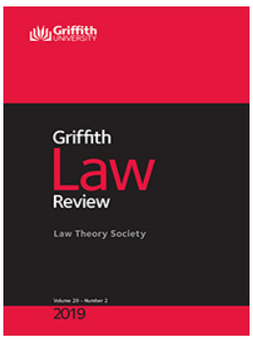

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Buribunks and foundational paradoxes of international law

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ABSTRACT

Schmitt's essay 'The Buribunks' reflects some age-old problems, tensions and paradoxes of international legal theory, including Schmitt's own treatment of the history of international law. Both Schmitt's essay and international legal theory are unable to define their main subject in a fully coherent way. They oscillate between naturalism and positivism, facticity and normativity and between internal and external perspectives. However, the inability to define its main subject does not as such discredit international legal theory or Schmitt's essay. On the contrary: it is the specific paradoxes and tensions that define what it is to engage in international legal reasoning, just as it is the endless going back and forth between opposite poles that makes the reader familiar with the strange character of the Buribunks.

1. Introduction

Let me start with a confession. Until recently, I only had a vague idea of the contents of *The Buribunks*. I had read some pieces about Schmitt's essay and realised the essay could be interesting as, apparently, it was connected to topical problems such as the power of social media,[1] modernity and enmity,[2] and one of my favourite novels, 'The Man Without Qualities'.[3] However, to me it remained an esoteric essay written by an author who was already puzzling enough in his legal and political writings. I never got to the point where I would actually pick up the essay and read it carefully. This changed when one of the guest editors to this special issue, Edwin Bikundo, invited me to join a seminar on *The Buribunks*. I went through the essay and was struck by how much I recognised. It was striking to see how many problems discussed in the essay echo age-old problems in the field of (international) legal theory. Maybe this should not have come as a surprise: Schmitt himself was a lawyer and most of his work is related to problems of jurisprudence somehow. Having said that, I simply did not expect that an essay about a people who obsessively keep diaries would turn out to be so closely related to some core problems in (international) legal theory.

In this article, I will make two arguments about *The Buribunks* in relation to international law – one explicit, the other more implicit. The first is that *The Buribunks* reflects

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[1]Carah and Thomas (2017).

[2]Friedrich Balke et al, in: Meierhenrich and Simons (2016), pp 629–657.

[3]Lambrov (2016), p 332.

some of the foundational paradoxes and tensions of international legal theory, including Schmitt's own reflections on international law. When faced with the question what international *is*, how it exists, international legal theory has oscillated between naturalism and positivism, facticity and normativity, between internal and external accounts of law. Almost identical paradoxes occur when Schmitt's essay tries to set out what defines a Buribunk. I discuss these tensions in section one (in relation to Schmitt's essay) and section two (in relation to international law). In the latter section, I will zoom in specifically on the approach to (international) law developed by the German Historical School, as this tradition has heavily influenced Schmitt's thinking. Secondly, my argument is that these paradoxes and tensions *themselves* define what it means to engage in international legal argumentation or in Buribunkology. They are, so to speak, a crucial part of the identity of international law or the Buribunk. Practicing international law means to be able to navigate the tensions between 'is' and 'ought', between power and normativity, between internal and external perspectives.[4] In similar fashion, getting to know the Buribunks means to engage with the paradoxes that come up when Schmitt tries to define their 'true' nature.

2. The construction of what is given

Like any fiction writer, Schmitt is faced with the question how to introduce a fictitious people, how to make readers suspend their disbelief and to act as if – well, as if what? The point for Schmitt seems not to be so much that readers need to act as if *they* believe Buribunks exist. The whole essay is so absurd, that it is clear to every reader that Buribunks are a figment of Schmitt's mind. The essay is filled with farcical elements, which constantly remind the reader that she should not take the text too seriously. However, these farcical elements only work if the audience acts upon the belief that the *author* is serious. Just like the jokes of *Fawlty Towers* would turn corny if the audience acts as if Basil Fawlty does not take his own problems seriously, the humour and irony of *Buribunks* would turn flat if the reader does not act as if the author really believes Buribunks exist. So how does the author inform the readers about the existence of Buribunks? Basically, the essay contains two introductions, both combining idealism with positivism. However, they work in opposite directions: the first starts with idealism, in order to get at the positivity of Buribunks; the second starts with factual criteria, only to end up in idealism. In addition, the essay moves from the existence of Buribunks to how Buribunks ought to be, thus combining 'is' and 'ought' in ways not totally foreign to legal reasoning. In the sub-sections below I will explain the three moves made in *Buribunks*.

2.1. From idea to fact

The first introduction can be found at the opening of the essay. Rather than presenting the fictitious people right away, *The Buribunks* starts with the science of buribunkology. The first thing the author sets out to do is to prove that there is such as thing as buribunkology.

[4]The idea of international law as a practice that revolves around foundational paradoxes was formulated in the 1980s by David Kennedy and Martti Koskenniemi. Kennedy (1987); Koskenneimi (2005).

The justification offered in the essay reads like constructivism *avant la lettre*: there would be 'no buribunkology if there were no buribunkologists'[5] – and that there *are* buribunkologists is proven by the fact that 'already more than 400,000 buribunkological Dissertations (…) have been published (…) and – last but not least – the Buribunk and Ferker Research Panel Commission (BAFREPAC) has a standard yearly budget of several billions'. [6]

From the existence of buribunkology Schmitt deduces the existence of the object of his study, the Buribunks: 'As the existence of America follows out of the fact that American studies exist, the existence of the Buribunks follows from the fact that buribunkology exists'.[7] So the order of knowing is: buribunkologists exist, therefore buribunkology exists; buribunkology exists, therefore the existence of Buribunks is put beyond doubt. Later in the text Schmitt comes full circle by declaring that a genuine buribunkologist is a 'true Buribunk at the same time'[8] an author of the subject she creates by writing about her object. From this perspective it is interesting to recall one of the most quoted passages of *The Buribunks*: 'I write, therefore I am; I am, therefore I write. What do I write? I write myself. Who writes me? I myself write myself. What is the content of my writing? I write that I write myself. What is the big motivator lifting me above this self-sufficient circle of I-ness? History! I am therefore a letter on the typewriter of history'.[9]

Subject and object of Buribunkology thus join together in a process of becoming. And yet, the point of studying 400,00 dissertations on Buribunkology is not to end up in high-minded idealism. On the contrary: the point is to get a sense of concrete, lived reality. Through the spirits of the buribunkologists the reader is supposed to arrive at 'live itself, life as it is historically present or was historically present, in its concrete factual actuality and positivity'.[10] So what are these facts, what is the positivity of the Buribunk that its science promises?

2.2. From fact to idea

Schmitt's second introduction starts at the third page, *in medias res*,[11] in the form of a 'burning, most interesting question': 'what is the criterion, the *differentia specifica*, the big distinctive feature?'[12] A question like this seems to turn away from the earlier idealism and to reorient the research to what is really out there: define the Buribunks, look at the characteristics of real existing persons and come to conclusions about their status. This looks like the method Schmitt adopts indeed. First, he defines Buribunks as those people that keep diaries of every aspect of their lives, subsequently assesses a number of people, and finally reaches a definite conclusion as to their status of 'Buribunk'. However, the picture changes if we take a closer look at *why* the criterion of diary keeping is adopted. Schmitt approaches this question as if it were possible to arrive at a non-arbitrary answer. The definition of the Buribunk is presented as independent of the whims of the researcher, as

[5]Carl Schmitt (2019), *The Buribunks*, 1.
[6]Schmitt (2017), 2.
[7]Schmitt (2017), footnote 1.
[8]Schmitt (2017), 8.
[9]Schmitt (2017), 12.
[10]Schmitt (2017), 2.
[11]Schmitt (2017), 3.
[12]Schmitt (2017), 3.

if it is grounded in the object of study *itself*. The researcher has to be receptive to her object and to capture its essence in the criterion used to distinguish Buribunks from others.

However, if we are looking for criteria to determine who counts as a Buribunk and then argue that these criteria should do justice to their nature, we are back at square one: whose nature should we do justice to? One way to get around this problem is to simply leave it behind and postulate what our object looks like. Initially it seems as if this is also the strategy adopted by Schmitt, who argues that his search for the proper criteria is 'as always (…) start with what is, with the facts'.[13] And the decisive fact, the distinctive characteristic, Schmitt argues, is that Buribunks keep diaries. However, this criterion turns out to be rooted in an idealistic, progressive understanding of history. The preference for diary keeping as defining characteristic of Buribunks *is 'guided in this by a decidedly historical appreciation of progress whose stages can indeed be proven historically by the spreading of the idea of keeping a diary*'.[14] This argument takes us back to the beginning of the essay, where the existence of Buribunks was derived from the development of the science of buribunkology. What starts out as a positivistic search for criteria to capture the facts, ends up in a progressive idealism, which defines Buribunks as drivers and products of a self-created history, as those who understand themselves as 'as history's subject-object, in which the World Soul has become action through writing itself'.[15]

2.3. From self-understanding to external obligation

In the previous sections we saw that Buribunks are characterised by an inner drive towards self-objectivation in diaries. The purest Buribunk of all, Schmitt contends, is a person called Schnekke, who 'is nothing more than a keeper of a diary, he lives for the diary, he lives in and through the diary – even though in the end, he keeps a diary about the fact that he has run out of ideas about what he could write in the diary'.[16] In Schnekke, ideal and reality converge, as he has become the truly generalised person, who is unique because he could be anyone.

However, from Schnekke on the freedom to externalise oneself in diaries is not longer a matter of choice. Where the earlier part of the essay is in search of the Buribunk, the latter part assumes that there is a society of Buribunks where 'every male and female Buribunk is obliged to keep a diary for every second of their lives'.[17] So after spending pages to define the Buribunk in terms of the fact that they keep diaries, it now turns out that Buribunks live in a totalitarian society that puts them under constant surveillance. Buribunks are obligated to keep diaries all the time; the maximum freedom they enjoy is 'that no Buribunk is prevented from writing in his diary that he refuses to keep a diary'.[18] But then again, we are back at the opening of the essay: how do we know who is the addressee of this obligation? If Buribunks are defined by the *fact* that they keep diaries, what is the point of putting them under an obligation to do

[13]Schmitt (2019), p 101.
[14]Schmitt (2019), p 101.
[15]Schmitt (2019), p 102.
[16]Schmitt (2019), p 107.
[17]Schmitt (2019), p 108.
[18]Schmitt (2019), p 109.

so? On the other hand, if it is necessary to put them under an obligation, how can they be true Buribunks?

3. Buribunks and the law

3.1. Positivity and idealism

Schmitt's search for the Buribunk echoes some age-old problems of (international) legal theory. Legal theory too has long struggled to 'define' law; to draw definite boundaries around law and to explain its foundations and existence. So far, it has proven impossible to conclude this struggle, to come up with a definition of law that sets it firmly apart from fields such as morality or (power) politics. This is not to say that the definitional question constantly haunts the creation or application of law in practice. Most legal activity takes place against the unspoken assumption that the legal system exists as a separate field, just like novels on fictitious people generally manage to go ahead without dwelling on questions of epistemology or ontology. However, foundational questions cannot be pushed away from legal practice entirely. They pop up even in seemingly technical legal questions such as the interpretation of treaties or the legal status of newly independent states,[19] and they move centre stage in times of change, when, for example, established sources and authorities of law are challenged.[20] Practicing international law then requires the ability to navigate the unsolvable tensions that make up the field.

An example is the ongoing debate between naturalism and positivism in the field of international law. According to the first school of thought, international law operates on the basis of certain pre-given principles, such as human dignity. It is up to international law to recognise such principles, in the dual meaning of the term: to cognise them again and to endow them with legal status. This is the logic that can be found in many human rights treaties, as can be illustrated by the preamble to the International Covenant on Civil and Political Rights, which states that the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. However, the moment these principles are to be applied in the real world of diverging values, identities and interests, they appear underdetermined and conflicting. Hence, their concrete validation depends on some kind of positive act of interpretation and authorisation. This then brings us back to the other scale of the spectrum, where law is defined in terms of authoritative decision-making. As Koskenniemi has put it: 'A deep-structured cosmopolitanism maintains that deep-down the world is already united. The problem is that the claimed deep-structural principles vary, are conflicting and recieve meaning and applicability only through formal decision-making structures. Re-enter government to make the choice; re-enter intergovernmental negotiation to set the balance. Cosmopolis must wait'.[21]

However, starting at the other end of the spectrum does not yield stable foundations either. For positivism, the basis of international law lies in the will of states or in their tacit consent. The problem is that 'will' alone cannot ground the validity of a normative

[19]For an analysis see the classical works from international law critical theory: Carty (1986); Kennedy (1987); Koskenneimi (2005).
[20]See, for example, the dissenting opinion of judge Trindade, discussed below (Section 2.3)
[21]Koskenniemi (2003), p 476.

rule, unless one is happy to forget about the logical fallacy of deriving 'ought' from 'is'. The will of states must therefore be translated into something beyond it; into formal sources of law such as treaties or rules of customary law. The validity of these sources cannot be traced back to the will of states, as this would produce the kind of circularity that has plagued Buribunkology for so long. What started out as positivism, grounded in facts, thus ends up in something normative: a theory justifying why and how the will of states is capable of producing valid norms.

In his major study of the history of international law, Schmitt tries to stay away from both naturalism and positivism.[22] Instead, he seeks to ground his analysis on the concept of *Nomos*, the concrete order that starts with the appropriation of land, and is linked to tangible questions of distribution and production.[23] The focus on concrete ordering echoes the idea of capturing Buribunks 'in their facticity'. However, as with the Buribunks, facticity cannot speak for itself. The concrete order of the *Nomos* needs to be articulated in abstract categories, which betray certain preferences for how to read history. In the case of Schmitt, the existence of a *Nomos* is not derived from an analysis of what happened on the ground (quite literally). Instead, his analysis focuses on dominant writers in different epochs, giving the impression of 'describing a "concrete order' when he is simply describing the logical corollaries of a theory of domestic absolutism', while invoking German public lawyers known for their 'rigorous formalism, (their) absolute distance from the social lives of European nations'. [24]

Schmitt's going back and forth between concrete ordering and abstract theorising is no coincidence. It fits Schmitt's admiration for the German Historical School, which combines an emphasis on law's rootedness in the life of concrete nations with a strong focus on abstract concepts and doctrines developed in Roman law. And just like Buribunkology has its founding heroes, so does the German Historical School – as Schmitt made clear in his essay *The Plight of European Jurisprudence*.[25]

3.2. The plight

Schmitt's *Plight* reads like a cry from the heart. It is Schmitt's attempt to rescue the spirit of European jurisprudence from what he regarded as a nihilistic tendency to equate 'law' with norms enacted by the legislator. This tendency, Schmitt argues, threatens the civilising spirit of age-old European jurisprudence rooted in Roman law.[26] The key figure of Schmitt's *Plight* is von Savigny, who is even personally equated with a model of thought in one of the section headings entitled 'Savingy as an Alternative Paradigm'.[27] There is a remarkable similarity between Schmitt's treatment of the person of Savingy and the way he speaks of one of the founders of Buribunkology, Ferker. According to Schmitt, Ferker was not just one of the intellectual fathers of Buribunkology, he turned himself into a paradigm of what it means to be a Buribunk. For this reason, no buribunkologist 'will utter the name

[22]Schmitt (2006).
[23]I will not delve into the concept of *Nomos* in any depth here. For a more thorough analysis, see: Ulmen (1993), p 39; Millerman (2014).
[24]Koskenniemi (2004), pp 492–511, at 495 and 497.
[25]Schmitt (1990), p 35.
[26]Schmitt (1990), p 35.
[27]Schmitt (1990), p 54. The translation on this point deviates from the German original, which speaks of "Savingy als Paradigma der Ersten Abstandsnahme von der Gesetzesstaatliche Legalitaet".

of such a man without the deepest reverence'.[28] Schmitt sets out his life story, to further illustrate his greatness – a greatness that can only be grasped in hindsight.[29] In similar fashion, but this time without irony, Schmitt describes the greatness of Savigny as embodiment of his intellectual position, sketches his life story and emphasises that his importance can only be appreciated when looking back. With the benefit of hindsight, Schmitt argues, we recognise von Savingy's plea for an autonomous jurisprudence as being of 'historical significance, because it made jurisprudence the counterpole of mere positive legislation without abandoning law to the civil war slogans of natural law'.[30]

This is not to say Schmitt presents the two heroes as infallible. Both made a similar mistake: they undertook actions that undermined what they stood for. In Ferker's case, crucial aspects of his life story were left out of his diaries.[31] In the case of Savigny, it was his decision to accept the invitation by King Wilhelm IV to become the minister in charge of law reform, as well as the president of the Prussian State Council and State Ministry. These functions put him in a position where he was tasked to do what he warned against in his writings: to accelerate top-down legislation instead of relying on the natural growth of law through custom and doctrine.[32] However, these aberrations in Ferker and Savingy's life should not affect our appreciation for his achievements, Schmitt argues. They both remain representatives of a spirit, but in opposite ways. Ferker was a person who came closer to being a Buribunk than anyone before, but who still had to wait for further perfection. This came in the person of Schnekke, who would make the move to pure buribunkdom. In this sense, Ferker 'is not the hero of buribunkdom, he is only the Moses, who was allowed to see the Promised Land but not to enter it'.[33] By contrast, developments after Savigny took an opposite turn, not towards perfection of his theory, but more and more away from it. Savigny did not see a future promised land, but instead a past that should be cherished and protected. This is what Schmitt takes from Savigny – not an uncritical adoption of his complete theory, but the idea that jurisprudence is 'the unity of the legal will, 'the essential preserver of the law', and the 'last refuge of legal consciousness'.[34]

3.3. Historical school

So how does von Savigny seek to protect the autonomy of jurisprudence (*Rechtswissenschaft)* against the twin dangers of abstract moralism and positivist instrumentalism? As was already clear from Schmitt's treatment of this question, the autonomy of jurisprudence was by no means an innocent, academic affair for Savingy. It arose in the aftermath of the Napoleontic occupation of Germany, when proposals were made to frame a legal code for the whole of Germany. Von Savigny expected that these proposals would be favourably received by the Vienna Congress.[35] This prompted him to write *Of the*

[28]Schmitt (2017), p 11.
[29]Schmitt (2017), p 11.
[30]Schmitt (1990), p 62.
[31]Schmitt (2017), pp 11, 12.
[32]Schmitt (1990), p 62. It is difficult not to think about Schmitt himself in this context. All that he stands for in *Plight*, the whole spirit of European jurisprudence, was of course betrayed by his cooptation with the Nazi regime.
[33]Schmitt (2017), 11.
[34]Schmitt (1990), respectively, at: pp 49, 59 and 64.
[35]von Savigny (1831), p 10.

Vocation of our Age for Legislation and Jurisprudence, a work which seeks to defend the need to ground law in the development of the nation, and not on the assumed wisdom of legislators. In order to defend this argument, Savigny argues in favour of an autonomous and truly scientific jurisprudence (*Rechtswissenschaft*). As was set out by Reimann, late 18th and 19th century lawyers sought to make their field 'scientific' by insisting on two elements: 'First, (…) it had to be a science of positive law only, which required its method to be strictly empirical. Second in order to be a true "Wissenschaft", it had to develop the inherent structure of its subject; therefore its goal had to be a scientific system'.[36]

The first element is present in the idea that law is rooted in the life of specific peoples. In other words, law is not derived from abstract, rational principles, but from concrete social facts on the ground. As Savigny puts it: 'In the earliest times to which authentic history extends, the law will be found to have already attained a fixed character, peculiar to a people, like their language, manners and constitution'.[37] The second element was present in an evolutionary perspective on law. Legal communities were treated as entities that could grow, develop and interact with each other. The more advanced a civilisation grew, the more complex its legal rules, institutions and legal relations would become. While law originated in the people, it could in a sense also outgrow them. The legal system would then become so sophisticated that a separate class of experts is needed to articulate its structure and meaning. In that case, the legal conscience of a people could no longer be identified by merely registering its usages. It had developed into a system based on inner principles and logical relations that escapes the layperson's mind. It was now up to trained lawyers to step up as representatives of the spirit of the people and to explicate the basis and rationale of the law. In this context von Savigny spoke of the 'vocation' of legislation and jurisprudence, and in particular for the jurist: 'With the progress of civilization, national tendencies become more and more distinct, and what would otherwise remained common, becomes appropriated to particular classes; the jurists now become more and more a distinct class of the kind; law perfects its language, takes a scientific direction, and, as formerly existed in the consciousness of the community, it now devolves upon the jurists, who thus, in this department, represent the community'.[38]

What started out as a theory that locates law firmly in the consciousness of specific communities, thus ends up in a theory defending the need for a separate class of jurists. The task of these jurists is not to be a mouthpiece for the legislator, but to explicate what is already contained in the development of law. Savigny even goes so far as to suggest that this can be done on the basis of logic and deduction. Just like geometry can deduce the nature of a whole triangle from basic data about sides and angle, 'every part of our law has points by which the rest may be given: these may be termed the leading axioms. To distinguish these, and deduce from them the internal connection (…) is among the most difficult of the problems of jurisprudence. Indeed, it is peculiarly this which gives our labours the scientific character'.[39]

Law thus has a dual existence: (a) as natural off-spring of a particular community (what Savingy called the 'political' side of law) and (b) as the product of scientific labour of the community of jurists (what he called the 'technical' side). This helps explaining how

[36]Reimann (1990), pp 842–897, at 847.
[37]von Savigny (1831), p 24.
[38]von Savigny (1831), at p 28.
[39]von Savigny (1831), pp 38, 39.

Savigny could emphasise the rootedness of law in popular conscience, and yet spend most of his professional life explicating the works of Roman law scholars.[40] However, this also means that the existence of law can never be definitely established: the law of a particular community has to be explicated by learned jurists, but the jurists' claims can only be justified in terms of rules that have been produced independently in a community. Just like the existence of Buribunks is pre-given and produced in 400,000 dissertations, the existence of law predates and is derived from the works of learned jurists.

3.4. The continued relevance of the historical school: the example of international law

The spirit of the Historical School heavily influenced the foundation of international law as a separate discipline at the end of the 19th century. As Koskenniemi has explained, it is a misunderstanding to view international law in the 19th century only through the lens of positivism and state-centrism.[41] While indeed the rationalistic, natural law principles lost much of their traction,[42] insights of the Historical School were frequently projected upon the field of international law. Take, for example, the work of Casper Bluntschli, one of the founding fathers of the *Institut de Droit International* in 1873.[43] Bluntschli had been a pupil of Savingy and applied the idea that law is rooted in the conscience of a legal community to the international realm. International law to him was not based on arbitrary acts of sovereigns, nor rationally deducted from natural law principles. By contrast, it 'emerged spontaneously through the lives of (European) peoples'.[44] Also other founders of the *Institut* held that neither positivism nor naturalism formed a solid basis for (international) legal thinking, arguing instead that international law was rooted in the spirit and development of 'one family of advanced nations'.[45] Therefore, progressive development of international law was not entrusted to states, but to the international equivalent of Savigny' class of learned jurists. The founders of the *Institut de Droit International*, for example, saw themselves as contributing to the improvement of international law through the formulation of 'the general principles of the subject, in such a way as to correspond to the legal conscience of the civilized world'.[46] The legal conscience of the civilised world was both pre-given and produced by the Institute. It was present in the spirit of the advanced peoples, but at the same time this spirit needed to be articulated, systematised and rationalised. The restatements produced by lawyers thus became the main source to obtain knowledge of what the legal conscience of the civilised world demanded.

By now the Historical School has become relatively marginalised in international law. Most approaches today understand international law as rooted in the consent or tacit acceptance by states, not in the consciousness of a group of civilised nations.[47] However,

[40]See, for example, the eight volumes of von Savingy (1838); Puchta (1884).
[41]Koskenneimi (2001), pp 47–54.
[42]For their continued relevance even in positivistic theories on war, see Neff (2005).
[43]Koskenneimi (2001), pp 47–54.
[44]Koskenneimi (2001), p 49.
[45]Lieber (1859), p vii. Quoted in Koskenneimi (2001), 49.
[46]Statute of the Institute of International Law, at: http://www.idi-iil.org/app/uploads/2017/06/Statutes-of-the-Institute-of-International-Law.pdf.
[47]Examples are discussed in: Werner (2016).

the idea that jurists have a vocational duty to guard and progressively develop international law has certainly not disappeared. Just a brief glance at the mission statements of different regional societies of international law shows how much the spirit of jurisprudence as preservers of the law is still alive. The European and American Societies of International Law, for example, seek to 'contribute to the rule of law in international relations and to promote the study of public international law' and 'foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice'. Similar aims can be found at the Australian and New Zealand Society, aiming to develop and promote the discipline of international law, and the Asian Society of International Law, seeking to promote international law (supplemented by the aim of encouraging specific Asian perspectives on international law). While the African Society focuses even more explicitly on regional perspectives (fostering the dissemination of African perspectives on International Law), it does remain committed to the 'development of international law', albeit with a recognition of 'the special needs of Africa'.[48] Sure, none of these societies directly invokes the language of the Historical School. Yet, all of them work under the assumption that the science of international law is somehow able to 'develop' international law and the rule of law. This assumption only makes sense if international law is treated as more than a collection of acts of will by states; if it is treated as a system whose logic and rationality can be further explored and developed by a group of trained jurists who agree on what counts as 'progressive development'.

Recently, the work of Savigny and the Historical School were invoked even more directly in the 2016 case before the International Court of Justice on Nuclear Disarmament.[49] Judge Trindade added a (strongly) dissenting opinion to the judgment of the Court, in which he not only critiqued the outcome of the case, but also the method used by the majority of judges.[50] The core issue in this context regards the identification of a rule of customary international law. According to most approaches today, rules of customary international law have to be identified on the basis of a practice of states that is accompanied by an *opinio iuris*, a sense of legal obligation.[51] According to Trindade, the majority of judges (and international law scholarship in general) erroneously locates the *opinio iuris* exclusively in the will of states. Trindade proposes a radically different method, which he claims is derived from Savigny and the Historical School: 'already in the nineteenth century, the so-called 'historical school' of legal thinking and jurisprudence (of F. K. von Savigny and G. F. Puchta) in reaction to the voluntarist conception, gradually discarded the 'will' of the States by shifting attention to *opinio juris*, requiring practice to be an

[48]The websites of the International Law Organizations can be found at, respectively: http://www.esil-sedi.eu/node/177; http://www.asil.org/mission.cfm; (http://anzsil.anu.edu.au/; http://asiansil-jp.org/en/ (all accessed 16 May 2018).

[49]Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016, p. 255.

[50]The dissenting opinion is available via: http://www.icj-cij.org/files/case-related/158/158-20161005-JUD-01-06-EN.pdf (accessed 29 May 2018).

[51]This approach was also adopted by the International Law Commission in its report on the identification of rules of customary international law. International Law Commission, Identification of Customary Law, A/71/10, 2016. The ILC report contains several references to ICJ jurisprudence where the same approach was embraced. The approach is also adopted by virtually all modern handbooks and introductions to international law. To mention just a few examples: Klabbers (2017), pp 25–35; Shaw (2014), pp 51–66; Henriksen (2017); Cassese (2005), pp 156–157.

authentic expression of the "juridical conscience" of nations and peoples'.[52] (para 303). By now, Trindade argues, the legal conscience has moved beyond individual states and nations, and become a true world spirit – a legal conscience of the international community as a whole.[53] And, he adds, this 'universal juridical conscience stands well above the "will" of individual States'.[54]

However, no legal conscience can remain abstract and universal – it has to be made positive and concrete through specific acts. This brings us back to the series of paradoxes that come up when one tries to identify a Buribunk or a rule of law. For Trindade, the universal juridical spirit is articulated in Resolutions of the General Assembly,[55] which makes the spirit dependent on acts of will and legislative activity. This is a form of 'humanitarian positivism', which is a far cry from Savigny's idea of the legal profession as embodying the unity of the legal will. More in line with Savigny's idea is Chimni's recent reinterpretation of Trindade's dissenting opinion, which accepts the idea of a universal conscience, but argues that this is also manifested in practices of global civil society. [56] However, broadening the scope of a universal conscience only makes the question of authority more pertinent: if the legal conscience of mankind is dispersed among different bodies and practices, who is best able to give it meaning in concrete circumstances? Here, Chimni combines a common-law solution with a German Historical School solution: "Of course, the necessary evidence of practice of civil society actors will have to be appropriately identified, weighed, and assessed by international tribunals in determining the emergence of a norm of [customary international law]. In this regard, the international law academia will have a crucial role to play'.[57]

4. Conclusion

In this article, I have read Schmitt's essay *The Buribunks* from the perspective of international law. Following James Boyd White, I have treated international law "not as an objective reality in an imagined social world, not as part of a constructed cosmology, but from the point of view of those who actually engage in its processes, as something we do and teach. This is a way of looking at law as an activity, and in particular as a rhetorical activity'.[58] In order to engage in international law as a rhetorical activity, it is necessary to learn how to navigate its foundational paradoxes.[59] These paradoxes come to light when lawyers are pressed to define international law or to explain the grounds for its validity. Answers to these questions pendulate between opposite categories such as 'is' and 'ought', naturalism and positivism or spontaneous growth and expertise. Getting to know the field of international law means getting acquainted with the way in which these opposite categories are mobilised in order to persuade an audience.

[52]Trindade (2016), para 303. One may wonder whether Trindade's formulation ('requiring practice to be an authentic expression') does justice to Savingy's concept of customary law, which was based on the notion that custom is *evidence* of legal opinions that are already present in the community.
[53]Trindade (2016), para 305.
[54]Trindade (2016), para 312.
[55]Trindade (2016), para 312.
[56]Chimni (2018), p 1.
[57]Chimni (2018), at p 43.
[58]White (1985), pp 684–702, at 688. I would like to thank the anonymous reviewerf or pointing out the relevance of White's article for my analysis.
[59]For an elaboration of this argument see: Megret (2005), pp 265–296.

Things are not much different when it comes to the Buribunks. The essay starts out with an attempt to define what makes someone a Buribunk and why we can safely conclude that Buribunks exist indeed. However, *The Buribunks* does not offer a consistent explanation how its main characters can or should be identified. The essay moves from idealism to positivism and back again, and combines facts and norms in ambivalent ways. Yet, along the way Schmitt's essay manages to inform its readers about the qualities, heroes, history and laws of the Buribunks. Apparently, the point of the search for the Buribunk is less to define it exactly than to show what emerges if one tries to define it. After reading the essay, it is actually rather clear what Buribunks are and what they do. What is true of *The Buribunks* also applies to jurisprudence: although the search for foundations yields no coherent result, it does contain important stories about the law. Along the way, we learn about the peculiarities of the field of law, precisely by engaging in the never-ending search for its identity.

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