Chapter X

The Delimitation of the World and the Competition among States (1857 – 1918)

Nations and States, Delimitation and Cross-Border Communication

State succession, clad into the diction of biologism, turned into a major issue in Europe as well as in other parts of the world and found the interest of scholars[1] and political activists alike. Already in 1831, nationalist activist Giuseppe Mazzini (1805 – 1872) had denounced the states, into which Italy had been divided, as the results of the greed and the calculations of native rulers or foreign conquerors; he had contended that these states served no other purpose than appeasing the vanity of the local aristocracy, who, he thought, benefited more from small territories than from a large country; and he had concluded that these states had not been the creations of the people.[2] Mazzini's message was straightforward: the states that the Congress of Vienna had established appeared as mere fossils of a remote past, their rulers seeming to be no longer parts of a Europe-wide network of aristocratic princes but having become egoistic, foolish and inflexible local tyrants. Mazzini juxtaposed the Italian states, which he described with the imagery of death, against the vision of a purportedly living, divinely willed agile Italian national state, which, he expected, Italian citizens ought to bring into and maintain in existence with their own blood.[3] Hence, for Mazzini, the establishment of new states was divinely willed, not any longer the preservation of the existing world of states. Mazzini thus provided the construction kit for an ideology of state succession. He himself and his successor activists drew on this ideology in their struggle against the existing states system. Even though established rulers succeeded in defending the existing states system during the revolutions of 1848 and 1849 in France, the German-speaking areas, Hungary and Poland, new states appeared in hasty processes in Central, Southern and Southeastern Europe since the 1850s.

More than forty years after Mazzini, jurist Carl Victor Fricker (1830 – 1907) restated the same views when referring to what he envisaged as the duties of subjects: "The autonomy of the state is the first freedom and the highest honour of the nation. Therefore, it is the substantial duty of the individual, to preserve this substantial individuality, independence and sovereignty of the state through jeopardising and sacrificing his property and life, his opinions and everything enshrined in the comprehensiveness of life. The sacrifice of the reality of the existence of the person brings about the reality of the sovereignty of the state, the truly absolute final purpose. This sacrifice is requested only at war. And because, in war, states stand against states in their mutual independence, the individual is no more than one among many; not personal courage is the most important matter but subjection under the general principle; it is not individuals that fight against individuals but only states against states." (Die Selbständigkeit des Staats ist die erste Freiheit und die höchste Ehre des Volks. Es ist daher die substantielle Pflicht des einzelnen, durch Gefahr und Aufopferung von Eigenthum und Leben, ohnehin seines Meinens und alles Dessen, was von selbst in dem Umfang des Lebens begriffen ist, diese substantielle Individualität, die Unabhängigkeit und Souveränität des Staates zu erhalten. Durch das Hingeben der persönlichen Wirklichkeit wird die Wirklichkeit der Souveränetät des Staates, des wahrhaft absoluten Endzwecks, vermittelt. Diese Hingabe wird nur im Kriege verlangt, und indem sich hier Staat gegen Staat in ihrer Selbständigkeit gegenüberstehen,

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[1] Leopold Freiherr von Neumann, *Grundriss des heutigen europäischen Völkerrechts*, § 7, third edn (Vienna, 1885), p. 17 [first published (Vienna, 1855); second edn (Vienna, 1877)]. Peter Conradin Planta, *Die Wissenschaft des Staats, Oder Die Lehre vom Lebensorganismus*, vol. 2, second edn (Chur, 1852), pp. 239-241. Among the few reserved and critical authors were: Carl Friedrich Wilhelm von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts*, second edn (Leipzig, 1869) [first published (Leipzig, 1865); third edn (Leipzig, 1880); reprint of the third edn (Aalen, 1969)], third edn, pp. 217-225: "Beilage I. Der Staat als Organismus". Albert Theodor van Krieken, *Über die sogenannten organischen Staatstheorien. Ein Beitrag zur Geschichte des Staatsbegriffes* (Leipzig, 1873), esp. pp. 130-141.

[2] Giuseppe Mazzini, *The Duties of Man*, edited by Thomas Jones (London and New York, 1955), p. 56 [first published (Biblioteca democratica settimanale, 13-16) (Genua, 1851)].

[3] Ibid., p. 59.

macht der Einzelne nur Eines unter Vielen aus; nicht der persönliche Muth, sondern die Einordnung in das Allgemeine ist hier das Wichtige; nicht der Einzelne kämpft gegen den Einzelnen – sie können einander vollkommen gleichgiltig, ja gut gesinnt sein – sondern nur der Staat gegen den Staat)[4] In Fricker's diction, states appeared as living bodies into which individuals were integrated as citizens or subjects. Ficker considered irrelevant personal relations among citizens or subjects of different states, which, in his view, were not to exist in their own right. Ficker equated sovereignty with independence and independence with autonomy. Clausewitz's concept of war as the armed contest among nations had become taken for granted. The national states demanded the unconditional sacrifice from its citizens or subjects, at least in war.

From Clausewitz's definition of war and its application to the theory of the state, military theorists derived the demand that state territories should be identical with the areas claimed for a nation as its "living space". Military commanders appeared to be capable to plan a war in compliance with Clausewitz's definition solely under the condition that all nationals could be regarded as willing to "sacrifice property and life". Therefore, military commanders seemed to be legitimised in their request that the international borders of states should fall together with the settlement boundaries of nations. Wherever the identity of both types of lines was not given, revisions of state borders through state succession emerged as the dictate of military theory.[5] However, the nineteenth-century criteria determining membership in a nation were still as loose and controversial as they had been late in the eighteenth century. Consequently, agreements among governments of states were difficult to accomplish as to where international borders of states were to be drawn as national boundaries. Moreover, there was competition among governments of European states not only about the sizes of the territories under their respective sway but also about the sizes of state populations. That competition did not necessarily have to lead to the implementation of state succession through war; yet the option of the deployment of military force existed, in Europe and in other parts of the world as well. The earliest victim of the competition among European states was the "European Concert", which only rarely served as an instrument to negotiate state succession after the middle of the nineteenth century.[6] Already in 1878, jurist Johann Caspar Bluntschli noted that the "Pentarchy" had ceased to exist, that the "Holy Alliance" had "passed away silently and had been dissolved" (leise verblichen und gelöst worden) and that the "great powers" (Großmächte) were "more alien towards one another" (stünden sich fremder gegenüber) and even "states of secondary rank [were watching] more jealously over their independence" (Staten zweiten Ranges wachten eifersüchtiger für ihre Unabhängigkeit) than ever before.[7] As "some states in Europe" (einige Staten in Europa) owned "large countries" (grosse Länder) in other parts of the world, Bluntschli deemed it "impossible to bring about an order in Europe without impacting indirectly upon the order of the world" (unmöglich, Europa zu ordnen, ohne mittelbar auf die Ordnung der Welt einzuwirken).[8] While borders appeared to matter a great deal in Europe, the world as a whole seemed borderless, with competition and conflict among European states seeming to affect the world at large.

The process of the founding of new states began in Romania which was carved out of the territories under the control of the Ottoman Turkish Sultan in 1862. Hungary with its dependencies in the Balkans accomplished the so-called "Compromise" with Austria, materialising in wide-ranging autonomy within the "Real Union" of the "Imperial and Royal Monarchy" under Habsburg rule. Italy came into existence as a unitary state in 1870 and the German Empire followed as a federal state in 1871, which comprised most of the members of the former German Confederation but not Austria. Montenegro and Serbia became states in 1878, Bulgaria in 1908 and Albania (without the Kosovo) in 1913. All newly established states were constituted as monarchies,

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[4] Carl Victor Fricker, 'Das Problem des Völkerrechts', in: *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), pp. 1-89, 347-386, at p. 13.

[5] Wilhelm Rüstow, *Die Grenzen der Staaten* (Zurich, 1868), pp. 1-5.

[6] Ernest Nys, 'Le Concert Européen et la notion du droit international', in: *Revue de droit international et de législation comparée* 31 (1899), pp. 273-313, at pp. 306, 312-313.

[7] Johann Caspar Bluntschli, 'Die Organisation des europäischen Statenvereines', in: Bluntschli, *Gesammelte kleine Schriften*, vol. 2 (Nördlingen, 1881), pp. 279-312, at pp. 280-281 [reprint (Libelli, 75) (Darmstadt, 1962); first published in: *Die Gegenwart* (1878)].

[8] *Ibid.*, p. 311.

with some new states in the Balkans, like Greece before them, coming under the control of immigrant aristocratic dynasties from Northern Europe. Bulgaria, the German Empire and Italy resulted from wars, Albania and Hungary from revolution, while diplomats pasted together Montenegro and Serbia during the Berlin Congress of 1878, confirming the Peace of Paris of 1856.[9] The establishment of national states was denied to the Finns, the Baltic nations, the Irish, Kymru, Scots, Tyroleans, Basks, Czechs, Slovaks, Slovenes, Croats and Poles, to the latter even beyond yet another failed revolution in 1863. The potential for state succession thus remained underutilised in the course of the nineteenth century.

Liberal jurist Bluntschli, like conservative pamphleteer and political Konstantin Frantz (1817 – 1891), who used Anti-Semitic phraseology, responded against the rising frequency of the demise and creation of states with plans for the foundation of a European federal state which was to curtail the competition among its sovereign member states. Bluntschli understood the "association of states" (Statenverein), which he proposed in 1878, as a means to "preserve the autonomy and freedom of the associated states", obviously following the example of the Swiss Confederacy. He thus advocated the association of the then seventeen sovereign states into a federation with an overarching Legislative Assembly under the leadership of the then perceived sixth "great powers" of Austria-Hungary, France, the German Empire, Italy, Russia and the UK.[10] For his plan, Bluntschli drew on the paradoxical argument that institutions above legally equal states could only operate under the leadership of a few privileged members. Even before Bluntschli, though no less naively, Frantz wanted to replace the "European Concert" by a federal state with a "centre of gravity" (Gravitätszentrum) in the then German Confederation and, in 1859, advertised his plan as a contribution to the maintenance of the balance of power. Yet Frantz warned that an equilibrium should not be imagined as the result of measuring square miles and counting souls, numbers of soldiers under arms and tax revenues in states, but that the "ideas and habits, the passions and interests" (Ideen und Sitten, Leidenschaften und Interessen) of people had to be taken into account. The latter, he predicted, would endanger the balance of power, were they being ignored.[11] A stable balance of power alone was desirable and accomplishable only within a federation of states, he concluded.[12]

However, these plans stood in direct opposition against the foreign policies of precisely the states that theorists ranked as would-be "great power" leaders of the federation. In governments of these states, the balance of power, the "European Concert"[13] or even the "European Areopagus"[14] remained part of the phraseology even early in the twentieth century. However, the use of these conventionalisms took different roles in the new context of perceptions of changes of the states system, for it served as a means to legitimise intervention into the domestic affairs of other states to the end of supporting or preventing state succession and provided argument in favour of arms increase.[15] Consequently, balance-of-power phraseology turned into a feature of political controversy and advocacy. Already since the 1870s, the number of theorists grew who took a critical stand against the very concept of the balance of power, if they did not reject the concept straightforwardly as political propaganda. They censured the concept as vague and the equilibrium

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[9] Nys, 'Concert' (note 6), p. 302.

[10] Bluntschli, 'Organisation' (note 7), pp. 300-307, 309.

[11] Constantin Frantz, *Untersuchungen über das europäische Gleichgewicht* (Berlin, 1859), pp. 20, 387 [reprint (Osnabrück, 1968)].

[12] Ibid., pp. 385-386, 415-416.

[13] Bernhard von Bülow, *Graf Bülows Reden nebst urkundlichen Beiträgen zu seiner Politik*, edited by Johannes Penzler, vol. 1 (Leipzig, 1903), pp. 24-26. William Ewart Gladstone, *Political Speeches in Scotland 1879* (Edinburgh, 1880), pp. 115-116. Thomas Erskine Holland, *The European Concert in the Eastern Question* (Oxford, 1885). Victoria, Queen of Great Britain, *Further Letters … from the Archives of the House of Brandenburg-Prussia* (London, 1938), pp. 53, 62.

[14] Edward Augustus Freeman, *Four Oxford Lectures. 1887. Fifty Years of European History and Teutonic Conquest of Gaul and Britain* (London, 1888), p. 56.

[15] Edward Grey, 'Minutes of the Committee of Imperial Defence [25. Mai 1911]', in: Harold William Vazeille Temperley and George Peabody Gooch, eds, *British Documents on the Origin of the War*, vol. 6 (London, 1930), pp. 782-783.

itself as unstable. The balance of power became downgraded to an "artificial expression" unrelated to what appeared as political reality.[16] To jurist August von Bulmerincq (1822 – 1890) the balance of power even appeared as "impenetrable" (unerfindlich), whence he judged "the underlying idea as an impracticable one" (die demselben zu Grunde liegende Idee als eine unpraktische).[17] His conclusion was that the balance of power was "as unstable as one might wish" (an Unbeständigkeit nichts zu wünschen übrig) and served the justification of intervention jeopardising the "independence of states" (Unabhängigkeit der Staaten).[18] Criticism of that kind became more thorough in the course of World War I, specifically within the German Empire, where theorists claimed that references to the balance of power were nothing but the disguise for the alleged British campaign for world rule.[19] But also authors publishing in English during World War I criticised the balance of power for its seeming lack of stability.[20]

Sir Eyre Crowe (1864 – 1925), diplomat in British service, tried nevertheless to condense the concept of the balance of power into scientific diction and to utilise it for the analysis of foreign policy. In a memorandum dated 1 January 1907, he endorsed the then widespread conviction, according to which the concept was an instrument of intervention not of cooperation, and rejected all forms of international organisation above sovereign states. In doing so, he gave support to inter-state competition and associated with it a direct, though implicit attack on the German Empire: "History shows that the danger threatening the independence of this or that nation has generally arisen, at least in part, out of the momentary predominance of a neighbouring State at once militarily powerful, economically efficient, and ambitious to extend its frontiers or spread its influence, the danger being directly proportionate to the degree of its power and efficiency, and to the spontaneity of "inevitableness" of its ambitions. The only check on the abuse of political predominance derived from such a position has always consisted in the opposition of an equally formidable rival, or of a combination of several countries forming leagues of defence. The equilibrium established by such a grouping of forces is technically known as the balance of power, and it has become almost an historical truism to identify England's secular policy with the maintenance of this balance by throwing her weight now in this scale and now in that, but ever on the side opposed to the political dictatorship of the strongest single State or group at a given time. If this view of British policy is correct, the opposition into which England must inevitably be driven to any country aspiring to such a dictatorship assumes almost the form of a law of nature."[21] Crowe raised to the level of a natural law something equivalent of a policy of flexible response to the perceived dynamics of changes of the balance of power, thereby betraying his convictions that the only stable element of international politics was change and that the international system was just the theatre of interstate conflict.

Crowe wrote before the background of a deepening academic interest in the history of the balance of power. Since the 1880s, an international group of diplomats, politicians and scholars, among them jurist Charles Dupuis (1863 – 1938),[22] historian and Foreign Minister Albert Auguste

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[16] Lothar Bucher, 'Über politische Kunstausdrücke', part II, in: *Deutsche Revue*, vol. 12, issue 3 (1887), pp. 67-80.

[17] *Au*gust Michael von Bulmerincq, 'Die Principien der internationalen Praxis, Teil 1: Das Princip des politischen Gleichgewichts', in: Bulmerincq, *Praxis, Theorie und Codification des Völkerrechts* (Leipzig, 1874), pp. 40-50, at p. 48.

[18] Ibid., pp. 47-48.

[19] Karl Jacob, 'Die Chimäre des Gleichgewichts', in: *Archiv für Urkundenforschung* 6 (1918), pp. 341-364. A. von Kirchheim, 'Politisches Gleichgewicht', in: *Deutsche Revue*, vol. 11, nr 4 (1915), pp. 308-313. Heinrich Otto Meisner, 'Vom europäischen Gleichgewicht', in: *Preußische Jahrbücher* 176 (1919), pp. 222-245. Ferdinand Jakob Schmidt, 'Das Ethos des politischen Gleichgewichtsgedankens', in: *Preußísche Jahrbücher* 158 (1914), pp. 1-15. Alfred Stern, 'Das politische Gleichgewicht', in: *Archiv für Politik und Geschichte* 3 (1915), pp. 29-37.

[20] Arthur James Grant, ed., *An Introduction to the Study of International Relations* (London, 1916), p. 190. Arthur W. Spencer, 'The Organization of Internationale Force', in: *American Journal of International Law* 9 (1915), pp. 45-71, at p. 66.

[21] Eyre Crowe, 'Memorandum on the Present State of British Relations with France and Germany [1 January 1907]', in: George Peabody Gooch and Harold William Vazeille Temperley, eds, *British Documents on the Origins of the War. 1914 – 1918*, vol. 3 (London, 1928), pp. 402-403 [also in: James Joll, ed., *Britain and Europe* (London, 1961), pp. 204-207; Moorhead Wright, ed., *Theory and Practice of the Balance of Power* (London and Totowa, NJ, 1975), pp. 89-90].

[22] Charles Dupuis, *Le principe d'équilibre et le Concert Européen de la Paix de Westphalie à l'Acte d'Algésiras*

Gabriel Hanotaux (1853 – 1944, in office 1893 – 1895, 1896 – 1898),[23] historian and archivist Ernst Kaeber (1882 – 1961)[24] and jurist Ernest Nys (1851 – 1920),[25] was devoting itself to research in the sources of balance-of-power politics through the centuries.[26] All of them studied diplomatic correspondence together with theoretical treatises that they detected in archives and libraries, and jointly arrived at the conclusion that the balance of power had been handled in different ways in Europe since the fifteenth century. The changing conceptualisation of the balance of power appeared to have resulted in smaller or wider ranges of the geographical extension of applicability and the higher or lower degree of bindingness of its norms. Scholars devoted special attention to the Congress of Vienna of 1814/1815, which, in their view, appeared to have implemented balance of power politics in its purest form. This rendering of the Congress as, so to speak, the classical locus of balance-of-power politics, has continued to penetrate the research literature throughout much of the twentieth century.[27] Yet, this rendering was political in its own right in the sense that it tied the implementation of balance-of-power politics to perceptions of the existence of "great powers" and their apparent interests. Against the background of these empirical researches, sheding light on transformations of the balance of power, Crowe, however, drew the conclusion that balance-of-power politics should be credited with permanence applying as if it was a law of nature. According to Crowe, British foreign policy appeared to be subject to such an apparent law, with the consequence that the British government might not be completely free in its political decisions. Hence, in Crowe's rendering, the balance of power was a dictate of politics that was not imposed by some ruling agency but by nature. Crowe's understanding of nature, however, was no longer the same as that of eighteenth-century theorists, but had been refurnished in accordance with the teachings of nineteenth-century biology and the systems model of the living body. By consequence, Crowe's conceptualisation of the balance of power turned into a propagandistic bulwark against factors promoting change in the world. Contrary to Vattel, twentieth-century balance-of-power discourse was no longer cast into legal diction but became watered down into a maxim of politics.

Important addition factors giving further heat to controversies about the balance of power were the increasing political clout of demands to enforce norms providing for the freedom of trade globally[28] and the promotion of transcontinental emigration out from Europe. Specifically in the USA, the UK, France, some states in the German Confederation as well as in Switzerland and Austria-Hungary, governments took up the demand for the implementing free trade rules and authorised missions, no longer only to China but also to other parts of Asia, with the stated goal of "opening" allegedly "closed" states for free trade. The US government had directed its attention towards East Asia already early in the nineteenth century intending to redirect trade between China and Europe from the route via Africa to the route across US territory.[29] The British government

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(Paris, 1909).

[23] Gabriel Albert Auguste Hanotaux, *Etudes diplomatiques. La politique de l'équilibre* (Paris, 1912).

[24] Ernst Kaeber, *Die Idee des europäischen Gleichgewichts in der publizistischen Literatur vom 16. Jahrhundert bis zur Mitte des 18. Jahrhunderts* (Berlin, 1907) [reprint (Hildesheim, 1971)].

[25] Ernest Nys, 'La théorie de l'équilibre européen', in: *Revue de droit international et législation comparée* 25 (1893), pp. 34-57.

[26] For further works on the same topic see: Léonce Donnadieu, *Essai sur la théorie de l'équilibre* (Paris, 1900). Olof Höijer, *La théorie de l'équilibre et le droit des gens* (Paris, 1917). Alexandre de Stieglitz [Shtiglits], *De l'équilibre politique, du légitimisme et du principe des natonalités*, vol. 1 (Paris, 1894).

[27] Inis Lothair Claude, Jr, *Power and International Relations* (New York, 1962), pp. 11-93. Edward Vose Gulick, *Europe's Classical Balance of Power* (Ithaca, 1955), pp. 184-261. Guglielmo Ferrero, *The Reconstruction of Europe. Talleyrand and the Congress of Vienna* (New York, 1941). Ernest Bernard Haas, 'The Balance of Power', in: *World Politics* 5 (1953), pp. 442-477. Henry Alfred Kissinger, *A World Restored. Metternich, Castlereagh and the Problems of Peace 1812-22* (London, 1957), especially at pp. 52-54, 173-174. Michael Sheehan, *The Balance of Power* (London and New York, 1996), pp. 1-23. Charles Kingsley Webster, ed., *British Diplomacy 1813-15. Select Documents Dealing with the Reconstruction of Europe* (London, 1921). Martin Wight, 'The Balance of Power', in: Wight and Herbert Butterfield, eds, *Diplomatic Investigations* (London, 1966), pp. 149-175.

[28] Adolf Beer, *Geschichte des Welthandels im 19. Jahrhundert* (Beer, Allgemeine Geschichte des Welthandels, section 3, vol. 1) (Vienna, 1864). Charles Poor Kindleberger, 'The Rise of Free Trade in Western Europe. 1820 – 1875', in: *Journal of Economic History* 35 (1975), pp. 20-55.

[29] Caleb Atwater, 'Remarks Made on a Tour to Prairie du Chien, Thence to Washington City, in 1829', in: Atwater,

motivated its own support for the global application of free trade rules with the claim that markets for British surplus industrial production[30] as well as for major products from the colonial dependencies, such as opium, needed to be found. It threatened the use of military force if the freedom of trade appeared to be unaccomplishable through the conclusion of treaties of trade and friendship.[31] The Prussian government, acting on behalf of the German Customs Union and mainly responding to an initiative from the Hanseatic Cities, dispatched a mission to East Asia between 1859 and 1863 with the aim of establishing trade relations on the basis of treaties under international law.[32] In Switzerland, the Federal Government displayed particular concern for the export of mechanical clocks, which had been available in the Chinese market since the end of the eighteenth century.[33] Needless to say that the global competition among European states about the expansion of their economic and political influence in Asia was irreconcilable with attempts to mediate a balance of power in Europe.

For the nineteenth and the early twentieth centuries, a theory, popular among economic historians and historically minded political scientists, even constructed a contradiction between the expansion of European government colonial rule with the deployment of military force on the one side and, on the other, the use of economic power to implement free trade rules. The theory was based on the observation that, since the fifteenth century, European colonial rule had often been tied to attempts to introduce trade restrictions and to direct transcontinental emigration from a European state into areas under the control of the government of the same state in other parts of the world. Economic historians adhering to the theory derived from it a sequence of phases of the expansion of European colonial rule. According to this sequence, in the older phase, lasting to the beginning of the nineteenth century, the expansion of European colonial rule had mainly been targeted at America. Around the middle of the century, the expansion old style had been replaced by the mainly British government push for the global implementation of free trade rules. This second phase had then ended with the return to the expansion of colonial rule and the pursuit of policies of the respect for trademarks and the institutionalisation of customs duties as means to restrict the freedom of trade. Vis-à-vis East Asia, this theory could be based on the British Foreign Office instruction of 20 April 1857, which mandated British emissaries dispatched to Japan to request the freedom of trade in Japan in general, not just for British traders.[34] But as, at that time, few vessels cruised in the Pacific Ocean except ships under the British flag, the enforcement of free trade rules in general was equivalent of free trade for British merchants. The theory met with opposition from theorists who claimed that the policy of the global enforcement of free trade rules was imperialistic in its own right and that economic imperialism was just a variant of the expansion of colonial rule.[35] However, both contending groups of theorists shared to the same premise that there was no significant expansion of

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The Writings of Caleb Atwater (Columbus, OH, 1833), pp. 202. Thomas Jefferson, '[Address to Congress, 18 January 1803]', in: Reuben Gold Thwaites, ed., *Original Letters of the Lewis and Clark Expedition. 1804 – 1806*, vol. 7 (New York, 1905), p. 207 [reprint, edited by Bernard De Voto (New York, 1969)].

30 Charles Poor Kindleberger, 'Foreign Trade and Economic Growth. Lessons from Britain and France. 1850 to 1913', in: *Economic History Review*, Second Series 14 (1961), pp. 289-305.

31 Laurence Oliphant, *Narrative of the Earl of Elgin's Mission to China and Japan in the Years 1857, '58, '59*, vol. 2 (Edinburgh, 1859), pp. 248-249 [reprint (New York, 1969)].

32 Prussia, [Diaries of the Prussian Mission to Japan, 1859 – 1861], in: Freiburg, Bundesarchiv – Militärarchiv, BA-MA RM 1/2350, und RM 1/2877, especially fol. 171^{r}-176^{r}.

33 Jean Charles Biaudet, Martin Graf and Françoise Nicol, eds, *Documents diplomatiques suisses*, vol. 1 (Berne, 1990), pp. 809-827. Caspar Brennwald, *Generalbericht betreffend den kommerziellen Theil der schweizerischen Abordnung nach Japan* (Berne 1865). Aimé Humbert, [Letters], in: Archives Cantonales de Neuchâtel, Dossier Aimé Humbert, Dossiers 11-13. Rudolph Lindau, Handelsbericht über Japan. Dem Kaufmännischen Direktorium in St. Gallen erstattet, 3 vols (St Gall, 1862-1863).

34 United Kingdom of Great Britain and Ireland, Foreign Office Instruction, 20 April 1857, in: London: British National Archives, FO 405/2, p. 23 = fol. 19^{r}.

35 On the debate see: John Gallagher and Ronald Edward Robinson, 'The Imperialism of Free Trade', in: *Economic History Review*, Second Series 6 (1953), pp. 1-15. Desmond Christopher St Martin Platt, 'The Imperialism of Free Trade. Some Reservations', in: *Economic History Review*, Second Series 21 (1968), pp. 292-306. Platt, 'Further Objections to an "Imperialism of Free Trade" (1830 – 1860)', in: *Economic History Review*, Second Series 26 (1973), pp. 77-91. Platt, *Finance, Trade and Politics in British Foreign Policy* (Oxford, 1968).

European colonial rule around the middle of the nineteenth century.[36]

The validity of the theory of free trade imperialism, however, crucially hinges on the modalities by which rules of free trade came to be enforced around the middle of the nineteenth century. Evidence from sources suggests that these rules were not self-imposing but required determined government action for their enactment. Even supporters of the argument that the establishment of a global free trade around the middle of the nineteenth century was non-colonial, could not ignore the fact that external diplomatic and military pressure was often required to facilitate the acceptance of free trade rules, specifically in East Asia. But they refrained from carefully investigating the precise political conditions under which the imposition took place. These conditions implied that private commercial producers and traders could demand the establishment of global trading rules but had to leave to governments of sovereign states the acts of enforcing these rules under international law.[37]

In fact, the imposition of rules of free trade was similar to the expansion of colonial rule in the perception of European governments, as both processes took place under the aim of widening the range of the economic, military and political influence of European governments, with or without taking direct control over populations elsewhere in the world. The British government in the main reserved for itself, explicitly around the middle of the nineteenth century and vis-à-vis states in East Asia, the option of switching from the pursuit of the establishment of free trade rules to the expansion of colonial rule. The possibility of the change of options was laid down in memoranda by its emissaries.[38] In a number of the cases, the option in favour of the use of military force did not remain declaratory but became manifest in action. Thus, in 1855, a joint British-French military contingent conquered the island of Urup in the Southern Kuriles,[39] and the Prussian government planned the occupation and colonisation of Taiwan in the course of its East Asian expedition from 1859 to 1862.[40] Although these short-term expeditions did not result in entrenched colonial rule, they documented the presence the colonial option in the minds of European emissaries to East Asia. Therefore, these short-term colonial expeditions should not be underestimated.

Government control of transcontinental emigration was not easier to regulate. According to a conviction that had hardly been disputed among governments of most European states since the beginning of the nineteenth century, the movement of persons to other states was not subject to restrictions beyond regulations for the enforcement of mandatory draft and sanctions against criminal offences. Since the 1840s, the number of emigrants increased, specifically from German-speaking areas and in consequence of the revolutions of 1848 and 1849. Even the revolutionary German National Assembly took up the issue of emigration and passed an "Emigration Act" (Auswanderungsgesetz) on 15 March 1849. The Act authorised the foundation of an "Imperial Emigration Office" (Reichsauswanderungsamt). The Office was to be in charge of the implementation of large-scale colonisation projects in America which the then non-existent German Empire was to promote in the future. The Act never went into force and the plan for colonial settlements remained a piece of paper. But, the Constitution of the German Empire, enacted on 16

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[36] Kindleberger, 'Trade' (note 30). Richard Koebner, 'The Concept of Economic Imperialism', in: *Economic History Review*, Second Series 2 (1949), pp. 1-29.; *309* Bernard Semmel, *The Rise of Free Trade Imperialism* (Cambridge, 1970).

[37] Beer, *Geschichte* (note 28), p. 25. Henry Wheaton, *Elements of International Law*, English edn,third edn, edited by Alexander Charles Boyd (London, 1889) [first published (London and Philadelphia, 1836); third edn (Philadelphia, 1846); new edn by William Beach Lawrence (Boston, 1855); second edn of the edn by Lawrence (Boston and London, 1863); eighth edn, edited by Richard Henry Dana (Boston and London, 1866), vol. 1, § 13, pp. 18-19; new English edn, edited by Alexander Charles Boyd (London, 1878), p. 356; second edn of the edn by Boyd (London, 1880); third edn of the edn by Boyd (London, 1889); fourth English edn, edited by James Beresford Atlay (London, 1904); fifth English edn, edited by Coleman Phillipsen (London, 1916); sixth English edn, edited by Arthur Berriedale Keith (London, 1929); reprint of the original edn (New York, 1972); reprint of the edn by Dana, edited by George Crafton Wilson (Oxford, 1936); reprint of this edn (New York, 1972); reprint of the first ed by Dana (New York, 1991)].

[38] Oliphant, *Narrative* (note 31), pp. 248-249.

[39] Thierry Mormanne, 'La prise de possession d'Urup par la flotte anglo-française en 1855', in: *Cipango* 11 (2004), pp. 209-236.

[40] Bruno Siemers, 'Preußische Kolonialpolitik 1861-62', in: *Nippon* 3 (1937), pp. 20-26.

April 1871, took up the plan and placed the new imperial government in charge of "colonisation in and emigration to states outside Germany".[41] Numerous printed texts from the late 1840s documented German government concerns that emigrants might simply run away without acquiring sufficient knowledge about their destinations. Hence, government officials, specifically in the South German states, together with academics, sought to influence emigrants in their choice of migration destinations.[42] Emigration associations flourished, one of the oldest being founded as the "National Association for German Emigration and Settlement" (Nationalverein für deutsche Auswanderung und Ansiedlung) in Darmstadt in 1847. The associations campaigned for directing emigrants into a small number of receiving destinations where they might settle together and thereby remain under the surveillance of the governments of the sending German states.[43] Governments took up these initiatives, seeking to purchase land mainly in America for redistribution among emigrants.[44] As a rule, the land envisaged for these settlement projects had previously been taken away from Native Americans who had been forced to evacuate their traditional homelands.[45] Yet, the majority of German emigrants did not move into the areas which private and government migration administrators envisaged as destinations, but ended in the USA, Canada, Australia, New Zealand or South Africa, that means, in areas under the control of the US and the British governments.

Official government migration administrators and their intellectual supporters perceived emigrants as poor, uprooted people and sought to proliferate anti-migration propaganda with the goal of raising the psychological threshold for the decision to emigrate. Governments failing to direct emigrants to overseas areas under their control were, by consequence, not only losing citizens or subjects, but also soldiers. Specifically, Imperial German migration administrators concluded that, in this case, the sending state was losing "defence capability", which the destination state was gaining.

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[41] German Empire, 'Verfassung des Deutschen Reichs vom 16. April 1871', Art IV, nr 1, in: Günter Dürig and Walter Rudolf, eds, *Texte zur deutschen Verfassungsgeschichte* (Munich and Berlin, 1967), pp. 109-130, at p. 112.

[42] Moritz Beyer, *Das Auswandererbuch. Oder Führer und Ratgeber bei der Auswanderung nach Nordamerika und Texas* (Leipzig, 1846). Traugott Bromme, *Hand- und Reisebuch für Auswanderer nach den Vereinigten Staaten von Nordamerika* (Bamberg, 1846). Johann Gottfried Flügel, *Rathschläge und Regeln für Auswanderer aus allen Classen und jedem Stande nach Nordamerika* (Brunswick, 1849). Francis J. Grund, *Handbuch und Wegweiser für Auswanderer nach den Vereinigten Staaten von Nordamerika und Texas* (Stuttgart, 1846). Carl von Haas, *Nordamerika, Wisconsin, Calumet.Winke für Auswanderer* (Elberfeld, 1848). Friedrich Kapp, *Ueber Auswanderung* (Sammlung gemeinverständlicher wissenschaftlicher Vorträge, 125) (Berlin, 1871). Rudolf von Maltitz, *Hand- und Reisebuch für Auswanderer nach den Vereinigten Staaten von Amerika* (Mannheim, 1843). August Schultze, *Kurze Belehrungen für Auswanderer* (Leipzig, 1848). C. A. Weimann, *Bemerkungen für Auswanderer nach Nordamerika* (Berlin, 1852). George Whiteland, *Belehrender Rathgeber für deutsche Auswanderer über Bremen nach den Vereinigten Staaten von Amerika* (Bremen, 1868).

[43] Ernst Wilhelm Johann Gaebler, *Deutsche Auswanderung und Kolonisation. Erster Rechenschaftsbericht des Berliner Vereins zur Centralisation deutscher Auswanderung und Kolonisation* (Berlin, 1850). Heinrich Künzel and Wilhelm Stricker, *Bericht über die Entstehung und bisherige Wirksamkeit des Nationalvereins für Deutsche Auswanderung und Ansiedlung zu Frankfurt a[m] M[ain]* (Frankfurt, 1849).

[44] Johann Jakob Sturz, *German Emigration to British Colonies* (Berlin, 1860). Sturz, *Die Krisis der deutschen Auswanderung und ihre Benützung für jetzt und immer. Ein Hebel für deutsche Schiffahrt, deutschen Handel, deutsche Rhederei und Gewerbe* (Berlin, 1862). Sturz, *Kann und soll ein Neu-Deutschland geschaffen warden und auf welche Weise? Ein Vorschlag zur Verwerthung der deutschen Auswandrung im nationalen Sinne* (Berlin, 1862). Sturz, *Schafzucht und Wollproduktion für deutsche Rechnung in Uruguay als Grundlage für deutsche Ansiedlung im La Plata-Flussgebiet* (Berlin, 1862). Sturz, *Suggestions for the Encouragement of Emigration by Theoretical, Financial and Practical Means* (Washington, DC, 1866). Sturz, *Die deutsche Auswanderung und die Verschleppung deutscher Auswanderer. Mit speziellen Documenten über die Auswanderung nach Brasilien zur Widerlegung falscher Angaben* (Berlin, 1868). Sturz, *Die deutsche und die chinesische Aus- und Rückwanderung in ihrer Bedeutung für das Deutsche Reich* (Auswanderung und Kolonisation, 9) (Berlin, 1876).

[45] For contemporary studies of emigration see: Leopold Caro, *Auswanderung und Auswanderungspolitik in Österreich* (Leipzig, 1909). Julius Fröbel, *Die deutsche Auswanderung und ihre nationale und kulturhistorische Bedeutung* (Leipzig, 1858). Ernst von Gessler, 'Über Auswanderung und Colonisation und die Stellung des Staates zu derselben', in: *Zeitschrift für die gesamte Staatswissenschaft* 18 (1862), pp. 375-439. Georg Friedrich Wilhelm Roscher, *Kolonien, Kolonialpolitik und Auswanderung*, second edn (Leipzig, 1856) [first published in: *Archiv der politischen Oekonomie*. N. F., vols 6-7 (1847/48); third edn (Leipzig, 1885)]. Carl-August Spiegelthal, *Die Organisation des Auswanderungswesens und ihr Einfluss auf die deutschen Handels-Verhältnisse* (Leipzig, 1851).

Emigration thereby impacted on military planning and fomented competition among governments.[46] Still, the idea that governments should purchase wide areas and reserve them for the re-settlement of emigrants, lingered on specifically in the minds of German lawmakers and government officials and, as late as in 1897, sparked the enactment of a law which was to promote emigration from Germany into select parts of South America.[47] Hence, despite publicly recorded toleration of emigration, the ancient general *ius peregrinationis* expired at the turn towards the twentieth century. Emigration regulation then became coupled with immigration control which nationality and immigration laws in many states of Northern, Western and Southern Europe sought to intensify.[48] As emigrants were no longer considered free in the choice of their destinations and immigration became curtailed, the principled freedom of emigration turned ineffective. Max August Scipio von Brandt (1835 – 1920), Prussian-German emissary successively to Japan and China, submitted a curious plan for the surveillance of emigration to the Prussian government in 1867. In the plan, he recommended that a Prussian expeditionary corps should conquer the northern Japanese island of Hokkaidō to make it ready for the colonisation by German farmers. He argued that the local climate was favourable to the project and that a few cannon boats were sufficient to sack the island that appeared undefended to him.[49] Even after the end of his active diplomatic service, he still expressed his regret that neither the Prussian nor the subsequent German government had ever implemented his recommendation.[50]

European colonial governments differed greatly with regard to the success of their efforts to accomplish the expansion of colonial rule. The government of the German Empire, for one, did not succeed in directing into the Germany the export of natural resources from the colonies under its sway. This was so because, towards the end of the nineteenth century, the main overseas trade routes had long been fixed and linked the world with European states other than Germany. Hence, the German Empire benefited little from the resources removed from the soil of the areas under its colonial rule. As late as in 1915, the then Colonial Secretary for the German Empire, Wilhelm Heinrich Solf (1862 – 1936, in this office 1911 – 1918), lamented the lack of participation of German traders in the trade in diamonds, copper, skins, sisal, copra, cacao and palm oil from German colonial dependencies in Africa and the South Pacific.[51]

The promotion of global free trade and settlement colonisation entailed the same consequence for international politics in that enlarged the number of areas in which European legal norms and procedures, political values, religious confessions, trading and cultural practices, specifically the use of European languages, were being applied. The drive towards the "opening" of states in Asia thus not only aimed at the exportation of items of European industrial production but also paved the way for the imposition of European political values, religious beliefs and patterns of communication. Jurists invented some "public right of communication", which could be claimed as the legal entitlement for the demand of "opening" states and was to comprise all types of actions across international borders of states. Governments of states appearing to be members of the "international legal community" became obliged to recognise this right. States seemingly outside the "international legal community" might not be admitted into the "community" with the consequence that their "request for communication would not be accepted" (begehrte Verkehr nicht acceptirt wird).

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[46] Theodor Bödiker, 'Die Einwanderung und Auswanderung des Preußischen Staates', in: *Preußische Statistik* 26 (1874), pp. I-IX, at p. IX.

[47] German Empire, '[Imperial Act on Emigration]', in: *Stenographische Berichte über Verhandlungen des Reichstags*, IX. Legislaturperiode, 4. Session (1895/97), pp. 5091-5106, 5739-5797.

[48] German Empire, *Reichs- und Staatsangehörigkeitsgesetz vom [22. Juli 1913] mit Nebenbestimmungen*, second edn (Munich and Berlin, 1960) [first published (Berlin, 1913)]. Myer Jack Landa, *The Alien Problem and Its Remedy* (London, 1911), pp. 1-39.

[49] Maximilian August Scipio von Brandt, '[Memorandum on the Colonisation of Hokkaidō, Januar 1867]', edited by Rolf-Harald Wippich, *Japan als Kolonie. Max von Brandts Hokkaidō-Projekt 1865/67* (Übersee, 31) (Hamburg, 1997), pp. 29-47.

[50] Maximilian August Scipio von Brandt, *Dreiunddreißig Jahre in Ostasien*, 3 vols (Leipzig, 1901) [new edn (Leipzig, 1909); reprinted in part in: Catharina Blomberg, ed., *The West's Encounter with Japanese Civilization. 1800 – 1940*, vol. 11 (Richmond, SY, 2000), p. 148; reprint (Kŭnse Tong Asea Sŏvangŏ Charvo Ch'angsŏ, 93) (Seoul, 2001)].

[51] Wilhelm Heinrich Solf, 'Die deutsche Kolonialpolitik', in: Otto Hintze, ed., *Deutschland und der Weltkrieg* (Leipzig and Berlin, 1915), pp. 142-170, at pp. 154-155.

That principle was not to mean that the government of a state might deny requests for "opening" addressed to it by another government. Instead, it meant that "state outside the legal community" (außerhalb der Rechtsgemeinschaft stehender Staat) asking for the establishment of communication, might be rejected on the grounds that "specific conditions" (gewisse Voraussetzungen) were not fulfilled, namely "a higher cultural level, the capability of and reliability in international communication" (eine höhere Kulturstufe, die Fähigkeit zum und die Zuverlässigkeit im internationalen Verkehr). Should communication have been granted under these conditions, the act did not automatically entail the "entry of the state into the international legal community" (Eintritt in die internationale Rechtsgemeinschaft) including the "benefit of all legal entitlements and the acceptance of community obligations" (Genuß sämmtlicher Berechtigungen und die Uebernahme der Verpflichtungen der Gemeinschaft).[52] The implication was that the "international legal community" was an elitist club of states. The legal mechanism of imposing "international intercourse" with the simultaneous admission to the "international legal community" was the conclusion of the non-reciprocal and, in this respect, unequal treaties, which European and the US governments had made out with states in Africa and Asia since the beginning of the nineteenth century. These treaties awarded to American and European diplomats and traders the specific and exclusive *ius peregrinationis*, together with the privileges of extraterritoriality and consular jurisdiction, the right of settlement and the freedom of trade, as long as they were carrying out their professional activates. At the same time, however, the treaties denied these rights and privileges to citizens or subjects of most of the states with which European and the US governments were establishing "intercourse" in legal terms elsewhere in the world. Nationality and immigration acts mainly of European states raised the immigration thresholds even for the citizens and inhabitants of states not bound by treaty obligations. The world appeared as the playground for American and European strategists who were ready to use force to enforce free trade rules and to implement colonial settlement projects as well as other types of expansionist projects.

The Expansion of European Colonial Rule

Several European governments were engaged in the pursuit of expansionist policies with the goal of establishing direct or indirect colonial rule during the second half of the nineteenth century. Initially the British, French, Dutch and Russian governments took the place of the defunct autonomous long-distance trading companies most of which had maintained strongholds in Africa, Asia and the South Pacific to the end of the eighteenth century, although the English East India Company (EIC) continued to operate as a territorial government to the middle of the nineteenth century. The German, Italian and Spanish governments followed suit later in the nineteenth century. All these governments, together with the Portuguese, long-established as a colonial ruler, formed a consortium of rivals, each seeking to maintain or expand the territories under its sway wherever in the world and as much as possible. Since the 1820s, the British government subscribed to the policy of expanding its grip on Southeast Asia. As a rule, it did not destroy states existing in the area but tied incumbent governments to itself through a system of bilateral non-reciprocal treaties, by which it sought to erect its suzerainty over its treaty partners. In the British government technical jargon, this type of suzerainty came to be called "indirect rule". By contrast, the French government launched a process of intervention in Southeast Asia during the 1860s, where it destroyed existing states and established itself in direct control along the Mekong River over Cambodia in 1863, Laos in 1863 and "Cochin-China" in 1864. Annam remained in existence as a sovereign state under a "protectorate", which the French government imposed in 1884. Yet it annexed the area called "Tongking" in 1883 and had this act confirmed in the Treaty of Tientsin of 11 May 1884 with the Chinese government as a non-involved third party.[53]

Later in the century, the British government subjected further areas to its control, namely

[52] August Michael von Bulmerincq, *Das Völkerrecht oder das internationale Recht*, § 26, second edn (Freiburg, 1889), p. 206 [first published (Freiburg, 1887)].

[53] Treaty China – France, Tientsin, 11 May 1884, in: *CTS*, vol. 163, pp. 498-499.

Burma (Myanmar) in 1886, and forced some sultanates on the Malay Peninsula under its "protectorate" in 1895, without effecting state destruction.[54] The Dutch government ordered the military conquest of large parts of the Indonesian archipelago, with the exceptions of Timor and the eastern part of New Guinea. In the end, only Siam (Thailand) remained in existence as a sovereign independent state, even though the British and French governments obliged their Siamese counterpart to cede territory and to have the international borders of the Siamese state drawn by dictates from its treaty partners.[55] There was still no comprehensive geographical name for the region, as the name Southeast Asia found its way into political diction only in the middle of the twentieth century.[56] Until then, fancy labels such as "Indo-China" prevailed.

The area called "Central Asia" since the times of Alexander von Humboldt (1769 – 1859) came under Russian rule by the middle of the nineteenth century, after Russian expeditionary corps had penetrated into Northeast Asia and reached the borders of Korea, the northern Japanese island of Hokkaidō, the coasts of Alaska and even the island of Kauai in the north of the Hawaiian archipelago, since the turn towards the nineteenth century. Since the Crimean War, the Russian government pushed ahead with the construction of railroads across Central Asia, Southern Siberia and in the Chinese Northeast (Manchuria). In Central Asia, Afghanistan and Persia, British and Russian expansionary movements clashed, until both sides reached an agreement over the demarcation of their "zones of interest", specifically in Afghanistan, in a treaty signed on 31 August 1907.[57] The British-Russian agreement allocated rights to rule between the signatory parties, while not involving the governments of the states affected by the deal. The treaty thus converted sovereign states as international legal subjects into objects of international treaty law. In the case of the British-Russian treaty of 1907, Persia was among these states, even though it participated in the Second Hague Peace Conference and belonged to the signatories of the second Hague Convention on the Laws and Customs of War on Land.[58] In other words, a state that had fully recognised the rules of "international intercourse" could simultaneously become the victim of transfers of rights to rule between colonial governments. The patterns of the expansion of colonial rule reveals that the rivalling governments were determined not to fight each other in parts of the world other than Europe.

The Qīng government in China, becoming the bone of contention among European governments, lost control over several coastal zones, specifically international trading ports, and was forced to lend out territory to France, the German Empire and the UK on a long-term basis. In consequence of repeated US government intervention against the establishment of control over further parts of Chinese territory by European governmentss, China remained intact as a sovereign state. But the increasing external diplomatic and military pressure in conjunction with the loss of control over some parts of Chinese state territory eroded the legitimacy of the Qīng government, so that several uprisings occurred and peaked in the revolution of 1911 turning China into a republican state. Japan, whose government was pressured into signing twelve non-reciprocal treaties with the US and several European governments between 1854 and 1869, resisted colonial ambitions extended by European governments. Yet also Japan witnessed a revolution. In 1868, the military government

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[54] Treaty Negri Sembilee/Pahang/Perak/Selangor – UK, July 1895, in: *CTS*, vol. 181, pp. 416-417.

[55] Treaty France – Siam, 13 February 1904, in: *CTS*, vol. 195, pp. 47-54. Treaty France – Siam, 23 March 1907, in: *CTS*, vol. 204, pp. 46-52. Treaty Siam – UK, Bangkok, 10 March 1909, in: *CTS*, vol. 208, pp. 367-374. The treaty of 1904 imposed the demarcation line between Siam and the then French colonial dependency of Cambodia. On the treaty see: Daniel Patrick O'Connell, *State Succession in Municipal and International Law* (Cambridge Studies in International and Comparative Law, 7), vol. 1 (Cambridge, 1967), pp. 147-148. The demarcation line of 1904 converted into the Cambodian-Siamese border during the decolonisation process and has been contested since then.

[56] Donald K. Emmerson, '"Southeast Asia". What's in a Name?', in: *Journal of Southeast Asian Studies* 15 (1984), pp. 1-21.

[57] Treaty Russia – UK, 31 August 1907, in: *CTS*, vol. 204, pp. 404-409, at pp. 406-407.

[58] International Convention on the Laws and Customs of War on Land, The Hague, 18 October 1907, in: *CTS*, vol. 205, pp. 263-298; also edited by: James Brown Scott, *Texts of the Peace Conferences at the Hague 1899 and 1907* (Boston, 1908); Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration Reports and Documents* (The Hague, 2001); Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts*, third edn (Alphen aan den Rijn, 1988), pp. 53-92 [first published (Leiden, 1973); second edn (Alphen aan den Rijn, 1981); fourth edn (Leiden, 2004)].

of the Shōgun, in power since 1603, withdrew from office, thereby making possible the "restoration" (Ishin) of a government in the name of the Tennō. The new government authorised a rigorous program of military arming, which was accompanied by thorough constitutional, economic and social reforms. These reforms resulted in the enactment of a written constitution in 1889, which abolished the form of state and form of government in use since the twelfth century and replaced them with new institutions modelled upon constitutional monarchies in Europe, mainly the German Empire.[59] The reforms enabled the Japanese armed forces to defeat the Chinese army in 1895 and the Russian navy in 1904/05. The Japanese government pressured the Qīng government to surrender Taiwan to Japanese control in 1895[60] and annexed Korea in 1910, saying that it was doing so in order to block further Russian penetration of Korea. Accordingly the Japan-Korea treaty of 22 August 1910 explicitly equated the annexation with the indefinite transfer of all sovereignty rights and granted to the Japanese government including full competence to provide security and maintain law and order in Korea.[61]

In Southern Africa, military conflicts arose between British settlers, mainly at the Cape of Good Hope, who focused on generating income from production and trade, and settlers of Dutch provenance who had moved there since 1651 and were bent on agriculture through the exploitation of slave work. The settlers of Dutch origin, using the name Boers, sought to distance themselves from British rule over the Cape which had taken root there in 1795. Boers migrated first to the East and then to the Northeast, founded new settlements from the 1830s and established the Oranje Free State in 1842 and the Republic of Transvaal in 1848. By 1854, the British government recognised the Oranje Free State as a sovereign, while the Transvaal had accomplished sovereignty already in 1852. With short-term interruptions, this state was in operation between 1856 and 1902 under the name South African Republic. The Boers created large plantations on territories parts of which had previously been under the control of the Zulu King Shaka (c. 1787 – c. 1828).[62] The Boer expansion entailed state destruction in areas coming under their rule, often in conjunction with massacres and the mass expulsion of the resident African population.

However, most of the interior of the African Continent remained beyond the reach of European long-distance trading companies and colonial governments to the 1860s. Indeed, the French government had snatched control over Algiers in 1830 and had since then become involved in a protracted war against the local population. Also, from the late eighteenth century, the French government had entered into treaty relations with some rulers elsewhere, pressuring governments in Madagascar and on the West African coast to cede small territories for the building of fortresses.[63] Only in 1857, it launched a more far-reaching enterprise, establishing a stronghold at Dakar and developing it into the administrative centre for the hinterland called Senegal. Between 1856 and

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[59] Anna Bartels-Ishikawa, ed., *Hermann Roesler. Dokumente zu seinem Leben und Werk* (Schriften zur Rechtsgeschichte, 135) (Berlin, 2007). Kazuhiro Takii, 'Lorenz von Stein und Japans Konstitutionslisierung', in: Wilhelm Brauneder and Kazuhiro Takii, eds, *Die österreichischen Einflüsse auf die Modernisierung des japanischen Rechts. Österreichisch-japanische Rechtsbeziehungen III* (Rechts- und Sozialwissenschaftliche Reihe, 33) (Frankfurt, 2007), pp. 19-28. Takii, *The Meiji Constitution. The Japanese Experience of the West and the Shaping of the Modern State* (Tokyo, 2007) [first published (Tokyo, 2003)]. Reinhard Zöllner, 'Lorenz von Stein und kokutai', in: *Oriens extremus* 33 (1990), pp. 65-76. Zöllner, 'Appreciating Critic. Lorenz von Steins Japan-Korrespondenz', in: *Nachrichten der Deutschen Gesellschaft für Natur- und Völkerkunde Ostaiens* 147-148 (1990), pp. 9-74. Zöllner, 'Lorenz von Stein und Japan', in: Albert von Mutius, ed., *Lorenz von Stein. 1890 – 1990* (Heidelberg, 1992), pp. 29-40.

[60] Treaty China – Japan, 30 March 1895, in: *CTS*, vol. 181, pp. 198-199.

[61] Treaty Japan – Korea, 22 August 1910, in: *Annual Report on Reforms and Progress in Chosen. 1910–11* (Keijō [= Seoul], 1911), p. 82; also in: *CTS*, vol. 212, pp. 43–44.

[62] Henry Francis Fynn, *The Diary. Compiled from Original Sources*, edited by James Stuart and D. McK. Malcolm (Pietermaritzburg, 1951), pp. 145-154 [reprint (Pietermaritzburg, 1986)].

[63] Treaty France – Madagascar, 1 April 1775, in: *CTS*, vol. 45, pp. 49-50. Treaty France – Joal, 25 March 1785, in: Archives Nationales du Sénégal, 19D1/59 [partly printed in: Isabelle Surun, 'Une souveraineté a l'encre sympathique? Souveraineté autochtone et appropriations territoriales dans les traits franco-africaines au XIX^{e} siècle', in: *Annales* 69 (2014), pp. 319-320]. Treaty France – Bissési/Dingavare/Sandigéry in Haute Casamance (Senegal), 1839, in: Archives Nationales du Sénégal 10D1/65 [partly printed in: Surun, 'Souveraineté' (as above), pp. 321-322].

1869, it established what it called the "Protectorate of the Southern Rivers". Elsewhere in Europe, interest in the interior of Africa increased only with the project of the building of the Suez Canal (1859 – 1869/1871), which was undertaken to make redundant the circumnavigation of Africa for ships on their voyage from Europe to South Asia. The project did not result from British, but from French initiative and, even in France, not from government circles but from private business persons. In fact, the British government initially even sought to torpedo the project by mobilising the Ottoman Turkish Sultan against it. But in 1866, seven years after the beginning of construction work, the Sultan issued his *firman* for the project. The financing of the project through the sale of shares remained uncertain, although the Khedive, the Sultan's representative in Egypt, shouldered 40% of the costs. Only upon the completion of the canal did the British government purchase the largest part of the shares, thereby executing its major influence, together with its French counterpart, upon the Khedive. Joint British-French intervention into the internal affairs of the Khedivial government was tantamount to colonial rule under the suzerainty of the Ottoman Turkish Sultan. In 1882, domestic unrest resulted into a military intervention in Egypt and to the establishment of British government control. The International Convention on the Suez Canal, signed in Istanbul on 29 October 1888, internationalised the waterway, hereby ending Egyptian control.[64]

Since the beginning of the 1880s, the British, French, German, Italian, Portuguese and Spanish governments, jointly with private entrepreneurial activities of King Leopold II of Belgium (1865 – 1909), developed competitive projects for the subjection of the entirety of the African Continent to colonial control. As a rule, they did not resort to the use of military force in carrying out their projects, but mostly used treaties of cession and other types of non-reciprocal agreements as instruments to expand their control. In the process of implementing these projects, private persons simultaneously penetrated into Africa from its Eastern and Western shores. British adventurers, among them Richard Francis Burton (1821 – 1890),[65] John Hanning Speke (1827 – 1864),[66] James Augustus Grant (1827 – 1892)[67] and Henry Morton Stanley (born as John Rowlands, 1841 – 1909),[68] reached Sudan from Egypt since the late 1850s and the interior of East Africa from the Indian Ocean coasts in the early 1860s, while David Livingstone (1813 – 1873)[69] traversed Southeastern Africa, starting from the Cape. During the 1870s, 1880s and 1890s, areas in West, East and Southeast Africa came under British control, which the government intended to connect into an array of territories stretching from the Cape to Cairo. The British government mapped out some areas in East and Southeast Africa as settlement colonies, reserved for emigrants from the UK. Between 1874 and 1878 Pierre Savorgnan de Brazza (1852 – 1905)[70] penetrated into the Congo

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[64] Treaty Austria-Hungary – France – German Empire – Italy – Netherlands – Russia – Spain – Turkey – UK, Istanbul, 29 October 1888, in: *CTS*, vol. 171, pp. 242-246.

[65] Richard Francis Burton, *The Search for the Source of the Nile. Correspondence between Captain Richard Burton, Captain John Speke and Others.From Burton's Unpublished East African Letter Book* (London, 1999). Burton, *The Lake Regions of Central Africa* (London, 1860) [reprint, edited by Ian Curteis (London, 1993)]. Burton, *The Nile Basin* (London, 1864) [reprint(New York, 1967)].

[66] John Hanning Speke, *Journal of the Discovery of the Source of the Nile* (Edinburgh and London, 1863) [second edn (Edinburgh and London, 1864); reprint (London, 1906); reprint of this edn, edited by John Norman Leonard Baker (London, 1969); another reprint, edited by John Norman Leonard Baker (London, 1975); further reprints (Amsterdam, 1982); (Mineola, NY, 1996); (Eugene, OR, 2007); microfiche reprint (Cambridge, 1990)]. Speke, 'The Upper Basin of the Nile from Inspection and Information', in: *Journal of the Royal Geographical Society* 33 (1863), pp. 322–334. Speke, *What Led to the Discovery of the Source of the Nile* (Edinburgh and London, 1864) [reprint (Cass Library of African Studies, Travels and Narratives, 18) (London, 1967); microfiche reprint (Cambridge, 1990)].

[67] James Augustus Grant, *A Walk across Africa* (Edinburgh and London, 1864) [reprint (Whitefish, MT, 2007)]. Grant, *Papers of James Augustus Grant (1827–92) and John Hanning Speke (1827–64) from the National Library of Scotland*, 17 microfilms (Colonial Discourses, Series 2: Imperial Adventurers and Explorers, 2) (Marlborough, 2003).

[68] Henry Morton Stanley, *Through the Dark Continent* (London, 1878) [reprint (New York, 1988)].

[69] David Livingstone, *The Last Journals of David Livingstone in Central Africa from 1865 to His Death* (London, 1874).

[70] Didier Neuville, *Les voyages de Savorgnan de Brazza* (Paris, 1884).

River valley by approval from the French government, while Louis Gustave Binger (1856 – 1936)[71] was active in West Africa from 1887. Between 1895 and 1898, the French government commissioned General Jean-Baptist Marchand (1863 – 1934) to conduct a wide-ranging campaign with the goal of establishing a string of French controlled territories from the Senegal through the Sahel Zone to the banks of the River Nile. In 1895, it federated the territories that had by then come under its sway, into zones called "French West Africa" and "French Equatorial Africa" respectively. And in 1903, it proclaimed the goal that French colonial dependencies in Africa and Asia should become economically self-sufficient and did not have to rely on support from the French national budget. The German government entered the race for colonial expansion late, in the 1880s, and then focused its attention to areas in the South Pacific and Africa that neither the British nor the French government had claimed until then. The German push into East Africa thwarted the British Cape-Cairo plans through the subjection to German rule of the Kingdoms of Burundi and Rwanda together with areas connecting these kingdoms with the Indian Ocean coast around Dar-es-salaam. Moreover, the German government grabbed some areas in West Africa (Togo) and Southwest Africa, the latter of which it turned into a settlement colony. The Italian government cast its eye on Northeast Africa already in the 1860s, when it concluded a series of treaties under international law with rulers and governments in areas that are parts of Ethiopia, Somalia and Sudan now. In 1896, it launched a military invasion in Ethiopia. But the Italian invasion army suffered a grave defeat against superior Ethiopian defence forces under the command of Menilek II (1844 – 1913, King of Shewa, 1865 – 1889, Emperor [Neguse Negest] Ethiopia, 1889 – 1913) during the Battle of Adua on 1 March 1896 and withdrew. Italy became a colonial power only after a war that the Italian army fought victoriously against the Turkish troops over Libya in 1911 and 1912. The Portuguese government expanded its rule beyond the coastal strongholds at Luanda and Mozambique that it had held since the sixteenth century. Its attempt to create a land bridge between both strongholds failed due to joint British and German resistance. The Spanish government, which had taken control over the Atlantic islands of Annabon and Fernando Po in 1778, subjected West Sahara to its rule in 1885 and erected a colony there in 1901. In Belgium, finally, the "Belgian Colonisation Company" (Companie Belge de Colonisation) existed since 1841. King Leopold II used it as a private entrepreneur to attract adventurers who were willing to do business in the Congo River valley. In the name of the King, they acquired land, over which the King issued privileges of tenure against the payment of lavish fees. The privileges entitled these adventurers to exploit the resident African population. This exploitation had all features of slavery except the name. In 1847, activists of abolitionist members of the American Colonization Society founded a new state on the West African coast, called it Liberia and designed it as a place for the resettlement of freed Afro-American slaves who were willing to return to Africa. However, the state came into being against resistance from local people and continued under protection by the US government. Thus, by the first decade of the twentieth century, almost the entire Continent of Africa had become subjected to European colonial rule, except Ethiopia and Liberia.

In several instances, supporters of government colonial expansion competed about influence over rulers and governments in the same parts of Africa. They induced these rulers and governments to sign treaties, and often one ruler or government on the African side successively concluded treaties with several European governments. In European perspective, the treaties had the purpose of securing exclusive rights and privileges for one European government and the citizens or subjects under its control. When several European governments were bound by treaties with the same African ruler or government, the secured rights and privileges were not exclusive, thereby lending themselves to potential diplomatic or even military conflicts among European governments on African soil. In order to avoid such conflicts, the German Chancellour Otto von Bismarck (1815 – 1898, in office 1862 – 1890) invited diplomatic representatives of interested European governments to a conference in Berlin in 1884. The conference was to sort out the modalities of carving up the African Continent into zones under the control of European governments, while minimising the conflict potential. The conference was to establish norms for the division of Africa and write them into international law. The conference did not complete its entire agenda but ended in February 1885

[71] Louis Gustave Binger, *Du Niger au Golfe de Guinée par le pays de Kong et le Mossi*, 2 vols (Paris, 1891).

with a partial result. First, it recognised, in terms of international law, the Congo Free State that had been created at King Leopold II's behest in 1876. The Congo Free State was to be and remain generally accessible, as a British international lawyer had proposed, and its general accessibility was to be guaranteed under Leopold's "protectorate". The Belgian government took over control of the Congo Free State only in 1908 and then turned it into a Belgian colony. Moreover, the Berlin Africa Conference decided about the rules, by which coastal zones of the Continent were to become partitioned among European governments. The Institute of International Law (Institut de Droit International), an association of international lawyers established in Ghent in 1873, explicitly welcomed the subjection of the Congo Free State to King Leopold's exploitative rule in 1885. There were two such rules, first that the European government, seeking to get involved in the partition and having concluded treaties earliest, should have full rights over the zone. Second, this rule was to be applicable only if and as long as the claiming European government had actually dispatched civilian administrators and military officers as manifestations of its "occupation". The conference thus denied the validity of mere paper titles. Even though this decision was explicitly limited in its reach to the coastal areas, it became tacitly applied for areas in the interior as well. Henceforth, the Berlin Africa Conference served as the legal basis for the imposition of European rule over Africa.[72]

Even after the Berlin Africa Conference, measures against slavery and the slave trade remained on European government agenda. However, the termination of slavery in America around 1890 and the resulting cessation of the transatlantic slave trade caused a shift in focus. The enforcement of the ban on slavery in America was no longer the target of government anti-slavery measures but the lifting of inner African forms of personal dependency. European governments were quick to equate these forms of dependency with slavery, while they continued to tolerate the slavery-like practices of suppression and exploitation licensed by King Leopold II in the Congo Free State.[73] Already the Anti-Slavery Act, approved at an international conference in Brussels on 2 July 1890, was cast in general terms, without specification of a certain part of the world,[74] thus serving as a legal platform for political action against the apparent domestic African slavery. Ideologues of colonial rule readily took up the chance and claimed that the imposition of European colonial rule was required to end slavery in Africa. Frederick John Dealtry Baron Lugard, Governour of the British "protectorates" in "Nigeria" (1858 – 1945, in this office 1912 – 1919), still used this argument in 1918 when he tried to justify British rule in this part of Africa. Lugard did not hesitate to maintain that the British government had tried to carry out the task of ending slavery in "Nigeria" since the end of the nineteenth century and even insisted that British colonial rule had to continue there because domestic African slavery appeared to continue. The admission that British colonial rule had failed to accomplish the goal Lugard proclaimed himself, served him as the concoction of an entitlement to retain colonial rule, and he envisaged it to last for hundred years to come.[75]

By and large, governments participating in the Berlin Africa Conference honoured their commitments. In 1884 and 1885 and still in 1889, numerous treaties came into existence between rulers and governments in Africa on the one side, the British, French and German governments on

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[72] Final Act, Berlin Africa Conference, 26 February 1885, in: *CTS*, vol. 165, pp. 485-502; also in: Robert J. Gavin and J. A. Betley, eds, *The Scramble for Africa. Documents on the Berlin African Conference and Related Subjects. 1884 – 1885* (Ibadan, 1973). Institut de Droit International, '[Comment by the Institute on the establishment of the Congo Free State and Its Subjection to King Leopold's Control]', in: *Annuaire de l'Institut de droit international* 8 (1885-1886), pp. 17-18. Travers Twiss, 'La libre navigation du Congo', in: *Revue de droit international et de législation comparée* 15 (1883), pp. 437-442. On the conference see: Sybil Eyre Crowe, *The Berlin West African Conference. 1884 – 1885* (London and New York, 1942) [reprint (Westport, CT, 1970)]. Martti Antero Koskenniemi, 'The Legacy of the Nineteenth Century', in: David Armstrong, ed., *Routledge Handbook of International Law* (London and New York, 2009), pp. 141-153, at p. 144.

[73] Claude Meillassoux, *L'esclavage en Afrique précoloniale* (Paris, 1975).

[74] Final Act, Brussels Conference on the Slave Trade, 2 July 1890, in: *CTS*, vol. 173, pp. 293-324.

[75] Frederick John Dealtry Lugard, *Political Memoranda. 1918* [= *Revision of Instructions to Political Officers Chiefly Political and Administrative. 1913 – 1918*], edited by Anthony Hamilton Millard Kirk Green (London, 1919), pp. 217-239, especially pp. 234-235 [reprint (London, 1970)]. Lugard, *Report on the Amalgamation of Northern and Southern Nigeria, and Administration 1912 – 1919* (Cmd, 468) **(**London, 1920). Similarly: Thomas Alfred Walker, *The Science of International Law* (London, 1893), pp. 160-161.

the other.[76] A conflict in 1898 between the British and the French governments about control over the Sudan resulted in the confrontation between a British military contingent under the command of Horatio Herbert Kitchener (1850 – 1916) and a French one led by Jean-Baptiste Marchand. Both troops faced each other at Fashoda on the banks of the River Nile in autumn 1898, ready for combat. Yet both governments reached agreement not to start a war, and the French government ordered the withdrawal of its contingent. Elsewhere, tensions arose between the governments of France and the German Empire about suzerainty over Morocco in 1905 and again in 1911. Yet, in both cases, tensions did not turn into open warfare either. The parties to the conflict arranged a deal by which the German side agreed to the establishment of a French "protectorate" over Morocco in return for the transfer of small stretch of land in the Cameroons unto German control.[77] Already in 1890, the British and the German governments had reached a similar transfer agreement relating to Zanzibar and the demarcation of areas under British and German control on the East African mainland, and, in 1904, the British and the French governments struck a deal partitioning the Niger River valley between each other.[78] A further British-German agreement did not go into force. Through this treaty, signed on 30 August 1898, both governments divided between themselves areas under Portuguese rule in Southern Africa in the then widely expected eventuality that the Portuguese state faced bankruptcy and, as a result, its grip on colonial dependencies could collapse. Yet, against the expectation, Portuguese colonial rule in Africa continued, and the treaty became null and void.[79] At long last, the French and the Spanish governments agreed in 1912 on the transfer onto Spanish control of a strip of land along the Western coast of the Sahara and the Moroccan Coast of the Mediterranean Sea. As a result, Spanish rule in Africa extended beyond the towns of Ceuta and Melilla, which had been under Spanish control since the seventeenth century.[80] The Dutch government was no longer active in Africa.

African population groups as well as their rulers and governments were not involved in the haggling over territories in the Continent. The treaties thus downgraded to objects of international law all those African states with which European governments had previously signed valid agreements. Nevertheless, most of the African states remained in existence as such. This was so not only from the African but even from the European point of view, because the European public law of treaties provided for the principle that such agreements could only come into existence among sovereigns. European governments, in order to enter into treaty relations with partners in Africa, therefore had to continue to recognise them as sovereign states, as long as the treaties remained in force. As most of these agreements were written out indefinitely, they could, in European perspective, only be replaced by renegotiated or new agreements, unless European governments unilaterally declared them null and void or simply broke them. In principle, then, the establishment of colonial "protectorates" through treaties was not a viable option in terms of European international law. But governments rarely chose the breach of treaties. A jurist named Hermann Hesse (1875 – ?) as well as Lord Lugard as an administrator did, in fact, recommend quashing the agreements and to impose colonial rule through military force in lieu of naked deception, but colonial governments opted against these recommendations and usually refrained from simply scrapping treaties.[81] They did so

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[76] *CTS*, vol. 161, pp. 197-250; vol. 163, pp. 157-236; vol. 165, pp. 47-75.

[77] Treaty France – German Empire, 4 November 1911, in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy and Friedrich Thimme, eds, *Die Große Politik der europäischen Kabinette*, vol. 29, nr 10772 (Berlin, 1927), pp. 413-317. Treaty France – Morocco, Fes, 30 March 1912, in: *CTS*, vol. 216, pp. 20-21.

[78] Treaty German Empire – UK, 1 July 1890, in: *CTS*, vol. 173, pp. 272-284. Treaty France – UK [West and Central Africa], 8 April 1904, in: *CTS*, vol. 195, pp. 206-216.

[79] Treaty German Empire – UK, 30 August 1898, in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy and Friedrich Thimme, eds, *Die Große Politik der europäischen Kabinette*, Nr 3872, vol. 14 (Berlin, 1927), pp. 347-355, at p. 347.

[80] Treaty France – Morocco, Fes, 30 March 1912, in: *CTS*, vol. 216, pp. 20-21.

[81] Hermann Hesse, Die Schutzverträge in Südwestafrika (Berlin, 1905), pp. 91, 159. Frederick John Dealtry Lugard, *The Dual Mandate in Tropical Africa* (Edinburgh, 1922), p. 17 [second edn (Edinburgh and London, 1923); third edn (Edinburgh and London, 1926); fourth edn (Edinburgh and London, 1929); reprint (London, 1965)]. Lugard, *The Rise of Our East African Empire*, vol. 2: Uganda (Edinburgh, 1893), p. 580 [reprints (London, 1968); (Hoboken, 2013)]. For a scholarly recommendation against the scrapping of treaties see: Conrad Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts', in: *Archiv des öffentlichen Rechts* 2 (1887), pp. 3-53, at p. 25.

because they stood in competition among themselves and did not want to become exposed to the blame of having acted against valid international treaty law. Hence, the participants in the Berlin Africa Conference agreed to respect treaties with their African counterparts and to accept them as a legal base for the carving up of the Continent into zones to fall under colonial rule.[82]

That notwithstanding, the French government subjected Madagascar to its "protectorate" in 1895 and did so against bilateral treaties binding Madagascar and third parties, some of which protested but refrained from interventions.[83] The French-Madagascan agreement of 1 October 1895 obliged the Queen of Madagascar to acknowledge the existence of the French "protectorate" (Art. I), including the recognition that the French government was placed in control of Madagascan foreign relations (Art. III). The French government obtained the right to dispatch a diplomatic emissary (Art. II) in charge, among other things, of supervising the administration of the kingdom (Art. V). The kingdom obliged itself to provide military forces to France (Art. IV). The treaty was transferred into Madagscan municipal law by a Royal Proclamation of 18 January 1896.[84] This treaty terminated a long series of bilateral French-Madagascan agreements, featuring, among others, the peace treaty of 7 August 1868 and another non-reciprocal treaty signed on 17 December 1885. The 1868 agreement forced the Madagascan government to pay an indemnity of 10 million Francs for the previous war (Art. VIII), while featuring some reciprocal stipulations, such as the mutual concession of the freedom of travel (Art. II) and the mutual entitlement to the dispatch of diplomatic envoys (Art. V). Among the unilateral concessions the Madagascan government gave to the French side, were the freedom of settlement of French citizens in Madagascar (Art. III), the French privilege of consular jurisdiction (Art. VII) and the Madagascan obligation not to interfere in conflicts between France and third parties (Art. VI).[85] The 1885 treaty, replacing this agreement, was non-reciprocal in most of its stipulations. It granted to the French government the rights of acting as Madagascar's foreign policy representative (Art. I) and of appointing a resident diplomatic emissary (Art. I-II), while it obliged the Queen of Madagascar to guarantee the freedom of religious practice to French citizens (Art. VII). Articles III, VI and VII of the 1868 agreement reappeared in the 1885 instrument.[86] Further treaties existed between Madagascar on the one side and, on the other, the UK and the German Empire. Madagascar and the UK were bound by the non-reciprocal peace and trade agreement of 27 June 1865 stipulating, among others, the freedom of settlement for British subjects (Art. II), the freedom of religious practice (Art. III), the right to send a British diplomatic envoy (Art. IV), the admission of British warships in Madagascan ports (Art. IX), consular jurisdiction for British subjects (Art. XI), the freedom of trade (Art. XIII) and the suppression of the slave trade (Art. XVII).[87] The agreement between the German Empire and Madagascar of 15 May 1883 was similar to the French-Madagascan treaty of 1868 in that it featured a number of reciprocal stipulations, among them the mutually granted privilege of sending diplomatic envoys (Art. II).[88] All these treaties were waived in consequence of the enforcement of the French-Madagascan agreement of 1895.

Other European governments also practiced widely the French technique of establishing itself as a colonial ruler over Madagascar, not only in other parts of Africa. Shortly before the beginning of the Berlin Africa Conference, the British government entered into a series of "protectorate" treaties with governments of West African states on the shores of the Bight of Biafra (now Bonny). All these treaties featured a standardised wording and mainly prohibited the governments on the African side from conducting relations with other states at their own discretion**,**

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[82] Berlin Final Act (note 72), Art. 34, p. 501.

[83] Treaty France – Madagascar, 1 October 1895, in: *CTS*, vol. 182, pp. 74-76. UK, [Instruction by the British government to its Ambassador in France, 9 July 1898], in: Daniel Patrick O'Connell, *The Law of State Succession* (Cambridge Studies in International and Comparative Law, 5) (Cambridge, 1956), p. 20.

[84] Ibid., pp. 74-76. Queen of Madagascar, 'Déclaration de la Reine de Madagascar [18 January 1896]', in: *CTS*, vol. 182 (1979), pp. 275-276.

[85] Treaty France– Madagascar, 7 August 1868, in: *CTS*, vol. 137, pp. 489-495, at pp. 490, 492-494.

[86] Treaty France – Madagascar, 17 December 1885, in: *CTS*, vol. 165, pp. 133-136, at pp. 134-136.

[87] Treaty Madagascar – UK, Tananarive, 27 June 1865, in: *CTS*, vol. 131, pp. 266-272, at pp. 267-270, 272.

[88] Treaty German Empire – Madagascar, 15 May 1883, in: *CTS*, vol. 162, pp. 94-95, at p. 94.

but retained their status as sovereigns with full competence over domestic legislation.[89] In 1893, an agreement followed with the Kabaka (King) of Buganda in East Africa, who also had to pledge "to make no Treaties or Agreements of any other king whatsoever with any Europeans of whatever nationality without the consent and approval of Her Majesty's Representative".[90] Elsewhere, in 1900, the British government obliged the King of Tonga not to have any "relations of any sort with foreign Powers concerning the alienation of any land or any part of his sovereignty or any demands for monetary compensation". In return, the British government offered "to protect" the King of Tonga, while forcing him to "lease" extensive lands at harbours and within the islands for use by British military forces.[91] The logic underlying these instruments aimed at establishing zones guaranteeing exclusive rights to European colonial governments, allowing them to monopolise the international relations of their "protectorates", to subject them to diplomatic and military control and to exclude rival European governments from these zones. By contrast, European governments recognised the sovereignty of their partners through the treaties. In one case, the British and the German governments even agreed between themselves to "respect the sovereignty" of a ruler in Africa, in this case, the Sultan of Zanzibar in 1886, just four years before both governments joined hands to approve between themselves about the creation of a British "protectorate" over Zanzibar.[92]

The legal instruments made out to the end of establishing "protectorates" entailed for the African partners the loss of subjecthood under international law, that is, the capability to act autonomously as öegal persons in the international arena. African states, even when they continued in existence as such, came under the sway of self-appointed European "protectorate" holders. Consequently, states not only in Africa, but in the same vein also in West, South, Southeast Asia and the South Pacific, were relegated to a secondary rank with restricted "foreign policy" competence.[93] Munich public lawyer Emanuel von Ullmann (1841 – 1913), in agreement with contemporary jurists, opined: "The independence of the inferior state, often emphasised in the protectorate treaties, might not be crucial; what is decisive is the general nature of the protectorate."[94] International legal theory

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[89] Treaty Opobo – UK, 1 July 1884, in: *CTS*, vol. 163, pp. 158-159. Treaty New Calabar – UK, 4 July 1884, in: *CTS*, vol. 163, pp. 159-161. Treaty Old Calabar – UK, 23 July 1884, in: *CTS*, vol. 163, pp. 102-103. Treaty Bonny – UK, 24 July 1884, in: *CTS*, vol. 163, pp. 163-164. When the British government claimed the right to intervene into domestic politics in Opobo, in the aftermath of the treaty of 1884, King Jaja of Opobo in what is Nigeria today addressed a formal letter of protest to the British Foreign Office in 1886 and filed the following complaint: "We, of course, signed [the] Treaty with Her Majesty's Government upon the sole basis that there should be no interference whatever with regard to our laws, rights and privileges of our markets etc., but at the present we are at a loss to find that we have been misled; that is after gratuitously arranging to come under Her Majesty's Government Protectorate, and preventing other nations coming in as have been previously agreed." [Jaya [Jubo Jubogha], King of Opobo, [Letter to Lord Salisbury, 26 March 1886, London: British National Archives, FO 84/1762, nr 1], partly printed in: Sylvanus John Sochienye Cookey, King Jaja of the Niger Delta, 1821–1891 (New York, 1974), 120; reprint (London, 2005)]. The statement is unequivocal in claiming that the relations between Opobo and the UK were based on a treaty [King Jaja referred to: Treaty Opobo – UK, 1 July 1884, in: CTS 163 (1978), 158], that they operated at the level of legal equality and that, according to the treaty, Opobo had the unrestricted right of autonomous legislation and law enforcement. In other words, King Jaja was not only familiar with the concept of sovereignty, as employed on the European side, but also used that same concept to defend his rights vis-à-vis British government intervention. That the British intervention was neither lawful nor morally acceptable was apparent already to contemporaries. One of them noted that "the King does not in all transactions appear to have been treated with generosity, or his position as a factor in African civilization sufficiently recognized" [Anonymous reporter in the African Times, attached to a letter by Jaya [Jubo Jubogha], King of Opobo to Lord Salisbury, 24 January 1887, in: London: British National Archives, FO 403/73, partly printed in: Cookey (as above), 121]. There can be no doubt that *King Jaja* and his government fully understood the agreement they had signed and assumed that this agreement had confirmed British recognition of Opobo sovereignty.

[90] Treaty Buganda – UK, 29 May 1893, Art IV, in: *CTS*, vol. 178, pp. 448-450, at p. 448.

[91] Treaty Tonga – UK, 18 May 1900, Art. I, in: *CTS*, vol. 188, pp. 415-417, at pp. 415-416.

[92] Treaty German Empire – UK, 29 October / 1 November 1886, Art. 1, in: *CTS*, vol. 168, pp. 270-277, at p. 272.

[93] Karl Gareis, *Institutionen des Völkerrechts*, § 15, second edn (Gießen, 1901), p. 61 [first published (Gießen, 1888)].

[94] Emanuel von Ullmann, *Völkerrecht*, § 26, second edn (Das öffentliche Recht der Gegenwart, 3) (Tübingen, 1908) , S. 10 [first published Tübingen 1898]. Henri Bonfils, *Manuel de droit international public (droit des gens)* , nr 545, sixth edn (Paris, 1912), p. 358 [first published (Paris, 1894); second edn (Paris, 1898); third edn (Paris, 1901; 1904); fourth edn (Paris, 1905); fifth edn (Paris, 1908); seventh edn (Paris, 1914); eighth edn (Paris, 1921-1926)]. Pasquale Fiore, *Nouveau droit international publique*, nr 342, second edn, vol. 1 (Paris, 1885), S. 301 [first edn in

thus distinguished between "superior" and "inferior" states,[95] the latter placed under some "protectorate", graciously waived the otherwise meticulously observed requirement for recourse to legal sources and made statements in the potential. The international system, seemingly under the rule of a club of members of the "family of nations", not only banned non-state actors as subjects of international law[96] but also sovereign states under some "protectorate" regime.[97] Chancellour Bismarck, though, pleaded in favour of leaving the exploitation of the "protectorates" to commercial trading companies in an address to the Imperial Diet on 26 June 1884, and placed the companies under the surveillance of a German consular agent.[98] Indeed, the amended Imperial Protectorates Act of 19 March 1888 regulated the legal structure of the trading companies doing business in the "protectorates", while establishing the German Emperor as the principal head of government over the "protectorates";[99] hence, these companies did not perform as rulers anywhere in the world and were often underfinanced at that. As a manifestation of inequality, international and state colonial law thus turned into a cheap ideology of colonial rule. In the last instance, it barred the victims of colonial suppression from access to the right of resistance. "The primitive state" must not "engage in a legal act which contradicts the interests of the protectorate", was the verdict of another Munich public lawyer, Karl Gareis (1844 – 1923).[100] Put differently: international law as ideology of colonial rule admitted as belligerents only states credited with subjecthood under international law and, in this capacity, appearing as the sole type of actors in the international system.

"Protectorate" holders not only intervened into the domestic affairs of African states but also drew new external borders. As a rule, colonial governments cooperated, when their claims related to adjacent zones through bilateral commissions staffed by members of those European

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French (Paris, 1868); first published (Milan, 1865); second Italian edn (Turin, 1884)].

[95] Franz von Holtzendorff, 'Staaten mit unvollkommener Souveränität', § 27, in: Holtzendorff, ed., *Handbuch des Völkerrechts auf Grundlage europäischer Staatenpraxis*, vol. 2 (Berlin and Hamburg, 1887), S. 98-117, at pp. 115-116.

[96] Wheaton, *Elements* (note 37, edn by Dana), § 294, p. 313. Thomas Joseph Lawrence, *The Principles of International Law*, § 54 (London and New York, 1895), pp. 79-82 [second edn (London, 1895); third edn (London and Boston, 1900; 1909);fourth edn (London and Boston, 1910; 1911); fifth edn (London and Boston, 1913); sixth edn (London and Boston, 1915); seventh edn, edited by Percy H. Winfield (Boston, 1923)]. Roscher, *Kolonien* (note 46), p. 419.

[97] Lassa Francis Lawrence Oppenheim, *International Law*, § 94, vol. 1 (London and New York, 1905), pp. 139-140 [second edn (London and New York, 1912); third edn, edited by Ronald F. Roxburgh (London and New York, 1920-1921); fourth edn, edited by Arnold Duncan McNair (London and New York, 1926); fifth edn, edited by Hersch Lauterpacht (London and New York, 1935); sixth edn, edited by Hersch Lauterpacht (London and New York, 1944);seventh edn, edited by Hersch Lauterpacht (London and New York, 1948; 1952-1953); eighth edn, edited by Hersch Lauterpacht (London and New York, 1955; 1957; 1963); ninth edn, edited by Robert Yewdall Jennings and Andrew Watts (Harlow, 1992; 1996; 2008)].

[98] Otto von Bismarck, '[Address to the German Imperial Diet on the Establishment of Protectorates, 26 June 1884]', in: Wilhelm Böhm and Alfred Dove, eds, *Fürst Bismarck als Redner*, vol. 13 (Berlin, 1891), pp. 278-326, at p. 304.

[99] German Empire, '[Act Relating to the Law in the Protectorates, dated 19. März 1888, Reichsschutzgebietsgesetz]', §§ 8-10, in: Norbert B. Wagner, ed., *Archiv des Deutschen Kolonialrechts*, second edn (Brühl and Wesseling, 2008), pp. 28-30 [first published in: *Reichsgesetzblatt* (1888), p. 75. 'Novelle des Gesetzes betreffend die Rechtsverhältnisse der deutschen Schutzgebiete vom 17. April 1886', in: *Reichsgesetzblatt* (1886), p. 75]. Fritz Giese, 'Zur Geltung der Reichsverfassung in den deutschen Kolonien', in: *Festgabe der Bonner Juristischen Fakultät für Paul Krüger zum Doktorjubiläum* (Berlin, 1911), pp. 415-446. Karl Theodor Helfferich, *Zur Reform der kolonialen Verwaltungs-Organisation* (Deutsches Kolonialblatt, vol. 16, issue 2) (Berlin, 1905), pp. 6-7. Hermann Edler von Hoffmann, *Einführung in das Deutsche Kolonialrecht* (Leipzig, 1911), pp. 31-34. Franz Josef Sassen, *Gesetzgebungs- und Verordnungsrecht in den deutschen Kolonien* (Abhandlungen aus dem Staats-, Verwaltungs- und Völkerrecht, vol. 5, issue 2) (Tübingen, 1909), pp. 34-36 [first published as LLD Thesis (University of Erlangen, 1909)]. The model was the British Jurisdiction Act of 1843. See: UK, 'Foreign Jurisdiction Act [6/7 Vict., cap. 94 (29 August 1843)]', in: Frederick Madden and David Kenneth Fieldhouse, eds, *Select Documents on the Constitutional History of the British Empire and Commonwealth* (Westport, CT, 1991), pp. 13-15 [partly printed in: Henry Francis Morris, 'Protection or Annexation? Some Constitutional Anomalies of Colonial Rule', in: Morris and James Read, eds, *Indirect Rule and the Search for Justice* (Oxford, 1972), pp. 41-70].

[100] Gareis, *Institutionen* (note 93), § 15, p. 61.

governments.[101] Only in a few cases did the superimposition of European colonial rule lead to state destruction. For one, the Kingdom of Ashanti in West Africa became the victim to British military conquest in 1895, whereby both states had been tied together through a succession of treaties since 1817. Although the British government had continued to recognise the kingdom as a sovereign state, it banned reigning Asantehene Prempeh (1870 – 1931, in office 1888 – 1896) into exile in the Seychelles Islands and annexed the state in 1901.[102] The German government tolerated and, in the end, accepted the genocide that the German commander in Southwest Africa, Lothar von Trotha (1848 – 1920, commander 1904 – 1905) ordered and executed.[103] The genocide was implemented as the purposeful "extinction" and "extermination",[104] and the vast majority of Herero and Nama, resisting militarily, were killed or starved to death. The heads of their states, who, as subjects under international law, had declared war on Germany in 1904, were treated as "robbers" by the German occupation forces;[105] the states of the Herero and Nama were destroyed.[106]

By contrast, governments involved in the partition of the South Pacific did not arrive at a consensus. While with regard to Africa, European governments were exclusively involved, the South Pacific became the theatre of colonial expansion not only for European but also the US governments as well as the governing institutions of the European settler colonies in Australia and New Zealand. Although the British, German and US governments did enter into a treaty about the partition of

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[101] Lazarus Hangula, *Die Grenzziehungen in den afrikanischen Kolonien Englands, Deutschlands und Portugals im Zeitalter des Imperialismus. 1880 – 1914* (Europäische Hochschulschriften, Reihe 3, Bd 493) (Frankfurt and Berne 1991).

[102] Ivor Agyeman-Duah and J. P. Mahoune, *The Asante Monarchy in Exile. Sojourn of King Prempeh and Nana Yaa Asantewaa in Seychelles* (Kumasi, 2000). William Walton Claridge, *A History of the Gold Coast and Ashanti* (London, 1915), pp. 403-422 [reprint (London, 1964)]. George Edgar Metcalf, *Great Britain and Ghana. Documents of Ghana History. 1807 – 1967* (London, 1964) [reprint, edited by J. G. Darwin (Aldershot, 1994)]. Nana Agyeman Prempeh I, *The History of Ashanti Kings and the Whole Country Itself. And Other Writings* [1922], edited by Albert Adu Boahen, Emmanuel Akyeampong, Nancy Lawler, T. C. McCaskie and Ivor Wilks (Sources of African History, 6) (Oxford and New York, 2003). Edgar Sanderson, *Great Britain in Africa* (London, 1907), S. 181-182 [reprint (New York, 1970)]. For studies see: Albert Adu Boahen, 'Agyeman Prempeh in the Seychelles. 1900 – 1924', in: Nana Agyeman Prempeh I, *The History of Ashanti Kings and the Whole Country Itself. And Other Writings* [1922], edited by Albert Adu Boahen, Emmanuel Akyeampong, Nancy Lawler, T. C. McCaskie and Ivor Wilks (Sources of African History, 6) (Oxford and New York, 2003), pp. 21-41. William Tordoff, 'The Exile and Repatriation of Nana Prempeh I of Ashanti. 1896 – 1924', in: *Transactions of the Historical Society of Ghana*, vol. 4, nr 2 (1960), pp. 33-58]. Ivor Wilks, *Ashante in the Nineteenth Century. The Structure and Evolution of a Political Order* (Cambridge, 1975).

[103] Adrian Dietrich Lothar von Trotha, '[Proclamation to the People of the Herero, 2 October 1904]', edited by Michael Behnen, *Quellen zur deutschen Außenpolitik im Zeitalter des Imperialismus. 1890 – 1911* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 26) (Darmstadt, 1977), pp. 291-292 [contemporary prints in: *Vorwärts*, nr 294 (16 December 1905); Konrad Rust, *Krieg und Frieden im Hereroland* (Leipzig, 1905), p. 385].

[104] Paul Rohrbach, *Deutsche Kolonialwirtschaft*, vol. 1: Südwest-Afrika (Berlin, 1907), S. 352-353. Werner Freiherr Schenk von Stauffenberg, '[Letter to His Mother, October 1904, after the genocide edict by Lothar von Trotha]', partly printed in: Gertrud Marchand-Volz, *Leutnant Werner Schenk von Stauffenberg. Von München nach Deutsch-Südwestafrika* (Windhoek, 1994), pp. 136-137.

[105] Rohrbach, *Kolonialwirtschaft* (note 104), pp. 352-353.

[106] Jürgen Zimmerer, 'Krieg, KZ und Völkermord in Südwestafrika, Der erste deutsche Genozid', in: Zimmerer and Joachim Zeller, eds, *Völkermord in Deutsch-Südwestafrika. Der Kolonialkrieg (1904–1908) in Namibia und seine Folgen* (Berlin, 2003), pp. 45-63 [second edn (Berlin, 2005)]. Zimmerer, 'Colonial Genocide. The Herero and Nama War (1904–1908) in German South West Africa and Its Significance', in: Dan Stone, ed., *The Historiography of Genocide* (London, 2004), pp. 323-343. Zimmerer, 'Rassenkrieg und Völkermord. Der Kolonialkrieg in Deutsch-Südwestafrika und die Globalgeschichte des Genozids', in: Henning Melber, ed., *Genozid und Gedenken. Namibisch-deutsche Geschichte und Gegenwart* (Frankfurt, 2005), pp. 23-48. Zimmerer, 'Das Deutsche Reich und der Genozid. Überlegungen zum historischen Ort des Völkermordes an den Herero und Nama', in: *Ethnologica* 24 (2004), pp. 106-123 [reprinted in: *Namibia-Deutschland. Eine geteilte Geschichte* (Cologne, 2004); also in: Zimmerer, *Von Windhoek nach Auschwitz. Beiträge zum Verhältnis von Kolonialismus und Holocaust* (Periplus-Studien, 15) (Munster, 2011), pp. 172-195]. Zimmerer, 'Der erste Genozid des 20. Jahrhunderts. Der deutsche Vernichtungskrieg in Südwestafrika (1904 – 1908) und die Globalgeschichte des Genozids', in: Zimmerer., *Windhoek* (as above), pp. 40-70.

Samoa in 1889,[107] the US government displayed its determination to use military force to the end of driving rival European governments out of the area. As the Spanish government appeared to be the weakest among the contenders, the US government launched a short war against Spanish dependencies in 1898. Indeed, the Spanish government backed in and surrendered control over the Philippines and Guam to the USA.[108] In the same year, the US government annexed Hawaii, which it had recognised as a sovereign state since the early nineteenth century. The German government used what appeared to it as a good opportunity and forced the Spanish side to acknowledge the factual German government control over the Micronesian islands of the Carolinas, Marianas and Marshall Islands, which the German side eventually bought in 1899.[109] Already in 1884, the German government had grabbed Northeast New Guinea in a rivalry with the Netherlands and the UK. Again, the affected local populations were not involved in the making and enforcement of the treaties to their disadvantage. The treaties resulted in state destruction not only in the Philippines but at a large scale all over the South Pacific.

In summary, by the beginning of the second decade of the twentieth century, the world beyond Europe, America, China, Japan and Antarctica had been carved up in zones mainly under the control of European governments, whereby these zones came to be termed "colonial empires" in colloquial diction. These so-called "colonial empires", however, had widely divergent structures. The set of dependencies under German rule consisted of imperial "protectorates" (Schutzgebiete) exclusively, Southeast Asian and Caribbean island worlds as well as Surinam, the old centre of the slave trade, stood under direct Dutch control. Likewise, the Portuguese government exercised direct rule over territories in West, Southwest and Southeast Africa and in the Southeast Asian archipelago. The Spanish and Italian governments claimed direct control over Territories in Africa. The US held sway over non-incorporated territories in the South Pacific, Hawaii and the Caribbean. To 1908, Belgian rule in the Congo River valley featured as Berlin Africa Congress mandate over the so-called Congo Free State. French colonial rule appeared as a mixture of "protectorates" and settler colonies in Africa, Algeria, America and the South Pacific. The British system of overseas rule was a conglomerate made up of settler colonies in Canada, Australia, New Zealand, South Africa, some territories in East and Southeast Africa, Crown Colonies in Hong Kong, Sierra Leone and the Gold Coast as well as "Protectorates" scattered across Africa, South, Southeast Asia and the South Pacific. All the "colonial empires" were legally distinct from the states over which European and US governments exercised control in Europe and North America. Only the Russian 'Empire' was not structured as a legal entity separate from Russia itself.

The British settler colonies in Canada, Australia and New Zealand, being the main destinations of emigration out from Europe, incrementally obtained self-government under "Dominion" status in 1867, 1901 and 1907. In South Africa, the conflict between British settlers and the Boers turned violent in the so-called Anglo-Boer War from 1899 to 1902, the only overseas military conflict between a European government and a group of settlers of European origin during the nineteenth and twentieth centuries. The Boers launched the war in an effort to bring about the collapse of the British "colonial empire", thereby seeking to enable themselves to take full control of South Africa.[110] But the Boer strategy failed due to the lack of support from rivals of the British government, specifically the German side. The war thus ended with a disastrous defeat of the Boers who were force to capitulate and sign the humiliating peace treaty of Vereeninging on 31 May 1902.[111] However, the British government unilaterally withdrew from South Africa in 1910 and allowed the Boers to construct a new sovereign state without the participation of the African majority population. The minority government of the Boers remained in existence until 1994. The lawyer Jan Christaan Smuts (1870 – 1950), turned military commander in the Anglo-Boer War,

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[107] Final Act, Samoa Conference, 14 June 1889, in: *CTS*, vol. 172, pp. 133-148.

[108] Treaty Spain – USA, Paris, 10 December 1898, in: *CTS*, vol. 187, pp. 100-105.

[109] Treaty German Empire – Spain, 30 July 1899, in: *CTS*, vol. 187, p. 375.

[110] Jan Christiaan Smuts, 'Memorandum [über den Burenkrieg, 4. September 1899]', in: Smuts, *Selections from the Smuts Papers*, Nr 130, edited by W. K. Hancock and Jean van der Pol, vol. 1 (Cambridge, 1966), pp. 313-329.

[111] Treaty Oranje Free State/South African Republic – UK, Vereeniging, 31 May 1902, in: *CTS*, vol. 191, pp. 232-234; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 336-338.

exercised paramount influence in the state to his death.

Colonial Rule, the International Peace Movement and World Politics

The expansion of the so-called "colonial empires" concurred with the increase of weapons for military forces of the larger European states and the USA. The increase materialised not merely quantitatively in the growing numbers of weapons accumulated for the various units as well as of combatants but also qualitatively in the introduction of new weapons technologies resulting in a higher lethality. Shortly before the beginning of World War I, the arms increase provoked the expectation among military planners that their sole strategic option was the brisk and concentrated "attack on two or three sides, that means, frontally against the enemy or against one or both flanks" (Angriff von zwei oder drei Seiten, also gegen die Front oder gegen eine oder beide Flanken), while excluding the possibility of a war of attrition. This, military planners concluded, was impossible because war, in their view, war could not be fought on the basis of a "strategy of attrition, if logistics for millions [of soldiers] demands billions of [Reichsmarks]" (Ermattungsstrategie, wenn der Unterhalt von Millionen den Aufwand von Milliarden erfordert).[112] The counter position, which Jean de Bloch (1836 – 1902), a railroad entrepreneur and military critic, argued, was that precisely because of the massive arms increase, long-lasting wars of attrition were inevitable.[113] As Bloch was not a military professional and a professing pacifist at that, this position had no effect on military planning at the time. Nevertheless, Bloch's analysis influenced the international peace movement, which, since the 1870s, was growing in response to the arms increase and sought to regulate and even prevent war. Already in 1874, the movement accomplished its first major success, when an international conference met in Brussels with the aim of working out a code of norms relating to the law of war. The conference actually produced such a code, which, however, was not put into force. In 1880, the Ghent based Institute of International Law issued another draft code and approved of it at its annual gathering in Oxford. Yet, again, the code did not attract government interest.[114] The Russian Foreign Minister Mikhail Nikolaevič Muraviev (1845 – 1900) took the next step in 1898 by the order of Czar Nicholas II (1894 – 1917) and presumably at Bloch's initiative. Muraviev had a document disseminated through which he invited governments in Europe to participate in an international conference on the question how wars could be regulated and arms reductions could be effected.[115] The conference indeed met at The Hague in 1899, with all self-styled "great powers" dispatching delegations. Among others, the conference approved of and put into force the code of legal norms on land warfare.[116] The norms of the Hague Convention of

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[112] Alfred Graf von Schlieffen, 'Schlußbesprechung [of the General Staff Respecting the War Game of 1905; Protocol, 23 December 1905]', Freiburg: Bundesarchiv – Militärarchiv, PH 3/653, fol. 001-018, at fol. 007 [English versio in: Schlieffen, *Military Writings*, edited by Robert T. Foley (London, 2003)]. Schlieffen, 'Der Krieg in der Gegenwart', in: Schlieffen, *Gesammelte Schriften*, edited by Hugo Freiherr von Freytag-Loringhoven, vol. 1 (Berlin, 1913), pp. 11-32, at pp. 23-24 [first published in: *Deutsche Revue* (January 1909)].

[113] Jean de Bloch [= Jan Gotlib Bloch, Ivan Stanislavovič Bloch], *Der Krieg*, 6 vols (Berlin, 1899).

[114] Protocol of the Brussels Conference on the Rules of Land Warfare, 27 August 1874, in: *CTS*, vol. 148, pp. 133-136. On the Brussels code see: Thomas Erskine Holland, *Studies in International Law* (Oxford, 1898), S. 59-78. Carl Lueder, *Der neueste Codifications-Versuch auf dem Gebiete des Völkerrechts. Kritische Bemerkungen zu den russischen Vorschlägen für den auf den 27. Juni 1874 nach Brüssel einberufenen Congress* (Erlangen, 1874). Institut de Droit International, 'The Laws of War on Land. Manual Published by the Institute of International Law [9 September 1880]', in: Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts*, third edn (Alphen aan den Rijn, 1988), pp. 35-48 [first published (Leiden, 1973); second edn (Alphen aan den Rijn, 1981); fourth edn (Leiden, 2004)].

[115] Mikhail Nikolaevič Muraviev, '[Rescript, 12 August 1898]', in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy und Friedrich Thimme (Hrsg.), *Rings um die Erste Haager Friedenskonferenz*, Nr 4215 (Die Grosse Politik der Europäischen Kabinette, 15) (Berlin, 1924), pp. 142-143; also in: Gwyn Prins and Hylke Tromp, eds, *The Future of War* (Nijhoff Law Specials, 46) (The Hague, Boston and London, 2000), pp. 59-60.

[116] International Convention on the Laws and Customs of War on Land, The Hague, 29 July 1899, in: *CTS*, vol. 187, pp. 430-442; also edited in: Shabtai Rosenne, *The Hague Peace Conferences of 1899 and 1907 and International Arbitration Reports and Documents* (The Hague, 2001). James Brown Scott, *The Hague Peace Conferences of*

1899 drew on the principles established at the Brussels conference of 1874. The Second Hague Conference of 1907 modified the 1899 norms. It approved of the establishment of an international prize court. This court might have evolved into a standard court; however, it did not go into force.[117] A further attempt to put into effect a similar convention on the law of war at sea failed. A conference convened in London passed such a convention on 26 February 1909 but this convention did not achieve validity in terms of international law.[118]

The international peace movement was often ridiculed as seeming to advocate perpetual peace as a dream, which was not just supposed "not to be a pleasant one" (nicht einmal ein schöner),[119] but even to jeopardise the "existing basic state structures" (bestehenden staatlichen Grundformen).[120] According to this logic, the rhetoric of perpetual peace should not be allowed to impede the capabilities of state governments to maintain their interests[121] and, in any case, would turn into reality only after many centuries.[122] Nevertheless, the international peace movement accomplished a major step towards the enforcement of legal norms relating to the conduct of war and did so on the occasion of the Hague Peace Conferences of 1899 and 1907. The several multilateral treaties, of which both Hague conferences approved, were transferred into state law at the behest of the participating governments. Beyond efforts to constrain the war-making capability of governments of sovereign states, the international peace movement would not limit its activities to repeated conclusions of new peace treaties, ending the state of war between two or more states, while leaving untouched government capabilities to decide about foreign policy matters exclusively at their own discretion.[123] Instead, peace activists hoped to be able to overcome the partition of humankind in often rivalling states and nations[124], to use international law as an instrument to establish "an ever increasing dependency of states upon one another" (eine immer größere Abhängigkeit der Staaten von einander),[125] thereby making redundant state war-making

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1899 and 1907 (Baltimore, 1909). Scott, ed.: *The Hague Conventions and Declarations of 1899 and 1907. Accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers and Texts of Reservations*, second edn (New York, 1915) [fist published (New York, 1915)]. Scott, ed., *The Reports to the Hague Conferences of 1899 and 1907* (Oxford, London and New York, 1917); also in: Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts*, third edn (Alphen aan den Rijn, 1988), pp. 49-51 [first published (Leiden, 1973); second edn (Alphen aan den Rijn, 1981); fourth edn (Leiden, 2004)].

117 Hague Convention 1907 (note 58). On the prize court plans see: Suzanne Katzenstein, 'In the Shadow of Crisis. The Creation of International Courts in the Twentieth Century', in: *Harvard International Law Journal* 55 (2014), pp. 151-209, at pp. 169-172.

118 John Westlake, *International Law*, vol. 2 (Cambridge, 1907), pp. 325-340 [second edn (Cambridge, 1913); Microfiche edn (Zug, 1982)].

119 Helmuth von Moltke, '[Letter to Johann Caspar Bluntschli, 11 December 1880]', in: Moltke, *Gesammelte Schriften und Denkwürdigkeiten*, vol. 5 (Berlin, 1892), p. 194. For a parallel statement see: Kaiser Wilhelm II, '[Statement of Programs for Perpetual Peace, 8 September 1899]', edited in: Volker Marcus Hackel, *Kants Friedensschrift und das Völkerrecht* (Tübinger Schriften zum internationalen und europäischen Recht, 53) (Berlin, 2000), S. 149.

120 Ferdinand Lentner, *Das Recht im Kriege. Kompendium des Völkerrechts im Kriegsfalle* (Vienna, 1880), p. 11.

121 Bernhard von Bülow, '[Memorandum to the German Ambassador in Paris, Georg Herbert Graf zu Münster, 12 May 1899]', in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy and Friedrich Thimme, eds, *Rings um die Erste Haager Friedenskonferenz*, nr 4256 (Die Grosse Politik der Europäischen Kabinette, 15) (Berlin, 1924), pp. 189-192, at pp. 191-192.

122 Carl Lueder, 'Die Nothwendigkeit und Gerechtigkeit des Krieges. Die Kriegsursachen und Arten', in: Franz von Holtzendorff, ed., *Handbuch des Völkerrechts*, vol. 4 (Berlin, 1888), pp. 195-202. Fritz Medicus, 'Kants Philosophie der Geschichte', in: *Kant-Studien* 7 (1902), pp. 1-22, 171-229. Otto Pfleiderer, *Die Idee des ewigen Friedens* (Berlin, 1895). Karl Michael Joseph Leopold Freiherr von Stengel, *Der ewige Friede* (Munich, 1899) [third edn (Munich, 1899); reprint (New York, 1972)]. Heinrich Triepel, *Die Zukunft des Völkerrechts* (Vorträge der Gehe-Stiftung, issue 8, nr 2) (Leipzig and Dresden, 1916), pp. 15-16.

123 Felix Dahn, 'Friedensschluss', in: Bernhard von Poten, ed., *Handwörterbuch der gesamten Militärwissenschaften*, vol. 3 (Bielefeld, 1877), pp. 385-386.

124 Norman Angell, *The Great Illusion*, second edn (London, 1910), p. 253.

125 Hans Wehberg, *Die internationale Friedensbewegung* (Staatsbürger-Bibliothek, 22) (Mönchengladbach, 1911), p. 7. Alfred Hermann Fried, *Handbuch der Friedensbewegung*, vol. 1, second edn (Berlin, 1911), pp. 14-15 [first published (Vienna, 1905); reprint, edited by Daniel Gasman (New York, 1972)]. James Lorimer, 'Plan for the

capability.[126] The increasingly numerous binding international legal norms would eventually intensify interstate relations, which were already being accelerated through the use of new communication technologies and steamships. The intensifying communication among states would require a close knit network of international organisations and state governments would have to oblige themselves to transfer competences to these organisations both in accordance with international law and in pursuit of their own interests. These expectations were based on easily recognisable facts, most notably the exponential increase of the number of international organisations since the 1860s.[127] For example, organisations such as the Telegraph Office and the Universal Postal Union obtained competence to regulate international postal services at the global level in 1865 and 1878 respectively.[128] Peace activists concluded that the ever closer network of international organisations would usher in some world domestic policy, to which state governments would have to subject themselves to some "world law of communication" (Weltverkehrsrecht) in accordance with their own interests.[129] World domestic policy would raise hurdles against the conduct of war so high that it would be practically impossible to launch wars.[130] States with their nations would continue to exist, but merge into some "world symphony" coordinating specific state interests with the needs of the international community of states.[131] However, peace activists were not concerned about the fact that the largest of humankind living in Africa, Asia and the South Pacific were then excluded from shaping "world domestic policy".

Moreover, the international peace movement placed great hopes on international arbitration as a means of peaceful conflict resolution.[132] Activists reviewed the number of cases between 1794 and 1900 and found a tremendous increase from just four between 1794 and 1800 to 111 between 1881 and 1900.[133] However, in their count they did not consider the fact that between 1794 and 1800 there had been virtually continuous warfare in Europe and, worse even, overlooked the numerous cases that are on record from the seventeenth and eighteenth centuries.[134] It was

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Organisation of an International Government', in: Lorimer, *The Institues of the Law of Nations*, vol. 2 (Edinburgh and London, 1884), pp. 279-287 [also edited by Dominique Gaurier, *Histoire du droit international* (Rennes, 2005), pp. 483-488].

[126] Christian Meurer, *Die Haager Friedenskonferenz*, vol. 1: Das Friedensrecht der Haager Konferenz (Munich, 1905); vol. 2: Das Kriegsrecht der Haager Konferenz (Munich, 1907). Eugen Schlief, *Der Friede in Europa. Eine völkerrechtlich-politische Studie* (Leipzig, 1892), p. 78. For studies see: Bernard Degen, Heiko Haumann, Ueli Mäder, Sandrine Mayoraz, Laura Polexe and Frithjof Benjamin Schenck, eds, *Gegen den Krieg. Der Basler Friedenskongress 1912 und seine Aktualität* (Basle, 2012).

[127] Francis Stewart Leland Lyons, *Internationalism in Europe. 1815 – 1914* (European Aspects. Series C, 14) (Leiden, 1963).

[128] Treaty of the World Postal Union, 9 October 1874, in: *CTS*, vol. 147 (Dobbs Ferry, 1981), pp. 136-160.; Treaty of the World Postal Union, 1 June 1878, in: *CTS*, vol. 152 (Dobbs Ferry, 1981), pp. 235-300; partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 538-545.]

[129] Walther Max Adrian Schücking, 'Die Organisation der Welt', in: *Staatsrechtliche Abhandlungen. Festgabe für Paul Laband*, vol. 1 (Tübingen, 1908), pp. 533-614, at pp. 594-595 [reprint (Frankfurt, 1978); also published separately (Tübingen, 1908)].

[130] Wehberg, *Friedensbewegung* (note 125), pp. 10-11]

[131] Ludwig Stein, *Das Ideal des ewigen Friedens und die soziale Frage* (Berlin, 1895).

[132] Alfred Hermann Fried, 'Organisiert die Welt!', in: *Die Friedens-Warte* 8 (1906), pp. 1-3, at p. 1. Christian Meurer, *Völkerrechtliche Schiedsgerichte. Ein populär-wissenschaftlicher Vortrag* (Würzburg, 1890). Lassa Francis Oppenheim, 'The Science of International Law. Its Task and Method', in: *American Journal of International Law* 2 (1908), pp. 313-356, at pp. 322-323 [reprinted in: Malcolm Evans and Patrick Cappa, eds, *International Law*, vol. 1 (Farnham, SY, and Burlington, VT, 2009), pp. 15-58].

[133] John Bassett Moore, 'International Arbitration. Historical Notes and Projects', in: Moore, *Collected Papers*, edited by Edwin Montefiore Borchard, Joseph Perkins Chamberlain and Stephen Duggan, vol. 2 (New Haven, 1944), pp. 27-70 [first published in: *The American Conference on International Arbitration. Held in Washington, DC, April 22 and 23, 1896* (New York, 1896)]. Wehberg, *Friedensbewegung* (note 125), p. 30.

[134] Christoph Kampmann, *Arbiter und Friedensstiftung. Die Auseinandersetzung um den politischen Schiedsrichter im Europa der Frühen Neuzeit* (Quellen und Forschungen aus dem Gebiet der Geschichte, N. F. 21) (Paderborn, Munich, Vienna and Zurich, 2001). Karl-Heinz Lingens, *Internationale Schiedsgerichtsbarkeit und das Ius publicum Europeum. 1648 – 1794* (Schriften zum Völkerrecht, 87) (Berlin, 1988).

therefore unjustified to speak of a tremendous increase of the number of cases of arbitration during the second half of the nineteenth century. Despite these shortcomings, the principal demand of the peace movement that an international court of justice should be established for the settlement of disputes among states found much positive response and could persuade the governments participating in the Hague Conferences to put a non-standing international court of justice into existence.

However, some peace activists advocated the further demand that the right to war should be restricted to military conflicts among sovereign states and to separate the law of war conceptually from international law. In the view of this group, international law should no longer comprise the law of war, but should be limited to matters relating to the preservation of peace. War, they argued, was taking place 'outside the realm of the law' (außerhalb der Sphäre des Rechts).[135] With their demand that only interstate wars should be recognised as legal wars, peace activists shifted the old fundamental ethical question about determining the criteria for the justice of war to the technical juridical question of the conditions under which wars could be legal. The Hague legal norms intended to regulate the conduct of land wars, became the standard upon which the legality of a war was to be decided, irrespective of the justice of war aims.[136] Because these peace activists argued within the tradition of the Clausewitzian definition of war as a military conflict of nations organised in states, they found approval among governments whose military advisers operated on the same theory of war. Hence, already the rules on land warfare approved at first Hague conference admitted only wars among states as the sole form of legal military conflict.[137] But with their narrow concept of war, the rules excluded military conflicts within colonial dependencies from their legal framework, as these dependencies were not regarded as states in the sense of the Hague rules. Hence, not merely colonial governments denied the legal status of belligerents and, by consequence, the *ius ad bellum*, to states under their rule but also activists of the international peace movement. Therefore, international efforts to hedge and regulate war were of no effect in colonial dependencies, and governments became not just entitled to abuse international law for the purpose of trading claims to colonial rule among European governments, such as through the British-German treaty of 1890 or the British-French agreement of 1904,[138] but also international law received the task of providing some "protective guarantee" for colonial rule.[139] "World domestic policy", were it ever to come into existence, would thus be policy for a world under the control of American and European colonial governments.

The international peace movement derived some of its arguments from established practice, which could be interpreted in various, not necessarily mutually compatible ways. For one, the demand of some right to global communication[140] was based upon the habit of concluding unequal treaties under the goal of "opening" states, whereby these states were to become accessible for European and North American traders. The consciousness of living in a world, in which governments appeared to be pitched against one another in absolute enmity and in which borders appeared to be insignificant and political decisions by one government with regard one part of the world might have repercussions on other governments with regard to other parts of the world and thereby trigger incalculable interdependencies,[141] shaped the formation of rival concepts and

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[135] Otfried Nippold, *Die Gestaltung des Völkerrechts nach dem Kriege* (Zurich, 1917), p. 115.

[136] Joseph Laurenz Kunz, 'Bellum Iustum and Bellum Legale', in: *American Journal of International Law* 45 (1951), pp. 528-534.

[137] Hague Convention 1899 (note 116), p. 436.

[138] Fried, *Handbuch* (note 125), vol. 2, p. 98.

[139] Nippold, *Gestaltung* (note 135), pp. 57-58; 251 Nippold, *The Development of International Law after the World War* (Oxford, 1923), p. 54.

[140] Bulmerincq, *Völkerrecht* (note 52), § 26, p. 206. Neumann, *Grundriss* (note 1), § 8, pp. 22-25. Georg Jellinek, *Die rechtliche Natur der Staatsverträge. Ein Beitrag zur juristischen Konstruktion des Völkerrechts* (Vienna, 1880), p. 42.

[141] Otto Hintze, 'Imperialismus und Weltpolitik', in: *Internationale Wochenschrift für Wissenschaft, Kunst und Technik* 1 (1907), pp. 593-605, 631-636 [reprinted in: Hintze, *Staat und Verfassung*, edited by Fritz Hartung (Hintze, Gesammelte Abhandlungen, vol. 1) (Leipzig, 1941), pp. 447-459, at p. 459; second edn of the *Abhandlungen*, edited by Gerhard Oestreich (Göttingen, 1962)]. Hintze, 'Imperialismus und Weltpolitik', in: *Die*

strategies in foreign ministries [142] and military commands,[143] even though they were often pitched against the international peace movement. Against this backdrop, the imposed concept of "world politics" around 1900 was not focused upon a foreign policy that was aimed at the accomplishment of the enforcement of some "world domestic policy" and the maintenance of stability on the globe at large,[144] but became the ideological instrument of big-power politics under the unilaterally formulated goal of precipitating change with purposefully steered effects on the world as a whole.[145] Imperialists, jointly with their left-leaning critics, believed that there was an international system comprising several big powers, that these powers had mutually recognised each other as such, that they were respecting their independence and legal equality and that a balance of power existed among them despite occasionally occurring minor or even major disturbances. They thus argued that, as a consequence of the believed expansion of the European states system since the fifteenth century, some world community of states had come into existence and stood under the control of a few big powers.[146] According to this conception, the international system existed without an institution of its own, simply as a consequence of the interdependence of big-power decision-making.[147] These big-power governments followed the maxim that all their decisions were relevant no matter at which part of the world they had been directed.[148] When implementing their world politics, these big-power governments all acted as colonial rulers. Even in the minds of contemporary liberal analysts,[149] they formed a "family of culture", appeared to act on some form of "world stage"[150] and to determine the fates of the allegedly 'lower races' wherever in the world, purportedly for the sake of preserving peace.[151]

Specifically in the German Empire, theories of the state and of public law strengthened opposition against the admission of a pluralism of conceptions of the state as demanded by some

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deutsche Freiheit (1917), pp. 114-169, at p. 117. Kurt Riezler [using the pseudonym J. J. Ruedorffer], *Grundzüge der Weltpolitik in der Gegenwart* (Stuttgart and Berlin, 1914), pp. 23, 184-188.

[142] Sönke Neitzel, *Weltmacht oder Untergang. Die Weltreichslehre im Zeitalter des Imperialismus* (Paderborn, Munich, Vienna and Zurich, 2000).

[143] Helmuth Johannes Ludwig von Moltke, 'Die militärpolitische Lage Deutschlands [Memorandum, dated 2 December 1911, with marginal notes by War Minister Heeringen]', Ms. Freiburg: Bundesarchiv-Militärarchiv, W 10/50279, nr 59, fol. 013-030, at fol. 014 = p. 2 [partly in: Annika Mombauer, 'Der Moltkeplan. Modifkation des Schlieffenplans bei gleichen Zielen?', in: Hans Ehlert, Michael Epkenhans and Gerhard P. Groß, eds, *Der Schlieffenplan. Anylsen und Dokumente* (Zeitalter der Weltkriege, 2) (Paderborn, Munich, Vienna and Zurich, 2006), p. 83]. Jehuda Lothar Wallach, *The Dogma of the Battle of Annihilation. The Theories of Clausewitz and Schlieffen and Their Impact on the German Conduct of Two World Wars* (Contributions in Military Studies, 45) (Westport, CT, 1986) [first published (Frankfurt, 1967)].

[144] Constantin Frantz, *Die Weltpolitik unter besonderer Bezugnahme auf Deutschland* (Chemnitz, 1882) [reprint (Osnabrück, 1966)].

[145] John Atkinson Hobson, *Towards International Government* (London, 1915). Theodore Roosevelt, 'Mr. Roosevelt's Nobel Address on International Peace', in: *American Journal of International Law* 4 (1910), pp. 700-703.

[146] Dupuis, *Principe* (note 22). Höijer, *Théorie* (note 26). John Frederick Maurice, *The Balance of Military Power in Europe. An Examination of the War Resources of Great Britain and the Continental States* (Collection of British Authors, Tauchnitz Edition 2513) (Leipzig, 1888). Nys, 'Théorie' (note 25), pp. 34-57. Stieglitz, *Équilibre* (note 26).

[147] Hintze, 'Imperialismus' (note 141, 1917), p. 118. John Atkinson Hobson, 'Imperialism and the Lower Races', in: Hobson, *Imperialism. A Study* (London, 1902), pp. 235-304 [fourth edn (London, 1954); fifth edn (London, 1954); further edn (London, 1988)]. For a recent study see: John M. Hobson, 'Eurocentric Imperialism. Liberalism and Marxism. c. 1830 – 1914', in: Hobson, *The Eurocentric Conception of World Politics* (Cambridge, 2012), pp. 33-58.

[148] Akira Iikura, *Ierō periru no shinwa. Teikoku Nihon to 'kōka' no gyakusetsu* (Tokyo, 2004).

[149] Hans Delbrück, 'Deutschlands Stellung in der Weltpolitik', in: Delbrück, *Vor und nach dem Weltkrieg. Politische und historische Aufsätze 1902-25* (Berlin, 1926), pp. 9-17, at p. 13.

[150] Ernst Immanuel Bekker, *Das Recht als Menschenwerk und seine Grundlagen* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, Philos.-Hist. Kl. 1912, nr 8) (Heidelberg, 1912), p. 8.

[151] Charles Wentworth Dilke, *Greater Britain. A Record of Travel in English-Speaking Countries during 1866 and 1867*, vol. 2 (London, 1868), pp. 405-407. Hobson, *Imperialism* (note 147), pp. 204-205, 208.

members of the international peace movement.[152] These theories helped disseminating a concept of the state that was closely related to the concept of sovereignty and denied the existence of binding legal obligations above sovereign states. For one, publicist Max von Seydel, who defended the sovereignty of the Bavarian state and regarded the German Empire as no more than a confederation,[153] believed that international legal norms could not exist as the relations among sovereign states could only be governed by the use of force. According to Seydel, if there were institutions capable of enforcing the law, they would have to be state institutions and not institutions above states. The theory not merely awarded legitimacy to but also raised the use of military force to the sole effective instrument of international politics. The theories thus provided the background for the assumption that war was a means of state-making. According to the theory, only governments of sovereign states were to be admitted as legal actors in international relations, capable of making decisions about war and peace. Consequently, the so-called "colonial wars" were not wars in the sense of the law of war but means to quench rebellions.[154] "World politics", based on the law, thus seemed impossible in the light of these theories. Chancellour Bismarck cast them into diplomatic diction when he advised his ambassador in London in 1885, to cancel the project of an alliance between the German Empire and the UK. He argued that an alliance, according to British law, was binding only for the government that had concluded it, not for its successors, with the consequence that an alliance might only continue until the next general elections. Hence, any contractual agreement by the British government appeared to be worthless. In stating this view, Bismarck endorsed his long standing expectation that international law could not provide for mechanisms to enforce treaties.[155]

Nevertheless, the expectation that decisions of a few governments could have effects everywhere in the world, dominated the minds at the turn towards the twentieth century to the degree that affected even the theorising of socialist critics. Already in 1907,[156] socialist theorists likened big-power foreign-policy decision-making to the behaviour of capitalists forming cartels. According to this analysis, European colonial governments were pursuing informal cooperation among rivals under the goal of carving up the world into zones under their exclusive control and were trying to accomplish this goal at the lowest political cost, each by recognising its rivals' share as if they were engaged in a globally operating cartel. Socialist critics created the term "ultra imperialism"[157] for

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[152] Otfried Nippold, *Der deutsche Chauvinismus* (Veröffentlichungen des Verbands für Internationale Verständigung, 9) (Stuttgart, 1913) [second edn (Zurich, 1917); French version (Paris, 1921)].

[153] Max von Seydel, *Commentar zur Verfassungsurkunde für das Deutsche Reich*, secnd edn (Freiburg and Leipzig, 1897), pp. 1-11 [first published (Freiburg and Leipzig, 1873)]. Seydel, 'Der Bundesstaatsbegriff', in: *Zeitschrift für die gesamte Staatswissenschaft* 28 (1872), pp. 185-256 [reprinted in: Seydel, *Staatsrechtliche und politische Abhandlungen* (Freiburg, 1893), pp. 1-89].

[154] William Edward Hall, *[A Treatise on] International Law*, fifth edn, edited by James Beresford Atlay (Oxford, 1904), p. 126 [first published (Oxford, 1880); second edn (Oxford, 1884); third edn (Oxford, 1890); fourth edn (Oxford, 1895); sixth edn, edited by James Beresford Atlay (Oxford, 1909); seventh edn, edited by Alexander Pearce Higgins (Oxford, 1917); eighth edn, edited by Alexander Pearce Higgins (Oxford, 1924); reprint of the eighth edn (Aalen, 1979)]. Lawrence, *Principles* (note 96), § 90, p. 136. John Westlake, *Chapters on the Principles of International Law* (Cambridge, 1894), S. 142-143 [reprints (Littleton, CO, 1982); (Charleston, 2009); reprinted in: Westlake, *The Collected Papers on Public International Law*, edited by Lassa Francis Oppenheim (Cambridge, 1914), pp. 1-282].

[155] Otto von Bismarck, '[Instruction to the German Ambassador Count Paul von Hatzfeldt in London, 9 December 1885]', in: Johannes Lepsius, Albrecht Mendelssohn Bartholdy and Friedrich Thimme, eds, *Die Große Politik der Europäischen Kabinette. 1871 – 1914*, vol. 4, nr 789 (Berlin, 1927), pp. 140-142, at p. 141. Bismarck, 'Gespräch mit dem Fürsten [Tomomi] Iwakura, Marquis [Hirobumi] Itō und anderen Japanern am 15. März 1873 in Berlin', nr 179, in: Bismarck, *Werke in Auswahl*, vol. 5, edited by Alfred Milatz (Stuttgart, Berlin, Cologne and Mainz, 1973), pp. 311-312 [first published in: *Staatsbürgerzeitung* 1 (1. Januar 1902); also in: Bismarck, *Die gesammelten Werke*, vol. 8 (Berlin, 1926), nr 51, pp. 64-65].

[156] Karl Liebknecht, 'Militarismus und Antimilitarismus [1907]', in: Liebknecht, *Gesammelte Reden und Schriften* (Berlin [GDR], 1958), pp. 247-456, at pp. 414, 427-428, 443-444.

[157] Karl Kautsky, 'Der erste Mai und der Kampf gegen den Militarismus', in: *Die neue Zeit*, vol. 30, part II (1912), pp. 97-109. Pacifist Max Huber, 'Beiträge zur Kenntnis der soziologischen Grundlagen des Völkerrechts und der Staatengesellschaft', in: *Jahrbuch des öffentlichen Rechts* 4 (1910), pp. 56-143 [newly edited as a monograph

this practice and drew the conclusion that expansion through cartelisation would result in the restriction of rivalries among the colonial governments and, eventually, lead to the stabilisation of colonial rule.[158] This imperialist international had, such was their diagnosis on the eve of World War I, more political clout than the Socialist International and might even protract the socialist revolution.

During World War I, Lenin produced his widely known pointed attack on the theory of "ultra imperialism", which he had initially welcomed.[159] In his critique, Lenin identified the war as a military conflict about colonial rule and concluded that colonial rule was to precipitate the socialist revolution.[160] However, the starting point of Lenin's attack was the claim, now recognised as unfounded, that the theory of "ultra imperialism" had been formed in September 1914. After the beginning of the war, according to Lenin, it should have been evident to socialist theorists that the war could not possibly have resulted in the stabilisation of colonial rule. Yet, as colonialism effectively continued throughout and beyond the war, Lenin's attack did not obstruct the dissemination of the theory, which continued to be argued during the 1920s.[161]

At the turn towards the twentieth century, socialist critics as well as military and political strategists in the foreign and war ministries of colonial governments diagnosed an increasing global interdependence of the bilateral relations among states and articulated fears that maintaining stability within the club of privileged states was becoming ever more difficult. They assumed that planning "world politics" as the estimation of chance occurrences could only be possible as long as credible information about the strategies of all globally active colonial governments was ascertainable. But such information appeared to become ever more difficult to obtain. Which government was engaging in the build-up of arms, might be determined, but the causes of the increase in military potential, might not be detectable. Even special envoys sent out on finding missions could hardly penetrate the veils of secrecy that surrounded foreign policy decision-making.[162] Moreover, there was no doubt that governments of the larger European states, specifically the British, French and German ones, were engaged in global rivalries. But which global repercussions might come up when one of these governments decided to grab a certain spot in some part of the world, remained unclear, despite the decisions of the Berlin Africa Conference. One of the most experienced contemporary observers, British diplomat Ernest Mason Satow (1843 – 1929), therefore noted that the purchase of secret information through bribes was more or less generally practiced.[163] "World politics" thus corrupted its most important agents. Moreover, calculations concerning "world politics" became even more awkward in consequence of networks of alliances, combined with the international legal recognition of neutral states such as Belgium since 1830 and Switzerland since 1814/15. For one, the German Empire maintained such alliances, some in secret terms, with Austria-Hungary[164] and, for a while,

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(Internationalrechtliche Abhandlungen, 2) (Berlin, 1928)], at pp. 69-70, concurred, expecting the compatibility of the formation of a "society of states" with ideologies of imperialism and foreseeing, in the case of the establishment of such a society, "the subordination of medium-sized and small states".

158 Karl Kautsky, 'Der imperialistische Krieg (Teil 2) ', in: *Die neue Zeit*, vol. 35, part II (1917), pp. 475-487, at p. 483.

159 Vladimir Il'ič Lenin, [Preface to: Nikolai Bucharin, The World Economy and Imperialism, written December 1915], in: Lenin, *Werke*, vol. 22 (Berlin [GDR], 1972), pp. 101-106.]

160 Vladimir Il'ič Lenin, *Imperialism. The Highest Stage of Capitalism* [written 1916, first published 1917], edited by Norman Lewis and James Malone (London and Ann Arbor, MI, 1996).

161 Rudolf Hilferding, 'Realistischer Pazifismus', in: *Die Gesellschaft*, vol. 1, part 2 (1924), pp. 97-114.

162 For a case see: Richard Haldane, Viscount of Haldane, 'Memorandum, 25 March 1912', in: Johannes Lepsius, Albrecht Mendelssohn-Bartholdy and Friedrich Thimme, eds, *Das Scheitern der Haldane-Mission und ihre Rückwirkung auf die Tripelentente*, Nr 11422 (Die Grosse Politik der Europäischen Kabinette, 31) (Berlin, 1927), pp. 205-208.

163 Ernest Mason Satow, *A Guide to Diplomatic Practice*, vol. 2 (London, 1921), p. 144 [reprint of the original edn (Satow, Collected Works, vols 8, 9) (Tokyo, 1998); further reprint (Oxford, 2009); sixth edn, edited by Ivor Richards, *Satow's Diplomatic Practice* (London, 1979)].

164 Treaty Austria-Hungary – German Empire, Vienna, 7 October 1879, in: *CTS*, vol. 155, pp. 304-305; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 421-422.

with Russia[165] and Italy as well. Since the 1890s, France, Russia and the UK[166] moved closer to each other into an entente, so that two opposing camps faced each other. The British and the Japanese governments forged an alliance in 1902, guaranteeing a free hand to Japan over East Asia, to the UK over South Asia.[167]

The beginning of World War I rendered useless these carefully executed plans of "world politics" and of "world domestic politics" alike. In the course of the negotiations conducted among governments in Berlin, London, Paris, St Petersburg and Vienna at the end of July 1914, the impending launch of a war was already part of calculation. In these negotiations, whose declared purpose it was to confine the war to Europe, its potential impact on colonial rule was crucial. This was so because, in the perception of negotiators, European states entering into the war would do so together with the colonial dependencies under their sway. By consequence, even if the war might be restricted to European theatres, its impact was to be innately global in kind.[168] Furthermore, the attempt to confine the war to Europe failed already in August 1914 with the entry of Japan, Australia and New Zealand as belligerents, whose naval forces occupied territories under German colonial control in the South Pacific. Simultaneously, a Japanese contingent placed the German "Protectorate" Kiautschou (Tsingtau) under siege and conquered it in November 1914. In the course of the war, international law appeared to have "miserably collapsed" (elend zusammengestürzt).[169] But this position, with which activists of the international peace movement placed war in principled opposition against the law, met with staunch resistance from jurists. The Berlin publicist Heinrich Triepel (1868 – 1946), who was not a supporter of the international peace movement, put on record his view in 1916 that no such thing as the "collapse" of international law, including the law of war, had actually happened. In his analysis, the war had left the law of peace completely untouched and even several norms of the law of war had "not been violated" (unverletzt geblieben) and, "despite several cracks that its body had received, was still alive" (trotz mancher Risse und Sprünge, die sein Körper erhalten hat, annoch am Leben) and even had a future.[170] Triepel insisted that "narrowing the realm of free decision-making among belligerents" (Ermessen der Kriegsparteien ... nach Möglichkeit einzuengen) remained the "goal of the making of international law" (Ziel internationaler Rechtsbildung).[171] However, he admitted that the "making of international law" could begin only after the end of the war.

The military conflict between the German Empire and Austria-Hungary, Italy (to 1915), Turkey (from 1914) and Bulgaria (from 1915) on the one side, France, Japan, Russia, the UK and the USA (from 1917) on the other as well as their alliance partners was a global war not only in its numerical and geographical dimensions by virtue of the fact that altogether 36 states on all continents had entered it. It also was a global war in the deeper political sense that it involved all major colonial governments. World War I therefore was also a conflict about colonial rule. The contemporaries in Europe experienced it as an unprecedented sequence of events, which, however, could be counted as the "First" World War only in retrospect after the carnage of "Second" World War.[172]

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[165] Treaty German Empire – Russia, 18 June 1887, in: *CTS*, vol. 169, pp. 318-325; auch in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 430-432.

[166] Military Convention France – Russia, 12 August 1892, in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 436-437. Treaty France– UK [Moroco], 8 April 1904, in: *CTS*, Bd 195, S. 201-205; also in: Grewe, *Fontes* (as above), pp.436-445. Treaty France – UK (1904) (note 79), pp. 206-216. Treaty Russia – UK, 31 August 1907, in: *CTS*, vol. 204, pp. 404-409.

[167] Treaty Japan – UK, 30 January 1902, in: *CTS*, vol. 190, pp. 487-488; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin and New York, 1992), pp. 447-449. On the alliance see: Ian Hill Nish, *The Anglo-Japanese Alliance* (London, 1966) [second edn (London, 1985)].

[168] For a close contemporary analysis see: Otfried Nippold, *"Die Ursachen des Europäischen Krieges"* [1915], edited by Harald Kleinschmidt and introduced by Akio Nakai (Munich, 2005).

[169] Heinrich Triepel, *Die Zukunft des Völkerrechts* (Vorträge der Gehe-Stiftung, issue 8, nr 2) (Leipzig and Dresden, 1916), p. 32.

[170] Ibid., pp. 33, 32, 35.

[171] Ibid., p. 29.

[172] For a survey see: David Reynolds, *The Long Shadow. The Great War and the Twentieth Century* (London, 2013).

International Law as an Instrument for the Legitimation of Colonial Rule

European colonial rule did not come into existence outside legal frameworks but on the basis of treaties under international law. As they had been made out among partners in Europe and North America on the one side, in Africa, Asia and the South Pacific on the other since the early nineteenth century, these treaties remained valid legal instruments, thereby putting on record the reciprocal recognition of the sovereign equality among their signatory parties. Theorists of international law adhered to the principle of the absolute independence and legal equality of all sovereign states, even though this principle had been inherited from eighteenth-century natural law doctrine, and thereby rejected the pursuit of the unilateral cancellation of valid treaties as a legitimate procedure.[173]

By the same standard, strategies of military conquest and occupation were hard to justify, when entire continents or subcontinents were to be placed under colonial rule. Indeed, the Final Act of the Berlin Africa Conference prescribed effective "occupation" as a means to document actual colonial control for all conference participants.[174] But this norm applied only to existing forms of colonial rule, while it did not regulate the modalities by which colonial rule might be established. Colonial governments often took the pragmatic path of recruiting mercenaries from among the population groups coming under their sway, thereby avoided the deployment of large contingents of armed forces under their direct command. In view of the lack of generally agreed legal norms for the establishment of colonial rule, the only available strategy for the legalisation of colonial rule was the reconceptualisation of the public law of treaties between states.

Mainly British theorists devoted themselves to the task of rephrasing international law so as to make it compatible with the demands of colonial rule. Foremost among them were John Westlake (1828 – 1913), incumbent to the Whewell Professorship of International Law at the University of Cambridge, and his successor Lassa Francis Lawrence Oppenheim (1858 – 1919). They did so by way of supporting the principle that the concept of sovereignty should be set apart from the related concept of subjecthood under international law.[175] The recognition of sovereignty, specifically in connection with the recognition of statehood was undeniable with regard to states that were parties to valid treaties with states in Europe and North America. Therefore, both theorists chose to define subjecthood under international law irrespectively of acknowledged sovereignty as the complete capability of state legal, political and military action without material or spatial restrictions. They detected this capability only in those sovereign states in Africa, South and Southeast Asia as well as the South Pacific, which they were willing to recognise as "civilised", whereby they did not see any need to specify what they meant by "civilisation". The concepts of the state and of "civilisation" appeared to have become so closely tied together in the context of international law that the meaning of "civilisation" could appear to be self-evidently consociated with European state practice. Put differently, both theorists assumed that only a state with "civilisation" in the European rendering could be a subject by international law.[176]

By implication, theorists limited the features of "civilisation", as it was constructed in Europe, to sedentary state populations residing under the control of a single central government on a territory demarcated through linear borders, further to the governmentality of state populations, the existence of systems of family, civil, property, trade and criminal law as well as some select aspects of culture, among them literacy as the generally applied standard of communication. Theorists classed as "uncivilised" states not displaying these features.[177] States, allegedly inhabited by migrating "tribes", were, by consequence, not to be admitted as international legal subjects.[178]

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[173] Travers Twiss, *The Law of Nations Considered as Independent Political Communities*, vol. 1 (Oxford, 1863), p. 11 [second edn (Oxford, 1875); new issue of the second edn (Oxford, 1884); reprint of the edn of 1884 (Littleton, CO, 1985)].

[174] Berlin Africa Conference (note 72), Art. 35, p. 501.

[175] Westlake, *Chapters* (note 154), pp. 177-178. Oppenheim, *Law* (note 97), vol. 1, § 226, p. 281.

[176] Arrigo Cavaglieri, 'La conception positive de la société internationale', in: *Revue générale de droit international public* 18 (1911), pp. 259-276, at pp. 268-269; Otfried Nippold, 'Das Geltungsgebiet des Völkerrechts in Theorie und Praxis', in: *Zeitschrift für Völkerrecht und Bundesstaatsrecht* 2 (1908), pp. 460-492, at p. 464.

[177] Hall, *Treatise* (note 154), pp. 100, 114-115, 125-127.

[178] Lawrence, *Principles* (note 96), §§ 44, 90, pp. 58, 136.

Populations seemingly lacking "civil society" were ranked as ignorant of the notion of landed property and thus appeared to be "hordes".[179] Reviewing the results of the Berlin Africa Conference of 1884/85, the Tübingen jurist Ferdinand von Martitz (1834 – 1921) found that "districts wherein savages and semi-savages are roving, cannot be accepted and treated as state territories" (Reviere, in denen Wilde und Halbwilde hausen, nicht als Staatsterritorien anzusehen und zu behandeln).[180] By consequence, norms of positive international law were, according to James Lorimer (1818 – 1890), a publicist teaching at the University of Edinburgh, not to be applied to "savages" (l'humanité sauvage). These norms could, Lorimer assumed, not be applied to "savages" because "savages" could only demand "natural recognition" (reconnaisance naturelle), whereby he meant recognition in accordance with some "natural" condition of existence only, but not as inhabitants of states in terms of positive international law.[181] Philosopher John Stuart Mill (1806 – 1873) seconded with the argument that what he called "international morality" demanded reciprocity of rights and obligations, and contended that "rules of ordinary international morality imply reciprocity. But barbarians will not reciprocate." Mill was even convinced that "nations which are still barbarous have not got beyond the period during which it is likely to be for their benefit that they should be conquered or held in subjection by foreigners."[182] Legal philosophers took the same position claiming that the allegedly "savage freedom" of "barbarians" should "become subject to ordered rule" and that such practice was "as little illegal as it was in the sphere of private law to put under guardianship a wholly or partly insane person" (wilde Freiheit einer geordneten Herrschaft unterzuordnen [ist] so wenig rechtswidrig, als es in der Sphäre des Privatrechts unerlaubt ist, einen ganz oder theilweise unzurechnungsfähigen Menschen einer Curatel zu unterwerfen). This perspective classed purported "savages" as deviants from some unstated norm.[183] The Bonn legal philosopher Ferdinand Walter (1794 – 1879) concluded that areas, in which so-called "savages" were living, could be occupied legally. This, he thought, could be so because "occupation of savage nations, which do not acknowledge a community of states, is not an infringement of international law" (gegen wilde Völker, welche keinen völkerrechtlichen Verband anerkennen, ist Occupation nicht wider das Völkerrecht).[184] Nineteenth-century theorists thus licensed the subjection to the control of American and European states of groups that they were not willing to recognise as "civilised".[185]

In application of this notion of "civilisation", theorists would regard as subjects by international law only states in America and Europe, which had been admitted to the "family of nations" as the club of privileged states, while they would deny that status to most states in other parts of the world, except Japan, Persia (Iran), Siam (Thailand), Liberia and Ethiopia. For one, Westlake opined that states outside the "family of nations" did not have a right to be recognised as

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[179] Theodor von Schmalz, *Das europäische Völkerrecht* (Berlin, 1817), pp. 4-5 [reprint (Frankfurt, 1970)].

[180] Ferdinand Carl Ludwig Ahasverus von Martitz, 'Das Internationale System zur Unterdrückung des Afrikanischen Sklavenhandels in seinem heutigen Bestande', in: *Archiv des öffentlichen Rechts* 1 (1885), pp. 3-10, at pp. 16-17.

[181] James Lorimer, *The Institutes of the Law of Nations*, vol. 2 (Edinburgh and London, 1884), p. 27; Lorimer, 'La doctrine de la reconnaisance, fondament du droit international', in: *Revue de droit international et de législation comparée* 16 (1884), pp. 333-359, at p. 335.

[182] John Stuart Mill, 'A Few Words on Non-Intervention', in: Mill, *Dissertations and Discussions. Political, Philosophical and Historical*, vol. 3 (London, 1867), pp. 153-178, at p. 168 [first published in: *Fraser's Magazine* (1859); also in: Mill, *Essays on Politics and Culture*, edited by Gertrude Himmelfarb (Garden City, 1963), pp. 368-384].

[183] Kraft Karl Ernst Freiherr von Moy de Sons, *Grundlinien einer Philosophie des Rechts aus katholischem Standpunkte*, vol. 2: Grundlinien einer Philosophie des Staats- und Völkerrechts aus katholischem Standpunkte (Vienna, 1857), § 67.

[184] Ferdinand Walter, *Naturrecht und Politik im Lichte der Gegenwart*, § 467, second edn (Bonn, 1871), p. 361 [first published (Bonn, 1863)]. At the turn towards the twentieth century, this argument found wide reception even among imperialists in Japan. For one, Kazutami Ukita declared the 'absorption of barbarous countries or lands of anarchy' … 'not at all immoral', and propagated what he termed 'ethical imperialism' as a means to promote 'civilisation'. See: Kazutami Ukita, *Teikokushugi to kyōiku* (Tokyo, 1901). Ukita, 'Teikokushugi no risō', nr 8, in: *Kokumin Shinbun* (21 January 1902). Ukita, 'Taiyō no dokusha ni tsugu', in: *Taiyō*, vol. 15, nr 2 (February 1909), pp. 1-3, at p. 2.

[185] John Stuart Mill, 'Civilization [1836]', in: Mill, *Essays on Politics and Society*, edited by John M. Robson (Mill, Collected Works, vol. 18) (Toronto, Buffalo and London, 1977), pp. 117-147.

international legal subjects, even if they were states; instead, Westlake demanded that access to membership in the "family of nations" should require permission from its members.[186] The Vienna-based activist and Peace Nobel Laureate Alfred Hermann Fried (1864 – 1921) limited the number of international legal subjects even further to states he was willing to accept as members of some "European-American Cultural Area".[187] By contrast, theorists classed states outside the "family of nations" as objects of concocted civilising missions, whereby subsequent annexation could be explicitly reserved as a feigned legal entitlement. Already the historian and social scientist Wilhelm Roscher (1817 – 1894) coined the term "culture colony", which he defined as a settlement established to the end of the alleged "civilising" of an apparently "crude nation" (eines rohen Volkes) by purportedly "better educated colonists".[188] Following such propaganda, the 1868 treaty between France and Madagascar explicitly justified the French government intervention in the domestic affairs of its treaty partner as a mission "for the purpose of putting the government and people of Madagascar on the march towards civilisation and progress". The French government pledged to dispatch "education officers, engineers, scientists and technical instructors" to accomplish that mission.[189] In order to support their restrictive handling of the notion of international legal subjecthood, theorists resorted to the concocted argument that populations "outside the European-American cultural area" did not or not fully "occupy" the state territory, were thus apparently leading some sort of nomadic life without a head of the state, were seemingly ignorant of European concepts of statehood and, by consequence, appeared to be incapable of securing governmentality in the sense of keeping the monopoly of the use of force. Within philosophical perspective, the conclusion simply was: "With savage nations, ignorant of concepts of the law, treaties cannot be concluded, contrary to what Kant demanded." (Mit wilden Völkern, denen die Rechtsbegriffe mangeln, lassen sich schlechterdings keine Verträge schließen, wie das Kant fordert)[190] Resistance against colonial rule was thus an act of rebellion. Theorists were explicitly unwilling to place colonial dependencies as so-called "protectorates" under the rule of the "military law" (Militärrecht), because, so they argued, populations under "protectorate rule" did not have their own regular armed forces and were thus dependent upon the 'protection' of the "protecting power".[191]

Few theorists voiced opposition against these views. Foremost among them was Henri Bonfils (1835 – 1897), publicist at Bordeaux. From the existence of large numbers of bilateral agreements by international law, Bonfils drew the conclusion that most European governments had respected the independence of the purportedly "barbaric nations" (peuples barbares).[192] Yet the majority of theorists chose to regard as "lordless" the sovereignty of these states and stuck to the view that this type of sovereignty did not provide sufficient grounds for the recognition of international legal subjecthood.[193] Nevertheless, some theorists did warn that total occupation of such allegedly "lordless" states could not be established except on the basis of treaties of cession or through the use of military force.[194] Specifically Westlake and Oppenheim subsumed these states under their category of the "protectorate" and Oppenheim even believed that the "protectorate" included an "inchoate title" to occupation and annexation at the discretion of the "protectorate"

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[186] Westlake, *Chapters* (note 154), p. 82.

[187] Fried, *Handbuch* (note 125), vol. 1, second edn, pp. 14-15.

[188] Roscher, *Kolonie* (note 46), p. 34.

[189] Treaty France – Madagascar (1885) (note 90), Art. XIV, p. 136.

[190] Peter Resch, *Das Völkerrecht der heutigen Staatenwelt europäischer Gesittung*, § 24, second edn (Graz and Leipzig, 1890), p. 34 [first published (Graz and Leipzig, 1885)].

[191] Conrad Bornhak, 'Die Anfänge des deutschen Kolonialstaatsrechts', in: *Archiv des öffentlichen Rechts* 2 (1887), pp. 3-53, at p. 37.

[192] Bonfils, *Manuel* (note 94), nr 545, p. 360. See also: August Wilhelm Heffter, *Das europäische Völkerrecht der Gegenwart*, § 70 (Berlin, 1844), p. 145 [second edn (Berlin, 1848); third edn (Berlin, 1853-1855); fourth edn (Berlin, 1861); fifth edn (Berlin, 1867); sixth edn (Berlin, 1873); seventh edn (Berlin, 1881); eighth edn (Berlin, 1888)]. John Atkinson Hobson, *Towards International Government* (London, 1915).

[193] Charles Salomo, *De l'occupation des territoires sans maîtres*. LLD Thesis (University of Paris-Sorbonne, 1889), p. 197.

[194] Oppenheim, *Law* (note 97), vol. 1, § 221, p. 276.

holder; the sole reason, in his view, was that populations in the "protectorates" allegedly lived in "tribal communities only".[195] Consequently, Oppenheim declared bindingless any agreement that might have been concluded between colonial governments and victims of colonial rule, as he was unwilling to accept most parties to treaties outside Europe and America as members of the "family of nations".

For his part, Westlake explicitly included into his concept of the "protectorate" all forms of dependent, even occupied areas. In his view, in states that had come under or were located in some "protectorate" of a European government, the holders of the "protectorate" could claim all land for themselves, except plots that could be identified as being in private ownership in the sense of European land law. The "protectorate" administration was to classify land as vacant if it did not appear to stand in private ownership and make it available to settler colonists for the purpose of establishing plantations. Rulers and governments within the "protectorates" were to lose their competence to conduct their own foreign policy and became obliged to surrender control over all international relations to the "protectorate" holders. In the case of war, the "protectorates" were to be neutralised.[196] In cases where the British government had established its "protectorates", states outside Europe, Westlake argued, had not lost their autonomy in consequence of some epochal declaration of British sovereignty over them, but simply through the unilateral change of the foreign policy of the British government.[197] Even though, Westlake concluded, the sovereignty of the states had not fallen victim to the British "protectorate" regime, so had their international legal subjecthood. The fact that the British government itself perceived these states as retaining their statehood, is amply on record, as it recognised a newly established government in Fiji[198] as late as in the 1870s, in 1933 concluded a treaty by international law with the government of Bunyoro located within the then British "Uganda Protectorate" and, as late as in 1952, officially recognised the Sultanate of Johore on the Malay Peninsula as a sovereign state.[199]

Moreover, the unilateral shift of foreign policy goals of a European government was not always as easy as Westlake imagined it. For example, when the Italian government decided to interpret its treaty with Ethiopia as if the Ethiopian government had, through the treaty, requested the establishment of an Italian "protectorate", Emperor Menilek II protested with reference to the treaty's wording in the Amharic version.[200] In Article XVII of the treaty, Menilek argued, no "protectorate" had been mentioned, contrary to the Italian assertion, and the Ethiopian government had never asked for a "protectorate" from anyone. Hence, Menilek accused the Italian government of having misrepresented the treaty when making out the Italian version, and declared the entire agreement null and void. Menilek also campaigned for international support and approached the German Kaiser Wilhelm II, well aware of the fact that the German Empire and Italy were tied together in an alliance. Menilek expected that Wilhelm II might be the appropriate intermediary.[201] Wilhelm did not take up the requested role and the controversy over the text of the treaty continued, and, eventually, turned into the Ethiopian-Italian war of 1896.

Johann Caspar Bluntschli, publicist at the University of Heidelberg, already in 1868 concocted a doctrine that could serve as an instrument for the legitimation of colonial rule. To him, "colonial states" (Colonialstaten) were subordinated to the "mother state" (Mutterstate), but had been granted the status of 'semi-sovereign states' (halbsouveräne Staten) by the "mother states". Bluntschli explicitly restricted the applicability of this type of states to the European settler colonies

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195 Ibid., vol. 1, § 226, p. 281.

196 Westlake, *Chapters* (note 154), pp. 177-178.

197 Ibid., p. 205.

198 E. A. Crane, *King Cakobau's Government. Or An Experiment in Government in Fiji. 1871 – 1874*. M. A. Thesis (Wellington: Victoria University, 1938).

199 Treaty Bunyoro – UK, 23 October 1933, in: Neville Turton, John Bowes Griffin and Arthur W. Lewey, eds, *Laws of the Uganda Protectorate*, vol. 6 (London, 1936), pp. 1412-1418. Daniel Patrick O'Connell, 'Independence and Succession to Treaties', in: *British Yearbook of International Law* 38 (1962), pp. 84-180, at p. 171.

200 Treaty Ethiopia – Italy, 2 May 1889, in: *CTS*, vol. 172, pp. 95-99.

201 Menilek [Menelik] II, Emperor of Ethiopia, '[Letters to Wilhelm II, German Emperor, 27 February 1893, and 13 December 1893]', edited by Bairu Tafla, *Ethiopia and Germany. Cultural, Political and Economic Relations. 1871 – 1936* (Äthiopistische Forschungen, 5) (Wiesbaden, 1981), pp. 219, 224-229.

in Canada and Australia.[202] Against this concept of "colonial states", Bluntschli set what he termed "several dependent countries" (mancherlei Nebenländer) that had been "subjected to the main state through conquest" (durch Eroberung dem Hauptstate unterworfen), and specified "the East Indian countries" and "Algiers" as examples, respectively under British and French control. In these "dependent countries", Bluntschli assumed, it was "more difficult to develop them into independent statehood than in the colonial states proper" (es schwerer, dieselben zu statlicher Selbständigkeit herauszubilden, als die eigentlichen Colonialländer).[203] Bluntschli's distinction is remarkable because it appeared prior to the Berlin Africa Conference, the carving up of the African Continent and the European and US government expansion to the South Pacific. Bluntschli thus would not accept the premise that there was a conflict between the European public law of treaties among states and the power politics of colonial governments. Any kind of rule that was not based on European overseas settler colonies had, in Bluntschli's world view, resulted from military conquest and was legitimate as the legal result of military occupation. The existence of military occupation excluded the recognition of the sovereignty of occupied population groups. If "semi-sovereign" states existed beyond the confines of Europe, they owed their status, Bluntschli concluded, to privileges issued by the colonial governments. International law in Bluntschli's making was thus not suitable as an instrument for the regulation of the relations between European colonial governments and their dependencies elsewhere in the world. In the case of Native Americans, the US government had, according to Bluntschli's doctrine, no reason to give out any privileges amounting to the recognition of some "semi-sovereign" status. Hence, states like that of the Cherokee were no subjects of international law. Bluntschli excluded the "several dependent countries" from the range of the applicability of international and, by consequence, delegitimised any resistance against colonial rule that might arise in these dependencies. In his view, the law of war was not valid for military conflicts between European states and the "several dependent countries".

However, the results of the Berlin Africa Conference rendered untenable Bluntschli's simple conceptual distinction between colonial states and "several dependent countries". This was so, because the conference prescribed the recognition of existing treaties by international law and because the sheer dimension of the expansion of colonial rule since the 1880s rendered incredible Bluntschli's trivialising phrase. However, international legal theory quickly adopted the legal framework created at the Berlin Africa Conference. The Munich publicists Franz von Holtzendorff (1829 – 1889) and Karl von Stengel (1840 – 1930), together with the criminalist Franz von Liszt (1851 – 1919), took a stand against the wording of the treaties and claimed that the "protectorates" which European governments had subjected to their control, were neither organised as states nor "semi-sovereign" nor "overseas protectorates" at all: "First and foremost, no reference can be made to the conditions, here under review, as states newly formed on deserted land or in areas inhabited by nomads. Any contractually agreed distinction between superior and inferior states is impossible for the sole reason that chiefs of barbarian tribes entirely lack elementary concepts of the life of states." (Zunächst kann bei den hier in Betracht kommenden Verhältnissen von neustaatlichen Bildungen auf wüsten oder von Nomadenstämmen bewohnten Gebieten überhaupt keine Rede sein. Vertragsmäßig vereinbarte Abgränzung staatlicher Competenzen zwischen Unterstaaten und Oberstaaten wird schon aus dem Grund unmöglich, weil den Häuptlingen barbarischer Völkerstämme die Elementarbegriffe des staatlichen Lebens überhaupt fehlen.)[204]

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[202] Johann Caspar Bluntschli, *Das moderne Völkerrecht der civilisierten Staten*, § 79 (Nördlingen, 1868), pp. 95-96 [second edn (Nördlingen, 1872); third edn (Nördlingen, 1878)].

[203] Ibid., **§** 80, p. 96. The word *Nebenländer* was a technical term used in eighteenth-century statistics for territories attached to the territory of state in consequence of rulers' marriages, trade relations or military conquests: Gottfried Achenwall, *Vorbereitung zur Staatswissenschaft der heutigen europäischen Reiche und Staaten* (Göttingen, 1748), p. 15. § 17.

[204] Holtzendorff, 'Staaten' (note 95), § 27, S. 115-116. Franz von Liszt, *Das Völkerrecht systematisch dargestellt*, § 10, ninth edn (Berlin, 1913), S. 98 [first published (Berlin, 1898);second edn (Berlin, 1902); third edn (Berlin, 1904); fourth edn (Berlin, 1906); fifth edn (Berlin, 1907); sixth edn (Berlin, 1910); sevent edn (Berlin, 1911); eighth edn (Berlin, 1912); tenth edn (Berlin, 1915); eleventh edn (Berlin, 1920); twelfth edn, edited by Max Fleischmann (Berlin, 1925)]. Karl Michael Joseph Leopold Freiherr von Stengel, 'Die Deutschen Schutzgebiete, ihre rechtliche Stellung, Verfassung und Verwaltung', in: *Annalen des Deutschen Reiches für Gesetzgebung,*

Holtzendorff, for one, thus took for granted that the European perception of population groups in Africa, West, South, Southeast Asia and the South Pacific as allegedly "uncivilized nomadic tribes" (unzivilisierte Nomadenstämme) was not only based on facts gathered by some purportedly "scientific anthropology and ethnology" (wissenschaftliche Menschen- und Völkerkunde),[205] and he added the conclusion that population groups inhabiting these dependencies should not be credited with the status of residents of states. In Holtzendorff's perspective, territories that appeared neither to be demarcated in terms of linear borders nor inhabited by sedentary population groups, were, when they came under the sway of European colonial governments, not to be considered as subsumable into the then popular European concept of the state.[206] Holtzendorff would not admit the counter-evidence of the wording of most of the treaties, as he denied the status of executive governments to the treaty partners of the European colonial governments in Africa, West, South, Southeast Asia and the South Pacific. Their representatives were, to him, allegedly non-governmental "chiefs" of "barbarian tribes", completely lacking "any legal consciousness" (überhaupt jedes Rechtsbewusstsein)[207] Because the treaty partners to the European governments appeared to lack the capability of exercising "stable rule of the entire state" (stabiler Herrschaft über den gesamten Staat),[208] the conclusion was that the treaties were not to be seen as related to the so-called "natives" but to Europeans that happened to be present on the spot. Holtzendorff and his fellow jurists left no doubt[209] that the treaties did not provide "protection" to the so-called "natives". Instead, according to Karl Gareis, the "establishment of protectorate power" (Errichtung einer Schutzgewalt) was to be understood as a "justifiable restriction of the power of a native state" (zu rechtfertigende Beschränkung der Staatsgewalt des Eingeborenenstaates) with a "population at a lower level of culture" (kulturell tiefer stehender Bevölkerung).[210] In this perspective, colonial governments appeared to be legitimised to categorise as "lordless" all land in the "protectorates" that did not appear to be identifiable as standing in private ownership according to European ownership standards. The land was then classed as unused by seemingly roving "nomads" and could, Stengel believed, be transferred into the ownership of settler colonists for agricultural exploitation.[211] Holtzendorff and other jurists concurred explicitly by granting to colonial European governments some "right of conquest" (Eroberungsrecht) or even something equivalent of a right to state destruction.[212]

Verwaltung und Statistik (1889), pp. 1-212, at p. 14.

[205] Carl Friedrich Vollgraff, *Erster Versuch einer wissenschaftlichen Begründung sowohl der allgemeinen Ethnologie durch die Anthropologie wie auch der Staats- und Rechts-Philosophie durch die Ethnologie oder Nationalität der Völker*, part 2: Ethnognosie und Ethnologie oder Herleitung, Classification und Schilderung der Nationen nach Maasgabe der Cultur- und Raçe-Stufen (Marburg, 1853); part 3: Polignosie und Polilogie. Oder: Genetische und comparative Staats- und Rechts-Philosophie auf anthropologischer, ethnologischer und historischer Grundlage (Marburg, 1855). Vollgraff, *Staats- und Rechtsphilosophie auf Grundlage einer wissenschaftlichen Menschen- und Völkerkunde*, part 1: Die Menschen- und Völkerkunde als wissenschaftliche Grundlage der Staats- und Rechtsphilosophie, new edn, §§ 14-17 (Frankfurt, 1864), pp. 26-34 [first published (Frankfurt, 1851)].

[206] Johann Caspar Bluntschli, *Allgemeines Statsrecht*, fourth edn, book III, chap. V/1 (Munich, 1868), p. 261 [first published (Munich, 1851); sixth edn (Munich, 1876)]. Conrad Bornhak, *Allgemeine Staatslehre* (Berlin, 1896), p. 10. Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), pp. 394-434 [second edn (Berlin, 1905); third edn (Berlin, 1913); seventh reprint of the third edn (Bad Homburg, 1960)].

[207] Alphonse Pierre Octave Rivier, *Lehrbuch des Völkerrechts*, book 1, § 1, second edn (Stuttgart, 1899), p. 3 [first published as: *Principes du droit des gens*, 2 vols (Paris, 1896)].

[208] Westlake, *Chapters* (note 154), p. 103.

[209] Ferdinand Lentner, *Das internationale Colonialrecht im neunzehnten Jahrhundert* (Vienna, 1886), pp. 42-50.

[210] Karl Gareis, *Deutsches Kolonialrecht*, second edn (Gießen, 1902), p. 2 [first published (Gießen, 1888)].

[211] Karl Michael Joseph Leopold Freiherr von Stengel, 'Deutsches Kolonialstaatsrecht mit Berücksichtigung des internationalen Kolonialrechts und des Kolonialstaatsrechts', in: *Annalen des Deustschen Reiches für Gesetzgebung, Verwaltung und Statistik* (1887), pp. 309-398, 865-957, at pp. 329-330. Stengel, 'Schutzgebiete' (note 204), p. 25.

[212] Franz von Holtzendorff, *Eroberungen und Eroberungsrecht* (Sammlung gemeinverständlicher wissenschaftlicher Vorträge, series 6, vol. 144) (Berlin, 1871). Pasquale Fiore, 'Du protectorat colonial et de la sphère d'influence (hinterland)', in: *Revue générale de droit international publique* 14 (1907), pp. 148-159, at p. 150. Vico Mantegazza, *Tripoli e i diritti della civiltà* (Milan, 1912), p. 23. The full extent of the discriminatory practice of the

Shortly after Gareis, Holtzendorff, Liszt and Stengel, Oppenheim refused to apply the legal statutes of "protectorates" beyond the confines of Europe. Instead, Oppenheim postulated that areas termed "protectorates" in treaties were simply being and reserved for future occupation by European colonial governments. Not merely Oppenheim and Westlake but also Lorimer constructed the American and European "family of nations" as a club of privileged holders of claims to rule over overseas dependencies.[213] Religious confession, Oppenheim opined, was not decisive alone as a criterion for admission, but what mattered more was the standard of "civilisation" that a population group appeared to have reached. No guarantee of the use of European public law of treaties between states could, by consequence, be extended to treaty partners of European colonial governments, when these treaty partners would not qualify for admission to the "family of nations". According to this doctrine, the victims of European colonial rule were under occupation even when the wording of treaties put on record the recognition of their existence as sovereign states. Oppenheim explicitly referred to Bluntschli and even radicalised the position of the latter: the status of the so-called "protectorates", allocated to apparently "depending countries" under "chiefs of tribes", was, he made clear, just an "inchoate title" for future occupation recognised among European colonial governments.[214] Hence, Oppenheim summed up his position, treaties between holders of "protectorates" and those "chiefs" had no binding effect on the relations between the signatory parties.

Needless to say that these concoctions not only were irreconcilable with existing treaty obligations, but also stood in stark opposition against perceptions and convictions of the victims of European colonial rule. Thus, King Jaya of Opobo (1821 – 1891) in what is Nigeria today reminded the British government in 1886 of its duty to abide by a treaty that had been signed in 1886 and which confirmed Opobo sovereignty. Noting that the treaty established "the sole basis that there should be no interference whatever with regard to our laws, rights and privileges of our markets etc.", he complained that "at the present we are at a loss to find that we have been misled." The statement put on record full knowledge of the concept of sovereignty as used on the European side together with the firm conviction of the need to honour the basic norm *pacta sunt servanda*. Likewise, when tensions intensified between the Herero and Nama on the one side, the German Empire on the other, the head of the Nama state took it for granted that he was in possession of the *ius ad bellum* and declared war against the German Empire.[215]

European and the US governments implemented these theoretical designs and not only employed international law for concoctions of the legitimacy of establishing and maintaining colonial rule but also used treaties as the legal basis for the transfer or exchange among each other of control over territories in various parts of the world. Among others,[216] agreements came into

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making of treaties between European and the US governments on the one side, rulers and governments in Africa, West, South, Southeast and East Asia as well as the south Pacific has not been recognised in the research literature on the history of treaties by international law. For insufficient studies see: Charles Henry Alexandrowicz, *The European-African Confrontation. A Study of Treaty-Making* (Leiden, 1973), pp. 29-105. Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge, 2005), pp. 65-100. Jan-Hendrik Conrad, *Die Geschichte der ungleichen Verträge im neueren Völkerrecht* (Wissenschaftliche Beiträge aus dem Tectum-Verlag. Reihe Rechtswissenschaften, 6) (Marburg, 1999). Matthew C. R. Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire', in: Craven and Malgosia Fitzmaurice, eds, *Interrogating the Treaty. Essays in the Contemporary Law of Treaties* (Nijmegen, 2005), pp. 43-80. Gerry J. Simpson, *Great Powers and Outlaw States. Unequal Sovereigns in the International Legal Order* (Cambridge, 2004), pp. 62-88, 91-131.

[213] Oppenheim, *Law* (note 97), vol. 1, § 226, pp. 280-281. Westlake, *Chapters* (note 154), pp. 177-178. Lorimer, *Institutes* (note 181), vol. 1, p. 101.

[214] Oppenheim, *Law* (note 97), vol. 1, §§ 91, 94, pp. 136, 140.

[215] Jaya [Jubo Jubogha], King of Opobo, '[Letter to Lord Salisbury, 26. März 1886, London: British National Archives, FO 84/1762, nr 1]', partly printed in: Sylvanus John Sochienye Cookey, *King Jaja of the Niger Delta, 1821 – 1891* (New York, 1974), p. 120 [reprint (London, 2005)]. Samuel Maharero, '[Letter to Theodor Leutwein, Gouvernor of German Southwest Africa, 6 March 1904]', in: Paul Rohrbach, *Deutsche Kolonialwirtschaft* (Berlin, 1907), pp. 333-334 [English version in: Jeremy Silvester and Jan-Bart Gewald, *Words Cannot be Found. German Colonial Rule in Namibia. An Annotated Reprint of the 1918 Blue Book* (Leiden, 2004), pp. 99-100].

[216] For explicit advocacy of translating theoretical international legal opinions into practical government polica see

existence partitioning Samoa among the German empire, the UK and the USA in 1889, trading Helgoland against Zanzibar between the German Empire and the UK in 1890, dividing areas under Portuguese control in Southern Africa between the German Empire and the UK in the envisaged case of Portuguese state bankruptcy in 1898, the delimitation of territories along the Niger River between France and the UK in 1898, preparing the British-French entente of 1904, and the transfer of rights to rule over sultanates in the Malay Peninsula between Siam and the UK in 1909.

Article I of the Samoa Agreement of 14 June 1889 declared the readiness of both signatory parties to respect the independence and neutrality of the Samoan archipelago. However, the dispositive parts of the treaty stipulated the partition of the archipelago among the three colonial governments, and did so without the involvement of the Samoan population. The treaty thus combined the recognition of state sovereignty of Samoa in terms of international law with the subjection of that state to a "protectorate" status, thereby turning Samoa into an object of international law.[217] The British-German agreement over Heligoland and Zanzibar had the twin purpose of rounding off territorial control by both contracting parties in East Africa and transferring the control over coastal waters in the North Sea from the British to the German government. From the point of view of international law, the transfer of rights to rule over Heligoland as the first part of the deal did not present a problem, as Heligoland itself had never had or claimed independence or sovereignty, let alone statehood. However, the transfer of rights to rule over Zanzibar from the German to the British government, the second part of the deal, posed a number of problems. First and foremost, the Sultanate of Zanzibar had valid treaties with a number of European states, which became invalid as a consequence of the British-German agreement. This consequence occurred because that treaty stipulated German government consent to the establishment of a British "protectorate" over Zanzibar, although the Sultan was not party to the treaty. The treaty thus intervened into the agreements that the Sultan had previously concluded in full use of his sovereignty and by recognition through several European governments.[218] Moreover, the treaty affected rights to rule that the Sultan held legitimately over population groups on the coasts of the East African mainland. The British-German treaty divided these population groups between the Tanganyika "Protectorate" (Schutzgebiet), which had been under German control since 1885, and the British East African 'Protectorate', that came to be called Kenya Colony in 1920. The treaty declared null and void the Sultan's entitlements to rule over these continental population groups and amalgamated them with other population groups in both 'protectorates'. It further arranged for areas in the interior of East Africa to the North and the Northwest of Lake Victoria to come under British control under the name Uganda "Protectorate". The treaty was thus an agreement to the disadvantage of a non-involved third party. Both governments proceeded in the same way with regard to the areas under Portuguese control in Southern Africa in 1898.[219] The effects of this agreement, had it been implemented, would have been even more complex than those of the British-German deal of 1890, because the 1898 treaty as a bilateral instrument negatively concerned a large number of third parties, among them many African states and political communities and the King of Portugal, the latter considered member of the 'family of nations' and an international legal subject.

The British-French border agreement of 14 June 1898[220] regulated the exchange of

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US diplomat and foreign policy-maker Paul Samuel Reinsch, *Colonial Government. An Introduction to the Study of Colonial Institutions* (New York and London, 1902) [further edns (New York, 1905; 1911; 1924; 1926); reprint of the original edn (Freeport, NY, 1970)], pp. 104-106, 109-112. For treaties see: Treaty France – UK, 2 / 9 February 1888, in: *CTS*, vol. 170, pp. 475-479 [on Abyssinia]. Treaty South African Republic – UK, Capetown / Pretoria, 1 / 8 November 1893, in: *CTS*, vol. 179, pp. 226-229 [über Swaziland]. Treaty Egypt – UK, 18 January 1898, in: *CTS*, vol. 187, pp. 155-157 [on the future administration of the Sudan].

[217] Samoa Conference (note 107), pp. 135-136.

[218] Treaty German Empire – Zanzibar, 20 December 1885, Art. II-IV, in: *CTS*, vol. 167, pp. 137-148, at pp. 138-139. Treaty UK – Zanzibar, 31 August 1889, in: *CTS*, vol. 172, pp. 199-202. Treaty UK (Imperial British East Africa Company) – Zanzibar, 4 March 1890, in: *CTS*, vol. 173, pp. 119-122. Treaty UK – Zanzibar, 14 June 1890, in: *CTS*, vol. 173, pp. 249-250.

[219] Treaty German Empire – UK (note 78), Art XI, pp. 282-283. Treaty German Empire – UK (note 80), pp. 347-355.

[220] Treaty France – UK, 14 June 1898, in: *CTS*, vol. 186, pp. 313-333.

territories which had previously been claimed as standing under colonial control by both sides. In both cases, the claims had been drawn on valid treaties by international law with local rulers and governments. Like the British-German agreement of 1890, this treaty intervened into existing legal obligations. Neither the British nor the French government took these obligations lightly, because treaties with African rulers had been recognised as valid legal instruments through the Berlin African Conference.[221] The Berlin Final Act appeared to imply that existing treaties might count as "evidence or indication" to the effect that "a state has taken control over the area specified in the treaty earlier than another state and has acquired this territory through occupation" (daß ein Staat früher als ein anderer sich in dem in diesem Vertrag bezeichneten Gebiet festgesetzt, dieses also durch Okkupation für sich erworben hat).[222] In compliance with the Berlin Africa Conference Final Act, the British-French agreement of 1898 featured an article which obliged signatory parties to treat "native chiefs" with "considerateness" (bienveillance) when they were to be shifted from the "sovereignty" of one treaty partner to that of the other.[223] The treaty did not specify what "considerateness" or "bienveillance" might mean. However, in the light of the Berlin Final Act, the assumption is possible that both parties agreed not to communicate the text of the agreement to the directly affected African rulers and governments. Put differently: The transfer of entitlements to rule was to take place tacitly, the existing treaties were to be scrapped without conveying information to the African side. The British-French convention of 8 April 1904 confirmed the treaty of 1898.[224] Through both treaties, the African states affected by them, were converted into objects of international law.

The Bangkok treaty between Siam and the UK of 10 March 1909 was one of the last agreements of this kind.[225] The territories it transferred to British control had stood under Siamese rule until then. The British[226] as well as many other European colonial governments recognised Siam not only as a sovereignty state but also as a legal subject throughout the nineteenth and twentieth centuries. However, in 1909, the British government requested control over the Sultanates of Kelantan, Tringganu, Kedak, Perlis and some nearby islands, specified in the treaty, and induced the Siamese government to surrender its "rights of suzerainty, protection, administration and control whatsoever".[227] The Sultanates became included into the British colonial Straits Settlement. Again, the governments of the Sultanates were not involved in the making of the agreement, which explicitly recognised them as sovereigns. Instead, the treaty converted them into objects of international law. The British government thus employed international law to expand its colonial rule over the Malay Peninsula to the disadvantage of a state, which it had previously recognised as a member of the "family of nations".

Colonial Expansion without Direct or Indirect Rule

In those parts of the world that, like East Asia, remained essentially untouched by European colonial rule, the imposition of the European public law of treaties between states served as a vehicle for the fixation of political inequality among sovereign states, even though they remained equals in legal terms. For example, some European and the US governments made out peace treaties with Japan declaring their intention to enter into friendly relations and to establish the legal basis for international trade. The formularies of the agreements reflected the formal nicety of the mutual recognition of the legal equality of contracting parties. With the exception of the first agreement, the Japan-US treaty of 1854, the practice of the alternate was applied, confirming the legal equality of the signatory parties. The practice of the alternate implied that each party was entitled to place its official name first in the version written out in its own language and to sign the original of that

[221] Berlin Africa Conference (note 72), Art. 34, p. 501.
[222] Liszt, *Völkerrecht* (note 294), § 10, p. 98.
[223] Treaty France – UK (note 220), Art. VI, p. 321.
[224] Treaty France – UK (note 79), pp. 208-209.
[225] Treaty Siam – UK, Bangkok, 10 March 1909, Art. I, in: *CTS*, vol. 208, S. 367-374, at pp. 367-368.
[226] Ibid., Preamble, p. 367.
[227] Ibid., Art. I, pp. 367-368.

version first, irrespective of the alphabetical order of the names.[228] In conformity with early nineteenth-century procedure, all these treaties combined in themselves the formularies of treaties of peace, friendship and trade. Whenever these treaties contained preambles, they established peace and friendship between their signatories and declared some ports in Japan to be "open" for international trade. The latter declaration followed from the widely held American and European perspective that Japan had been "closed" for trade in general, even though, in Japanese constitutional perspective, this had not been the case. Instead, only in 1825 had Tadaakira Mizuno, Governour (*daimyō*) of Numazu (in office 1802 – 1834) issued an edict according to which all foreign ships had to be denied access to Japan unless they had a specific permission to land at Nagasaki Port.[229] The combination of the formulary of the peace treaty with that of instruments establishing trade, even though Japan had never been at war with any of its treaty partners, resulted in the fusion of two irreconcilable legal principles, which otherwise ought to have been laid down in distinct agreements. Whereas, within the European public law of treaties among states, peace treaties must reconcile the general statement of the legal equality of the peace-concluding partners with the inequality of non-reciprocal specific dispositive stipulations, agreements seeking to establish the freedom of trade should, in principle, consist of reciprocal stipulations so as not to discriminate against one partner. However, most of the treaties that the government of Japan had to conclude between 1854 and 1869 followed the formulary of the peace treaties and contained predominantly non-reciprocal stipulations. That these treaties followed an established formulary is evident from the fact that the US, British, Russian and Dutch governments signed two treaties in succession, one each in 1854, 1855 and 1856, and then another series of agreements in 1858. In all cases, the first as well as the second series of treaties established peace. Some European governments, mainly the British, even pursued their "big power" ambitions to the degree that they gave out the acceptance of non-reciprocal privileges, which the Japanese government had granted to them, as manifestations for the superiority of the rank of Japan's treaty partners.[230]

The US government launched its expedition to Japan under the command of Commodore Matthew Calbraith Perry (1794 – 1858), who first crossed the Atlantic in 1852 and then traversed the Indian Ocean and the Western Pacific before reaching Japan. The government in Edo, which had been informed about the expedition early on, made efforts to direct Perry to Nagasaki, first and foremost because this was then the only port designated to receive ships from abroad, but also because it wanted to avoid direct negotiations with the US envoy in Edo. Yet Perry carried with him a letter by US President Millard Fillmore (1800 – 1874, in office 1850 – 1853) to the "Emperor of Japan" and assumed that he had been commissioned to approach the government in Edo. Hence, the expedition made landfall near Kurihama outside Edo Bay on 8 July 1853 at a place, which a US sailor had reached already in 1846.[231] During the negotiations upon which Perry insisted, the

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[228] Resch, *Völkerrecht* (note 190), § 207, p. 218.

[229] Japan, 'Chūkai injun roku', in: *Nihon kaibō shiryō sōsho*, vol. 4 (Tokyo, 1932), pp. 113-122, at pp. 113-122.

[230] Treaty Japan – USA, Kanagawa, 31 March 1854, in: *Treaties and Conventions Concluded between Empire of Japan and Foreign Nations* (Tokyo, 1874), pp. 1-4; also in: *CTS*, vol. 111, pp. 378-387. Treaty Japan – UK, Nagasaki, 14 October 1854, in: *Treaties* (as above), pp. 6-8; also in: *CTS*, vol. 112, pp. 246-250. Treaty Japan – Russia, Shimoda, 7 February 1855, in: *Treaties* (as above), pp. 9-12; also in: CTS, vol. 113, pp. 468-471. Treaty Japan – Netherlands, 30 January 1856, in: *Treaties* (as above), pp. 15-19; also in: CTS, vol. 114, pp. 226-229 (Dutch version), pp. 230-233 (English version). Treaty Japan – USA, Edo, 29 July 1858, in: *Treaties* (as avove), pp. 52-62; also in: *CTS*, vol. 119, pp. 254-280. Treaty Japan – Netherlands, 18 August 1858, in: *Treaties* (as above), pp. 71-89; also in: *CTS*, vol. 119, pp. 314-332. Treaty Japan – Russia, 19 August 1858, in: *Treaties* (as above), pp. 90-110; also in: *CTS*, vol. 119, pp. 338-347. Treaty Japan – UK, 26 August 1858, in: *Treaties* (as above), pp. 111-129; also in: *CTS*, vol. 119, pp. 402-412. UK, Instruction by the Early of Clarendon to the Earl of Elgin [British emissary to Japan], 20 April 1857, in: London: British National Archives, FO 405/2, p. 23 = fol. 19^{r}. UK, Report by the Earl of Elgin to the Earl of Malmesbury, 29 August 1858, in: ibid., p. 630. Oliphant, *Narrative o* (note 31), pp. 248-249.

[231] Daniel Webster, '[Letter to John H. Aulick, dated 10 June 1851]', in: Webster, *The Papers of Daniel Webster*, edited by Kenneth E. Shewmaker and Kenneth R. Stevens, Series 3: Diplomatic Papers, vol. 2 (Hanover, NH, and London 1983, pp. 290-291. J. C. Dobbin, '[Letter to Matthew Calbraith Perry, dated 14 November 1853]', in: United States 33rd Congress, Second Session, Senate, *Correspondence Relative to the Naval Expedition to Japan*, Document Nr 34 (Washington, DC, 1853), p. 57. On the US mission of 1846 see: Richard A. Doenhoff, 'Biddle,

question came up where Perry would have to deliver the letter. Perry refused to accept the response given to him that the government in Edo was not in charge of handling foreign relations with other states. Likewise, he would not withdraw his request for the "opening" of at least one port on the Pacific side of the archipelago. The latter point was crucial from the US point of view because steamships crossing the Pacific from the US West Coast were to be entitled to use Japan as a coaling station on their way from California to China. Nagasaki port, located on the Asian side of the archipelago, seemed unsuited for US ships on this route. With regard to both issues, Perry set precedents. In fact, the government in Edo did conduct direct negotiations not only with the US emissary but with all subsequent envoys except the first British mission in 1854, which the Governour of Nagasaki faced. All treaties between 1854 and 1867 were written in the name of the Shōgun ("Emperor"), even though, according to the then Japanese constitution, the Tennō was in fact in control of foreign relations. Likewise, the main result of the negotiations with Perry and all further emissaries was the "opening" of a select number of ports in Honshū and Hokkaidō that could be accessed easily from the Pacific side.

Perry turned down all Japanese requests concerning the procedure of concluding the envisaged treaty. Instead, he used a planned provocation to bully the Japanese side into accepting his demands, when he entered Edo Bay without consent by the Japanese government and did not vacate it when asked to do so. He also strictly refused to move on to Nagasaki. Moreover, during the negotiations, Perry insisted that US principles of human rights should find recognition as universal principles, adding that, without that recognition, there could not be "friendship" between Japan and the USA. In retrospect, Perry defended his harsh stand vis-à-vis the Japanese government with the claim that firm positions were necessary against a government that allegedly had "closed" its country to the world for ages. That defense may have been reasonable in view of the mandate given to Perry by the US Ministry of the Navy that the mission ought to be carried out peacefully. However, some members of Perry's crew took the opposite view that the commander's inflexible negotiation tactics had stiffened the Japanese stance. Indeed, Perry's attitude did raise concerns on the Japanese side, which strengthened already existing demands that the government in Edo should step up its defense efforts. Eventually, after Perry had succeeded in submitting his letter to the government in Edo, he proceeded to the Ryūkyū Kingdom and had a treaty concluded there.[232] Upon his return to Edo Bay he restated his demand that the government should agree on a formal treaty with him as the US representative. At Perry's insistence, an agreement was finally signed at Kanagawa on 31 March 1854 and written out in a Japanese, an English, a Dutch and a Chinese version.[233] Compared to the treaties that followed to 1869, this agreement featured the lowest number of non-reciprocal articles. The preambles of both the Japanese and the English versions, first named the USA and then the Shōgun of Japan as signatory parties, the Shōgun's title being circumscribed as "August Sovereign of Japan" (Nihon Kun'ō). The fact that the same sequence of the signatories was retained in both versions indicates that Perry's draft treaty served as the basis for the Japanese version.

The government in Edo thus did not have at its disposal an established formulary for concluding treaties under international law and therefore adopted the European treaty formulary, presumably on the basis of the Chinese-US treaty of 1844, the text of which was available in Edo. The government of Japan, apparently unfamiliar with the practice of the alternate, quickly understood the European treaty formulary and practiced the alternate already in the next treaty it had

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Perry and Japan', in: *US Naval Institute Proceedings* 42 (1966), pp. 79-87. Stephen Bleeker Luce, 'Commodore Biddle's Visit to Japan in 1846', in: *US Naval Institute Proceedings* 31 (1905), pp. 555-563. William W. McOwie, *The Opening of Japan. 1853 – 1855. A Comparative Study of the American, British, Dutch and Russian Naval Expeditions to Compel the Tokugawa Shogunate to Conclude Treaties and Open Ports to Their Ships* (Folkestone, 2006, pp. 39-42.

[232] Treaty Ryūkyū – USA, 11 July 1854, in: *CTS*, vol. 112, pp. 78-79.

[233] On the expsdition see: Francis Lister Hawks, *Narrative of the Expedition of an American Squadron to the China Seas and Japan under the Commodore M[atthew] C[albraith] Perry, United States Navy* (Washington and New York, 1856), pp. 239-240, 244, 256-257, 259-260 [new edn (New York, 1857); reprints (New York, 1952); (New York, 1967); (Stroud, 2005)]. Roger Pineau, ed., *The Japan Expedition. 1852 – 1854. The Personal Journal of Commodore Matthew [Calbraith] Perry* (Smithsonian Institution Publication, 4743) (Washington, 1968), pp. 105, 168-169 [reprint (Richmond, SY, 2002)].

to sign. Following the preamble to the Japan-US treaty of 1854, Article I stated that the treaty partners were willing to henceforth conduct their mutual relations in peace and friendship.[234] To that end, although with great reluctance on the Japanese side, both parties mutually assured their readiness to rescue and assist shipwrecks.[235] Then, the Japanese side conceded the right that US ships could visit ports at Shimoda and Hakodate for the specified purposes of taking on board food and fuel (Articles II, X).[236] Articles VI and VII further stipulated that all further trading activities by US citizens in Japan were to take place in accordance with Japanese law and to be approved of Japanese authorities.[237] There is also the provision that the US government could send a diplomatic envoy.[238] Finally, the Japanese side unilaterally granted Most-Favoured-Nation States to the US (Article IX).[239] The US side did not explicitly concede any of these privileges to Japan. The lack of reciprocity is remarkable specifically with regard to the Most-Favoured-Nations clause. This clause had been enshrined in treaties of trade since the fifteenth century with the intention of granting equal conditions for traders from both contracting parties and was mentioned with this specification in the British-French agreement of Utrecht of 1713.[240] The non-reciprocal stipulation of Most-Favoured-Nation status thus not only discriminated against Japanese merchants in the case that they would be willing to trade in the USA at some time in the future, but also manifested a breach in the European tradition of the making of treaties of trade. The Japan-US treaty of 1854 did indeed subject US citizens to the law of the territory. But Article V prescribed explicitly that US citizens could not become subject to stricter rules of conduct than persons of Chinese and Dutch nationality in Nagasaki.[241] The status of US citizens appeared to have been raised to a higher level than that of Nagasaki Chinese and Dutch because, at Perry's request, US citizens were granted a larger area around the port of Shimoda within which they could move freely. Nevertheless, there is no mention whatsoever of a general "opening" of Japan for free trade. Even in the treaty ports, merely managed treaty was allowed beyond the acquisition of food and fuel.[242] Thus, Japanese concessions with regard to seaborne traffic remained within the general law of hospitality for seamen. In 1854, then, the Japanese side withstood the pressure for "opening" the state to free trade at large. In Japanese perspective, the agreement was a treaty not of friendship and trade but only of friendship.

Soon after the treaty had been signed, a controversy arose about a discrepancy of wording in the English and the Dutch versions on the one side, the Chinese and the Japanese versions on the other. With regard to the right of the dispatch of a diplomatic envoy from the USA to Japan, the versions of Article XI in the East Asian languages stipulated that "the governments of both states" (in Japanese: ryōgoku seifu) had to agree, if the US government decided to dispatch an emissary to Shimoda after eighteenth months from the signing of the treaty. By contrast, the European language versions prescribed that the US government could dispatch an envoy eighteenth months after the conclusion of the treaty provided one of the two governments deemed such an arrangement necessary.[243] The US government, drawing on the English version, already in the second half of 1854 took the view that it could dispatch its envoy without agreement by the government of Japan.

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[234] Treaty of Kanagawa (note 230), Art. I, p. 1. Treaty China – USA, Wang Hiya, 3 July 1844, in: *CTS*, vol. 97, pp. 106-123; also in: *Dai Nihon komonjo, Bakumatsu gaikoku kankei monjo*, vol. 5 (Tokyo, 1915), pp. 126-148.

[235] Ibid., Art. III, IV, V, VIII, X, pp. 2-4. Japanese reluctance to agree on the inclusion of the shipwreck article into the text was based on the recognition that the rescue of shipwrecks was considered a matter of natural in Japan and, therefore, did not require specific stipulation by treaty. See: Akira [Fukusai] Hayashi, Satohiro Ido, Masayoshi Izawa, Chōei Udono, for Amerika ōsetsu gakai, [Letter to the Rōjū, 2 April 1854], in: *Bakumatsu Gaikoku Kankei Monjo*, vol. 5 (Tokyo, 1927), pp. 478-485 [a version modified by the Rōju has been appended at pp. 460-470; reprint (Tokyo, 1972)].

[236] Ibid., Art. II, X, pp. 1, 4.

[237] Ibid., Art. VI, VII, pp. 2-3.

[238] Ibid., Art. XI, p. 4.

[239] Ibid., Art. IX, p. 4.

[240] Boris de Nolde, 'La clause de la Nation la Plus Favorisée et les tariffs prérérentiels', in: *Recueil des cours* 39 (1932, Part I), pp. 1-130, at pp. 24-31.

[241] Treaty of Kanagawa (note 230), Art. V, p. 3.

[242] Akira Hayashi, 'Diary of an Official of the Bakufu', in: *Transactions of the Asiatic Society of Japan*. Second Series, vol. 7 (1930), pp. 98-119, at p. 102.

[243] Treaty of Kanagawa (note 230), Art. XI, p. 4.

This view not only contradicted the wording of the Chinese and Japanese versions but was also incompatible with the logic of the stipulation itself. The wording of the Dutch and English versions, understood literally, implied that not only the US, but also the Japanese side had the right of unilaterally requesting the dispatch of a US emissary, and this wording made no sense. Instead, a non-reciprocal concession to the US ought to have read that the US side had the right to dispatch its envoy at its own discretion. The discrepancy of the wording between the East Asian and European language versions therefore did not result from some superficial handling of the text by US interpreter Samuel Wells Williams (1812 – 1884) and his Chinese teacher Luo Sen of the translations from Japanese into English through the Chinese version. By contrast, what was crucial was the superficiality of the knowledge that the negotiators on the US side had about the privilege of consenting to the exchange of diplomatic envoys. According to Japanese records about the negotiations, the discrepancy seems to have arisen from the refusal by Japanese chief negotiator Akira Hayashi (1800 – 1859) to immediately accept Perry's demand for the admission of a US emissary. Hayashi hesitated to accept that demand because the Japanese side had until then only admitted persons of Chinese and of Dutch origin as residents on Japanese soil at Nagasaki. But Perry insisted on receiving the privilege of dispatching a resident envoy to Edo and threatened that in case of a conflict the US side would send its representative anyway. Hayashi thus agreed on the re-examination of the request after eighteenth months.[244] Apparently, the US government misunderstood this concession as agreement that it was entitled to dispatch its emissary even against the will of the Japanese government.

Within the contemporary European public law of agreement among states, the British-Japanese treaty signed at Nagasaki on 14 October 1854 was neither a formal treaty nor any otherwise binding legal instrument regulating relations between sovereign states, because, on the British side, the agreement was concluded by an agent without formal empowerment.[245]

The British government indeed pursued a policy of pressuring the government of Japan to "open" ports for British ships cruising in the Pacific. However, during the 1850s, the security of the British Crown Colony of Hong Kong against Russian ships took priority over the "opening" of Japanese ports against the background of the Crimean War. The British government was fearful that the Russian navy, operating in the Pacific at that time, might open another front and launch reprisals against the poorly defended British positions in the Pacific, namely Hong Kong and Singapore. Consequently, the British government gave order to postpone plans for the "opening" of Japan as long as warfare in the Black Sea was continuing.

However, Rear Admiral James Stirling (1791 – 1865), who was familiar with the Perry expedition, started his own voyage to Nagasaki in 1854 in retrospect stating the intention that he had wished to determine the attitude of the Japanese government concerning the military conflict between Russia and the UK. But Stirling's actual intention prior to his departure has remained unrecorded. In any case, Stirling reached Nagasaki in September 1854 and handed over to the Governour of Nagasaki (*Nagasaki Bugyō*) a formal letter, written in English, asking how the Japanese government would decide in the eventuality that it were approached to "open" its ports to any of the parties engaged in the Crimean War. The head (*Opperhoofd*) of the Dutch settlement on Deshima in Nagasaki, Jan Hendrik Donker Curtius (1813 – 1879), translated the letter into Dutch and passed this version on to the Nagasaki authorities which produced a Japanese version.[246] Prior to Stirling's expedition, Donker Curtius had already informed the government in Edo about British preparations for an expedition to Japan from Hong Kong. The Japanese version of Stirling's letter took the form of a British request for the "opening" of Japanese ports for British warships, while Stirling had requested the confirmation that Russian ships would not be entitled to use Japanese ports. On the basis of the Japanese version of Stirling's letter, the government in Edo, from which the *Nagasaki Bugyō* requested a reply, came to the conclusion that Stirling was asking the Japanese government to take side with the UK against Russia. Seeking to avoid a major confrontation with

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[244] Hayashi, 'Diary' (note 242), pp. 113-114.

[245] Julius Schmelzing, *Systematischer Grundriß des praktischen europäischen Völker-Rechtes*, §§ 373-383, vol. 3 (Rudolstadt, 1820), pp. 294-315.

[246] Miyako Vos [-Kobayashi], ed., *Bakumatsu Dejima mikōkai monjo. Donkeru Kuruchiusu oboegaki* (Tokyo, 1992), pp. 90-100.

Russia at this point of time, the government in Edo refused to concede a general "opening" of ports arguing that Japanese ports could not be theatres of the war between Russia and the UK. Yet it did give permission that British ships could use ports at Nagasaki and Hakodate, if necessary also Shimoda, under the conditions that had been granted to Perry. The government in Edo thus made efforts to appease Stirling without jeopardising the then ongoing negotiations with Russia through concessions that the latter side might take as an offense. As Stirling had left Hong Kong without government authority and was facing disciplinary prosecution, he had to return with what he could purport to be a binding international legal document. Consequently, he did not hesitate to accept the offer if general access was also refused to Russian ships. The treaty that was eventually signed still bears the hallmarks of its drafting under extreme time pressure, as it does not feature a preamble stating its purpose.[247] Its English version thus starts with rudimentary statement naming only the plenipotentiaries but not the signatory parties. The alternate is practiced in the English and the Japanese versions, with the Shōgun appearing under the title Nihon Taikun in the dispositive text. Japanese negotiators thus quickly adopted the European formulary of treaties under international law.[248]

While the Perry treaty comprised a majority of reciprocal articles, there was no reciprocal stipulation in Stirling's treaty, although both agreements featured the recognition of the legal equality of their sovereign partners.[249] All articles regulated issues relating to British subjects in Japan. Stirling's treaty was the first legal instrument displaying the imperial title for the Shōgun in its English version as "His Imperial Highness the Emperor of Japan".[250] However, in both treaties, the Japanese side conceded no more than the general right of hospitality for seamen,[251] the Most-Favoured-Nations clause[252] and the "opening" of the ports at Nagasaki and Hakodate for the sole purpose of the acquisition of food and fuel for crews of British ships.[253] Moreover, British subjects, having landed in Japan, were explicitly placed under Japanese law. Violations of the treaty by higher officers and ship commanders were to result in the closure of the ports for British ships.[254] Even though the British government appears to have insisted with more pressure than the US side upon enforcing the principles of the Nanjing Treaty of 1842 vis-á-vis Japan as well, it had little success in implementing this goal without the use of military force. Stirling not even raised the issue of dispatching a British diplomatic envoy to Japan, which was not explicitly stated in the treaty. However, the British government obtained this privilege through the Most-Favoured Nations clause,[255] as the same privilege had been granted to the USA in the Perry treaty. However, the privilege was restricted again through a passage, according to which the rights enjoyed by Chinese and Dutch residents in Nagasaki were not to be granted to British subjects. This stood in direct opposition to the Perry treaty. The Japanese government thus rejected the bid to "open" the state and admit general rules of the freedom of trade not only vis-à-vis the USA but also vis-à-vis the UK. However, the Japanese side changed its position in the course of the treaty negotiations with the Russian special emissary and the Dutch resident envoy, to whom it first grated a status equivalent of extraterritoriality. The actual "opening" of the state beyond highly restricted access to a few treaty ports began only in 1858 and 1859.[256]

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[247] Treaty Japan – UK 1854 (note 230).

[248] UK, *Correspondence Respecting the Late Negotiations with Japan* (Parliamentary Papers 1856, Bd 61. = Command Paper, 2077) (London, 1856), pp. 220-221, 225. Japan, *Dai Nihon Komonjo. Bakumatsu Gaikoku Kankei Monjo*, vol. 7 (Tokyo, 1915), nr 18, pp. 39-63, nr 55, pp. 147-150, nr 79, pp. 214-217, nr 85, pp. 247-253, nr 133, pp. 374-383, nr 137, pp. 385-390, nr 141, pp. 408-410, nr 142, pp. 410-418, nr 148, pp. 425-427, nr 151, pp. 439-441.

[249] Treaty Japan – UK 1854 (note 230), Preamble, pp. 6-7.

[250] Ibid., Preamble, p. 6-7.

[251] Ibid., Art. III, p. 7.

[252] Ibid., Art. V, p. 7.

[253] Ibid., Art. I, III, pp. 6, 7.

[254] Ibid., Art. IV, p. 7.

[255] Ibid., Art. V, p. 7.

[256] Ibid., Preamble, pp. 6-7. Treaty Japan – Russia (note 230). Treaty Japan – Netherlands (note 230). The contrary idea that the series of treaties made out in 1858 formed a turning-point in the practice of treaty-making was first argued by Saburō Shimada, an early critic of the Edo government and theorist of "civilisation". See: Saburō

The treaty of peace, friendship and trade concluded between Japan and Prussia on 24 January 1861 followed the conventions of the European public law of treaties among states and opened with the statement of the signatory sovereigns. As in the other agreements made out since the British-Japanese treaty of 1854, both sides observed the alternate.[257] In the case of the Japanese-Prussian agreement, one unusual feature relates to the naming of a ruler, King Frederick William IV (1840 – 1861), as a sovereign on the Prussian side who had died on 2 January 1861, that is, before its conclusion. On the day of the signing, the Prussian delegation could not have received information about the King's death; yet the deceased King's name remained in the text of the treaty even after it had been ratified. In the course of the nineteenth century, the separation between person and office had taken roots in European legal practice to the degree that the death of the ruler mentioned in a legal document, had no longer an impact on its validity and thus made the replacement of the sovereign's name in the ratified version redundant. The Japanese side does not appear to have been informed about the calamity.

Instead, the negotiations proved hard for the Prussian side for two reasons. First, the reigning King Frederick William IV had already been pronounced ill by the time the Prussian expedition left for Japan in 1859, having been placed under the regency of his brother William (Regent 1858 – 1861, King of Prussia 1861 – 1871, German Emperor 1871 – 1888). William had signed the authorisation for the Prussian plenipotentiary on behalf of the King. As the Prussian side demanded that the treaty be written out in the name of the King, although the letter of accreditation showed the name of the Regent, the Japanese side requested an explanation of the discrepancy. The Prussian plenipotentiary argued that the King was ill, thereby triggering the question from the Japanese side, why he had not resigned. The Prussian emissary responded with a lengthy lecture on the Prussian state constitution and appears to have overcome the concerns of the Japanese bureaucrats, who eventually accepted the accreditation letter. The second difficulty resulted from the Prussian request to conclude the treaty not just for Prussia but on behalf of the German Customs Union. From a Japanese point of view, the German Customs Union was equivalent of the federal structure of the USA, whence the negotiators rejected the Prussian request, arguing that in the case of a federal state, the federal government represented the entire federation. The Prussian side withdrew its request in order not to jeopardise the conclusion of the agreement. The treaty followed its predecessors in naming the Shōgun as the sovereign on the Japanese side and maintained reciprocity with regard to the general Article I stipulating peace and friendship between the signatory parties. Article II was also reciprocal in admitting the mutual establishment of diplomatic relations. The following articles were, however, non-reciprocal, exclusively regulating the rights of Prussian subjects in Japan. These rights were more far-reaching than those granted in the early treaties before 1858 and essentially consisted in the "opening" of ports for Prussian ships at Hakodate, Kanagawa [= Yokohama] and Nagasaki,[258] the concession of consular justice for Prussians on Japanese soil[259] and the repetition of customs regulations from the previous agreements.[260] Further non-reciprocal articles granted the freedom of religious practice and the freedom of trade in the ports, the right of Prussian subjects to take Japanese subjects into their service, obliged Japanese authorities to ban smuggling, to provide pilots for incoming Prussian ships, to lift the mandate to use Japanese currency for Prussian subjects, to rescue and assist Prussian shipwrecks, to allow the acquisition of food and fuel for Prussian ships, to concede Most-Favoured-Nation status to Prussia, to file no request for the renegotiation of the treaty before 1872 and to allow the Prussian side to conduct its official correspondence with the Japanese government in the German language, with the proviso that for a period of five years, the Prussian side would attach Japanese versions.[261] The Prussian

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Shimada, *Kaikoku shimatsu* (Tokyo, 1978) [first published (Tokyo, 1887)]. On Shimada see: Carol Gluck, *Japan's Modern Myths* (Princeton, 1985), p. 319. McOwie, *Opening* (note 231), pp. 456-465, repeats the assumption that Japan was "opened" in 1853.

[257] Treaty Japan – Prussia, 24 January 1861, Preamble, S. 186, in: *Treaties and Conventions Concluded between Empire of Japan and Foreign Nations* (Tokyo, 1874), pp. 186-206; also in: *CTS*, vol. 123, pp. 448-458.

[258] Ibid., Art. III, XII, XIII, XIV, XVI, pp. 187-189.

[259] Ibid., Art. V, VI, VII, pp. 190-195.

[260] Ibid., Supplementary Trade Agreement, pp. 204-205.

[261] Ibid., Art. IV, VII, IX, XI, XV, XVII, XVIII, XIX, XX, XXI, pp. 189, 191-195.

negotiators returned with a treaty but not with satisfaction. In the Prussian perception, the Japanese government had proved to be an obdurate partner essentially because it had rejected the Prussian request for stating in the treaty not only Prussia but also the German Customs Union as a signatory party. Consequently, the ratification process on the Prussian side proved difficult and continued until 1864, although 1 January 1863 had been fixed in the text as the day when the treaty was to come into force.[262] Moreover, the representatives of some German Chambers of Trade who had joined the expedition, cautioned expectations for the trade with Japan.[263] However, the Prussian negotiators insisted that they had achieved the same concessions from the Japanese government as all previous missions. The state representatives from the European and US side thus juxtaposed their own demand for equal treatment from the Japanese side against their own lack of willingness to recognise the Japanese government as an equal partner.

Significant innovations of the practice of concluding treaties took place with regard to Japan only with the rarely considered agreement between Japan and the North-German Confederation of 20 February 1869. This Confederation had replaced the defunct German Confederation in 1867, after Austria-Hungary's secession. The Prussian side assumed that it was obliged by law to renegotiate the treaty of 1861, and the Japanese side used the Prussian negotiation request to impose changes of the substance of several articles that cannot be found in any other agreement until 1894. The preamble to the 1869 treaty addressed the head of state on the Japanese side as "His Majesty the Tenno of Japan" (Seine Majestät der Tenno von Japan), while the Prussian side is circumscribed as "the King of Prussia in the Name of the North German Confederation and the Members of the German Customs and Trade Union Not Belonging to That Confederation" (König von Preußen ... im Namen des Norddeutschen Bundes und der zu diesem Bunde nicht gehörenden Mitglieder des Deutschen Zoll- und Handelsvereins). Max von Brandt, who negotiated the treaty on the Prussian-German side, thus prima facie achieved the goal that had been denied to the Prussian negotiators in 1861, but the naming of the Customs Union remained confined to the preamble and was never repeated in any of the dispositive articles. Articles I and II were reciprocal as in some of the previous treaties, stipulating the establishment of peace and the exchange of diplomatic representatives.[264] Article III defined the treaty ports, now naming Hakodate, Kōbe, Yokohama, Nagasaki, Niigata, Ōsaka and – for the first time with unrestricted entry permission – Edo.[265] Further provisions deviated from the precedents on two key points. Article XV restricted the period during which foreigners could benefit from the freedom of the circulation of coinages to the point of time when the Japanese government would establish a mint to issue a national coinage.[266] More importantly, Article VII prescribed for the first time reciprocity with regard to permissions of migration and travel. Accordingly, „Japanese Princes or persons in their services may immigrate to Germany within the law, as all Japanese shall also be allowed to proceed to Germany for purposes of education and trade" (Japanische Fürsten oder Leute in Diensten derselben sich unter den allgemeinen gesetzlichen Bestimmungen nach Deutschland begeben, wie es auch allen Japanern erlaubt sein [soll], sich behufs ihrer Ausbildung oder in Handelszwecken nach Deutsch[land] zu begeben).[267] The article supplemented the right of Prussian-German citizens to immigrate to Japan and is appended with the remark that Japanese migrants and travellers should carry "proper passports issued by their authorities in accordance with the edict by the Japanese government of 23 May 1866" (mit vorschriftsmaessigen Paessen ihrer Behörden nach Massgabe der Bekanntmachung der Japanischen Regierung vom 23ten Mai 1866 versehen). This was the first international legal agreement concerning the emigration of Japanese subjects abroad. The edict of 1866 lifted the ban

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[262] Ibid., Art. XXIII, p. 196.

[263] C. Jacob, *Bericht über die Handels-Verhältnisse von Japan. Als Manuskript gedruckt. 30. Juni 1861*. Stuttgart: Württembergisches Hauptstaatsarchiv, Bestand E 50/01, Bü 1684, at p. 18. J. Kreyher, *Die preußische Expedition nach Ostasien in den Jahren 1859 – 1862* (Hamburg, 1863), pp. 124-125.

[264] Treaty Japan – North German Confederation, 20 February 1869, in: *Treaties and Conventions Concluded between Empire of Japan and Foreign Nations* (Tokyo, 1874), pp. 474-500, at pp. 475-476; also in: *CTS*, vol. 139, pp. 92-105.

[265] Ibid., pp. 476-478.

[266] Ibid., pp. 485.

[267] Ibid., pp. 480-481.

on emigration that had been in force since the seventeenth century.

This article is remarkable in several respects. First, it shows that the Japanese government had become aware of the negative implications of the lack of reciprocity of treaty stipulations, and betrayed its intention to increase the number of reciprocal treaty provisions. Second, although the lift of the ban of emigration went into force already in 1866, the first international legal text to contain a reference to it came into existence only after the Meiji Restoration and was not included into the treaties that had been signed in the meantime. This suggests that the change of negotiation strategy on the Japanese side followed the change of the state constitution. Virtually since it took office, the new Meiji government placed more weight on accomplishing reciprocity of international treaties than its predecessor governments had done. The Meiji government made its intention of seeking treaty revision known long before the official beginning of revision negotiations in 1872, thereby demonstrating its determination to accomplish sovereign equality not merely regarding the formalities of legal doctrine but also the practical conduct of policy. Third, one copy of the official collection that contains the treaties between the Japanese government on the one side, governments in Europe and the USA on the other and was published in 1874, has a number of marginal notes inserted into it. These notes have been written in German in ink and pencil in a late nineteenth-century hand. They are to be found on the pages on which the general convention of customs duties of 25 June 1866 and the treaty of 1869 are printed.[268] The copy has been preserved in the Library of the Economics Department of the University of Tokyo but must previously have been owned by the member of the German diplomatic staff. In the main, the notes relate to textual emendations and brief indications of contents. However, beside the text of Article II of the treaty of 1869, referring to the exchange of diplomatic envoys, a note written in ink reads "sole reciprocal concession" ([ein]zige Gegenseitigkeit).[269] Consistently, Article VIII, stipulating the reciprocal right for migration, has been crossed out.[270] The German side, represented by Max von Brandt according to the treaty of 1869, thus was unwilling to concede the reciprocity of the right of immigration, against the wording of the treaty. Hence the concession of special dispositive reciprocal stipulations beyond the formal mutual recognition of sovereign equality was lip service on the German side, which reserved for itself the option to ignore parts of the text of the treaty. The basic norm *pacta sunt servanda*, which was often claimed as the essence of the European public law of treaties, does not appear to have been considered valid with regard to matters which the German side perceived as standing in contradiction to its own interests.

The problem of treaty revision was obviously more serious for the Japanese side than for its treaty partners. The fact that the year 1872 appeared for the first time in the treaties of 1858 and remained unaltered to the latest treaties signed in 1869, makes it clear that none of the signatory parties of the early agreements saw a necessity to regulate the issue of revisions. Only the governments of the UK and the USA could then have an interest in revisions because they might have wished to receive the benefits that the governments of Russia and the Netherlands had received through their treaties concluded in 1855 and 1856. As the term during which the beginning of revision negotiations did not change between 1858 and 1869, the period of the unquestionable validity of the treaties was rather long for the treaties about which agreement was reached in 1858. It can therefore be assumed that the fixing of the term for a period of altogether fourteen years followed from the interests of the European and the US governments, seeking to postpone the beginning of renegotiations as long as possible. By contrast, the Japanese side insisted on the same term in the later treaties, whereby 1 July 1872 the precise day of the end of renegotiation ban remained identical in the Japanese-Portuguese treaty of 3 August 1860 and all subsequent agreements.[271] Hence, the Japanese government became increasingly determined to accomplish the option for treaty revision at the earliest point of time, the more treaties it was compelled to sign. In addition, the 1869 treaty shows that the Japanese government was actually capable of launching renegotiations before 1872 and did so against the threadbare disappointment of the German side.

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[268] Ibid., University of Tokyo, Keizaigakubu (Institute of Economics), 3-A:1111, pp. 476-487.

[269] Ibid., pp. 476.

[270] Ibid., p. 481.

[271] Treaty Japan – Portugal, 3 August 1860, in: *Treaties and Conventions Concluded between Empire of Japan and Foreign Nations* (Tokyo, 1874), pp. 151-170; also in: *CTS*, vol. 122, pp. 306-316.

Nevertheless, the revision negotiations turned out to be a lengthy and awkward process, dragging on for more than twenty years.[272] The first reciprocal treaty with any European and the US governments that the Japanese government succeeded in concluding was the British-Japanese agreement of 16 July 1894, two weeks before the beginning of the first Since-Japanese War.[273] The Japanese side accomplished its recognition as an equal partner in legal and political terms only after it had transferred European international legal norms into state law, had enacted very strict and comprehensive laws, instructions and orders concerning war,[274] and had introduced entire parts of European legal systems, specifically constitutional, civil, trade, patent, intellectual copyright and criminal law.[275] To the end of the nineteenth century, most European and the US governments refused to waive the privileges they had reserved for themselves, most notably consular jurisdiction and extraterritoriality, using the feigned argument that these privileges had to remain valid until the full transfer of European law into Japan.[276]

The agreements that the Japanese governments was pressured to enter into with European and the US governments between 1854 and 1869, featured a fairly homogeneous formulary, combining reciprocal stipulations of sovereign legal equality in general and often non-reciprocal provisions in particular dispositive articles. The agreements tacitly imposed the European public law of treaties between states upon Japan, as had previously happened to China and other states.[277] The European and US governments would only admit as a platform for treaty negotiations the legal framework that had emerged in Europe since the turn towards the nineteenth century, while disregarding customary practices of their partners elsewhere in the world. The European public law of treaties among states placed high importance upon the tacitly and customarily applied basic norm *pacta sunt servanda* in conjunction with the positivist principle of laying down agreements in written texts. Consequently, European and the US governments insisted towards their treaty partners anywhere else in the world that only what happened to be laid down in written treaties had been agreed upon and thus had to be implemented meticulously. But they reserved for themselves the option of ignoring the basic norm *pacta sunt servanda* under the pretext that perceived state interests induced them to act otherwise.

This position gained its truly significant legal impact through the fact that in most cases,

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[272] Alessandro Paternostro, 'La révision des traités avec le Japon au point de vue du droit international', in: *Revue de droit international et de législation comparée* 23 (1891), pp. 5-29, 176-200. Leopold Marx, *Die gerichtlichen Exemtionen der Staaten, Staatshäupter und Gesandten im Ausland*. LLD Thesis (University of Tübingen, 1895). Francis Taylor Piggott, *Exterritoriality. The Law Relating to Consular Jurisdiction and to Residence in Oriental Countries* (London, 1892) [second edn (London, 1907)]. Erich Schlesinger, *Exterritorialität der diplomatischen Agenten*. LLD Thesis (University of Rostock, 1904). Wilhelm Ziemssen, *Beitrag zur Casuistik der Lehre von der Exterritorialität der gesandtschaftlichen Functionäre*. LLD Thesis (University of Greifswald, 1898). For recent studies see: Pär Kristoffer Cassel, *Grounds of Judgment. Extraterritoriality and Imperial Power in Nineteenth-Century China and Japan* (Oxford, 2012). Richard Taiwon Chang, *The Justice of the Western Consular Courts in Nineteenth Century Japan* (Contributions in Intercultural Comparative Studies, 10) (Westport, CT, 1984). James Hoare, 'Extraterritoriality in Japan', in: *Transactions of the Asiatic Society of Japan*, Third Series, Bd 18 (1983), pp. 71-97. Hoare, *The Uninvited Guests. Japan's Treaty Ports and Foreign Settlements. 1858 – 1899* (Folkestone, 1994). Douglas R. Howland, 'The Foreign and the Sovereign. Extraterritoriality in East Asia', in: Howland and Luise White, eds, *The State of Sovereignty. Territories, Laws, Populations* (Bloomington, 2009), pp. 35-55. Francis Clifford Jones, *Extraterritoriality in Japan and the Diplomatic Relations Resulting from Its Abolition. 1853–1899*, edited by Jerome D. Green (New Haven and London, 1931) [reprint (New York, 1970)]. Turan Kayaoğlu, *Legal Imperialism. Sovereignty and Extraterritoriality in Japan, the Ottoman Empire and China* (Cambridge, 2010). Shih Shun Liu, *Extraterritoriality. Its Rise and Decline* (Studies in History, Economics and Public Law, vol. 118, nr 2 = Columbia University Studies in the Social Sciences, 263) (New York, 1925), pp. 201-209 [reprint (New York, 1969)].

[273] Treaty Japan – UK, 16 July 1894, in: *CTS*, vol. 180, pp. 258-272.

[274] Sakuei [Sakuye] Takahashi, ed., *Cases on International Law during the Chino-Japanese War. With a Preface by Thomas Erskine Holland and an Introduction by John Westlake* (Cambridge, 1899), S. 2.

[275] Paul-Christian Schenck, *Der deutsche Anteil an der Gestaltung des modernen japanischen Rechts- und Verfassungswesens* (Beiträge zur Kolonial- und Überseegeschichte, 68) (Stuttgart, 1997).

[276] Paternostro, 'Revision' (note 272), p. 6. Piggott, *Exterritoriality* (note 272).

[277] Treaty France – Tonga, 9 January 1855, in: *CTS*, vol. 112, p. 388. Treaty Fiji – France, 7 July 1858, in: *CTS*, vol. 119, p. 234.

the material inequality of treaty obligations was manifest in the texts of the agreements by implication, namely through the absence of reciprocal stipulations. Hence, the written texts of most treaties simply did not refer to rights that signatories in Africa, Asia and the South Pacific might have or might be entitled to claim. But the principle that the lack of reciprocity of written stipulations should be recognised as equivalent of the lack of reciprocal rights, was stated nowhere explicitly in the treaties themselves, but was, in European and US perspective, solely part of the underlying public law of treaties among states. This customary law was unknown to signatory parties in Africa, Asia and the South Pacific and its tacit imposition was therefore a political instrument for the discrimination of these signatories. The expansion of the European public law of treaties among states, as the nucleus of international law in general, reached the boundaries of the globe at the turn towards the twentieth century. It was innately tied to the expansion of European and US colonial rule.

Colonialism and Treaties on the Establishment of International Organisations

The European and US government policy of imposing written agreements by international law not only stood under the purpose of disseminating legal norms and of establishing colonial rule but also pursued the generation of new global norms and standards and the foundation of international organisations to enforce them. Already at the end of the nineteenth century, several of these organisations were set up through multilateral treaties. Some of these agreements may already at that time have came about in response to practical concerns for the regulation of international communication, such as cross-border traffic, the protection of the environment, cross-border crime prevention, the care of the wounded in war and the regulation of maritime traffic on the open seas. These concerns appear to have been behind the Metrical Convention of 1875,[278] the International Geodetic Convention of 1895,[279] the International Convention on the Prevention of Trafficking in Women, which was approved in 1904 under the title "International Agreement for the Suppression of the White Slave Traffic",[280] the Geneva Convention on the Wounded in War of 1864,[281] the Convention on the Use of Automobiles of 1909,[282] the treaty on the Foundation of an International Consultative Commission of the Protection of Nature of 1913,[283] the Convention on the Adjustment of Rules on Collisions on the Open Sea of 1910[284] and the International Convention on the Safety of Traffic on the Open Sea of 1914.[285] By contrast, further multilateral treaties resulted from efforts to promote globally enforceable rules for postal services, the protection of patents and other intellectual property rights. These efforts lay behind the making of a series of telegraph conventions since 1865,[286] the agreements on the foundation of the International Postal Union of 1874 and 1878,[287] the approval of the International Conventions of the Protection of Industrial Property of 1883 and 1886,[288] the Berne Convention of Copyright of 1886 and the international Convention on Copyright

[278] Metrical Convention, 20 May 1875, in: *CTS*, vol. 149, pp. 237-248.

[279] International Geodetic Convention, 11 October 1895, in: *CTS*, vol. 182, pp. 82-87.

[280] International Agreement for the Suppression of the White Slave Traffic, 18 May 1904, in: *CTS*, vol. 195, pp. 326-333.

[281] Convention on the Improvement of the Condition of the Wounded of the Armies in the Field, Geneva, 22 August 1864, in: *CTS*, vol. 129, pp. 361-367.

[282] Convention on Automobiles, 11 October 1909, in: *CTS*, vol. 209, pp. 362-369.

[283] Treaty of the Foundation of a Consultative Commission for the Protection of Nature, 19 November 1913, in: *CTS*, vol. 219, pp. 32-36.

[284] Convention on the Adjustment of Rules on Collisions on the Open Sea, 23 September 1910, in: *CTS*, vol. 212, pp. 178-186.

[285] Convention on the Safety of Traffic on the Open Sea, 20 January 1914**,** in: *CTS*, vol. 219, pp. 177-255.

[286] Among many: Telegraph Convention, 17 May 1865, in: *CTS*, vol. 130, pp. 198-225. Telegraph Convention of 1866, in: *CTS*, vol. 133, pp. 468-470.

[287] World Postal Agreement, 9 October 1874, in: *CTS*, vol. 147, pp. 136-160. World Postal Agreement, 1 June 1878, in: *CTS*, vol. 152, pp. 235-300.

[288] Convention on the Protection of Industrial Property, 20 March 1883 in: *CTS*, vol. 161, pp. 409-417. Convention on the Protecvtion of Industrial Property**,** 11 May 1886, in: *CTS*, vol. 167, pp. 478-483.

of 1896[289] as well as the International Convention of the Publication of Customs Tariffs of 1890.[290] Max von Brandt, among others, still in 1895 complained about the lack of mechanisms for the enforcement of intellectual property rights in East Asia, thereby documenting the belief that European governments should become active in the global promotion and imposition of international norms and standards at the turn towards the twentieth century.[291] Indeed, European and the US government claimed for themselves the right to demand the world-wide application of these norms and standards and expected that recognition of these norms and standards could be taken as the criterion measuring the alleged "cultural progress" of European and the US governments vis-à-vis governments elsewhere in the world. Ideologues of European expansion raised the implementation of "cultural progress" all over the globe to the declared goal of purported "civilising missions" under the name of colonial rule. Some academics not only applied the concept of "cultural progress" in the context of promoting missionary activities but even went so far to take the norms of "cultural progress" literally and demanded the enforcement of global standards of hygiene.[292] With regard to the latter demand, academics had unprecedented success. Indeed, an international "congress on hygiene" took place at Dresden in 1893[293] and launched the making of an international convention, approved on 3 December 1903 and mainly serving the purpose of fighting cholera and plague in Africa, Asia and the South Pacific.[294] Critics noted that governments took combating contagious diseases more serious than simultaneous efforts to reduce the likelihood of war.[295] Invitations to participate in this and other international conferences were extended only to a limited number of governments, as participation in these conferences ranked as tantamount to the recognition of membership in the "family of nations".

In order to promote the implementation of "cultural progress" and "civilisation", European colonial governments were even determined not only to prevent states from acceding to international conventions and from joining international organisations, to also destroy states or to unilaterally deny subjecthood under international law or statehood, but were also willing to bar the potential for endogenous cultural, economic and political change in the parts of Africa, West, South, Southeast Asia and the South Pacific that had come under their control. In doing so, they left to the victims of colonial rule the choice merely between adaptation and resistance. The strategy of adaptation resulted in dependence, while the strategy of resistance could end in genocide. In both cases, the

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[289] Berne Convention of Intellectual Property Rights, 9 September 1886, in: *CTS*, vol. 168, pp. 186-198. Agreement on Property Rights, 4 May 1896, in: *CTS*, vol. 182, pp. 441-449. For a survey of the history of copyright law see: Isabella Löhr, *Die Globalisierung geistiger Eigentumsrechte. Neue Strukturen internationaler Zusammenarbeit. 1886 – 1952* (Kritische Studien zur Geschichtswissenschaft, 195) (Göttingen, 2010).

[290] International Convention on the Publication of Customs Tariffs, 5 July 1890, in: *CTS*, vol. 173, pp. 329-340.

[291] Maximilian August Scipio von Brandt, 'Der chinesisch-japanische Konflikt', in: Brandt, *Ostasiatische Fragen* (Berlin, 1897), pp. 259-268, at p. 265 [reprint (Seoul, 2001); microfiche reprint (German Books on Japan 1477 – 1945) (Munich, 2002); first published in: *Deutsche Rundschau* (February 1895)].

[292] For one: Albrecht Ludwig Agathon Wernich, *Geographisch-medicinische Studien nach den Erlebnissen einer Reise um die Erde* (Berlin, 1878), pp. 241-242. For parallels in arguments about missionary strategy see: Carl Mirbt, Einwirkungen auf das Recht der Eingeborenen in den deutschen Schutzgebieten [May 1914]. Ms. Berlin: Bundesarchiv Berlin, R 1001/4999, Nr 45. Mirbt, *Die evangelische Mission in Deutschland unter dem Druck des gegenwärtigen Weltkrieges* (Berlin, 1917), specifically at pp. 15-17. Julius Richter, *Weltmission und theologische Arbeit* (Gütersloh, 1913), p. 8. Ernst Troeltsch, 'Die Mission in der modernen Welt', in: *Die christliche Welt* 20 (1906), cols 8-12, 26-28, 56-59, at cols 57. Gustav Warneck, *Die gegenseitigen Beziehungen zwischen der modernen Mission und Cultur* (Gütersloh, 1879), pp. 40-42, 51-52, 137. Warneck, *Die Heidenmission, eine Großmacht in Knechtsgestalt* (Halle, 1883), p. 24.

[293] E. van Ermengen, Rapport de la Première Commission [Internationale Hygienekonferenz Dresden, 30 March 1893], in: London: British National Archives, FO 1277. James W. Garner, 'Le développement et les tendances récentes du droit international', in: *Recueil des cours* 35 (1931, Part II), pp. 605-720, at p. 643.

[294] For the contemporary global attention paid to the fight against cholera see: Jinnosuke Tsuzuki, 'Bericht über meine epidemiologischen Beobachtungen und Forschungen während der Choleraepidemie in Nordchina im Jahre 1902 und über die im Verlaufe derselben von mir durchgeführten prophylaktischen Maßregeln mit besonderer Berücksichtigung der Cholera-Impfung', in: *Archiv für Schiffs- und Tropen-Hygiene*, vol. 8, nr 2 (1904), pp. 71-81. International Convention on Hygiene, 3 December 1903, in: *CTS*, vol. 194, pp. 295-349.

[295] Schücking, 'Organisation' (note 129), p. 571.

insistence upon the implementation of "cultural progress" as a goal of colonial rule confirmed the perspective among the victims of colonial suppression that colonialism with all its institutions and legal norms served European interests alone. This perspective concerned international law as it came to be recognised as an instrument for the legitimation of colonial rule. Even the thoroughly critical members and supporters of the international peace movement conceived international organisations exclusively on the basis of European models of statehood and refused to admit a pluralism of concepts of the state into their plans for the build-up of international organisations. In doing so, they excluded most states in Africa, West, South, Southeast Asia and the South Pacific from membership in international organisations and, by consequence, they themselves laid the foundations for the failure of the peace programs, the conception of which rested on the premises that international law was European in origin and that only European and the US governments could take over the task of promoting the global application of these programs.[296] The peace movement pretended to be internationalist, while mainly looking at Europe. The very fact that Japanese intellectuals contributed significantly to the conception of "cultural internationalism" at the turn towards the twentieth century, remained largely unknown in Europe at that time.[297]

The abuse of international law as a means for the legitimation of colonial rule entailed the further consequence that a contradiction opened between the claim for the general validity of norms, enshrined in European international law on the one side and, on the other, the denial of subjecthood under international law towards a large number of states in the world at large. Because European colonial governments refused to recognise their treaty partners in Africa, West, South, Southeast Asia and the South Pacific as international legal subjects, and did so against the wording of these agreements, they barred governments of states under any form of colonial rule from the right to articulate claims in accordance with international law. By the same degree, by which international law sank to the level of the house law of the "family of nations", it lost the global validity that international legal theorists postulated for it.

The Japanese experience points towards a further dimension of the expansion of European control over law enforcement mechanisms without the establishment of colonial rule. European and the US governments argued that their request the admission of consular justice was based on the alleged lack of domestic legal systems compatible with European practice. According to the same argument, even international courts of law were to be established through treaties and placed in charge of settling disputes involving foreigners of European and US provenance on the territory of a non-European signatory party. Hence, these foreigners became exempted from state law. In the case Siam, international courts of law were established through the British-Siamese agreement of 10 March 1909. The treaty prescribed that these courts were to continue in operation until European legal norms would have been introduced to Siam.[298] In another case, which is best recorded in Japan, the wholesale reception of European legal systems and public hygiene followed from diplomatic pressure, the refusal to give up extraterritorial status and the purposeful protraction of negotiations for the revision of non-reciprocal treaties in attempts to retain privileges that seems to provide diplomatic leverage and military threat capability to European and the US governments.[299] However, the Japanese government did succeed in playing off the competing European colonial governments against one another by taking over various legal systems from different states in Europe and the USA. But it did so at the price of establishing a pluralism of various sets of legal norms following from different legal philosophies and disuniting the domestic legal system.

Theories of Colonial War

Not only the practice but also the theory of colonial war served the purpose of discriminating victims

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[296] Schücking, 'Organisation' (note 129), pp. 597-598.

[297] Akira Irie [= Iriye], *Cultural Internationalism and World Order* (Baltimore and London, 1997), pp. 36-46.

[298] Treaty Siam – UK (note 225), Art. V, p. 368.

[299] Maximilian Fleischmann, *Weltfriede und Gesandtschaftsrecht* (Munich, 1909), pp. 64-67. Paternostro, 'Révision' (note 272). Ram Prakesh Anand, 'Family of "Civilized" States and Japan. A Story of Humiliation, Defiance and Confrontation', in: *Journal of the History of International Law* 5 (2003), pp. 1-75.

of colonial suppression. At the end of the nineteenth century, Charles Edward Callwell (1859 – 1928), serving as a British intelligence officer in South Asia, systematised the concept of colonial war for which he used the phrase "small wars". He categorised "small wars" as irregular military conflicts and included all operations other than engagements of regular armed forces on either side. Specifically, Callwell wished to include all kinds of "expeditions against savages or semi-civilised races by disciplined soldiers, campaigns undertaken to suppress rebellions and guerilla warfare in all parts of the world where organised armies are struggling against opponents who will not meet them in the open field."[300] Callwell distinguished three classes of "small wars" by their purposes. The first, he believed, consisted in "campaigns of conquest or annexation against an enemy on foreign soil", the second, he expected, aimed at "the suppression of insurrections or lawlessness, or for the settlement of conquered or annexed territory, the struggle against guerillas and banditti" and the third, he claimed, was "undertaken to wipe out an insult, to avenge a wrong or to overthrow a dangerous enemy".[301] With regard to the purposes of the second class, he agreed with Captain Gudewill, German commander in the war against the Herero and Nama who reported to the Chief of Staff of the Navy about German warfare in Southwest Africa: "The war has just entered into its second stage. The harshest punishment of the enemy is necessary as a sanction for the countless cruel murders and as a guarantee for a peaceful future. The sole means to bring about the restoration of calm and confidence among the whites is the complete disarmament and the confiscation of all lands and cattle." (Der Krieg ist in ein zweites Stadium getreten. Die härteste Bestrafung des Feindes ist notwendig als Sühne für die zahllosen, grausamen Morde und als Garantie für eine friedliche Zukunft. Um Ruhe und Vertrauen der Weissen herzustellen, ist völlige Entwaffnung und Einziehung von sämtlichen Ländereien und Vieh einzigstes Mittel.)[302] Callwell equated his first and third class of purposes with ordinary wars of conquest, except that they occurred outside Europe. Among the armed conflicts Callwell analysed, the first and the third were the most frequent, specifically the Indian Mutiny, British operations in Egypt and Sudan, the British "pacification" of the Burmese Highlands as well as the US government military responses against "nomadic Red Indians".[303] Callwell categorised these armed conflicts as acts of the use of force within a state and argued that they had been undertaken as means to preserve established British colonial and US federal government rule. "Small wars", according to Callwell, did not necessarily differ from regular wars in terms of the intensity of the use of force but essentially with regard to the asymmetry of the warring parties.[304] Like Gudewill, Callwell did not hesitate to acknowledge "revenge" and "sanction for offenses" as causes of "small wars", even though the law of war did not admit such causes.[305]

Callwell's concept of the "small wars" was far broader than any of the definitions of "little" or irregular wars of the early nineteenth century. Callwell's concept comprised all forms of the use of force, including occupation, in which no more than one regular army was engaged. Callwell grouped among the belligerents whom he identified as enemies of regular arms, non-uniformed troops and fighting forces such as "guerillas and banditti", who appeared to him not to be willing to subject themselves to the control of established governments.[306] He applied this definition even in cases of armed conflicts, such as the British war against the then sovereign Kingdom of Ashanti in 1873 and 1874, which had involved regular armies on both sides and featured battles in the "open

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[300] Charles Edward Callwell, *Small Wars* (Lincoln, NE, 1996), p. 21 [first published (London, 1896)]. For a study of colonial warfare, though not of the theory of colonial wars see: Frank Füredi, *Colonial Wars and the Politics of Third World Nationalism* (London, 1994), pp. 109-141 [reprint (London, 1998)].

[301] Callwell, *Wars* (note 300), pp. 25-27.

[302] Gudewill, '[Report on the Conduct of War against the Herero and Nama, 1904] ', in: Gudewill, Kriegstagebuch, in: Freiburg: Bundesarchiv-Militärarchiv, RM 3 10263, fol. 38a; partly printed in: Jürgen Zimmerer, 'Krieg, KZ und Völkermord in Südwestafrika, Der erste deutsche Genozid', in: Zimmerer and Joachim Zeller, eds, *Völkermord in Deutsch-Südwestafrika. Der Kolonialkrieg (1904 – 1908) in Namibia und seine Folgen* (Berlin, 2003), p. 48 [second edn (Berlin, 2005)].

[303] Callwell, *Wars* (note 300), pp. 21-22, 26.

[304] Ibid., p. 21.

[305] Christian Wolff, *Grundsätze des Natur- und Völckerrechts*, § 155 (Halle, 1754), p. 98 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, Abt. A, Bd 19) (Hildesheim and New York, 1980].

[306] Callwell, *Wars* (note 300), p. 26.

field", military occupation and sieges. Callwell included into the data sets for "small wars" the experiences of this campaign, which took place when Ashanti neither was nor came under British rule, related to what was a perfectly regular war in his own terminology.[307]

For Callwell, "small wars" were also campaigns of European armies against armed anti-colonial resistance groups among populations that he contemptuously downgraded to "half-civilised races or wholly savaged tribes".[308] Call well referred to the campaigns against these groups as "expeditions", thereby denying to these enemies not only the term "war" but also the status of belligerents in terms of international law. He also subsumed the use of force against rebels and *guerilleros* among the "small wars", ranked them, in other words, as policing measures in defence of allegedly existing legitimate government control. Resistance against colonial rule, to Callwell, was thus illegitimate from the very beginning.

The common tactical element of all "small wars" thus was, in Callwell's perspective, the purported refusal of battles in the "open field" by the enemies of European regular armies. Within this perspective, Callwell expanded *razzia* tactics, which the French occupation army had employed solely in areas around Algiers, to a general theoretical principle enshrined in the concept of colonial wars against resistance groups, which were seemingly unwilling or incapable of organising themselves in states according to European patterns. Callwell denounced these groups as "savaged tribes" and claimed that they were not following the rules of regular warfare. According to this logic, colonial "expeditions" were not wars in the sense of the law of war, because that law recognised as wars only military conflicts carried out among armies under the control of governments of sovereign states as belligerents.[309] Hence, Callwell operated within the confines of the law of war, when he classed colonial "expeditions" as acts of the suppression of seemingly illegitimate resistance against purportedly legitimate rule. By consequence, within Callwell's military theory, the military used in these colonial "expeditions" could aim at harming, and even killing, armed combatants as well as unarmed civilian non-combatants. The law of war thus was blunt vis-à-vis these colonial "expeditions" and the delimitation of the use of military force remained unsanctioned beyond disciplinary measures. Callwell's "expeditions", therefore, were total wars because they blurred the conceptual boundary between combatants and non-combatants. Yet truly cynical was Callwell's conclusion by which he put the blame for the totalisation of colonial wars on the victims of colonial rule, arguing that "regular forces are compelled, whether they liked it or not, to conform to the savage method of battle".[310] Put differently: Because the victims of European colonial rule decided autonomously about the choice of tactics and means of combat, the European armies were not bound by the restrictions of the law of war. That regular armies could choose to employ even genocide as a tactical instrument came on record through the war against the Herero and Nama in German Southwest Africa.[311]

Moreover, Callwell resorted to contemporary myths of "civilisation" to the effect of downgrading the enemies of European regular armies to "savaged tribes". He ascribed "savagery" to them as an apparently well-ascertained feature, displaying, in his perspective, the lack of governmentality, and asserted that policing pacification measures were demanded from European regular armies. At the turn towards the twentieth century, military theorists thus rejected the premise that the enemies of European regular armies could have the capability of building up a military organisation equivalent of European standards. This conclusion was paradoxical: Because allegedly the victims of European colonial rule were too weak to be able to face European regular armies in the "open field", they opted for hit-and-run tactics and did so since the beginning of the French occupation of Algiers. Because they appeared to refuse battle in the "open field", all tactical means

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[307] Ibid., pp. 246-247.

[308] Ibid., pp. 90-96.

[309] Protocoll, Brussels Conference 1874) (note 114), p. 134. Institut, 'Laws' (note 114), Art. 2, p. 37. Hague Convention (1899) (note 116), p. 436-442.

[310] Callwell, *Wars* (note 300), pp. 30-31.

[311] Gesine Krüger, *Kriegsbewältigung und Geschichtsbewußtsein. Realität, Deutung und Verarbeitung des deutschen Kolonialkrieges in Namibia. 1904 – 1907* (Göttingen, 1999). Krüger, 'Warum gingen die deutschen Kolonialkriege nicht in das historische Gedächtnis der Deutsche ein? ', in: Nikolaus Buschmann, ed., *Der Krieg in den Gründungsmythen europäischer Nationen und der USA* (Frankfurt, 2003), pp. 120-137, at pp. 134-136.

seemed available for choice against the enemies of European armies in colonial dependencies anywhere and against the stipulations of the law of war.

Ethnographic descriptions confirmed and even strengthened this conclusion, when anthropology and ethnology, as academic disciplines in charge of the study of purportedly "savage" or "primitive" cultures of so-called "nomads", appeared to provide the factual basis on which military theorists believed to be able to draw. Ethnographic descriptions rendered cultures, which these disciplines positioned at the beginning of human history seemingly without states and market economies, as continuing into in an apparently unchanged condition of "savagery" and "primitiveness" and marked them as recent manifestations of some concocted lack of "civilisation".[312] These allegedly continuing "primitive" cultures, according to ethnographic descriptions, were lacking governmentality in that they appeared to be incapable of establishing states, subjecting their populations to law and order and maintaining peace among themselves. Nineteenth-century anthropologists and ethnologists located these purportedly "primitive" cultures predominantly in Africa, among Native Americans, in parts of South and Southeast Asia as well as in the South Pacific.[313] These perceptions have continued to impact on social anthropological research into the early twenty-first century.[314]

Early twentieth-century social anthropological research condensed these seemingly empirical findings and theoretical deductions, together with experiences that had grown out of the colonial wars, into an anthropological concept of war that was relativistic and sharply set apart from that informing the law of war. Social anthropologists did apply the word war and its correlates in other European languages, but placed the use of this word outside the range of validity of the law of war. They categorised wars among members of seemingly "primitive" cultures as "small wars", because the purported "savages" appeared not to be able to organise themselves in groups with large numbers of members. Consequently, their choice of weaponry seemed to be limited to the range that small combat forces appeared to be able to deploy.[315] Nevertheless, warfare among the seemingly "primitive tribes" was reportedly more often severe and bloody than mild and harmless.[316] Social anthropologists explicitly specified that apparent "nomads" should be recognised as more war-prone than agriculturalists, because groups seemed to run into conflict with their neighbours easily due to

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[312] Friedrich Ratzel, *Völkerkunde*, second edn, vol. 1 (Leipzig and Vienna, 1894), p. 126 [first published (Leipzig and Vienna, 1885)]. Herbert Spencer, *The Principles of Sociology*, vol. 1 (New York and London 1877), pp. 482, 485-486 [first published (London, 1876); further edns (London, 1882; 1893); (New York, 1897; 1901; 1906; 1912); reprints (Osnabrück, 1966); edited by Stanislav Andreski (London and Hamden, CT, 1969); (Westport, CT, 1975); edited by Jonathan H. Turner (New Brunswick, 2002)]. Edward Tylor, *Primitive Culture*, vol. 1, sixth edn (London, 1920), p. 32 [first published (London, 1871); second edn (London, 1873); third edn (London, 1891); fourth edn (London, 1903); fifth edn (London, 1913); reprints of the first edn (New York, 1974); (Tylor, Collected Works, vol. 3) (London and Tokyo, 1994); (Cambridge, 2010); American Editions (New York, 1877; 1888; 1889)]. For a survey based on travel logs see: Johann Baptist [Giovanni Battista] Fallati, 'Keime des Völkerrechts bei wilden und halbwilden Stämmen', in: *Zeitschrift für die gesammte Staatswissenschaft* 6 (1850), pp. 151-242, at pp. 173-201.

[313] Tylor, *Culture* (note 312), pp. 27, 42-43, 61.

[314] Richard Brian Ferguson, 'Explaining War', in: Jonathan Haas, ed., *The Anthropology of War* (Cambridge, 1990), pp. 26-55. Jürg Helbling, *Tribale Kriege. Konflikte zwischen Gesellschaften ohne Zentralgewalt* (Frankfurt and New York, 2006). Keith F. Otterbein, 'The Anthropology of War', in: John Joseph Honigman, ed., *Handbook of Social and Cultural Anthropology* (Chicago, 1973), pp. 923-958. Otterbein, *The Evolution of War. A Cross-Cultural Study* (New Haven, 1970) [second edn (New Haven, 1985); third edn (New Haven, 1989)]. Otterbein, 'The Origin of War', in: *Critical Review* 11 (1997), pp. 251-277. Otterbein, 'A History of Research on Warfare in Anthropology', in: *American Anthropologist* 101 (1999), pp. 794-805.

[315] Alfred Knabenhans, 'Der Krieg bei den Naturvölkern', in: *XVI. Jahresbericht der Geographisch-Ethnologischen Gesellschaft Zürich 1915/16* (1917), pp. 37-81, at p. 78.

[316] Charles Jean Marie Letourneau, *Le guerre dans les diverses races humaines* (Bibliothèque anthropologique, 16) (Paris, 1895), p. 528. Richard Thurnwald, 'Das Rechtsleben der Eingeborenen der deutschen Südseeinseln', in: *Blätter für vergleichende Rechtswissenschaft* 4 (1910), pp. 3-46, at p. 40. Thurnwald, 'Ermittlungen über Eingeborenenrechte der Südsee', in: *Zeitschrift für vergleichende Rechtswissenschaft* 23 (1910), pp. 309-364, at pp. 323-325.

their vagrancy.[317] As members of allegedly "primitive" cultures lacked governmentality in social anthropological perspective, no state institutions could be established.[318]

In providing these analyses and definitions, social anthropology propagated heterostereotypes, some of which had a touch of racism even though anthropologists claimed a relativistic approach for themselves. These heterostereotypes were constructs imposed upon cultures that were classed as "primitive" on the basis of knowledge that was given out as empirical and scientific. In turn, these constructs formed the platform for ideologies serving the purpose of legitimising the continuity of European colonial rule. Colonialist social anthropology thus posited that the "study of natives" was the precondition for political control of "natives", and demanded that anthropologists should investigate the patterns of thinking of "natives", thereby allowing the profitable exploitation of "native" labour force in mines and agricultural plantations.[319] To that end, colonial governments authorised the collection of empirical data about "native" legal systems in their colonial dependencies and supported the build-up of large collections of things, which were often forcefully removed from "native" lands.[320] In this respect, social anthropologists did even

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[317] Wilhelm Emil Mühlmann, *Krieg und Frieden. Ein Leitfaden der politischen Ethnologie mit Berücksichtigung völkerkundlichen und geschichtlichen Stoffes* (Kulturgeschichtliche Bibliothek. Series 2, N. F., vol. 2) (Heidelberg, 1940), p. 103. Karl Weule, *Der Krieg in den Tiefen der Menschheit* (Kosmos-Bändchen, 64/65) (Stuttgart, 1916), S. 15, 33, 35 [sixteenth edn (Stuttgart, 1923)].

[318] For a critical review of these arguments see: Richard Brian Ferguson and Neil L. Whitehead, 'The Violent Edge of Empire', in: Ferguson and Whitehead, eds, *War in the Tribal Zone. Expanding States and Indigenous Warfare* (Santa Fe, 2000), S. 1-30 [first published (Seattle, 1992); third edn (Santa Fe, 2001); fourth edn (Santa Fe, 2005)].

[319] On these investigations see: Margitta Boin, *Die Erforschung der Rechtsverhältnisse in den „Schutzgebieten" des Deutschen Reiches* (Münsteraner Studien zur Rechtsvergleichung, 19) (Munster, 1996). Bernhard Großfeld and Margitta Wilde[-Boin], 'Josef Kohler und das Recht der deutschen Schutzgebiete', in: *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 58 (1994), pp. 59-75. Cornel Zwierlein, 'Übersetzung ohne Original. Die Erfassung des Rechts der ‚Naturvölker' per Fragebogen in den deutschen Kolonien. 1907 – 1914', in: *Zeitschrift für neuere Rechtsgeschichte* 34 (2012), pp. 219-245.

[320] Max Beneke, 'Entwurf eines Fragebogens über die rechtlichen und wirtschaftlichen Verhältnisse der Naturvölker mit besonderer Berücksichtigung der Bantu', in: *Mitteilungen der Gesellschaft für vergleichende Rechts- und Staatswissenschaften zu Berlin* 1 (1895), pp. 29-49. Beneke, 'Fragebogen über die rechtlichen und wirtschaftlichen Verhältnisse der Natur- und Halbkulturvölker', in: *Mitteilungen der Gesellschaft für vergleichende Rechts- und staatswissenschaften zu Berlin* 1 (1895), pp. 83-110. Knabenhans, 'Krieg' (note 315). Josef Kohler, 'Fragebogen zur Erforschung der Rechtsverhältnisse der sogenannten Naturvölker, namentlich in den deutschen Kolonialländern', in: *Zeitschrift für vergleichende Rechtswissenschaft* 12 (1897), pp. 427-440 [English version in: Alison H. Redmayne, 'Research on Customary Law in German East Africa', in: *Journal of African Law* 27 (1983), pp. 28-36]. Albert Hermann Post, 'Fragebogen der internationalen Vereinigung für vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin über die Rechtsgewohnheiten der afrikanischen Naturvölker', in: Sebald Rudolf Steinmetz, ed., *Rechtsverhältnisse von eingeborenen Völkern in Afrika und Ozeanien* (Berlin, 1903), pp. 1-13 [English version in: Andrew Lyall, 'German Legal Anthropology. Albert Hermann Post and His Questionaire', in: *Journal of African Law* 52 (2008), pp. 124-137]. Post, *Einleitung in das Studium der ethnologischen Jurisprudenz* (Oldenburg, 1886), p. 24 [reprint, edited by Hans-Jürgen Hildebrand (Göttingen, 1989); partly translated in: Open Court 11 (1897), pp. 641-653, 719-730; newly edited in: A. Kocourek and J. H. Wigmore, eds, *Primitive and Ancient Legal Institutions* (Boston, 1915), pp. 10-36]. Erich Schultz-Ewerth and Leonhard Adam, ed., *Das Eingeborenenrecht. Sitten und Gewohnheitsrechte der Eingeborenen der ehemaligen deutschen Kolonien in Afrika und der Südsee. Gesammelt im Auftrag der damaligen Kolonialverwaltung von Beamten und Missionaren der Kolonien, geordnet und kommentiert von früheren Kolonialbeamten, Ethnologen und Juristen [on the Basis of the Replies to the Enquiry Authprosed by the German Imperial Diet of 1907]*, 2 vols (Stuttgart, 1929-1930) [Originals of the Replies are in: Berlin: Bundesarchiv, R 1001/4990]. Sebald Rudolf Steinmetz and Richard Thurnwald, *Ethnographische Fragesammlung zur Erforschung des sozialen Lebens der Völker außerhalb des modernen europäisch-amerikanischen Kulturkeises* (Berlin, 1906). Richard Thurnwald, 'Angewandte Ethnologie in der Kolonialpolitik', in: *Verhandlungen der Hauptversammlung der Internationalen Vereinigung für Vergleichende Rechtswissenschaft und Volkswirtschaftslehre zu Berlin* 1 (1911), pp. 59-69. Thurnwald, 'Rechtsleben' (note 316). Thurnwald, 'Ermittlungen' (note 316). Louis Wodon, 'Enquête sur les coutumes juridiques des peuplades congolaises', in: *Bulletin de la Société d'Etudes Coloniales* 1 (1894), pp. 97-108. On the conception of ethnographic museums as instruments facilitating the smooth operation of colonial administration see: Oswald Richter, 'Über die idealen und praktischen Aufgaben der ethnographischen Museen', in: *Museumskunde*, vol. 2 (1906), pp. 189-218, vol. 3 (1907), pp. 14-25, 99-120, vol. 4 (1908), pp. 92-106, 156-168,

better service to the continuation of colonial rule than international legal theory. While international legal theorists provided the categories allowing the denial of subjecthood under international law to the victims of colonial rule, social anthropology delivered the political arguments with which colonial governments could collectively deny governmentality to the inhabitants of their dependencies. Put differently: Whereas international legal theories could solidify the legal basis for the establishment of colonial rule, social anthropological work offered the logic from which reasons for the indefinite continuity of colonial rule could be concocted.

There was scarce criticism in Europe of these concoctions, which social anthropologists gave out as well-ascertained facts. Critics objected that "native" warfare were not structured in the same way all across the globe,[321] and demanded that the deployment of European armies in colonial dependencies should not take place in the form of "civilising missions" but on the basis of the law of war.[322] However, outside Europe, contemporary sharp-minded theorists penetrated behind the propagandistic character of ideologies of colonial rule and subjected them to careful scrutiny. The analyses showed that international law, when applied outside Europe, was not a neutral instrument of the maintenance of peaceful relations among states,[323] that, by contrast, unchecked colonial rule was spreading like a dangerous prairie fire,[324] and even in Europe itself any order imposed over "displeased peoples" could only be enforced "through the crude physical force of the police and the so-called militarism … against the economic wellbeing of the population".[325]

Yet, international legal theorists concurred with military theorists in narrowing down their concepts of war. For one, Travers Twiss (1809 – 1897), civilist at the University of Oxford, before he advised King Leopold II on the issue of the establishment of the Congo Free State and the British delegation at the Berlin Africa Conference, in 1863 took a strong stand against the universalistic concept of war that he found in Grotius's work. Twiss censured Grotius for not having sufficiently differentiated between public and private war as legal concepts and proposed to define war as the object of special rights among warring parties and neutrals.[326] With this definition, Twiss followed the Lieber Code of 24 April 1863 containing articles of war for the Union Forces in the US Civil War.[327] Hence, Twiss, contrary to Grotius, would not recognise as war any type of military conflict, differing from court arbitration solely by the criterion of the use of force, but subsumed into war only those armed conflicts that stood under the special rights conveyed upon belligerents and neutrals by international law. The use of these special rights was, according to Twiss, possible only outside the state of peace and remained conditional upon the ascription of subjecthood under international law. Twiss insisted that it was impossible for any member of a political community, no matter how this might be organised, to be at war with other members of the same community or with other communities in times of peace. This was so, he argued, because the obligation to maintain peace was mandatory for all members of a political community and could only be lifted under the constraints of the special rights contained in international law on the conduct of war. Consequently, Twiss offered a new definition of private war. Accordingly, private war was no longer a type of military conflict among persons in the state of nature; instead, it was the illegitimate use of force by

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224-235, vol. 5 (1909), pp. 102-113, 166-174, 231-236, vo. 6 (1910), pp. 40-60, 131-137, at pp. 210-211.

321 Rudolf Holsti, *The Relation of War to the Origin of the State* (Annales Academiae Scientiarum Fennicae, 13) (Helsinki, 1913), p. 16.

322 Jean Lagorgette, *Le rôle de la guerre* (Paris, 1906), p. 200.

323 Do-Yün Ma, *Der Eintritt des Chinesischen Reiches in den völkerrechtlichen Verband*. LLD. Diss. University of Berlin 1907, p. 74.

324 Shūsui Kōtoku, *Teikokushugi*, edited by Susumu Yamaizumi (Tokyo, 2004), p. 15 [first published (Tokyo, 1901); further edns (Tokyo, 1952; 2010)].

325 Hong-Ming Gu, 'Kultur und Anarchie', in: Gu, *Chinas Verteidigung gegen europäische Ideen*, edited by Alfons Paquet (Jena, 1911), pp. 1-17, at pp. 9-10.

326 Twiss, *Law* (note 173), vol. 2, pp. 45-46.

327 Francis Lieber, *Lieber Code = General Order Nr 100*, 24 April 1863, Art. 20 [http.//www.icrc.org/ihist/FULL/100?OpenDocument]; also in: Dietrich Schindler and Jiří Toman, eds, *The Laws of Armed Conflicts*, third edn (Alphen aan den Rijn, 1988), pp. 3-23 [first published (Leiden, 1973); second edn (Alphen aan den Rijn, 1981); fouth edn (Leiden, 2004); also in: Richard Shelley Hartigan, ed., *Lieber's Code and the Law of War* (Chicago, 1983); seconed edn s. t.: *Military Rules, Regulations and the Code of War. Francis Lieber's Certification of Conflict* (New Brunswick and London, 2011)].

persons who were infringing upon their obligation to maintain peace. Such illegitimate use of force was equivalent of militant resistance against rule within a state. Such resistance was, according to Twiss, by no means war, not even when large numbers of fighters were combining their activities into armed forces. That dogma could easily be turned against anti-colonial resistance armies struggling in the European colonial dependencies. This could be done because, Twiss postulated, colonial dependencies were no international legal subjects and states without subjecthood under international law could not claim any special rights tantamount of the *ius ad bellum*. Hence they could not be legitimate belligerents. Whereas even "protectorates" had not lost their *ius ad bellum* according to early nineteenth-century international legal theorists, Twiss admitted only international legal subjects as legitimate belligerents for which the law of war was valid. Therefore, Twiss excluded the victims of colonial rule from the application of the law of war.

A narrow definition of war also informed a few restatements of the Augustinian paradigm of peace, war and peace even in the later nineteenth century. Theodore Dwight Woolsey, President of Yale College (1801 – 1889), for one, confessed to his view that peace was the normal condition of humankind and war just a temporary interruption of peace.[328] But Woolsey specified that this statement should be regarded as applicable only to wars against states within the same political system and to armed conflicts against foreign states outside the Christian "civilization", "savages", "pirates" and parts of other states. That meant that Woolsey considered the Augustinian paradigm relevant for military conflicts among the European colonial governments, between these governments against states elsewhere in the world as well as against non-state armed forces. But Woolsey excluded from his conception all military forms of armed resistance from among victims of European colonial rule and US expansion across North America. These forms of resistance, according to Woolsey, did not constitute war and, by consequence, were not legal by the standards of international law.[329]

Moreover, Woolsey's position remained that of a small minority of theorists, their majority arguing along the lines that Twiss had mapped out. William Edward Hall (1836–1894), a practicing lawyer belonged to the majority group. For him, like Twiss, wars were matter-of-factly military conflicts among states, which Hall, following Wheaton, categorised as armed conflicts among nations. Only national states as international legal subjects, under governments capable of making decisions at their own discretion, were entitled to go to war in Hall's perspective. Accordingly, insurgents had no right to become recognised as legitimate belligerents, when they stood against regular armed forces under the control of governments of sovereign states. In Hall's view, states that had waived some of their competences and thereby had acquired "protectorate" status might remain states, but their governments were permitted to act only within the limits that the treaty stipulating the "protectorate" status had set. These limits precluded, Hall and other contemporary jurists opined, the possibility of starting war legally against the holder of the "protectorate" or against any other fully sovereign state.[330] Moreover, Hall defined as enemies in a legal war all citizens and subjects of the warring parties.[331] In opting for this definition, Hall joined jurist James Kent and General Henry Wager Halleck (1815 – 1872)[332] against the doctrine proposed by Rousseau and widely accepted on the Continent, that in regular wars under international law, only states were enemies but not their citizens or subjects.[333] Hall's doctrine had far-reaching implications on the choice of tactics, because

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[328] Theodore Dwight Woolsey, *Introduction to the Study of International Law*, § 110, third edn (New York, 1872), pp. 187-188 [first published (Boston, 1860)].

[329] Ibid., § 113, pp. 190-191.

[330] Hall, *Treatise* (note 154), § 4, S. 19, § 10, S. 33-35. Lawrence, *Principles* (note 96), pp. 76-84; Nippold, 'Geltungsgebiet' (note 176), p. 454. Nippold, 'Das Völkerrecht und der jetzige Krieg', in: *Politisches Jahrbuch der Schweizerischen Eidgenossenschaft* 28 (1914), pp. 331-377, at pp. 341-343.

[331] Hall, *Treatise* (note 154), § 18, pp. 55-61.

[332] James Kent, *Commentaries on American Law*, vol. 1 (New York, 1826), p. 53 [new edn (Philadelphia, 1889)]. Henry Wager Halleck, *International Law*, chap. XXVI, § 1 (San Francisco. 1861), p. 496 [second edn (London, 1878); third edn (London, 1893); fourth edn (London, 1908); reprint (Amsterdam, 1970)].

[333] Jean-Jacques Rousseau, *Du contrat social* [Printed Version], book I, chap. 4, edited by Simone Goyard-Fabre (Paris, 2010), p. 124; Bluntschli, *Völkerrecht* (note 202), pp. 35-40. Oppenheim, *Law* (note 97), vol. 2, pp. 57, 59. Hannis Taylor, *A Treatise on International Public Law*, § 451 (Chicago, 1901), pp. 449-451 [further edn (London,

it seemed to make possible confiscations and even the destruction of enemy private property. Hall sought to mediate these implications by insisting that the law of war restricted the grip on the private property of non-combatants as well as actions against their safety.[334] Yet he left these restrictions unspecified. Conversely speaking, Hall removed military conflicts between regular armies and purportedly irregular resistance forces, that is, colonial wars, from the range of the applicability of international law.

While, like contemporary theorists,[335] regarding war as a "violent legal instrument of the defence of the legal status of relations between states" (gewaltsames Rechtsmittel zur Verteidigung des Rechtszustands zwischen Staaten),[336] Heidelberg publicist August von Bulmerincq became more explicit than his contemporaries in rejecting the dogma that the validity of international law should be acknowledged as a given fact. Instead, he assumed that international law could only be regarded as valid among states that had been coopted into the "family of nations" as the self-proclaimed "civilised" community of international legal subjects. Bulmerincq asserted that only states within the "family of nations", in their capacity as international legal subjects, could be admitted as equals in terms of international law, irrespective of the size of their territory and their means to exercise power.[337] Consequently, according to Bulmerincq, states without subjecthood under international law could not be legitimate belligerents. Like Twiss, then, Bulmerincq did not revoke the principle of the legal equality of sovereign states but imposed a difference between sovereign states with subjecthood under international law within the "family of nations" and states that were not recognised as international legal subjects outside the "family". Bulmerincq linked the granting of the privilege of subjecthood under international law to the condition that a certain degree of "civilszation" was deemed manifest. Only purportedly "civilised" states as international legal subjects could be admitted as actors in the international law arena and execute the *is ad bellum*.

Shortly after Bulmerincq, publicist Thomas Joseph Lawrence (1849 – 1920), who was incumbent of the Whewell Professorship of International Law at the University of Cambridge from 1884 to 1886 and later taught at the University of Bristol, went even further and claimed that international law as such could only be regarded as valid among states seemingly equipped with "civilisation". Lawrence defined international law as the set of rules determining the direction of the "general body of civilized states" through their mutual actions.[338] Lawrence would only recognise as states political "unities" that had acquired titles of ownership over certain portions of the surface of the earth. By contrast, Lawrence would not concede statehood to political "units" without clearly demarcated territories, for, in his view, it was impossible "for a nomadic tribe, even when it were highly organized and civilized", to be included into any concept of the state.[339] Wherever, following Lawrence, European governments identified apparent "nomads", international law remained invalid. Hence, war in the sense of international law, could not take place against "nomads" who appeared to be found mainly in Africa and the South Pacific.[340]

At the turn towards the twentieth century, John Westlake gave unprecedented expression to the same dogma. In 1907 he defined: "War is the state or condition of relations among governments contending by force". Drawing attention to the Hague Conventions on the Rules of Land Warfare of 1899, Westlake insisted on the importance of his reference to "governments" rather than to states. His point was that he included insurgents among belligerents, provided they stood under the control of a government.[341] Hence, Westlake admitted armed resistance as an element of his definition of war, which, therefore, was a little broader than those supported by Twiss, Bulmerincq and Lawrence. Yet Westlake limited the war-making capability to insurgents that had placed themselves under the

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1902)]. Triepel, *Zukunft* (note169), pp. 25-28.

334 Hall, *Treatise* (note 154), § 18, pp. 55-61.

335 Bulmerincq, Völkerrecht (note 52), p. 1. Similarly: Josef Kohler, *Grundlagen des Völkerrechts* (Stuttgart, 1918), p. 171. Rivier, *Lehrbuch* (note 207, original edn), vol. 2, p. 200.

336 Bulmerincq, *Völkerrecht* (note 52), § 92, p. 357.

337 Ibid., § 26, p. 206; § 24, p. 205.

338 Lawrence, *Principles* (note 96), § 1, p. 1.

339 Ibid., § 90, p. 136.

340 Liszt, *Völkerrecht* (note 204)., § 10, p. 98.

341 Westlake, *Law* (note 118), vol. 2, p. 1.

rule of some government. Hence, to him, insurgents could only be legitimate belligerents if and as long as they had organised themselves like sovereign states and had obtained manifest legal entitlements to act on behalf of identifiable population groups. In colonial dependencies, which Westlake would no longer admit as "protectorates", but categorised as occupied territories under the rule of a colonial government, this definition of insurgency hardly ever applied.[342] Consequently, Westlake granted legality to the unrestrained use of military force against "savages" engaged in armed resistance and classed these campaigns of total war as purportedly legitimate pacification measures. Westlake, of course, was well aware of the fact that valid treaties existed by which European colonial governments had recognised not only the statehood but also the sovereignty of their treaty partners in Africa, West, South, Southeast Asia and the South Pacific. But he was not willing to accept the factuality of the treaties as an argument against his doctrine. Like contemporary theorists, Westlake postulated that the treaties had been made with states existing outside the "family of nations" and were therefore not covered by international legal norms. No one, according to Westlake, could draw on the treaties as a means of the legitimation of anti-colonial resistance.

James Lorimer was as hard-nosed. At length, he reviewed the question how some "relative value of states", as he called it, could be measured. Contrary to Bulmerincq, Lorimer supposed that this alleged "value of states" was not a political, but a legal category, which could even justify the unequal treatment of states.[343] He specified territorial size, together with "quality", form and ruling capacity of government as the measurement standards. Accordingly, states with a small territory, seemingly without "civilisation", inhabited by apparent "nomads" and under governments purportedly not accomplishing the governmentality of the population under their sway, might have been recognised as states in treaties. Yet the treaties could not convey "value" that was sufficient to support claims for treatment as equal states.[344] Treaties, Lorimer concluded, could not convey a right of equal treatment, because the "sphere" of the "complete political recognition" was to be confined to "all existing states in Europe with their colonial dependencies".[345] Lorimer would not consider an expansion of this "sphere". In other words: Lorimer, like Westlake, argued that colonial dependencies under the control of European governments were states but stood outside the vaguely termed "sphere" of the validity of international law. Lorimer thus was explicit in equating international law with the house law of the "family of nations" and denied the validity of international law to states not admitted into that club. Hence, in Lorimer's theory, international law remained inapplicable to colonial wars.

Eventually, Lassa Oppenheim, whose textbook of 1905 remained in the print market in several new editions until the 1990s, made the doctrine explicit that colonial wars were not wars under international law. His reason was that colonial dependencies were part of the "mother country"[346] and, by consequence, could not be "parties to international negotiations".[347] In order to support his doctrine, Oppenheim imposed the distinction between "protectorates" by international law and "so-called protectorates" to which he refused to grant subjecthood under international law. Oppenheim based this distinction on theories that had been argued since the early nineteenth century. He went to these theories for evidence that "protectorates" had sovereignty, as they could only cede parts of their sovereignty as long as they remained sovereigns.[348] Holders of "protectorates" were entitled to use their rights solely to the extent that had been stipulated by treaties and was recognised by governments of other states. The latter condition was required, Oppenheim believed, because a hierarchy of "protectorates" and "protectorate" holders, manifesting levels of varying degrees of sovereignty, could only acquire legal force on the basis of a general recognition of the existence of "protectorates" within the "family of nations".[349] Oppenheim, like early nineteenth-century theorists,

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[342] Westlake, *Chapters* (note 154), pp. 177-178. Westlake, *Law* (note 118), vol. 2, p. 59.
[343] Lorimer, *Institutes* (note 181), vol. 1, pp. 182-215.
[344] Ibid., vol. 1, pp. 168-171.
[345] Ibid., vol. 1, p. 101.
[346] Oppenheim, *Law* (note 97), vol. 1, p. 219.
[347] Ibid., vol. 1, p. 506.
[348] Ibid., vol. 1, § 92, pp. 137-138.
[349] Ibid., vol. 1, § 94, pp. 139-140.

located this type of "protectorates" exclusively in Europe[350] and, with three exceptions, repeated the long-established lists of examples of such "protectorates".[351]

By contrast, Oppenheim insisted that this "protectorate" status could not apply to the "so-called protectorates", because they were located outside Europe and were neither members of the "family of nations", nor Christian, nor even states in accordance with some legal concept of the state.[352] Holders of such "protectorates" could unilaterally occupy and even annex them in accordance with domestic law, without being in need of approval or recognition by other international legal subjects. In Oppenheim's logic, such necessity did not exist, because, with regard to rights over their dependencies, "protectorate" holders were not bound by treaties with other international legal subjects. Oppenheim referred to the French-Madagascan treaty of 1895, which he classed as an annexation treaty against its wording.[353]

Likewise, Oppenheim would not admit as genuine "protectorates" the European dependencies then existing on African soil, even when these dependencies had previously been recognised as sovereign states.[354] These dependencies could, in his view, not be compared to the European "protectorates", because they appeared to him not to be organised as states. Instead, he identified "tribes" in them,[355] whose "chiefs" could not be admitted as heads of states and were therefore not to be included into the "family of nations".[356] Even if the word "protectorate" might have been used for them in treaties, they still were not "protectorates" in any legal sense but only areas that had been reserved for future "occupation" and "annexation". To Oppenheim, "occupation" was a legal title equivalent of "discovery", no matter under which word reference might have been made to it.[357]

Therefore, Oppenheim was unwilling to consider as wars military conflicts in colonial dependencies. Instead, he ranked these conflicts as acts of the quenching of rebellions that did not come under the rule of international but were regulated under domestic law. In advocating this position, Oppenheim narrowed down the concept of war as rigidly as hardly any other theorist before him. He not merely excluded private persons from the possibility of acquiring the legal status of belligerents but allowed wars under international law to occur only in those few parts of world, in which states as international legal subjects appeared to him to exist. He explicitly admitted armed conflicts among "protectorates" in Europe into his concept of war and pointed to the war between Bulgaria as a Turkish "protectorate" and Serbia in 1885.[358] But he sharply rejected the perception that wars in any legal sense could take place between "so-called protectorates" outside the "family of nations" and international legal subjects. The "so-called protectorates", Oppenheim assumed, lacked statehood, even in the face of valid treaties binding these "so-called protectorates" and members of the "family of nations". Moreover, Oppenheim even limited the range of his concept of war in temporal terms, claiming that wars in his definition had only been conducted since the sixteenth century. In earlier periods, wars in any legal sense could not have happened, because private persons had then regularly been admitted as legitimate belligerents.[359]

In summary, military and international legal theorists at the turn towards the twentieth

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[350] Ibid., vol. 1, § 94, pp. 139-140.

[351] Bluntschli, *Völkerrecht* (note 202), § 78, p. 95. Miloš Bogiževič [Boghitchévitch], *Halbsouveränität. Administrative und politische Autonomie seit dem Pariser Vertrage (1856)* (Berlin, 1903), pp. 1-84 [first published as LLD. Diss. (University of Berlin, 1901)]. Frantz Clément René Despagnet, *Essai sur les protectorates. Etude de droit international* (Paris, 1896), pp. 62-216. Eduard Engelhardt, *Les protectorats anciens et modernes. Etudes historiques et juridique* (Paris, 1896), pp. 31-180. Holtzendorff, 'Staaten', §§ 26-27, pp. 107-117. Liszt, *Völkerrecht* (note 204), § 6, pp. 52-62. Robert Phillimore, *Commentaries upon International Law*, third edn (London, 1879), pp. 100-155 [first published (London, 1854); second edn (London, 1871); reorint of the third edn (Boston, 2004)].

[352] Oppenheim, *Law* (note 97), vol. 1, § 94, pp. 139-140.

[353] Ibid., vol. 1, § 94, pp. 139-140.

[354] Ibid., vol. 1, § 94, p. 140.

[355] Ibid., vol. 1, § 94, p. 140.

[356] Ibid., vol. 1, § 226, pp. 280-281.

[357] Ibid., vol. 1, § 226, pp. 280-281; vol. 2, § 57, p. 63.

[358] Ibid., vol. 2, § 56, p. 58.

[359] Ibid., vol. 1, § 30, p. 34; vol. 2, § 57, p. 59.

century concurred with regard to their attempt to justify colonial wars as irregular military campaigns that were, in their view, taking place as total wars outside the constraints of international law. They concocted the argument that enemies of European regular armies ought to have observed the norms of the law of war, but were practically ignoring them. Within this concoction, that denied to the enemies of European regular armies the freedom of the choice of weaponry and tactics, theorists accused enemies of European regular armies of not applying the norms of the law of war and then believed to be able to justify breaches of that law on the side of these European armies. Theorists also claimed that the enemies of European regular armies were not fulfilling the conditions under which the law of war was seen as applicable, namely the ascertainment of the statehood of belligerents. For the latter claim, theorists could point to positive norms existing since the end of the nineteenth century, as laid down in the Hague Conventions on the Rules of Land Warfare of 29 July 1899 and of 18 October 1907.[360] The applicability of these conventions was restricted to armies, militias and free corps, which had to operate under an identifiable command structure in order to be recognised as belligerents, had to carry their weapons openly and respect the positive as well as the customary law of war.[361] In cases of sudden invasions, population groups resisting the invaders could be awarded belligerent status if they honoured at least the fourth condition, even if time had not permitted them to fulfill the others.[362] That norm implied the denial of belligerent status to armed groups not applying any of the four conditions, and this was the case with most anti-colonial resistance groups. Whether the Hague Conventions, as has often been claimed, actually contributed to the "humanisation" of war, to the pursuit of the goals of the international peace movement and to the acceptance of international law, can therefore be subjected to doubts.[363] For one, Karl Strupp (1886 – 1940), publicist at the University of Frankfurt, defined concisely in 1914: "War in a legal sense is always a conflict between states". Hence "a conflict with insurgents cannot be conceived as war, because only states are international legal subjects." (Krieg im Rechtssinn ist immer nur ein Kampf zwischen Staaten, sodass also ein Kampf mit Aufständischen nicht als Krieg aufgefaßt werden kann, weil nur Staaten Subjekte des Völkerrechts sind). By way of defining war in this rigorous limitation, Strupp denied the *ius ad bellum* to all colonial dependencies.[364] And jurist Friedrich Fromhold Martens (1845 – 1909), Russian delegate at the First Hague Peace Conference, when discussing the concept of belligerency, insisted that the "principles of international law" ought to be considered as consisting solely of norms resulting from the customs applied among "civilised nations". Martens refused to grant belligerency to victims of colonial suppression and met with no objections from other delegates.[365] The formula that Martens proposed found its way into the preamble of the convention as approved by the Hague Conferenceand has been applied in international law to 1977, when the UN agreed upon the protocol of 8 June 1977 to the Geneva Convention on the Protection of Civilians in Times of War of 12 August 1949, which, in Art. 1, nr. 4, widened the concept of armed conflict to include struggles by groups fighting against colonial rule,

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[360] Hague Convention (1899) (note 116), pp. 436-442. Hague Convention (1907) (note 58), pp. 289-297. Prepared in: Brussels, Protocoll (note 114), p. 134. Institut, 'Manual' (note 114), Art. 2, p. 37.

[361] Hague Convention (1899) (note 116), Art. 1, p. 436.

[362] Ibid., Art. 2, p. 436.

[363] Andrew Dickson White, '[Address at the Grotius Celebration, 4 July 1899]', in: Frederick William Holls, 'The Hugo Grotius Celebration at Delft, July 4, 1899', in: Holls, *The Peace Conference at The Hague and Its Bearing on International Law and Policy* (New York, 1900), Appendix III, pp. 538-552, at p. 551. Otfried Nippold, *Die Fortbildung des Verfahrens in völkerrechtlichen Streitigkeiten* (Leipzig, 1907), pp. 480-600. Hans Wehberg, 'La contribution des Conférences de la Paix de la Haye au progrès du droit international', in: *Recueil des cours* 37 (1931, Part III), pp. 527-669.

[364] Karl Strupp, *Das internationale Landkriegsrecht* (Frankfurt, 1914), p. 15.

[365] Friedrich Frommhold [Fyodor Fyodorovič] Martens, '[Contribution on the Mandates in accordance with Humanity and the Customs of "Civilised" Nations as Guidelines from which Legal Norms of the Law of War Shall Emerge, 11 Meeting, Second Committee, Second Sub-Committee, 20 June 1899]', in: *Conférence internationale de la paix. La Haye, 13 Mai – 29 Juillet 1899*, vol. 3 (The Hague, 1907), pp. 120-121 [also in: Arthur Clement Guillaume Marie Eyffinger, *The 1899 Hague Peace Conference. "The Parliament of Man, the Federation of the World"* (The Hague, 2000), p. 379]. Edouard Rolin, 'Report to the Conference from the Second Commission on the Laws and Customs of War on Land', in: James Brown Scott, ed., *The Reports to the Hague Conferences of 1899 and 1907* (Oxford and London, 1917), pp. 137-155, at p. 141.

foreign occupation and racist regimes.[366] In a comment on the then ongoing Boxer Rebellion in China, Heidelberg publicist Georg Jellinek (1851 – 1911) judged in 1900 that quenching of the rebellion was taking place outside the confines of international law. This, Jellinek assumed, was so because China, in his view, was ignorant of the idea of the "sanctity of treaties", had not ratified the Hague Convention and, by consequence, appeared not to be "civilised".[367] Like Jellinek, Franz von Liszt did not count China among the "civilised states".[368]

Questions about the Sources of International Law and the Possibility of Its Derivation

During the second half of the nineteenth century, the question about the sources of international law developed into a basic problem for theorists willing to confirm that international law existed. The majority of these theorists, among them jurist and international peace movement activist Otfried Nippold (1864 – 1838), who taught at the University of Berne, assumed that international law could only be derived from the wills of states.[369] They had no other choice because they were no longer ready to accept divine or natural law as its sources. Even the few jurists, who, like Bluntschli, briefly referred to natural law, devoted little more than mockery to it and rejected it entirely as a source of international law.[370] Hence, the question remained to be answered why, on the one side, governments of sovereign states should obey only the dictates of power beyond the borders of the states under their control, whereas, on the other, they should subject themselves to the rule of law.[371] Some international legal theorists sought to provide answers to these questions by pointing to treaties between states as sources of international law. According to a formula coined by the Tartu, later Bonn publicist Karl Magnus Bergbohm (1849 – 1927), these agreements were "declarations of converging wills of two or more states".[372] Bergbohm set apart agreements stipulating norms concerning specific issues from instruments setting new law. According to this theory, only the latter type of agreements could be sources of international law. However, Bergbohm believed that law-setting treaties under international law could not take over the same role as legislative institutions within states. While, according to Bergbohm, state laws had the prime task of "narrowing down the arena of self-help as much as possible" (das Gebiet der erlaubten Selbsthilfe möglichst zu verengern),[373] treaties between states could not reduce the decision-making capability of governments of sovereign states in any binding way. Hence, Bergbohm insisted, treaties as "explicit conventions" were voluntary self-obligations of governments of states.[374] International law, thus, flew from the will of the state law directed to the outside, was "external state law".[375] Despite the voluntariness of the self-obligation of governments of sovereign states, Bergbohm saw no "reason to deny the binding force just for the treaty under international law" (Veranlassung, allein beim völkerrechtlichen Vertrag die Gebundenheit des Staates zu leugnen); for that binding force existed for treaties under international law "in the same way as for municipal law" (hier gerade so vorhanden wie beim innerstaatlichen Recht).[376] Bergbohm postulated that governments of states could not at the same time want to conclude and to break treaties.[377] The lack of enforceability of

[366] Hague Convention (1899) (note 116), Preamble, p. 431.
[367] Georg Jellinek, 'China und das Völkerrecht', in: Jellinek, *Ausgewählte Schriften*, vol. 2 (Berlin, 1911), pp. 487-495, at pp. 492-494 [reprint (Aalen, 1970); first published in: *Deutsche Juristen-Zeitung* (1900), pp. 401-404].
[368] Liszt, *Völkerrecht* (note 204), § 1, p. 4.
[369] Otfried Nippold, *Der völkerrechtliche Vertrag. Seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht* (Berne 1894), p. 19.
[370] Bluntschli, *Völkerrecht* (note 202), § 529, p. 296.
[371] On the debate about sources of law see: Miloš Vec, *Recht und Normierung in der Industriellen Revolution. Neue Strukturen in Völkerrecht, staatlicher Gesetzgebung und gesellschaftlicher Selbstnormierung* (Studien zur europäischen Rechtsgeschichte, 200 = Recht in der Industriellen Revolution, 1) (Frankfurt, 2006).
[372] Karl Magnus Bergbohm, *Staatsverträge und Gesetze als Quellen des Völkerrechts* (Tartu, 1876), p. 77.
[373] Ibid., p. 63.
[374] Ibid., pp. 19, 39, 77.
[375] Rivier, *Lehrbuch* (note 207), pp. 1-2.
[376] Nippold, *Vertrag* (note 369), p. 196.
[377] Jellinek, *Natur* (note 140), p. 57.

treaties between states gave as little justification for the denial of the existence of international law as infringements of municipal laws proved the lack of existence of municipal law.[378]

However, the deniers of international law attached their criticism precisely to this argument. Philipp Zorn (1850 – 1928), publicist at Königsberg and subsequently at Bonn, claimed that a treaty between states "bears no juristic, also no international legal character, but just that of a *bona fide* agreement between the representatives of two or more states without legal protection" (trägt zuächst gar keinen juristischen – auch völkerechtlichen Charakter, sondern lediglich den einer des Rechtsschutzes völlig ermangelnden Verabredung auf Treu und Glauben zwischen den Vertretern zweier oder mehrerer Staaten). The contents of such kind of an "agreement", generally speaking, consisted merely in the permission to "intervene into the domestic legal sphere, extended to another state power" (das Eingreifen der andern Staatsgewalt in die eigene Rechtssphäre) and raised, what had been agreed upon, "to an imperative binding the subjects" (zu dem die Untertanen bindenden Imperative).[379] This analysis appeared to lead to the conclusion that positive international law could not exist at all. Adolf Lasson, teacher at the Louisenstädtischen Realschule in Berlin, Honorary Professor of Philosophy at the University of Berlin since 1897, like other contemporary philosophers[380] and some jurists[381] used this argument to deny international law fully and wholly. Against the majority of jurists, Lasson came up already in 1871 with the simple, pragmatic and power political formula that found its way into popular philosophy: An "agreement of the powerful with the weaker side makes no sense at all – the powerful breaks the treaty and the weaker cannot resist" (Verabredung des Mächtigen mit dem Schwachen hat gar keinen Sinn – der Mächtige bricht den Vertrag, der Schwache kann sich nicht widersetzen). Lasson concluded from this dictum that treaties between states were "reasonable as long as they continue to make explicit the mutual relationship between the signatories in an essentially correct manner" (so lange vernünftig, als sie das gegenseitige Verhältniss der Macht zwischen dem Paciscierenden im wesentlichen correct ausdrücken), and any treaty was unjust "that stands in contradiction against power relationships" (jeder Vertrag, der den Machtverhältnissen widerspricht). Law, according to Lasson, could exist beyond state borders only in a world state, and as that was impossible, there was no international law. Consequently, Lasson postulated that might made right.[382] At least he was consistent in so far as he admitted validity for treaties between states solely within the confines of the *clausula de rebus sic stantibus*, while denying any significance for the basic norm *pacta sunt servanda* with respect to international law.[383]

Early nineteenth-century jurists had assumed that law emerged from "the will of a nation or a state" (eines Volkes oder eines Staats).[384] Georg Jellinek and Heinrich Triepel applied this assumption to international law late in the same century, and their views have been dominant thoughout the twentieth century. In accordance with the biologistic system model, Jellinek categorised states as quasi living persons and assumed that the "establishment and maintenance of communication with other states" (Herstellung und Aufrechterhaltung des Verkehrs mit anderen Staaten) should be counted among the essential purposes of states.[385] Even if no state could be coerced into establishing communication with another state, the same conditions for the establishment and maintenance of communication should be accepted as valid for "all reasonable individual persons" (für alle vernünftigen Individualitäten) and for states alike. Accordingly, every individual, wishing to take up communication with another individual was obliged to recognise that

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[378] Neumann, *Grundriss* (note 1), § 1a, p. 5.

[379] Philipp Karl Ludwig Zorn, 'Die deutschen Staatsverträge', in: *Zeitschrift für die gesamte Staatswissenschaft* 36 (1880), pp. 1-39, at pp. 9-10.

[380] Friedrich Adolf Trendelenburg, *Lücken im Völkerrecht* (Leipzig, 1870), p. 26.

[381] Fricker,' Problem' (note 4), p. 375. Luitpold von Hagens, *Staat, Recht und Völkerrecht. Kritik juristischer Grundbegriffe*. LLD. Thesis (University of Munich, 1890). Seydel, *Commentar* (note 153), pp. 12-13. Stengel, *Friede* (note 122), pp. 29-32. Zorn, 'Staatsverträge' (note 379), pp. 9-10.

[382] Adolf Lasson, *Princip und Zukunft des Völkerrechts* (Berlin, 1871), pp. 57-58, 62-63.

[383] Ibid., pp. 65-66.

[384] Georg Friedrich Puchta, *Gewohnheitsrecht*, 2 vols (Erlangen, 1828-1837) [reprint (Darmstadt, 1965)]. Puchta, *Pandekten*, second, enlarged edn (Leipzig, 1844), pp. 16-17.

[385] Jellinek, *Natur* (note 140), pp. 2, 42.

other individual as a "legal subject" (Rechtssubjekt). Likewise, a state should "recognise as a legal subject any other state with which it wants to take up communication" (den anderen als Rechtssubjekt anerkennen, wenn er überhaupt mit ihm in Verkehr treten will). Jellinek was willing to credit this "nature of inter-state communication" (Natur der Staatenbeziehungen) with objective existence and was thereby binding upon the will of the state. Inter-state communication thus brought into existence the „community (*societas*)" of states: "Every state is formally free to decide whether it wants to join the *societas* or not. But if it has done so, it has opted for *jus* in conjunction with *societas*."[386] According to Jellinek, the *societas* of states was founded upon "objective features" (objectiven Merkmalen), "regulating this living communicative relationship" (welche dieses Lebensverhältnis regeln). These features "convert into law at the very moment, in which the state accepts them into its will through establishing the communicative relationship" (werden zum Rechte in dem Augenblicke, wo der Staat sie durch das Eingehen des betreffenden Verhältnisses in seinen Willen aufnimmt).[387] According to that reasoning, international law was a kind of law of communication, Jellinek believed in agreement with contemporary jurists.[388] Hence, the will of the state was "tied to the objective nature of inter-state relations" (gebunden an die objective Natur der Staatenbeziehungen),[389] which, in turn, were not subjected to the will of the state. With the assumption of the objective "nature of inter-state relations", every contracting state would be entitled to maintain its own "right of judging the legal quality of contractual obligations" (Recht für die Beurtheilung der von ihm eingegangenen Verbindlichkeiten), and a "treaty as the coming together of several wills" (ein Vertrag als Übereinkunft mehrerer Willen; *conventio plurium in idem placitum*) was impossible outside the *societas* of states.[390] Jellinek did not treat this "community of states" as a person capable of legal action and refused to "derive it from the state", as he would not derive "the state from an isolated human being" (ebenso wenig aus dem Wesen des Einzelstaates deducirt werden wie der Staat aus dem des isolirten Menschen). Nevertheless, to Jellinek, the community of states was "a given fact for the civilised states, whose legal nature … has to be acknowledged" (für die Cultur-Staaten eine gegebene Thatsache, deren rechtliche Natur ... zu constatiren ist).[391]

However, Jellinek's idea of the *societas* as the community of states tied together through mutual communication was not that of the free traders, seeking to justify their demands for the "opening" if states for the purpose of establishing trade relations. Instead, he drew this idea from early nineteenth-century regulations that had been agreed upon to secure the freedom of traffic on international rivers such as the Danube and the Rhine.[392] Already in the middle of the century, the idea had been expanded into the postulate that the international law of treaties might evolve into some "world legal order for the protection of intercourse" (den Verkehr schützende Weltrechtsordnung).[393] This expectation came close to the political argument, subsequently promoted by the international peace movement around 1900, that the states of the world would not be able to avoid subjecting themselves to the norms of some "world domestic policy" (Weltinnenpolitik) as a result of their close communicative ties.[394] This argument was thus prefigured in Jellinek's theory of the sources of international law. Put differently, once states had been "opened" for communication, they had become subject to the rule of law. Jellinek apparently

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386 Ibid., p. 48.

387 Ibid., p. 49.

388 Walter, *Naturrecht* (note 184), § 463, p. 346., Leopold August Warnkönig, 'Die gegenwärtige Aufgabe der Rechtsphilosophie nach den Bedürfnissen des Lebens und der Wissenschaft', in: *Zeitschrift für die gesamte Staatswissenschaft* 7 (1851), pp. 219-281, 473-536, 622-665, at pp. 625-628, 630.

389 Jellinek, *Natur* (note 140), p. 48.

390 Ibid., p. 47.

391 Georg Jellinek, *System der subjektiven öffentlichen Rechte* (Freiburg, 1892), p. 298 [second edn (Freiburg, 1905); newly edited (Freiburg, 1919); reprint of the first edn (Chestnut Hill, MA, 2006); reprint of the second edn, edited by Jens Kersten (Freiburg, 2011); reprints of the edn of 1919 (Darmstadt, 1963); (Aalen 1964; 1979)].

392 Jellinek, *Natur* (note 140), pp. 160-162.

393 August von Bulmerincq, *Die Systematik des Völkerrechts von Hugo Grotius bis auf die Gegenwart* (Bulmerincq, Die Systematik des Völkerrechts, vol. 1) (Tartu, 1858). pp. 205; 356. Friedrich Adolf Trendelenburg, *Naturrecht auf dem Grunde der Ethik*, § 224 (Leipzig, 1860), p. 582 [second edn (Leipzig, 1868)].

394 Schücking, 'Organisation' (note 129), pp. 533-614.

realised that his claims placed him in proximity to eighteenth-century natural law theory, specifically Christian Wolff's *civitas maxima*. Jellinek used the word "nature" when reasoning about the foundation of the legal bonding of the state will.[395] He anticipated that his reasoning might be misunderstood as acceptance of natural law theories and built a defense line against the potential subsequent criticism that he was a natural law theorist. According to his preemptive defense, natural law theorists held beliefs in metaphysical, somehow wooden mechanisms and expected that these mechanisms would have effects on the decision-making of governments of sovereign states. By contrast, he insisted, the "objective features of the communicative relationships of international life" (objectiven Merkmale der internationalen Lebensverhältnisse) did not have any "legal nature independent of the will of the state", but would "as merely imagined, purely potential relations among states be empty barns receiving their flesh and blood, life and movement only through the creative will of the state" (als nur gedachte, als rein potentielle Beziehungen von Staat zu Staat leere Scheunen, die Fleisch und Blut, Leben und Bewegung erst durch den schöpferischen Willen des Staats erhalten).[396]

Jellinek thus reinterpreted natural law theory in the light of nineteenth-century biologistic creeds. As he analysed the state with the model of the living body, he had to reject eighteenth-century natural law theory which had been based on the machine model and had derived core parts of the law among states from non-human sources. Despite his disavowal, Jellinek adduced the natural law assumption of a superior force, based in reason, regulating the communicative inter-state relations and binding the will of the state, as the sole basis on which the legislative activity of the will of the state could come into existence. This was so, because the basic norm *pacta sunt servanda* could only be derived from this superior force of the "objective nature of inter-state intercourse": "Formally, this norm follows from the contracting wills, because it is impossible to want something and not want it at the same time." (Formell folgt dieser Satz aus dem vertragschließenden Willen, denn es ist unmöglich, Etwas zugleich zu wollen und nicht zu wollen.)[397] No natural law theorist could have provided a more cogent explication of the basic norm *pacta sunt servanda*.[398] Moreover, in providing this explication, Jellinek, like contemporary jurists,[399] took issue with the then current argument that the basic norm *pacta sunt servanda* had been transferred into international law from ancient Roman civil law.[400] Jellinek rejected this derivation with the argument that such a transfer by way of analogy would require recognition in the area of law into which the transfer was to occur.[401] As, however, such recognition was nowhere on record, the basic norm *pacta sunt servanda* could not have moved into international law from another area of law but followed directly from the effects of the "objective features which are recognised by contracting states through the fact that they have entered into a contract" (objective Momente, welche von den in Vertragsverhältnissen stehenden Staaten vermöge der Thatsache, dass sie mit einander contrahirt haben, anerkannt werden).[402]

Although Jellinek imagined the *societas* of states as independent from the will of the state, he was in full agreement with contemporary international legal theorists who were determined to restrict the arena of validity of international law to the predominantly European "family of nations" as the community of "states with Christian faith" (Staaten christlicher Gesinnung) within the "community of Occidental civilisation" (abendländischen Kulturwelt).[403] Jellinek took this view because it seemed to him that the "largest part of international legal titles" (grösste Theil der

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395 Warnkönig, 'Aufgabe' (note 388), pp. 622-653.

396 Jellinek, *Natur* (note 140), p. 49.

397 Ibid., p. 57.

398 Walter, *Naturrecht* (note 184), § 472, p. 355.

399 Ernst Meier, *Über den Abschluss von Staatsverträgen* (Leipzig, 1874). p. 37.

400 Franz von Holtzendorff, *Encyclopädie der Rechtswissenschaft in systematischer Darstellung*, second edn (Holtzendorff, Encyclopädie der Rechtswissenschaft, part 1) (Leipzig, 1873), p. 954 [first published (Leipzig, 1870); third edn (Leipzig, 1877); fourth edn (Leipzig, 1882); fifth edn (Leipzig, 1889)].

401 Jellinek, *Natur* (note 140), pp. 50-51.

402 Ibid., p. 52.

403 Georg Jellinek, 'Die Zukunft des Krieges [Lecture delivered to the Gehe-Stiftung, Dresden, 15 March 1890]', in: Jellinek, *Ausgewählte Schriften*, vol. 2 (Berlin, 1911), pp. 515-541, at pp. 519-520 [reprint (Aalen, 1970)].

völkerrechtlichen Ansprüche) were based "on explicit agreements in the form of conventions and treaties" (auf ausdrücklichen Verabredungen in der Form von Vereinbarungen und Verträgen) among the then limited number of members of that "family of nations".[404] In order to fulfill the demands of the *societas* of states, Jellinek demanded, the members had to be "civilised", located in vicinity to one another, tied together through a long history as well as common tasks and engaged in permanent mutual communication.[405] This *societas* could by itself recognise "no status of states" (keinen Status der Staaten), because the "community of states is not capable of acting legally as a community forming one single person" (die Staatengemeinschaft als nicht zur Persönlichkeit gediehene Gemeinschaft rechts- und handlungsunfähig ist): "Instead, all rights and obligations of states fall apart in rights and obligations of all against all." (Vielmehr lösen sich alle Rechte und Pflichten der Staaten auf in Rechte und Pflichten Aller gegen Alle.)[406] The capability of states to perform as actors within their *societas* was, therefore, not rooted in natural rights but "legally granted and acknowledged capability of acting forms the essence of all subjective international rights. The category of permission, strictly speaking, does not exist in international law at all, as giving permission presupposes the existence of a power that might as well be entitled to prohibit." (Die Handlungsfähigkeit der Staaten in ihrer Gemeinschaft beruht daher nicht auf natürlichen Rechten, sondern rechtlich gewährtes und anerkanntes Können bildet den Inhalt aller subjektiven völkerrechtlichen Rechte. Die Kategorie Erlauben existiert streng genommen für das Völkerrecht überhaupt nicht. Denn Erlauben setzt eine Macht voraus, die verbieten könnte.)[407] Yet the *societas* of states knew "no rulers' commands" (keine Herrschergebote).[408] Therefore, according to Jellinek, the community of states was not an institution for the recognition of states and their actions, entitled to act at its own discretion. But, like every state was independent from the will of its nationals, the community of states was independent of the will of its state members.[409]

Heinrich Triepel, Jellinek's junior contemporary, was not satisfied with that line of argument. Contrary to Jellinek's warnings, he indeed censured his senior for operating "fairly close" to natural law, when he appeared to have derived international law from the "nature" of states. In Triepel's perspective, reference to the "nature" of states was "certainly no less awkward" (etwas sicherlich nicht minder Bedenkliches) than the postulate of some power capable of enforcing law above states.[410] Accordingly, Triepel claimed that Jellinek had done no more than establish some "general law" for members of the *societas* of communicating states but "no law mutually binding states" (kein die Staaten gegenseitig bindendes Recht). This, Triepel argued, had not happened because Jellinek appeared to have allowed for the possibility that a state could renounce the norms of international law without breaking that same law. Triepel adduced "experience", which he did not specify any further and according to which states were renounce norms of international law even if they faced the danger of becoming excluded from the *societas* of communicating states.[411] Hence, Triepel concluded, the derivation of the binding force of international law would have to start at a more fundamental level. To reach that level, Triepel withdrew to early nineteenth-century theories of the derivation of customary law, explicitly to the work of the Berlin jurist Georg Friedrich Puchta.[412] Like Puchta, who had argued that not just statutory but also customary law required the existence of some legal community in order to obtain enforceability, Triepel postulated that international law could only become enforceable if what he termed the "single wills" (Einzelwillen) of states could be "merged" (zusammenfließen) into a "plurality of persons capable of setting the law" (zur

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[404] Jellinek, *System* (note 391), pp. 307, 308.
[405] Ibid., p. 298.
[406] Ibid., p. 300.
[407] Ibid., p. 301. Likewise: David Dudley Field, 'De la possibilité d'appliquer le droit international européen aux nations orientales', in: *Revue de droit international et de législation comparée* 7 (1875), pp. 659-668, at pp. 662-663, with explicit reference to treaties as the core source of international law.
[408] Ibid., p. 299.
[409] Ibid., p. 298.
[410] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig, 1899), pp. 80-81 [new edn (Tübingen, 1907); reprint (Aalen, 1958); French version (Paris, 1920)].
[411] Ibid., p. 81.
[412] Puchta, *Gewohnheitsrecht* (note 384). Puchta, *Pandekten* (note 384), pp. 16-17.

Rechtsschöpfung befähigte Personenmehrheit).[413] According to Triepel, this "plurality of persons" as a group of legal actors constituted the "common will" (Gemeinwillen), but it was not identical with the general "community of states", but a group in which "the 'commanders are at the same time the executors'", quoting an eighteenth-century expression.[414] The "common will" was to come into existence through the conclusion of "agreements" (Vereinbarungen) among states forming the "plurality of persons". These "agreements" were different from usual bilateral treaties between states, which could not produce the "common will". Usual treaties between states could not produce the "common will" because, as in the case of peace treaties, they represented the coming together of opposing "single wills"; elaborating on Bergbohm's approach, Triepel insisted that the "common will" would have to arise from "single wills" moving in the same direction. Only "agreements" specifically made to the end of setting norms of international law could establish the "common will". As such, these "agreements" could not produce their own binding force, as Triepel conceded. However, the binding force would be accomplished at the very moment at which the "common will" had completely come into existence and enforced the "agreements" with their norms. Norms having been enforced through the "common will" would be transferred into the municipal law of states, as Triepel expected in accordance with the theories advocated by the contemporary international peace movement.[415] By consequence, acts against the norms set by the "common will" were breaches of the law.[416] The conclusion of an "agreement" on the establishment of the "common will" was not an act of self-obligation of the contracting states, as Triepel noted, but the result of the fusion of "single wills" of several states into the "common will".[417] Therefore, the "common will" was binding only for the states that had contracted to establish it. Hence, Triepel concluded, there were no general norms of international law but only "particular ones" (partikulare),[418] namely those which the states, having formed the "common will", had validated through their own particular "agreement".

Triepel was aware of the fact that the "agreement" setting the "common will" was not the highest source of law. But, he insisted, this defect was not specific for international law but applied to all legal fields. This was so because every legal norm required another legal norm in order to obtain binding force. With regard to international law, Triepel postulated that the political "single will" of every contracting state was the highest extra-legal source. Even though, evidently, each "single will" of a state could not be identical with the "common will", the "common will" was not totally alien to but part of the combined "single wills".[419] Triepel posited the "plurality of persons" as a *societas* of a few states and as an international legal community, which, as Puchta had argued, could produce a legal consciousness and, specifically, set legal norms.[420] Thus Triepel drew on elements of the contract theory of rulership of the seventeenth and eighteenth century, which he combined with the early nineteenth-century theory of the legal community. He did not, it is true, construct his contractual "plurality of persons" as a state; for the "agreement" he postulated as the instrument of establishing the "common will" in its own right neither produced a binding force nor was it a law or a kind of formal decision of some federation of states.[421] Yet Triepel had his "plurality of persons" come into existence through an act of will of the contracting states. Consequently, Triepel's legal community producing the "common will" had the same task as Christian Wolff's *civitas maxima*, namely laying the foundations for setting legal norms, which could restrict the freedom of decision-making of governments of sovereign states. However, contrary to Wolff, who had imagined the *civitas maxima* as a universal community established by nature, Triepel limited membership in his "plurality of persons" to states, which he and contemporary theorists of international law were ready to recognise as "civilised", and assumed that his "plurality

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413 Triepel, *Völkerrecht* (note 410), pp. 76, 80.

414 Ibid., pp. 80-81. Cf. Adam Friedrich Glafey, *Vernunfft- und Völcker-Recht*, § 307 (Frankfurt and Nuremberg, 1723), p. 194 [third edn (Nuremberg, Frankfurt and Leipzig, 1752)].

415 Triepel, *Völkerrecht* (note 410), pp. 75-76.

416 Ibid., pp. 49-50, 45, 70-71, 74, 110.

417 Ibid., pp. 77, 79.

418 Ibid., pp. 80, 83-84.

419 Ibid., pp. 82-83.

420 Paul Heilborn, 'Les sources du droit international', in: *Recueil des cours* 11 (1926, part I), pp. 1-63, at p. 14.

421 Triepel, *Zukunft* (note 169), p. 87.

of persons" had come into existence through human action.

Jellinek as well as Triepel, although taking different starting points, thus arrived at the same concluding point of their theories. Both jurists tried to derive the binding force of international legal norms using only theoretical instruments of legal positivism. In doing so, they introduced the community of states "as an association capable of creating law" (als eine zur Rechtserzeugung befähigte Genossenschaft). This community alone was, in their view, the locus of the establishment of the "common will". In this perspective, international law was neither a given of natural law nor some form of customary law, even though the "plurality of persons" might for itself also recognise as binding norms of customary law.[422] But their attempt failed. Eventually, both theorists had to employ elements from older natural law theories, thereby involuntarily proving the lack of possibility to derive the binding force of international legal norms solely from positive law. At the very point, where they had to argue why governments of states were willing to cooperate, both theorists were compelled to withdraw to extra-legal, that is, political reasons. Whereas Jellinek assumed some a priori decision to join the *societas* of communicating states, Triepel postulated an a priori willingness to engage in a contractual obligation to establish a "common will". Within both theories, the argument entailed the conclusion that the "community of states" as an international legal community was not only not to be universal but, instead, had to be a community that was narrowly limited to allegedly "civilised" states and in need of specific acts of admission. Neither Jellinek nor Triepel were thus ready to accept the starting point of the inclusionistic natural-law theory for their derivation of the binding force of legal obligations of states. This starting point had consisted in the belief that the general rules of natural law were binding for all humankind and therefore enforceable on the globe at large. Instead, neither Jellinek nor Triepel were in a position to establish the ground for the binding force of the basic norm *pacta sunt servanda*. They had to rank that norm as "particular" in the sense that they could regard it as binding only for the members of the community of states as an international legal community with limited membership. In doing so, they offered an exclusionistic international legal theory that justified the discriminating application of international law through the colonial governments in Europe and North America. The community of states as an international legal community, which Jellinek and Triepel postulated, was no more than a club of the allegedly "civilised" "family of nations", whose house law was to be international law. The American and European club of states could hardly constitute a Kantian "federalism of nations" in pursuit of the maintenance of world peace, as the international peace movement expected even at the time of World War I.[423]

The political consequences resulting from the Jellinek-Triepel theory of the sources of international law became apparent already contemporarily in the work of the Japanese jurist Tsurutarō Senga (1857 – 1929), professor of law at Kyōto University. Senga already pointed out that international law was being handled to the effect of discriminating states to which access to the club of allegedly "civilised" states was either being denied and made dependent upon harsh conditions. In his doctoral dissertation on consular jurisdiction, appearing to Senga as "the abnormal institution per se", he noted already in 1897 that this institution was "in contradiction with the sovereign rights of the state of Japan". This was so, in his view, because Japan was sovereign and consular jurisdiction was detrimental to the principle of the legal equality of sovereign states as one of the "basic international rights". Moreover, Senga criticised that consular jurisdiction betrayed grave defects in its practical implementation, as it was based on the "combination of an administrative office with the office of a judge in the position of the consul". This, Senga noted, was awkward, because the union of two offices might entail the danger of "the meddling of foreign policy with the jurisdiction by the consul", jurisdictional procedures were imperfect and disadvantages might arise from lack of certainty in the application of material law.[424] That was, phrased in academic diction, the condemnation of consular jurisdiction as a means to interfere into the domestic affairs of sovereign states. Specifically, this was the implication of the practice of consular jurisdiction in states outside

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[422] Jellinek, *Natur* (note 140), p. 42; Triepel, *Völkerrecht* (note 410), pp. 82-83.

[423] Franz von Liszt, *Vom Staatenbund zur Volksgemeinschaft* (Munich, 1917). Walther Max Adrian Schücking, *Der Weltfriedensbund und die Wiedergeburt des Völkerrechts* (Leipzig, 1917).

[424] Tsurutarō Senga, *Gestaltung und Kritik der heutigen Konsulargerichtsbarkeit* (Berlin, 1897), pp. 123-134, 143-160.

America and Europe, because it was European and the US governments, which claimed the privilege of consular jurisdiction for themselves unilaterally, while denying it to many governments of states elsewhere in the world. In his critique of consular jurisdiction, Senga evoked "basic international rights", which he regarded as not subject to legislation, and thereby employed natural law theories. Consular jurisdiction provided an important lever through which states outside the community of states could be discriminated. As a vehicle of discrimination, consular jurisdiction was already recognised as irreconcilable with norms of international law, and natural-law theory offered a venue of legitimate resistance against unjust treaty stipulations.

Teaching International Law in Universities and the Establishment of International Law as a Legal Discipline

Jurists, among them mainly holders to chairs of public law, but also some criminal lawyers, took a significant part in the formation of international legal theory and also shaped the agenda of international congresses, most notably the Hague Peace Conferences of 1899 and 1907. Despite the important academic and political role of international lawyers, specialised chairs for international law existed only in a few universities in France, Italy and the United Kingdom.[425] Among the oldest of these specialised chairs were professorships successively established at the universities of Urbino in 1863, Pisa in 1865 and Turin in 1875 as well as the Whewell professorship for international law at the University of Cambridge. Its earliest incumbents were Pasquale Fiore (1837 – 1914), who held the three Italian professorships in succession, and Henry Sumner Maine (1822 – 1888) from 1887 to his death,[426] John Westlake from 1888 to 1908 and Lassa Oppenheim from 1908 to his death in 1919. Although a long tradition of teaching international law existed in German universities, reaching back to the seventeenth century, the first specialised teaching and research institution established in the German Empire was the "Chair of International Law and the Law of Nations" founded at the University of Kiel in 1912, in fact the restoration of the professorship of *ius gentium* that had already existed in the seventeenth century. Theodor Niemeyer (1857 – 1939), who had taught public law jointly at the university and local Naval Academy, was the first incumbent. The first special academic society for international law came into existence in 1873 as the Institut de Droit International, which, despite its name, was not a research institution.[427]

Not only with regard to international law, but also other legal disciplines as well as the full range of fields of study in universities, the nineteenth century witnessed a broad process of disciplinary diversification of teaching and research, resulting in the publication of systematic surveys in text- and handbooks together with the emergence of disciplinary terminologies and jargons.[428] Many handbooks on international law, published during the second half of the nineteenth century, featured two volumes, one focused on the law of war, the other devoted to the law of

[425] August Michael von Bulmerincq, 'Die Lehre und das Studium des Völkerrechts an den Hochschulen Deutschlands und die Betheiligung der Deutschen an der Völkerrechtsliteratur neuerer Zeit', in: *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft*, N. F., vol. 1 (1877), pp. 457-464, at p. 459.

[426] Henry Sumner Maine, *Ancient Law. Its Connection with the Early History of Society and Its Relation to Modern Ideas*, second edn (London, 1863), pp. 43-51 [reprint of the second edn (Tucson, 1986); first published (London, 1861); reprint of this edn (Bristol, 1996); third edn (London, 1866); reprint of the third edn (New Brundswick, 2002); fifth edn (London, 1873); sixth edn (London, 1876); tenth edn (London, 1885); eleventh edn (London, 1887)].

[427] Francis Lieber, '[Letter to Gustave Rolin-Jaequemyns, September 1871]', in: Gustave [Gustaaf = Gustavus Henricus Angelus Hippolytus] Rolin-Jaequemyns, 'De la necessité d'organisé une institution scientifique permanente pour favoriser l'étude et le progress du droit international', in: *Revue de droit international de législation comparée* 5 (1873), pp. 480-481. Rolin-Jaequemyns, 'Necessité' (as above), pp. 463-491. For studies see: Peter Macalister-Smith, 'Bio-Bibliographical Key to Members of the Institut de Droit International (1873 – 2001)', in: *Journal of the History of International Law* 5 (2003), pp. 77-159. Fritz Münch, 'Das Institut de Droit International', in: *Archiv des Völkerrechts* 28 (1990), pp. 76-105.

[428] For a study see: Hans-Peter Haferkamp, *Georg Friedrich Puchta und die „Begriffsjurisprudenz"* (Studien zur europäischen Rechtsgeschichte, 171) (Frankfurt, 2004).

peace.[429] Occasionally, handbooks were structured as privately composed codes of law. For one, Bluntschli wrote his survey of the law of war as a "code" (Rechtsbuch),[430] and likewise styled his handbook of international law as a *Rechtsbuch*.[431] Like subsequent authors, [432] Bluntschli thus claimed for himself the rank of a learned codifier, compiling what he considered valid international law. Bluntschli explicitly limited the contents of his two "codes" to states he would recognise as "civilised", thereby denying the general validity of the legal norms he had put together. He not only underwrote the creed that international law should be conceived as set law but also insisted that international legal norms had to be assembled and enforced in the form of statutes.[433] The concept of positivism, current in general academic diction, came in use for this idea.[434] Within the legal disciplines, this approach appeared to facilitate constructions of the social world as an objectively given quasi-tangible reality placed in opposition to observers.[435]

In the discipline of international law, as in other legal disciplines, controversies emerged about proper definitions of concepts. Among them, the concept of the state, in its rendering as the triad of the unities of territory, population and government by Jellinek,[436] achieved general applicability in juristic diction irrespective of words that might be in use for states. Hence, a situation might occur in which so-called "states" were not states in Jellinek's diction, because they did not meet the requirements for his definition, such as the US federal "states". Conversely, states might exist even when and where they were not called "states", such as the German Empire. In the same vein, treaties in terms of Triepel's concept might be distinguished from agreements that featured the word "treaty" in their text but did not stand up to the requirements for Triepel's concept. According to Triepel, treaties in the sense of juristic diction were agreements resulting from the convention of two opposing state wills,[437] even when the word 'treaty' did not occur in their texts, and vice-versa, agreements were not just treaties for the reason that their texts contained the word 'treaty'. Last but not least, not all military conflicts were wars in accordance with the law of war but, as Westlake and others insisted, only as regular armed conflicts among states.[438] The text- and handbooks of international law served the purpose of systematising and disseminating the disciplinary terminology. They lent expression to the claim that the legal diction current in America and Europe should be applied everywhere in the world as the basis for the making of legally valid agreements. The emerging academic discipline of comparative law did take notice of legal systems seemingly deviating from American and European standards and investigated them with official government assistance. In the German Empire, for example, jurists launched the collection of data on "native law" in 1907 with the approval of the German Imperial Diet, which commissioned the colonial

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[429] Twiss, *Law* (note 173), vol. 2. Westlake, *Law* (note 118).

[430] Johann Caspar Bluntschli, *Das moderne Kriegsrecht der civilisirten Staten* (Nördlingen, 1866).

[431] Bluntschli, *Völkerrecht* (note 202).

[432] David Dudley Field, *Outlines of an International Code*, second edn (New York, 1876) [first published s. t.: *Draft Outlines of an International Code* (New York, 1872); French version (Paris, 1881)]. Pasquale Fiore, *International Law Codified and Its Legal Sanction*, edited by Edwin Montefiore Borchard (New York, 1918) [first published (Rome, 1890)]. Karl Strupp, *Landkriegsrecht* (note 364). The Convention [Approved by the Third Pan-American Conference] Respecting an International Law Commission, 23. August 1906, Art. I, in: *CTS*, vol. 202, p. 306-310, at p. 307, obliged its signatories to establish an international commission of jurists with the task of compiling draft codes one for private and another for public international law. But the convention was not implemented.

[433] Alejandro Álvarez, *La codification du droit international, ses tendencies, ses bases* (Paris, 1912), pp. 13-47. Lassa Francis Lawrence Oppenheim, 'The Science of International Law. Its Task and Method', in: *American Journal of International Law* 2 (1908), pp. 313-356, at pp. 319-320 [reprinted in: Malcolm Evans and Patrick Cappa, eds, *International Law*, vol. 1 (Farnham, SY, and Burlington, VT, 2009), pp. 15-58].

[434] Heinrich Rickert, *Die Grenzen der naturwissenschaftlichen Begriffsbildung* (Freiburg, 1896) [new edn (Freiburg, 1902); second edn (Tübingen, 1913); third and fourth edns (Tübingen, 1921); fifth edn (Tübingen, 1929); reprint of the fifth edn (Hildesheim, 2007)].

[435] Peter von Oertzen, *Die soziale Funktion des staatsrechtlichen Positivismus. Eine wissenssoziologische Studie über die Entstehung des formalistischen Positivismus in der deutschen Staatsrechtslehre*. New edn, edited by Dieter Sterzel (Frankfurt, 1974) [first published as Ph.D. Diss., typescript (University of Göttingen, 1953)].

[436] Jellinek, *Staatslehre* (note 206), pp. 394-434.

[437] Triepel, *Völkerrecht* (note 410), pp. 75-76.

[438] Westlake, *Law* (note 118), p. 1.

administration to collect the data.[439] Yet, the legal concepts behind the data questionnaires originated solely from the European tradition. Neither the project organisers nor its implementers envisaged the admission of legal pluralism.

Some practitioners in foreign ministries, in charge of shaping international relations, together with some academics, devoted themselves to the study of the theory and the history of diplomacy and, from the latter, drew the conclusion that diplomacy, understood as the activity of the implementation of the law of peace, was undergoing a thorough and rapid change. They noted the sudden increase of the speed of communication, which appeared to be in the progress of establishing worldwide communicative networks, bringing to the fore the need of swift responses to urgencies and subjecting diplomats stationed in foreign countries to the ever more rigid control by dispatching governments. Observers also assumed that "collective passions" (passions collectives) had been allowed to develop and were limiting the decision-making capabilities of envoys.[440] Diplomat Jules Cambon (1845 – 1935), in 1905, was fearful that foreign policy-makers in governments engaged in "world politics" were facing the need of having to take public opinion into their calculations, and he believed that some "democratic indiscretion" had annihilated the "old diplomacy".[441] But, after World War I, Cambon withdrew this observation, then claiming that no principled changed of diplomatic practice had occurred.[442] At the same time foreign policy-makers invited lawyers to advise them, such as Twiss, Martens or Zorn, who taught at universities, while an increasing number of diplomats had studied international law. In other words, academics as professional advisers and academic teachers exerted a higher influence over foreign policy-making and the practical application of international law through governments in America and Europe than ever before. Even though it had been customary already in the seventeenth century that legal advisers to rulers collected juristic publications in their own libraries,[443] this literature then mainly served as a quarry for arguments in diplomatic controversies.[444] By contrast, the impact of later nineteenth-century academic jurisprudence relating to international law extended far into the technicalities of treaty-making, such as the invocation of the *si-omnes* clause as an instrument to limit the validity of a treaty to the proviso that all parties would agree to a certain stipulations, and the introduction of reservations that one treaty party might be entitled to put on record against a certain stipulation while agreeing to all others.

Many text- and handbooks opened with sketches of the history of the *ius gentium* and the law among states since the Roman Empire of Antiquity, while the history of *ius gentium*, especially in Antiquity, also became the subject of extensive monographic studies. For one, Maine's *Ancient Law*, his classical inquiry into legal history of 1861, had a chapter on 'Law of Nature and Equity' describing the Roman *ius fetiale*.[445] Ancient historian Theodor Mommsen (1813 – 1901) included the *ius gentium* into his monumental survey of Roman municipal law,[446] while another ancient

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[439] Schultz-Ewert, *Eingeborenenrecht* (note 320).

[440] Albert Sorel, 'La diplomatie et le progrès', in: Sorel, *Essais d'histoire et de critique* (Paris, 1883), pp. 281-295, at pp. 283-289, 290-293 [second edn (Paris, 1894); third edn (Paris, 1910); fourth edn (Paris, 1913); fifth edn (Paris, 1930)].

[441] Jules Cambon, '[Letter to Pierre de Margerie, 24 March 1905], in: Paris: Archives du Ministère des Affairs Etrangères, Fonds Pierre de Margerie; partly printed in: Keith Hamilton and Richard Langhorne, *The Practice of Diplomacy* (London and New York, 1995), p. 137.

[442] Jules Cambon, *Le diplomate* (Paris, 1927), p. 119.

[443] Engelbert Kaempfer, *Catalogus verschiedener rarer und auserlesener Theologisch-Juristisch-Medicinalisch-Phlilosophisch-Philologisch- und Historischer Bücher, welche den 25ten October 1773 und folgende Tage des Morgens um 9 und des Nachmittags um 2 Uhr in Lemgo in der seel[igen] Jungfer [Maria Magdalena] Kämpfern Behausung an den Meistbietenden verkauft, jedoch ohne baare Bezahlung in Conventionsmüze nicht verabfolget werden sollen*. Print (Lemgo, 1773) [Lemgo: Stadtarchiv, A 989, formerly Na 65/K 200].

[444] *Staats-Betrachtungen über gegenwärtigen Preußischen Krieg in Teutschland in wie fern solcher das allgemeine Europäische, vornehmlich aber das besondere Teutsche Interesse betrift* (Vienna, 1761) [Reissued with Notes (Berlin, 1761); edited, without the Notes, by Johannes Kunisch, *Das Mirakel des Hauses Brandenburg* (Munich and Vienna, 1978), pp. 102-141].

[445] Maine, *Law* (note 426), pp. 42-69.

[446] Theodor Mommsen, *Römisches Staatsrecht*, vol. 3,third edn (Leipzig, 1887), pp. 590-591 [reprint (Basle and Stuttgart, 1963); first published (Leipzig, 1871)].

historican devoted a specialised study to treaties between Rome and other states.[447] These studies converged in emphasising the differences that their authors sensed between the *ius gentium* or the *ius fetiale* of Antiquity and the positive international law of the nineteenth century. Insofar, this research literature on the history of international differed fundamentally from eighteenth-century historiography that had manifested the continuities.

Moreover, the theory of the law of war and peace came into the focus of historical inquiries. Drawing on the surveys by Ward (1795), Pütter (1843) and Kaltenborn (1847 and 1848), jurist Ernest Nys showed that the great tradition of the law of war and peace reached far back beyond Grotius into the twelfth century, as he thought. Nys singled out Gratian's *Decretalia* as the ground-laying collection of legal norms, impacting on the law of war and peace until the eighteenth century. Nys also provided short biographies of key legal theorists since John of Legnano[448] with brief reviews of their works. Specifically, Nys, after Hermann Conring[449] and Henry Wheaton,[450] stressed the importance of Francisco de Vitoria for sixteenth-century legal theory. [451]

Historical research also became concerned with East Asian international law. William Alexander Parsons Martin, missionary in China, reported to the Fifth International Congress of Orientalists in Berlin in 1881 on 'Traces of International Law in Ancient China', sketching Confucian theories of the law of war and peace. Martin conveyed the impression, as if he was the first European to point to these theories, and passed over in silence previous references in the European literature of the seventeenth and eighteenth centuries.[452] In 1909, jurist and sinologist Herbert Müller (1885 – 1966) published his translation of a report on the Lǐ-fǎn-yuàn, the office of relations with foreigners in Beijing. Introducing the text, Müller also described the history of the Lǐ Bù, the office for the ceremonies, since the later eighteenth century. The office was in charge of managing the relations between the Qīng government and governments of states elsewhere in the world.[453]

Following the partial 1839 translation of Vattel's handbook on the law among states,[454] Martin and several further translators worked out a Chinese version of Henry Wheaton's textbook and published it under the title *Wànguó Gōngfǎ* (The Public Law of Ten Thousand States) in 1864. The purpose of the Chinese version of Wheaton's textbook was no longer the establishment of a common platform for Chinese and European conceptions of international law. Instead, the translation was undertaken at government request to the end of introducing to China the technical terms and concepts of American and European international law. The effort of finding Chinese equivalents of European, mainly English, words proved to be awkward. Martin himself complained about the wide

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[447] Eugen Täubler, *Imperium Romanum*, part 1: Die Staatsverträge und Vertragsverhältnisse (Leipzig, 1913) [reprint (Aalen, 1964)].

[448] Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Brussels, Leipzig, London, New York and Paris, 1882), pp. 71-105, 154-187. Nys, *Le droit des gens et les anciens jurisconsultes espagnols* (The Hague, 1914), pp. 54-55.

[449] Hermann Conring, 'Examen rerum publicarum potiorum totius orbis', in: Conring, *Opera*, vol. 4 (Brunswick, 173, pp. 47-548, at p. 77.

[450] Henry Wheaton, *History of the Law of Nations in Europe and America* (New York, 1845), pp. 34-42 [reprints (New York, 1973; (Buffalo, 1982)].

[451] Nys, *Droit de la guerre* (note 448), p. 168. Nys, *Droit des gens* (note 448), pp. 86-87.

[452] William Alexander Parsons Martin (= Wei-Liang Ding), 'Traces of International Law in Ancient China', in: *Verhandlungen des 5. Internationalen Orientalisten-Congresses*, vol. 2 (Berlin, 1881), pp. 71-78 [reprinted in: *The International Review* 14 (1883), pp. 63-77; also as: 'Traces of International Law in China', in: *The Chinese Recorder* 14 (1883), pp. 380-393. French version in: *Revue de droit international et de législation comparée* 14 (1882), pp. 227-242].

[453] Herbert Müller, 'Über die Natur des Völkerrechts und seine Quellen in China. Einleitende Bemerkungen zu einer Bearbeitung des Li-fan-yan-tse-li', in: *Zeitschrift für Völkerrecht* 3 (1909), pp. 192-205, at pp. 201-202.

[454] Emer[ich] de Vattel, *Le droit des gens. Ou Principes de la loi naturelle appliquées à la conduite et aux affairs des Nations et des Souverains*, chap. I/8, Nr 90 (on trade), II/8, nr 100, 101 (on war), II/1, nr 1-4 (on war) (London [recte Neuchâtel], 1758), pp. 84-85, 328-330, 1-2 [second edn (Paris, 1773); third edn (Amsterdam, 1775); new edn, edited by Silvestre Pinheiro-Ferreira, Jean Pierre Baron de Chambrier d'Oleires and Paul Louis Ernest Pradier-Fodéré (Philadelphia, 1863); reprint of the first edn, edited by Albert de Lapradelle (Washington, 1916); reprint of the reprint (Geneva, 1983)].

gaps between Chinese and European terminologies and the difficulty of finding Chinese words (characters) adaequately representing European concepts, and admitted that, in several cases, the solutions found were hardly satisfactory.[455] Indeed, subsequent translations of further American and European international law handbooks[456] had Martin's solutions replaced by Japanese versions.[457] Martin himself revised the Chinese translation of the introduction to the study of international law by Theodore Dwight Woolsey.[458] The editor of the revised edition of the English text of Wheaton's textbook included into his introduction a reference to the Chinese version, which he ranked as the "most remarkable proof of the advance of Western civilization in the East".[459]

The imposition of European concepts of international law into Chinese and Japanese came in response to the insistence by European and the US governments that the international legal norms familiar to them should be given priority over traditions available in East Asia, specifically in the context of the public law of treaties betwen states. It kicked off thorough changes of offices in charge of international relations. Thus the Qīng-Regierung replaced the Lǐ Bù by the "Office in Charge of Matters of All States" (Zǒnglǐ Géguó Shìwù Yámén) in 1861, which became the Foreign Ministry (Waì-Jiào Bù) in 1901. In Japan, the Foreign Ministry (Gaimushō) was established as an agency of its own in 1869 and devoted itself to the revision of the non-reciprocal treaties which became negotiable in 1872, with a focus on the abolishment of consular justice.[460] However, the European and the US governments turned down revision request for more two decades after 1872 under the often repeated argument that Japan was not a "civilised state".[461] The British-Japanese treaty of 1894 was the first reciprocal instrument and opened the path not only to the revision of the other non-reciprocal treaties but also to the Anglo-Japanese Alliance of 1902.[462] A witness to this process categorised the gradual abolishment of the non-reciprocal treaties as the "entry of Japan into European international law".[463]

With regard to China, the same process lasted longer. The Qīng government did not participate in most international conferences at the turn towards the twentieth century and, by consequence, was not involved in procedure of setting new international law.[464] As it had acknowledged its equality with the British government through the Treaty of Nanjing of 1842, the cession of territory and the presence of British, French, German and Russian troops on Chinese soil, that the Qīng government had been pressured to successively accept, appeared to be irreconcilable with the recognition of China as a sovereign state through the Nanjing and further treaties. Hence, the repeated interventions by foreign governments into Chinese domestic matters appeared to be unlawful.[465] In Chinese perspective, the treaties contained unlawful stipulations, as they violated China's sovereignty. Moreover, according to the Chinese reading of the treaties, the Qīng government had not ceded land but had lent it out, even though the wording of the Treaty of Nanjing had explicitly transferred the island of Kong Kong to the property of Queen Victoria and her successors for ever. By the first decade of the twentieth century, the "entry of the Chinese Empire

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[455] Stefan Kroll, *Normgenese durch Re-Interpretation. China und das europäische Völkerrecht im 19. und 20. Jahrhundert* (Studien zur Geschichte des Völkerrechts, 25) (Baden-Baden, 2012), p. 99. Rune Svarverud, *International Law and World Order in Late Imperial China. Translations, Reception and Discourse. 1840 – 1911* (Sinica Leidensia, 78) (Leiden, 2007), pp. 106-107.

[456] Svarverud, *Law* (note 455), pp. 267-302.

[457] Kroll, *Normgenese* (note 455). Keun-Gwan Lee, 'La traduction et la circulation des termes de droit international en Asie Orientale', in: *Ebisu* 33 (2004), pp. 178-207.

[458] Kroll, *Normgenese* (note 455), p. 99. Woolsey, *Introduction* (note 328).

[459] Wheaton, *Elements* (note 37, edn by Dana), p. 16a.

[460] For a study see: William Gerald Beasley, 'The Foreign Threat and the Opening of the Ports', in: Marius Berthus Jansen, ed., *The Cambridge History of Japan*, vol. 5: The Nineteenth Century (Cambridge, 1989), pp. 259-307.

[461] Alexander Freiherr von Siebold, *Der Eintritt Japans in das europäische Völkerrecht* (Berlin, 1900), pp. 40-42.

[462] Treaty Japan – UK, 30 January 1902, in: *CTS*, vol. 190, pp. 487-488; also in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 3, part 1 (Berlin und New York, 1992), pp. 447-449.

[463] Siebold, *Eintritt* (note 461), Title.

[464] Ma, *Eintritt* (note 323), p. 74.

[465] For studies see: Gerd Kaminski, Chinesische Positionen zum Völkerrecht (Berlin, 1973), pp. 117-128. Kroll, *Normgenese* (note 455), p. 126. Svarverud, *Law* (note 455), pp. 260-263.

into the international legal community" had not yet been completed.[466]

The professional activities of East Asian jurists, who had received their training in Europe and the USA or had familiarised themselves with international law in different ways, strengthened the consciousness that China and Japan were being discriminated as states. These jurists worked as teachers of international law and confronted international legal theory with the diplomatic practice exhibited by European and the US governments, especially the making and interpretation of treaties. Among these jurists were Ju-Jia Ou (1858/68 – 1910/12)[467] and Wei-Jun Gu (= K. Wellington Koo, 1888 – 1985)[468] in China, and in Japan Tōru Terao (1858 – 1925), Professor at the University of Tokyo, Tsurutarō Senga in Kyoto, Nagao Ariga (1860 – 1921),[469] who advised Chinese President Shi-kai Yuan (1859 – 1916, in offce 1912 – 1916) since 1912, Sakuei Takahashi (1867 – 1920), whom the Japanese government consulted on issues of the law of war during Chinese-Japanese War of 1894/95 and who was successor to Terao at the University of Tokyo,[470] and Saburō Yamada (1869 – 1965), who was one of the founders of the Association of International Law (Kokusaihō gakkai), established in 1897.[471] These scholars made efforts to intensify the exchange of knowledge about the history of the law of war and peace between East Asia and Europe as well as international legal theory. But these efforts did not contribute to the deepening of the acceptance in East Asia of international legal norms of American and European provenance but increased the awareness that these norms were tied to ideologies of rule.

In China, the long tradition of the Confucian theory of the "Great Union" did not collapse before the Revolution of 1911, despite the several Chinese versions of American and European text- and handbooks on international law. In his Academy for the Study of the Present Time at Hunan, Ju-Jia Ou drew attention to the theory of the "Great Union" as a tool for the analysis of problems of his own time. Thus Ou referred to Confucian texts as testimony for his argument that in an epoch without order, only military strength could provide victory, whereas in an epoch of order and peace, wisdom carried victory. The order of the Spring-and-Autumn Period, according to Ou, had been the common political framework for a multitude of states and, in this respect, could serve as a model for his own time.[472] The great tradition of the law of war and peace was not simply dumped of some garbage hill of history in China at the turn towards the twentieth century.[473]

Summary

The second half of the nineteenth and the first two decades of the twentieth centuries stood under the impact of efforts by legal, military and political theorists as well as practitioners of diplomacy to justify international law, as it then came to be called not only in English but in other European languages as well. These theorists sharply rejected traditions of the law of nature, without becoming able to derive international law completely without recourse to natural law theory. In China, revolutionary activists directed their concerted resistance against existing traditions of rulership and state legitimacy, assuming that these traditions were unchangeable and thus had to be abolished

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466 Ma, *Eintritt* (note 323), pp. 64-75.

467 Ju-Jia Ou, *Zhì xīn bào*, nr 38 (1897), pp. 444-445 [partly translated in: Svarverud, *Law* (note 455), p. 202].

468 K. Wellington Koo [= Wei-jun Gu], *Memoranda Presented to the Lytton Commission*, vol. 2 (New York, 1932).

469 Nagao Ariga, *Kokusai kō hō* (Tokyo, 1901). Ariga, *Senji kokusai kō hō* (Tokyo, 1906).

470 Takahashi, *Cases* (note 274). Takahashi, 'Le droit international dans l'histoire du Japon', in: *Revue de droit international et de législation comparée* 33 (1901), pp. 199-201. Takahashi, *International Law Applied to the Russian Japanese War* (London, 1908). Takahashi, ed., *Reviews of Dr Takahashi's Recent Work "International Law Applied to the Russo-Japanese War"* (Tokyo, 1909).

471 Saburō Yamada, *Kokusai shihō* (Tokyo, 1913).

472 Ou, *Zhì* (note 466).

473 This is commonly overlooked in European descriptions of Qīng diplomacy at the turn towards the twentieth century: Antony Best, 'The Role of Diplomatic Practice and Court Protocol in Anglo-Japanese Relations. 1867 – 1900', in: Markus Mössland and Torsten Riotte, eds, *The Diplomats' World. A Cultural History of Diplomacy. 1815 – 1914* (Oxford, 2008), pp. 231-253.

through a process of rapid and fundamental change.[474] But even they could not completely extinguish Confucian patterns of thinking. In Japan, bureaucrats and politicians subjected state and society to a comprehensive transformation from above in pursuit of the goal of wrangling from their American and European treaty partners not merely over the recognition of the legal equality of Japan as a sovereign state, but also of political equity in international relations. But they could not completely dissolve the state in order to rebuild it anew from scratch. Nevertheless, both in China and in Japan, the changes of state structures ushered in the abandonment of East Asian traditions of the law of war and peace and customary practices of conducting relations among states. Concepts transferred from European legal diction and institutions drawn on European models initially competed with these practices, which they eventually replaced. Whereas the public law of treaties between states and non-state sovereigns had been applied without specific enforcement acts across boundaries of religion and culture into the early nineteenth century, diplomatic representatives of European and the US governments dispatched to East Asia insisted that only norms enshrined in the European public law of treaties between states could form the basis for the conclusion of agreements and enforced these principles through military threats and political pressure. Within these procedures, the lack of reciprocity of most treaty stipulations carried no less weight as a means of discrimination than the tacit superimposition of the European public law of treaties between states. International law, as it emerged in Europe throughout the nineteenth century, had the effect of a kind of regime colonialism. Its victims did not come under the direct or indirect rule of European and the US governments but still were compelled to abide by the international law that representatives of these governments carried in their intellectual luggage. Whereas European and the US governments employed international law as a vehicle to justify colonial rule in Africa, West, South, Southeast Asia and the South Pacific, they used the threat of establishing colonial rule as an instrument to impose international law in East Asia.[475]

The process of the enforcement of international law was styled as some "entry into the international legal community" as a club of states for which international law was the house law. This club classed the majority of states of the world as seemingly "uncivilised" and excluded them from membership. Access of new states into the club was highly selective. To 1914, only Ethiopia, Japan, Liberia, Persia, Siam and Turkey were admitted into the club as members from Africa and Asia. In Turkey, the "entry into the international legal community" entailed the extinction of the Muslim tradition of the law of war and peace as the legal platform for the conduct of relations among states, even though Muslim theologians continued to cultivate the tradition. The substantial number of states in Africa, West, South, Southeast Asia and the South Pacific that had received recognition as sovereigns from European and the US governments in the course of the nineteenth century, found their subjecthood under international law, in some cases even their sovereignty and statehood, unilaterally withdrawn by their treaty partners in Europe and North America. European and the US governments took these measures under the goal of establishing themselves as colonial rulers and on the basis of concoctions of lack of governmentality and sedentary patterns of life as well as allegations, derived from these concoctions, of the lack of government control over territory and populations. The denial of subjecthood under international law concurred with the refusal of the *ius ad bellum* to the victims of colonial suppression and the resulting lack of recognition of the right of resistance. Hence, European and the US governments refused to grant belligerent status to armed groups using weapons against colonial rulers in the "protectorates" and other types of dependencies, but classed them as purportedly illegitimate insurgents. Colonial governments, therefore, assumed that they could authorise strikes at these resistance forces unfettered by the constraints of the law of war. The denial of the recognition of the law of war to anti-colonial resistance forces had the dreadful implication that the conceptual border between combatants and non-combatants became blurred and that entire population groups could be selected as targets of attacks. Colonial wars thus turned into 'small wars' that could be fought as total wars and lead to genocide.

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[474] Eung-Jeun Lee [= Ŭn-jŏng Yi], *Anti-Europa. Die Geschichte der Rezeption des Konfuzianismus und der konfuzianischen Gesellschaft seit der frühen Aufklärung* (Politica et Ars, 6) (Munster and Hamburg, 2003).

[475] Matthew C. R. Craven, 'What Happened to Unequal Treaties? The Continuities of Informal Empire', in: Craven and Malgosia Fitzmaurice, eds, *Interrogating the Treaty. Essays in the Contemporary Law of Treaties* (Nijmegen, 2005), pp. 43-80.

Against the proponents of legal positivism, taking the dominant position in the debate about the sources of international law and suggesting that international law should solely be regarded as "external state law", a minority of jurists, philosophers and theologians maintained that international law should not be recognised as a collection of legal norms but solely as an ethical doctrine.[476] To these rival orientations, one group of theorists has to be added who took the view that international law should not only be derived from human will and human action alone but wished to position the binding force of the law as a given prior to the existence of human communities. Against the minority of the deniers of international law, this group had to show that international law was a fully-fledged legal system. Against the majority of legal positivsts, they had to defend the primacy of international over state municipal law. In support of the latter position, they could point even to official government statements together with some legal norms that seemed to reflect principles of the natural law tradition. Recourse to natural law is on record in government pronouncements against positive legal norms already from the second half of the nineteenth century. For one, the official note by the Meiji government of Japan of 8 February 1868, then new in office, asserted willingness to respect the unequal treaties that its predecessors had been forced to sign since the year 1854, while claiming the right to seek the revision of these treaties in accordance with "universal public law" (udai no kōhō).[477] As the Meii government did not and could not draw on positive law in its bid to revise the existing treaties with other states, it can only have made reference to a concept of natural law which it perceived as an unset legal system above states. Similarly, the Lieber Code, enforced for the troops of the United States of America during the Civil War, obliged the armed forces to abide by the unset normative principles of justice, honour and humanity.[478] Likewise, the so-called Martens clause in the preamble to the Hague Convention on the Rules of Land War of 1899 stood within the tradition of natural law. According to this clause, warring parties were to be placed "under the protection and the authority of the law of nations" (sous la sauvegarde et sous l'empire des principes du droit des gens),[479] which was to be regarded as unset and therefore in existence even without acts of legislation.

In 1912, Karl Ludwig von Bar (1836 – 1913), a specialist in criminal law, took issue with the legal positivist stance that states were obliging themselves to honour legally binding agreements in accordance with their own will, and argued that the will of states could change and that, by consequence, it could not alone produce a binding force for all times. In raising this issue, Bar called into question the validity of the *clausula de rebus sic stantibus* and insisted that the binding force of positive international law could not be derived from the power of states but could only result from a superior "belief in the necessity of keep promises" (Glauben an die Notwendigkeit des Worthaltens). This belief, Bar claimed, was "innate to all human relationship" (dem gesamten menschlichen Verhältnisse).[480] Explicitly, he referred to this "relationship" as "natural law",[481] thereby committing himself to eighteenth-century natural law theory. Bar's colleague and younger contemporary Ernst von Beling (1866 – 1932), however, did not approach the question of the conditions of the binding force of international law at the level of treaties by international law, but of the concept of sovereignty. No state, Beling believed, could acquire its sovereignty through autonomous acts but only through "the community states above the states" (die den Staaten übergeordnete Staatengemeinschaft). This community, Beling noted by analogy, existed next to sovereign states in the same way as free persons maintained their freedoms within states. If there were a concept of sovereignty which was "incompatible with the postulate of a superior community of states" (mit der Annahme einer übergeordneten Staatengemeinschaft unvereinbar wäre), then this

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476 Fricker, 'Problem', (note 4), p. 375. Lasson, *Princip* (note 382).

477 Japan, Gaimushō '[Note of the Meiji Government dated 8 February 1868 on the treaties then in force between Japan and other states, by Ōkubo Toshimichi and Mutsu Munemitsu]', in: *Dai Nihon gaikō monjo*, Nr 97, vol. 1 (Tokyo, 1938), pp. 227-228.

478 Lieber Code (note 327).

479 Martens, 'Address' (note 365).

480 Ludwig von Bar, 'Grundlage und Kodifikation des Völkerrechts', in: *Archiv für Rechts- und Wirtschaftsphilosophie* 6 (1912), pp. 145-158., at pp. 145-146.

481 Ibid., p. 155.

concept of sovereignty would have to be removed, not the community of states.[482] According to Beling, no state could hold a claim for sovereignty unless the community of states had already created the concept of sovereignty and had approved of its use. Beling's idea of the community of states thus differed from the international legal community that positivists imagined as an engine to create international law. Contrary to positivists, Beling positioned his community of states in proximity to Christian Wolff's *civitas maxima* as the hypothetical community which appeared to be required as a condition for the conceptualisation and institutionalisation of states.[483] Rudolf Stammler (1856 – 1938), another criminal lawyer, even professed to the conviction that what he termed the narrow "international law" (Völkerrecht) as the law of the "Western European civilisation" (westeuropäischer Zivilisation) should be distinguished from the 'world law' (Weltrecht), and demanded that this "world law" should comprise the "legal will" (das rechtliche Wollen) without any restrictions to certain states and population groups.[484] Stammler described this "world law" in terms of natural law, as Wolff had described the *civitas maxima*. In doing so, he took a determined stance against contemporary attempts to limit the arena of the validity of international law to the members of the "family of nations". Moreover, the Vienna-based publicist, member of the international peace movement and last Prime Minister of the Habsburg Dual Monarchy, Heinrich Lammasch (1853 – 1920, in office 27 October to 11 November 1918), shared the view that the superior community of states did not stand against the sovereignty of its members but was mandatory for the maintenance of ordered inter-state relations.[485] In the same vein, Catholic theologians such as Viktor Cathrein SJ (1845 – 1931)[486] and Joseph Mausbach (1861 – 1931)[487] explicitly sought to revindicate the great tradition of the law of war and peace, seeking to reinstall St Thomas Aquinas's natural law doctrine. Last but not least, the ethicist Leonard Nelson (1882 – 1927) was explicit in deriving international law from natural law.[488]

Elsewhere in Europe, the idea of grounding international law in natural law and attaching it to a superior community of states found further supporters. Among them, Leiden publicist Hugo Krabbe (1857 – 1936), agreeing with Beling, assumed that states were created through international law and that the binding force of international law flew from the general human legal consciousness.[489] He identified this legal consciousness as the precondition of all law.[490] Similarly, in France, the publicist Henri Bonfils[491] and the constitutional lawyer Léon Duguit (1859 – 1928)[492] argued the theory that law above the state had come into existence without human acts of will and had resulted from a general human legal consciousness. These theorists thus insisted that international law originated from the willingness to acknowldge the rule of law and positioned this willingness as a general feature of humankind. The Latin American jurist Alejandro Àlvarez (1868 – 1960), already in 1912, explicitly placed under the rule of law the community of states to which he variously referred as "international community" (la communauté internationale) or as "international society" (une société internationale).[493]

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[482] Ernst von Beling, *Die strafrechtliche Bedeutung der Exterritorialität. Beiträge zum Völkerrecht und zum Strafrecht* (Breslau, 1896), pp. 12-13.

[483] Christian Wolff, *Jus Gentium methodo scientifico pertractatvm*, §§ 8-16 (Halle, 1749), pp. 6-12 [reprint, edited by Marcel Thomann (Wolff, Gesammelte Werke, Series B, vol. 25) (Hildesheim and New York, 1972)].

[484] Rudolf Stammler, *Theorie der Rechtswissenschaft* (Halle, 1911), pp. 282-283 [second edn (Halle, 1923); reprint (Aalen, 1970)].

[485] Heinrich Hugo Edwin Lammasch, *Das Völkerrecht nach dem Kriege* (Publication de l'Institut Nobel, 3) (Oslo, 1917), pp. 80-83.

[486] Victor Cathrein, SJ, *Die Grundlagen des Völkerrechts* (Stimmen der Zeit. Ergänzungshefte, Series 1, issue 1) (Freiburg, 1918).

[487] Joseph Mausbach, *Naturrecht und Völkerrecht* (Das Völkerrecht, 1/2) (Freiburg, 1918).

[488] Leonard Nelson, *Die Rechtswissenschaft ohne Recht. Kritische Betrachtungen über die Grundlagen des Staats- und Völkerrechts, insbesondere über die Lehre von der Souveränität* (Leipzig, 1917), pp. 3-50 [second edn (Göttingen, 1959); reprint of the second edn (Hamburg, 1971).

[489] Hugo Krabbe, *De modern staatsidee* (The Hague, 1915), pp. 180, 183 [further edns (The Hague, 1918)].

[490] Hugo Krabbe, *Die Lehre von der Rechtssouveränität* (Groningen, 1906).

[491] Bonfils, *Lehrbuch* (note 94), p. 18.

[492] Léon Duguit, *Traité de droit constitutionel*, second edn, vol. 1 (Paris, 1921), p. 105 [first published (Paris, 1911)].

[493] Álvarez, *Codification* (note 433), p. 50.

These theorists not only did not hesitate to base their work on traditions of the law of nature, but also did not shy away from using exactly that phrase. Vis-à-vis the arguments, that they presented self-confidently and with a critical intention, Bergbohm's, Jellinek's and Triepel's anxiety about negating even the slightest impression of proximity to natural law theories appeared myopic, precisely because all three of them could not avoid the law of nature. Bergbohm withdrew to psychopathology when explaining why breaches of treaties did occur. He postulated a mysterious "lack of unity" (Uneinigkeit) of the will of the state "in itself" (in sich selbst): "the will, in a concrete case wanting to acquire a good, that is, wanting to act by itself, becomes engulfed in a contradiction with the will" (der Wille, der im konkreten Falle nach einem Gute strebender, also ein selbst handeln wollender ist, gerät in Widerspruch zu dem Willen), which is one "wanting the abstract legal norm" (die abstrakte Rechtsnorm wollender).[494] Bergbohm did not bother to provide evidence for this Faustian dilemma of bringing together contradicting emanations of will, at once striving to fulfill all too human needs and abiding by the law. Instead, he took these contradictions for granted, as if states were somehow debile persons. Jellinek noted the difficulty, commenting that it was impossible to want and not to want the same thing. Yet he did not fare better, as he had to derive the basic norm *pacta sunt servanda* from the extralegal sphere. In a turn against Hegel, Jellinek pointed to "moral principles" (Grundsätze der Sittlichkeit) outside the state, thereby implicitly digging up arguments from natural law theory.[495] Triepel, the last participant in the debate, who had the advantage of drawing on hindsight knowledge, invented the "common will". But he could not clarify, how that "common will" could come into existence from the plurality of "single wills" without already existing procedural law at minimum.[496] Hence, the theorists bent on conceptualising international law exclusively as positive law, fell victim both to their unreflected willingness to perceive not only the state but also the community of states through the lense of the living-body model and to their determination to employ this perception to the end of justifying the use of international law as the house law of the "family of nations". This perception suggested the acceptance of the analogy between rights of the freedom of the individual and sovereign rights of states. Within this analogy, states could only be free, as long as they were sovereigns. However, this analogy militated against the concept of the state that acquired currency in Europe in the course of the nineteenth century. It did so, because, within the practical application of international law in the contexts of the establishment and justification of colonial rule, there were sovereign states as international legal subjects within the "family of nations", non-sovereign "states" as their constituent parts, for example within federations, sovereign states to which subjecthood under international law was denied, and international legal subjects, such as the Maltese Order and the Holy See, which were no states. Consequently, sovereignty was no longer a required element of statehood, as Vattel had assumed[497] and as even Jellinek still postulated,[498] but turned into an ornamental *quisquilium* for the definition of the state. For example, the fact that "states" by contitutional stipulation were parts of federations such as the German Empire and the USA, led some publicists to conclude that these "states" conformed to the legal definition of the state.[499] But such nominalism resulted in assertions that stood in direct contradiction to empirical evidence recorded in the texts of constitutions. In Jellinek's theoretical perspective,[500] the German Empire had established the federal states that formed its parts, even though the text of the Imperial Constitution of 16 April 1871 said the opposite and despite the fact that all these "states" were much older than the German Empire. Whereas the text of the constitution pronounced the German Empire as having resulted from the will of its member "states", Jellinek constructed the exactly reverse causality and invented a genetic relationship between the Empire and its member "states". Consequently, according to Jellinek's theory, the member "states"

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494 Bergbohm, *Staatsverträge* (note 372), p. 39.
495 Jellinek, *Natur* (note 140), p. 57.
496 Triepel, Völkerrecht (note 410), pp. 82-83.
497 Vattel, *Droit* (note 454), chap. I/1, nr, 1, p. 17.
498 Georg Jellinek, *Die Lehre von den Staatenverbindungen* (Vienna, 1882), p. 37 [reprint, edited by Walter Pauly (Bibliothek des Öffentlichen Rechts, 3) (Goldbach, 1996)].
499 Paul Laband, *Das Staatsrecht des Deutschen Reiches*, fifth edn, vol. 2 (Tübingen, 1912), p. 18 [first published (Freiburg, 1882); reprints of the fifth edn (Aalen, 1964); (Goldbach, 1997)].
500 Jellinek, *Lehre* (note 498), pp. 46, 256-257, 262-263, 278, 284-289.

had never had the freedom to determine their statehood and could not be states in any legal sense. With their postulate of some analogy between sovereign rights of states and freedom rights of persons, theorists thus gave licence to the arbitrary use of the freedom they ascribed to states, although already Jean Bodin had insisted that there no such licence, either for private persons nor for rulers and governments of states. Nineteenth-century international legal theorists equated sovereignty with independence. But they granted the freedom of the use of sovereign independence solely to members of the “family of nations”. Through the practical implementation of colonial rule, international law supported a regime of inequality, not of freedom.