceived of different international law orders—in the plural—that were to apply to different ‘sets’ or ‘classes’ of nations.

Neither of these two traditions would, however, prevail in the British nineteenth century, for both remained within a pre-Enlightenment past, whose antiquated principles even a post-1815 ‘restoration’ was unable to fully resurrect. After the middle of the nineteenth century, and especially in its last third, natural law thinking seemed dead. What normative ideas came to replace it? For centuries, much of English legal scholarship on international law had extensively drawn on foreign writers;³ and, from the 1820s onwards, many of the key ideas now came from the United States (US).⁴ Writing in 1839, William Manning, author of the first systematic British textbook on the law of nations, could therefore justly lament:

It is indeed singular that, in the multiplicity of works which are published on almost every subject, we have never had a systematic treatise on the Law of Nations by an English writer. There are two productions on this subject in our language, both of which I should be proud to claim as belonging to our literature, but both are written by Americans ... The fact of the systematic writers on the Law of Nations having been all foreigners, is, I think, chiefly attributable to the similarity of the method of studying the Law of Nations, and that adopted in the study of the Roman Law, the basis of jurisprudence on the continent.⁵

Taking up Manning’s gauntlet, many more British textbooks on international law did finally appear during the Victorian period—a period symbolically framed by the reign of its eponymous Queen (1837–1901). What characterises this Victorian period of British international law, and what are its main authors and ideas? There are surprisingly few studies dedicated to this issue.⁶ This literary gap is especially remarkable, because a classic treatise on the history of international law memorably

² R Ward, *An Enquiry into the Foundation and History of the Law of Nations in Europe* (Butterworths 1795) vol I. For an analysis of Ward’s general conservatism, see D Panizza, *Genesi di una Ideologia: Il Conservatorismo Modern di Robert Ward* (Cedam 1997).

³ Up until the early decades of the nineteenth century, E de Vattel, *The Law of Nations* (1797) appears to have remained the dominant textbook in Britain: J Pitts, *Boundaries of the International: Law and Empire* (Harvard University Press 2018) 119. A newly edited, and swiftly famous, edition of Vattel was published in 1834 by Joseph Chitty: see E de Vattel, *The Law of Nations* (Joseph Chitty ed, T&JW Johnson 1834).

⁴ For a discussion of these early nineteenth-century American writers, especially Kent and Wheaton, see MW Janis, *America and the Law of Nations 1776–1939* (OUP 2010) chs 2–4.

⁵ WO Manning, *Commentaries on the Law of Nations* (Milliken and Clark 1839) v–vi. The two American authors referred to are Kent and Wheaton.

⁶ For earlier and excellent analyses of the British conceptions of international law in the nineteenth century, see DHN Johnson, ‘The English Tradition in International Law’ (1962) 11 ICLQ 416; C Warbrick, ‘The Theory of International Law: Is There an English Contribution?’ in P Allott et al (eds), *Theory and International Law: An Introduction* (British Institute of International and Comparative Law 1991) 49; C Sylvest, ‘International Law in Nineteenth-Century Britain’ (2004) 75 BYIL 9; J Pitts, ‘Boundaries of Victorian International Law’ in D Bell (ed), *Victorian Visions of Global Order* (CUP 2009) 67. See especially M Lobban, ‘English Approaches to International Law in the Nineteenth Century’ in M Craven, M Fitzmaurice and M Vogiatzi (eds), *Time, History and International Law* (Brill 2006) 65; and, most recently, D Armitage and I de la Rasilla, ‘“The Most Neglected Province”: British Historiography of International Law’ in R Lesaffer and A Peters (eds), *The Cambridge History of International Law: The Historiography of International Law* (CUP 2024) vol I, 293.

brands the nineteenth century the 'British age' (1815–1919);⁷ and one of the most well-known contemporary historians of the subject has famously claimed that modern international law (1870–1960) was shaped by a 'shared Victorian conscience',⁸ which animated the 'Victorian tradition' of international law until the middle of the twentieth century.⁹

What are the normative and legal manifestations of this Victorian tradition? The article explores this question for British international law scholarship in the nineteenth century. It starts with a discussion of 'public' international law scholarship between 1830 and 1914 in Section 2. It aims to show here that, instead of one, there were, in fact, *three* distinct legal traditions during this period: an early Victorian naturalist tradition was complemented by a mid-Victorian historicist tradition that itself came to compete with a late Victorian voluntarist tradition. These three Victorian traditions will be further explored and compared in Section 3 in the context of 'private' international law. Section 4, by contrast, offers a closer analysis of the transformative work of Lassa Oppenheim, whose intellectual evolution, it will be argued, announces and reflects a radical break in the 'sensibility' (Koskenniemi) of international lawyers around '1914' and the outbreak of the Great War. Abandoning his earlier Victorian syncretism, Oppenheim indeed ended the nineteenth century and opened the 'modern' twentieth century for British international law.

In revisiting the normative project(s) of Victorian international law scholars, as presented in British textbooks of the era, this article aims to critically engage with three established views in the academic literature. The first view holds that State positivism, especially that of the British utilitarians, exercised a decisive influence on British international law scholarship after 1830.¹⁰ A second view has claimed, relatedly,

⁷ W Grewe, *The Epochs of International Law* (De Gruyter 2000) pt 4.

⁸ This is how Koskenniemi describes the Victorian tradition: see M Koskenniemi, 'Hersch Lauterpacht (1897–1960)' in J Beatson and R Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth Century Britain* (OUP 2004) 601, 603.

⁹ M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP 2001) 3–4. Nevertheless, and as the late Robert Cryer acutely observed in R Cryer, 'Déjà Vu in International Law' (2002) 65 MLR 931, 933, the great irony behind this impressive book is that it hardly deals with Victorian English lawyers: 'British international lawyers are largely absent from [Koskenniemi's] survey.' An extended engagement with British international law scholars during the nineteenth century is equally lacking in M Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870* (CUP 2021), in which the Victorian period is barely discussed in a chapter on 'England' that formally ends around 1830. The book nonetheless extensively discusses the utilitarian positivists (674–87), and it also offers a brief seven-page overview of British international law scholars from Mackintosh to Phillimore.

¹⁰ This position has been taken, for example, by S Neff, *Justice Among Nations: A History of International Law* (Harvard University Press 2014). Neff characterises the nineteenth century as the 'positive century' and, while he distinguishes between three variants of positivism (226), all three are in fact seen as variants of State positivism, and in which the 'seminal figure was the British lawyer John Austin' (223). For a similar statement, as regards at least the late Victorian era, see A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2004) 44: 'The English jurists of the late nineteenth century ... were most influenced by John Austin, the foremost spokesman for positivism at the time ... [I]nternational lawyers based their legal framework on sovereign behaviour and, like Austin, insisted on the distinction between law and morality or justice.' For a recent discussion of the British utilitarian positivists, including John Austin, see R Schütze, 'British Utilitarianism after Bentham: Nineteenth-Century Foundations of International Law II' (2024) 26 JHistIntL 243.

that, after 1850, an idiosyncratic and particularly British approach to international law emerged that was ‘distinctive from the continental one’.¹¹ Third and finally, it has been argued that there was a ‘radical’ break in the field of international law around 1870, whose reformist sensibility was ‘distinctly different’ from the first half of the nineteenth century and which lasted—through Lauterpacht in Britain—until ‘around 1960’.¹² The conclusion argues that all three views must be qualified, if not completely abandoned.

2. Victorian traditions I: foundations of public international law

With the onset of the Victorian era in the late 1830s, three British conceptions of international law coexisted in three overlapping phases. An early Victorian tradition had remained rooted in natural law and simply equated the law of nations with the law of nature, whose verity and authority ultimately derived from ‘God’ (Section 2.1). In the middle of the nineteenth century, a secular metaphysical conception was added. This second tradition borrowed from the German Historical School and its normative belief that all positive law ultimately derived from the historical morality of a particular society (Section 2.2).¹³ Finally, around 1880, a State positivist school emerged that rejected all religious and metaphysical foundations and attempted to justify the normativity of international law solely through the voluntary consent of sovereign States (Section 2.3). This section presents and analyses each of these three Victorian traditions, and their normative foundations, in the context of public international law. The next section will do the same in respect of private international law.

2.1. The ‘naturalist’ tradition: the re-Christianisation of international law

The unofficial starting point for a British–Victorian conception of international law is Manning’s *Commentaries on the Law of Nations* (1839).¹⁴ What are its normative ingredients? Drawing on older European and modern American authors,¹⁵ it expressly rejects Austinian positivism and categorically affirms the legal quality of international law.¹⁶ For Manning, there undoubtedly exists a law of nature and that law is, to him, ‘identical with the will of God’.¹⁷ What is the will of God? The will of God is to make

¹¹ Lobban (n 6) 66: ‘In what follows, it will be suggested that English approaches to international law after 1850 were indeed distinct from continental ones.’

¹² Koskenniemi, *The Gentle Civilizer of Nations* (n 9) 3–4. Koskenniemi has recently confirmed that the central point behind the ‘Gentle Civilizer’ was that ‘modern international law arose in the last third of the nineteenth century’: M Koskenniemi, ‘The Law of International Society: A Road Not Taken’ (2024) 74 (Supplement 1) UTLJ 107.

¹³ This historical morality will, of course, and especially for European societies, heavily overlap with Christian morality and the first and second legal traditions will therefore partly coincide. A good example of this overlap is the work of Phillimore, who can be considered a ‘joint’ representative of the first and second Victorian traditions.

¹⁴ Manning (n 5).

¹⁵ Manning refers to von Martens, Klüber, Dumont, Ompteda and, of course, also to Kent and Wheaton. He singles out Martens as the most important influence (ibid 39: ‘[p]erhaps the most valuable writer on the law of nations’).

¹⁶ ibid 5. John Austin is extensively discussed and rejected.

¹⁷ ibid 58.

mankind happy; and the foundations of Manning's *Law of Nations* therefore seem, at first, rooted in Bentham's utilitarian ideas:

[Everything] around us proves that God designed the happiness of his creatures. It is the will of God that mankind should be happy. To ascertain the will of God regarding any action, we have therefore to consider the tendency of that action to promote or diminish human happiness. The right application of this principle, commonly known as the principle of utility, is identical with the law of nature, the laws prescribed by human nature being obviously the laws tending to human happiness ... The bringing of this principle into general circulation is due to the writings of Bentham, and constitutes his real claim to be regarded as an improver of the science of morals. Bentham's classifications may be regarded as unnecessary, and his works may, and probably will, fall into disuse; but the benefit he conferred on moral science should never be forgotten. He was the propagator of a doctrine of which he expressly disclaims being the originator; but it is to him that we owe the common use of the most correct, and readiest, test of moral action.¹⁸

Yet ultimately antithetical to Bentham, and heavily influenced by William Paley (and Robert Ward),¹⁹ Manning believed that 'Christianity reveals to us a general system of morality' and that '[i]t is as an "authoritative publication of natural religion" that Christianity must be looked to in international relations'.²⁰ This contrasts strikingly with the relativist Ward, because the law of Christianity is no longer seen as solely imposing legal obligations on Christian nations themselves; it is 'the *law of nature* – obligations from which none can be exempt'.²¹ And, interestingly, while Manning did accept custom and convention as positive sources of international law, the relationship between the divine law of nature and positive international law was hierarchically defined: '[t]he Divine law commands the observance of the Positive law; and the latter cannot be disregarded without violating the former'.²²

This new Christian 'universalism' can also be detected in Phillimore's mid-century *Commentaries upon International Law* (1854).²³ Not only are the 'precepts of Natural Law' normatively considered to be 'obligatory upon Heathen States',²⁴ but also the 'principles of international justice' again assume a strong Christian flavour. This re-Christianisation of international law was reflected in the sources of international law that Phillimore identified as follows:

1. The Divine Law, in both its branches – namely: The principles of Eternal Justice implanted by God in all moral and social creatures, of which nations are the aggregate, and of which governments are the International organs[.]
2. The Revealed Will of God, enforcing and extending these principles of Natural Justice.

¹⁸ *ibid* 58–59.

¹⁹ The former was famous for his W Paley, *Natural Theology or Evidences of the Existence and Attributes of the Deity* (Faulder 1802), while the latter had published R Ward, *Inquiry into the Foundation and History of the Law of Nations* (Wogan 1795).

²⁰ Manning (n 5) 65.

²¹ *ibid* 67 (emphasis in original).

²² *ibid*.

²³ R Phillimore, *Commentaries upon International Law* (Johnson 1854).

²⁴ *ibid* 60. The same position is espoused in the second edition: see R Phillimore, *Commentaries upon International Law* (2nd edn, Butterworths 1871) 22–23.

3. Reason, which governs the application of these principles to particular cases, itself guided and fortified by a constant reference to analogous cases and to the written reason embodied in the text of the Roman Law, and in the works of Commentators thereupon.
4. The universal consent of Nations, both as expressed (1) by positive compact or treaty, and (2) as implied by usage, custom and practice[.]²⁵

This mix of divine and positive international law also resurfaces in *Halleck's International Law* (originally published 1861 in the US but widely read in the United Kingdom),²⁶ which offers a standard account of the evangelical religiosity found in the Victorian age. The divine law is here understood as 'the rules of conduct prescribed by God to his rational creatures, and revealed by the light of reason, or the sacred scriptures', which are—following Grotius—themselves conceived of as 'natural law'.²⁷ This natural law must, it is nevertheless admitted, often be modified when applied to States; and it will therefore—following Vattel—need to be complemented by a positive law of nations in the form of international treaties and international custom.²⁸ Yet the relationship between the two bodies of natural and positive law is clear: 'Customs which are lawful and innocent are binding upon the States which have adopted them; but those which are unjust and illegal, *and in violation of natural and Divine law, have no binding force*.'²⁹

The most idiosyncratic illustration of this Victorian re-Christianisation of international law, however, can be found in the work of James Lorimer.³⁰ This closet Hegelian considered the law of nature to be 'realised in the relations of separate nations', and his entire *Law of Nations* was therefore centred on the (Hegelian) doctrine of recognition;³¹ yet Lorimer explicitly linked his idea of the 'reciprocating will' to religious creeds and, in particular, Christianity:

It is Christianity alone which, in opening humanity a new avenue to knowledge of God's will, and of those ultimate and absolute laws which lie behind and beyond all religions, does not close the avenue to this knowledge which nature has opened to mankind. In claiming to be a direct revelation to humanity, it does not repudiate the indirect revelation though humanity. On the contrary, it is on its coincidence with the latter, so far as the

²⁵ Phillimore (n 23) 86. For essentially the same position in the second edition, see Phillimore (n 24) 67. It was the primacy of divine law that allowed Phillimore 'easily to counter the position of John Austin', which he resolutely rejected: see JE Noyes, 'Christianity and Theories of International Law in Nineteenth-Century Britain' in M Janis and C Evans (eds), *Religion and International Law* (Brill 2004) 235, 250. Phillimore, however, also endorsed elements of the Historical School and, even in the first edition, refers to Savigny and Puchta.

²⁶ The following editions were, respectively, published: S Baker, *Halleck's International Law* (2nd edn, Paul 1878); (3rd edn, Paul 1893); (4th edn, Paul 1908). All quotations are taken from the second edition.

²⁷ *ibid* 42.

²⁸ *ibid* 44.

²⁹ *ibid* 46 (emphasis added). Identical passages can be found, for example, in the third edition: Baker (3rd edn) (n 26) 50–51.

³⁰ J Lorimer, *The Institutes of The Law of Nations* (Blackwood 1883) vol I. For an excellent discussion of the ideas behind Lorimer's conception of international law, see Noyes (n 25) 238–47. See also M Koskeniemi, 'Race, Hierarchy and International Law: Lorimer's Legal Science' (2016) 27 EJIL 415; K Knop, 'Lorimer's Private Citizens of the World' (2016) 27 EJIL 447.

³¹ Lorimer (n 30) 1, 3. For Lorimer's Hegelian leanings, see J Lorimer, *The Institutes of Law* (Clark 1872) where Hegel is discussed, *inter alia*, on pages 2, 19, 22, 36, 63, 74, 114, 240, 246, 267, 275, 281 and 443.

latter goes, that Christianity mainly bases its claim to our further acceptance. Its divinity is guaranteed to our nature by the divinity which addresses us through our nature.³²

These few illustrations, drawn from this first Victorian tradition of international law, should caution any attempt to characterise this period as predominantly influenced by State positivism—whether in its collective or individualist variants.³³ Nineteenth-century British international law scholarship did, indeed, retain a natural law undercurrent until the last quarter of the nineteenth century;³⁴ and, as will be seen in the next section, a similarly strong metaphysical rebuttal of State voluntarist ideas came from a second normative conception that rose to prominence after 1848: legal historicism.

2.2. The 'historicist' tradition: the rise of the German Historical School

By the middle of the nineteenth century, the religious foundations of British international law encountered a competitor: 'the traditional, religiously based notion of international law' had henceforth to coexist with 'other, no less moralistic but more secular notions of the subject'.³⁵ This new metaphysical competitor had been introduced by James Reddie. Reddie agreed with Bentham that a classic 'naturalism' could no longer be justified,³⁶ yet he disagreed with the utilitarian positivist that 'such a *Jus naturae* has no existence whatever'.³⁷ To explain this philosophical middle ground, Reddie drew on the German Historical School,³⁸ and the clearest expression of this intellectual debt is given in a series of articles, published anonymously between 1848 and 1850, in the *Law Review and Quarterly Journal of British and Foreign Jurisprudence*.³⁹

³² Lorimer (n 30) 114.

³³ Contra, Neff (n 10).

³⁴ For a remarkable PhD thesis aiming to unearth the 'vibrant natural law discourse in nineteenth century Britain', see G Costello, *Natural Law and Natural Rights in Nineteenth Century Britain* (PhD Thesis, University of Sydney, 2014).

³⁵ C Sylvest, *British Liberal Internationalism, 1880–1930: Making Progress?* (Manchester University Press 2009) 66.

³⁶ J Reddie, *Inquiries Elementary and Historical in the Science of Law* (Longman 1840) 74.

³⁷ *ibid* 76.

³⁸ For a discussion of the central premisses of the German Historical School, see R Schütze, 'German Idealism after Kant: Nineteenth-Century Foundations of International Law' (2023) 25 *JHistIntL* 105; J von Bernstorff and M Mayer, 'The Historical School and German International Legal Thought in the 19th Century' (2023) 25 *JHistIntL* 311. For an overview of the influence of the Historical School on international law in general, see J von Bernstorff and R Schütze (eds), *The Historical School and International Law: A Forgotten Legacy* (OUP forthcoming).

³⁹ Five instalments were published between 1848 and 1850 in various issues of the *Law Review and Quarterly Journal of British and Foreign Jurisprudence*. The author remains anonymous yet indirectly reveals himself, in the fourth instalment, as James Reddie—the author of *An Historical View of the Law of Maritime Commerce* (Blackwood 1841). Authorship of these works will thus be referred to in square brackets. See also the preface to J Reddie, *Inquiries in International Law: Public and Private* (Blackwood and Sons 1851) vi. It is surprising that Koskenniemi missed these clear pointers to the author's real identity: see Koskenniemi, *To the Uttermost Parts of the Earth* (n 9) 692 fn 377.

What is the nature of international law? To Reddie, international law is ‘real’ law,⁴⁰ whose normative foundation is described as follows:

[I]f, guided by observation and experience, we pass from the contemplation of individuals, living together in civil society, to the contemplation of such individuals, so associated and congregated, as constituting so many separate communities or states, we find, that among the latter also, as among the former, certain juridical or legal relations exist, or arise, in certain circumstances, anterior to, and independent of, any exercise of the national will ... And many, if not most, of these juridical or legal relations, and the concomitant or consequent rights and obligations, are simple and obvious, and are almost intuitively perceived or apprehended, and almost instinctively felt, by the ordinary population generally of whom states are composed. *They come to exist in the consciousness or conviction of the people, just in the same manner, in which M. de Savigny shows the private rights and obligations of individuals living in civil society are unfolded, in the gradual progress of the internal jurisprudence of states.*⁴¹

The collective ‘consciousness’ of people(s) within international civil society is here seen as the fountain of positive international law; and with this novel reconceptualisation, divine or natural law is replaced by customary law as the central source of international law.⁴² But importantly, it is not actual custom, as an empirical phenomenon, that constitutes the basis of international law; the true—idealistic—foundation of all international law is the *ratio juris* underlying custom: the collective consciousness itself.⁴³ It is legal reason that creates all legal or judicial relations among nations. These relations are ‘antecedent to, independent of, and not created by, human legislation’; and it consequently follows that, despite the absence of legislative or judicial powers above States, there ‘exist among nations, legal relations, rights and obligations, similar or at least analogous to those, which are recognised among individuals in the private law of a State.’⁴⁴

⁴⁰ [J Reddie], ‘International Law’ (1848) 9 Law Review and Quarterly Journal of British and Foreign Jurisprudence 22, 34: ‘The guarantees or sanctions of international law are more slender, more feeble, than those of public or constitutional law, and much more insecure than those of internal private law. But this difference does not affect or alter the essence or nature of the right, or law.’

⁴¹ *ibid* 36 (emphasis added).

⁴² See, e.g. R Wildman, *Institutes of International Law* (Benning 1849) vol I, 1: ‘International law is the customary law, which determines the rights and regulates the intercourse of independent states in peace and war ... Hence neither do treaties form any part of its elements; nor do the rules of abstract propriety, which are commonly called the law of nature.’

⁴³ [Reddie] (n 40) 43 (emphasis added): ‘Along with M. Von Savigny and the late acute Professor Puchta, we view the long, successive, uninterrupted, and uniform repetition of the act, which constitutes the usage or custom, as clearly indicating and affording satisfactory evidence of the existence of the notion and feeling of right or legality in the consciousness and conviction of the great majority of the population, of whom the assemblage of nations is composed. In the uniformity of a long continued and permanent mode or course of action, we recognise its common root, as opposed to mere accident or chance—the firm belief of the people. And custom is thus the sign or mark, by which we recognise positive or established law, not its original foundation.’ See also [Reddie] (n 40) 37, 40; Reddie, *Inquiries in International Law* (n 39) 255.

⁴⁴ Reddie, *Inquiries in International Law* (n 39) 117.

With this spectacular introduction of the work of Savigny, British international law scholarship comes under the spell of the German Historical School.⁴⁵ For once international society—and not the State or States—is seen as the origin or fountain of international law, there positively can be—contrary to Austin's view—international 'law' even without a sovereign or State. In other words, and to quote Phillimore once more:

It is sometimes said that there can be no law between nations because they acknowledge no common superior authority, no international executive capable of enforcing the precepts of International Law. This objection admits of various answers: First, it is a matter of fact that states and nations recognize the existence and independence of each other; *and out of a recognized society of nations, as out of a society of individuals, Law must necessarily spring. The common rules of right approved by nations as regulating their intercourse are of themselves, as has been shown, such a law.* Secondly, the contrary position confounds two distinct things; namely, the physical sanction which law derives from being enforced by superior power, and the moral sanction conferred on it by the fundamental principle of right; the error is similar in kind to that which has led jurists to divide moral obligations into perfect and imperfect.⁴⁶

This view is, *mutatis mutandis*, shared by Twiss:

Savigny has observed, that "there may exist between different Nations a common consciousness of Right similar to that which engenders the Positive Law of a particular Nation. The foundation of this community of feeling rests partly on a community of origin, partly on common religious convictions; and upon this Community of feeling has been built up a Positive Law of Nations, as it especially exists amongst the Christian States of Europe".⁴⁷

International law is therefore 'law' because it is based on a 'community of feeling' and the Austinian objection that there can be no law without a sovereign is flatly rejected.⁴⁸ This international 'community' or 'society' conception is further reinforced by Maine's historical studies,⁴⁹ but it fell to Westlake—the most famous Victorian international lawyer—to sum up this philosophical tradition conclusively: 'whatever merit Austin's

⁴⁵ On the general influence of Savigny on British law during this period, see P Stein, *Legal Evolution: The Story of an Idea* (CUP 2009) 72ff.

⁴⁶ Phillimore (n 23) 91 (emphasis added).

⁴⁷ T Twiss, *Law of Nations* (Longman 1861) 126. This is repeated, verbatim, in T Twiss, *Law of Nations* (2nd edn, Clarendon Press 1884) 161. See also AC Boyd (ed), *Wheaton's Elements of International Law* (Stevens 1878) 19: 'According to Savigny: "there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe"'

⁴⁸ Twiss (1st edn) (n 47) 140–41, especially 140: 'It is however not a valid objection to the existence of juridical relations between Nations, that they are not, like the domestic law of a State, defined by the Sovereign Power, or that they are not enforced by the executive authority of a political Superior.' This is repeated in Twiss (2nd edn) (n 47) 175–76.

⁴⁹ On Maine's influence on Victorian jurisprudence in general, see RC Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (CUP 1988). For Maine's views on Austin, see especially W Rumble, 'John Austin and His Nineteenth Century Critics: The Case of Sir Henry Sumner Maine' (1988) 39 NILQ 119.

analysis may have for the law of a country, his treatment of international matters appears to be inadequate' because 'the nation with its law is merely the strongest case in point; and that another case, not less real because weaker, is presented by the society of states with its international law'.⁵⁰

The Austinian challenge is here met by postulating—following Savigny—the co-constitutive function of 'society' and 'law'. International law exists because there is an international society: 'When we assert that there is such a thing as international law, we assert that there is a society of states: when we recognise that there is a society of states, we recognise that there is international law'.⁵¹ Westlake's famous later work *International Law* (1910), consequently, redefines its subject-matter as 'the law of the society of states or nations'.⁵²

But did such an international society really exist? This was, of course, 'the' critical question, for:

when international law is claimed as a branch of law proper, it is asserted that there is a society of states sufficiently like the society of men, and a law of the society of states sufficiently like state law, to justify the claim, not on the ground of metaphor, but on the ground of likeness to the type.⁵³

And looking at the facts of international life, Westlake had no doubts: 'states live together in the civilised world substantially as men live together in a state, the difference being one of machinery [only], and we are entitled to say that there is a society of states and a law of that society'.⁵⁴

This emphasis on international society elevated, according to Westlake, custom and reason—not treaties—to its normative centre: '[c]ustom and reason are the two sources of international law'.⁵⁵ Custom is thereby defined as 'that line of conduct which the society has consented to as obligatory';⁵⁶ and, fundamentally, consent here does not refer to individual State consent, as it is 'not necessary to show that the state in question has assented to the rule'.⁵⁷ What is, instead, meant is the 'consent of the *international society*', that is: 'the *general consensus* of opinion within the limits of European civilisation' reconstructed by 'reason'.⁵⁸

⁵⁰ 'Chapters on the Principles of International Law' in J Westlake, *The Collected Papers of John Westlake on Public International Law* (L Oppenheim ed, CUP 1914) xxii–xxiii, 11–23.

⁵¹ *ibid* 3.

⁵² J Westlake, *International Law: Part I, Peace* (CUP 1910) 5.

⁵³ *ibid* 6.

⁵⁴ *ibid* 7.

⁵⁵ *ibid* 14.

⁵⁶ *ibid* 14.

⁵⁷ *ibid* 16 (emphasis added). See also Westlake (n 50) 78.

⁵⁸ Westlake (n 52) 15 (emphasis added). The idea of reason as a direct source of international law may here best be understood as referring not to classic natural law theory but to the 'synthetic' method of the Historical School in which reason abstracts and perceives general principles from custom. It is in the very same spirit that Roman law is seen as the best guide in many cases, because it is seen as written reason: Westlake (n 52) 15.

With international treaties as a formal source of international law excluded,⁵⁹ Westlake consequently sees international law as a *non*-voluntary law: 'This is so because the international society is not a voluntary but a necessary one, and the general consensus of opinion among its members is the only authority that can make rules for it.'⁶⁰ To many Victorian authors, including Westlake, the emphasis on custom (and reason) thereby also implied a monistic relationship between international and national law, with customary international law especially being seen as an integral part of the common law of England.⁶¹ It is this historicist-monistic common law position that would become the 'gold standard' in the last quarter of the British nineteenth century.⁶²

2.3. The 'voluntarist' tradition: the rise of State positivism after 1870

The historicist conception of international law had successfully challenged the earlier naturalist tradition—even if both schools continued to coexist for some time. The ultimate decline of the naturalist school was only sealed when a new 'positivistic' challenge made its first appearance in the 1870s.⁶³ This third approach began to radically question *all* non-voluntarist foundations, whether religious or metaphysical, that went beyond the consent of sovereign States. Part and parcel of this State positivist tradition would be the rise of the international treaty as the primary source of international law; and the concomitant marginalisation of customary law therefore also challenged the metaphysical assumptions behind the Historical School.

How did this new voluntarist tradition gain momentum and force? Holland's *Elements of Jurisprudence* (1880) represents a first major assault on the 'legal' and 'public' nature of international law.⁶⁴ It was complemented by Hall's *Treatise on*

⁵⁹ To Westlake, treaties were merely evidence of a consented practice or customary rule (ibid 16). This exclusion of international treaties would, subsequently, be severely criticised by Oppenheim in a footnote in L Oppenheim, *International Law: A Treatise* (Longmans 1905) vol I, 22 fn 1.

⁶⁰ Westlake (n 50) 79.

⁶¹ J Westlake, 'Is International Law a Part of the Law of England?' in Westlake (n 50) 498.

⁶² See especially R Pound, 'Fifty Years of Jurisprudence' (1937) 50 HarvLRev 557, 564: '[T]he historical school had become the dominant school towards the end of the last century'. Through Higgins, and others, it indeed remained the dominant school until 1914: see AP Higgins, *The Binding Force of International Law* (CUP 1910) 2–6, which affirms the binding nature of international law, against all Austinian doubts, as follows: 'Now it may be as well at once to admit that viewing International Law from the standpoint of students adopting the principles of Hobbes and Austin it lacks the marks of Positive Law which they predicate ... Notwithstanding the absence of these factors I am prepared to contend that the body of principles known as International Law, or the Law of Nations, is fully entitled to the name of Law, and that it is of binding force among the nations of the civilized world ... International Law is then the law of the society of states, for independence and interdependence were soon found to be correlative ... Custom is the prime source of International Law.' See also F Pollock, 'The Sources of International Law' (1902) 2 ColumLRev 511.

⁶³ L Oppenheim, *International Law: A Treatise* (3rd edn, Longmans 1920) vol I, 115: 'From the seventies of the nineteenth century the influence of the downfall of the theory of the Law of Nature becomes visible in the treatises on the Law of Nations, and therefore real 'positivistic' treatises make their appearance.'

⁶⁴ The first edition was published in 1880. The following section will draw on the enlarged second edition: TE Holland, *Elements of Jurisprudence* (2nd edn, Clarendon Press 1882).

International Law (1880),⁶⁵ according to which all international law depended on the consent of sovereign States:

[States] are independent beings, subject to no control, and owning no superior; no person or body of persons exists to which authority has been delegated to declare law for the common good; *a state is only bound by rules to which it feels itself obliged in conscience after reasonable examination to submit.*⁶⁶

For Hall, an exploration of the binding rules of international law must consequently start—and end—with national acts that offer evidence of consent;⁶⁷ and the clearest evidence is—of course—offered by international treaties.⁶⁸

Surprisingly, this new State voluntarism still seeks—despite the centrality of State sovereignty—to affirm the legal quality of international law.⁶⁹ Hall thus expressly rejects Austin's criticism of the legal nature of international law (though he admits that 'there is an element of truth in [his] criticism'), because he finds—consistent with the Historical School—'that the proper scope of the term law transcends the limits of the more perfect examples of law.'⁷⁰ International law can, therefore, be considered as positive law and not merely as positive morality.⁷¹ An almost identical argument can also be found in Lawrence's *Essays on Some Disputed Questions in Modern International Law* (1885) as well as his later *Principles of International Law* (1895).⁷²

What, however, is the difference between international 'law' and international 'morality'? To Lawrence (and Hall), the difference lies in the fact that States have, as regards the former, individually consented to particular norms.⁷³ Law is binding because, and only to the extent that, each and every State has given its consent. Moreover, and importantly, the legal and moral spheres of international life must be kept distinct: 'the question what are the rules of International Law on a given subject and the question whether they are good or bad should be kept distinct' because '[t]hey differ in their nature and in their method of solution, and nothing but harm can come of any attempt to unite them.'⁷⁴ This clear-cut separation between (international) law and (international) morality will become a core feature of all future positivist approaches to international law.⁷⁵

⁶⁵ WE Hall, *A Treatise on International Law* (Clarendon Press 1880).

⁶⁶ *ibid* 4 (emphasis added).

⁶⁷ *ibid* 5.

⁶⁸ *ibid* 7–11.

⁶⁹ It is only Hall's second edition (1884) that starts to expressly deal with this question: see WE Hall, *A Treatise on International Law* (2nd edn, Clarendon Press 1884) 14–16.

⁷⁰ *ibid* 14.

⁷¹ *ibid* 16.

⁷² TJ Lawrence, *Essays on Some Disputed Questions in Modern International Law* (2nd edn, Deighton 1885) 39–40. See also TJ Lawrence, *The Principles of International Law* (Macmillan 1895) 12: 'It never seems to have occurred to Austin that any definition of law other than his own could be constructed with the slightest approach to scientific accuracy. But in truth, his results are obtained by seizing upon one element only in the ordinary conception of law, and elaborating it to the exclusion of all the rest.'

⁷³ *ibid* 16.

⁷⁴ *ibid* 23.

⁷⁵ For a famous British twentieth-century expression of the positivist 'separation thesis', see HLA Hart, *The Concept of Law* (Clarendon Press 1961).

3. Victorian traditions II: foundations of private international law

Turning now to the nineteenth-century foundations of private international law, the beginnings of this branch of law in the Victorian period also emanated from abroad and an American jurist: Joseph Story. This constitutional law scholar and US Supreme Court judge had published his influential *Commentaries on the Conflict of Laws* in 1834.⁷⁶ Lamenting the lack of a systematic treatise in English, while criticising '[t]he civilians of continental Europe' for their overly 'theoretical distinctions' and 'metaphysical subtleties',⁷⁷ Story's fundamental starting point is the principle that 'every nation possesses an exclusive sovereignty and jurisdiction within its own territory'.⁷⁸ To him, it is clear that 'whatever force and obligation the laws of one country have in another, depend solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent'.⁷⁹

From this State voluntarist perspective, private international law is neither 'international' nor 'private'; instead, it is a branch of national public law, which determines to what extent judicial authorities are to apply foreign law. Story, however, did not deny that there were moments when a State morally ought to recognise and apply foreign law within its territory. However, this was not a legal obligation but derived from 'comity';⁸⁰ and this duty of comity was, as an 'imperfect obligation', for each State to judge for itself.⁸¹

This quasi-sovereignist solution was to become, with some qualifications, the early Victorian solution too, which can be found, for example, in William Burge's *Commentaries on Colonial and Foreign Laws* (1838).⁸² Yet with the rise of the Historical School in the mid-Victorian period, a new 'international society' conception of private international law gradually gained ground (Section 3.1). That this historicist tradition nevertheless ultimately fails in Great Britain is the result of a late Victorian constitutional scholar, Albert V Dicey (Section 3.2).

3.1. The rise of 'Savignian' private international law around 1850

The rise of the Historical School in Germany (and elsewhere) had reignited the idea of an international law that directly applied to private individuals. For much of the nineteenth century,⁸³ this private international law is seen as a legitimate sibling to public international law, with both branches rooted in international society. With

⁷⁶ Originally published in 1834, this article, however, relies on the second edition: J Story, *Commentaries on the Conflict of Laws* (2nd edn, Little and Brown 1841).

⁷⁷ *ibid* 10.

⁷⁸ *ibid* 19.

⁷⁹ *ibid* 23–24.

⁸⁰ *ibid* 29–38.

⁸¹ *ibid* 32. See also *ibid* 35: 'It is, therefore, in the strictest sense, a matter of the comity of nations, and not of any absolute paramount obligation, superseding all discretion on the subject.'

⁸² The full title is W Burge, *Commentaries on Colonial and Foreign Laws Generally, and in Their Conflict with Each Other, and with the Law of England* (Saunders and Benning 1838). For Burge's endorsement of Story, see xi.

⁸³ See especially R Banu, *Nineteenth Century Perspectives on Private International Law* (OUP 2018).

the general emergence of the Historical School in mid-Victorian England, it is not surprising that the Savignian idea of a private international law also entered Britain around the same time.⁸⁴

The chief entry point for this British reception of German ideas is, again, James Reddie. His *Inquiries in International Law: Public and Private* (1851) considers private international law as international law proper: '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'.⁸⁵ With Savigny, and in contrast to Story, the earlier conflict-of-laws discipline is now radically reconceptualised as a branch of international law:

[W]hen an independent state allows its citizens or subjects to have intercourse with the inhabitants of other states, for the purposes of commerce or otherwise, and to enter into connections or transactions similar to those into which its own subjects enter with each other, and which are enforced by the state under the social union, the state itself, as well as its inhabitants, thereby creates judicial relations, and comes under legal obligations, which it is bound, and may be legally compelled, to see or cause to be fulfilled. So far, we apprehend, private international law does not rest upon the *comitas* or courtesy, or upon the mere consent of nations, but may be legitimately enforced by such physical means as such states have at their disposal ... [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, the principles of the private common law in civil societies or states[.]⁸⁶

For Reddie, private international law is thus, in contrast to Story, 'not merely a matter of *comitas* or courtesy, to be observed at pleasure or not, if found convenient – not mere ethical rules'; rather, it is 'in reality a branch of what we call law', namely, international law.⁸⁷ Based primarily on custom 'it rests upon principles more definite and stable than the mere *comitas* or courtesy of nations ... namely, upon what the Romans called the *ratio juris*, upon juridical relations, which arise in the course of their mutual transactions and dealings with each other'.⁸⁸

This historicist position was subsequently taken up by Twiss's *Two Introductory Lectures on the Science of International Law* (1856). He states:

Allusion has already been made to the expression 'International Law', as of a more extensive import than 'the Law of Nations', which may be regarded as a specific subdivision of the former ... Writers, amongst whom Heffter, one of the most recent and most distinguished jurists of Germany, may be mentioned, have proposed to designate the system of law, which regulates the mutual relations of sovereign states, by the name of *external Public Law* of states as distinguished from the *internal Public Law* of states, and

⁸⁴ On the influence of the Historical School, and especially Savigny, on Anglo-Saxon private international law thought, see especially M Gutzwiller, *Der Einfluss Savignies auf die Entwicklung des Internationalprivatrechts* (Gschwend 1923); K Nadelmann, 'Private International Law: Lord Fraser and the Savigny (Guthrie) and Bar (Gillespie) Editions' (1971) 20 ICLQ 213; M Hoeflich, 'Savigny and His Anglo-American Disciples' (1989) 37 AJIL 17; G Kegel, 'Story and Savigny' (1989) 37 AJIL 39. See, more recently, A Mills, 'The Private History of International Law' (2006) 55 ICLQ 1.

⁸⁵ Reddie, *Inquiries in International Law: Public and Private* (n 39) 461 (emphasis added).

⁸⁶ *ibid* 456, 462 (emphasis added).

⁸⁷ *ibid* 463–64.

⁸⁸ *ibid* 493.

thereupon assign to the expression International Law a still wider application, including under it those private relations between the citizens of separate states ... to which, apart from that which regulates the relations between sovereign states, as such, the name of *private International Law* has been assigned. Thus the conflict of laws, foreign and domestic, as it has been termed by Mr Justice Story, would fall within the province of private international law[.]⁸⁹

Nevertheless, Twiss ultimately felt closer to Story than to Savigny; and the same is true for Westlake's *Treatise on Private International Law or the Conflict of Laws* (1858),⁹⁰ which settled on a similar compromise between the two views.⁹¹ Yet this balance again partly tilted back towards Savigny during the 1860s. One reason for this was Phillimore's *Private International Law or Comity* (1861), whose very title had been chosen in direct opposition to Story's *Conflict of Laws*.⁹² Indeed, for Phillimore, private international law was identical to the *jus gentium* and, like public international law (*jus inter gentes*),⁹³ it was 'built upon the hypothesis of a common law for a Commonwealth of States'.⁹⁴ This historicist-communitarian conception would gain broader support still through the English translation of Savigny's famous work on the subject in 1869.⁹⁵

A Scottish voice in favour of the international conception of the conflict of laws ought to be mentioned here too. Even if James Lorimer rejected the normative premisses of the Historical School, his private international law was a branch of the international law of nature.⁹⁶ To Lorimer, the binding nature of private international law derived from the conceptually necessary self-limitation required

⁸⁹ T Twiss, *Two Introductory Lectures on the Science of International Law* (Longman 1856) 54–55 (emphasis in original).

⁹⁰ J Westlake, *A Treatise on Private International Law or The Conflict of Laws* (Maxwell 1858). Four more editions were published in Westlake's lifetime in, respectively, 1880, 1890, 1905 and 1912.

⁹¹ Westlake's position seems indeed closer to that of Story than to that of Savigny in that he treats his subject primarily 'as a department of English law' (*ibid* iii). Yet while accepting that municipal law always prevails in determining the limits of its own scope, he equally claims that 'where the municipal law is silent as to its own limits', 'the jurisprudence which is the subject of this Treatise admits of judicial enforcement' (*ibid* 3). According to AV Dicey, 'Obituary of Westlake' (1913) 29 LQR 260, 261: 'In every line of the first edition of Westlake's *Private International Law* you can trace the influence of Savigny ...'.

⁹² R Phillimore, *Commentaries upon International Law: Private International Law or Comity* (Benning 1861) iv: 'The subject has been treated of, till lately, under the title of the *Conflict of Laws*, a title which I think has been justly censured as expressive of a limited and unsound view of this important portion of jurisprudence; but under which title so able a treatise has been written by Story, substantially, upon Private International Law'. And for his express admiration of the German Historical School, see x: 'I cannot help expressing a hope that the Treatises of such jurists as those of *Puchta* and *Savigny*, which have the merits without the defects of German erudition, may one day become familiar to English lawyers.' There are indeed many references to both authors' ideas and concepts in Phillimore's work.

⁹³ *ibid* 1.

⁹⁴ *ibid* 9.

⁹⁵ The translation was made by William Guthrie, see FC von Savigny, *Private International Law: A Treatise on the Conflict of Laws* (W Guthrie trans, Clark 1869). A second edition of this translation was published in 1880. For an excellent discussion on English Savigny translations, see S Vogenhauer, 'Schlüsselworte in englischen Savigny-Übersetzungen' in T Duve and J Rückert (eds), *Savigny International?* (Klostermann 2015) 251.

⁹⁶ Lorimer (n 30) 357. For a specific discussion of Lorimer's private international law work, see Knop (n 30).

by the inter-dependence of States,⁹⁷ because the recognition of another State simultaneously implied the recognition of ‘the rights of the private citizens of whom the State is composed’.⁹⁸ Yet this naturalistic recognition of the international and legal nature of private international law was idiosyncratic to the extreme. It should be considered a naturalist outlier to an historicist mainstream that was itself increasingly challenged by a late Victorian voluntarist conception.

3.2. *The triumph of the voluntarist conflict-of-laws conception*

From the late 1870s onwards,⁹⁹ Savigny’s conception of private international law began to dramatically decline in England. A first decisive move was again made by TE Holland,¹⁰⁰ whose *Elements of Jurisprudence* (1880) claimed that the very term ‘private international law’ was indefensible:

Such a phrase should mean, in accordance with that use of the word “international” which, besides being well established in ordinary language, is both scientifically convenient and etymologically correct, “a private species of the body of rules which prevails between one nation and another”. Nothing of the sort is however intended; and the unfortunate employment of the phrase, as indicating the principles which govern the choice of the system of private law applicable to a given class of facts, has led to endless misconception of the true nature of this department of legal science. It has also made it necessary to lengthen the description of International Law, properly so called, by prefixing to it the otherwise superfluous epithet “public”. It is most important, for the clear understanding of the real character of the topic which for the last forty years has been misdescribed as “Private International law”, that this barbarous compound should no longer be employed.¹⁰¹

Story’s original label ‘conflict of laws’ was consequently revived, because private international law was a branch of national law and, as part of national law, the choice whether or not to apply foreign law was a purely ‘voluntary act’ based on comity and with total indifference to international law.¹⁰² This view was equally shared by Hall¹⁰³ and Lawrence.¹⁰⁴ Yet the final nail in the coffin of the Historical School would not be forged by an international law scholar. Rather, it was the work of the most important constitutional law scholar of Victorian Britain, Albert

⁹⁷ Lorimer (n 30) 365.

⁹⁸ *ibid* 370.

⁹⁹ See, e.g. JA Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, based on the Decisions in the English Courts* (Stevens and Haynes 1878); AV Dicey, *Law of Domicil as a Branch of the Law of England: Stated in the Form of Rules* (Stevens and Sons 1879).

¹⁰⁰ Holland (n 64).

¹⁰¹ *ibid* 316.

¹⁰² *ibid* 355.

¹⁰³ Hall (n 65) 45: ‘Private international law is not however a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their state.’

¹⁰⁴ Lawrence, *The Principles of International Law* (n 72) 7 (with reference to Holland): ‘The title [Private International Law] is a misnomer. The rules in question cannot with propriety be called international.’

Venn Dicey,¹⁰⁵ that ensured the triumph of State voluntarism in late Victorian England.

Following Holland's lead,¹⁰⁶ Dicey's *The Law of England with Reference to the Conflict of Laws* (1896) left no doubt as to his views on the nature of this branch of law: the very idea of a 'private international law' was fatally misconceived. For not only could 'international' law, in line with Bentham, only exist between nations; any such law could not, in line with Austin, be 'law' in a proper sense.¹⁰⁷ All that private 'international' law could be, if it wanted to be positive law, was (external) *national* law. The various 'conflict of laws' rules thus simply reflected each nation's choice whether, and to what extent, to impose its domestic law on foreigners.

Methodologically, Dicey also thought that the Historical School, and especially Savigny, was fundamentally mistaken.¹⁰⁸ Its theoretical method had 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';¹⁰⁹ yet this was not what the law *is*. Only the 'positive method' could avoid this problem:

The positive method is followed by a whole body of authors, among whom Story is the most celebrated ... This school starts from the fact that the rules for determining the conflict of laws are themselves 'laws' in the strict sense of that term, and that they derive their authority from the support of the sovereign in whose territory they are enforced. *Story, therefore ... [did] not practically concern [himself] with any common law of Europe, but made 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.¹¹⁰

Dicey, in conclusion, comes to lastingly deny the very existence of any private international law in Britain. There simply was no such law: all that there was were 'statutory enactments and the judicial decisions' adopted within each national legal order.¹¹¹ Conflict-of-law norms were positive *national* laws that could only gain an

¹⁰⁵ The following will draw on the second edition: AV Dicey, *A Digest of the Law of England with Reference to The Conflict of Laws* (2nd edn, Stevens and Sons 1908). For a good discussion of the importance of this text, see GW Bartholomew, 'Dicey and the Development of English Private International Law' (1959) 1 *TasUnivLRev* 240. Prior to the publication of this famous book, Dicey (n 99) had already announced some of his early thoughts.

¹⁰⁶ The express references to TE Holland, *Elements of Jurisprudence* (Clarendon Press 1880) are plenty throughout the work and Dicey specifically thanks Holland in the preface (Dicey, *A Digest of the Law of England with Reference to The Conflict of Laws* (n 105) 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.'

¹⁰⁷ Dicey, *A Digest of the Law of England with reference to The Conflict of Laws* (n 105) 14 (with reference to Holland (n 106)).

¹⁰⁸ *ibid* 16. In addition to Savigny, Dicey includes Bar, Pillet, Schöffner and Wächter.

¹⁰⁹ *ibid* 17 (emphasis added).

¹¹⁰ *ibid* 19 (emphasis added).

¹¹¹ *ibid* 20.

international dimension if harmonised in international *treaties* voluntarily agreed to by each sovereign State.

4. From 'Victorian' to 'modern' scholar: Lassa Oppenheim's two lives

The Victorian era formally ended with the death of its eponymous Queen in 1901, yet much of the era's intellectual sensibility posthumously extended until the outbreak of World War I.¹¹² Among these post-Victorian 'Victorians' is Lassa Oppenheim,¹¹³ who—at first—embraced a late Victorian synthesis between the historical–legal and State positivist traditions. While rejecting natural law, Oppenheim indeed retains the Historical School's commitment to the normative existence of an international community, governed by customary law; yet this law is now, in a voluntarist countermove, recast in 'Statist' terms (Section 4.1). Around 1914–1918, however, Oppenheim abandons this Victorian synthesis and takes a decisive 'institutionalist' turn that—clairvoyantly—proposes to replace the (unorganised) 'Family of Nations' with an (organised) 'League of Nations' (Section 4.2).

4.1. The 'Victorian' Oppenheim: recasting customary law in Statist terms

What are the normative foundations and legal sources for Oppenheim? His famous textbook begins with a clear definition: international law 'is the name for the body of customary and conventional rules which are considered legally binding'.¹¹⁴ This definition conceptually excludes all natural law¹¹⁵ and, importantly, it also excludes all private international law because international law is to him, as to Bentham, 'a law for the intercourse of States with one another, not a law for individuals'.¹¹⁶ International law is, consequently, the law of nations that exclusively applies to States and that is exclusively made by States.

¹¹² See the sources cited in n 62.

¹¹³ The German Oppenheim had come to England in 1895, where he became a naturalised British citizen in 1900 and where he eventually succeeded Westlake to the Whewell Chair in International Law in 1908. For excellent biographical overviews of Oppenheim and his work, see M Schmoeckel, 'The Story of a Success: Lassa Oppenheim and His "International Law"' in M Stolleis and M Yanagihara (eds), *East Asian and European Perspectives on International Law* (Nomos 2004) 57; M Schmoeckel, 'Consent and Caution: Lassa Oppenheim and His Reaction to World War I' in R Lesaffer (ed), *Peace Treaties and International Law in European History From the Late Middle Ages to World War One* (CUP 2004) 270. See also B Kingsbury, 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law' (2002) 13 EJIL 401; A Perreau-Saussine, 'A Case Study on Jurisprudence as a Source of International Law: Oppenheim's Influence' in Craven, Fitzmaurice and Vogiatzi (n 6) 91; see especially M García-Salmones Rovira, *The Project of Positivism in International Law* (OUP 2013) chs 2, 3.

¹¹⁴ Oppenheim (n 59) 3. Subsequent editions of this textbook would make it 'the' British textbook of the twentieth century. For a discussion of the various editions, see WM Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 YaleJIntL 255–280.

¹¹⁵ In his famous words, 'We know nowadays that a Law of Nature does not exist': Oppenheim (n 59) 92.

¹¹⁶ *ibid* 4. Oppenheim continues: 'As the distinction of Bentham between International Law public and private has been generally accepted, it is necessary to emphasise that only the so-called public International Law, which is identical with the Law of Nations, is International Law, whereas the so-called private International Law is not.' Oppenheim nevertheless dedicated an entire chapter to the position of individuals in international law in Oppenheim (n 59) pt II, ch 3.

But can this international law be real law properly so called? Oppenheim undoubtedly thinks so, and the legal nature of international law is here, with Savigny, established through the organic–historicist connection between a community and its law:

[T]here need not be, at least not among primitive communities, a law-giving authority within a community. Just as the rules of morality are growing through the influence of many different factors, so the law can grow without being expressly laid down and set by a law-giving authority. Wherever we have an opportunity of observing a primitive community, we find that some of its rules of human conduct apply to conscience only, whereas others shall by common consent of the community be enforced; the former are rules of morality only, whereas the latter are rules of law. For the existence of law neither a law-giving authority nor courts of justice are essential.¹¹⁷

Law, for Oppenheim, is thus defined as 'a body of rules for human conduct within a community which by common consent of this community shall be enforced by external power'.¹¹⁸ This definition axiomatically links the legal nature of international law to three conditions. First, like the Historical School, Oppenheim insists that there must be a community or society before there can be law. Second, this community must agree on rules of State behaviour by 'common consent'; and, third, these rules must, and by the same common consent, be externally enforceable so as to distinguish them from moral rules.

As regards the first condition, Oppenheim specifically finds:

The conception of community is a wider one than the conception of state. A State is a community, but not every community is a State. Likewise, the conception of law pure and simple is a wider one than that of Municipal Law ... A community may be said to be the body of a number of individuals more or less bound together through such common interests as create a constant and manifold intercourse between the single individuals. This definition of community covers not only a community of individual men, but also a community of individual communities such as individual States ... Innumerable are the interests which knit all the individual civilised States together and which create constant intercourse between these States as well as between their subjects ... And these common interests and the necessary intercourse which serves these interests, unite the separate States into an indivisible community. For hundreds of years this community has been called "Family of Nations" or "Society of Nations".¹¹⁹

Oppenheim thus arrives, like the Historical School, at the non-universal scope of international law. The dominion of the latter is restricted by the existence of shared interests that define and bound a moral and legal community. But this (moral) international community is—unlike the position of the Historical School—no longer thought of as a supranational community of individuals; it is, on the contrary, 'a

¹¹⁷ *ibid* 7. That courts are here not essential for Oppenheim's definition is also made clear when rejecting Austin's view of customary law: 'Courts of justice having no law-giving power could not recognize unwritten rules of law if these rules were not law before that recognition': *ibid* 5.

¹¹⁸ *ibid* 8.

¹¹⁹ *ibid* 9–12.

community of individual *states*.¹²⁰ International society is, to Oppenheim, a society of States: the ‘family of nations’.

This family of nations generates its own law; yet Oppenheim also insists on the law’s external enforcement and thus comes to re-emphasise the sanctions element within international law. But in the absence of a central enforcement authority, how could there be international law? Oppenheim’s answer here reverts to the classic idea of decentralised enforcement: ‘Self-help and the help of the other States which sympathise with the wronged one are the means by which the rules of the Law of Nations can be and actually are enforced.’¹²¹ This makes international law weaker than municipal law, ‘[b]ut a weak law is nevertheless still law’.¹²²

To Oppenheim, all international law creation and enforcement must—finally—be done by common consent: ‘common consent is the basis of all law’.¹²³ This consent requirement does not mean, however, that all States must consent to all international law all the time, as it only refers to ‘the express or tacit consent of such an *overwhelming majority* of the members that those who dissent are of no importance whatever’.¹²⁴ (Oppenheim’s common consent is thus closer to Rousseau’s ‘*volonté générale*’ than to a ‘*volonté de tous*’.¹²⁵) ‘[N]o State which is a member of the Family of Nations can at some time or another declare that it will in future no longer submit to a certain recognised rule of the Law of Nations’;¹²⁶ nor can States wishing to enter the (European) family of nations pick and choose the rules they wish to follow.¹²⁷

Because common consent is seen as the foundation of all international law, it is evident to Oppenheim that ‘there must exist, and can only exist, as many sources of International Law as there are facts through which such a common consent can possibly come into existence’; and, to him, there ‘are only two’ such sources: international treaties (express consent) and international custom (tacit consent).¹²⁸ Oppenheim thereby considers custom the older and original source of international law, which is—importantly—also normatively superior to treaties. ‘[T]reaties are a source the power of which derives from custom’ because their

¹²⁰ *ibid* 12 (emphasis added). See also *ibid* 16: ‘[T]he community for which this Law of Nations is authoritative consists not of individual human beings, but of individual States’.

¹²¹ *ibid* 13.

¹²² *ibid*. To Oppenheim, the State enforcement of international law is only possible if no State is strong enough to resist collective enforcement by the rest. Oppenheim therefore believes in the balance of power principle as a *sociological* precondition for the possibility of international law. Oppenheim names these sociological preconditions morals, and the first historical moral is indeed this principle: *ibid* 73.

¹²³ *ibid* 15.

¹²⁴ *ibid* (emphasis added).

¹²⁵ For this excellent point, with reference to H Kelsen, ‘Théorie du droit international coutumier’ (1939) 10 *RevIntlThéorieDroit* 253, see Schmoeckel, ‘The Story of a Success: Lassa Oppenheim and His “International Law”’ (n 113) 92.

¹²⁶ Oppenheim (n 59) 18.

¹²⁷ *ibid* 18: ‘No single State can say in its admittance into the Family of Nations that it desires to be subjected to such and such a rule of International Law, and not to others. The admittance includes the duty to submit to all the existing rules[.]’

¹²⁸ *ibid* 22, 24.

binding nature 'is based on the customary rule of the Law of Nations.'¹²⁹ Following the Historical School, 'custom is at the background of all law, whether written or unwritten.'¹³⁰

Oppenheim's historicist views on the normative primacy and collective origin of customary law distinguish him from those English (and German) State positivists that see the ultimate basis of international law in the self-limitation of sovereign States through treaties.¹³¹ Yet Oppenheim's theory also departs from the philosophical premises of the Historical School, as his customary law is no longer the *organic* product of the moral consciousness of individuals or peoples forming international society; rather, it is the sum of *State* actions and convictions. (The semantic shift from the international society metaphor to the family-of-nations metaphor reflects this subtle move away from a naturalist-individualist to a voluntaristic-nationalist definition of customary law.) Nonetheless, Oppenheim's conception of customary law remains rooted in a collective voluntarism that locks individual State wills into a collective *volonté générale*: 'Der Wille der einzelnen Staaten bricht sich an der Maurer der uneinnehmbaren Festung dieser Gemeinschaft.'¹³²

How can this external limitation of State sovereignty in international law be squared with each State's sovereignty in national law? Oppenheim's solution to this problem represents a fundamental departure from the classic monistic common law solution.¹³³ He adopts Triepel's dualistic theory, according to which international and national law are 'essentially different' types of law.¹³⁴ National courts can apply only those rules of international law that have been transformed into national law and they 'must apply even such rules of Municipal Law as conflict with the Law of Nations.'¹³⁵ To Oppenheim (following Triepel), this conceptual dualism between international and

¹²⁹ *ibid* 24.

¹³⁰ *ibid* 16. See also L Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313, 349: 'Customary international law will then [after its codification] be pushed into the background, although it will never entirely disappear.'

¹³¹ On the English State positivists, see Section 2.3. The new 'State positivism', ushered in by German constitutional law scholars after 1870, equally reconceptualises international law as a form of external State law so as to sublimate the (external) sovereignty of the new German State. For a brief discussion of this point, see R Schütze, *From Utopia to Apologia: International Normativity in the Long Nineteenth Century* (LSE thesis, 2019) 99–106.

¹³² L Oppenheim, 'Zur Lehre vom Internationalen Gewohnheitsrecht' (1915) 25 NiemeyersZ 1, 13: 'The will of the individual states breaks on the walls of the impregnable fortress of this community' (author's translation). For that reason, and in light of the passages quoted above, Carty's view that Oppenheim was effectively 'following the doctrine of Jellinek, that power governed inter-State relations except to the extent that States compromised through agreements' is, in the author's view, mistaken: see A Carty, 'Why Theory? The Implications for International Law Teaching' in P Allott et al (eds), *Theory and International Law: An Introduction* (British Institute of International and Comparative Law 1991) 75, 80–81.

¹³³ On Westlake's monism, see Westlake (n 61). Even the post-1880 English positivists appear to have supported this view, see, e.g. TE Holland, *Studies in International Law* (Clarendon Press 1898) 194: 'The "Law of Nations" (which I may venture to define as the public opinion of the Governments of the civilized world, with reference to the rights which any State would be justified in vindicating for itself by a resort to arms) is, no doubt, incorporated into the Common Law which binds the courts of this country.'

¹³⁴ Oppenheim (n 59) 25. Oppenheim explains in detail that the two bodies of international and national law have different sources, regulate different relations and differ as regards their substance.

¹³⁵ *ibid* 27.

national law thereby derives from their different subjects: international law exclusively applies to States—and never to individuals—whereas national law exclusively applies to individuals and never to States.¹³⁶

4.2. *The modern Oppenheim: the ascendance of institutional international law*

The historical and hierarchical priority of custom as a source of international law, expressed in Oppenheim's early conception of international law, make him—as regards his intellectual sensibility—one of the last Victorian scholars. Yet this appearance is one-sided, as there is a significant change in Oppenheim's intellectual outlook on international law around 1914. This philosophical shift is indeed so significant that one ought to speak of two 'Oppenheims': in addition to the late Victorian scholar looking backwards into the nineteenth century, the modern Oppenheim is looking forwards into the twentieth century, in which a positive international law is to be founded upon and legislated within international organisations.

This second—institutional—Oppenheim comes to believe that, while the international community of the past had not been totally anarchic, its aims would be much better achieved if it were 'organised'. This new vision of an organised international society is set out in two books: *The Future of International Law* (1911/1914) and *The League of Nations and Its Problems* (1919).¹³⁷ In both works, Oppenheim not only comes to totally reject the Historical School's conception of an organic international society based on (rationalised) custom;¹³⁸ he even seems to question the very usefulness of customary law in the new, twentieth century.¹³⁹

What form should the organised society of nations take? Oppenheim thinks that it must not take the institutional form of a federal State—but that is not because he believes, like Kant, that this is physically impossible;¹⁴⁰ rather, because such a solution is feared to 'bring death instead of life'.¹⁴¹ Nor is the British Empire, à la Mill, an institutional example to be followed.¹⁴² The present era is, to Oppenheim, a nationalist

¹³⁶ *ibid* 19. To Oppenheim, individuals can never be subjects but only 'objects of the Law of Nations'; *ibid* 344.

¹³⁷ L Oppenheim, *The Future of International Law* (Clarendon Press 1921). This English translation was finalised just before World War I in July 1914 and was itself based on Oppenheim's 1911 German contribution: see L Oppenheim, *Die Zukunft des Völkerrechts* (Engelmann 1911). The English book is composed of four chapters, namely: 'The Organization of the Society of States'; 'International Legislation'; 'International Administration of Justice'; and 'The Science of International Law'. Oppenheim subsequently published a second, updated book, with an almost identical structure, under the name *The League of Nations and Its Problems* (Longmans 1919), which had been written before the end of World War I and thus before the actual League of Nations had been founded.

¹³⁸ Oppenheim, *The Future of International Law* (n 137) 3: 'The contention of the historical school that all law springs up "naturally", like language, is chimerical.'

¹³⁹ *ibid* 5.

¹⁴⁰ Unlike Kant, Oppenheim thinks that 'a universal federal state and the like' is 'at the present day no longer a physical impossibility' because modern technology has conquered geography and 'the ever-increasing international intercourse' has brought nations closer together than ever before: *ibid* 12.

¹⁴¹ *ibid* 13. See also Oppenheim, *The League of Nations* (n 137) 18: 'A Federal State comprising all the single States of the whole civilised world is a Utopia, and an International Army and Navy would be a danger to the peace of the world.'

¹⁴² *ibid* 20: 'The British World Empire may be taken as an example to show that it is impossible for one single Government to govern a number of States with somewhat divergent interests.'

one in which 'the development of mankind is inseparably bound up with the national development of the different peoples and states'.¹⁴³ With the zeitgeist insisting on sovereign States,¹⁴⁴ it follows that '[t]here can, therefore, be no talk of a political central authority standing above individual states; and so the organization in question must be *sui generis* and cannot frame itself on the model of state organization'.¹⁴⁵

The new international organisation or 'League of Nations', as he calls it, would nonetheless have a 'constitution',¹⁴⁶ as it is to 'be founded upon a solemn treaty'.¹⁴⁷ This constitutional treaty should, in turn, create an international legislature as well as an international court.¹⁴⁸ Yet can there be such a thing as international legislation? Oppenheim concedes that his is an innovative use of the word, yet according to him, the meaning of the concept of legislation should not be confined to a State context: 'legislation is really nothing more than the conscious creation of law in contrast to the growth of law out of custom'.¹⁴⁹ Law-making treaties had indeed existed in the past,¹⁵⁰ but the twentieth century needed a more systematic and dynamic legislative activity: 'international legislation can no longer be left to mere chance'.¹⁵¹ The institutional organ to adopt such international legislation thereby ought to be 'comparable to the parliaments of individual states'.¹⁵² The sovereign equality of States must, however, always mean that every State has to agree individually to whatever law is made: international legislation 'cannot be created by a majority vote'.¹⁵³

Oppenheim's 'League of Nations' ought also to have an international court. To him, this indeed appears to be the most important issue of his time: 'Hitherto, although International Legislation has been to some extent in existence, no International Courts

¹⁴³ Oppenheim, *The Future of International Law* (n 137) 13.

¹⁴⁴ For Oppenheim, the idea of sovereignty 'does not exclude the possibility that the sovereign should subject himself to a self-imposed order, so long as this order does not place him under any higher earthly power': *ibid* 11.

¹⁴⁵ *ibid* 16.

¹⁴⁶ *ibid* 20.

¹⁴⁷ Oppenheim, *The League of Nations* (n 137) 11: '[T]his new League would be founded upon a solemn treaty, whereas the League of Nations hitherto was only based on custom.'

¹⁴⁸ Oppenheim, *The Future of International Law* (n 137) chs 2 and 3, respectively. Oppenheim argues against an international executive power so as to 'avoid the proposal to set up in international society an organization resembling that of a state': *ibid* 21.

¹⁴⁹ *ibid* 23.

¹⁵⁰ Oppenheim expressly mentioned the Congress of Vienna as an example before the Hague Peace Conferences: *ibid* 24.

¹⁵¹ *ibid* 33.

¹⁵² *ibid* 18. For Oppenheim, the regularisation and periodic meetings of the Hague Peace Conferences could easily transform into such a legislative organ. Contrast Oppenheim's late optimism, as regards international institutions, with Westlake's pessimism as regards specifically the Hague Peace Conferences: see J Westlake, 'The Hague Conferences' in Westlake (n 50) 531, 535: 'parody of a parliament', 'phantom of a legislature'.

¹⁵³ Oppenheim, *The Future of International Law* (n 137) 30. See also 19: 'No state taking part in the Conferences is bound by the resolutions of the Conferences without its assent. Majority resolutions only bind the members of that majority'. See also Oppenheim, *The League of Nations* (n 137) 44: 'International Statutes cannot be created by a vote of the majority of States, but only by a unanimous vote of all the members of the Community of civilized States.'

have been established before which States in dispute have been compelled to appear.¹⁵⁴ The future development of international law is thus seen to lie in its judicialisation: 'every State must submit all judicial disputes to an International Court of Justice and abide by the judgment of such Court.'¹⁵⁵ The primary task of the world judiciary is therefore to interpret and give precision to customary rules. Through this process, Oppenheim believes, the many gaps in the existing law will come to light and may eventually be filled 'by a discreet employment of analogy.'¹⁵⁶

These institutionalist ideas receive a last and posthumous treatment in the third edition of *Oppenheim* (1920),¹⁵⁷ in which a new chapter is dedicated to the—by then established—League of Nations, created by its 1919 Covenant of the League of Nations (Covenant). To Oppenheim, this child of the Versailles Treaty constitutes the first real attempt 'to organise the hitherto unorganised community of states by a written constitution'¹⁵⁸ and, as such, despite some serious defects,¹⁵⁹ it 'inaugurated a new epoch in the development of mankind'.¹⁶⁰ The centrality of the judicial function in Oppenheim's future international law project is expressed one last time:

International Law [must] develop more or less on the lines of Municipal Law, aiming at the codification of firm, decisive, and unequivocal rules of International Law, and working for the establishment of international courts for the purpose of the administration of international justice.¹⁶¹

5. Conclusion: three views on the nineteenth century revisited

What international law ideas characterise the British Victorian era? As explained in Sections 2 and 3, from the late 1830s onwards, three discursive traditions on the normativity of international law overlapped and competed with one another. There, first, remained a natural law tradition that had, nonetheless, shed its rationalist–legal character in favour of a Christian–moralist one. The re-Christianisation of international law is especially prevalent in the earlier Victorian

¹⁵⁴ *ibid* 60. On the experimental character behind the establishment of an international court, see also *ibid* 63: 'There is no doubt that, under present conditions and circumstances of international life, the institution of International Courts represents an unheard of experiment.'

¹⁵⁵ *ibid* 28. See also *ibid* 40: 'All members of the League of Nations agree once and for all to submit all judicial disputes to International Courts[.]' Nevertheless, for 'complex cases', that is: cases in which 'there is at the same time involved a vital political principle', the Court may, according to Oppenheim, decide to refer the dispute to an international 'Council of Conciliation': *ibid* 68–69.

¹⁵⁶ Oppenheim, *The Future of International Law* (n 137) 57. Oppenheim, however, again emphatically adds that these gaps cannot be filled by the science of international law and academic writers.

¹⁵⁷ Oppenheim (n 63). The book was posthumously published by RF Roxburgh, but Roxburgh expressly states that the sections on the League were written by Oppenheim himself: x. Oppenheim had indeed published a minor piece on the 1919 League of Nations Covenant as L. Oppenheim, 'Le Caractère Essentiel de la Société des Nations' (1919) 26 RGDIP 234, which informed the third edition of his *International Law* (n 63).

¹⁵⁸ Oppenheim, 'Le Caractère Essentiel de la Société des Nations' (n 157) 269.

¹⁵⁹ *ibid* 297–300.

¹⁶⁰ *ibid* 300.

¹⁶¹ Oppenheim (n 63) 96–97.

periods.¹⁶² With the rise of evolutionism (Darwin) and sociology (Spencer) in the 1860s and 1870s,¹⁶³ the intellectual background conditions of this theocratic–naturalist tradition, however, steadily disappeared.

A second British tradition, by contrast, had suddenly emerged around 1850. It was inspired by the rise of (legal) historicism on the European continent: 'The mid-Victorians welcomed the doctrine that the law of civilised societies was the product of a development through a series of identifiable stages related to, but distinct from, the development of society itself.'¹⁶⁴ This historicist tradition derived the binding nature of international law from the moral existence of an international society out of which legal norms spontaneously sprang: *ubi societas, ibi ius*.¹⁶⁵ This second tradition gradually gained prominence in the late Victorian period and remained dominant—especially through the work of Westlake (and the early Oppenheim)—until the early twentieth century.

A third Victorian tradition finally emerged in the last quarter of the nineteenth century. It rejected all non-voluntarist elements within both the naturalist and the historicist schools and, through its emphasis on State sovereignty, it elevated international treaties to the centre of international law. As regards public international law, this State positivist school was nonetheless overshadowed by the Historical School and its emphasis on custom and reason (Westlake) until 1914;¹⁶⁶ yet for British conflict-of-law thinking, the influence and authority of Dicey had guaranteed a much earlier victory.

It is against the background of these brief conclusions that the three academic views on Victorian international law scholarship, set out in [Section 1](#), can be revisited. These were: first, the belief that State positivism, especially that espoused by Austin, exercised a decisive influence on Victorian international law scholarship; second, the claim that, after 1850, a distinctively British approach to international law diverged from a continental one; and, third, the view that there was a major break in the general conception or sensibility of international lawyers around 1870. What can be made of these positions in light of [Sections 2–4](#)?

It was seen above that, for the better part of the nineteenth century, the influence of British utilitarian or State positivist thinking on international law was indirect and partial at best. This was especially true for Austin's State positivism (outside private international law), for almost all public international law scholars, even positivist ones, consider international law as law properly so called.¹⁶⁷ The

¹⁶² For the pervading influence of Christian theology in especially the first half of the nineteenth century, see CM Kennedy, *The Influence of Christianity upon International Law* (Macmillan 1856). As regards mid-Victorianism, see D Thomson, *England in the Nineteenth Century* (Penguin 1950) 107: 'No interpretation of mid-Victorianism would be sound which did not place religious faith and observance in the very centre of the picture.'

¹⁶³ See S Collini, 'Political Theory and the "Science of Sociology" in Victorian Britain' (1980) 23 *HistJ* 203.

¹⁶⁴ P Stein, *Legal Evolution: The Story of an Idea* (CUP 1980) 99.

¹⁶⁵ 'Wherever there is society, there is law.'

¹⁶⁶ See nn 58–62.

¹⁶⁷ With some exceptions (e.g. Holland), all Victorian writers on public international law seem to reject Austin's denial of the legal normativity of international law. What is particularly striking in this anti-Austinian Victorian stance is that even the voluntarist international law scholars (e.g. Lawrence, Hall)

key—historicist—counterargument always insists that the State-sovereignty theory of law is unduly reductionist when applied to European or international society.¹⁶⁸ The master concept guaranteeing the legal normativity of international law after 1850 is the ‘collective consciousness’ of the international society as expressed in (rationalised) custom.

This leads directly to the second academic view. In light of the strong impact of the German Historical School in mid-Victorian Britain, the claim that, after 1850, the English approach to international law became ‘distinctive from the continental one’ must surely be qualified.¹⁶⁹ Indeed, as regards public international law scholarship, the very opposite is the case. The mid-Victorian legal imagination did not start ‘at home’ (Koskenniemi); it was inspired by foreign ideas and heavily borrowed from them. Even if the emergence of State positivism after 1870 was, in its engagement with Austin, a very ‘British’ affair, it also emerged—and with remarkable synchronicity—in the form of the German State positivists (Jellinek and Triepel), who also began to make their case in favour of absolute State sovereignty in the last quarter of the nineteenth century.¹⁷⁰

What of the third claim? Was there a radical break in the sensibility of international lawyers in the last third of the nineteenth century, when a new ‘shared Victorian conscience’ of rationalism, individualism and cosmopolitanism came to prevail? To the present author, the ‘men of 1873’ appear firmly embedded in an earlier historicist tradition best characterised by moralism, societism and regionalism. However, with Koskenniemi, something important did change around 1870. The traditional pessimism regarding legal codification partly gave way to a feeling of professional optimism that was best represented by Mancini’s belated rejoinder to Savigny in *Della Vocazione del Nostro Secolo per la Riforma e la Codificazione del Diritto delle Genti*.¹⁷¹

Yet dialectically, and in contrast to Koskenniemi, it marks not the beginning of something new but the beginning of an end.¹⁷² The process of codification, combined

come to reject Austin’s ‘State-law’ theory. See, e.g. WE Hall, *Treatise on International Law* (Clarendon Press 1895) 15; and the same passage can be found in the last pre-1914 edition: WE Hall, *Treatise on International Law* (JB Atlay ed, 6th edn, Clarendon Press 1909) 13.

¹⁶⁸ The key analogy to justify that there could be a (European) international law is thereby always to earlier and more ‘primitive’ societies. Inspired by Maine’s historical studies in particular, the general argument is that because these non-State societies had a conception of law, that there could also be international law. Thus, instead of simply disqualifying primitive societies as legal non-entities, the historical conception of international law uses them to ‘qualify’ international law as law. This is also seen by Anghie (n 10) 62, who considers it a self-contradictory paradox and ‘complete irony’. Yet another way of looking at this apparent paradox is to argue that nineteenth-century colonialism was not rooted in (Austinian or historicist) legal positivism but rather (Millian) civilisational moralism. On this point, see Schütze (n 10). For Maine’s views, especially on India, see Rumble (n 49).

¹⁶⁹ Lobban (n 6) 66.

¹⁷⁰ This is, of course, not to claim that both positivist schools were intrinsically connected (this would need further study), as was the rise of the Historical School in Germany and England, but the ‘English distinctiveness’ thesis is, in the author’s view, untenable at the level of scholarly ideas and doctrines. For an early rejection of the divergence thesis, see especially H Lauterpacht, ‘The So-Called Anglo-American and Continental Schools of Thought in International Law’ (1931) 12 BYIL 31.

¹⁷¹ See PS Mancini, *Della Vocazione del Nostro Secolo per la Riforma e la Codificazione del Diritto delle Genti* (Civelli 1874) 48.

¹⁷² For a similar conclusion, see I Hunter, ‘About the Dialectical Historiography of International Law’ (2016) 1 GlobIntellectHist 1.

with the gradual rise of State positivism after 1873, entailed the danger that the 'collective consciousness,' the moral-cum-legal object of scientific codification, was not seen as confirmed but rather validated, and thus surreptitiously replaced, by the formal will of sovereign States. Within post-Victorian Britain, this positivist danger is best exemplified by the later Oppenheim. Oppenheim's State-centred method not only questioned the natural law foundations of international law; his subsequent turn towards international organisation and codification, based on unanimous State consent, made the decisive *post*-Victorian move against the Historical School's moralistic and collectivist premisses.

With the 1919 Covenant of the League of Nations, Oppenheim's 'move to institutions' became the defining characteristic of the twentieth century.¹⁷³ It was here that a 'new' modern international law was born.¹⁷⁴ The twentieth-century 'British' international law scholar that best represents that new institutionalist sensibility was Hersch Lauterpacht because, contrary to the suggestion of Koskenniemi, he did not 'look[] back into the middle of the nineteenth century'.¹⁷⁵ Lauterpacht firmly began where Oppenheim had stopped: in 1919 and with the Covenant; from there, he looked into the future—a future in which an organised international society was to guarantee the normativity of international law through 'statutes' and 'judgment'.¹⁷⁶ But this is a story for another time that will need to be told elsewhere.

Acknowledgements. The article is warmly dedicated to my former Durham colleague Professor Colin Warbrick, who offered the kindest of intellectual welcomes to a young German scholar entering British academic life.

¹⁷³ D Kennedy, 'The Move to Institutions' (1987) 8 CardozoLRev 841.

¹⁷⁴ Grewe (n 7) 575: 'It is generally agreed that, with the end of the First World War, the "classical" system which had existed in Europe from the fifteenth century gave way to a "new" law of nations which was often referred to, in a specific sense, as "modern international law".'

¹⁷⁵ Koskenniemi, *The Gentle Civilizer of Nations* (n 9) 355. For a new look at Lauterpacht's normative project, see R Schütze, 'Lauterpacht's Legal Positivism' (currently under review, on file with the author).

¹⁷⁶ Lauterpacht's tombstone reads: 'He loved truth/Did justice and righteousness/*And taught the peoples statutes and judgment*' (emphasis added). For the full text in print, see E Lauterpacht, *The Life of Hersch Lauterpacht* (CUP 2012) 421. For a new look at Lauterpacht's normative project, see Schütze (n 175).