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The Context of International Legal Arguments:
'Positivist' International Law Scholar August von
Bulmerincq (1822-1890) and His Concept of
Politics

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The Context of International Legal Arguments:
‘Positivist’ International Law Scholar August von Bulmerincq (1822-1890) and
His Concept of Politics

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* Head of International and European Law Department; Assistant Professor of International Law; University of Tartu, Estonia. I would like to thank Professor Benedict Kingsbury and Professor Martti Koskenniemi for the very valuable guidance and criticism they have offered to me throughout my stay as Hauser Research Scholar and Alberico Gentili Fellow at NYU School of Law. I would also like to thank Professor Joseph H.H. Weiler for creating to the Hauser Research Scholars a most stimulating environment for thinking and discussions.

Abstract

This working paper discusses the life and legal arguments presented by August von Bulmerincq (1822-1890), a leading figure in the discipline of international law during the 1860s-1880s. One of the influential initial collaborators of the Institut de droit international, Bulmerincq taught international law at the universities of Dorpat (today: Tartu, Estonia) and Heidelberg. The paper discusses the positivist concept of the separation of international law from politics in Bulmerincq's theoretical work and demonstrates how Bulmerincq's Baltic German background had impact on his legal views. The paper examines, by going through Bulmerincq's international legal arguments, whether he could hold up to his normative ideal of the separation of law from politics. In particular, Bulmerincq's views regarding the right to asylum, the legal status of the Baltic provinces, the international law aspects of the unification of Germany under Bismarck and the right to national self-determination are discussed.

1. Introduction

August von Bulmerincq (1822-1890) was a leading figure in the discipline of international law during the 1860s-1880s. The way most international lawyers see and use international law today, is strongly influenced by the heritage of “the men of 1873”¹ (of whom Bulmerincq was one). Bulmerincq was influential in his time and thought about many questions about which international lawyers think today. He had a keen interest in the theoretical foundations of international law and propagated the idea that the foundation of international law had to be found in the history. Reading Bulmerincq’s works, one can witness how the positivist theory of international law gained ground and confidence in parallel to the intensification of international relations during the second half of the 19th century. Thus, Bulmerincq deserves further attention – if not for the sake of his own glory then in any case because through learning about him we can learn more from him.

In this working paper, I will focus on international legal arguments presented by Bulmerincq. I will first present a biography of Bulmerincq, and then turn to his positivist vision of international law as the antipode of the politics. In the proceeding part of the study, I will investigate the politics behind Bulmerincq’s international legal arguments. In the end of the workin paper, I will draw conclusions from the study.

This working paper is part of a larger research project with the working title “A Sociology of International Legal Arguments” that I have carried out as Hauser Research Scholar at New York University School of Law. The main idea of the research project is to situate the international legal arguments of the representatives of an international law chair, that of my own university in

¹ See M. Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870-1960*, Cambridge University Press, 2001.

Tartu (historically also Dorpat and Iur'ev), Estonia, in their socio-political context. The timeframe of the activity of Tartu's five international law professors – August von Bulmerincq, Carl Bergbohm, Vladimir Hrabar, Ants Piip and Abner Uustal – covers the period since the inception of modern international law by the “men of 1873” roughly until the end of the Cold War (1855-1985).

The hope and ambition underlying the project is that turning one's attention to the question “what is it that academic international lawyers are doing?” instead of the archetypical lawyers' question “what is the law?” bears potential of providing new insights about the practice of international law. The central idea is that context is crucial for understanding the practice of international law, i.e. international legal arguments of the representatives of professionals in the ‘field’ of international law.²

International law has emerged from the practical necessity, not or not only from needs for philosophical speculation. Therefore, it is insufficient to explore claims, positions and arguments presented within the framework of international law merely as part of ‘pure’ doctrinal history. However, in the legal scholarship, this insight is not as self-evident as it may seem. The legal scholarship and international lawyers typically claim their authority from the principles of neutrality, universality, rationality and objectivity. The central strategy of the positivist legal tradition has been to claim the separation of law from politics. The positivist tradition plays down the political, socioeconomic, historical context of the legal arguments and doctrines and highlights the dangers of relativization.

² For the development of the sociological concept of fields, see e.g. P. Bourdieu, *In Other Words. Essays Towards a Reflexive Sociology*, Transl. by Matthew Adamson, Stanford University Press, 1990; *The Force of Law: Toward a Sociology of the Juridical Field*, 38 *Hastings Law Journal* 1986, pp. 814-854.

When sociologically interested lawyers turn to the past of their discipline, they should do so with some caution, at least in order to avoid becoming (bad) amateur historians. As a minimum, familiarity with and internalization of methodological debates in the science of history is required. A leading contemporary author on the methods of writing intellectual history, Quentin Skinner, the Regius Professor of History at Cambridge University, has emphasized the importance of situating historical texts in their intellectual and linguistic context, in order to establish the purpose their authors had in mind when advancing their arguments.³ In his work, Skinner has discussed several fundamental problems that arise from interpreting old texts.

One such problem, for instance, is whether the historian of ideas should characterize certain beliefs or statements of historical agents as “false” or erroneous.⁴ Skinner claims not and argues that the only standard such statements and beliefs should be measured with is some generally accepted standard of epistemic rationality. Historians would merely be reporting that it was not an appropriate belief for that particular agent to have espoused in that particular society at that particular time.⁵ A related difficulty is the temptation to judge somebody in the past not on the basis of what he or she knew but what we subsequently know.

Skinner argues that all serious utterances are characteristically intended as acts of communication: “*But to argue is always to argue for or against a certain assumption or point of view or course of action. (...) To put the point in another way, there is a sense in which we need to understand why a certain proposition has been put forward if we wish to understand the proposition itself. We need to see it not simply as a proposition but as a move in an argument.*”

³ Q. Skinner, *Visions of Politics, Volume 1: Regarding Method*, Cambridge University Press, 2002.

⁴ For instance, Bulmerincq called Kant’s project of a *Staatenstaat* (today we would say: international organization) a ‘mistake’ since international law had to be founded on the independence of States. *Die Systematik*, p. 144.

⁵ Skinner, *op. cit.*, p. 37-38.

(...) any act of communication will always constitute the taking up of some determinate position in relation to some pre-existing conversation or argument. It follows that, if we wish to understand what has been said we shall have to identify what exact position has been taken up.”⁶

Both Skinner and the German historian Reinhart Koselleck in his programme for the study of *Begriffsgeschichte* (histories of concepts) assume that we need to treat our normative concepts less as statements about the world than as tools and weapons of ideological debate.⁷ Linguistic disagreements are also disagreements about our social world itself. Koselleck argues that central linguistic elements in a discourse have social or political content.⁸ *Begriffsgeschichte* began as a critique of a careless transfer to the past of modern, context-determined expressions of constitutional argument, and second, it directed itself to criticizing the practice in the history of ideas of treating ideas as constants, articulated in differing historical figures but of themselves fundamentally unchanging.⁹

The critical historical study of the delimitation of international law from politics in the doctrine – and application - of international law is simultaneously a study of a (or perhaps the) central paradigm in international law. According to the historian and philosopher of science, Thomas S. Kuhn, the notion of paradigm indicates the consensus and shared belief of a scientific community.¹⁰ It is not wrong to say that if there is a paradigm among the scientific community of international lawyers, it is the shared belief about what international law is not - politics. Although Kuhn has left in his works open to what extent social sciences (as opposed and inferior

⁶ Skinner, p. 115.

⁷ Skinner, p. 177.

⁸ Reinhart Koselleck, *Futures Past. On the Semantics of Historical Time*. Translated by Keith Tribe, MIT Press: Cambridge, 1985 (original 1979, *Vergangene Zukunft. Zur Semantik geschichtlicher Zeiten*), p. 79.

⁹ Koselleck, p. 80.

¹⁰ Thomas S. Kuhn, *The Essential Tension. Selected Studies in Scientific Tradition and Change*, University of Chicago Press: Chicago and London, 1977, p. 294 *et seq.*

to more developed natural sciences) have at all acquired paradigms¹¹, he has suggested that especially in social sciences the new “external” (contextual) historiography promises new valuable insights.¹²

2. The General Outline of the Case: the Baltics as Borderland

For understanding the international legal arguments of Bulmerincq, one needs to understand his specific Baltic German background, and the historical “condition” at his first home university, Dorpat (Tartu), Estonia. The geopolitical constant of Estonia has been its role as borderland. Throughout centuries, Estonia has been a politically and culturally contested territory between different powers, most notably the Germans and the Russians. This feature can be demonstrated with a brief outline of the history of the university of Dorpat/Iur'ev/Tartu. The university was established by one of the most important actors in the 30-years war (1618-1648) that led to the peace of Westphalia which is largely considered as the starting point of modern State system and international law. The Swedish king Gustavus II Adolphus signed the orders for the establishment of a university in Dorpat in 1632, just before a battle he led on the soil of Germany during the 30-years war. The university of Dorpat was modeled after the oldest Swedish university, Uppsala. The context of the university's foundation was significant. As is well known, the 30-years war was led about the religious freedom and dominance in Europe divided by the Catholics and the Protestants. The establishment of the university in Dorpat by the king Gustavus II Adolphus can be seen in the light of this ongoing religious conflict. The Poles had established a Catholic seminar in Vilnius, Lithuania, in 1579 and the Swedish king, an ardent Protestant was concerned about the seminar's undue intellectual influence in the region. Therefore, Academia Gustaviana in Dorpat was established as Protestant counterweight to the Catholic university in

¹¹ Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2nd ed., University of Chicago Press, 1970 (1st ed. 1962), p. 15.

¹² Thomas S. Kuhn, *The Essential Tension. Selected Studies in Scientific Tradition and Change*, p. 112-113.

neighboring Lithuania. This pattern of Estonia's history, as we will see, remained similar during the subsequent centuries: reformation was followed by counter-reformation, revolution by counter-revolution, occupation by counter-occupation.

The university of Dorpat was closed when the Russian czar Peter the Great attacked Sweden in 1700. In the ensuing Nordic war (1700-1721) Russia beat Sweden and the provinces of Estonia and Livonia became part of the Russian Empire. However, the university of Dorpat was reopened only in 1802, following the orders of the Russian Tsar Alexander I. While the faculty of law had been one of the four initial faculties since 1632, public international law was included in the curriculum only in the middle of the 19th century with the rise of August Bulmerincq at the faculty.

Since Bulmerincq, every succeeding international law professor faced a new political situation. Identity conflicts are symbolically revealed already in the change of the name of the university (and town) in the course of history. Since 1802, i.e. while Bulmerincq and Bergbohm were professors, the university of Dorpat was the only German university in the Russian Empire, the *Kayserliche Universität Dorpat*. In the last quarter of the 19th century the Baltic provinces became subjects to the politics of Russification and in 1889 the Faculty of Law was Russified. The university council lost its right to elect professors and all lectures had to be held in Russian. In 1893 the town and university of Dorpat were renamed Iur'ev. The architects of the politics of Russification in St. Petersburg referred to an ancient Russian chronicle which narrated that in 1030 the Kiyevian Russ prince I'aroslav (I'uri) had made a successful military campaign against the Estonians, conquered their castle in Tarbatu (Tartu) and created his own stronghold. Although the Russians had subsequently been expelled from the place, the town's new name,

Iur'ev, was designed to remind of that ancient continuity of the Russian presence. In the first place, Iurev passed a message to the Baltic Germans: we were here before you.

The *Kulturkampf* between the Baltic Germans and the Russian central power in the second half of the 19th century was carried out at the background of the emancipation of the native peoples, the Estonians and the Latvians. A distinct feature of those peoples was their relative smallness in terms of numbers - in fact, Friedrich Engels' diminutive word *Völkerabfälle* in characterizing the Slavonic peoples of the Austria-Hungarian Empire could have even more be used with respect to the Estonians and the Latvians. The Estonian and the Latvian nations were born of the idea that distinct languages form the bases of distinct nations. Estonian, a Fenno-Ugric language close to Finnish and Latvian, a Baltic language close to Lithuanian, were unlike German or Russian. Herder's national ideas empowered the Estonian and Latvian quest for identity and self-determination. The national identity of the Estonians and the Latvians was primarily a linguistic one. As the Russians started to challenge the position of the Baltic Germans, both the Russians and the Germans appealed to the interests and sympathy of the native peoples making at that time through a process of emancipation. This emancipation finally led to the creation of the Estonian and Latvian nation States in 1918.

With this background information in mind, we can now turn to the life and work of August Bulmerincq.

3. *Vita: Noblesse oblige*

„Er war der ächte und treue Lutheraner seiner liefländischen Heimat (...) ein guter deutscher Protestant, wurzelnd in protestantischer Wahrheit und Wahrhaftigkeit.“¹³

When August Bulmerincq, professor of international law at the University of Heidelberg, died in Stuttgart on 18 August 1890, many friends and colleagues had reasons to look back at his fruitful life and activities with deep thankfulness. The initiator of the *Institut de droit international*, G. Rolin-Jaequemyns reminded in the obituary published in the *Annuaire de l'institut de droit international* that it had been only recently that a procession of the members of the *Institut*, led by Bulmerincq, visited in Heidelberg the tomb of Bulmerincq's predecessor at the chair of international law at Heidelberg's Ruprecht Karl University, the recently deceased Johan Caspar Bluntschli (“*lui aussi avait eu deux patries*”¹⁴). And now it was time to say farewell to Bulmerincq himself. Rolin-Jaequemyns remarked: “*S'il fallait résumer d'un mot l'apparence extérieure, le caractère, le talent et la science de Bulmerincq, je crois que nulle épithète ne lui conviendrait mieux que celle de solide. Solides étaient son port, sa démarche, sa stature, solides ses amités, solides ses connaissances. C'est sur la base solide du droit positif et des traités qu'il voulait fonder le droit international.* »¹⁵ It is, however, difficult to say retrospectively with any solidity whether the word of “solidity” truly meant recognition or constituted a hidden insult, pointing to mediocrity.

August Michael Bulmerincq was born in the biggest city of the Baltic provinces of the Russian Empire, Riga, on 31 July (12 August) 1822. His family had Scottish origins but had established itself in Lübeck centuries ago, moving from this former Hanseatic capital to Riga in the 17th

¹³ W. Hönig, *Stadtpfarrer von Heidelberg, Rede am Grabe des Herrn Geheimen Rats Dr. August von Bulmerincq: gestorben am 18. August 1890.*

¹⁴ G. Rolin-Jaequemyns, *Notices nécrologiques – M. de Bulmerincq*, in : *Annuaire de l'institut de droit international 1892-1894*, pp 335-339 at 336.

¹⁵ *Ibid.* P. 339.

century.¹⁶ Bulmerincq's family was one of the most rich and respected ones in Riga. His father was the senior of the organization of the richest merchants in Riga (*Grosse Gilde*)¹⁷ and expected August Michael to take over the family business after his completion of gymnasium in Riga. However, August Michael's interests lied elsewhere and finally, the father had to yield to August Michael's wish to study law.

August Michael Bulmerincq studied law at the University of Dorpat in 1841–1845. In 1847 he became candidate of law at the same university. After that, his father financed him to continue his studies in Heidelberg; however, a few weeks upon his arrival the revolution broke out and his father, a “rigid conservative”¹⁸, immediately called him back to the Baltic. Bulmerincq started to practice law in his home town Riga – first, on 16 July 1848 he became the second notary at *Landvogteigericht* of Riga and in 1850 secretary of the criminal law division of Riga's city council. At the same time, he continued to work for his scholarly advancement and defended in Dorpat in 1849 his master's thesis on alternative dispute settlement. Bulmerincq's masters thesis was also his first legal study that was published as (small) book.¹⁹

In Riga, young Bulmerincq participated actively in the social and intellectual life of the city. As secretary of the *Literarisch-praktische Bürger-Verbindung zu Riga*, an intellectual society established with practical and charity purposes by the city's German elite, he wrote the history of the society.²⁰ Part of the society's concerns and activities, primarily its work against poverty can be described as human rights work of the 19th century. These were the noble and influential

¹⁶ Notices necrologiques, p. 336.

¹⁷ Olaf Welding et al, *Deutschbaltisches biographisches Lexikon 1710-1960*, Wedemark: Verlag Harro von Hirschheydt, 1998, p. 129.

¹⁸ Notices, p. 336.

¹⁹ A. Bulmerincq, *Von der Wahl und dem Verfahren des freiwilligen Schiedsgerichts*, master thesis, Dorpat: H. Laakmann, 1849

²⁰ A. Bulmerincq, *Geschichte der Allerhöchst bestätigten literarisch-praktischen Bürger-Verbindung zu Riga. Bei Gelegenheit ihrer fünfzigjährigen Jubelfeier am 12. Dezember 1852. Riga: Häcker, 1852.*

people of Riga who, Boston Brahmins alike, did not have to worry so much about their own daily material wellbeing and could dedicate their free time to the public causes and the progress and enlightenment within their society. They deeply cared about their home city and the Baltic provinces.²¹ The years in Riga were also significant in Bulmerincq's private life – in 1852 he married Mathilde Hernmarck, daughter of the governing mayor (*Oberbürgermeister*) of Riga.²²

In 1853 Bulmerincq left Riga and settled to Dorpat where he presented to the Faculty of Law for the achievement of *venia legendi* his first study in the field of public international law, a thorough investigation of the law of asylum from the historical point of view.²³ In 1854 he became Privat-Docent with secured salary (*Etats-mässiger Privat docent*) and taught from 1854 to 1856 in Dorpat commercial law and maritime law.

Bulmerincq had been introduced to the field of international law in Dorpat by Professor Erdmann Gustav von Bröcker (-1854) whose speciality was the law of the Baltic provinces but who was also appointed in 1831 professor of “positive constitutional law, international law and politics”. According to Bulmerincq, von Bröcker was a “fatherly friend” to his students.²⁴ However, the field of international law was completely new to von Bröcker – a fact that in the words of Bulmerincq created “plenty of new difficulties” for him. Von Bröcker never published anything on international law and according to Bulmerincq, his lectures were characterized by his emphasis on the “practical” aspects of it.²⁵

²¹ See e.g. Bulmerincq's *Das alte und das neue Riga*, in: Baltische Monatschrift pp. 468-476. See also for the spirit of the time A. Bulmerincq, *Carl Eduard Otto. Doctor der Philosophie und Rechte und Professor emeritus der K. Universität Dorpat. Eine biographische Skizze*, Dorpat: H. Laakmann, 1858.

²² *Notices*, p. 337.

²³ *Das Asylrecht in seiner geschichtlichen Entwicklung beurtheilt vom Standpunkte des Rechts und dessen völkerrechtliche Bedeutung für die Auslieferung flüchtiger Verbrecher. Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts*, Dorpat, 1853 (Reprinted in Wiesbaden, Martin Sändig, 1970).

²⁴ A. Bulmerincq, *Dr. Erdmann Gustav von Bröcker*, in : *Das Inland* No 15, 29.03.1854, pp 200-220 at p. 211.

²⁵ *Ibid.*

In 1856 Bulmerincq defended in Dorpat his doctoral dissertation in Latin: « *De natura principiorum iuris inter gentes positivi* »²⁶ and became extraordinary professor in public law, international law and politics. In 1858 Bulmerincq published another work in public international law, the dogmatically ambitious “*Die Systematik des Völkerrechts*” and was in the same year nominated ordinary professor of the above mentioned disciplines. He continued to serve in this function at the Faculty of Law of the University of Dorpat until his retirement in 1875. A year before his retirement from Dorpat, in 1874, his most personal and powerful account of public international law, “*Praxis, Theorie und Codification des Völkerrechts*” was published.

We do not know very much about Bulmerincq as teacher. However, during Bulmerincq’s professorship in Dorpat, several noteworthy works in the field of public international law with the emphasis on theory and history of international law were defended under his supervision. For example, one of Bulmerincq’s students was Witold Zaleski, a son of a Polish nobleman of Grodno, who was born in Warsaw and had gone to the gymnasium in Vilna.²⁷ Since Poland was divided and annexed by other countries in the 19th century and there existed severe constraints to the higher education in Poland, more than two thousand Poles (such as Zaleski) living in the part annexed by Russia received their university education in Dorpat (thus their nickname, “dorpatchiki”). Dorpat was at that time known for its relative autonomy, academic freedom, and the fact that the language of instruction at the university was German.²⁸

²⁶ Augustus Bulmerincq, *De natura principiorum iuris inter gentes positivi*, Dorpat: H. Laakmann, 1856.

²⁷ See Estonian History Archive F 402/2/28072 and F 402/2/28073. Zaleski’s master thesis was *Zur Geschichte und Lehre der internationalen Gemeinschaft*, Dorpat: H. Laakmann, 1866 and his doctoral thesis was *Die völkerrechtliche Bedeutung der Kongresse*, Dorpat: H. Laakmann, 1874.

²⁸ See further Erik Amburger, *Die Bedeutung der Universität Dorpat für Osteuropa*, in: G. v. Pistohlkors et al (Hg.) *Die Universitäten Dorpat/Tartu...*, 1987, pp 163-181.

During his approximately twenty years of teaching in Dorpat, Bulmerincq continued to actively participate in the public life and contribute to the education of the popular masses in the Baltic provinces. Maybe to express the practical side in him that his father would have wished to have been expressed in an even more determined fashion, Bulmerincq established in Dorpat in 1863 a magazine dedicated to economic issues, “*Baltische Wochenschrift für Landwirtschaft, Gewerbfleiss und Handel Liv-, Est- und Curlands*”. He remained the editor-in-chief of the magazine for the first three years and organized the first agricultural congress and the first exposition of the products of small industry (*Gewerbfleiss*) in the Baltic provinces.²⁹

While being professor of international law, Bulmerincq did not neglect the particular law of the Baltic provinces. In fact, as the effort of Russification in the Baltic provinces were consolidating, the preoccupation with the German-influenced law of the Baltic provinces acquired a political meaning, became a patriotic act.³⁰ Bulmerincq emphasized the historic importance of (German) particular law in the Russian Baltic sea provinces³¹ and served as one of the editors of the collection of the sources of this law.³²

As international lawyer, Bulmerincq was known not only as prolific writer but also as an active member of *Institut de droit international*. When *Institut de droit international* was established in Gent in 1873, Bulmerincq was also invited to attend. However, the invitation did not reach him in due time and he could not be present at the inaugural session. In a letter sent to the *Institut* he wrote that he was glad to become a member of the institute “*d’abord parce qu’il y voit une occasion de travailler en communauté avec des hommes, que depuis longtemps il a souhaité de*

²⁹ August v. Bulmerincq, in: Brockhaus Konversations-Lexikon, Leipzig, 1901, Band 3, p. 688.

³⁰ Marju Luts, *Juhuslik ja isamaaline: F.G. von Bunge provintsiaalõigusteadus*, Tartu Ülikooli Kirjastus, 2001.

³¹ Bulmerincq, *Die Rechtsbildung und das Rechtsstudium der Ostseeprovinzen Russlands*, 22 *Baltische Monatsschrift* 1873, pp. 68-78.

³² Friedrich Georg von Bunge, Hermann Hildebrand, Philipp Schwartz, August von Bulmerincq, Leonid Arbosow d.Ä. (Hg.) *Liv- est und kurländisches Urkundenbuch nebst Regesten*.

*connaître, et ensuite parce qu'il y voit un plus large champ ouvert á ses efforts pour contribuer á fonder sur le droit le bonheur des peuples. »*³³ He was subsequently considered member of the *Institut* since its foundation.³⁴

Upon his retirement from the University of Dorpat in 1875, Bulmerincq moved to Wiesbaden, Germany. During his professorship in Dorpat he had maintained close ties with Germany and spent most of his summer vacations there. It has been speculated whether his rapid move to Germany after his retirement can *inter alia* be explained by his dissatisfaction with the tightening grip of the Russification in the Baltic provinces. As retired professor in Wiesbaden, Bulmerincq continued to publish extensively, both in newspapers such as Augsburg's "Allgemeine Zeitung" and in legal periodicals. As his letters to the former faculty colleagues in Dorpat demonstrate, he continued to keep in touch with developments in his native Baltic provinces. In 1877, Bulmerincq started an article in „Baltische Monatsschrift“ with the following sentence: „*Wenn ich auch nicht mehr im Inlande für das Inland wirke, so folge ich dennoch aus der Ferne mit vollem Interesse dessen Entwicklung und erkenne durch Vergleich mit Zuständen des Auslandes Vorzüge und Mängel der Heimath nur um so mehr und unbefangener.*“³⁵ In other words, Bulmerincq made it clear that one could work for one's home country even when living outside of it – for him as Baltic German, *Inland* always remained *Inland*, even when living in Germany.

Bulmerincq acquired a second life as international lawyer in the framework of the work of *Institut de droit international*. On the pages of *Revue*, he stepped up as active discussant and

³³ G. Rolin-Jaequemyns, *Revue...*, tome VI, 1874, p. 176.

³⁴ See e.g. *Revue*, tome ?, p. 150.

³⁵ *Bulmerincq, Wann wird in Liv- und Estland eine Volkszählung stattfinden?, Baltische Monatsschrift 1877, Band XXV, S. 345-349 at 345.* Criticizing indirectly the politics of the Russian central government that had postponed the census in the Baltic provinces.

figured as one of the most frequent contributors.³⁶ In 1881, upon the death of his colleague Johan Caspar Bluntschli, he was invited to occupy the chair of public international law in Heidelberg – a position Bulmerincq accepted and maintained until his death on 18 August 1890. Being professor in Heidelberg, Bulmerincq finally published a systematic treatment of public international law in Marquardsen's "*Handbuch des öffentlichen Rechts*".³⁷ A treatment of disputes between States followed in another German international law series in 1889.³⁸

In *Institut* – that at that time served as the voluntary codifier of international law, a kind of predecessor of the UN's International Law Commission in that task – Bulmerincq served as special rapporteur for the regulation of the law of prizes in naval war³⁹ and regarding the question of the passage of troops or material of war by belligerents on the territories of neutral States during the war.⁴⁰ It was probably the professional culmination of August Bulmerincq's life when he was elected president of the *Institut* in 1887-1888, and presided over the organization's session in Heidelberg that finally accepted his report on prize courts in naval war suggesting the creation of international and impartial rather than national prize courts. Moreover, he chaired the committee in the *Institut* that discussed "desired reforms" in the judicial institutions of the countries of Orient.⁴¹ When Bulmerincq died, nobody could seriously regret that he had been unable to "complete his life work" properly.

4. The Concept of Politics in Bulmerincq's Doctrine of International Law

³⁶ See e.g. A. Bulmerincq, *Règlement international des transports par chemin de fer*, Revue No 10, 1878, p. 83 et seq.

³⁷ A. Bulmerincq, *Das Völkerrecht*, in: Marquardsens Handbuch des öffentlichen Rechts, 1884, Band I, Freiburg.

³⁸ A. Bulmerincq, *Die Staatsstreitigkeiten und ihre Entscheidung*, in: Holtzendorffs „Handbuch des Völkerrechts“, Band 4, Hamburg, 1889.

³⁹ A. Bulmerincq, *Commission des prises maritimes* (Institut de droit international), Gand : van Doesselaere, 1880. (Also published in Revue t. 10-13.)

⁴⁰ Bulmerincq, *Du passage de troupes ou de materiel de guerre des belligérants sur territoire neutre en temps de guerre*, 21 Revue 1889, p. 139 et seq.

⁴¹ Bulmerincq, *Réformes désirables dans les institutions judiciaires aujourd'hui en vigueur dans les pays d'orient*, 20 Revue 1888, p. 379-382.

“If the theory does not distinguish clearly both fields of law and politics and their subjects from each other, how can this be expected from the practice?”⁴²

Bulmerincq’s conception of politics was, characteristically to his time, ‘positivist’. He claimed the separation of law and politics as the underlying identity for international law. Already in 1858 he demanded the separation from the positivist legal material from philosophical speculation: *“Still today it is a widespread view held by distinguished authors that the system of positive international law could not exist without the inclusion of the philosophical. But this view is based on a misunderstanding of the most general nature and purposes of positive international law. (...) The historical direction in legal scholarship which has in other fields won over natural law, should also in positive international law bring the purely positive material to validity and here too substitute the philosophical law with the philosophy of law.”⁴³*

In creating the system of international law, one could only take into account the legal and not the political: *“What is therefore in treatises of positive international law not of purely legal nature, has to be expelled from our systematization. (...) every field has to stay with what belongs to it. It seems to us that the scholarly organization of the State external relations has to be mainly based on two general ideas: law and wisdom.”* Bulmerincq therefore held that it was necessary to distinguish from international law *“the external politics or State wisdom, the scholarly nature of which is at the time yet problematical”⁴⁴.*

Bulmerincq reiterated the same positions on politics in his *“Praxis, Theorie und Codification des Völkerrechts”* (1874):

⁴² Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts*, 1878, pp 96-97.

⁴³ *Die Systematik des Völkerrechts*, 1858, p. 2 and 6.

⁴⁴ *Die Systematik des Völkerrechts*, p. 7-8. Many international lawyers continue to be sceptical about the scientific foundations of the field of international relations. See e.g. the Philip Allott’s foreword to his book *“Eunomia”*.

“A lot has been counted as international law what is not at all law but that belongs to international relations. It is completely overlooked that international law is shaped by different principles and not every international maxim is a legal one. Thus, political and legal are not clearly separated either in historical works or in most systems or individual studies on international law.”⁴⁵

“Every law and so also international law has no bigger enemy than the phrase and with phrases has international law been overwhelmed – but it emancipated from the phrases and it will stand there asking recognition and equal to other disciplines of law – as a law.(...) The main thing in international law is the law through which it can be distinguished from foreign policy which may not do anything against the law but to which nevertheless remain enough tasks. If the theory does not distinguish clearly both fields of law and politics and their subjects from each other, how can this be expected from the practice?”⁴⁶

“The material of international law is a legal one, as should be self evident with a legal discipline, although oftentimes political is mixed in international law. But legal and political have to be differentiated as unconditional and conditional. The law establishes and does not leave a choice, politics offers different means to a goal and leaves the choice free. What is different in principle does not suit in the same system: the legal belongs to international law, the political to external politics”.⁴⁷

⁴⁵ Praxis, Theorie (1874), p. 94-95.

⁴⁶ Praxis, Theorie, pp 96-97.

⁴⁷ Ibid., p. 143.

However, later on Bulmerincq developed a somewhat more reflexive and nuanced approach to politics which he expressed in an article titled “*La politique et le droit dans la vie des états* » (1877)⁴⁸. In this article, Bulmerincq conceptualized law and politics, both domestically and internationally, as the two opposites that fight for supremacy. As international lawyer, he adopted a belligerent and hostile approach towards politics as opposed to law.

Bulmerincq recognized that although science had made efforts to draw a clear distinction between law and politics, nevertheless there existed no unanimity about the solution of the problem. Although one might have wished a peace between law and politics, this was impossible since both were the opposites that wanted to maintain and expand their empires.⁴⁹ “*The maxim of the politics is: force rules over law. The maxim of the law is: law rules over force.*”⁵⁰

In the view of Bulmerincq, it was mistaken to base the distinction between law and politics on the notion of interest since law was serving lasting interests while politics only temporary interests.⁵¹ The difference between politics and law consisted in the absence or presence of the choice of will. While politics could choose the means that seemed appropriate in particular circumstances, in law there was only one rule that had to be applied correctly.⁵² Progressive humanistic civilization, the existence of which depended on the certainty of law, did not have to hesitate to expand the realm of law on the costs of the realm of politics. It was necessary that law, the guardian of civilization, would advance step by step just as the light conquered the shadows. “*Who does not any more believe in the final triumph of law, does not any more believe*

⁴⁸ A. Bulmerincq, *La politique et le droit dans la vie des états*, in : 9 *Revue de droit international et de législation comparée* 1877, pp. 361-379.

⁴⁹ *La politique*, p. 361.

⁵⁰ P.362.

⁵¹ p. 362.

⁵² P. 363.

in the triumph of civilization.”⁵³ Law emerged with civilization while politics existed already among primitive peoples. Finally, Bulmerincq demonstrated that politics left its mark on international legal practice, causing States to act in an egoistic and hypocritical manner. An example was England whom Bulmerincq criticized for lecturing other nations about humanity while when its own interests were at stake, it demonstrated a backward egoism unforeseen in his century of “*progrès et de lumières*”.⁵⁴

5. The Politics of Bulmerincq’s International Legal Arguments

5.1. Asylum: Empowering the State over the Catholic Church and the Individual in the Aftermath of the 1848 Revolution

An aspect of Bulmerincq’s identity was his religious embeddedness in Protestantism, more precisely Lutheranism – that was predominant among the Baltic Germans. As we will see, Bulmerincq’s Lutheran faith made him to take strong positions against what he perceived as Catholic universalistic ambition.

The antagonism of the Church and the State had since Bulmerincq’s earliest works constituted a central theme in his scholarly discourse. History of the institute of asylum in international law offered ways to illustrate this in “*Das Asylrecht in seiner geschichtlichen Entwicklung beurtheilt vom Standpunkte des Rechts und dessen völkerrechtliche Bedeutung für die Auslieferung flüchtiger Verbrecher. Eine Abhandlung aus dem Gebiete der universellen Rechtsgeschichte und des positiven Völkerrechts*”.⁵⁵

⁵³ P. 364.

⁵⁴ P. 377. Critique of England at pp. 374-379.

⁵⁵ Dorpat, 1853 (Reprinted in Wiesbaden, Martin Sändig, 1970).

This is a thoroughly erudite study but also a highly interesting work from the methodological point of view. At the outset, Bulmerincq gives an explanation about why he turns to the history: it must be found out whether according to international law, States can offer asylum to citizens of other States. *“Recently, extradition treaties have been concluded between States but they are not sufficient since constrained with time and not binding to non-members. The general norm has yet to be established. (...) To observe this development and to tie to it a future development is a purpose of this work that should prove the unconditional obligation of all States to extradite fugitive criminals. But how can one best accomplish this task? The historical development has to be taken as the basis of observation.”*⁵⁶ It is astonishing that Bulmerincq already explains beforehand what the ultimate outcome of his turn to the history would be, what the history *should* demonstrate. He does not leave it open whether there exists such an unconditional obligation to extradite or not. Here, history serves a classical teleological purpose: to prove a particular claim or thesis. Bulmerincq’s approach to the history of international law was generally teleological: the historical foundation of international law was supposed to raise the potential of and respect for the discipline.⁵⁷ Already in his “Systematic de Völkerrechts” (1858) Bulmerincq insisted that *“In the current problems of international law, the deniers of this law may not even present the biggest problem: the main guilt has the scholarship because it has not done what it had to do: to demonstrate positive international law historically and through that as non-attackable.”*⁵⁸

⁵⁶ P. 9.

⁵⁷ See e.g. Bulmerincq, *Brief an die Dorpater Juristen-Facultät anlässlich der Glückwünsche zum Doktorjubiläum*, Wiesbaden, 14. Mai 1881: „Überhaupt aber war der Unterzeichnete bemüht die Bedeutung der publizistischen Fächer zu heben, indem er einerseits sie zu systematisieren und andererseits auf historischer Basis aufzurichten trachtete.“ Tartu University Archive.

⁵⁸ Bulmerincq, *Die Systematik des Völkerrechts*, I Teil, Dorpat: Karow, 1858, p. 3.

Bulmerincq's view on the history and development was truly Hegelian⁵⁹: there appeared to be logic, a purpose in the history (of international law). Every human order developed towards its completion.⁶⁰ When explaining the significance of the historical right of the Church to offer asylum to individuals, Bulmerincq claimed: "*Everything that exists and will emerge has its necessary connection with the past and future of the world history. So has been the right to asylum a necessary means towards the consolidation of the unitary power of the State.*"⁶¹ He added that "the present thankfully enjoyed the fruit of the past" and "safely pushed it towards its goal": *dem Recht auf dem Wege des Rechts immerdar sein Recht werden zu lassen.*⁶²

The main thesis of Bulmerincq's work is that the right of asylum belonged to the past, to the era when the State had not yet emerged powerfully and in fulfilling this vacuum the Church could exercise power and jurisdiction over individuals. In the time of Bulmerincq's writing, however, he claimed that the Church had lost the battle over secular authority to the States. There was no longer any reason, no justification for the institute of the right to asylum in a world dominated by the States.

Bulmerincq started his historic exposé with a reference to the God in the way that was still characteristic to the period when positivist arguments got intertwined with references characteristic to natural law tradition. We read that initially, places of asylum were created by "the God himself" (*Gott selbst*) in the times of rough unconstrained power that the State was yet incapable of controlling.⁶³ Later on in the same work, Bulmerincq subordinated international law to the divine law, claiming that "international law too stands under the law that God revealed and

⁵⁹ See Georg Wilhelm Friedrich Hegel, *The Philosophy of History*, New York: Dover Publications, 1956.

⁶⁰ Bulmerincq, *Die Systematik des Völkerrechts*, p. 3.

⁶¹ P. 136.

⁶² P. 138.

⁶³ P. 7.

that people have to fulfil.”⁶⁴ This was in accordance with the 19th century doctrine of sources in the international law literature. For example, the English scholar Phillimore distinguished the divine will as the first source of international law.

In the light of the historical development, Bulmerincq held that the main problem with the institute of asylum was this: an institute that was initially designed to protect the unjustly persecuted persons transformed into a hindrance to the pursuit of justice and of the punishment of evil.⁶⁵ The right to asylum was recognized in ancient Israel and developed in ancient Greece. The State later offered the right to give asylum to the Christian Church as a privilege.⁶⁶ But the Church, after it received this privilege from the State, did not consider it as such but rather started to see in it a natural expression of its own rights. As the State did not recognize this kind of thinking by the Church, a conflict evolved and the State took the Church’s right to asylum back. The motives given by the Church, however, did not hold critic.⁶⁷

Differently from the Catholic Church, the claim of jurisdiction of the Protestants was from the very beginning restricted.⁶⁸ At the same time, the Roman-Catholic Church claimed until the government of the Austrian monarch Maria-Theresa its old rights. In short, the Church had expanded its concept of asylum over time illegitimately.⁶⁹ The Popes even claimed jurisdiction over those individuals who had violated the Church’s right to asylum.⁷⁰ Only during the 16.-18th centuries did the Popes recognize that the Church may not offer asylum to the perpetrators of gravest crimes.⁷¹ *“The right to asylum in the Church was backed by capital punishment,*

⁶⁴ P. 160.

⁶⁵ P. 7.

⁶⁶ P. 73.

⁶⁷ P. 75.

⁶⁸ P. 82.

⁶⁹ P. 84.

⁷⁰ P. 94.

⁷¹ P. 103.

*excommunication or severe monetary penalties. But whom did this right protect? Often those who had violated the right of the others. But those upon who was inflicted injustice, it did not protect. And what punishment did the right to give asylum inflict upon the fugitive who was a criminal?”*⁷² So the State that was consolidating power and authority took the right to asylum back from the Church: *“The person in danger does not need to take refuge in order to find protection in front of the altar of God, he finds the protection in normal court proceedings.”*⁷³

Bulmerincq then claimed that the era of the diplomatic asylum in international law had ended. It would have amounted to the violation of international law to grant such asylum.⁷⁴ In the worst case and if such asylum was still illegally granted, the host State of the diplomatic representation was entitled to go after the person, while showing due respect to the diplomats’ premises.⁷⁵ Thus, the last expression of the right to asylum – the diplomatic asylum – had disappeared from international law.

And the culmination of Bulmerincq’s argument is again presented in a historical-teleological – and paradoxically, quasi-theological - fashion:

“Through the misuses of the right of asylum the State became conscious of its authority. By establishing itself and granting to the unhappy ones protection, and to the violator punishment according to its laws, the State has broken the power of the right to asylum. The State is now itself the asylum but not the one of the deliberate asylum but the one of the application of the existing laws. In its asylum, the law is applied and the violation of law prosecuted. He is the haven against any unlaw and who fleas to him, finds protection when he is looking for his right.

⁷² P. 104.

⁷³ P. 105.

⁷⁴ P. 125-132.

⁷⁵ P. 134.

*The State embodies in law the goodness; the development of the State has led to that. But through mistakes he has had to acquire knowledge since not everything was law that carried the name of law. (...)*⁷⁶

The reason why there had to exist a customary obligation to punish or extradite (*aut punire aut judicare*) was immanent to the system of the nation States. “As every State had the task to advance the cause of law, so is it the general task of all States: to guarantee to every other State legal help and to safeguard the capture and punishment of fugitives of other nations.”⁷⁷ There was no right to asylum for fugitive criminals. By committing wrong against a member, the criminal committed wrong against the whole.⁷⁸ Extradition had become a duty of all States that protected their existence, so that no one may doubt in its necessity, in its generality, in its justification in the law of nations.⁷⁹ With what right could then the institute of asylum serve as a pretext? The reasons for the right to asylum have disappeared: „*Der Verbrecher, wo er sich auch hinwende, sei seiner Strafe gewiss!*“.⁸⁰

However, contrast Bulmerincq’s thesis with the ones of Robert Mohl (1799-1875), a leading German international law scholar at that time.⁸¹ Mohl’s treatise was published in the same year as Bulmerincq’s⁸² and Bulmerincq made a positive reference to it subsequently.⁸³ Mohl explained how the significance of the asylum question consisted in the aftermath of the 1848 revolution and the question of political refugees. He contrasted the asylum legislation in different

⁷⁶ P. 137.

⁷⁷ P. 156.

⁷⁸ P. 157.

⁷⁹ P. 157-158.

⁸⁰ P. 159.

⁸¹ The attempt of the rector of Dorpat University, Gustav Ewers, to win Mohl from Tübingen to Dorpat in 1825 had turned out unsuccessful. See P. Järvelaid, *Sissejuhatus kultuuripiiri teoriasse: Friedrich Georg von Bunge ja Leo Leesment*, Tallinn: Publications of Nord University, 2004, p. 21.

⁸² R. Mohl, *Revision der völkerrechtlichen Lehre vom Asyle*, Zeitschrift für Staatswissenschaft 1853, pp. 461-604.

⁸³ Augustus Bulmerincq, *De natura principiorum iuris inter gentes positivi*, Dorpat: H. Laakmann, 1856, p. 1-2.

countries, pointing out that the Great Britain and the US offered an almost unlimited asylum and almost never extradited refugees and fugitives to other countries.⁸⁴ In contrast, most German states did not recognize the right to asylum and extradited refugees to their countries of origin.⁸⁵ Most other countries adopted in their practice a line somewhere in between those two opposites.⁸⁶ Due to the lack of unanimity in the practice it was no wonder that there was a disagreement among writers of international law about whether international law foresees a right to grant asylum or, conversely, prescribes a duty to extradite.

Mohl's approach was nuanced – while he criticized Britain's expansive approach to asylum, he also observed that if a country would in general fail to accept foreigners and refugees, it would make itself co-responsible in cases of "irresponsible suppression".⁸⁷ According to Mohl, one could take a cosmopolitan and an egoistic view about the right to asylum (remarkably, Mohl argued that it was precisely Britain that had taken the egoistic view).⁸⁸ However, the right to asylum was needed already for the reason that no one could be sure that he would himself not need asylum one day in the cases of violence. The purpose was not to help mean criminals who had deserved their punishment but to offer refuge to those who were unjustly prosecuted.⁸⁹

Reasoning not so much on the basis of history (as Bulmerincq) or international treaties (which anyway contained contradictory principles), Mohl argued more or less on the ground of a philosophy based on common sense, offering a compromise solution that is accepted in international law doctrine until our days. A State should not grant asylum and should extradite criminals who have violated State's usual criminal law (citizens' rights primarily vis-à-vis each

⁸⁴ Mohl, p. 476-480.

⁸⁵ Mohl, p. 486-490.

⁸⁶ About Russia, see Witte, *Die Rechtsverhältnisse der Ausländer in Russland*, Dorpat, 1847.

⁸⁷ Mohl, p. 527-528.

⁸⁸ Mohl, p. 532-535.

⁸⁹ Mohl, p. 528.

other). However, Mohl insisted that there had to be a political exception doctrine for crimes arguably committed against the state.⁹⁰ Sometimes governments were not motivated by the desire to re-establish justice but wanted to take revenge, and the courts acted in dependence and without courage. The danger was to sacrifice to a formal duty the “inner law and humanity” and to “humiliate oneself in the position of an executer of the most nobles among people and the most justified friends of the fatherland.”⁹¹ Mohl’s was the liberal approach.

However, Bulmerincq’s concern seemed to be that, as a rule, people should not violate their country’s laws in the first place. “*The State is now itself the asylum,*” Bulmerincq had maintained. Should he have foreseen the totalitarian regimes and the mass repressions of the 20th century that were committed in the name of States?

Bulmerincq was not aware of the need to check and balance the right of States to define crimes – for him, if a State had said that somebody was a criminal, he had to be treated as criminal by the other States. Differently from Mohl, Bulmerincq treated the very institute of the right to asylum from an exclusively collectivist and State-centric point of view.

5.2. The Emerging Conflict over the Status of the Baltic Sea Provinces (1865)

When young Bulmerincq wrote obituary to his international law teacher von Bröcker, he pointed out that von Bröcker had been a true admirer of the Russian Emperor’s Court and even had held in the festive hall of the university on 21 April 1827 a festive speech in the honour of the deceased Russian tsar “Alexander the Legislator”.⁹² Indeed, Alexander I had ruled Russia as liberal and enlightened monarch, especially during the first part of his reign (1801-1825) when

⁹⁰ Mohl, p. 548-549 and 553.

⁹¹ Mohl, p. 553.

⁹² Das Inland 29.03.1854, p. 211.

he abolished serfdom in the Baltic provinces (much earlier than elsewhere in the Russian Empire). Prussia and Russia had been allies in the fight against Napoleon's France and many leading generals of the Russian army in 1812, such as Barclay de Tolly, had been Baltic Germans. The contribution and sacrifice of the Baltic German noblemen in the Russian army's fight against France is for instance reflected in an epitaph for the fallen Baltic Germans in Tallinn's (Reval's) Lutheran Dome Church. Von Bröcker's support for St Petersburg's court was in the first place a support for the principle of monarchy as the guarantor for conservative politics. At that time, the German-dominated Baltic provinces enjoyed their autonomy and constituted thus an outpost of the West in the vast Russian empire.

However, not all tsars turned out to be "good". The successor of Alexander I, tsar Nicholas I (1825-1855) was already a reactionary autocrat. Nicholas' I successor Alexander II (1855-1881) was pan-Slavistically minded. Coinciding with the rise of Prussia, they started to regard the German autonomy in the Baltic provinces much less favourably.

When Bulmerincq became professor in Dorpat, he – as any other State official who the professors were - had on 7 September 1856 to give a standard oath confirming his loyalty to the Russian Emperor. The oath read (original text both in Russian and German) as follows: *„Ich, August Bulmerincq, gelobe und schwöre bei Gott dem Allmächtigen und seinem heiligen Evangelium, dass ich will und soll Seiner Kaiserlichen Majestät, meinem Allergnädigsten wahren und angeborenen Großen Herrn und Kaiser Alexander Nikolajewitsch, Selbstherrscher aller Reussen, und seiner Kaiserlichen Majestät Erben des Thrones aller Reussen, Seiner Kaiserlichen Hoheit, dem Großfürsten Caräwitsch Nikolai Alexandrowitsch, treu und redlich dienen und in Allem unterwürfig sein, ohne meines Lebens, bis zum letzten Blutstropfen zu*

schonen. (...)“⁹³ This standard oath was a pledge of allegiance to the principle of monarchy and to the particular monarch.

However, the principle of monarchy became challenged by the principle of nationalism. Prussia and Russia had more and more become rival powers. This created increasingly tensions of loyalty and identity in the situation of the Baltic Germans. If your Russian monarch competes or even fights with the monarch of your German brethren, whom do you support? At least indirectly, Bulmerincq’s position in 1871 was expressed in his jubilant contribution written and published in “*Baltische Monatsschrift*” at the occasion of the German unification and entitled “*Kaiser und Reich*”.⁹⁴ (About this later.)

During Bulmerincq’s professorship in Dorpat, the debate between the Russian imperial writers and the Baltic Germans had fully enflamed. The idea of Russification of the Baltic provinces had been taken up already in the 1830s under the Minister of education (1833-1849) Count S.S. Uvarov. The question whether the Baltic German autonomy could be trusted became especially acute in the light of the 1848 revolution in Germany and Austria. According to a Baltic German author, the time of Uvarov became “*the birth hour of a specific Baltic spirit that first expressed itself in negation, partiality and harshness. Individually and instinctively, the Baltic German felt already earlier alien towards Russia and the Russians; after the great wake-up of 1845 the move was consciously away from the East. The mental border (Grenzwall) that had to defend the West from the East became essential.*”⁹⁵

⁹³ Tartu University Archive, F. 402, 3, 204.

⁹⁴ A. Bulmerincq, *Kaiser und Reich*, XX *Baltische Monatsschrift* 1871, pp 170-180 at 170. See also Bulmerincq’s other articles in *Baltische Monatsschrift*, *Das germanische Nationalmuseum und unsere historische Arbeit*, pp. 204-231; *Aus der Literatur über deutsche Einheit und deutsches Reich*, pp. 191-208.

⁹⁵ W. Wulffius, *Carl Schirren*, 58 *Baltische Monatsschrift* 1927, pp. 2-21. Among international law scholars of the 20th century, a representative of this spirit was Axel Freiherr Freytagh-Loringhoven, a leading writer on international law in Nazi Germany, former student and professor in Dorpat/Iur’ev. On him, see *Zwischen Volk und Staat*.

After the Polish upheaval of 1863, the Russian newspapers became particularly alert about the German autonomy in the Baltic provinces.⁹⁶ An occasion to this was given when the Livonian Lutheran Bishop Ferdinand Walter preached in 1864 the Germanization of the Latvians and Estonians, in order to achieve “national and confessional identity and equality with their masters”.⁹⁷ A history professor of Dorpat, Carl Schirren, started in 1862 his influential public lectures in which he argued that the Baltic Germans differed in their culture fundamentally from the Russians.⁹⁸ The leader of the German Baltic autonomy, Count Lieven had in 1863 ordered that erroneous presentations in the Russian media had to be countered by reliable individuals in the Russian media itself.⁹⁹

This was the situation in which Bulmerincq published in 1865 his views on the legal and historical development of the Baltic provinces.

“*Rußland. Die deutschen Ostseeprovinzen*“ was published in Bluntschli’s „Deutsches Staatswörterbuch.“¹⁰⁰ Note the tension in the title of the contribution – after all, were those provinces Russian or German, or both?

Bulmerincq’s narrative in this contribution moved between the history and the law. Nevertheless, the central building block of the argumentation in this text is the history, starting from the

⁹⁶ S. Isakov, *Ostzeiskij vopros v russkoi pechati 1860-kh godov*, Tartu, 1861.

⁹⁷ M. Haltzel, *Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russlands*, Marburg/Lahn, 1977, p. 29.

⁹⁸ Andres Kärssin, *Politiker Carl Schirren und seine „Livländische Antwort“*, Tartu, Diplomarbeit, 1995.

⁹⁹ A. von Tobien, *Die livländische Ritterschaft in ihrem Verhältnis zum Zarismus und russischen Nationalismus*, Bd. I, Riga, 1925, p. 126.

¹⁰⁰ A. Bulmerincq, *Russland. Die deutschen Ostseeprovinzen*, J. C. Bluntschli and K. Brater (eds.) *Deutsches Staatswörterbuch*, 9. Band, 1865. For Bluntschli’s prominent role in 19th century international law scholarship, see Betsy Röben, *Johann Caspar Bluntschli, Francis Lieber und das moderne Völkerrecht 1861-1881*, Baden-Baden: Nomos, 2003.

German colonization (Bulmerincq's own term) in the 13th century and establishing the civilizational superiority as the ultimate justification for the act of colonization:

*“We leave aside the question whether since the 9th century the Estonians, Latvians and Livonians had to pay tribute to the Russians. In any case the mere duty to pay tribute could not be the basis of a closer and more efficient relationship. Therefore, the recently raised fight about the priority of civilization in the Baltic sea provinces “through the Russians or the Germans?” is superfluous since even if Russia has made civilizational attempts, in any case to the Germans as the more civilized ones there remained and still remains enough work to do.”*¹⁰¹

Bulmerincq pointed out that at the arrival of the German colonizers the native peoples were almost exclusively heathens. *“The level of the culture was low.”* One could not really speak of science and art – only Latvian and Estonian folk songs and tales witnessed of some sort of cultural development of the native peoples. The native peoples had not yet learned to write. As far as their material life was concerned, only shipbuilding was to a modest extent developed.¹⁰²

Contemporary authors have pointed out how the most outstanding Baltic German lawyers and historians (e.g. Arbusow) up until the early 20th century held the view that only through the arrival of the German colonizers in the 13th century did the Baltic lands gain access to the culture and the history.¹⁰³ Bulmerincq constituted no exception in that regard.

¹⁰¹ Russland, p. 2.

¹⁰² Ibid., p. 2.

¹⁰³ Michael Garleff, *Stereotypen im wechselseitigen deutsch-baltischen Kulturtransfer*, in: Hans Henning Hahn (Hg.) *Stereotyp, Identität und Geschichte: die Funktion von Geschichte in gesellschaftlichen Diskursen*, Frankfurt a. M.: Lang, 2002, pp. 349-363 at 352.

Bulmerincq recounted how “the Baltic sea provinces recognized historically Protestantism, the predominance of German language and German law.” Nevertheless, Bulmerincq was not a political hardliner and recognized it as a historical problem that the social stratification largely followed the ethnic lines and the native peoples, the Estonians and Latvians, while constituting the big numerical majority in the provinces, had been kept in the lower status as peasants and servants.¹⁰⁴

Interesting is Bulmerincq’s account of the end of the independence of the Old Livonia after the Russians caused its collapse when in 1558, ending an earlier peace treaty, Moscow started a military campaign against the country. – “*Old Livonia could have continued to exist for further centuries, if the neighbouring peoples would not have pushed it too hard, if the scarcity of its own military forces and the lack of inner unanimity would not have defended it too badly and if the German Reich would not have left it out helplessly, notwithstanding the repeated requests for support.*”¹⁰⁵ There was a sense of nostalgia for the lost independence of Old Livonia in this interpretation of Bulmerincq. In addition, there was an expression of disappointment for betrayal, so often felt by colonists and borderlands with respect to their distant “motherlands”.

Ultimately, Russia was unable to gain control over the Old Livonia and the country was divided between Poland and Sweden in 1583. “*Was there through Livonia not only divided but also its political independence stolen, the divided lands and conquered towns had at least to watch out to defend their confession, their language, their laws, their unique institutions and possessions. Although at this hour of danger, the motherland was not ready to help and keep the German*

¹⁰⁴ Bulmerincq, p. 5.

¹⁰⁵ Bulmerincq, p. 9.

colonies through their connection and independence, so it remained a duty to the colonizers to defend their most dear goods.”¹⁰⁶

In other words, the Baltic Germans had to fight for their national self-rule and autonomy on their own. The next centuries were difficult from the point of view of the Baltic German self-rule. Bulmerincq recounted how Poland started in the early 17th century to implement its plans for the destruction of the German religious and linguistic autonomy of the provinces.¹⁰⁷ Similarly disappointing was in Bulmerincq’s interpretation the Swedish rule since it was ultimately directed towards the destruction of the “uniqueness of the country” (i.e. autonomy).¹⁰⁸

Bulmerincq further recounted that when Estonia and Livonia were finally conquered by Russia from Sweden in the course of the Nordic war (1700-1721), the Baltic Germans and the cities presented to the Russian tsar their conditions of subjugation (*Accord Punkten*). The Baltic German nobility wanted its earlier rights and privileges, ultimately its political, linguistic and religious autonomy to be confirmed. Peter the Great accepted those conditions through an act of grace on 30 September 1710.¹⁰⁹

And now was 1865: *“The colonies established at the Baltic Sea have started their life with a fight, lost independence in a fight but have notwithstanding all fights preserved their Lutheran religion, their German language, their German education, their German law and their unique administration.”*¹¹⁰ Nevertheless, Bulmerincq held the view that under the Emperor Alexander II,

¹⁰⁶ P. 10.

¹⁰⁷ P. 10-11.

¹⁰⁸ P. 13.

¹⁰⁹ P. 15.

¹¹⁰ P. 19.

the colonies needed to realize that a new politics and attitude were necessary. The native peoples had to be included more in the government but in the first place, the German Baltic provinces Estonia, Livonia and Curonia had to realize that there was no alternative to unification: “*Then but also only then will a new time of development break out and the work of colonization be continued in a worthy manner. (...) Should old Livonia stand up anew, the old Livonians have to transform into new ones, the special notions Livonians, Estonians and Curonians have to disappear in front of a uniting meaning of the name: the Baltic Germans.*”¹¹¹

But unity with whom exactly? If the essence of the Baltic provinces was their German uniqueness and their national self-determination, what was to be done with the overwhelming majority of the population, the non-German native population, the Estonians and the Latvians? If national self-determination was the guiding principle, should the native Estonians and Latvians also have somehow counted? Although Bulmerincq recognized the need for institutional reform and wider inclusion of the native peoples, this inclusion had to be undertaken under the German Baltic leadership. In the view of Bulmerincq, this was dictated by the inherent cultural-historical superiority of the Germans over the native peoples – in essence a typically colonialist argument that was otherwise usually employed by Europeans outside Europe.¹¹²

The political-intellectual race over the identity of the Baltic provinces had started. After Bulmerincq published his views, the conflict escalated even further with the outbreak of the so-called *Broschyrenstreit*. The Russian publicist Juri Samarin (1819-1876) published in 1868 a polemical booklet in which he claimed that it was the highest time to subject the Baltic provinces

¹¹¹ P. 19.

¹¹² See the work of Anthony Anghie on colonialism and international law in the 19th and 20th centuries.

to the Russian language and the Orthodox religion.¹¹³ The privileges of the Baltic Germans had to come to their end.

The history professor of Dorpat, Carl Schirren, responded with a fiery reply “Die livländische Antwort an Herrn Juri Samarin” (1869, “The Livonian Answer to Mr Juri Samarin”)¹¹⁴ in which he emphatically rejected Samarin’s claims for further Russification as unfounded and illegal.¹¹⁵

Law became a central argument in the question regarding supremacy in and identity of the Baltic provinces. The debate concentrated at the time when Estonia and Livonia had become part of the Russian Empire in the course of the Nordic war (1700-1721). Schirren and other Baltic German scholars claimed that the “Accord Punkten” of 1710 constituted an international treaty – *pacta sunt servanda*.¹¹⁶ They advanced the Baltic constitution theory, according to which the Baltic States were in personal union with Russia, not mere provinces of the latter.

In comparison with Schirren, Bulmerincq’s tone was softer, politics more liberal. In his 1865 text, Bulmerincq the international lawyer did not base the central claim about the Baltic provinces on international law. Paradoxically, it was the history (and geography) professor Schirren who, in response to the attack by Samarin, raised the international legal argument that the German Baltic provinces were in personal union with Russia and had thus their rights for autonomy under international law..

¹¹³ J. Samarin, *Okrainy Rossii. Serija pervaja. Russkoe baltijskoe pamor’e*, Prague, 1868.

¹¹⁴ C. Schirren, *Livländische Antwort and Herrn Juri Samarin*, Leipzig: Duncker & Humblot, 1869 (reprinted 1971 in Hannover-Döhren by Harro von Hirschheydt).

¹¹⁵ See *ibid.*, p. 155. For Schirren’s other historical works of political relevance for that time see also his *Qullen zur Geschichte des Untergangs livländischer Selbständigkeit. Aus dem schwedischen Reichsarchive zu Stockholm*, Reval: Franz Kluge, 1861.

¹¹⁶ Schirren, *Livländische ...*, p. 157.

5.3. Praxis, Theorie und Codification des Völkerrechts (1874): Celebrating the German Nation State and Fighting Its External and Internal Enemies

One of the surprising characteristics of “positivist” international law scholars such as Bulmerincq and others of his time was how easily they could express in a single breath demands for objectivity and scientific legalism - and at the same time make utterly subjective political comments. Ironically, it is also in this sense that G. Rolin-Jaequymans’ words about Bulmerincq’s book “*Praxis, Theorie und Codification des Völkerrechts*”- “*livre qui sort de la banalité*”¹¹⁷ – hold true.

On the one hand, Bulmerincq demanded that subjectivism and “phrases” be expelled from international law. For instance, he demanded of the universal history of international law neutrality and the expulsion of the political. Such history had yet to be written: “*We expect equally little the glorification of one single nation as e.g. in Combes (Histoire générale de la diplomatie Européenne, Paris, 1854) or throwing dirt at others as e.g. in Mitchell’s Memoirs and Papers 1850).*”¹¹⁸

At the same time in the same book, Bulmerincq revealed at least three open political biases: his bias as German regarding the Franco-German rivalry, his bias as Lutheran vis-à-vis the Catholic Church and thirdly, his political (conservative) disagreement with the socialist movement that had envisaged an “impossible future”.

¹¹⁷ Revue de droit, 6 1874, pp 694-696 at. 696.

¹¹⁸ Theories, p. 95. In a later addendum, Bulmerincq added that it was in the nature of this work that it had to be international and not national. No nation could feel privileged in advancing the work of completing the history of international law. Qualified men from all countries had the right to participate, without jealousy and presumption. See *Notice de M. A. Bulmerincq sur la littérature récente du droit international en Allemagne, traduite par M. Rivier et lue par lui en séance du lundi matin, 30 août 1875, Revue 1875, pp 99-104 at. 103-104.*

In a non-legal festive speech titled “Kaiser und Reich” and published in 1871 in “Baltische Monatsschifte”, Bulmerincq had already earlier celebrated the unification of Germany. This was a moving patriotic speech in which the author expressed the wish that the Germans “*will live at home in an undisturbed manner, outside, in the council of peoples, let its mighty voice be heard, to the just ones for help and defence (zum Schutz und Trutz), to the arrogant ones for warning and punishment.*”¹¹⁹ – “*The strong people in the Middle Empire are ordered to serve as the guardian and guarantor (Hüter und Wächter) of the world peace.*”¹²⁰ Bulmerincq was also confident that “*the German people is peace loving, its Emperor may not be a breaker of peace. He will defend his own people, not attack the others.*”¹²¹ While this speech was of course not formulated as legal text, it demonstrated that even international lawyers who insisted on the separation of law and politics, were individuals from flesh and bones, with their political dreams and social aspirations that occasionally needed to be expressed and celebrated.

In “Praxis, Theorie und Codification des Völkerrechts”, i.e. the same work in which Bulmerincq demanded objectivity and separation from politics for international law, Bulmerincq made several passionate comments about the war of 1870/1871 between Prussia and France and the ensuing unification of Germany, the new Middle Empire (*Reich der Mitte*). According to Bulmerincq, it was necessary for the maintenance of peace that France gave up its “chauvinism and revanchist dreams”.¹²² He was also upset that international laws of neutrality had been violated in the war between Prussia and France – when citizens of third countries “in the greatest fashion” delivered shipments of war material to “one of the warring parties”.¹²³ It was again the history that explained quite a lot about the state of international affairs. For example, in some countries (such as France, Spain and Italy) monarchs could claim title according to the principle

¹¹⁹ P. 170.

¹²⁰ P. 170.

¹²¹ P. 170.

¹²² P. 6.

¹²³ P. 10.

of legitimacy but as their dynasties were “not grown together with the people” but “only wanted to rule”, the mere legitimacy they held did neither safeguard power nor enable to regain it. They were not “part of the people”, not representing it.¹²⁴ Already Napoleon I lacked intimate relationship (*inniges Verhältnis*) to its people.¹²⁵ The most deplorable thing about him was that he was striving towards universal monarchy – but this was also the reason why this once feared ruler had to fail and became a “powerless prisoner in St. Helena”.¹²⁶

It was then only seemingly incoherent that Bulmerincq also found an opportunity to express himself about the new constitution of Germany - although it had found its critics among scholars of South Germany (such as von Mohl), it was a “reasonable compromise” implemented by a “non- doctrinal *homme d’Etat*”.¹²⁷

And yet there was more to be added about the rulers of France: “*Statesmen have repeatedly tried to switch attention from dissatisfactory domestic circumstances to glorious wars and this has especially been the politics of the Bonapartes – but they never were representatives of international law. (...) Their victories did not increase their prestige as subjects of international law; Napoleon I was only feared, never respected and Napoleon III issued almost unnoticed demands to the creation of a universal congress. As he experienced his last failure, the one of Sedan, the world felt relieved from a nightmare and even France breathed freely, France that is now again pushed by Bonapartism and begins to forget Sedan. France that would entangle itself in the Bonapartian revenge nets could only deserve political disrespect.*”¹²⁸

¹²⁴ P. 7.

¹²⁵ P. 11.

¹²⁶ P. 11-12.

¹²⁷ Praxis, Theorie, p. 13.

¹²⁸ P. 22.

Bulmerincq's critique of policies of France did not, however, prevent him from recognizing the position of the French language as the language of international law. Bulmerincq believed that the French language suited best for international law, better than English or German.¹²⁹ This was so for the reasons immanent to the French language itself. English would never make it to this status.¹³⁰ But Bulmerincq also made it clear that preferring a certain language did not imply preferring the nation of its native speakers.¹³¹

Secondly, equally clear-cut as Bulmerincq's disdain of policies of Napoleon's France was his rejection of the Catholic universalism. In fact, his angry reaction to claims of Catholic universalism invoked images of age-old conspiracy theories regarding power pursuits of the Church. There were ultramontanist "disturbers of peace" whose political propaganda was "unpatriotic and radical".¹³² Essentially, the Church with its universalistic claims was leading a battle against the State. To fight the ultramontanists was thus not only a political necessity, it was an "international legal obligation".¹³³ *"The head of the religious-political International has its seat in Rome, its constitutive members (Bundesgenossen) are (...) knights of legitimacy (...) the religious-political International have far-reaching goals, it wants to create a Christian-Catholic world state. It is an international legal obligation to intervene against all those enemies of the State and of the States."*¹³⁴

The antagonism of the Catholic Church and the nation State was a historic phenomenon. According to Bulmerincq, the Germans and other Germanic peoples played a crucial role in securing the victory to the nation State: *"The power position desired by the Catholic Church was*

¹²⁹ P. 119-120.

¹³⁰ P. 121.

¹³¹ P. 122.

¹³² P. 18-19.

¹³³ P. 20.

¹³⁴ P. 21.

disturbed already before the Reformation. The nations acquired their complete independence only when they completely broke with the Catholic Church. This was the work of Reformation that was carried out by the Germanics led by a German monk. It was of German origin and German and Swedish blood sealed it in the 30-years war. The reformation was an uprising against the papacy because the latter was disrespectful towards and even tried to undermine the independence of nations and the freedom of individuals.¹³⁵ (The Swedish king) Gustav Adolph saved the Reformation and therefore indirectly the principle of nationality.” Moreover, Bulmerincq claimed that the principle of individuality also originated in the German thought.¹³⁶

Bulmerincq’s attack on Catholicism in his international law treatise becomes more understandable when one takes into account his position expressed in the 1871 festive speech “Kaiser und Reich” – namely that the Lutheran Church would become the church of the German people in which the national and the Christian would be united and express everything that was “healthy” in the German people.¹³⁷ Bulmerincq thus positioned himself clearly in German *Kulturkampf* on the side of Bismarck against the Catholic ultramontanists, in particular the (Catholic conservative) Centre Party.¹³⁸

But Catholic ultramontanists were not the only enemies of the State that Bulmerincq fought against in 1874. Equal danger was presented by the social democratic movement that, as Bulmerincq claimed, had a lot in common with the ultramontanists. Both ultramontanists and socialists (*Socialpolitiker*) had been accorded the “undeserved honour” of equal rights with

¹³⁵ P. 59.

¹³⁶ P. 60. This thought was Hegelian. Hegel wrote in „The Philosophy of History“ that „the Orient knew and knows only that one is free, the Greek and Roman world that some are free; the Germanic world knows that all are free.“ New York: Dover Publications, 1956, foreword of C.J. Friedrich.

¹³⁷ Kaiser und Reich, p. 175.

¹³⁸ See on Bismarck’s *Kulturkampf* e.g. in Gordon A. Craig, *Germany 1866-1945*, New York, Oxford: Oxford University Press, 1978, p. 63 *et seq*; Edgar Feuchtwanger, *Bismarck*, New York and London: Routledge, 2002, p. 187 *et seq*.

political parties, instead of considering them as enemies of the concept of political parties.¹³⁹

*“Although the social democrats are only represented in minor numbers in elected assemblies, they constitute a power that is more and more endangering to the State, since outside the chambers, in the circles of material work, they attract bigger and bigger crowds to their anti-State doctrines in order to manipulate with the masses. While first limiting themselves to economic and societal questions, the social democrats later turned to political questions and now seek to overthrow the State from economy and society.”*¹⁴⁰

Social democrats and ultramontanists offered various points of comparison: *“Both meet the organs of the State with contempt and the existing laws with disrespect; both are unpatriotic, both write and talk fanatically, without piety and moderation; both see their activities in agitation and organize therefore for the employees and workers strikes, while ultramontanists organize time stealing pilgrimages for the masses. (...) The difference between the both consists in the fact that the ultramontanists recognize the authority of the Church and Jesuitism while the social democrats, denying all religion and morality, seek supporters through a political economy and dialectic created by themselves and that mainly consists in negation and envisages an impossible future.”*¹⁴¹

Bulmerincq drew his readers’ attention to the fact that the agitation of the workers had turned towards the creation of the social-democratic fraternalism crossing State borders and had created a central organ for its goals: “the so-called International”. With that development, there had emerged for international law “not only a reason but a duty to react”.¹⁴² *“The States that in bold overestimation of their conditions have offered their soil to socialists for doing propaganda in*

¹³⁹ P. 23.

¹⁴⁰ P. 24.

¹⁴¹ P. 24-25.

¹⁴² P. 26.

*other countries, will one day recognize that they have themselves fed and raised the disturbers of their own order as well.”*¹⁴³

Note that Bulmerincq’s assault on ultramontanists and social democrats completely coincided with Bismarck’s policies and campaigns. Also note that the book immediately preceded Bulmerincq’s move from Dorpat to Wiesbaden, Germany. It is likely that he simply wished his political views to be known in clear terms in his new homeland.

5.4. The Status and Future of the National Self-Determination in Bulmerincq’s Work

In his 1874 book, Bulmerincq also asked: has international law given to the peoples the right to secede and create of their own nation states? He argued that the French revolution of 1789 initiated the international legal treatment of the “nationality principle”. Abbé Gregoire had declared in 1795 meeting of the National Convent that the peoples were independent of each other and sovereign. Moreover, on 5 March 1848, following the February revolution, Lamartine had issued a proclamation of the French government insisting that peace should be based on the recognition and respect of the independence of the peoples.¹⁴⁴ There was no doubt that the unification of Germany in 1871 found its justification in the “nationality principle”.¹⁴⁵ Other such examples were Greece, Belgium and Italy. The Italian author Manzini had even argued in his 1851 work¹⁴⁶ that peoples rather than State were elementary units of international law. Bulmerincq argued against this Manzini’s view that there existed peoples without the unity of their country or no country at all (the Jews) and that international law demonstrated that a community of law could exist without being a community of nationalities.¹⁴⁷

¹⁴³ P. 27.

¹⁴⁴ P. 61.

¹⁴⁵ P. 63.

¹⁴⁶ Manzini, Della nazionalità come fondamento del diritto delle genti.

¹⁴⁷ Bulmerincq, p. 67.

Bulmerincq finally “completely supported” the opinion of Rolin-Jaequemyns according to which States that “represented” the nationality principle had the right to follow their natural development and unite the same people, living in different States, into one State.¹⁴⁸ Nationality principle could legitimately be a factor in domestic politics, being a basis for the request of guarantees such as the use of a language. But in the view of Bulmerincq to go further would have brought along the dissolution of existing States, revolution and war. Bulmerincq finally warned prophetically: “*As earlier religion wars, so in the future wars between nationalities can be led and have already been led. Today not any more the religion but the nationality is the driving force but this too does not lead to the peace but to the struggle.*”¹⁴⁹ This concern and the limited number of precedents made Bulmerincq conclude that international law could not be based on the “nationality principle”.¹⁵⁰ Would he have held the same opinion if Germany would not yet have been unified?

6. In Conclusion. Bulmerincq’s ‘Positivist’ Approach to Politics in International Law

August Bulmerincq belonged to the first generation of modern international law professionals. The more narrow specialization among international lawyers had not yet taken place. Moreover, Bulmerincq and his *Gründergeneration* of international lawyers saw themselves as activists for various good causes. To build up international law was one of the challenging projects but not the only one. Therefore, Bulmerincq’s writings and interests were almost universal, ranging from international law to all kinds of questions of public life, up until to agriculture. Yet although Bulmerincq had many interests, he was first and foremost activist for “positive” international law.

¹⁴⁸ P. 68.

¹⁴⁹ P. 69.

¹⁵⁰ P. 70.

Bulmerincq's work and character had been characterized as 'solid' by his contemporaries. This was recognized by his successors in Dorpat. Carl Bergbohm recognized that in his time Bulmerincq had possessed "the best knowledge of the material contained in the treaties".¹⁵¹ From the positivist point of view, this was the best possible compliment about one's craftsmanship. Vladimir Hrabar, Bergbohm's successor in Dorpat (Iur'ev) maintained that although Bulmerincq's works may sometimes have been difficult to read, they were deep and rich in content and demonstrated how hardworking their author had been.¹⁵²

Bulmerincq's "solidity" did not automatically imply his affiliation with political conservatism. After all, there was a Catholic and a Protestant version of conservatism in Bismarck's Germany. First of all, Bulmerincq was admirer of Bismarck – therefore, he could have no sympathy for the Catholic Conservatives.¹⁵³ But he had strong convictions on issues that touched upon his identity. And in his soul, he remained a conservative when he regretted that thanks to secularism States are no longer seen as moral institutions and have become subjects to steady political changes, without a determined goal.¹⁵⁴ He remained a conservative when his history of the Baltic provinces led him to conclude in 1865 that the German *Kulturträgerei* in the Eastern part of Europe, the *mission civilisatrice* that was started in the 13th century, had to be continued. He remained a conservative when he painted the looming danger of the socialist movement that did nothing else but wished an "impossible future". He was unable to give up what was dear to him – and there was a lot that had to be defended.

¹⁵¹ C. Bergbohm, *August von Bulmerincq*, in *Allgemeine Deutsche Biographie*, Bd. 47, S. 348-350 at 349.

¹⁵² V. Hrabar, *August Bulmerincq*, in: I. Andreevski (ed.) *Entsiklopeditseski slovar Brokhausa-Efrona*, St Petersburg: Efron, 1891, pp 910-122 at 910.

¹⁵³ A. Bulmerincq, *La politique et le droit dans la vie des états, IX Revue de droit international et de législation comparée 1877*, pp 361-379 at 370 he criticized that in the German Reichstag of conservatives, ultramontans and social democrats is only explained by their common negation of liberalism.

¹⁵⁴ *Ibid.* P. 366.

Bulmerincq's international law reflected who he was. But he never tried to hide who he was either. Typically for us, lawyers, his own subjectivity never seemed to be an issue for him. In the time of Bulmerincq, national identity was so self-evident for most intellectuals in the legal academia that no one was surprised when an international lawyer also argued as patriot of his country.

As Dr Jekyll and Mr Hyde, there are two Bulmerincq's: Bulmerincq the protagonist for 'positive' international law who advocates the expulsion of the politics from the legal discourse and Bulmerincq the German patriot and pamphletist for various (mostly conservative) political causes. It was less contradictory as long as the positions authored for different purposes and audiences were printed in different fora such as the legal "Revue de droit international et de législation comparée" and the cultural-political "Baltische Monatsschifte". But sometimes, as in particular in "Praxis, Theorie and Codification des Völkerrechts" (1874), Bulmerincq the international lawyer and Bulmerincq the political pamphletist met, got blurred and contradicted each other. Already for his positivist successors such as his disciple Carl Bergbohm, this amounted to a professional failure. There was either an amount of hypocrisy or professional short-sightedness contained in this kind of inconsequent "positivist" approach. It was true, Bergbohm wrote on Bulmerincq, that the latter had been working in the period when the state of general theory of international law was yet weak and there was no clarity about sources. But Bergbohm also was compelled to conclude that Bulmerincq finally lacked "the sharpness of definition and the energy for uncompromising defence of subjective ideas from the system of a science promising objective truths".¹⁵⁵

¹⁵⁵ C. Bergbohm, *August von Bulmerincq*, in *Allgemeine Deutsche Biographie*, Bd. 47, S. 348-350 at 349.

Whether those “subjective ideas” criticized by Bergbohm have disappeared from the doctrine and practice of international law ever since Bulmerincq, is the question. Immersion of an international legal text with politics can of course be regarded as professional failure. (This was essentially Bergbohm’s judgment on Bulmerincq.) However, alternatively it may be a strategy of argumentation, the strategy of positivism¹⁵⁶ or perhaps even of the whole international legal discourse. The context of international legal texts indicates that such texts do not only aim at presenting knowledge, they usually also attempt to persuade, take a stance, change the world. International law is an argumentative framework in the context of historical struggles. One of the ways of persuading and claiming authority with international legal arguments is emphasizing “interest in disinterestedness”. Therefore, Bulmerincq realized that to claim the distinction between law and politics was essential for the authority of international law. International law developed into a formalized, seemingly depoliticized language for addressing the world of political and social struggles. Bulmerincq’s legal positivism freed from politics was politics disguised in which politics appeared officially only as the politics of others. The fight against asylum or social democratic or ultramontanist agitation, however, turned in Bulmerincq’s discourse quite powerfully into international legal obligations.

The task of the future research is to trace the further historical development of the claim of the separation of international law from the politics. Bulmerincq’s academic successors in Dorpat/Iur’ev/Tartu made their own (sometimes painful and even tragic) experiences with politics and developed their own stances regarding the paradigm “international law is not politics”. Only after this material has been analyzed together, can further observations and normative conclusions be drawn.

¹⁵⁶ For going in this direction, see B. Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s International Law*, 13 EJIL 2002, pp. 401-436.