Chapter VII

A World of Many: Giving up the Belief in the Possibility of Universal Rule (1648/59 – 1714)

A Description of the "State" of the Holy Roman Empire

Slightly less than twenty years after the treaties of Munster and Osnabrück, the jurist and historian Samuel von Pufendorf (1632 – 1694) clad his description of the Holy Roman Empire into a fictitious travel report. He took the role of a Veronese citizen named Severinus de Monzambano, explaining to his alleged brother the oddities of the form of government of the Empire. The choice of Veronese identity had not been random, as the city of Verona the lay on Venetian territory and, from the fourteenth century, Venice had no longer been considered part of the Empire,[1] from the turn towards the sixteenth century even as the foe of the Emperor. Pufendorf explained the form of government of the Empire in historical terms, described the processes by which the centre of rule had shifted from the Italian Peninsula to areas north of the Alps and, at the very beginning of his report, made it clear that the Empire was known by the wrong official name. Instead of "Holy Roman Empire", it should, Pufendorf insisted, be called the "new state of the Germans", because it had nothing to do with the ancient empire of the Romans. It was a grave mistake, he wrote, to believe that this ancient empire of the Romans had continued to be in existence. Quite on the contrary, the empire, whose capital the city of Rome had once been, had been destroyed. Already King Charles I of the Franks had no longer had any rights to rule over the city beyond those of a protector.[2] The German state, which existed in replacement of the ancient empire of the Romans, was merely one among many other European states, Pufendorf claimed in agreement with contemporaries like Hermann Conring.[3] It was absurd, Pufendorf maintained, to determine the power and the ruling competences of the current Emperor in accordance with the vision of the Biblical Prophet Daniel or in agreement with Roman law. The assertion that the Emperor as a universal ruler had no one above himself, except the divine creator of the world, was idle talk, which already the Dutch had proved wrong through their rebellion.[4] The Emperor, Pufendorf argued like Bartolus before him and similar to his contemporary, Christian Thomasius, jurist (1655 – 1728) at Halle, had restricted his powers at his own discretion through the issue of freedom privileges and the recipients of these privileges had turned him into hereditary legal titles. By consequence, the Emperor held no claim whatsoever to universal rule.[5] Nevertheless, Pufendorf contended, the Empire was not a mere republic of aristocrats,[6] as Theodor Reinkingk (1590 – 1664), jurist at the University of Gießen and subsequently councillor of the King of Denmark, had argued.[7] According to the constitutional theory, which Pufendorf adapted from Aristotle, a republic of aristocrats required a senate as the highest holder of government power, while the Empire was a monarchy controlled by the Emperor as the head of a state, not as a universal ruler.[8] Therefore, the Empire had an irregular constitution,[9] as if it were a "monster".[10] These

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[1] Giovanni da Legnano, *Tractatus de bello, de represaliis et de duello*, chap. XII, edited by Thomas Erskine Holland (Oxford, 1917), p. 233 [partly reprinted (New York and London, 1964)].

[2] Samuel von Pufendorf [Severinus de Monzambano Veronensis], *De statu Imperii Germanici ad Laelium Fratrem*, book I, chap. 14 (Geneva, 1667); edited by Fritz Salomon (Quellen und Studien zur Verfassungsgeschichte des Deutschen Reiches in Mittelalter und Neuzeit, vol. 3, issue 4) (Weimar, 1910), pp. 45-46.

[3] Hermann Conring, *De finibus Imperii Germanici*, chap. XIX (Helmstedt, 1654), p. 339. Pufendorf, *Status* (note 2), book II, chap. 1, p. 48.

[4] Pufendorf, *Status* (note 2), book VI, chap. 6, p. 121.

[5] Ibid., book III, chap. 4, p. 70. Christian Thomasius, *Dissertationes juridicae* (Leipzig, 1695), pp. 80-83.

[6] Pufendorf, *Status* (note 2), book VI, chap. 6, p. 121.

[7] Theodor von Reinkingk, *Tractatus de regimine seculari et ecclesiastico*, book I, chap. 2 (Gießen, 1619), pp. 42-43 [second edn (Basle, 1622); (Marburg, 1632); third edn (Marburg, 1641); fifth edn (Frankfurt, 1651); sixth edn (Frankfurt, 1659); further edns (Frankfurt, 1663); (Cologne, 1736)].

[8] Pufendorf, *Status* (note 2), book VI, chap. 5, p. 119.

[9] Ibid., book III, chap. 1, p. 67; Samuel von Pufendorf, *De jure naturae et gentium*, book VII, chap. 5, § 15 (Amsterdam, 1688), pp. 712-715 [reprint (Oxford and London, 1934); first published (London, 1672); newly edited by Frank Böhling (Pufendorf, Gesammelte Werke, vol. 4, parts 1. 2) (Berlin, 1998)].

seeming irregularities of the form of government of the Empire appeared to have resulted from the amalgamation into the imperial constitution of the three Aristotelian forms of government of monarchy, aristocracy and democracy.

Pufendorf produced a state description focused on the form of government, following a then fashionable genre of academic literature.[11] He treated the Holy Roman Empire, as if it were a state like all others and explained in genetic terms what appeared to him as the irregularities of the imperial form of government resulting from the perceived lack of continuity between the Roman Empire of Antiquity and the current imperial institutions. Pufendorf defined the state as an institutional order, in which a ruler exercised legitimate control over a demarcated territory with consent of the ruled.[12] If the Empire of his own time was a particular state, Pufendorf had to distinguish that state from the institution of universal rule, which, in his view, the Roman Imperium had been in Antiquity. Consequently, Pufendorf had to accept the possibility that institutional orders of rule might change. With his acceptance of the change of institutions of rule, Pufendorf encountered opposition from his contemporaries, who did not call into question the statehood of the Empire, but the postulate of its transience.[13]

Pufendorf thus focused his attention on states, while non-state sovereigns, such as the long-distance trading companies, known to him, remained outside the range of his theory.[14] Rulers and governments of states, he believed, could enter into alliances or be composed of various constitutive parts. He referred to these alliances as "system", but, like other theorists, would not admit that the Empire was such a "system".[15] Pufendorf's texts mainly featured the Latin words *civitas* and *res publica* as expressions for the concept of the state. Yet, on occasions, he, like other contemporary jurists,[16] also accepted the word *status*, which had become part of academic diction during the sixteenth century. This Latin word became the root for Modern English 'state' and its variants in other northern, western and southern European languages. When employed in the singular, Pufendorf, in accordance with Classical as well as Medieval Latin and like some of his contemporaries, used the word to denote the historically established but stable condition in which a state should be;[17] but in the plural, the same word *status*, together with "ordines", stood for rulers

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[10] Pufendorf, *Status* (note 2), book VI, chap. 1, p. 116; book VI, chap. 9, pp. 126-127.

[11] Christoph Besold, *Discursus politici*, nr 5: De reipublicae formarum inter sese comparatione (Strasbourg 1624). Jacob Brunnemann [praes.] and Andreas Caspar Schwartzkopf [resp.], *De foederibus statuum Imperii cum exteris*. LLD Thesis (University of Halle, 1703). Hermann Conring, *Thesavri rervmpvblicarvm* (Geneva, 1675). Cyriacus Lentulus, *Arcana regnorum et rerum publicarum* (Herborn, 1655; 1666). Lentulus, *Politicorum sive de re publica nova rebus et methodo meridiatio* (Kassel, 1661). Lentulus, *Princeps absolutus* (Herborn, 1663).

[12] Pufendorf, *Ius gentium* (note 9), book VII, chap. 2, nr 1-16, pp. 660-676.

[13] Justus Wolrad Bodinus [praes.] and Johann Heinrich Baxmann [resp.], *Bilanx justae potestatis inter principes ac status imperii*. LLD Thesis (University of Rinteln, 1689), p. 3. Gottfried Wilhelm Leibniz, 'In Severinum de Monzambano', in: Leibniz, *Politische Schriften*, vol. 1 (Leibniz, Sämtliche Schriften und Briefe, series IV, vol. 1) (Berlin, 1983), pp. 500-502.

[14] Pufendort, *Ius gentium* (note 9), book I, chap. 13, p. 9.

[15] Samuel von Pufendorf [praes.] and Daniel Christiernin [resp.], 'De systematibus civitatum', in: Pufendorf, ed., *Dissertationes academicae selectiores* (Frankfurt, 1678), pp. 226-283., S. 226-283. Pufendorf, *Ius gentium* (note 9), book VII, chap. 5, nr 16-211, pp. 712-720. Brunnemann, *De foederibus* (note 11). Hugo Grotius, *De jure belli ac pacis libri tres*, book I, chap. 3, § 7, nr 2 [(Paris, 1625)]; reprint of the edn (Amsterdam, 1646) (Washington, 1913); newly edited by Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (Leiden, 1939). Reprint of this edn (Aalen, 1993); further reprint, edited by Richard Tuck, *The Rights of War and Peace. Hugo Grotius from the Edition by Jean Barbeyrac* (Indianapolis, 2005)].

[16] Heinrich Binn [praes.] and Ludolf Hugo [resp.], *Dissertatio inauguralis de statu regionum Germaniae*. LLD Thesis (University of Helmstedt, 1661) [further edns (Helmstedt, 1670; 1672); (Gießen, 1689); (Leipzig, 1735)].

[17] Pufendorf, *Status* (note 2), book II, chap. 2, p. 49. Christian Gastel, De statu publico Europae novissimo tractatus (Nuremberg, 1675). Ludolf Hugo, *De statu regionum Germaniae liber unus* (Gießen, 1689). Lazarus von Schwendi, Diskurs und Bedenken über den jetzigen Stand und Wesen des heutigen Reiches, unseres lieben Vaterlands [1570]. Ms. Vienna: Österreichisches Staatsarchiv, Haus-, Hof- und Staatsarchiv, Kriegsakten 26; Berichte aus dem Reich 6d; edited by Maximilian Lanzinner, 'Die Denkschrift des Lazarus von Schwendi zur Reichspolitik', in: Johannes Kunisch, ed., *Neue Studien zur frühneuzeitlichen Reichsgeschichte* (Zeitschrift für Historische Forschung, Beiheft 3) (Berlin, 1987), pp. 154-185. Justus Sinolt genannt von Schütz, 'Exercitatio II: De divisione Imperii Romani, ratione regiminis et in specie de summi capitis, imperatoris, constitutione seu

within the Empire, who had legitimate autonomous legislative competence,[18] i. e. the Estates, as well as for the pluralism of states in Europe, including the Empire. In Pufendorf's own words, then, Tte Empire was a "state", it had "state" and it consisted of "states" as its members. Describing the Empire as a stable "state", prima facie conflicted with Pufendorf's assertion that the Empire of his own time had no historical connections with the Roman Imperium. Pufendorf resolved this apparent contradiction by ascribing to the Roman Imperium the claim for universal rule, thereby denying to it the "state" (condition) of the particular "state" as an institution of government. As a "state", the contemporary Holy Roman Empire might not exist in perpetuity, because it had been established through human will and was thus finite; yet, it could still be stable for the time being. In this respect, the Holy Roman Empire showed no difference from any other existing state. As Pufendorf chose the perspective of the Veronese citizen, for whom the derivation of an institution of government from human will would not be an odd and alien proposition at all, he tied his statement of the "monstrosity" of the Empire to the pluralism of the meanings of the word "state" for the Empire and variety of power-holders within its borders. According to this description, a political community could hardly be regular if it was a "state" and simultaneously consisted of "states". Pufendorf's description met with instantaneous success.[19] His book attracted attention and criticism, so much that he wrote two follow-up explanatory texts and published them under his own name. In subsequent editions, he distanced himself from the equation of the Empire with a "monster" and eventually even admitted his authorship of the original text.[20]

The treaties of Munster and Osnabrück, promulgated to the status of a basic law for the Empire by decree from the Imperial Diet of 1654 and thereby included among the permanent unchangeable assemblage of laws on the "state constitution" of the Empire,[21] laid the foundation for a debate about the form of government of the Empire and its position within the European states

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electione', in: Sinolt, *Collegium publicum de statu rei Romanae*, edited by Carl Scharschmid (Frankfurt, 1683), pp. 69-138 [first published (Marburg, 1641); further edn (Frankfurt, 1682)]. Johannes Urbach, 'Tractatus de statu Fratrum Ordinis Teutonicorum', edited by Stanislaus Franciszek Belch, *Paulus Vladimiri and His Doctrine Concerning International* Law, vol. 2 (The Hague, 1965), pp. 1116-1180. And the nine-volume survey of the current conditions of some states in Europe by: Joachim Hagemeier, *Juris publici Europei de trium regnorum septentrionalium Daniae, Norvegiae et Sveciae statu epistola prima* (Frankfurt, 1677). Hagemeier, *Juris publici Europei de statu Galliae epistola secunda* (Frankfurt, 1678). Hagemeier, *Juris publici Europei de statu Angliae, Scotiae et Hiberniae epistola tertia* (Frankfurt, 1678). Hagemeier, *Juris publici Europei de statu Imperii Germanici epistola quarta* (Frankfurt, 1678). Hagemeier, *Juris publici Europei de statu Provinciarum Belgicarum epistola quinta* (Frankfurt, 1679). Hagemeier, *Juris publici Europei de statu Italiae epistola sexta* (Frankfurt, 1679). Hagemeier, *Juris publici Europei de statu Regnorum Hungariae et Bohemiae epistola septima* (Frankfurt, 1680). Hagemeier, *Juris publici Europei de statu Poloniae et Imperii Moscovitici epistola octava* (Frankfurt, 1680). Hagemeier, *Juris publici Europei de statu Hispaniae et Portugalliae epistola nona* (Frankfurt, 1681). For a study see: Armin von Bogdandy and Stephan Hinghofer-Szalkay, 'Das etwas unheimliche *Ius Publicum Europeum*. Begriffsgeschichtliche Analysen im Spannungsfeld von europäischem Rechtsraum, *droit public de l'Europe* und Carl Schmitt', in: *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 73 (2013), pp. 209-248.

[18] Pufendorf, *Status* (note 2), book II, chap. 13, p. 63; Bodinus, *Bilanx* (note 13), p. 5. Christian Gastel, *De statu, dignitate et præcedentia Pontificum, Imperatorum, Regum, Magnorum Ducum, Vicariorum, Electorum, Archi-Ducum, Cardinalium, Patriarcharum, Magistrorum Teutonici Ordinis, Episcoporum, Ducum, Palatinorum, Comitum, Baronum, Notilium, Doctorum, Licentiatorum, Magistrorum, Militum, Civitatum Imperialium et Hanseaticarum* (Guben, 1669), pp. 343-369.

[19] Detlef Döring, 'Untersuchungen zur Entstehungsgeschichte der Reichsverfassungsschrift Samuel Pufendorfs (Severinus de Monzambano)', in: *Der Staat* 33 (1994), pp. 185-206. Julia Haas, *Die Reichstheorie in Pufendorfs „Severinus de Monzambano". Monstrositätstheorie und Reichsdebatte im Spiegel der politisch-juristischen Literatur von 1667 bis heute* (Schriften zur Verfassungsgeschichte, 76) (Berlin, 2006).

[20] Samuel von Pufendorf, *Disquisitio de Republica Irregulari. Ad Severini Monzambano Cap. VI de Forma Imperii Germanici* (London, 1669). Pufendorf, 'Addenda Dissertationis de Republica Irregulari', in: Pufendorf, ed., *Dissertationes academicae selectiores* (Frankfurt, 1678), pp. 529-574. Pufendorf, '[Preface to the planned posthumous edition]', edited by Fritz Salomon, *De statu Imperii Germanici ad Laelium Fratrem* (Quellen und Studien zur Verfassungsgeschichte des Deutschen Reiches in Mittelalter und Neuzeit, vol. 3, issue 4) (Weimar, 1910), pp. 164-165.

[21] Johann Jakob Moser, *Teutsches Staatsrecht*, book IV, chap. 4, vol. 1 (Nuremberg, 1737), p. 46 [reprint (Osnabrück, 1968)].

system. This debate continued to the end of the eighteenth century, dominated jurisprudence within the Empire[22] and focused on questions of sovereignty. In contradistinction to retrospective twentieth-century juristic and political science assessments,[23] contemporary participants in the debate took the existence of state sovereignty for granted and did not position the Westphalian treaties as supportive factors of the establishment of the European states system purportedly bent on the sovereignty of its members. The debate was not a matter of arcane theory but shaped the practical use of the law of war and peace. Pufendorf himself joined the debate. The gist of his description of the "state" (condition) of the Empire was the assertion that the Empire was a "state" (institution of rule) drawn on consent by the ruled but derived from divine will. Pufendorf constructed the Empire as an institution of rule in separation from the person of the ruler, thus crediting the Empire with continuity beyond the lifetime of an incumbent ruler.[24] According to contemporary legal theory, neither the Empire nor any other state could be at the disposition of political decision-makers during war or peace negotiations. Philosopher Gottfried Wilhelm Leibniz (1464 – 1716), who, like Pufendorf, had been a student under the mathematician Erhard Weigel (1625 – 1699), a few years after Pufendorf argued the same view that the Empire was "a country standing for itself and in whose power it is to be happy if it just wants".[25] Leibniz urged political decision-makers to make sure that Europe could be restored "to the balance" as a condition for the maintenance of "peace and repose".[26] In agreement with late seventeenth-century peace theories,[27] Leibniz equated happiness and balance with stability. The Empire, he wrote elsewhere,[28] like any other state was the place, at which the provision of security made possible life in communities under the rule of law, regulating basic human concerns. He assigned to rulers legislative competence and the task of exercising territorial sovereignty (superioritas territorialis) through legislation and the right to war, and included the Imperial Estates into this principle. Territorial sovereignty was, in Leibniz's words, "supremacy" or, the same expressed in French, "la Souveraineté".[29] Leibniz thus explicitly not only equated supreme territorial rule with sovereignty, but also the Imperial Estates with the other European states. Through both equations, Leibniz operated within the terminological tradition enshrined already in thirteenth- and fourteenth-century legal theory, according to which autonomous legislative competence had been the core element of sovereignty. Yet, Leibniz also took issue with Bodin's insistence that only rulers of the highest rank could be admitted as sovereigns. As Imperial Estates, ranging from rulers over large territories to imperial cities and some monasteries, had autonomous legislative competence and recognised the Emperor as overlord in the Empire, Leibniz's interpretation of the sovereignty of the Empire allowed for the recognition of hierarchies among rulers.[30] Put differently: whoever used terms like sovereignty and territorial supremacy

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[22] For a survey see: Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. 1 (Munich, 1988), pp. 225-267.

[23] Leo Gross, 'The Peace of Westphalia', in: *American Journal of International Law* 42 (1948), pp. 20-41. Gene M. Lyons and Michael Mastanduno, 'Introduction. International Intervention, State Sovereignty and the Future of International Society', in: Lyons and Mastanduno, eds, *Beyond Westphalia? National Sovereignty and International Intervention* (Baltimore and London, 1995), pp. 1-19.

[24] Pufendorf, *Status* (note 2)**,** book II, chap. 1, pp. 48-49.

[25] Gottfried Wilhelm Leibniz, 'Bedencken Welchergestalt securitas publica interna et externa und status praesens im Reich iezigen Umbständen nach auf festen Fuss zu stellen [1670]', in: Leibnz, *Politische Schriften*, vol. 1 (Leibniz, Sämtliche Schriften und Briefe, series IV, vol. 1) (Berlin, 1983), pp. 133-214, at p. 133.

[26] Ibid., p. 214.

[27] William Penn, 'Plan for a League of Nations [1693]', edited by Taro Terasaki, *William Penn et la Paix* (Paris, 1926), pp. 63-132, at p. 130 [also edited by William I. Hull (Philadelphia, 1919); also in: *Peace Projects of the Seventeenth Century,* edited by J. R. Jacob and M. C. Jacob (New York, 1972)].

[28] Gottfried Wilhelm Leibniz, *De jure suprematus ac legationis principum Germaniae* (Amsterdam, 1677) [second edn (Amsterdam, 1678); (London, 1678); further edns (Cologne, 1682); (Nuremberg, 1692); new edn of the first edn in: Leibniz, *Politische Schriften*, vol. 2 (Leibniz, Sämtliche Schriften und Briefe, series IV, vol. 2) (Berlin, 1984), pp. 13-270, at p. 53-54].

[29] Ibid., pp. 52, 55, 56.

[30] Hugo, *De statu* (note 17), chap. II, nr 9, chap. III, nr 1. Lentulus, *Politicorum* (note 11). Peter Müller [praes.] and Carl Andreas Seyfert [resp.], *De jure investiendi Status Imperii Germanici-Romani. Von Reichs-Belehnungen*. LLD Thesis (University of Jena, 1685), chap. VI, Thesis 3, fol. D3^{r}. Sinolt, 'Exercitatio' (note 17). For a study see:

during the seventeenth and eighteenth centuries, did not necessarily identify sovereignty with independence, even though nineteenth-century theorists of the state[31] as well as twentieth- and twenty-first-century legal and political historians[32] have regularly assumed the conceptual identity of sovereignty and independence. Before the nineteenth century, this identification was incompatible with the stability-oriented theories of the state and of the law, because independence presupposed the then unknown operation of state successions, with states coming and going, and the termination of legally existing relations of dependence between states.

The Law of Rulers and the Law of States

However, the principle of the separation of ruling offices from the persons of rulers militated not only against then prevailing patterns of the conduct of foreign policy, but was also incompatible with the theory that defined rule as the ruler's power to dispose of the state as a whole and determined that competence as the personal right of rulers and the kin groups whose members they were. During the second half of the seventeenth century, this theory found most frequent application in the French diplomatic service, which repeatedly resorted to it in arguments for the justification of war. Resulting from the Peace of the Pyrenees of 1659, the marriage between King Louis XIV of France and Maria Theresa, daughter of King Philipp IV of Spain from his first wife, had been concluded, thereby establishing kin relations between the French dynasty of the Bourbons and the dynasty of the Habsburgs, ruling over the Empire, Spain, the Austrian hereditary lands and the Southern Netherlands. In 1665, Charles II (1665 – 1700), son of Philipp IV and his second wife, had succeeded his father as a minor according to Spanish succession law, but was seriously ill. From the kin relationship, French diplomats constructed the so-called right of devolution, focused on the contention that Louis XIV as husband to Maria Theresa, the first born child of the late Spanish king, had the right to rule over the Southern Netherlands, then under Spanish control, rather than Charles. French diplomats thus ranked dynastic rights above succession law, even insisted that these rights were binding sovereign rulers,[33] and requested that Charles II should renounce his rights to rule over the Southern Netherlands, an area bordering on France to the North. When the Spanish side refused to accept the request, King Louis XIV declared war on Spain in 1667. The French army occupied parts of the County of Hainaut as well as of Flanders and conquered the Spanish controlled Franche Comté of Burgundy surrounded by French territory. The Peace of Aix-la-Chapelle of 2 May 1668[34] restored the Franche Comté to Spain but confirmed the French positions in the Southern Netherlands. In this so-called "War of Devolution", the use of dynastic rights barely concealed the quest for the expansion of rule of the King of France to the disadvantage of the Spanish Habsburgs, with French diplomats involuntarily revealing the uncomfortable fact that they did not have stronger entitlements in justification of their war against Spain in accordance with the established law of war and peace.

But the agreement of 1668 did npt have lasting impact, because the French side soon took upon weapons again in support of its demand. In 1672, Louis XIV launched a new military campaign in the Southern Netherlands, this time allied with Great Britain, Sweden, the Bishopric of Liège and the Bishopric of Munster, the latter an Imperial Estate. This war ended with six peace treaties concluded in the Dutch city of Nijmegen in 1678, supplement by a further instrument signed

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Yvonne Pfannenschmid, *Ludolf Hugo (1632 – 1704). Früher Bundesstaatstheoretiker und kurhannoverscher Staatsmann* (Hannoversches Forum der Rechtswissenschaften, 27) (Baden-Baden, 2005), pp. 126-130.

[31] Georg Jellinek, *Allgemeine Staatslehre* (Berlin, 1900), pp. 394-434 [second edn (Berlin, 1905);third edn (Berlin, 1913); reprint of the third edn (Bad Homburg, 1960)].

[32] Johannes Burkhardt, 'Der Westfälische Friede und die Legende von der landesherrlichen Souveränität', in: Jörg Engelbrecht and Stephan Laux, eds, *Landes- und Reichsgeschichte. Festschrift für Hansgeorg Molitor zum 65. Geburtstag* (Bielefeld, 2004), pp. 199-220. Christian Hillgruber, *Die Aufnahme neuer Staaten in die Völkerrechtsgemeinschaft* (Kölner Schriften zu Recht und Staat, 6) (Frankfurt, 1998), p. 5.

[33] Louis XIV, King of France, *Remarques que l'on a faites dans le traitté ... des droits de la reyne très-chrestienne sur les Pays-Bas*, ascribed to Antoine Bilain (s. l., 1667) [Abridged English version as: *A Dialogve Concerning the Rights of the Queen* (Paris, 1667)].

[34] Treaty France – Spain, Aix-la-Chapelle, 2 May 1668, in: *CTS*, vol. 11, pp. 13-25.

in the German town of Celle in 1679.[35] The agreements placed the King of France in control of the Franche Comté of Burgundy, Alsace, Lorraine and the city of Freiburg in Southwest Germany, then under Austrian rule. In the course of the two wars, the French army had emerged as the foremost fighting force in Europe and served Louis XIV as the most formidable instrument in the expansion of French rule to the disadvantage of the Habsburgs and their allies. In 1688, Louis XIV again issued dynastic claims for hereditary succession, this time against the Palatinate. When, again, these requests were turned down, Louis XIV ordered the occupation of the Palatinate. Emperor Leopold I (1657 – 1705) sought to respond against the invasion by forming an alliance with King Charles II of Spain, members of the Upper Rhine Imperial Circle and King Charles XI of Sweden (1660 – 1697), who was member of the Bavarian dynasty of the Wittelsbachs. William of Orange, Stadhouder of the Netherlands (1672 – 1702), acceded to the alliance in 1689, after he had been elected King of Great Britain as William III (1689 – 1702). Through the alliance, the conflict, which became known as the Nine Years War, affected not only Europe but also other parts of the world, namely the strongholds under the control of long-distance trading companies in South and Southeast Asia. The peace of Rijswijk of 20 September and 30 October 1697 terminated this war, again through a series of bilateral agreements. The war ended unfavourably for Louis XIV. In the course of the campaign, he had to evacuate the Netherlands and areas east of the Rhine, to recognise the election of William III as King of Great Britain against the Stuart pretender residing in exile in France and to pledge not to act against the British king. The stronghold of Pondichéry in South Asia, which the VOC had conquered during the war, was restored to French control.[36] However, at the end of the war, the Kingdom of France formed an integrated stretch of land extending from the Pyrenees and the Mediterranean Sea to the Atlantic and the Rhine, with the tiny exceptions of the town of Montbéliard, remaining under the rule of the Duke of Württemberg, and the Venaissin with the town of Avignon under the secular rule of the Pope. Drawing on this territorial basis, French theorists could state the principle that rivers, mountains and oceanic coasts as features of the natural landscape should serve as given administrative borders separating states rather than lines that had seemingly been drawn arbitrarily through political consensus or military force. As frontiers in accordance with physical features of the landscape appeared to follow the dictates of nature, they seemed not to be in need of legal recognition by rulers. In the case of France, the diplomatic service employed the argument with "natural" frontiers in support of its insistence that the Rhine, the Alps, the Pyrenees as well as the coasts of the Mediterranean and the Atlantic Ocean should be equated as the borders of the Kingdom of France.[37]

The results of the wars, which the French king undertook between 1667 and 1697, contradicted the declared war aims. The wars had not boosted the recognition of the priority of dynastic rights, but had solidified government control over state territory in accordance with alleged dictates of the natural landscape. Nevertheless, French diplomatic service defiantly pursued the priority of dynastic rights, with continuing focus on Spain. Charles II had remained without offspring, and already during the negotiations for the Peace of Rijswijk, the king's demise appeared to be imminent. French diplomats therefore put the question about royal succession in Spain on the

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[35] Treaty France – States General of the Netherlands, Nimegen, 10.August 1678, in: *CTS*, vol. 14, pp. 367-397.Treaty France – Spanien, Nimegen, 17 September 1678, in: *CTS*, vol. 14, pp. 443-476.Treaty France – Roman Emperor and Roman Empire, Nimegen, 26 January / 5 February 1679, in: *CTS*, vol. 15, pp. 3-54.Treaty France – Munster, Nimegen, 19 / 29 March 1679, in: *CTS*, vol. 15, pp. 111-118.Treaty Munster – Sweden, Nimegen, 19 / 29 March 1679, in: *CTS*, vol. 15, pp. 121-129. Treaty States General of the Netherlands – Schweden, Nimegen, 2 / 12 October 1679, in: *CTS*, vol. 15, pp. 319-330.Treaty France – Sweden, Celle, 26 January / 5 February 1679, in: *CTS*, vol. 15, pp. 81-102.

[36] Treaty France – States General of the Netherlands, Rijswijk, 20 September 1697, partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 210-216. Treaty France – Great Britain, Rijswijk, 20 September 1697, in: *CTS*, vol. 21, pp. 411-444. Treaty France – Spain, Rijswijk, 20 September 1697, in: *CTS*, vol. 21, pp. 455-506. Treaty France – Roman Emperor and Roman Empire, Rijswijk, 30 October 1697, in: *CTS*, vol. 22, pp. 7-27.

[37] Sébastien le Prestre de Vauban, 'Interêt présent des états de la Chrétienté [c. 1700]' , in: Vauban, *Vauban. Sa famille et ses écrits*, edited by Eugène Auguste Albert de Rochas d'Aiglun, vol. 1 (Paris, 1910), pp. 490-496, at p. 492.

agenda of negotiations, which took place in Paris, London, Vienna and Munich against manifest protest from Charles II. Louis XVI announced that he would not acknowledge the succession of a member of the Habsburg dynasty and, in the case of Charles's death, would demand succession for one of his descendants. Yet, French diplomats conveyed the impression that Louis XIV might change his position if a candidate from a third dynasty could be found. Indeed, by 1698, the six-year old Bavarian prince Joseph Ferdinand (1692 – 1699) of the Wittelsbach dynasty was selected as a compromise candidate and found general acceptance. But the young prince died already in the following year. The search for yet another candidate proved unsuccessful. When Charles II eventually passed away on 1 November 1700, French diplomats produced a last will, which Charles apparently had signed two weeks before his death. The testament designated Philipp of Anjou, grandson of Louis XIV as the heir to the Spanish throne. The Habsburgs rejected the document as invalid, as it appeared to have been written under pressure from French diplomats. Moreover, the Habsburg's claimed that hereditary succession to kingdoms stood under fundamental laws not subject to alterations of the will of a reigning monarch. The Habsburgs in Vienna named Archduke Charles (King of Spain, 1703 – 1714, Emperor 1711 – 1740), as their candidate. Both candidates found support in Spain and were elected. The result was war. In 1701, the Grand Alliance was formed between William III of Great Britain and Stadhouder of the Netherlands, Emperor Leopold I and a number of larger Imperial Estates. Louis XIV sided with the Wittelsbach dynasty, reigning not only over the Electorate of Bavaria but also the Electorate and Archbishopric of Cologne, as well as with the Duke of Savoy. The Alliance and the Empire declared war on France on 6 October 1702.[38] The Emperor enforced a ban and a punitive action against the Duke of Bavaria, as he seemed to have broken the treaties of Munster and Osnabrück.[39] The ensuing war was costly and led to serious defeats of the French army in the battles at Höchstedt on 13 August 1704, Ramillies on 23 May 1706 and at Malplaquet on 11 September 1709 with a total of about 44000 dead and wounded on the French side. The British army conquered almost the entire Southern Netherlands and the stronghold of Gibraltar on the southern coast of Spain. During the peace negotiations, beginning in 1710, Louis XIV was ready to make concessions, while the allies aimed at full victory over France. However, when Emperor Joseph I (1705 – 1711) died, Archduke Charles became Emperor Charles VI, like his namesake Charles I/V, again uniting in his person the offices of Roman Emperor and King of Spain. The combination of offices seemed to restore sixteenth-century Habsburg-Spanish relations and intensified the intense public row that had arisen in Britain about the formation of the Great Alliance at the very beginning of the war.[40] Sympathies for the Habsburgs waned elsewhere in Europe as well.

Habsburg military and political strength not only came on record through the war that they fought in Western Europe against France but also in the campaigns that had been going on in the Balkans since the Battle of Mohács between the Habsburgs as kings of Hungary and the Ottoman

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[38] Leopold I, Roman Emperor, '[Declaration of Imperial War, 6 October 1702]', in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp. 272-273.

[39] Leopold I., Roman Emperor, '[Edikt zur Verhängung der Reichsacht gegen das Kurfürstentum Bayern, 1702]', in: Hanns Hubert Hofmann, ed., *Quellen zum Verfassungsorganismus des Heiligen Römischen Reiches Deutscher Nation. 1495 – 1815* (Ausgewählte Quellen zur deutschen Geschichte der Neuzeit. Freiherr-vom-Stein-Gedächtnisausgabe, 13) (Darmstadt, 1976), pp. 273-274.

[40] Daniel Defoe, *Reasons against a War With France* (London, 1701). Defoe, *A Review of the State of the English Nation* (London, 1706) [edited in: Moorhead Wright, ed., *The Theory and Practice of the Balance of Power* (London and Totowa, 1975), pp. 45-49]. Defoe, *Reasons Why This Nation Ought to Put a Speedy End to This Expensive War* (London, 1711) [third edn (London, 1711)]. Jonathan Swift, *A Discourse of the Contests and Dimensions between the Nobles and Commons in Athens and Rome with the Consequences They had upon Both Those States* (London, 1701) [also in: Swift, *A Tale of the Tub with Other Early Works. 1696 – 1701*, edited by Herbert John Davis (Oxford, 1965), pp. 193-236; also edited by Frank Hale Ellis (Oxford, 1967)]. Swift, The Conduct of the Allies, edited by Charles Barker Wheeler (Oxford, 1916) [first published (London, 1711); also edited by Herbert John Davis, in: Swift, *Political Tracts. 1711 – 1713* (Swift, The Prose Writings, vol. 6) (Oxford, 1973), pp. 1-65]. Swift, *Some Remarks on the Barrier Treaty* (London, 1712) [second edn (London, 1712); also edited by Davis, Political Tracts (as above), pp. 85-117].

Turkish Sultan in 1526. During the second half of the seventeenth century, Habsburg-controlled armed forces took the initiative forcing the Ottoman army into retreat. In 1683, the Ottoman army moved towards Vienna, subjecting the city to a siege for the second time. But what was planned as a relief operation collapsed, after Habsburg defenders received support from an army under the command of Jan Sobieski, King of Poland (1674 – 1696). Prince Eugene of Savoy (1663 – 1736), who had risen to the supreme commander of the Habsburg-led imperial army, inflicted a grave defeat upon Ottoman forces during the Battle of Zenta on 11 September 1697 in an irregular surprise attack at extremely low casualties on the Habsburg side. Following this defeat, the Sultan agreed upon a peace settlement consisting in four bilateral agreements signed at Carlowitz on 26 January 1600. In essence, the agreements established a frontier between territories under Habsburg and on Ottoman control, thereby including the Sultan and the territories under his rule in the Balkans into the European states system.[41] The treaties recognised the legal equality of the signatory parties not only through repeating the mutual concession of the imperial title to the Emperor and the Sultan, but also by the inclusion of the Most-Favoured-Nation clause; the British-Ottoman treaty of 1675 even guaranteed the freedom of travel of British merchants in territories under Ottoman control.[42] The complex of treaties signed at Carlowitz included the Emperor and the Sultan into the treaty network and the underlying customary law of public treaties among states. By 1699, the making of treaties between Muslim and Latin Christian rulers on the basis of the recognition of legal equality had evolved into an established practice, as documented in the agreement between Great Britain and Tripolis of 5 / 15 March 1676,[43] between Algiers and France of 11 March 1679[44] and between Algiers and the Netherlands of 30 April 1679 and the two treaties between France and Persia of 1708 and 1715.[45] The British-Tripolitan agreement, as the two other instruments, regulated maritime traffic on the Mediterranean Sea and stipulated the reciprocal renunciation of the use of force against ships travelling under the flags of the signatory parties. The two French-Persian instruments were trade agreements, in the latter of which King Louis XIV used the title "Emperor" (Empereur) for himself in addition to the traditional style "Most Christian King of France" (Rois Très Chrétien de France). The mutual recognition of treaty partners as states presented no problems on the Christian as well as on the Muslim side. The complex of treaties signed at Carlowitz included the Emperor and the Sultan into the treaty network and the underlying customary law of public treaties among states. Philosopher and politician Gabriel Bonnot de Mably (1709 – 1785), a close contemporary observer, noted already in 1748 that the Carlowitz treaties had connected the Ottoman Turkish Empire with Europe.[46] For the Habsburgs, the Carlowitz settlement was particularly beneficial, as their control over territories in the Balkans expanded significantly. As a result, British as well as French diplomats could persuasively point to the political dangers of again uniting the offices of the Emperor and of the King of Spain in one and the same Habsburg ruler.

Consequently, the British government, at the recommendation of Henry Saint-John

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[41] Treaty Ottoman Empire – Poland, Carlowitz, 26 January 1699, in: *CTS*, vol. 22, pp. 247-263. Treaty Ottoman Empire – Roman Emperor and Roman Empire, Carlowitz, 26 January 1699, in: ibid., pp. 221-235. Treaty Ottoman Empire – Poland, Carlowitz, 26 January 1699, in: ibid., pp. 249-256. Treaty Ottoman Empire – Republic of Venice, Carlowitz, 26 January 1699, in: ibid., pp. 267-278. Treaty Poland – Roman Emperor and Roman Empire, Carlowitz, 26 January 1699, in: ibid., pp. 289-293.

[42] Treaty Ottoman Empire – Holy Roman Empire 1699 (note 41), art. 14, p. 230. On the history of the clause see: Boris de Nolde, 'La clause de la Nation la Plus Favorisée et les tariffs préférentiels', in: *Recueil des cours* 39 (1932, part I), pp. 1-130. Treaty Great Britain – Ottoman Empire, September 1675 = Akir 1086 [extant in the form of an edict in the name of the Ottoman Turkish Sultan], Art. I-III, in: *CTS*, vol. 13, pp. 431-461, at pp. 433-434; also in: Jean Dumont, Baron of Carels-Croon, ed., *Corps diplomatique*, vol. 7, part 1 (The Hague, 1726), pp. 297-305.

[43] Treaty Great Britain – Tripolis, 5 / 15 March 1676, in: *CTS*, vol. 14, pp. 75-81.

[44] Treaty Algiers – France, 11 March 1679, in: *CTS*, vol. 15, pp. 105-108.

[45] Treaty Algiers – States General of the Netherlands, 30 April 1679, in: *CTS*, vol. 15, pp. 143-151. Treaty France – Persia [Edict in the name of Shah Kulikan], September 1708, in: *CTS*, vol. 26, pp. 199-217. Treaty France – Persia, Versailles, 13 August 1715, in: *CTS*, vol. 29, pp. 305-309. For a study of the French-Persian treaties see: Maurice Herbette, *Une ambassade persane sous Louis XIV* (Paris, 1907), pp. 231-281.

[46] Gabriel Bonnot, Abbé de Mably, *Le droit public de l'Europe fondé sur les traitez conclus jusqu'en l'année 1740* (Mably, Collection complète des œuvres, 5) (Paris, 1794-1795), p. 100 [reprint (Aalen, 1977); first published (Amsterdam, 1748)].

Viscount Bolingbroke (1678 – 1751),[47] could suggest the dissolution of the Great Alliance in 1712 and 1713 with the implication that the British side would no longer back Habsburg war aims. Bolingbroke went even further with his proposal that the British government should promote the settlement of the controversy about royal succession in Spain by recognising Philipp of Anjou. Bolingbroke demanded as a condition for British approval of Philipp's succession that the French and the Spanish Bourbons reciprocally renounced the rights to succession in the kingdom where they did not reside. Accordingly, members of the Bourbon dynasty in France would not be entitled to claim succession rights in Spain and, vice versa, Spanish Bourbons would waive their rights of succession in France.[48] Beyond fears of increasing Habsburg military and political leverage, another factor strengthening the French position in the informal negotiations about the ending of the war was royal succession in Great Britain. In 1688, a "Revolution" had forced King James II (1685 – 1688), grandson of James I, to seek exile in France and led to the election of William of Orange as king, who ruled jointly with his wife Mary (1689 – 1694). Queen Anne (1702 – 1714), William's successor was without offspring and, after her death, succession to the British throne would pass to the Protestant dynasty of the Welfs as Dukes and Electors of Hanover in the Empire. However, the descendants of James II, living in France, campaigned for their succession rights and hoped to return eventually. As Louis XIV indirectly supported the claims of the descendants of James II, the British government tried to trade its conciliatory approach towards France against Louis XIV's recognition of the Protestant succession in Britain.

In 1712 and 1713, formal peace negotiations took place in the Dutch city of Utrecht, which led to the conclusion of twelve bilateral treaties among the warring parties.[49] Taken together, the treaties cast into legal norms Bolingbroke's proposal, thereby confirming the priority of the stability of state institutions over dynastic privileges. Philipp of Anjou (1700 – 1746) received recognition as the rightful King of Spain for himself and his descendants, while "renouncing" his entitlements for succession in France. Vice versa, the French Bourbons "renounced" the claims to hereditary succession in Spain for themselves and their descendants. Consequently, the ruling kin group of the Bourbons divided itself into two separate, legally unrelated dynasties. Henceforth, the continuity of the Kingdom of Spain as a state was guaranteed even under a Bourbon king. On his side, Louis XIV accepted Viennese Habsburg rule over the Southern Netherlands, which had previously been under the sway of the Spanish king, as well as over the Spanish controlled parts of the Italian Peninsula, namely Naples, Mantua, Parma, Piacenza and Guastalla. Great Britain, which had been transformed into the United Kingdom of Great Britain and Ireland through the union of the English and the Scottish Parliaments in 1707, obtained some French colonial territories in North America and the stronghold of Gibraltar. The Duke of Savoy became ruler of Sicily. Emperor Charles VI, who had hesitated to withdraw as King of Spain, eventually agreed upon the principles of the Utrecht settlement and signed the special treaties of Rastatt of 6 March 1714 and Baden of 7 September 1714.[50]

Through the treaties of Utrecht, Rastatt and Baden, the Holy Roman Empire gained stability as a state, featuring some special elements of its form of government, namely the irregularities which Pufendorf had pointed out, but no longer holding any special position vis-à-vis

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[47] Henry Saint-John, Viscount Bolingbroke, *Works*, edited by David Mallet, vol. 2 London, 1754), pp. 435-612 [reprint, edited by Bernhard Fabian (Anglistica et Americana, 13) (Hildesheim, 1968)].

[48] Leopold von Ranke, 'Der Krieg über die spanische Erbfolge', in: Ranke, *Französische Geschichte vornehmlich im sechzehnten und siebzehnten Jahrhundert*, vol. 4, fourth edn (Ranke, Sämmtliche Werke, 11) (Leipzig, 1877), pp. 85-217, at pp. 207-208.

[49] For a collection of sources on the Utrecht settlement see the general collections: *Trattati di pace conclusi in Utrecht*, 6 vols (Venice, 1713). The Compleat History of the Treaty of Utrecht, 2 vols (London, 1717). For some treaties see: Treaty Spain – UK, 26 March 1713 [Asiento Treaty], in: *CTS*, vol. 27, pp. 439-453; partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 611-612. Treaty France – States General of the Netherlands, Utrecht, 11 April 1713, in: *CTS*, vol. 28, pp. 39-82. France – UK, Utrecht, 11 April 1713, in: *CTS*, vol. 28, pp. 3-36. Treaty Spain – UK, Utrecht, 13 July 1713, in: *CTS*, vol. 28, pp. 295-324.

[50] Treaty France – Roman Emperor and Roman Empire– Spain, Rastatt, 6 March 1714, in: *CTS*, vol. 29, pp. 3-39. Treaty France – Roman Emperor and Roman Empire – Spain, Baden, 7 September 1714, in: ibid., pp. 143-174.

other states. The Emperor, indeed, remained the sole bearer of the imperial title in Latin Christendom, thereby possessing a unique position among other monarchs in this part of the world. The uniqueness of the imperial title within Latin Christendom continued to support the argument that Emperor was in a privileged position over other monarchs. Yet, the Holy Roman Empire as a whole no longer held legal prerogatives over kingdoms and other states and their rulers outside its borders. However, up until the beginning of the nineteenth century, the priority of the stability of states over dynastic privileges remained contested, as the dynasties formed a Europe-wide network of kin groups and continued to demand the rights in a series of further wars of hereditary succession. Nevertheless, the Utrecht settlement did establish the basis on which the European states system constituted itself as a firm assemblage of political communities. Wars might jeopardise the continuity of the states system, but legal norms no longer called it into question.

By consequence, sovereigns could not hope to accomplish the raise of their rank by simply increasing the number of territories under their rule through the deployment of military force. Instead of resorting to war, sovereigns more often succeeded in the acquisition of higher monarchical titles through diplomatic means and, as a rule, beyond their traditional realms. For one, Elector Frederick August II of Saxony (1694 – 1733, King of Poland 1697 – 1706, 1709 – 1733) acquired the royal title through his election as King of Poland in 1697. The Duke of Savoy rose to King of Sicily through the Utrecht settlement. He exchanged this title against the novel title of the King of Sardinia in 1718. George Louis I of Hanover (1698 – 1727), whose father Ernest August (1679 – 1698) had just been appointed ninth hereditary Elector of the Empire in 1692, succeeded to Queen Anne as King George I in the United Kingdom (1714 – 1727). Frederick III Elector of Brandenburg (1688 – 1713) had a new royal title created for himself over Prussia, which was perceived as located outside the Empire, technically on Polish territory. Once, the fabrication of the new royal title had been accepted among other kings, Frederick III had himself crowned "King in Prussia" as Frederick I in 1701. Hence, some monarchs within the Empire accomplished the raising their ranks by uniting rule over their hereditary lands with control over kingdoms outside the Empire. The personal unions, resulting from these maneuvers, not necessarily entailed unions of states. For example, the election of the Elector of Hanover as British king did not entail the union of both states, and neither so did the election of Elector Frederick August as King of Poland. Hence, personal unions did, as a rule, not lead to state destruction. Even in the few cases, where, as in Brandenburg-Prussia and Savoy-Sardinia, real unions came into existence in the context of upgrade of rulers' titles, no state destruction took place, as the areas serving as the territorial bases for new royal titles had not uncontestably been states before. In any case, the recognition of the newly created royal titles through other sovereigns within the European states system was considered a requirement.[51]

Expansion and Centralisation of European Rule

The British-Spanish agreement of Utrecht followed the precedent of the treaties of Munster and Osnabrück in stipulating a Christian, general and perpetual peace under the goal of preserving repose through a "just balance of power" (ad firmandam stabiliendamque Pacem ac Tranquillitatem Christiani Orbis justo Potentiæ Æquilibrio).[52] This bilateral treaty included the whole of Christendom into its framework of norms and even regulated the relations among colonial rulers in America. During the second half of the seventeenth century, there had been repeated clashes on the sea among crews of European ships cruising in American waters as well as on the main land over rights of colonial rule. These conflicts had not only affected the involved European rulers but also the long-distance trading companies doing business and holding possessions in America. The conflicts had arisen from the gradual retreat of the Portuguese and Spanish colonial administration in face of competition from other European state governments. For one, Oliver Cromwell (1599 – 1658) in his capacity as British Lord Protector after the execution of King Charles I (1625 – 1649)

[51] For a study see: Barbara Stollberg-Rilinger, '"Honores regii". Die Königswürde im zeremoniellen Zeichensystem der Frühen Neuzeit', in: Johannes Kunisch, ed., *Dreihundert Jahre Preußische Königskrönung* (Forschungen zur brandenburgischen und preußischen Geschichte, Beiheft N. F., vol. 6) (Berlin, 2002), pp. 1-26.

[52] Treaty Spain – UK, July 1713 (note 49), art I., II., p. 299.

had obtained in 1655 a manifesto from poet jurist John Milton (1608 – 1674), who, like Francisco de Vitoria in the sixteenth century, advocated the effective occupation and use of the soil for agricultural purposes as a precondition for the recognition of entitlements to colonial rule. Milton, however, turned Vitoria's argument against Portugal and Spain, proclaiming the limitation of Portuguese and Spanish colonial rule to those parts of the American continent and the Caribbean, where Spanish settlement had been in existence since the sixteenth century. According to this argument, large parts of the American continent were open for the settlement of colonists from other European states.[53] In his manifesto, Milton combined Grotius's doctrine of the open sea with the limitation of access rights to areas which could actually be used for agriculture. However, there was no binding agreement under the law among states accommodating rival claims to colonial control, whence conflicts were often settled through the use of military force.

Moreover, the continuing deportation of enslaved Africans to America put on the diplomatic agenda the demand for agreements about the issue, who had the legal competence to privilege European slave traders for the operation of slave ships as well as for the sale of slaves in American markets. Arrangements over this issue, which could not be defended on any moral grounds, became desirable, once the Spanish and, from 1640, the Portuguese administration proved incapable of executing the competence of giving out deportation licenses to slave traders. While the Portuguese and Spanish administrations had entered into special "asiento" contracts with trading companies for certain parts of the world,[54] the Utrecht peace conference of 1712/13 also enacted a general treaty through which the monopoly of the trans-Atlantic slave trade passed from the Spanish to the British government. The British king, then, privileged a variety of trading companies with the consequence that the deportation of enslaved Africans became practically unregulated. The eighteenth century, conseuqnelty, witnessed a sharp increase in the numbers of deported Africans.[55]

Among the European states, the Kingdom of France rose to the model of centralised bureaucratic rule, even though the French army had not been able to conclude the war on the succession in Spain victoriously. The government under Louis XIV attracted local aristocratic lords to the central royal court, which was established in the Palace of Versailles outside Paris. Louis XIV ordered the construction of Versailles as the centre of the entire kingdom and allowed himself to be regarded as the personification of the state. The subjection of local aristocrats to the control of the central administration had, among others, the merit that the royal bureaucracy obtained direct access to tax revenues, which previously aristocrats had collected on behalf of, though not always faithfully surrendered to the king completely. As a higher amount of revenue reached the central court under the new regime, it became possible for the administration to establish specialised agencies, thereby enhancing its grip on the ruled. While the bureaucratisation of government applied to many aspects of administration, it had its most significant impact on the conduct of relations with other states in diplomatic and military respects. While specialised secretaries in charge of the relations with other sovereigns had been appointed in England from the beginning of the sixteenth century, in France from the times of King Henry II, it was only Louis XIV who formed a hierarchically ordered bureaucracy dealing with foreign policy. Under Louis's minister Jean Baptist Colbert, Marquis de Torcy (1665 – 1746), who was in office from 1698 to 1715, a ministry for foreign affairs came into existence. The number of officials in charge of foreign affairs increased twentyfold between 1661 and 1715. The increase of ministerial staff reflected the growth in size and number of French diplomatic missions elsewhere in the European states system, now including not only the Ottoman Turkish Empire but also Russia. The French model of the diplomatic service spread to other

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[53] John Milton, 'Scriptum Dom[ini] Protectoris Republicae Angliæ, Scotiæ, Hiberniæ etc. ex consensus atque sententia concilii sui editum, in quo hujus Reipublicæ Causa contra Hispanos justa esse demonstratur [(London, 1655)]', partly printed in: Wilhelm Carl Georg Grewe, ed., *Fontes historiae juris gentium*, vol. 2 (Berlin and New York, 1992), pp. 457-463, at pp. 460-461 [also in: Milton, *The Works*, edited by Frank Allen Patterson, vol. 13: The State Papers (New York, 1937), pp. 510-563].

[54] Treaty Spain – UK, March 1713 (note 49). For studies see: Enriqueta Vila Vilar, 'Los asientos Portugueses y el contrabando de negros', in: *Anuario de estudios Americanos* 30 (1973), pp. 557-609. Andrea Weindl, 'The Asiento de Negros and International Law', in: *Journal of the History of International Law* 10 (2008), pp. 229-257.

[55] Herbert S. Klein, *The Middle Passage. Comparative Studies in the Slave Trade* (Princeton, 1978). Joseph Calder Miller, *Way of Death. Merchant Capitalism and the Angolan Slave Trade. 1730 – 1830* (Madison, 1988).

European states at the turn towards the eighteenth century.

The norms of diplomatic service were a field of study at universities and were treated in academic literature, which displayed diplomats as news agents.[56] Grotius had opened a wide-ranging discussion about the legal conditions under which the integrity of diplomatic envoys and their property could be enhanced. He had established the legal fiction as if an envoy would ,,so to speak, be placed outside the territory" of the receiving ruler (fictione simili constitueretur quasi extra territorium). In doing so, he provided a juristic formulation of the principle of the extraterritoriality of diplomatic envoys in an effort to remove them from the legal control of the receiving rulers and governments. He did so by resorting to the fourteenth- and fifteenth-century theory of the personality of law and suggested that diplomats should be treated as if they carried the territory of their sending state on their backs and never legally entered the territory of the receiving state. Grotius used this fiction for the purpose of supporting the conventional general argument that diplomatic envoys should be inviolable. In this respect, he argued a more cogent fiction than later seventeenth-century theorists, who, like Cornelis van Bynkershoek (1673 – 1743), believed that envoys remained legally on the territory of the sending state. Bynkershoek's radicalisation of Grotius's fiction established a tradition of legal reason about extraterritoriality that early twentieth-century theorists still upheld. Yet later theorists, such as Heinrich Cocceji (1644 – 1719), were in line with Grotius in continuing to demand inviolability for envoys.[57]

Although diplomacy formed part of academic debates, specialised institutions for the training of diplomats were rare and the few schools that did exist folded soon. The papal curia established the first of these schools in 1701, which closed after a few years. In France, the Académie Politique for the education of diplomats operated between 1712 and 1720. The University of Oxford installed a professorship for Arabic to train young envoys to be dispatched to Istanbul. These teaching institutions did respond to the rising demand for qualified diplomatic staff and put on record the widening acceptance of the French model of the bureaucratic state. Yet, the brief periods of their operation revealed their limited achievements. The effort of central administrations, to professionalise the conduct of inter-state relations through bureaucratic measures of the training of young diplomats stood against the established conventions of diplomatic practice. These conventions privileged aristocrats as, so-to speak, born diplomats, who would not subject themselves to

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[56] Dominicus Arumaeus, *An legatus in principem ad quem missus est, conjurans puniri posit* (Jena, 1610). Wolfgang Heider [praes.] and Johann Ernst Krosnitzki [resp.], *Exercitatio de legationibus*. LLD Thesis (University of Jena, 1610). Matthias Börtius [praes.] and Richard Froreich [resp.], *De legationibus et legatis*. LLD Thesis (University of Jena, 1611). Johann Gryphiander [Johann Griepenkerl] [praes.] and Georg Schubhard [resp.], *Velitatio politica de legatis*. LLD Thesis (University of Jena, 1615). Reinhard König [praes.], and Johann Eppinger [resp.], *Disputatio XI: De legatis et legationibus*. Ph. D. Thesis (University of Gießen, 1618). Christoph Besold [praes.] and Michael Rasch [resp.], *Themata juridico-politica de legatis et legationibus*. LLD Thesis (University of Tübingen, 1622). Christian Krembergk [praes.] and Johann Joachim Beckmann [resp.], *De legationibus et legatis dissertatio iuridico-politica*. LLD Thesis (University of Wittenberg, 1623). Gerhard von Stökken, *De iure legationum*. LLD Thesis (University of Altdorf, 1657). Hermann Conring [praes.] and Haro Antonius Bolmeier [resp.], *Disputatio politica de legatis*. LLD Thesis (Helmstedt, 1660). Heinrich von Cocceji [Koch] [praes.] and Johann Victor Kothe [resp.], *Dissertatio juridica inauguralis de legato rei propriae et alienae*. LLD Thesis (University of Frankfurt/Viadra, 1701) [reprinted in: Cocceji, *Exercitationum curiosarum*, vol. 1 (Lemgo, 1722), pp. 473-484]. Kaspar von Stieler, *Zeitungs Lust und Nutz* (Hamburg, 1695) [newly edited by Gert Hagelweide (Sammlung Dieterich, 324) (Bremen, 1969), p. 16].

[57] Hugo Grotius, *De jure belli ac pacis libri tres* [(Paris, 1625)], book II, chap. XVIII/4, § 5, reprint of the edn (Amsterdam, 1646) (Washington, 1913); newly edited by Bernardina Johanna Aritia de Kanter-van Hettinga Tromp (Leiden, 1939). Reprint of this edn (Aalen, 1993); further reprint, edited by Richard Tuck, *The Rights of War and Peace. Hugo Grotius from the Edition by Jean Barbeyrac* (Indianapolis, 2005)]. Cornelis van Bynkershoek, *Quaestionum juris publici libri duo, quorum primus est de rebus bellicis, secundus de rebus varii argumenti*, book I, chap. X (Leiden, 1737) [reprint (London, 1930); reprints of the reprint (New York and London, 1964); (Buffalo, 1995)]. Maximilian Fleischmann, *Weltfriede und Gesandtschaftsrecht* (Munich, 1909), pp. 66-67. Heinrich von Cocceji [Koch] [praes.] and Friedrich W. von Lüderitz [resp.], *Dissertatio juris gentium publici de legato sancto, non impuni*. LLD Thesis (University of Frankfurt/Viadra, 1699). Cocceji [praes.] and Conrad von Berchem [resp.], *Disputatio de legato inviolabili* [LLD Thesis (University of Frankfurt/Viadra, 1684], reprinted in: Cocceji, *Exercitationum curiosarum*, vol 1 (Lemgo, 1722), pp. 600-611.

educational measures promoted under royal administrative authority. Aristocrats could take this position, for they usually received education within their kin groups. In addition, they usually continued to go on their missions at their own expense. That practice awarded to them ample chances of conducting their activities in such ways as to compensate their expenditures from resources offered to them during their missions and from non-monetary advantages of which they might be able to avail themselves. Hence, the central administration had limited control over the envoys as long as they were travelling. The envoys did receive instructions from dispatching rulers about what to do and not to do at their destinations. But while they were on the move, they could act largely at their own discretion. Even Leibniz as a distant observer demanded that the diplomatic service should become subject to further ordering measures and suggested the introduction of official ranks among the envoys. He specified that only the highest ranking diplomat in a mission should hold the title of Ambassador officially representing the sending ruler.[58] But that proposal remained theoretical. In practice, even at the beginning of the eighteenth century, there was no generally accepted ranking scheme for diplomatic offices in standing missions. Instead, non-standardised, usually descriptive titles remained in use for envoys. Even though the French title "Ambassadeur" and its variants in other European languages became more common from the turn towards the eighteenth century, its special application for the head of a standing diplomatic mission increased only sluggishly. The British king, for one, sent out only 69 envoys under the title "Ambassador" between 1689 and 1789. Furthermore, the old question of which members of a standing mission could claim immunity for themselves remained without a legally binding answer. Hence, arrests among diplomats continued to occur.

Already jurist, politician and liberal parliamentary deputee Heinrich Bernhard Oppenheim (1819 – 1880) noted in 1845[59] parallels between the buildup of standing diplomatic missions and the contemporary seventeenth-century changes of the modalities of military service. Oppenheim took these parallels to indicate the rising intensity of the bureaucratisation of rule in states. The changes of military organisation have repeatedly been associated with the formation of the so-called "standing" armies.[60] However, this term is misleading as it suggests a planned and purposefully steered process, at the end of which armies were "standing" fighting forces. But no such process ever existed. References to "miles perpetuus" (perpetual warrior) were contemporary indeed. Yet armies as lasting institutions under the command of sovereigns did not result from some master plan, rather they came into existence as the eventual result of many decisions that had been made ad hoc in given situations without overarching long-term goals. Commanders of armed forces had made such ad hoc decisions even before the seventeenth century by ordering certain contingents of warriors to remain under arms after the end of a battle or of a war. King Charles VII of France (1422 – 1461) ordered troops to remain under weapons in peace time in 1448,[61] and Emperor Charles V did not disband his warriors after the Battle of Pavia in 1525. However, after the end of the Thirty Years War, such decisions took place at increased frequency, specifically in France. Instead of referring to these fighting forces as "standing", it is more appropriate to apply to them the formula of "armies that remained standing".[62] This formula ably encapsulates the practice, gaining popularity among sovereigns and military commanders, to employ warriors not merely in military confrontations but also as ordering forces within states in times of peace. The "armies that remained standing" demanded continuing pay as well as the employment of a corps of professional commanders. Hence, warriors, mercenaries and militiamen turned into soldiers as the ruler's men and commanders became officers as holders of offices in service to the ruler. Armies converted into state agencies, if

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[58] Leibniz, 'De jure' (note 28), pp. 39-43.

[59] Heinrich Bernhard Oppenheim, *System des Völkerrechts*, chap. 3, 3 (Frankfurt, 1845), p. 27.

[60] Sidney Bradshaw Fay, 'The Beginnings of the Standing Army in Prussia', in: *American Historical Review* 42 (1917), pp. 763-777. Walter Hummelberger, 'Der Dreißigjährige Krieg und die Entstehung des kaiserlichen Heeres', in: *Unser Heer* (Vienna, 1963), pp. 1-108. Helmut Schnitter, *Volk und Landesdefension. Volksaufgebote, Defensionswerke, Landmilizen in den deutschen Territorien vom 15. bis 17. Jahrhundert* (Militärhistorische Studien, N.F., vol. 18) (Berlin, 1977), pp. 145-149.

[61] Edgard Boutaric, *Institutions militaires de la France* (Paris, 1863), p. 318 [reprint (Geneva, 1978)].

[62] Johannes Burkhardt, *Der Dreißigjährige Krieg* (Frankfurt, 1992), pp. 213-222. Peter Hamish Wilson, 'Defining Military Culture', in: *Journal of Military History* 72 (2008), pp. 11-41.

and as long as rulers had at their disposal financial resources sufficient to maintain soldiers under arms and could also keep in existence the necessary administrative services. In France, the process of the generation of an "army that remained standing" was fastest. Under Louis XIV, armies became subjected to intense government surveillance, manifest in comprehensive officially and even privately authored manuals of military service.[63] Therefore, the argument does not hold, according to which the French government under Louis XIV should simply have been unable of disbanding armed forces, because warfare was endemic from the Peace of the Pyrenees of 1659 onwards. Instead, Louis XIV not only refrained from disbanding armed forces under his control but also imposed a new type of order upon them. To accomplish this new order, he employed his most active and efficient reformer of the state and the military, namely Sébastien le Prestre de Vauban (1633 – 1707). Vauban drew on the military reforms, which Maurice of Orange had promoted during the Dutch rebellion against Spanish rule, introduced regularly and centrally supervised drill for all soldiers and conducted maneuvers in the form of movements, called "evolutions", of entire battalions according to fixed plans. The Oranian military reform also took root in Britain and in the German-speaking areas from the middle of the seventeenth century.

Oranian practice also shaped the style of fortification building according to geometrical patterns. Vauban ordered the construction of fortresses on the borders of the kingdom along strategically significant roads in an effort to block invading armies from entering territory under the control of the French king. In addition to this defensive strategy, he advocated the Lipsian ethics of self-constraint. In his memorandum on the interest of states in Christendom, he urged Louis XIV around 1700 to recognise Spanish colonial possessions in America, thereby pleading against attempts to challenge the then existing arrangements among European rulers about colonial rule. In Vauban's view, the fortresses and the French army above all else served the purpose of guaranteeing the security of France.[64] However, Vauban's defensive strategy was difficult to reconcile with the expansionist policy that Louis XIV was pursuing.

French fortifications in Vauban's style served as the model for fortifications built elsewhere in Europe and even for the defense works that the long-distance trading companies put in their overseas strongholds. The theoretical foundation for these schemes rested on the expectation that war could be made plannable through the regularisation of actions performed in its course, the building of a network of fortified places as focal points of military action and through the avoidance of incalculable risks for warring parties. According to the firm conviction of seventeenth-century military theorists, the battle was the most risky type of military action. In the view of theorists, then, wars had to be made plannable through the avoidance of battles whenever possible. Marshall Henri de la Tour d'Auvergne, Vicomte de Turenne (1611 – 1675), perhaps the most prominent of military commanders under Louis XIV, posthumously received the highest praise, which was thinkable within the disposition to make war plannable: early eighteenth-century theorists ranked him as the master of the avoidance of battle.[65] Put differently: armies "that remained standing", were to be capable of doing battle at any time; but succeeding in battle was not their main purpose; instead, they stood under arms to guarantee the preservation of the existing order and the termination of a war with the smallest possible number of casualties. The principal goal of the avoidance of battle neither implied that no battles were fought nor did it mean that battles were fought less bloodily. But the principle put on record that military service had adopted Lipsius's ethics of self-constraint. Moreover,

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[63] *L'exercice des mousquetaires du Roi* (Paris, 1661). *L'Exercice general pour l'infanterie* (Lille, 1672). *Exercice general, que le Roi a réglé pour toute son infanterie, tant Françise qu'Étrangère et pour ses companies de mousquetaires et celles des Gentils-Hommes, qui sont à sa solde* (Brest, 1693). *Règlements et ordonnances du Roy pour les gens de guerre*, 4 vols (Paris, 1680-1682). Jacques Collombon, *Traité de l'exercice militaire* (Lyon, 1650). Pierre Giffart, *L'art militaire française pour l'infanterie* (Paris, 1696) [further edn (Augsburg, 1697); reprint (Strasbourg, 1968)]. François de La Baume le Blanc de La Valière, *Maximes et pratiques de la guerre* (Paris, 1671) [further edn (Paris, 1673)]. Lafontaine, *Les devoirs militaires des officiers de l'infanterie et de cavalerie* (Paris, 1668) [further edn (Paris, 1675)].

[64] Vauban, 'Interêt' (note 37), pp. 492-493.

[65] Jacques François de Chastenet, Maréchal de Puységur, *Art de la guerre par principes et par règles* (The Hague, 1749) [first published (Paris, 1748); extract (Paris, 1752); German version, book VIII, chap. 19, Bd 2 (Leipzig, 1753), p. 205].

accomplishing calculability of wars presupposed the enforcement of strict discipline and order in the armies themselves. David Fassmann (1683 – 1744), free journalist and bestseller author, used Lipsian ethics of self-constraint as the platform for a catalogue of virtues he assigned to soldiers early in the eighteenth century. The catalogue consisted of eighteen "qualities" soldiers were to exhibit: fear of God, prudence, courage, willingness to face danger and death, sobriety, watchfulness, self-contentedness, loyalty, obedience, respect for superiors, attentiveness, "hatred of despicable people", ambition and desire for fame, cleanliness, refraining from reasoning, that is, from calling into question given orders, avoiding mistakes, searching for knowledge and, at last, a "good nature".[66]

The Law among States and the Law of Nature

The parallelism that Oppenheim noted between the build-up of a network of standing diplomatic missions and "armies that remained standing" indicated the increasing significance, which efforts for the preservation of order and the accomplishment of rule-based patterns of action obtained during the second half of the seventeenth century. In other words, the expectation gained widening acceptance during the period that legal norms and other types of rules not only ought to be observed in war and in peaceful relations among states, but also could be observed. Military action in war as well as activities of diplomats communicating between states, already within Grotius's theory of the law of war and peace, had to follow the principle that the restitution and maintenance of peace were not being jeopardised. In its association with the ethics of self-constraint, the expectation that the acknowledgement of the rule of law was not only mandatory but also possible re-enforced the Augustinian paradigmatic sequence of peace, war and peace.

In addition to the ethics of self-constraint, the perception gained strength that nature was the comprehensive, divinely-willed, stable order not subject to human decision-making. As in Cicero's time, this order seemed to comprise even legal norms, considered to be generally valid all over the globe. The law of war and peace, now integral part of the law among states, thus, appeared to be correlated with the law of nature. While this perception remained uncontested throughout the seventeenth and eighteenth centuries, controversy arose among theorists about the problem of how precisely both fields of the law were related. Within this controversy, Grotius's theory of the law of war and peace formed the platform, on which all participants in the debate based their arguments. The controversy led to the increase in the production of academic writing, listed up in research reports from the turn towards the eighteenth century. These reports reviewed research work on the law among states not only with a focus on Europe, but also took into account Africa, America and Asia.[67] At the same time, Arabic texts, containing information about the Muslim law of war and peace, became accessible in English, German and Latin versions. The publication of these texts served the explicit purpose of defending Muslims against erroneous charges of having acted in breach of the law of war and peace.[68] Although theorists did not totally disconnect the law of war and peace from religious beliefs, they took notice of the empirical fact that the religious foundation of the law of war and peace did not stand against manifest material agreements among norms of that law across the bounds of religions. Hence, theorists confirmed that legal relations among different religious communities were possible,[69] as the great tradition of the law of war and peace had suggested for a long time.

By the 1670s, the controversy about the relationship between the law among states and the law of nature produced two schools. On the one side, theorists more or less rigorously set the law among states apart from the law of nature on the grounds that the law among states appeared to them

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[66] David Fassmann, *Der Urspung, Ruhm, Excellentz und Vortrefflichkeit des Krieges- und Soldaten-Standes* (Berlin, 1719), pp. 85-103.

[67] Hermann Conring, 'Examen rerum publicarum potiorum totius orbis', in: Conring, *Opera*, vol. 4 (Brunswick, 1730), pp. 47-548, pp. 58-109. Johannes Gröning, *Bibliotheca juris gentium communis* (Hamburg, 1701). Nicolaus Hieronymus Gundling, *Vollständige Historie der Gelahrtheit*, vol.3 (Frankfurt and Leipzig, 1735), pp. 3246-3333.

[68] Adriaan Reelant, *De religione Mohammedica libri duo* (Utrecht, 1705) [English version (London, 1712)].

[69] Mably, *Droit* (note 46), p. 35.

to result mainly from human action, while the law of nature did not. On the other side, theorists denied the possibility that the law among states above sovereigns could result from human action. The first school, in turn, fell apart into two camps. One group of theorists restricted the meaning of *ius gentium* to the law among states, which followed from human action alone, thereby defining the law among states as positive law. The other group advocated the position that *ius gentium* should serve as the comprehensive term for the law flowing from nature together with the law arising from human action. On member of the first group, known as positivists in research on the history of international law,[70] was the Jena philosopher Johann Friedrich Horn (1629 – 1665), who devoted to the law among states a passage in his general theory of the state published in 1665. In this passage, Horn restricted the application of the term *ius gentium* to set legal norms and insisted that such norms could neither be generated by way of treaties nor through the law of nature, but only through custom. He insisted that only customary law was binding exchanges among most states. Horn's reasoning was that the usually bilateral agreements between sovereigns could not generate norms that were universally binding. Instead, only customary law could effectively restrict the decision-making power of sovereigns, even though it had not been explicitly agreed upon and was usually not laid down in writing. Quoting Grotius[71] and referring to Lipsius,[72] Horn would derive the binding force of the law among states neither from the obligation to honour existing treaties (*pacta sunt servanda*) nor from the commands of some non-human agent. Rather, Horn restated the Lipsian creed that the binding force of the law among states resulted exclusively from the insight of reasonable sovereigns, who would selfishly recognise the advantage of abiding by the law among states.[73] Even though the sovereignty (majestas) of a ruler could only originate from divine will and not from human contractualising action, the law among states, Horn insisted, was capable of orienting the actions of sovereigns towards the abidance by the law and the preservation of peace. Horn used the word "tranquility" (tranquillitas) for the concept of stability in conjunction with the concept of peace, [74] in accordance with legal texts of the twelfth century.[75] In his memorandum on the security of the Holy Roman Empire of 1670, Leibniz, who elsewhere even consociated stability with happiness, followed Horn's usage,[76] as did the imperial councillour Franz Paul von Lisola (1613 – 1674) in his treatise on imperial privileges of 1674.[77]

Likewise, jurist Samuel Rachel (1628 – 1691), who held a professorship of the law of nature and *ius gentium* at the University of Kiel, the first professorship of this kind to be established in a law faculty, drew the distinction between the law among states "proper", which he identified with law set through human action, and that part of the law of nature that appeared to apply to humankind. However, Rachel differed from Horn in admitting only treaties as sources for the "proper" law among states and maintained, referring to Aristotle, but not to Roman civil law, that the

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[70] Wilhelm Georg Carl Grewe, *Epochen der Völkerrechtsgeschichte*, second edn (Baden-Baden, 1988), pp. 414-417 [first, unpublished print (Leipzig, 1945); first book-trade edn (Baden-Baden, 1984); English version (Berlin, 2000)].

[71] Johann Friedrich Horn, *Politicorum pars architectonica de civitate* (Utrecht, 1664), p. 201.

[72] Ibid., p. 29.

[73] Ibid., p. 202.

[74] Johann Nikolaus Hert [praes.] and Johann Konrad Fabricius [resp.], *Dissertatio de superioritate territoriali*. LLD Thesis (University of Gießen, 1682), p. 202.

[75] Conrad III, Roman Emperor, '[Charter for the Monastery of Liesborn and the Monastery of St Mary Überwasser at Munster, April / May 1151]', edited by Friedrich Hausmann, *Die Urkunden Konrads III. und seines Sohnes Heinrich*, nr 249 (Monumenta Germaniae Historica. Diplomata, Bd 9) (Vienna, Graz and Cologne, 1969), p. 433. Treaty Aragón/Castile – France, 19 January 1493, edited by Gottfried Wilhelm Leibniz, *Codex iuris diplomaticus*, nr 203, § 2 (Hanover, 1693), pp. 463-472, at p. 464 [further edn (Wolfenbüttel, 1747); reprint (Berlin, 1964)].

[76] Gottfried Wilhelm Leibniz, 'Bedencken Welchergestalt securitas publica interna et externa und status praeses im Reich iezigen Umbständen nach auf festen Fuss zu stellen [1670]', in: Leibniz, *Politische Schriften*, vol. 1 (Leibniz, Sämtliche Schriften und Briefe, series IV, vol. 1) (Berlin, 1983), pp. 133-214, at p. 214. Leibniz, 'Elementa juris naturalis [1669/1670] ', in: Leibniz, *Sämtliche Schriften und Briefe*, series VI, vol. 1 (Berlin, 1971), pp. 433-454, at p. 435.

[77] Franz Paul von Lisola, *Gerechte / Nutzliche / und zu Erhaltung Ihro Kayserlichen Majestät höchsten Gewalt zu des Reichs Ruhe-Stand / und zu Beforderung des Friedens Nothwendige Gefangenschafft deß Printz Wilhelm von Fürstenberg* (s. l., 1674).

obligation to honour treaties applied to private law exclusively and was of no concern for sovereigns.[78] Nevertheless, Rachel did credit the law of nature with effects on practical human action in the respect that he derived from the law of nature certain norms of the conduct of war. Among these norms, Rachel ranked the obligation of warring parties to declare only just wars, to exercise constraint regarding the deployment of military means in war and to pursue no other war aim than the restitution of peace. Like Horn, Rachel used the word *tranquillitas* as a term connected with peace.[79] The Strasbourg theologian Johann Joachim Zentgraf (1643 – 1707)**,** another member of the group, concurred in admitting the restitution of peace as the sole just war aim, but differed from other seventeenth-century legal theorists in conventionally juxtaposing the ubiquitously valid *ius gentium* against what he posited as the specifically European law among states.[80]

In contradistinction against Horn, Leibniz, Rachel and Zentgraf, Samuel von Cocceji (1679 – 1755), who taught the law of nature and *ius gentium* at the University of Frankfurt on the Viadra, took the view that the law among states set through treaties was the "secondary" part of a comprehensive law, the "primary" part of which was the law of nature valid for all humankind. In taking this stance, Cocceji opted for the second group, arguing that both legal fields flew from divine will, while accepting as binding only the law of nature. The law among states, Cocceji assumed, could not be binding for sovereigns, as there was no binding obligation for sovereigns to abide by law above them. However, he conceded, in the Lipsian vein, that sovereigns could voluntarily accept the duty of either implementing certain legal norms or recognising the same duty as part of customary law.[81] Horn, Leibniz, Rachel and Zentgraf, on the one side, as well as Cocceji on the other, thus, responded to the question why sovereigns should be willing to acknowledge the validity of existing treaties under the law among states. Horn and his group assumed that there could not be a principled legal obligation to honour treaties, because such an obligation could not become part of agreements among sovereigns and, further, because the law of nature did not provide for the basic norm *pacta sunt servanda*. By contrast, Cocceji expected that the law of nature featured the basic norm *pacta sunt servanda*, whence it applied to sovereigns as to all humankind, could be explicitly stated in treaties or be contained in customary law. Cocceji thus postulated that the pluralism of contractual obligations of sovereigns in conjunction with customary law could transfer the law of nature into the law among states. Cocceji's postulate made sense in the second half of the seventeenth century, given the then waning practice of swearing oaths in validation of treaties. As contracting parties betrayed increasing reluctance to rely on the oath, the conditional self-sacrifice towards the divine agent, as the ultimate guarantee of the implementation of treaties, they ever more often resorted to patterns of human action as instruments of the enforcement of treaties. An early eighteenth-century systemic scheme of enforcement mechanisms listed the verbal "promise" (promissio), the surrender of material items, such as land, mobile as well as immobile objects, and the production of hostages as instruments for the enforcement of treaties and omitted the oath.[82]

Samuel von Pufendorf, who was the first to hold a professorship of the law of nature and *ius gentium* from 1661 to 1668, placed within the arts faculty of the University of Heidelberg, and had been appointed to this professorship upon recommendation from Peter Grotius, the son of Hugo Grotius,[83] remained within the ethics of self-constraint according to Lipsius, Grotius and Horn. In his handbook on the law among states, first published in 1672, he categorised peace as the normal

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[78] Samuel Rachel, *De jure naturae et gentium dissertatio* (Kiel, 1676), pp. 233, 235, 241, 257 [reprint, edited by Ludwig von Bar (Washington, 1916)].

[79] Ibid., p. 332.

[80] Johann Joachim Zentgraf, *De origine, veritate et obligatione juris gentium instituta disquisitio in Academia Argentoratensi* (Strasbourg, 1684), pp. 175-176, 375.

[81] Samuel von Cocceji [Koch], *Tractatus juris gentium* (Frankfurt/Oder, 1702), pp. 5, 8-11.

[82] Heinrich von Cocceji [Koch] [praes.] and Daniel von Stephani [resp.], *Disputatio juris gentium publici de guarantia pacis*. LLD Thesis (University of Frankfurt/Oder, 1703), pp. 5-24.

[83] Peter Grotius, '[Letter to Elector Charles Louis of the Palatinate Relating to the Appointment of Samuel von Pufendorf as Professor of Natural Law and ius gentium at the University of Heidelberg, September 1660]', in: J. Witte, 'Zur Berufung Pufendorfs nach Heidelberg [1660/61]', in: *Zeitschrift für die Geschichte des Oberrheins* 72 = N. F. 33 (1918), pp. 137-138. Charles Louis, Elector of the Palatinate, '[Confirmation of Appointment to Samuel von Pufendorf at the University of Heidelberg, 29 September 1660], in: Witte (as above), p. 139.

condition of humankind and concluded that nature demanded the avoidance of unnecessary destructions in war.[84] Like Rachel, Pufendorf derived the basic norm *pacta sunt servanda* from private law, but, unlike Rachel, considered it self-evidently as applicable to treaties among sovereigns under the law among states.[85] According to Pufendorf, every state was sovereign and the sole law binding sovereigns contained the duty to provide security (salus) for the ruled (populus).[86] Thus, Pufendorf insisted that states were security-providing institutions and that rulers should conduct relations among states in good order within an unchangeable systemic normative framework, even when laws were lacking. The norms, he claimed, were to be derived from the law of nature.[87] It was only with regard to this point that Pufendorf agreed with Thomas Hobbes (1588 – 1679), whose political theory he otherwise criticised severely. Against early seventeenth-century theorists, Hobbes defined the state comprehensively as body politic or political society comprising a multitude of members united into one "person" through a common power for their common peace, common defence and common well-being.[88] Hobbes posited rulers as providers of comprehensive security for the ruled under their control and argued that rulers had to respect the law of nature, if they wanted to be and remain capable of acting as security providers. He was in agreement with contemporary political theorists in equating the government contract with the explicit renunciation by the ruled of their natural right of self-government.[89] According to this theory, wars stood against the law of nature, the sum of which, he noted, consisted in the making of peace.[90] Hobbes even committed himself to the principled statement that security for the ruled should be acknowledged as the supreme law of rule.[91] Hobbes agreed with seventeenth-century theorists such as Johannes Althusius (1563 – 1638) in demanding that wars should be fought only under a morally justifiable war aim and under the conditions that St Thomas Aquinas and Lipsius had already outlined. Thus, Hobbes imposed upon sovereigns the overall duty of providing security for the ruled. New studies in the history of political theory have therefore rightly argued that Hobbes in *Leviathan* did not identify the state of nature with the permanent state of war of all against all, but rather categorised as a given the possibility of the eruption of violence at any point of time as long as the state of nature prevailed.[92] Even though Hobbes's categorisation of the state of nature as the unruly condition of insecurity met with staunch rejection not only from Pufendorf but also from other contemporary theorists, who identified peace as the given state of nature,[93] both Pufendorf and Hobbes shared the conviction that all sovereigns held the right of autonomous legislation and, in their relations with other states, operated as persons, who were not subject to rule but solely to the law of nature. As

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[84] Pufendorf, *Ius gentium* (note 9), book VIII, chap. 6, nr 2, pp. 880-881.

[85] Ibid., book V, chap. 9, nr 2, p. 521; book V, chap. 11, nr 1, p. 533.

[86] Ibid., book VII, chap. 9, nr 3, p. 766.

[87] Samuel von Pufendorf [praes.] and Herman Fleming [resp.], 'De statu hominum naturali', § 6, in: Pufendorf, ed., *Dissertationes academicae selectiores* (Frankfurt, 1678), pp. 497-538, at p. 497 [reprints, edited by Michael Seidler, *Samuel Pufendorf's On the Natural State of Men. The 1678 Latin Edition and English Translation* (Studies in the History of Philosophy, 13) (Lewiston, NY, 1990); edited by Anna Lisa Schino (Lecce, 2009)]. Pufendorf, *Ius gentium* (note 9), book VII, chap. 5, nr 17-18, pp. 714-715.

[88] Thomas Hobbes, *De cive. The English Version Entitled in the First Edition Philosophicall Rudiments Concerning Government and Society* [(London, 1651)], edited by Howard Warrender (Oxford, 1983), p. 157. Hobbes, 'De corpore politico. Or The Elements of Law, Moral and Politic [(London, 1650)]', edited by William Molesworth, *The English Works of Thomas Hobbes*, vol. 4 (London, 1840), pp. 77-228, at p. 122 [reprint of the edn by Molesworth (London, 1997)].

[89] Hobbes, *De cive* (note 88), pp. 170-171. Marchamont Nedham, *The Excellentie of a Free State* (London, 1656), pp. 85-86 [further edn (London, 1767); edited by Blair Worden (Indianapolis, 2011)]. Samuel Rutherford, *Lex, Rex. Or The Law and the Prince* (London, 1644), pp. 3-4 [new edn (Edinburgh, 1843); reprint of this edn (Edinburgh, 1990)].

[90] Hobbes, *De corpore* (note 88), p. 87.

[91] Thomas Hobbes, *Leviathan*, chap. XXX [(London, 1651)], edited by Richard Tuck (Cambridge, 1991), p. 244.

[92] David Boucher, *Political Theories of International Relations* (Oxford, 1998), pp. 145, 149, 157. Beate Jahn, 'I[nternational] R[elations] and the State of Nature. The Cultural Origins of a Ruling Ideology', in: *Review of International Studies* 25 (1999), pp. 417-425.

[93] Christian Rohrensee [praes.] and Bernhard Neumann [resp.], *De bello*, §§ XII, XIII. LLD Thesis (Wittenberg, 1703), fol. B2^{r}, B3^{r}-B [4]^{r}.

Pufendorf devoted the largest part of his handbook to explication of the law of nature, his statements on the law among states had summary character and were not highly original compared to those of contemporary theorists. Despite discrepancies over detail, the theorists postulating the existence of the law among states remained within the conventions of the law of war and peace.[94] In a posthumously edited work, even Horn applied Cicero's and Grotius's concise definition of war as a "struggle by force" (certatio per vim) and tied the conditions for the recognition of a war as just to the goals of providing security for the ruled, the restoration of lost property, the restitution of previously inflicted injustice and the existence of a legitimate ruler as the initiator of the war. He also demanded that wars should be oriented towards the overall aim of stabilising peace.[95]

In addition to these matters of general scope, Heinrich von Cocceji, Pufendorf's successor at Heidelberg, the Strasbourg theologian Zentgraf and Johann Wolfgang Textor (1638 – 1701), jurist initially at the University of Altdorf, then at Heidelberg and also jurisconsultant of the city of Frankfurt, took to special topics of the law of war, which earlier handbook literature had rarely raised. Zentgraf investigated, among others, the problem of the weaponries that could be deployed legally in war.[96] In view of the increasing centralisation of rule in states and the demarcation and fortification of inter-state borders under the prevailing mix of small-scale territories, Cocceji focused on the question of how legitimate rule could be spread out across several non-contiguous territories.[97] Moreover, Textor focused on the practical application of the law of war relating to the issue of the conditions under which the army of a belligerent ruler could legally be marched across the territories of non-belligerents. As a rule, the possibility of passing through non-belligerent territory, often the essential condition for the movement of troops before and during a war, depended upon the consent by the ruler in control over the territory to be crossed. Therefore, non-belligerent sovereigns could take sides in a war by simply refusing passage to one and granting it to the other side. Textor dealt with the question of whether there could be a right of passage even against the declared will of the sovereign in charge. On principle, Textor rejected the argument that some right of passage could be enforced against the will of a sovereign, drawing on the private legal norm that granted to land owners the right to regulate access to their property. However, Textor admitted that in war, the right could be restricted, if belligerents had cogent interests in their support. For example, Textor noted, a sovereign could refuse to grant permission to cross only under the condition that the permission might seriously jeopardise core sovereign ruling competences. Yet, Textor insisted that refusal to grant permission to cross non-belligerent territory could not be a just cause of a war. In any case, the crossing armies had to refrain from inflicting any damages upon the lands and the resident populations and should compensate for any damages that had actually occurred. Under no circumstances could entire armies be permitted to march through nonbelligerent territory in combat formation, as such marches were a threat to the security of the territory. Instead, trespassing armies had to be divided into separate contingents.[98] Still now, many state archives keep a substantive amount of records from the seventeenth and eighteenth centuries about regulations for the passages of armies.

The debate about the conceptual relationship between the law among states and the law of nature took place mainly in academic treatises, published in Latin in universities of the German-speaking areas. Even though the number of professorships specialising in the law of nature

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[94] Hermann Conring [praes.] and Johann Dreiling [resp.], *Disputatio politica de bello et pace*, § IX. LLD Thesis (University of Helmstedt, 1663), fol. A [4]^{r}-B [1]^{r}.

[95] Johann Friedrich Horn [praes.] and Christoph Heinrich von Kayn [resp.], *Disputatio de bello*, § V, §§ 2, 4-7 (Jena, 1689), fol. A[4]^{r}, fol. B [1]^{r}-B2^{v}.

[96] Johann Joachim Zentgraf [praes.] and Johann Martin Georgius [resp.], *De armis in bello prohibitis, ad Hugonis Grotii J[us] b[elli et] [pacis] III.4 § 15 seqq*. DD Thesis (University of Strasbourg, 1677).

[97] Heinrich von Cocceji [Koch] [praes.] and Lubertus Erewinus Iconius [resp.], *Disputatio ordinaria juris civilis et gentium de fundata in territorio et plurium locorum concurrente potestate*. LLD Thesis (University of Heidelberg, 1684).

[98] Johann Wolfgang Textor, *Synopsis juris gentium*, Rz 32-41 (Basle, 1680), pp. 176-179 [reprint, edited by Carl Ludwig von Bar (Washington, 1916); further reprint (New York and London, 1964)]. For a more skeptical view see: Johann Jakob Moser, *Versuch des neuesten europäischen Völker-Rechts in Friedens- und Kriegs-Zeiten*, 10 Parts (Frankfurt, 1777-1780), Part 10 (1780), chap. 3, § 5, pp. 76-77.

and law among states was small – the Heidelberg professorship, for one, was in existence only for a few years –, the law among states formed a regular subject in many university curricula, often in association with the law of nature, mainly in law faculties. Hence, there was an audience for this academic literature, usually juristic in kind. The law faculties positioned lectures in the law among states next to lectures on the public law of the Holy Roman Empire. While the Kingdom of France under Louis XIV emerged as the model for the centralisation and bureaucratisation of rule and the French language rose to the rank of a lingua franca among diplomats within the European states system, as Leibniz observed in his comment on the Peace of Rijswijk,[99] the inclusion of the law of nature and the law among states into the curricula of law faculties took place within the Empire, where the argument made sense that the conceptual boundaries between imperial public law and the law among states were not overly tight.

The school of the deniers of the law among states formed itself around the middle of the seventeenth century. Its members defended their position on the basis of the theory of the law of nature. According to the theory, so Baruch Spinoza as well as Thomas Hobbes[100] believed, nature had endowed all human beings with the demand for everything. As all individuals appeared to them to be equals in the state of nature, competition and conflicts could arise about objects of limited availability but in simultaneous general demand. They ascribed such conflicts to relations among states as well.[101] Consequently, states were under continuous threat of war, in which the power of a single state could set the law.[102] Individuals could, according to this argument, overcome the incessant threat of war through the voluntary conclusion of a government covenant, subjecting them to the control of a ruler. However, such a government covenant was not available for sovereigns, because there could not be a ruler above sovereigns. Imperial publicists such as the Gießen jurist Johann Nikolas Hert (1651 – 1710) concluded, following Hobbes and Spinoza, that no law could be enforced among states.[103]

Samuel von Pufendorf vehemently objected to this theory. He argued that nature had provided everything within human reach in sufficient quantity, so that conflicts over the possession of scarce items could not have come about in the state of nature. Wars, according to Pufendorf, had occurred only, after human beings had formed groups, thereby abandoning the state of nature.[104] Nature, Pufendorf insisted, was not under the continuous threat of war but ruled by a lasting and well-ordered peace. According to him, the deniers of the law among states, by implication, called into question the Augustinian paradigmatic sequence of peace, war and again peace by postulating that peace was not naturally given but the product of human activity within states. Pufendorf and, with him, the defenders of the law among states, took the counter position that the Augustinian paradigm remained valid and that the conclusion of peace was a sovereign privilege and part of the divinely willed world order.[105] The recognition of the law among states, Pufendorf claimed, was the first and foremost condition making possible the establishment of peace through contracts.[106] Thus,

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[99] Gottfried Wilhelm Leibniz, 'Patriotische Aufsätze in Folge des Ryswycker Friedens [1697]', in: Leibniz, *Werke*, vol. 6, edited by Onno Klopp (Hanover, 1872), pp. 231-233.

[100] Hobbes, *Leviathan* (note 91), chap. XIII, pp. 87-88; Hobbes, *De cive* (note 88), p. 49. Baruch Spinoza, *Tractatus theologico-politicus* [1670], chap. XVI, edited by Carl Gebhardt, Spinoza, *Opera*, vol. 3 (Heidelberg, 1925), pp. 189-200 [reprint of the edn by Gebhardt (Heidelberg, 1972); newly edited by Günter Gawlick and Friedrich Niewöhner, Spinoza, *Opera*, vol. 1 (Darmstadt, 2008)].]

[101] Hobbes, *Leviathan* (note 91), chap. XXX, p. 244.

[102] Spinoza, *Tractatus* (note 100), chap. XVI, pp. 189-200.

[103] Johann Nikolaus Hert [praes.] and Johannes Christianus Viselius [resp.], *Dissertationem de Lytro von Rantzion ... publicae eruditorum ventilationi examinandam offert ... Viselius*. LLD Thesis (University of Gießen, 1686). Hert [praes.] and Johann David Gilfeld [resp.], *Dissertatio Iuridica de societate facto contracta*. LLD Thesis (University of Gießen, 1695). Hert [praes.] and Friedrich Ludwig Waldner von Freundstein [resp.], *Dissertatio de diplomatis Germaniae Imperatorum et regum*. LLD Thesis (University of Gießen, 1699). Hert [praes.] and Ludwig von Freudenberg [resp.], *Dissertatatio de origine et progressu specialium Romano-Germanici Imperii rerumpublicarum*. LLD Thesis (University of Gießen, 1701).

[104] Pufendorf, *Ius gentium* (note 9), book II, chap. 2, nr 3, pp. 108-109.

[105] Gabriel Siöberg [praes.] and Gabriel Hinnel [resp.], *Dissertatio politica de pace*. LLD Thesis (Tartu, 1697), p. 16.

[106] Johannes Hannke and Johann Philipp, *Ex politica de pace suffragio amplissimæ Facvltatis Philosophiae in illustri Salana*, chap. II, nr 2 (Jena, 1648), fol. A4^{v}. Christian Henel, *Da pacificatoris, seu et hodie appellant,*

Pufendorf argued against Grotius,[107] a peace agreement coming into existence under pressure was invalid, because agreements could only be endurable if they had been concluded voluntarily.[108]

The Machine, the Order of Nature and the Balance of Power

Not just Pufendorf perceived nature as the divinely willed order, but also Hobbes. In his political theory, Hobbes described the state as if its parts formed a complete and unchangeable system like the wheels, springs and further elements of a regularly operating and carefully constructed machine. He called these machines "automata", self-moving instruments.[109] Hobbes's usage of the machine as a model [110] for states [111] as well as entire states systems [112] was in line with popular seventeenth-century imagery, employed even in descriptions of the human body[113] and even the soul.[114]

Around the middle of the seventeenth century, the machine model already seemed to allow the description of complex orders. The model was specifically suitable for legal and political contexts, as even the word 'state' carried with it the connotation of the stability of lasting institutions of rule. In application to relations among states, however, the simpler model of the scales dominated political diction in seventeenth-century descriptions of the balance of power among states. The scales model implied the statement that constancy in inter-state relations would promote repose and peace.[115] Among others, Franz Paul von Lisola used the scales model to support his argument that the preservation of the balance of power was in the interests of sovereigns, because, despite detailed markers of difference in rank and related privileges,[116] no sovereign should be allowed to accomplish supremacy. To Lisola, then, the maintenance of the balance of power was the best guarantee for the preservation of security for all sovereigns.[117] Yet, Lisola's argument already revealed the limitations of the use of the scales model. In agreement with other authors at the turn towards the eighteenth century,[118] Lisola understood the preservation of the balance of power to be

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plenipotentiarii ad tractatus pacis requisitis et officio dissertatio. LLD Thesis (University of Frankfurt/Oder, c. 1670) Henel, *De praeliminaribus tractatuum pacis*. LLD Thesis (University of Frankfurt/Oder, c. 1674). Johann Müller [praes.] and Georg Ernst von Tschirnhaus [resp.], *Disputatio politica de compositione pacis*. LLD Thesis (University of Wittenberg, 1679). Philipp Müller [praes.] and Johann Julius Jesse [Jessaeus, resp.], *De praetextibus pacis*. DD Thesis (University of Jena, 1677).

107 Grotius, *De Jure* (note 57), book II, chap. 17, nr 20; book III, chap. 9, nr 11.

108 Pufendorf, *Ius gentium* (note 9), book VIII, chap. 6, nr 2-4, 9; book VIII, chap. 8, nr 1, pp. 901-902.

109 Hobbes, *Leviathan* (note 91), pp. 9-10.

110 Heikki Kirkinen, *Les origines de la conception moderne de l'homme-machine. Le Problème de l'âme en France à la fin du règne de Louis XIV (1670 – 1715)* (Annales Academiae Scientiarum Fennicae, series B, vol. 122) (Helsinki, 1960), p. 176. Francesca Rigotti, *Metafore della politica* (Bologna, 1989), pp. 61-83. Gérard Simon, 'La machine au XVIIe siècle', in: *Revue des sciences humaines*, Nr 186-187 (1982/83), pp. 9-31.; 148 Barbara Stollberg-Rilinger, *Der Staat als Maschine* (Historische Forschungen, 30) (Berlin, 1986), pp. 101-201.

111 Similarly: Peter Müller [praes.] and Carl Andreas Seyfert [resp.], *De jure investiendi Status Imperii Germanici-Romani. Von Reichs-Belehnungen.* LLD Thesis (University of Jena, 1685). Diego de Saavedra Fajardo, *Idea di un principe politico e christiano*, nr 57 (Munich, 1640) [second edn (Milan, 1642); numerous further edns; newly edited (Barcelona, 1845); (Madrid, 1927-1930; 1942-1946; 1958-1960; 1969; 1976; Salamanca 1972); reprint (Murcia, 1985); partly edited in: Arthur Henkel and Albrecht Schöne, *Emblemata* (Stuttgart, 1967), col. 1341-1342].

112 Pufendorf, *De systematibus* (note 15), pp. 10-11.

113 Giambattista Della Porta, *Magia naturalis. Sive de miraculis rerum naturalium libri 4* (Naples, 1558).

114 René Descartes, 'Passions de l'âme', in: Descartes, *Œuvres et letters* (Paris, 1952), pp. 775-776.

115 Traiano Boccalini, *La bilancia politica di tutte le opere* (Castellana, 1678).

116 Gastel, *De statu* (note 18), pp. 16-97.

117 Franz Paul von Lisola, *Bouclier d'Estat et de Justice* (Brussels, 1667) [English version (London, 1673), pp. 276-279].

118 G. de Courtilz de Sandras, *Nouveau interest des Princes de l'Europe, où l'on traite des maxims qu'ils doivent observer pour se maintenir dans leur états et pour empêcher qu'ils ne se forme und Monarchie Universelle* (Cologne and The Hague,1685). *A Project for Establishing the General Peace of Europe by a More Equal Partition than Has Hitherto Been Proposed* (London, 1712), pp. 5-6.

of primary concern for dyads of states and expected that the entire states system would be stable, once dyadic balances had been established between all states in the system. However, the scales model, based on the image of two poised scales, did not allow the description of multilateral inter-state relations within the states system. Like Lisola, pamphleteer Jonathan Swift (1667 – 1745) faced the same dilemma, when he took up the scales model in a theoretical essay about the state published in 1701. Like Lisola, Swift laboured hard to prove that the keeping of sets of dyadic balances was the precondition for the preservation of peace among states. Swift specified that any dyadic balance could be preserved, if someone "held" the scales. But Swift introduced a third party into his analysis, without indicating the place where in the model this balancer might stand. Hence, even though Swift tried to stretch the scales model beyond its epistemological limits, he could not provide an analysis of multilateral inter-state relations, because his model applied applied to dyadic relations at best.[119] The multi-dimensional machine model was, therefore, preferable as a device for the explication of multilateral inter-state relations.

At the turn towards the eighteenth century, references to the multilateral balance became standard in political debates and even legal texts. Mainly in British perspective, the King faced the task at the beginning of the war over the succession in Spain to defend the formation of the Grand Alliance and the resulting military intervention on the Continent. From the British point of view, the intervention was not self-evident, because British interests were not directly involved in the succession to the Spanish throne. At best, the conflict had indirect effects due to the person of King William III and his position in the Northern Netherlands. The Northern Netherlands might, as in earlier wars with France, indeed become targets of invasions by French armies, but not Britain. In fact, at the time of William's election in 1689, a British-Dutch alliance treaty had been made, which declared the goal of maintaining repose and peace in Europe as a whole.[120] The same goal had been included in two of the bilateral treaties of Rijswijk.[121] The parties to the Grand Alliance also included a statement on the same goal into the text of their multilateral treaty of 1701.[122] In his address to Parliament on the declaration of war against France, William III did not adduce the need of defending the Northern Netherlands as an argument for the making of the Grand Alliance. Rather, he claimed that it was in the interest of all Protestant states in Europe to maintain the balance in the European states system as a whole.[123] On this occasion, the King repeated arguments that he had proposed already in 1694. At this time, he had declared the British intention of preserving the balance of power all over Europe.[124] These references to the alleged need of the preservation of the multilateral balance tuenred into a stereotype of justification of war that continued to be schematically applied in British politics to 1867, whenever the British government explained a declaration of war in Parliament.[125] Yet, even William III, in his choice of words, followed the logic of the scales model, when he referred to Great Britain as the "holder" of the scales. Thus, he still struggled with the difficulty of trying to defend the British intervention in a multilateral war and as a member of a multilateral alliance with a type of argument that was suitable only to bilateral relations. Specifically within the war on the succession in Spain, not only reference to the "holder" of the scales, but also the pluralism of warring parties was incompatible with the scales model. Hence, the machine model dominated political debates about inter-state relations during the eighteenth century.

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[119] Jonathan Swift, *Discourse* (note 40), pp. 197, 230-231.

[120] Treaty Great Britain – States General of the Netherlands, 29 April 1689, in: *CTS*, vol 18, pp. 347-352.

[121] Treaty France – Spain 1697 (note 36), p. 456. Treaty France – Roman Emperor (note 36), p. 8.

[122] Ludwig Martin Kahle, *La balance de l'Europe considerée comme la règle de la paix et de la guerre* (Berlin and Göttingen, 1744), p. 80. Guillaume de Lamberty, *Mémoires pour servir à l'histoire du XVIIIe siècle*, vol. 1 (The Hague, 1731), p. 621.

[123] William III, King of Great Britain, 'Address to Parliament, 1701', in: James Watson Gerard, *The Peace of Utrecht* (New York and London, 1885), p. 118.

[124] 'Reflections upon the Conditions of Peace Offer'd by France [1694]', in: *A Collection of State Tracts Publish'd during the Reign of King William III*, vol. 2 (London, 1706), pp. 412-422, at p. 422.

[125] 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), p. 1.

Specifically, the clock as one type of machine model[126] was already enshrined in legal texts preparing the Utrecht peace settlement. When the Bourbon Duke Charles de Berry (1686 – 1714) renounced his succession rights over Spain in 1712, he did so through a formula, by which he expressed his intention of maintaining the balance among states with equal legal entitlements in Northern and Western Europe.[127] The multilateralism of relations among states was also explicit in some of the treaties concluded at Utrecht, even though all of these treaties were bilateral. The tension between the bilateralism of form and the multilateralism of contents continued throughout the eighteenth century and allowed references to repose, security and balance to feature prominently in legal texts relating to the European states system. The stipulations of these treaties presented the European system as a framework of legally equal and yet hierarchically ordered states, which appeared to be laid out for long duration like a carefully constructed complex clock. The states system was confined to Europe like a clock operating within a stable frame.

By contrast, the language and models of the balance of power did not apply to relations between Europe on the one side, Africa and Asia on the other. The long-distance trading companies, operating as non-state sovereigns outside Europe, were bound to maximise profits for their stockholders and to avoid expenditures, which operative business did not dictate. Moreover, the trading companies, in their own interest, kept a low military profile vis-à-vis their trading partners in Africa and Asia, so as not to jeopardise market access through displays of military power.[128] Hence, the conceptualisation and implementation of miiltary strategies took a secondary role in company policy-making. While some theorists, such as economist William Petty (1623 – 1687), committed themselves to derogatory views about African population groups at the Cape of Good Hope, whom he likened to animals,[129] such evaluations remained rare at the time and did not obstruct the perception in Europe of African rulers and governments as sovereigns of states.[130] Hence, the trading companies did not even consider demanding legal equality for themselves in their relations with rulers and governments in Africa and Asia. Instead, they sought to fit into the giving domestic legal frameworks of the states where they were engaged in trade. Specifically, the VOC instructed its employees to observe laws meticulously, as they were valid in the states around their trading spots, and implement rulers' mandates.[131] When, for example, the Japanese government ordered the VOC to transfer its trading spot from the island of Hirado to the artificially created island of Dejima in Nagasaki port, the VOC complied instantaneously. Even merchants, who, like the Portuguese, were not operating in companies, executed given orders. When the Japanese government banned Portuguese and Spanish merchants from access to the state under the charge that these merchants had not abided by Japanese laws, neither these merchants nor the dispatching sovereigns objected.

Elsewhere, the companies usually complied by given orders, though not always without resistance. When Ming loyalist Chéng-Gōng Zhèng, known in Europe as Koxinga (Guóxìngyè) (1624 – 1662), after the Ming defeat in China withdrew to Taiwan in 1660 and proclaimed himself ruler there, he requested that the VOC vacate its stronghold Fort Zeelandia, which had been built in 1624. Initially, the VOC refuse to withdraw and sustained to a siege of nine months. However, when no reinforcements arrived from Batavia, it agreed to depart from the fortress against the promise of safe conduct on 1 February 1662[132] and completely left the island in 1668. With its flexible,

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[126] Klaus Maurice and Otto Mayr, eds, *Die Welt als Uhr* (Munich and Berlin, 1980). Otto Mayr, *Authority, Liberty and Automatic Machinery in Early Modern Europe* (Baltimore,1986).

[127] Charles, Duc de Berry, '[Renunciation, 24 November 1712]', in: Moorhead Wright, ed., *The Theory and Practice of the Balance of Power* (London and Totowa, 1975), pp. 50-51 [first published in: Henri Vast, *Les grands traités du règne de Louis XIV*, vol. 3 (Paris, 1899), p. 54].

[128] Roger Coke, *Reflections upon the East-Indy and Royal African Companies* (London, 1695), pp. 1-8.

[129] William Petty, 'The Scale of Animals [1677]', in: Petty, *The Petty Papers*, edited by Henry William Edmund Petty-Fitzmaurice, vol. 2 (Petty, The Collected Works, vol. 4, part 2) (London and Fairfield, NJ, 1927), pp. 25-34, at p. 31 [reprints (London, 1967; 1997)].

[130] Olfert Dapper, *Naukeurige Beschrijvingen der Afrikaensche gewesten* (Amsterdam, 1668) [English version as: *Africa* (London, 1670].

[131] Andreas Cleyer, '[Diary]', edited by Eva Susanne Kraft, *Tagebuch des Kontors zu Nagasaki auf der Insel Deshima* (Bonner Zeitschrift für Japanologie, 6) (Bonn, 1985), pp. 189-190.

[132] Tonio Andrade, *How Taiwan became Chinese. Dutch, Spanish and Han Colonization in the Seventeenth Century*

sometimes treaty-based strategy of maximising profits, the VOC was successful to the degree that it dominated the trade between East as well as Southeast Asia and Europe during the seventeenth century and attracted large shares of the inner Asian trade at that.[133] Nevertheless, the trading companies did use military force against one another, mainly the English and French East India companies in the rivalry over Bengal.

Among European sovereigns, King Louis XIV of France belonged to the very few rulers who intervened directly into the relations between Europe on the one side, Africa and Asia on the other. He did so between 1680 and 1689, when two Siamese special missions reached France and one French mission went to Siam. The latter was accompanied by an armed force and received support from the VOC. The French army interfered with Siamese domestic affairs in 1688, but was asked to withdraw and followed suit.[134] All missions gave expression to the joint perception both of the French and the Siamese governments that their mutual relations were taking place on the basis of the recognition of sovereignty and legal equality. Both sides took for granted that municipal law within each state was to be observed and that the relations between the two states were governed by the law. Relations between China and Russia yield the same evidence from the end of the seventeenth century.[135] In 1689, the Qīng government in China and the Russian Czar concluded a treaty at the border town of Nerčinsk, which demarcated the border between both states and regulated the rights of merchants on either side. The treaty contained the formal obligation to exchange the sealed original texts and prescribed the erection of stone steles with inscriptions of the text of the treaty in the Chinese and the Latin language.[136] After some incidents had occurred along the border and after Russian Czar Peter I dispatched a diplomatic mission to Beijing, both sides agreed upon another treaty at Kiachta in 1727, which covered a wider range of issues, including the freedom of religious practice. Jesuit missionaries working in China drafted the text in Latin.[137] Both treaties documented the existence and the practical applicability, both in China and in Russia, of a set of general, unset norms relating to the law of treaties. They testified to the mutual perception of states as sovereigns, even though the government in China continued to maintain its traditional stance that relations between itself and any other government in the world could only be unequal.

(New York, 2008) [further edns (New York, 2009; 2010); reprinted (Taibei, 2007)]. Charles Ralph Boxer, 'The Siege of Fort Zeelandia and the Capture of Formosa from the Dutch. 1661 – 1662', in: *Transactions and Proceedings of the Japan Society of London* 24 (1926/27), pp. 16-47 [reprinted in: Boxer, *Dutch Merchants and Mariners in Asia. 1602 – 1795* (Aldershot, 1987), nr III].

[133] Treaty Mataram (Java) – VOC, 1646, in: Jan Ernst Heeres, ed., *Corpus diplomaticum Neerlando-Indicum*, Part 1 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië, 57) (The Hague, 1907), pp. 483-485. Treaty Mataram (Java) – VOC, February 1677, in: Jan Ernst Heeres, ed., *Corpus diplomaticum Neerlando-Indicum*, Part 3 (Bijdragen tot de Taal-, Land- en Volkenkunde van Nederlandsch-Indië, 91) (The Hague, 1934), pp. 39-47, 74-83. Sinnapali Arasaratnam, *Maritime Trade, Society and European Influence in Southern Asia. 1600 – 1800* (Aldershot, 1995).

[134] Dirk van der Cruysse, *Siam and the West. 1500 – 1700* (Chiang Mai, 2002) [first (Paris, 1991)].

[135] Sabine Dabringhaus, 'Grenzzone im Gleichgewicht. China und Rußland im 18. Jahrhundert', in: Ronald G. Asch, Wulf Eckart Voß and Martin Wrede, eds, *Frieden und Krieg in der Frühen Neuzeit* (Der Frieden, 2) (Munich, 2001), pp. 577-597.

[136] Treaty China – Russia, Nerčinsk, 27 August 1689, in: *CTS*, vol. 18, pp. 505-507; also in: Michael Weiers, ed., *Die Verträge zwischen Russland und China. 1689 - 1881. Faksimile der 1889 in Sankt Petersburg erschienenen Sammlung mit den Vertragstexten in russischer, lateinischer und französischer sowie chinesischer, manschurischer und mongolischer Sprache* (Wehling Reprints, 1) (Bonn, 1979), pp. 1-10 [first published in: *Sbornik dogovonorov Rossi s Kitaem. 1689 – 1881gg* (St Petersburg, 1889)].]

[137] Treaty China – Russia, Kiachta, 21 / 27 October 1727, in: *CTS*, vol. 33, pp. 25-32. Confirmed by the treaty of 18 October 1768, in: *CTS*, vol. 44, pp. 229-231; both treaties also in: Michael Weiers, ed., *Die Verträge zwischen Russland und China. 1689 - 1881. Faksimile der 1889 in Sankt Petersburg erschienenen Sammlung mit den Vertragstexten in russischer, lateinischer und französischer sowie chinesischer, manschurischer und mongolischer Sprache* (Wehling Reprints, 1) (Bonn, 1979), pp. 74-83, 84-92 [first published as: *Sbornik dogovonorov Rossi s Kitaem. 1689 – 1881gg* (St Petersburg, 1889)].

Summary

The activities of the long-distance trading companies did not expand the European law among states to Africa and Asia. Instead, the trade relations between the companies and rulers mainly in East and Southeast Asia were based on special privileges according to the municipal law of the states in which the companies did business. Hence, these relations were unequal. The hierarchical order became explicit in the giving of gifts and the payment of tributes, which the companies had to provide. The companies and rulers in Africa and Asia further agreed on the principle that sovereigns were entitled to regulate trade through laws and privileges. This competence covered the option to close certain markets for certain groups of traders. European traders accepted these access restrictions, even when rulers enacted them to the disadvantage of the traders. However, the inequality of relations did not prevent the conclusion of treaties between the trading companies and rulers in Africa and Asia, as both side recognised each other as legitimate sovereign signatory parties. Not only the general norms of the law of treaties among states found application without specific positive stipulation but also those norms, which, according to the European perception, were enshrined in the tradition of the law of nature as applicable to all humankind. Neither signatory parties of agreements between trading companies and rulers in Africa and Asia saw any requirement for legislative acts as the condition for the validity and enforceability of the law of treaties among states. Empirically, the law of treaties among states was part of an unset assemblage of norms that parties to agreements assumed to be valid even at the first time when they entered into such agreements.

During the second half of the seventeenth century, the concept of the law among states obtained general acceptance within the European states system. Its validity could extend beyond the confines of the European system, when it regulated relations among European colonial governments in America on equal footing, such as in the British-Spanish agreement of 1670, but also the relations between Native American states and Great Britain, whereby Native Americans, while remaining recognised as sovereigns, could fall under stipulations sbjecting them to „immediate dependency and total subjection to the Grand King of England“ (dépendance immédiate et ... toute sujettion au grand Roi d'Angleterre).[138] Even without explicit stipulation in treaties, the traditional perception held sway, according to which the law among states was valid even without specific acts of legislation. For one, Hermann Conring took it to be a commonplace that the competence to supreme legislation (legibus solutio) could exempt a sovereign ruler neither from divine or natural law nor even from the unset basic norms of state constitutions, and he would not admit any limitations of the applicability of this commonplace to any part of the world.[139] In sum, the European states system was integrated into the unset overarching basic norms of the law among states. However, the use of the traditional Augustinian paradigmatic sequence of peace, war and again peace remained tied to the European states system, for which theorists demanded the orientation of inter-state relations upon the preservation of the balance of power, repose and security. This demand did not exclude resort to war; rather it did eventually promote the recognition of the priority of the continuity of states over the interests of ruling dynasties. Diplomatic practice as well as the conduct of war thereby became subject to the quest for order, finding its most straightforward expression the expansion of the network of standing missions and the buildup of armies "that remained standing". In 1673, Franz Paul von Lisola gave a classical expression to the Augustinian paradigamtic sequence of peace, war and again peace: "The best advice, he can give to the Emperor is the the safest one, namely to conduct war to the end of a good and secure peace."[140] Moreover, the number of treaties among states sharply increased. Next to formal peace agreements, specific instruments regulated special issues, such as hereditary succession in monarchies and matters of trade. The "composite" procedure of treaty-making became integrated into the customary law of treaties with the consequence that

[138] Treaty Great Britain – Spain, 18 July 1670, in: *CTS*, vol. 11, pp. 385-395. Peace treaty Hottoways/Naneymond/Pamunkey/Waonske – Great Britain, 29 May 1677, in: *CTS*, vol. 14, pp. 257-263.

[139] Hermann Conring [praes.] and Bernhard Friedrich von Krosigk [resp.], *De capitulatione Caesarea*, Thesis VIII (Leiden, 1686) , fol. X[8]^{v} [first published (Helmstedt, 1675): also in: Conring, *Dissertationes academicae selectiores* (Leiden, 1692, nr 4; further ends (Frankfurt and Leipzig, 1693)].

[140] Franz Paul von Lisola, *Anmerckungen auff die Rede, die der Commandeur von Grémonville vor denen Herren Räthen der Röm[isch] Kayserl[ichen] Majestät in Wien abgelegt* (Amsterdam, 1673), p. 18.

signatory parties ratified their agreements rather than swearing oaths. The law among states, perceived as flowing from natural reason, no longer appeared to request with cogency the oath as the base for the expectation that treaties could be implemented, thereby no longer necessarily subordinating the signatories to divine will. Nevertheless, the general validity of the basic norm *pacta sunt servanda* was taken for granted among sovereigns willing to enter into treaty relations across the boundaries of the European states system. Hence, the deniers of the law among states had difficulties to reconcile their stance with the imminent practice of treaty-making within and across the European states system.