Chapter 5

Sources in the 19th Century European Tradition: The Myth of Positivism

Miloš Vec

I. Introduction: Focus, Intention, and Sources of this Contribution

The question of sources in 19th century international law is part of the debate on 'international law's *normativity*'.[1] It addresses a century, the legacy of which is of high relevance for any legal theory of international law. The 'turn to history' in international law had its starting point here.[2] The following paper analyzes sources of international law in the 19th century European tradition. It is neither a 'pre-history' of Article 38 of the ICJ Statute or 20th and 21st century debates on sources, nor a contribution to contemporary discussions, but aims to reconstruct the rich and disputed notions of sources of the 19th century as a historical value of its own while reflecting the underlying concepts of jurisprudence.

The focus lies on doctrine, not on State practice.[3] It includes scholars and theorists from a range of professions, perspectives, and nationalities (German, English, American, French, Italian, Suisse, Austrian, Dutch, Belgian, Danish, Portuguese, Russian-Estonian, Chilean, Argentinean) between 1815 and 1914. This selection is justified by the dominance and academic relevance of these nationalities in that period. The European Law of Nations became the global standard and was adopted by scholars all over the world.[4] Further, this contribution refers mainly to the academic writings, considering the fact

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1 Samantha Besson, 'Theorizing the Sources of International Law', in *The Philosophy of International Law*, edited by Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), pp. 163–85, 165 (highlighting in original).

2 George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law', *European Journal of International Law* 16 (2005): 539–59.

3 See Lauri Mälksoo's illuminative contribution in this volume.

4 Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert*, (Baden-Baden: Nomos, 2012); Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge: Cambridge University Press 2015); Nina Keller-Kemmerer, *Die Mimikry des Völkerrechts. Andrés*

that the lack of central authority and the ambition to institutionalize this legal field enabled 19th century scholars to dominate the legal discourse on international law's sources.

Although jurists gained a monopoly and established sovereignty over legal interpretation, my aim is to include also some non-jurist's perspectives on the international normative order(s). The 19th century discourse was dominated by jurists, but philosophers, theologians and *Staatswissenschaftler*s still kept writing about the international normative order(s). The departing point of my research is their definition what international law sources are; such elaborations can be found in all contemporary textbooks in different places and in a great variety. Therefore I searched for consensus and also conflicts within these positions, which vary in principal from author to author. A typology (e.g. country to country or continent to continent) turned out to be impossible to make.

Considering this, it is even more important to discuss the 19th century as a period of juridification, universalization and positivism in international law.[5] What did 'juridification' and 'positivism' mean at the time, and in how far were they connected to the current discussions dealing with these terms? Was there only one single take on positivism, and another one on natural law? The adequate understanding of such a 'positivism' as a juridical method was named to be 'a (or perhaps the) central paradigm in international law'[6] and will also be the overarching focus of this paper. Hence, the first part will examine definitions of legal sources as well as the sources' significance for the construction of international law in the 19th century (see Sections I and II). The contemporary interest in sources of international law finally lead to a turn in the self-perception of the discipline, still positivistic approaches did not entirely replace other explanations for international law's normativity (see

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Bellos Principios de Derecho de Jentes (in preparation for 2016); Liliana Obregón, 'Latin American International Law', in *Routledge Handbook of International Law*, edited by David Armstrong (London: Routledge, 2011), 154–64.

5 Miloš Vec, 'From the Congress of Vienna to the Paris Peace Treaties of 1919', in *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), 654–78.

6 Lauri Mälksoo, 'The Context of International Legal Arguments. "Positivist" International Law Scholar August von Bulmerincq (1822-1890) and His Concept of Politics', *Journal of the History of International Law* 7 (2005): 181–209, 185.

Sections III and IV). This should reject the often heard claim in historical research that 19th century lawyers made a complete and consequent turn into positivism. In a further step I confront the (often very formal) impressions and statements from international law theory/philosophy with international law's regulatory challenges in that epoch (see Section V). How did the international legal argument work here? Again it turns out, that the often told story of the end of natural law is only partly true.

II. The Visible Invisible: What is a Source, Then?

When Lassa Oppenheim discussed the issue of international law sources in 1905, he was very critical towards the fuzziness of his colleagues who had written on this subject earlier. Oppenheim tried to clarify the notion of 'source' by elaborating on the metaphor:

Source means a spring or well, and has to be defined as the rising from the ground of a stream of water. When we see a stream of water and want to know whence it comes, we follow the stream upwards until we come to the spot where it rises naturally from the ground. On that spot, we say, is the source of the stream of water. We know very well that this source is not the cause of the existence of the stream of water. Source signifies only the natural rising of water from a certain spot of the ground, whatever natural causes there may be for that rising.[7]

Thus, Oppenheim called for separating the conception of 'source' from 'cause'. But maybe there was a source for this approach he himself did not name: the German international and criminal lawyer Franz von Holtzendorff had already taken the same literate introduction focusing also on the metaphor into his elaboration of the sources of international law he published in 1885:

Whereas every *source* presents on the one hand a *visible* start of a water stream and on the other hand points out that the source itself is produced by invisible, naturally inevitable, and physically

[7] L[assa Francis Lawrence] Oppenheim, *International Law. A Treatise*, *Volume 1: Peace* (London: Longmans, Green & Co., 1905), § 15, pp. 20-1.

explorable reasons of humidity-accumulation, a *source of law* requires the spirit and actions of a preexisting and continuing *legal idea*.[8]

Thus, there are invisible causes for what appears on the surface, which have to be separated from the visible appearances in the physical world. Such a separation limits the question of international law's sources to a certain point and it makes at the same time clear that there are deeper causes behind the phenomena of this normative order.

1. No Consent on Dissent

International lawyers undertook in the 19th century numerous efforts to sum up and systematize the sources of what they perceived as the normative order of the law of nations, increasingly called 'international law'. Obviously their definitions, systematizations, and argumentations widely differed. They used a plurality of terms and points of reference for what appeared to them the sources of international law. It is not the aim of this paper to reconstruct these concepts in detail. However, the differences are significant.

For example, the American Henry Wheaton mentioned under the heading of '[t]he various sources of international law' as his first point the '[t]ext-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.'[9] Carlos Calvo agreed: *'[l]a source du droit international la plus abondante sans contredit consiste dans les œuvres des publicistes*.'[10] In 1906 John Bassett Moore also recommended to his readers to—case of doubt—look at first 'to the authority of writers'.[11] But in Pasquale Fiore's textbook, '*les écrits des publicistes*' came only second in the list

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8 Franz von Holtzendorff, 'Die Quellen des Völkerrechts', in *Handbuch des Völkerrechts, Volume 1: Einleitung in das Völkerrecht*, edited by Franz von Holtzendorff (Berlin: C. Habel, 1885), 77–155, 79.

9 Henry Wheaton, *Elements of International Law*, 8th ed. (London: Sampson Low, Son & Co., 1866), § 151, p. 23.

10 Charles Calvo, *Le droit international théorique et pratique*, vol. 1, 5th ed. (Paris: Arthur Rousseau, 1896), L.1, Sect. II, § 28, p. 158.

11 John Bassett Moore, *A digest of international law*, vol. I (Washington: Government printing office, 1906), p. 2.

of sources. In 1906 Moore also listed 'the decisions of municipal courts'.[12] But Franz von Holtzendorff opposed both types of sources (decisions of courts; text-writers) and pled that both just provide proofs of what was elsewhere legally stated.[13] Same indication occurs with 'analogy' as a source, where some scholars claim it is a source of international law,[14] and others deny.[15] Other aberrations among the positions of the scholars can be identified when comparing the mere quantity and immanent order of listed sources. The Swiss Alphonse Rivier defined in 1896 monolithically: '*[l]a source première est la conscience juridique commune*',[16] whereas other scholars started their analysis by working their way through long lists of possible sources and obviously referred to pluralism.[17]

Thus, Oppenheim was totally right when observing in 1905 that '[t]he different writers on the Law of Nations disagree widely with regard to kinds and numbers of sources of this law.'[18] It is even more striking that some lawyers like Argentinian Carlos Calvo claimed the contrary and stated that '*presque tous les publicistes sont d'accord sur l'énumération des sources du droit international*' and conceded only that there is disagreement in terms of their classification and importance.[19] The

12 Moore, *A digest of international law*, p. 2.

13 Holtzendorff, 'Die Quellen des Völkerrechts', p. 84.

14 E[gidius]-R[udolph]-N[icolaus] Arntz, *Programme Du Cours Droit des Gens* (Brüssel: Alliance typographique, 1882), Introduction, II A 3, p. 5; Fr[iedrich] Saalfeld, *Grundriß eines Systems des europäischen Völkerrechts* (Göttingen: J.F. Röwer, 1809), p. 1; Karl Heinrich Ludwig Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Fünfter und letzter Theil: Practisches (europäisches) Völkerrecht; Diplomatie; und Staatspraxis*, 2nd ed. (Leipzig: Hinrichssche Buchhandlung, 1828), p. 16.

15 Alphonse Rivier, *Principes du Droit des Gens* (Paris: Arthur Rousseau, 1896), T 1, L.1, § 2, 5, IV, p. 33; Carl Baron von Kaltenborn von Stachau, *Kritik des Völkerrechts* (Leipzig: Gustav Mayer, 1847), p. 235.

16 Rivier, *Principes du Droit des Gens*, p. 27.

17 H[enry] W[ager] Halleck, *Elements of International Law and Laws of War* (Philadelphia: J.B. Lippincott & Co., 1872), C. II §§ 18–30 (pp. 36–41); Arntz, *Programme Du Cours Droit des Gens*, Introduction, II A 1-11, pp. 4–6.

18 Oppenheim, *International Law*, p. 20.

19 Calvo, *Le droit international théorique et pratique*, p. 158.

opposite is true: there was no consensus on the disagreement among the authorities of late 19th international law.

2. Rare Definitions of 'Source'

One reason for the difficulty to name the dissent was that only a minority of authors gave clear and explicit definitions of what seemed to them a 'source'. It is no coincidence that Holtzendorff and Oppenheim did so in their ambition to separate the question of sources from other fundaments of international law.

Holtzendorff defined in 1885: '[a] source of international law in its actual sense is a commonly noticeable act of a—either within or by a State—recognized power, which obliges to a certain behavior or omission and which might be enforceable.'[20] Oppenheim put it quite differently, leaving the element of State aside and introducing the historical dimension: '"[s]ource of Law" is therefore the name for an historical fact out of which rules of conduct rise into existence and legal force.'[21] More definitions could be added easily, many different, few similar, hardly two or three ever identical. But for the purpose of this paper it is sufficient to make clear that there was a wide range of definitions of where rules came from and that there was not even consent on the underlying dissents among the authors.

III. Constructing 19th Century International Law: Source Matters

The question of sources was without any doubt one of the key issues of 19th century international law which is indicated by various elements the following paragraphs exemplify. It was discussed prominently and at length.

1. No Source of Sources

[20] Holtzendorff, 'Die Quellen des Völkerrechts', p. 79.

[21] Oppenheim, *International Law*, p. 21.

The relevance of the question was historically even heightened through the fact that there was no contemporary (legal) authority who or which had defined the canon of sources. A similar definition or a functional equivalent to Article 38 of the ICJ Statute was absent. No universal list summed up what international law sources should be, theory and legal practice were manifold, and no authority coordinated this pluralism. Hence, the authors were quite free in their construction and systematization of sources, and this probably aroused their genius and creativity.

2. If it Matters, Put it Into the Title

The question of sources was traditionally so important that many textbooks took it directly or indirectly into the title. There are two well-known and prominent variants.

a. A Pre-Modern Tradition Continued: 19th Century 'Law of Nature and of Nations'

First, there was the pre-modern tradition of the *Ius Naturae et Gentium*. Not only jurists were its authors,[22] but also theologians,[23] and philosophers.[24] International law was conceptualized as a universal natural law which was its primary (and often only) source. The rules were often derived by the so-called 'domestic analogy'.[25] Primarily defined for the individual, the rules were transferred to the State by analogy.[26]

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[22] See e.g., Lauritz Nørregaard, *Natur- og Folke- Rettens Første Grunde* (Copenhagen: Gyldendals Forlag, 1776); Giovambattista Almici, *Institutiones iuris naturae et gentium secundum catholica principia* (Madrid: Saluatoris Faulí, 1789); Johann Friedrich Weidler, *Institutiones Iuris Naturae et Gentium* (Wittenberg: Heinr. Schwarz, 1781).

[23] See e.g., Augustin Schelle, *Praktische Philosophie zum Gebrauch akademischer Vorlesungen. Zweyter Theil, welcher das Natur- und Völkerrecht, und die Staatsklugheit enthält* (Salzburg: Hof- und akad. Waisenhausbuchhandlung, 1785).

[24] Gottlob August Tittel, *Erläuterungen der theoretischen und praktischen Philosophie nach Herrn Feders Ordnung. Natur- und Völkerrecht* (Frankfurt am Main: J.G. Garbe, 1786).

[25] Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (Cambridge: Cambridge University Press, 2009), p. 89, with further references in note 66.

[26] See e.g., Jean Jacques Burlamaqui, *Principes du Droit Politique*, vol. 2 (Amsterdam: Zacharie Chatelain, 1751), p. 6; Thomas Rutherforth, *Institutes of Natural Law* [1st ed. Cambridge 1754-6], 2nd American edition (Baltimore: William

This approach did not cease at the turn of the 19th century. On the contrary, the genre of *Ius Naturae et Gentium*-treatises continued in many countries and languages after Latin had stopped to be the dominant language of the legal discourse. For many decades, in France, Italy, Spain and the Netherlands, the main place for the discourse on international law were the textbooks on natural law which comprised elaborated sections on the normative order of international relations. Authors like Gérard de Rayneval,[27] Charles-Jean Baptiste Bonnin,[28] Claude Louis Samson Michel,[29] Louis Barnabé Cotelle,[30] and Léopold Malepeyre in France,[31] Pietro Baroli,[32] Guglielmo Audisio,[33] or Nicola Caputi in Italy,[34] or Hendrik Cockin the Netherlands,[35] were, before the birth of international law as an autonomous discipline,[36] the main reference for all those who wanted to read about the rank of States, the rules for warfare and on the rights and duties of diplomats.

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and Joseph Neal, 1832), B.II, C.IX, I, p. 484; Johann Gottlieb Heineccius, *Elementa Juris Naturae et Gentium* (Neapel: Typographia Balleoniana, 1764), L.II, C.I, § 1, p. 293;

27 Gérard de Rayneval, *Institutions du droit de la nature et des gens*, 1st ed. (Paris: Leblanc, 1803); nouvelle édition (Paris: A. Durand, 1851).

28 Charles-Jean Baptiste Bonnin, *Traité du Droit, contenant les Principes du Droit Naturel et du Droit des Nations* (Paris: Garnery, 1808).

29 C[laude] L[ouis] S[amson] Michel, *Considérations nouvelles sur le droit en général et particulièrement sur le droit de la nature et des gens* (Paris: Delaunay, 1813).

30 [Louis Barnabé] Cotelle, *Abrégé Du Cours élémentaire du Droit de la Nature et des Gens* (Paris: Gobelet-Cotelle & Janet-Louis Janet, 1820).

31 [Léopold] Malepeyre, *Précis de la science du droit naturel et du droit des gens* (Paris: Bachelier, 1829).

32 Pietro Baroli, *Diritto Naturale Privato E Pubblico*. Volume V-VI: Diritto Naturale Pubblico Esterno (Cremona: G. Feraboli, 1837).

33 Guglielmo Audisio, *Iuris naturae et gentium privati et publici fundamenta* (Roma: Propaganda Fide, 1852).

34 Nicola Caputi, *Elementi del Diritto di Natura e delle Genti* (Bari: Libreria e stamperia Capasso, 1840).

35 Hendrik Cock, *Natuur- Staats- en Volkenregt* (Leyden: J.G. la Lau, 1837).

36 Luigi Nuzzo and Miloš Vec, *Constructing International Law—The Birth of a Discipline* Frankfurt am Main: V. Klostermann, 2012).

But also in the United States and in Great Britain, this tradition was upheld. The law of nations was treated—as by the theologian Johan Daniel Gros in 1795[37]—in the context of natural law. James Mackintosh came first out with 'the study of the law of nature and nations' in 1797, but was reprinted not only in 1799, 1800, but also in 1828, 1835, 1836, and 1843,[38] Leone Levi in 1855 with a similar title,[39] both referring primarily to natural law as a source.

Even when the tradition of such treatises became extinct, its methodological premises did not. Such doctrines as the 'fundamental rights and duties of States' outlived the genre and operated with its constructions when stating international law rules—but often denying their natural law origin.[40]

b. *Vorsprung Durch Technik*: Modernization Through Historical Sources

This title page tradition to name natural law as the source of international law was continued by a discontinuity in the field of treatises that came up in the second half of the 18th century. Textbooks on the law of nations were published that claimed to elaborate the rules on a new fundament. It was so important for them that they took the new fundament into their titles, and it was about sources, too. Georg Friedrich Martens is the best known of this group of authors. The English translation of the Philadelphia edition 1795 of his textbook reads as 'Summary of the Law of Nations, founded on the Treaties and Customs of the Modern Nations of Europe; with a list of the principal treaties . . .'.[41] But there were also many other authors publishing very similar titles before the turn of the 18th century

37 Johan Daniel Gros, *Natural principles of rectitude* (New York: T. & J. Swords, 1795).

38 James Mackintosh, *Discourse on the study of the law of nature and nations* (Boston: Pratt & Co., 1843).

39 Leone Levi, *The Law of Nature and of Nations as affected by Divine Law* (London: W. & G. Cash, 1855).

40 Miloš Vec, 'Grundrechte der Staaten. Die Tradierung des Natur- und Völkerrechts der Aufklärung', *Rechtsgeschichte. Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte* 18 (2011): 66–94.

41 [Georg Friedrich von] Martens, *Summary of the Law of Nations, founded on the Treaties and Customs of the Modern Nations of Europe; with a list of the principal treaties, concluded since the year 1748 down to the present time, indicating the works in which they are to be found*, trans. by William Cobbett (Philadelphia: Thomas Bradford, 1795).

like Pierre Joseph Neyron,[42] or Karl Gottlob Günther.[43] Martens' book received many editions in the 19th century and was translated into various languages.[44] A modernization of the science of international law took place and the new technique focused primarily on historical sources, treaties and customs, instead of the eternity of natural law.

3. Other Systematical Locations

The question of sources was also treated in various places within the textbooks. I suggest considering five different possibilities.

a. Monographs on Sources

First, some monographs appeared during the 19th century that depicted mainly the issue of international law sources by dealing with treaties and their relevance for contemporary international law. The most prominent books in this genre were probably the Estonian-Russian Carl Bergbohm's *Staatsverträge und Gesetze als Quellen des Völkerrechts* from 1876,[45] and Georg Jellinek's *Die rechtliche Natur der Staatenverträge* which was published in 1880.[46] Lesser known, but of similar relevance is the Swiss Otfried Nippold's book from 1894 on international treaties.[47]

b. Defining International Law Through its Sources

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42 Pierre Joseph Neyron, *Principes Du Droit Des Gens Européen Conventionnel et Coutumier, ou bien Précis historique politique & juridique des droits & obligations que les Etats de l'Europe se sont acquis & imposés par des conventions & des usages reçus* (Braunschweig: Bronswic, Librairie des Orphelins, 1783).

43 Karl Gottlob Günther, *Europäisches Völkerrecht in Friedenszeiten nach Vernunft, Verträgen und Herkommen mit Anwendung auf die teutschen Reichsstände*, vol. 1 (Altenburg: Richtersche Buchhandlung, 1787), vol. 2 (Altenburg: Richtersche Buchhandlung, 1792).

44 Peter Macalister-Smith and Joachim Schwietzke, 'Bibliography of the Textbooks and Comprehensive Treatises on Positive International Law of the 19th Century', *Journal of the History of International Law* 3 (2001): 75–142, 100–1.

45 Carl Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Dorpat: C. Mattiesen, 1876).

46 Georg Jellinek, *Die rechtliche Natur der Staatenverträge* (Wien: A. Hölder, 1880).

47 Otfried Nippold, *Der völkerrechtliche Vertrag, seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* (Bern: Wyss, 1894).

Secondly, the international lawyers sometimes referred prominently to the questions of sources when defining international law. So did Klüber in 1819 when he stated under the headline of the '*Définition et parties du droit des gens*':

On appelle *gens* ou *nations* libres les états indépendans, considérés dans leurs rapports mutuels comme personnes morales. L'ensemble de leurs droits réciproques et parfaits, du droit des états entr'eux, forme le *droit des gens* ou *droit des nations* (*jus gentium*, *jus civitatum inter se*). Ce droit est *naturel*, en tant qu'il dérive de la nature même des relations qui subsistent entre les états: *positif*, lorsqu'il est fondé sur des conventions expresses ou tacites.[48]

Wheaton and Calvo made similar references in their definition of international law on its sources.[49]

c. Explicit Chapters on Sources

The most common variant however is, thirdly, the elaboration on the sources of international law within a distinct chapter of the textbook. These chapters are often to be found at the very beginning of the textbooks.[50] The most comprehensive and differentiated tract I do know on this topic is Holtzendorff's already mentioned nearly 80-pages-long section in his own four-volume *Handbuch*.[51] Conversely, it is striking when authors do not include such explicit treatises in their textbooks or do not prominently mention the term 'source' in this context.[52]

d. Implicit References in International Law Histories

Fourthly, the question of sources is also treated when authors undertake retrospectives on the history of the writings on international law. These retrospectives were often critical in their approach and they

48 Jean Louis Klüber, *Droit des Gens moderne de l'Europe*, vol. 1 (Stuttgart: Librairie de J. G. Cotta, 1819), § 1, p. 11.

49 Wheaton, *Elements of International Law*, p. 23; Calvo, *Le droit international théorique et pratique*, p. 139.

50 See e.g., Pasquale Fiore, *Nouveau Droit International Public*, vol. 1 (Paris: A. Durand & Pedone-Lauriel, 1868), T. I, C. 4, pp. 84–94.

51 Holtzendorff, 'Die Quellen des Völkerrechts', p. 77–155.

52 See e.g., William Edward Hall, *A Treatise on International Law*, ed. J. B. Atlay, 5th ed. (Oxford: Clarendon Press, 1904), Introductory Chapter, p. 1–16, mentions 'source' only at pp. 6, 10—I have no explanation for that.

formulated them clearly as a self-legitimation of their own writings. [53] Thus they developed their own ideas by displaying and commenting on the former theories and [*d*]*iverses écoles*[54] of international law.[55]

e. Discussing Sources When Contending Rules

Fifthly, international lawyers discussed the various sources when they treated concrete rules. They discussed rights and duties of the various actors in a certain situation or conflict and thus had to refer to anything that seemed suitable to justify the claim that such rules existed and such a behavior was lawful—or not.

f. A Dualistic Structure: The 'Practical' and the 'Philosophical' Law of Nations

The plurality of possible sources of international law (see Section II. 2. a and b) led for some decades between the late 18th and the 19th century to a dualism in the tracts. The Viennese natural lawyer Martini formulated the dualism within the discipline when he differentiated between the '*natural*—philosophical or the posited—historical' international law.[56] Therefore, some 19th century authors—jurists and *Staatswissenschaftler*s—included two separate sections in their books on international law. One, usually the first, dealt with the so called 'Philosophical Law of Nations'. This section incorporated international law theory, mainly developed on the basis of natural law. The second section, named 'The practical (or Positive) Law of Nations' comprised the concrete regulations,

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53 Martti Koskenniemi, 'A History of International Law Histories', in *The Oxford Handbook of the History of International Law*, edited by Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2012), pp. 943–71.

54 Fiore, *Nouveau Droit International Public*, pp. 30–54.

55 See e.g., Oppenheim, *International Law*, pp. 90–3.

56 [Karl Anton] Freiherr von Martini, *Lehrbegriff des Natur- Staats- und Völkerrechts. Vierter Band, welcher das Völkerrecht enthält* (Wien: Sonnleithnerische Buchhandlung, 1784), § 13 (p. 18, highlighting in original).

established by treaties and the custom of States. Such dualistic presentation can be found in the writings of Robert von Mohl,[57] Pölitz,[58] Bülau,[59] Droste-Hülshoff,[60] and others.

This dualism, based on a dichotomic confrontation of international law's sources, ends in the last third of the nineteenth century. I have the suspicion that the radical dualism of such presentations might have been a German specialty. However, the relation between the philosophical and the positive law of nations was not, and it was discussed earnestly and intensely.[61]

IV. The 'European Law of Nations': A New Disciplinary Self-Understanding as a Result of a Paradigm Shift in Sources

The above mentioned shift to a new group of sources which was displayed in the titles of Martens, Neyron, Günther and others, had its consequences for the self-understanding of the discipline. As a paradigm change the denomination of the science altered. 'Europe' went into the explicit focus of the law of nations.[62] The new academic approach labeled the books additionally with the adjective

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57 Robert von Mohl, *Encyklopädie der Staatswissenschaften*, 1st ed. (Tübingen: Laupp'sche Buchhandlung, 1859), Philosophisches Völkerrecht: §§ 54ff., pp. 402 ff, Positives europäisches Völkerrecht: §§ 68ff., pp. 461 ff.

58 Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Erster Theil: das Natur- und Völkerrecht, das Staats- und Staatenrecht, und die Staatskunst*, 2nd ed. (Leipzig: Hinrichssche Buchhandlung, 1827), pp. 120–45; Pölitz, *Fünfter und letzter Theil: Practisches (europäisches) Völkerrecht;* Karl Heinrich Ludwig Pölitz, *Staatswissenschaftliche Vorlesungen für die gebildeten Stände in constitutionellen Staaten*, vol. 3 (Leipzig: Hinrichssche Buchhandlung, 1833), p. 83.

59 Friedrich Bülau, *Encyclopädie der Staatswissenschaften*, 2nd ed. (Leipzig: C.E. Kollmann, 1856): starts with elaborations on the 'philosophischen Staatenrechts', pp. 395 ff; additionally, he treats the 'praktisches europäisches Völkerrecht', pp. 440 ff.

60 Clemens August von Droste-Hülshoff, *Lehrbuch des Naturrechts oder der Rechtsphilosophie* (Bonn: Adolph Marcus, 1823), § 166, p. 250.

61 See e.g., Kaltenborn von Stachau, *Kritik des Völkerrechts*, pp. 13, 16–20; Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Fünfter und letzter Theil*, p. 9.

62 Karl-Heinz Lingens, 'Europa in der Lehre des »praktischen Völkerrechts«', in *Auf dem Weg nach Europa. Deutungen, Visionen, Wirklichkeit*, edited by Irene Dingel and Matthias Schnettger (Göttingen: Vandenhoeck & Ruprecht, 2010), 173–86.

'European'.[63] The treatises were named *Primae lineae iuris gentium Europaearum practici*,[64] *Inleiding tot de Wetenschap van het Europesche Volkenregt*,[65] *Grundlinien des europäischen Gesandschaftsrechtes*,[66] or *Grundriß eines europäischen Völkerrechts*.[67] This became a dominant label which persisted until the last quarter of the 19th century. The focus on Europe was a result of the focus on empiricism: treaties and custom were possible among States and other political entities all over the world, but in fact the heavyweight of the treaty relations laid on this continent. Empiricism and Europeanization went hand in hand.

The former natural law-universalism was rejected through this shift to positive law. Henry Wheaton declared the limited applicability of rules:

Is there a uniform law of nations? There certainly is not the same one for all the nations and States of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.[68]

The new discipline was at the same time European, practical, and modern, and the titles of the treatises took this set in various combinations to attract readers with the promise of juridical validity as opposed to mere philosophical speculation in a Christian Wolff-manner.[69]

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63 Julius Schmelzing, *Systematischer Grundriß des praktischen Europäischen Völker-Rechtes*, 3 vol. (Rudolstadt: Verlag der Hof-, Buch- und Kunsthandlung, 1818-20).

64 Georg Friedrich von Martens, *Primae lineae iuris gentium Europaearum practici* (Göttingen: Dieterich, 1785).

65 See e.g., Gabinus de Wal, *Inleiding tot de Wetenschap van het Europesche Volkenregt* (Groningen: Cornelius Star Numan, 1835).

66 Anonym, *Erste Grundlinien des europäischen Gesandschaftsrechtes* (Mainz: Andreas Craß, 1790).

67 [Karl Gottlob Günther], *Grundriß eines europäischen Völkerrechts nach Vernunft, Verträgen, Herkommen und Analogie*, (Regensburg: Montagische Buchhandlung, 1777).

68 Wheaton, *Elements of International Law*, pp. 17 ff.

69 J[anus] L[aurids] A[ndreas] Kolderup-Rosenvinge, *Grundrids af den positive Folkeret. Til Brug ved Forelæaesninger*, 2nd ed. (Copenhagen: Gyldendalske Boghandlings Forlag, 1835); Philipp Thomas Köhler, *Einleitung in das praktische*

V. Debating International Law's Normativity

International law's normativity was debated controversially in these treatises. The authors discussed which legal sources existed, their systematization, their interrelation, and many issues more. But first, one fundamental step had to be taken.

1. If Not Morality: The Minority Report

Their departing point was mostly the assumption that international law was a juridical system of norms. As we all know, not all scholars shared this view. Some 19th authors claimed that the interpower-normativity was not based on law, but on the mere morality of States;[70] others saw its source in domestic law, not in international legal normativity. Among this academic minority were such eminent lawyers as Gustav Hugo,[71] Georg Friedrich Puchta,[72] John Austin,[73] theologians as Thomas Rutherforth,[74] but also philosophers John Stuart Mill,[75] or Georg Friedrich Wilhelm Hegel.[76] This group—often labelled as 'deniers' of international law—was heterogeneous, and generalizations are hard to make.

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europäische Völkerrecht (Mainz: Andreas Graß 1790); [Karl Theodor] Pütter, 'Über das Princip des practischen Europäischen Völkerrechts', *Zeitschrift für die gesammte Staatswissenschaft* 6 (1850): 535–62.

70 Kristina Lovrić-Pernak, '*Morale internationale' und 'humanité' im Völkerrecht des späten 19. Jahrhunderts. Bedeutung und Funktion in Staatenpraxis und Wissenschaft*, (Baden-Baden: Nomos, 2013), pp. 28–31.

71 Gustav Hugo, *Lehrbuch eines civilistischen Cursus. Erster Band, welcher als allgemeine Einleitung die juristische Encyclopädie enthält*, 8th ed. (Berlin: August Mylius, 1835), pp. 73 ff.

72 Georg Friedrich Puchta, *Das Gewohnheitsrecht, Erster Theil* (Erlangen: Palm'schen Verlagsbuchhandlung, 1828), p. 142.

73 John Austin, *The Province of Jurisprudence Determined* (London: J. Murray, 1832), p. 147.

74 Rutherforth, *Institutes of Natural Law*, p. 483.

75 Casper Sylvest, 'International Law in Nineteenth-Century Britain', *British Year Book of International Law* 75 (2004): 9–70, 36.

76 Georg Friedrich Wilhelm Hegel, *Grundlinien der Philosophie des Rechts* (Berlin: Nicolai, 1821), §§ 330–40, pp. 337–43.

But the vast majority of jurists clearly rejected this view strongly in practice and theory. They had many and good arguments,[77] and general overviews on 19th century jurisprudence hardly debated the issue of international law being not a proper field of international juridical order, but an extra-legal normativity or founded in mere State law.[78] Rudolf von Jhering terminated his discussion with the clear statement: '[t]he legal character of international law is . . . unquestionable.'[79]

2. Claims and Candidates for 'Positivism'

But if international law was constructed in the 19th century as a juridical discipline, was its normativity in the concepts of jurists and other scholars solely based on posited sources of law?

a. The Never-Ending End of Natural Law

The claim of the end of natural law during the 19th century and the turn to 'positivism' is classical and it is still spread in academia. German Diplomat and scholar of the history of international law Wilhelm Georg Grewe wrote that 'in the continental conception of international law a clear and unequivocal positivism increasingly prevailed.'[80] Eminent scholar Heinhard Steiger generalized in 1997: '[t]he German jurisprudence of international law . . . changed from a natural law based doctrine to a positivistic one.'[81] Karl-Heinz Ziegler made in 2007 a very similar statement: '[w]ithin the doctrine of international law positivism, which was already dominating in many other fields of jurisprudence, achieves common acceptance in continental Europe.'[82] Anthony Anghie seems to share

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77 See e.g., Ferdinand Walter, *Juristische Encyclopädie* (Bonn: Adolph Marcus, 1856), § 341, p. 335.

78 Adolf Merkel, *Juristische Encyclopädie*, 1st ed. (Berlin / Leipzig: J. Guttentag, 1885), § 828 (p. 363); 2nd ed., § 855, p. 306.

79 Rudolph von Jhering, *Der Zweck im Recht*, vol. 1, 3rd ed. (Leipzig: Breitkopf & Härtel, 1893), C. VIII: Die gesellschaftlichen Zwecke, 10. Das Recht—Bedingtheit desselben durch Zwang, pp. 324s.

80 Wilhelm Georg Grewe, *The Epochs of International Law*, translated and revised by Michael Byers (Berlin: De Gruyter, 2000), pp. 503s; Epochen der Völkerrechtsgeschichte, 2nd ed. (Baden-Baden: Nomos, 1988), p. 592:

81 Heinhard Steiger, 'Völkerrecht und Naturrecht zwischen Christian Wolff und Adolf Lasson', in *Naturrecht im 19. Jahrhundert. Kontinuität—Inhalt—Funktion—Wirkung*, edited by Diethelm Klippel (Goldbach: Keip, 1997), 45–74, 45.

82 Karl-Heinz Ziegler, *Völkerrechtsgeschichte. Ein Studienbuch*, 2nd ed. (München: C.H. Beck, 2007), § 40 III 2, p. 172.

this view.[83] In her recently published book Mónica García-Salmones Rovira captions a chapter with the 'Fall of Natural Law'.[84]

This assertion of the decline of natural law in the 19th century often lacks a definition or discussion of what 'positivism' would or should signify in this context. But there were and are some exceptions—in sources and in secondary literature. Lassa Oppenheim proclaimed his understanding of positivism in a high tone in 1905: '[o]nly a positive Law of Nations can be a branch of the science of law.'[85]

Lauri Mälksoo, depicting and contextualizing such statements, argued in 2005 that 'The central strategy of the positivist legal tradition has been to claim the separation of law from politics. In playing down the political, socioeconomic, historical context of legal arguments and doctrines, the mainstream legal tradition relies on the absolutist programme.'[86] Neff distinguishes three different approaches to positivism in the 19th century.[87] Hence, 'positivism' is a term that was and is understood in many different ways and historically lacked consent on the underlying criteria. My ambition is to discuss this assertion of the decline of natural law in the 19th century critically and to refute as a legal historian some of the claims combined with this phrase.

b. Some Classical Candidates for 'Positivism'

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83 Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005), pp. 9, 32s, 40s.

84 Mónica García-Salmones Rovira, *The Project of Positivism in International Law. The History and Theory of International Law* (Oxford: Oxford University Press, 2013), pp. 30–35.

85 Oppenheim, *International Law*, p. 92. See Amanda Perreau-Saussine, 'Lauterpacht and Vattel on the sources of international law: the place of private law analogies and general principles', in *Vattel's International Law in a XXIst Century Perspective*, edited by Peter Haggenmacher and Vincent Chetail (Boston: Martinus Nijhoff Publishers, 2011), 167–85, 179.

86 Mälksoo, *The Context of International Legal Arguments*, p. 182; see also: Mälksoo, 'The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855–1985', *British Year Book of International Law* 76 (2005): 383–502, 500–1.

87 Neff, *Justice among Nations*, p. 226.

This disputed and broad understanding of positivism within the writings of many jurists leads to the result that numerous 19th century international lawyers were labelled as 'positivists' (some of them with constraints). The list of suspects and the corresponding names of the nominees is impressive: Georg Friedrich von Martens, Johann Ludwig Klüber, August Wilhelm Heffter, Robert Phillimore, August von Bulmerincq, Adolph Hartmann, as well as Thomas Joseph Lawrence, Thomas Alfred Walker, John Westlake, Emanuel von Ullmann, Franz von Liszt, Karl Gareis, Hannis Taylor, and, at the end of the pre-World War I period, of course Lassa Oppenheim himself.

3. Secularization: Divine Law as a Source?

One of the master narratives of international law is the idea of secularization. Did this also affect the sources? If the often-told story of 'positivism' should be true, one would have to assume that.

But a brief look at the theory of sources refutes this hypothesis. Quite a number of eminent 19th century lawyers claimed still that divine law is a source of international law. Casper Sylvest has pointed this out for British John Austin and Oke Manning,[88] where such positions could be found. Robert Phillimore claimed in the very sense: '[t]he Primary Source, then, of International Jurisprudence is Divine Law. Of the two branches of Divine Law which have been mentioned, natural law, called by jurists *jus primarium*, is to be first considered.'[89] Interestingly, Phillimore nevertheless claimed that this international law was also binding non-Christian States.[90] Henry Wager Halleck wrote in 1872 that international law is divided: '[t]he most common of these general divisions is, into the natural law of nations, and the positive law of nations. The first of these branches has been sub-divided into the divine law, and the application of the law of God to States.'[91] Alphonse Rivier claims that '*[l]e droit des gens est positif et pratique*', but informs the reader that God has created and still is

88 Sylvest, 'International Law in Nineteenth-Century Britain', respectively p. 16, 21.

89 Robert Phillimore, *Commentaries upon International Law*, vol. 1 (Philadelphia: T. & J. W. Johnson, 1854), C. III, Nr. XXIII, p. 56.

90 Phillimore, *Commentaries upon International Law*, p. 59.

91 Halleck, *Elements of International Law and Laws of War*, pp. 30 ff.

creating the universal order of natural law for the relations among peoples.[92] English jurist Leone Levi treats in 1855 'The Law of Nature and of Nations as affected by Divine Law'.[93]

Even top candidate for positivism August Bulmerincq referred prominently at the very end of his 1853 published habilitation to divine law when he writes that: 'international law is subordinated under divine law, which humankind is supposed to fulfil. This law proclaims that the leadership of the present authorities is not without purpose. The representatives and preservers of positive international law are established by God.'[94]

Mälksoo concluded that there were different Bulmerincqs: [t]he positivist asked for a separation of law and politics, but the political Bulmerincq did not hesitate to instrumentalize legal issues for political needs.[95]

4. Positivism as the End of Natural Law Textbooks?

Another variant of positivism is the claim that the 19th century terminated the tradition of natural law textbooks. This is true, but not in that extent as many writers believe. The tradition of 'law of nature and of nations'-books displayed some late works (see Section II. 2. a). Additionally, the whole genre of natural law books was much more alive than it is often assumed. German legal historians Diethelm Klippel and Jan Schröder have devoted much of their work to the proof of how vivid these writings still were, not only in late 18th,[96] but also in the 19th century.[97] Schröder identifies a flourishing of

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92 Rivier, *Principes du Droit des Gens,* p. 28–9.

93 Levi, *The Law of Nature and of Nations as affected by Divine Law*.

94 August Bulmerincq, *Das Asylrecht und die Auslieferung flüchtiger Verbrecher. Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts* (Dorpat: J.C. Schünmann's Witwe & C. Mattiesen, 1853), p. 160.

95 Mälksoo, 'The Science of International Law and the Concept of Politics', p. 418.

96 Diethelm Klippel, 'Das deutsche Naturrecht am Ende des 18. Jahrhunderts', in *Das Naturrecht der Geselligkeit. Anthropologie, Recht und Politik im 18. Jahrhundert*, edited by Vanda Fiorillo and Frank Grunert (Berlin: Duncker & Humblot, 2009), 301–25.

natural law theories in early 19th century jurisprudence, some of them inspired by Kant's legal reasoning and Hegel's legal philosophy.[98]

Often, only the terminology changed. The context of treating international law shifted from 'natural law' to 'law of reason' as in the case of Rotteck,[99] or, in the case of Pölitz,[100] a replacement of 'natural law' through 'philosophical law' took place. Another indicator of the continuing interest in this tradition is the ongoing publication of abundant versions of Vattel's *Le droit des gens ou principes de la loi naturelle* (1758). It received numerous editions and translations during the 19th century.[101]

5. Persistence of Natural Law as a Source

The claim that natural law persisted in many ways during the 19th century, is also true beyond the ongoing tradition of textbooks treating international law as a part of it without or with only terminological changes in their titles.

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97 Jan Schröder and Ines Pielemeier, 'Naturrecht als Lehrfach an den deutschen Universitäten des 18. und 19. Jahrhundert', in *Naturrecht—Spätaufklärung—Revolution*, edited by Otto Dann and Diethelm Klippel (Hamburg: Meiner, 1995), 255–69; Diethelm Klippel, *Naturrecht und Rechtsphilosophie im 19. Jahrhundert: Eine Bibliographie. Band I: 1780 bis 1850* (Tübingen: Mohr Siebeck, 2012), pp. 270–92.

98 Jan Schröder, *Recht als Wissenschaft. Geschichte der juristischen Methodenlehre in der Neuzeit (1500-1933)*, 2nd ed. (München: C.H. Beck, 2012), p. 205.

99 Carl von Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften. Erster Band: Allgemeine Einleitung in das Vernunftrecht. Natürliches Privatrecht* (Stuttgart: Hallberger'sche Buchhandlung, 1829); *Dritter Band (der besondern Staatslehre erster Band): Materielle Politik: 1.) Auswärtige Angelegenheiten (Politik im engsten Sinne; insbesondere das Völker- und Staaten- Recht)* (Stuttgart: Hallberger'sche Verlagshandlung, 1834), pp. 1–166.

100 Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Fünfter und letzter Theil*, p. 3: the 'philosophical law of nations' is founded on 'reason'.

101 On 19th century Vattel reception see: Vincent Chetail, 'Vattel and the American dream: An Inquiry into the reception of the Law of Nations in the United States', in *The Roots of International Law/Les fondements du droit international. Liber Amicorum Peter Haggenmacher*, edited by Pierre-Marie Dupuy and Vincent Chetail (Leiden: Martinus Nijhoff Publishers, 2014), 251–300; Elisabetta Fiocchi Malaspina, 'La ricezione e la circolazione di "Le droits des gens" di Emer de Vattel nel XIX secolo', *Materiali per una storia della cultura giuridica* 2 (2013): 303–20.

a. 19th Century International Law Sources Theory: Natural Law is Still Alive and Kicking

Analogous observations can be made in the theory of sources. The starting point of exposure is in the first half of the 19th century still very often an open reference to natural law. The Chilean scholar and author of the first Latin American treatise on international law Andrés Bello writes in 1832:

El derecho de jentes no es pues otra cosa que el natural, que, aplicado a las naciones, considera al jénero humano, esparcido sobre la faz de la tierra, como una gran sociedad de que cada cual de ellas es miembro.[102]

Portuguese jurist Vicente Ferrer Neto Paiva defined the topic of his book on international law strictly in the same manner by a reference to natural law: '[d]ireito das Gentes é a sciencia, que tracta das modificações do Direito Natural Puro, applicado ás relações sociaes, que existem entre as nações (D. N. §. 44.) tanto no tempo de paz, como de guerra.'[103] In the first edition of his textbook in 1819 Klüber stresses the importance of natural law as the foundation for international law principles and its subsidiary validity in this field.[104] Other authors like Belgian professor Arntz also addressed the latter function of natural law.[105] Mackintosh was treating 'the natural law of States'.[106]

This claim that such a natural law based law of nations existed was not limited to the first half of the 19th century and writers like Bello and Mackintosh. Also in the 2nd half of the 19th century theologians and *Staatswissenschaftler*s stated that the main source of international law was to be found in natural law. Italian jurist Pasquale Fiore shared this point:

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102 A[ndrés] B[ello], *Principios de Derecho de Jentes* (Santiago de Chile: Imprenta de La Opinión, 1832), Preliminares, 2, pp. 1s.

103 Vicente Ferrer Neto Paiva, *Elementos de direito das gentes*, 3rd ed. (Coimbra: Imp. da Universidade, 1850), P.I, Sec. I, § 1, p. 1.

104 Klüber, *Droit des Gens moderne de l'Europe*, vol. 1, p. 4.

105 Arntz, *Programme Du Cours Droit des Gens*, p. 5; Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Fünfter und letzter Theil*, p. 17.

106 Mackintosh, *Discourse on the study of the law of nature and nations*, p. 45.

Puisque le fondement de tout le droit international est la loi naturelle des nations, on comprend clairement que la première source directe doive être la raison. La loi naturelle, en effet, n'est pas écrite, elle n'a jamais été formulée en aucune langue humaine, ni promulguée par un législateur; elle se révèle immédiatement à notre raison.[107]

The link that Fiore spoke about at the beginning of this statement was more radically taken by other authors. Instead of 'natural law', the source of international law was being found in 'reason'—such positions can be found in Wheaton's treatise: '[i]nternational law . . . may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations . . .'.[108] Thus, the denominations changed: *reason*, *raison Vernunft*, *Natur der Sache*, *nature des choses*[109] were the functional equivalents for the recourse on natural law which went terminologically out of fashion.

b. References to Natural Law in Various Regulatory Fields

This ongoing reference to natural law as a source can also be traced in various regulatory fields. The principle of non-intervention, for example,[110] was, according to the Italian lawyer Carnazza-Amari, one of the hotspots of 19th century international legal arguments.[111]

But when debating this issue, the points of reference were preferably: 'natural law',[112] 'law of reason',[113] 'a reasonable theory of law',[114] 'the reasonable',[115] 'the general grounds of reason'.[116] This

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107 Fiore, *Nouveau Droit International Public*, p. 84.

108 Wheaton, *Elements of International Law*, p. 23.

109 Albert Fritot, *Esprit Du Droit*, 2nd ed. (Paris: E. Pochard, 1825), p. 108.

110 I refer here to my former publication: Miloš Vec, 'Intervention/Nichtintervention. Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert', in *Macht und Recht. Völkerrecht in den internationalen Beziehungen*, edited by Ulrich Lappenküper and Reiner Marcowicz (Paderborn: Ferdinand Schöningh, 2010), 135–60.

111 G[iuseppe] Carnazza-Amari, 'Nouvel exposé du principe de non-intervention', *Revue de droit international et de législation comparée* 5 (1873): 352–89 and 531–65, 352.

had of course something to do with this special field where law left the leeway for (power) politics and could not agree in establishing a general undisputed principle in positive law. Thus, the recourse on natural law was less surprising in the field of intervention than in others where treaties and custom existed.

c. Entanglements Between Natural and Positive Law

Thus, natural law was not expelled from 19th century sources of international law. On the contrary, it played an eminent role. Even scholars like Georg Friedrich Martens, who claimed in the late 18th century to have modernized the discipline through their turn to customs and treaties,[117] did not deny the existence of a natural law of nations.[118] Martens frequently referred to the perspective of natural law when discussing regulatory matters.[119]

Those 19th century writers who claimed the opposite and said that their international law system was nowadays only based on positive law were heavily flouted by Carl Bergbohm in 1892 who saw the persistence of natural law more critical than probably anybody else:

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112 Karl Hermann Scheidler, 'Natural Law', Nachtrag [on Art. Intervention (völkerrechtlich)], in *Das Staats-Lexikon oder Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, vol. 7, edited by Carl von Rotteck and Carl Welcker, 2nd ed. (Altona: Hammerich, 1847), 434–47, 442.

113 Carl von Rotteck, 'Intervention (völkerrechtlich)', in *Das Staats-Lexikon*, vol. 8, edited by Rotteck and Welcker, 1st ed. (Altona: Hammerich, 1839), pp. 377–94, 377.

114 Carl von Rotteck, 'Intervention (völkerrechtlich)', in *Das Staats-Lexikon*, edited by Rotteck and Welcker, 377–94, 386.

115 [Albert Friedrich] Berner, 'Intervention (völkerrechtliche)', in *Deutsches Staats-Wörterbuch*, vol. 5, edited by Johann Caspar Bluntschli and Karl Brater (Stuttgart/Leipzig: Expedition des Staats-Wörterbuchs, 1860), pp. 341–54, 350.

116 [Wilhelm Traugott] Krug, *Dikäopolitik oder neue Restaurazion der Staatswissenschaft mittels des Rechtsgesetzes* (Leipzig: Hartmann, 1824), p. 324.

117 Georg Friedrich Martens, *Versuch über die Existenz eines positiven Europäischen Völkerrechts und den Nutzen dieser Wissenschaft* (Göttingen: J.C. Dieterich, 1787).

118 Georg Friedrich Martens, *Einleitung in das positive Europäische Völkerrecht auf Verträge und Herkommen gegründet* (Göttingen: J.C. Dieterich, 1796), Einleitung, p. 2.

119 Georg Friedrich Martens, *Einleitung in das positive Europäische Völkerrecht*, pp. 28, 46, 50, 52, 56, 58, 59, 61, 75, 76, 93, 106, 116, 119, 135, 147s., 170, 206, 298, 352, 378.

I just recall the law of traffic, the law of intervention, the doctrines of just and unjust war etc., which are all beyond the realm of positive law. The real traits of positive international law are not perceivable due to well-disposed disguise! If one revised according to my definition of natural law all the writings, which label themselves as international law or at least claim to be juridical, and eliminated all the sections, which are wholly or partly deduced from natural law, he would approve that I refrain from compiling this poor bibliography.[120]

Natural law and other sources went together, the authors separated and combined them from case to case and depending on their interests. Casper Sylvest thus concludes correctly that '. . . there is no clear distinction to be discerned between legal positivism and legal naturalism in nineteenth century international legal thought; for most of the century the two co-existed, but especially in the later decades they did so in a distinctive fashion that secured the coherence and respectability of the subject.'[121]

Martti Koskenniemi comes to the same result and focuses on the attitude of the international lawyers. They had their 'cultural and moral sensibilities' which lead them to be more than 'mere describers of valid (positive) law'.[122] Koskenniemi concludes:

It is precisely such shifting [between fact and evaluation, MV] that makes it pointless to try to class these writers—any one of them—as 'positivists' or 'naturalists'. They were always both at the same time—their arguments about valid positive law implying loaded assumptions about political worth,

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120 Carl Bergbohm, *Jurisprudenz und Rechtsphilosophie. Band 1: Einleitung. Erste Abhandlung: Das Naturrecht der Gegenwart* (Leipzig: Verlag von Duncker & Humblot, 1892), p. 352. Wrong attribution of the Bergbohm quotation to Jellinek by Jochen von Bernstorff, 'Georg Jellinek—Völkerrecht als modernes öffentliches Recht im fin du siècle?', in *Georg Jellinek. Beiträge zu Leben und Werk*, edited by Stanley Paulson and Martin Schulte (Tübingen: Mohr, 2000), pp. 183–206, 184, note 10.

121 Sylvest, 'International Law in Nineteenth-Century Britain', p. 12.

122 Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960* (Cambridge: Cambridge University Press, 2001), p. 95.

and their humanitarian sentiments always receiving expression in their practices of their own States or in some sociological understanding of the fact of the European civilization.[123]

6. A Century of Principles

This tendency to political assumptions was furthermore expressed in the widespread affection to principles 19th century lawyers displayed.[124] International lawyers formulated and postulated a whole bunch of principles when constructing international law. They needed these principles to fill the gaps in positive international law, to make statements about the nature of international relations and to include values into the system of international law. Heinhard Steiger saw these principles as the last outcome of the natural law school (which he believed to have declined) within the science of international law. Whereas natural law had lost its juridical validity, such principles did not, although being a product of the same school.[125] Amanda Perreau-Saussine has similarly highlighted the function of principles between law and politics, also addressing them as a product of natural law:

Principles of natural law, on this account, are a product of politics: they are legal principles—and not simply disguised policy decisions, as in the second account, above—but the justifying grounds of the relevant legal obligations are to be found within official practices and positive law themselves, within an imposed nexus of pacts, practices, and customs.[126]

VI. Positivism as Legalization of International Law

What could positivism then mean? One variant was the ambition of 19th century international lawyers to push back politics from their juridical science. Such statements can be found in various treatises,

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123 Koskenniemi, *The Gentle Civilizer of Nations*, p. 96.

124 Miloš Vec, 'Principles in 19th Century International Law Doctrine', in *Constructing International Law—The Birth of a Discipline*, Studien zur europäischen Rechtsgeschichte 273, edited by Luigi Nuzzo and Miloš Vec (Frankfurt am Main: V. Klostermann, 2012), pp. 209–27.

125 Steiger, 'Völkerrecht und Naturrecht zwischen Christian Wolff und Adolf Lasson', p. 50.

126 Perreau-Saussine, 'Lauterpacht and Vattel on the sources of international law', p. 182.

many of them written by the leading figures in the field, like Klüber,[127] or Heffter.[128] Klüber strived for a separation between the legal status of international law and other kinds of normativity.[129]

Others like Saxon *Staatswissenschaftler* Pölitz were not so sure about this and made stronger links from the positive law of nations to the maxims of *Staatsklugheit* (politics) as a source of international law.[130] But Pölitz was atypical and the tendency of his statement might be explainable through the fact that he was not a lawyer and thus had no ambition to keep law's and lawyer's realm clean from unlawful contaminations.

This tendency of 'legalization of international law' can be recognized on many levels of 19th century international law.[131] Jurists became the only authoritative writers. The sum of positive explicit legal rules among States increased impressively. In practice it meant that as the moral philosopher William Whewell already noted 'the body of International Law, in the course of the jural and moral progress of Nations, constantly becomes more and more exact, more and more complete . . .'[132] This was not only expressed in the mere increase of treaties—Edward Keene has recently highlighted on the basis of empirical data the 'treaty revolution' of the 19th century.[133] It was also the tendency to multilateralism, the conclusion of lawmaking treaties, the allotment of new fields of international cooperation, the institutionalizations,[134] particularly within the flourishing 19th century sciences, in economy and technology.[135]

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127 Klüber, *Droit des Gens moderne de l'Europe*, vol. 1, p. 14.

128 August Wilhelm Heffter, *Das Europäische Völkerrecht der Gegenwart*, 2nd ed. (Berlin: Schroeder, 1848), p. VI.

129 Klüber, *Droit des Gens moderne de l'Europe*, vol. 1, p. 14.

130 Pölitz, *Die Staatswissenschaften im Lichte unsrer Zeit, Fünfter und letzter Theil*, p. 9–10.

131 Besson, 'Theorizing the Sources', p. 165.

132 William Whewell, *The Elements of Morality, Including Polity*, 4th ed. (London: Bell and Daldy, 1864), p. 538.

133 Edward Keene, 'The Treaty-Making Revolution of the Nineteenth Century', *The International History Review* 34 (2012): 475–500.

134 Madeleine Herren, *Internationale Organisationen seit 1865. Eine Globalgeschichte der internationalen Ordnung* (Darmstadt: WBG, 2009); Madeleine Herren, 'Governmental Internationalism and the Beginning of a New World Order in the Late Nineteenth Century', in *The Mechanics of Internationalism. Culture, Society, and Politics from the*

VII. Pluralism Without a Hierarchy: The (Non-)Missing Systematization of Sources

The theory of sources is and was never consented among international lawyers. This paper has given some evidence on the historical positions and discussions. The writings of the scholars were manifold and controversial, their beliefs in what sources are, seemed pluralistic. Samantha Besson has made analogous observations for contemporary international law: 'the international legal order is vertically pluralistic in the absence of a hierarchy among legal sources, on the one hand, and horizontally pluralistic or fragmented in many parallel legal regimes on different matters but also in different regions, on the other'.[136] The 19th century was in no respect luckier.

Even within one author's work this historical pluralism seemed not to be orchestrated. No meta-rule was available to decide in cases of conflict between two sources which one to follow. This was not perceived as a deficit. Maybe such pluralism offered the chance to the science of international law to remain flexible; it enabled the international lawyers to generate such results the individual writers hold as adequate in the regulatory matter they were discussing.

VIII. Conclusion: Reluctance to Glance in the Mirror

The discourse of international law in the 19th century was mainly dominated by jurists in accordance with the institutionalization of international law, but some other professions also wrote about the normative order among States. Both positions towards the sources of international law did not differ in principle. They only set slightly different accents, including more extra-legal norms, or highlighted more prominently the link between law and morality. But none of the lawyers or other scholars

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1840s to the First World War, edited by Martin H. Geyer and Johannes Paulmann (Oxford: Oxford University Press, 2001), 121–44; Akira Iriye, *Global Community. The Role of International Organizations in the Making of the Contemporary World* (Berkeley: University of California Press, 2004).

135 Miloš Vec, *Recht und Normierung in der Industriellen Revolution. Neue Strukturen der Normsetzung in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (Frankfurt am Main: Vittorio Klostermann, 2006), pp. 1–166.

136 Besson, 'Theorizing the Sources', p. 164.

assumed that there was an international law that did not refer somehow to morality. On the contrary, *moralité internationale*,[137] the 'moral law of nations',[138] and other prominent references to a specific morality in international relations were often a keyword for them.

In their self-perception, they believed in a project called 'positivism', which had many different expressions and appeared in diverse variants (it thus appears detrimental to define *ex post* what 'positivism' is). It had historically different meanings. The international lawyers agreed on the idea of positivization of international law through treaties and codifications and institutions. But that did not mean that they excluded natural law, legal philosophy, reason, or even Roman law,[139] from the canon of sources.

As jurists, they claimed that their discipline was objective, different from politics, and thus a real science in the late 19th century understanding.[140] But this was often only a legitimation and a self-empowerment to politicize when discussing inter-state-issues where they gave openly 'subjective political comments'.[141] Academic writings and 19th century treaty practice were full of explicit references to 'international morality' as an intellectual and ethic fundament and source of international law.[142] The attitude of being a positivist international lawyer included in so far a specific political attitude they did not consequently reflect on,[143] and which was often undermined in their practical work. Their self-perception was in so far different from our picture of their work, which

137 Fiore, *Nouveau Droit International Public*, p. 466; and see Lovrić-Pernak, '*Morale internationale' und 'humanité' im Völkerrecht des späten 19. Jahrhunderts.*

138 Daniel Gardner, *A treatise on International Law* (New York: N. Tuttle, 1844), p. 95.

139 John Westlake, *International Law. Part I: Peace* (Cambridge: Cambridge University Press, 1904), p. 14; Halleck, *Elements of International Law and Laws of War*, p. 37.

140 Anne Orford, 'Scientific Reason and the Discipline of International Law', *European Journal of International Law* 25 (2014): 369–85, 373–77.

141 Mälksoo, *The Context of International Legal Arguments*, p. 202.

142 Lovrić-Pernak, '*Morale internationale' und 'humanité' im Völkerrecht des späten 19. Jahrhunderts.*

143 Kingsbury, 'Legal Positivism as Normative Politics', pp. 139–77.

criticizes them for being hypocritical and 'politics disguised'.[144] One could in so far claim that they suffered from a 'reluctance to glance in the mirror',[145] which might explain some of the shortcomings of their analytical and political attitude.

Research Questions

• Which sources did 19th century doctrine and practice acknowledge, where were the controversial issues and what did the discrepancies and differences signify?
• To which extend can it still be claimed that the 19th century was an epoch in which international law took a turn into positivism?

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144 Mälksoo, *The Context of International Legal Arguments*, pp. 208–9.

145 I borrowed this title from Michael Stolleis, *Reluctance to Glance in the Mirror: The Changing Face of German Jurisprudence after 1933 and post-1945* (Chicago: University of Chicago, 2002).

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